OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DALE FARRAR AND PAT SMITH, CO-ADMINISTRATORS OF ESTATE OF JOSEPH D. FARRAR, DECEASED, Petitioner v. WILLIAM P. HOBBY, JR.

CASE NO: 91-990

PLACE: Washington, D.C.

DATE: October 7, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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DALE FARRAR AND PAT :
SMITH, CO-ADMINISTRATORS :
OF ESTATE OF JOSEPH D. :
FARRAR, DECEASED, :
Petitioners :
v. : No. 91-990
WILLIAM P. HOBBY, JR. :

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Washington, D.C.

Wednesday, October 7, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

GERALD M. BIRNBERG, ESQ., Houston, Texas; on behalf of the Petitioners.

FINIS E. COWAN, ESQ., Houston, Texas; on behalf of the Respondent.

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P R O C E E D I N G S

(12:59 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 91-990, Dale Farrar and Pat Smith v. William Hobby.

Mr. Birnberg.

ORAL ARGUMENT OF GERALD M. BIRNBERG

ON BEHALF OF THE PETITIONERS

MR. BIRNBERG: Mr. Chief Justice, and may it please the Court:

In Carey v. Piphus this Court held that procedural due process is so important to organized society that it is actionable even without a showing of actual damages. In this case a jury found that the respondent had knowingly violated Joseph Farrar's constitutional rights to procedural due process essentially by obtaining a closing of this school for incorrigible delinquent children without prior administrative proceedings and hearings to which he was entitled under state law and by the process of a state court proceeding that didn't involve a fair and unbiased judge.

In all events the Fifth Circuit in 1985 concluded on the basis of that jury verdict that the petitioner was entitled at least to nominal damages, it

having been found by the jury that his rights to procedural due process have been violated. They found that notwithstanding the fact that that same jury had also found that Dr. Farrar had been unable to prove that he had sustained actual damages, but of course under Carey against Piphus that was essentially irrelevant. He was entitled to an award of nominal damages.

The question in this case is does that final determination of entitlement to a judgment for nominal damages, not more than $1.00, in a case involving the deprivation of procedural due process entitle the plaintiff who recovered that judgment to also recover reasonable attorneys' fees under 42 United States Code Section 1983. We submit that the question, that the answer to that question can be found in four separate places.

QUESTION: What was the denial of procedural due process?

MR. BIRNBERG: The denial of procedural due process was very complex, Justice White. It involved essentially two things. Number one, it involved having a decision made to shut down the school and not utilize the administrative procedures that Texas law provided. And secondly it involved interfering with the, there was a district court hearing, a temporary restraining order, and

at that district court hearing there was, it was an ex parte hearing --

QUESTION: But did the, was the proceeding -- was due process finally given?

MR. BIRNBERG: Was due process finally given? I don't know that that question was ever presented to the jury, nor is it in this record, Justice White. Our view of that fact is no. But I would say this, and I think this is the gravamen of your question --

QUESTION: Well, was the school, are we talking about a school?

MR. BIRNBERG: The school was closed. Yes.

QUESTION: Which was shut down?

MR. BIRNBERG: It was shut down and it remained closed.

QUESTION: And it has never opened?

MR. BIRNBERG: It has never opened. It was never reopened. And in fact --

QUESTION: And is it conceded that it didn't deserve to be opened?

MR. BIRNBERG: Well, conceded by whom? It is conceded that that's what the verdict of the jury implicitly holds, that by finding that we had not proved actual damages I think that that in fact establishes that the jury --

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QUESTION: That the school should have been, that the jury found that if due process had been given it still would have been closed.

MR. BIRNBERG: I think that's a fair inference of what one could read into the jury verdict.

QUESTION: So you lose on the merits, you lose on the merits but by the wrong process?

MR. BIRNBERG: Lose which by the merits, Justice White?

QUESTION: Well, you lost on the merits of whether the school should be open.

MR. BIRNBERG: We certainly lost on the merits of whether the school should be opened or should be closed.

QUESTION: The only problem was that they, that it was by the wrong process?

MR. BIRNBERG: I think in part that's true. I think the point was that there was never a process that was provided. But I think this is of crucial importance, the decision on the merits before the jury, all that said is we did not prove any actual damages from the closing without due process. That's something that occurred in a trial that occurred 10 years after the fact. By that time Dr. Farrar had died. He wasn't present to testify to many of the things that were brought to the, brought forth for

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the first time during the course of that proceeding.

But in all events, Justice White, that's not the question that's presented here, whether the jury's verdict was right or wrong. The question that's presented here is whether or not having recovered a judgment that says procedural due process was violated, and Carey against Piphus says that is a judgment which is vindicated by award of nominal damages whether we, since we prevailed to that extent whether we are entitled to reasonable attorneys' fees, whether we are a prevailing party at that point.

We submit that --

QUESTION: The lieutenant governor didn't have the authority to close the school? What is your, was your theory of the lieutenant governor's liability? He was a co-conspirator or --

MR. BIRNBERG: No, in fact he acted substantively. Justice Kennedy, the lieutenant governor under Texas law had no role in the closing of this school whatsoever. He was in the midst of a heated political contest and for reasons of furthering his political contest the evidence at trial was, the theory at trial was that he had intervened by calling the commissioner, he did have the authority in telling the commissioner he wanted the school closed and without the administrative

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procedures being followed.

Then Lieutenant Governor Hobby, despite the fact that he had no relationship to the closing of the school, actually went to the hearing in Liberty County, which was an ex parte hearing, the theory that was presented to the jury being that that was to bring political pressure to bear on the fact finder to make him not an impartial fact finder in the procedural due process sense.

Now, Governor Hobby could have challenged, had he chosen to do so, the fact finding that he violated the petitioner's rights in the Fifth Circuit in 1985 or in the district court earlier than that. For whatever reason he did not undertake to do so and this case involves that as a given. That is to say the given is that the procedural due process rights were violated.

We submit that the plain language --

QUESTION: I just have one other question.

MR. BIRNBERG: I'm sorry.

QUESTION: Did he argue that there was some, that there was a privilege? Did he argue that he had a privilege to make these statements?

MR. BIRNBERG: A privilege to make the statements? I do not recall ever having seen that in any of the pleadings or any of the briefs. I do not -- well, there was a qualified immunity issue that was submitted,

but I don't think that's what you have in mind when you ask about privilege.

QUESTION: Well, in any event we take the case with the jury finding against the lieutenant governor?

MR. BIRNBERG: I believe that's the posture of the case at the present time, Mr. Justice.

QUESTION: Mr. Birnberg, do you take the position that any nominal damages award entitles the winner to get a fee award for attorneys' fees --

MR. BIRNBERG: Justice O'Connor, I take the position --

QUESTION: -- regardless of the context in which it's given?

MR. BIRNBERG: Yes, if it is a procedural due process violation which is thereby vindicated according to Carey against Piphus. In all candor in preparing for the argument I have tried to conjure up what might be a nominal damage situation that would not involve an entitlement to attorneys' fees.

QUESTION: I guess this Court has at least spoken in dicta to the effect that a de minimis victory does not justify the award of fees.

MR. BIRNBERG: That's absolutely correct. In your opinion for the Court in TSTA v. Garland there is that sentence of dictum, and it's purely technical or de

minimis is the standard that you referred to. We believe that this case does, that a nominal damages award in a Carey against Piphus case does not involve de minimis victory nor technical victory for a number of reasons.

Let me direct first the question of de minimis. The term de minimis refers to a type of injury which is so trifling that the law can't take it into account, the law can't do anything about it. That's what the phrase de minimis non curat lex means, the law can't do anything about it because it is so trifling. In fact Carey against Piphus specifically says that the law can, will, and indeed must do something about procedural due process violations, namely give a judgment, albeit for $1.00. That means that the law will, in fact this is the phrase that comes out repeatedly both in Carey and of course in Memphis Community Schools v. Stachura, vindicate the right to procedural due process.

Procedural due process rights are intrinsically non-pecuniar. They are the type of things that don't necessarily result in money damages occurring. So how do you cure those kinds of problems which are so, procedural due process being so fundamentally important to the society.

QUESTION: Well, I would have thought that the statute 1988 speaks both in terms of discretion whether to

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award the fees and secondly that they should be in a reasonable amount. And I wonder if the very small nominal damages award shouldn't be taken into account in any event under those provisions.

MR. BIRNBERG: Of course it should, and our point is not that you should not take into account the amount of the recovery in fixing what is a reasonable fee. But as you said yourself, Your Honor, in TSTA v. Garland, where it goes into the formula is in figuring the amount that constitutes a reasonable fee, not in establishing whether you have crossed the threshold to any fee at all.

QUESTION: Well, I guess the language in Garland said you're not entitled to any fee at all.

MR. BIRNBERG: I would -- you were the author of the opinion, Your Honor --

QUESTION: Right.

MR. BIRNBERG: -- but I would respectfully --

QUESTION: It may not have been felicitous phrasing, but that's certainly is what it suggests.

MR. BIRNBERG: Oh, you're talking about the dictum?

QUESTION: Uh-huh. Yes.

MR. BIRNBERG: I think the dictum says that -- in fact that's, the dictum even, Your Honor, says that there may be cases which are so technical or de minimis

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that a district court would be justified, not that it would be mandatory but that a district court would be justified in concluding that the minimum threshold we announce today has not been satisfied. But in fact the holding of the Court, the holding of the Court in TSTA v. Garland is that you are entitled, you are regarded as a prevailing party entitled to recover fees if you have succeeded on any significant issue in the litigation that produces some of the benefit sought in bringing suit.

Certainly that's what occurred here. We can't -- if we focus exclusively on the amount of the damages which were recovered, $1.00, then we have ignored Justice White's admonitions in Blanchard against Bergeron that civil rights cases are not driven by trying to up the amount of money damages that are recovered. What's important in civil rights cases of course is the constitutional right that's involved.

QUESTION: Mr. Birnberg, did you seek other relief than monetary damages in this case?

MR. BIRNBERG: In the third amended complaint, Your Honor, no. The third amended complaint sought only money damages.

QUESTION: So it wasn't as if you had obtained an adjunction or, all you wanted was money damages and you got nominal damages?

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MR. BIRNBERG: Well, Rule 54 of course says that we're entitled to any relief that the evidence at trial supports.

QUESTION: Well, you wouldn't have gotten any damages without a rule, without having a rule of law announced that would permit, that would entitle you to. And you got that.

MR. BIRNBERG: Exactly, Your Honor. That is precisely --

QUESTION: You got in effect a declaratory judgment at least.

MR. BIRNBERG: That is precisely the point, Your Honor. That is what is so unique. I was contemplating last night, it seems to me that a nominal damages award really in many theoretical respects is closer to the traditional equitable relief of injunction or declaration than the traditional tort type relief.

QUESTION: Well, it certainly differs rather sharply from an injunction in that nobody is ordered by the court to do anything other than to pay nominal damages.

MR. BIRNBERG: It's certainly, that's certainly correct, Your Honor, but what it does is it adjudicates that there has been a constitutional deprivation. And that is the crucial point here.

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QUESTION: No, that can be valuable to your client or to the plaintiff where the client is still in the business, and so that deprivation will not occur again in the future, or at least where it is not terribly fact bound it might be useful to some other people. But I don't see how this adjudication that on these peculiar facts there had been a violation of due process benefits anybody in the world, neither the plaintiff in the future nor anybody else in the future. The only thing to come out of this case is nominal damages. What other good came out of it, and a statement that this person was wronged in the past?

MR. BIRNBERG: But you see, that's an important thing. A statement that this person was wronged was, and in this context, Justice Scalia, and that is in a situation in which a person's good name is at stake. Had Dale Farrar been given procedural due process he would have had an opportunity to at least make his case at the time. That --

QUESTION: And in fact we know from the lack of damages that he would have failed. He would have failed.

MR. BIRNBERG: Well, I think that's not correct. I think, Justice --

QUESTION: Then why didn't he get, then why didn't he get some damages?

MR. BIRNBERG: We did not prove the monetary damages which he would have, that he sustained. And that's an important distinction. We don't -- and secondly and more importantly because the trial happens years later once Dr. Farrar is in fact dead, there were witnesses who testified at that trial who had never surfaced before Joseph Farrar's death. Therefore there was no possible opportunity to rebut what they had to say. Had they made their statements in 1973 at a procedural due process opportunity then Dr. Farrar may very well have been able to rebut it.

QUESTION: Well, it may very well have been the case, but that, I mean that's just the luck that goes, good or bad, with trial dates, and that kind of speculation can't be a basis for determining an entitlement to counsel fees.

MR. BIRNBERG: That is the reason that procedural due process is so vital. That is the reason that we insist and the Constitution insists that procedural due process take place. Now, given the fact that is established by the jury verdict that this petitioner had his rights to procedural due process violated, then the question is what, I guess what Justice Scalia's question is is what benefit comes from that. And the benefit that comes from that is that originally Dale

Farrar, had he lived, Dale Farrar's estate can say that the procedure by which my good name was taken from me was fundamentally flawed, it was a flawed procedure.

Now, I'm not saying that that means had it not been a flawed procedure the same result might not have obtained, but it was a flawed procedure. And when your good name is taken by a flawed procedure the law says that must be vindicated.

QUESTION: Is your good name --

QUESTION: Was that the basis for the jury finding, that his good name was taken? I thought the basis for the jury finding was that the school was improperly closed.

MR. BIRNBERG: Justice Kennedy, it's very, I can't give you a yes or no answer to that question because the jury verdict was regrettably obtuse. The jury verdict says that you find that Lieutenant Governor Hobby violated the constitutional rights of Joseph Farrar. Now, in the various pleadings that the respondent has filed throughout the course of these proceedings, the respondent has said that what that jury verdict meant was that his procedural due process rights were violated, and that's therefore what I am essentially relying on.

QUESTION: But I take it the procedural due process rights had to be to vindicate the closing of the

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school, not damage to reputation, or am I incorrect about that? Did you, was there an instruction to the jury that they were entitled to compensate for damage to reputation? No.

MR. BIRNBERG: I'm not sure that -- well, I will answer that question during my time on rebuttal. I have the jury instructions here and I'm not sure that they did not in fact permit that. I do know this, Justice Kennedy, they permitted the emotional distress that Dr. Farrar, they would have permitted the emotional distress to which Dr. Farrar was subjected to be compensated. That can only have come necessarily from loss to reputation, loss of, the closing of the school would not have given rise to claims, it seems to me, for emotional distress.

QUESTION: Well, if that's the case aren't you in more serious trouble because loss of reputation is not compensable in 1983, is it?

MR. BIRNBERG: Well --

QUESTION: And if you're saying he got his emotional damages simply, damage for emotional distress simply as a kind of pendant or consequent to damage to his good name, and his good name is not subject to clearance under 1983, then you should be entitled to nothing.

MR. BIRNBERG: I am saying, Justice Souter, no, in fact not. I'm saying, Justice Souter, that what he

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benefitted was he got a judgment, and enforceable judgment which vindicated his rights to procedural due process.

QUESTION: Right. Well, but a minute ago you were saying that it also vindicated his good name. And do you agree that his good name is not subject to litigation and damage to it is not subject to compensation under 1983?

MR. BIRNBERG: Candidly I don't, but I don't believe that that's presented by the case --

QUESTION: I think you should, but in any case if --

MR. BIRNBERG: I believe there are certain circumstances in which one has a liberty interest. I also understand -- in one's good name. I also understand that that's a pretty complex additional area of the law and I don't mean to trip into that, if I can avoid it. My point --

QUESTION: All right. But if you don't trip into it and if you stay away from vindication of good name, then aren't you right back where you left off with Justice Scalia's question, and that is there has been a finding that in fact there was a procedural due process violation but there has been an equally clear finding, implicit as you said a moment ago, that no substantial harm was done by it. And if we exclude reputation here,

then absolutely, absolutely nothing was affected except a pure procedural error per se. Isn't that correct?

MR. BIRNBERG: I don't believe that is correct. I think the error in that question, Justice Souter, is in the suggestion that that, question number 8 that says how much was he damaged, and the jury says nothing, that that necessarily means that, everything that you imply in your question. I believe that all that means is that we failed in our burden of proof to prove the dollars and cents value of the procedural due process violation. I believe that the vindication was --

QUESTION: What could that dollars and cents value be if you accept, as I think you do and have to do, that he had no right to continue operating the school, and with all the procedural due process in the world the school would have been shut down and the result would have been reached, the result that would have been reached is exactly the result that was reached. Where can you find damage in this?

MR. BIRNBERG: I'm sorry, I would like to concede that. I can't concede that point. I don't believe that the record necessarily shows that to be the case. The jury found only that, notwithstanding the procedural due process violation, the petitioner failed to prove any actual damages flowing from the procedural due

process violation. There can be any of a number of reasons why that is so, but the crucial point here is that what the judgement does is it gives us a judgment. It is an enforceable judgment.

QUESTION: Let me ask you, do you suppose that you could have stayed in court and litigated a procedural due process violation if you claimed no damages at all? Just say I want a declaratory judgment that there was a violation of procedural due process.

MR. BIRNBERG: I believe the answer to that is yes, Justice. And certainly if I had said we want procedural due, a declaration that procedural due process has been violated and nominal damages --

QUESTION: No, no, I didn't ask that. All he wants is a procedural due process judgment.

MR. BIRNBERG: I have never seen a case that is a declaration of --

QUESTION: Do you think that presents a case in controversy?

MR. BIRNBERG: I believe that it can. Yes, an appropriate case, I think that it can.

QUESTION: Well, it's subject though to this, declaratory judgments are subject to some of the same rules that injunctions are. I don't think you can get an injunction about conduct which is simply in the past and

that there's no prospect of repeating. I would think the same rule would apply to declaratory judgments.

MR. BIRNBERG: I think that is correct, Your Honor, and I do -- in fact I think that is correct, Chief Justice Rehnquist, that there is a requirement in the rules of equitable relief that before you can get a declaratory judgment there must be some showing that there is a likelihood of repeat in the future. Which is why I believe the court says in Carey against Piphus the way you vindicate procedural due process violations is with nominal damages. I mean, that's the vehicle. That's the remedy that the court has chosen and that the court says vindicates --

QUESTION: It's not -- what does vindicate mean? I don't know what vindicate -- what does vindicate mean? I thought vindicate means you get something out of it. You get money or you get the other fellow to say I won't do it again, or something like that. This is just sort of a bare acknowledgement that somebody created, made a technical mistake in the past which as far as we know didn't cause any damage to anybody. That is vindication?

MR. BIRNBERG: It is vindication to say that this individual so transgressed the constitutional rights, the procedural due process rights of the petitioner that the court will intervene and correct it. And the way, the

court will say, the court will say that your rights were violated. Now the court won't say your rights were violated unless there is a real concrete dispute.

QUESTION: You say intervene and correct it, but the court did not correct anything. It neither said don't do it again, nor did it say here's the money for, you know, pay him money for having done it in the past. It didn't correct a thing.

MR. BIRNBERG: The court said your right to a hearing has been violated. In the same sense in Carey against Piphus, Justice Scalia, in Carey against Piphus we talk about a student who was suspended for, I have forgotten, 20 days or something like that, without any kind of a prior hearing, for passing a marijuana cigarette on the play ground. He never maintained in any way that he was not guilty of that. He never maintained that had he had a hearing that the result would have been different.

What he maintained was that he was entitled to a hearing as a matter of procedural due process. And what this Court held is, of course it's a two-fold hearing. Number one is that there is no substantial damages that you can recover simply because your procedural due process rights have been violated without a showing that had they not been violated there would have been a different

result. But number two, so long as you make that minimum showing then you are entitled to a judgment which will vindicate the loss of procedural due process and that judgment is a judgment for nominal damages.

QUESTION: Well, you ought to say that, maybe you ought to say that maybe the civil rights laws and the attorneys' fee provisions are to sort of get people to act as private attorneys general.

MR. BIRNBERG: Well, certainly they are, Justice White, and certainly that, the congressional intent I think in this circumstance frankly could -- well, I was going to say --

QUESTION: At least I suppose your judgment sends a message to other state officials.

MR. BIRNBERG: Oh, and that of course is what Judge Hughes says in his opinion. At the very least that is what he says. And that brings us to what would have been my third point of argument, and that is that the congressional intent clearly was to encourage private attorneys to engage in this kind of litigation precisely because it is for the public good and for the public benefit.

Now, admittedly under Hewitt, Justice Scalia, that in and of itself would not be enough to carry the day. What is the threshold that gets us to get reasonable

fees, whatever reasonable means in the context of superimposing the recovery upon the effort that was expended to get it. We got the judgment. We got a judgment for nominal damages, and that vindicates the constitutional rights, it does something, it is some benefit. If the marshall goes out to execute on that judgment General Hobby can't say wait a minute, that doesn't count, that's only a technicality. I mean, it is something that changes the legal position of the parties.

Now why would the courts say you do that? The courts don't engage in meaningless acts. The courts don't do things that aren't meaningful. It is precisely because that is meaningful, because it has a benefit, and because it is substantial.

It seems to me that where this case gets bogged down conceptually is in our failure to distinguish between the qualitative significance of the judgment and the quantitative significance of it. Quantitatively $1.00 is not necessarily a lot of money. Qualitatively we got the vindication that we sought in that we got a judgment that said our procedural due process rights had been violated and for that we were entitled to the relief which the law establishes, namely nominal damages.

Mr. Chief Justice, I will reserve the balance of my time.

QUESTION: Very well, Mr. Birnberg.

Mr. Cowan, we'll hear from your.

ORAL ARGUMENT OF FINIS E. COWAN

ON BEHALF OF THE RESPONDENT

MR. COWAN: Thank you, Mr. Chief Justice. If it please the Court:

My friend Mr. Birnberg and I agree on one significant point about this case which I think is very relevant to one of Justice White's questions and one of Justice Kennedy's questions. The point that we agree on is that the verdict in this case is truly obtuse. We agree on that. And that, Your Honor, Justice White, is very pertinent to your question of what kind of a message does this send. And we'll get to this --

QUESTION: But I suppose there had to be the equivalent of a declaratory judgment here that the procedural due process rights were violated.

MR. COWAN: No, Your Honor, there was never any judgment of any kind, even a judgment for $1.00.

QUESTION: Why pecuniary damages then?

MR. COWAN: Why pecuniary damages?

QUESTION: I mean why nominal damages then?

MR. COWAN: Because -- well, no judgment for nominal damages was ever entered, which is one of the facts that my friend and I differ about. The court of

appeals said a judgment for $1.00 would be appropriate, but that amount was so nominal, so technical --

QUESTION: Well, all right, but anyway --

MR. COWAN: -- that the judgment was never entered.

QUESTION: Why would the court of appeals have said nominal damages unless there had been a violation of the due process rights, which it said there were?

MR. COWAN: The jury in fact found that there was.

QUESTION: All right.

MR. COWAN: And if you look at that single jury finding you get one result.

QUESTION: Well, that's what the case is all about.

MR. COWAN: But if you look at the whole case and if you look at the entire test set forth in TSTA v. Garland you come up with an entirely different result than if you look at that one jury finding. And I suppose the bulk of our plea to Your Honors is to ask you to look at not a single jury finding but to look at the entire case.

QUESTION: And when you look at it what do you come up with?

MR. COWAN: You come up with --

QUESTION: That there shouldn't have been even

nominal damages, I suppose.

MR. COWAN: That can be argued, but you come up with --

QUESTION: Well, you aren't arguing that.

MR. COWAN: It's too late to argue that. What you come up with is the result that the Fifth Circuit majority came up with, and that is that under the facts of this case, applying the four-fold standard set forth in TSTA v. Garland, by no means can these plaintiffs be designated as prevailing parties. That's, Your Honor, where you come up with.

QUESTION: Just as a factual matter, Mr. Cowan, the opinion of the Fifth Circuit says that following remand from that court the trial court awarded the Farrar's $1.00 in nominal damages.

MR. COWAN: Factually inaccurate, Your Honor.

QUESTION: Well, we're certainly not going to delve into that here. I think you take that as a given in order to deal with the question presented.

MR. COWAN: Except that in the record before Your Honors and the briefs it is factually undisputed that the judgment for $1.00 was never entered. And that we say is very, highly relevant although it's not controllable. I think you would get the same result, but it is highly relevant to the fourth prong of the standard which Your

Honors enunciated so carefully in TSTA v. Garland.

What I would like to do today --

QUESTION: Mr. Cowan, is there --

MR. COWAN: -- in addition to --

QUESTION: Justice Blackmun wants to ask you a question.

QUESTION: Is there any significance at all in the amount that the district judge originally gave as damages in six figures?

MR. COWAN: Well, Your Honor, the, no one has ever awarded these plaintiffs any compensatory damages. The jury found from the start that the plaintiffs had not proved actual damages. In other words while the jury, perhaps displeased in some respects with the conduct of the defendants, they still held that the plaintiffs have not proved that any of the plaintiff's rather considerable damage was caused --

QUESTION: But what is the significance of that $280,000 figure?

MR. COWAN: That's the attorneys' fees, Your Honor. That's the attorneys' fees that were assessed against my one single poor client against whom there is just this --

QUESTION: Well, I'm asking about its significance. We're speaking of attorneys' fees here,

aren't we?

MR. COWAN: Yes, sir.

QUESTION: Now, of course that's faded into the background, but is there any significance in that six figure figure?

MR. COWAN: Well, yes, it's significant to my client who may have to pay it, Your Honor. It's of great significance to him.

(Laughter.)

QUESTION: You keep emphasizing $1.00 and the absence of a judgment. I just say that in the background of this record there is another figure that, and I'm asking you whether it has any real significance.

MR. COWAN: Well, yes, Your Honor, the $280,000 in attorneys' fees has real significance. But the jury didn't find that the plaintiff had suffered $280,000 in damage. That's the attorneys' fees, that's the full lode stone amount that the trial court, in direct contravention of Your Honor's instructions in Hensley v. Eckerhart, which I don't intend to argue here today because it's not the key thing that I want to say to you. But the trial court, that's the amount that the trial court awarded in direct contradiction to Your Honor's instructions that you had given to trial courts in Hensley v. Eckerhart where Justice Powell said the result is the chief thing to look

at.

QUESTION: Mr. Cowan, the question presented here by the petitioners was whether the award of reasonable attorneys' fees to civil rights plaintiffs who recover nominal damages is proper. And in your brief in opposition it doesn't seem to me that you raised any question about the fact that $1.00 had been awarded in damages. So I suggest you not argue that point.

MR. COWAN: With all respect, sir, that is in our brief. I apologize if I contradict you, sir, but I have read it over and over and it is there.

What I would like to do, Your Honors, today in addition to responding to your very perceptive questions is, what I would really like to do is to discuss with you the very careful, the very eloquent standard enunciated in TSTA v. Garland and Hewitt v. Helms, and to demonstrate to Your Honors why under the facts in this case applying that standard and the four prong test in that standard the plaintiffs here can by no means be regarded as prevailing parties.

In addition to that, Your Honors, we would also like to talk to you about one of the aspects of the TSTA v. Garland in which you ask what does this case do as a matter of public policy. What are the public policy ramifications of this and related cases.

QUESTION: Well, even if they are prevailing parties, are they entitled to any attorneys' fees here under the statute?

MR. COWAN: Yes, a prevailing party is entitled to some attorneys' fees. It may be nominal --

QUESTION: Even when the recovery is limited to $1.00?

MR. COWAN: If the plaintiff as prevailing party is entitled to some attorneys' fees. Now, under Hensley v. Eckerhart the trial court should look at the amount as being the crucial amount, or the trial court could conclude, although he did not here, that special circumstances of this case would make any award of attorneys' fees inequitable, but we have not argued that. Our --

QUESTION: And you don't take that position. You say if they're prevailing parties they get some attorneys' fees.

MR. COWAN: They get some attorneys' fees, we say, and we don't -- we raised it in the court of appeals and we have preserved the point here. We say that the trial court did not apply Hensley v. Eckerhart correct and we challenge the amount of the attorneys' fees. But as we appear before Your Honor today our principal purpose is to argue that the plaintiffs by no means can be regarded as

prevailing parties, that they just don't get over the threshold at all of being prevailing parties. But Your Honor is correct, the trial court could have said $1.00 in nominal damages, $1.00 in attorneys' fees, and we wouldn't be here today, of course.

QUESTION: Or maybe nothing.

MR. COWAN: Or maybe nothing.

QUESTION: Or maybe nothing. Why, why does it make more sense to make the trial court go through a separate determination of whether -- you acknowledge that in some cases nominal damages, where nominal damages are awarded there will have been success on the merits. You don't say that nominal damages never justify attorneys' fees, do you?

MR. COWAN: Yes. The answer to your question is yes.

QUESTION: Yes, no.

MR. COWAN: Yes, we acknowledge that in some cases nominal damages will support, maybe in most cases, but not in this case.

QUESTION: Okay. Then why does it make sense to do it in a two-step process instead of in a one-step process? Why do you have to have the district judge first ask himself whether he is a prevailing party given that it's nominal damages, and then go through well, you know,

and then step two, having decided that even though it's nominal damages he is a prevailing party, then go through analyzing well, how much money should I give him?

Why not compress the two into one and say look, whenever he gets damages, nominal or not, he is a prevailing party. And it's in the step two when you decide how much money he ought to get that you come in and say well, it's so nominal that it's not worth anything, I'm going to give him no attorneys' fees, or $1.00 attorneys' fees.

MR. COWAN: Because, Your Honor, that is a per se rule and we do not believe that a per se rule is called for by the standards and the test which Your Honors set forth in TSTA v. Garland and Hewitt v. Helms. Now, as a practical matter to support your line of reasoning a different trial judge differently motivated would have said look, nobody can sensibly say this plaintiff prevailed or if he did he prevailed at such a minor level that no substantial attorneys' fees are called for, and we wouldn't be here today.

QUESTION: My point is if you're dealing with a trial judge who's going to make that mistake when you split it into a two-step process, he's going to make it when you have it in a one-step process as well. It really doesn't matter, does it?

MR. COWAN: Well, Your Honor, that goes to what I'm going to respectfully suggest to you as the third part of my argument, and that is where Your Honors ought to go with this case as far as establishing the law. While I hope it's not presumptuous, I do have some respectful suggestions to make to you in that regard. But Your Honors in TSTA v. Garland and Hewitt v. Helms went to great lengths to establish very, very carefully a standard, that's the way you describe it, and you set forth the various tests or prongs that one needs to go through in order to determine whether that standard has been met.

And we would respectfully say that when you look at this case, not an isolated part of the case like one jury finding, but when you look at the whole case one comes to the conclusion that the plaintiff has not gotten over any of the four hurdles, and he certainly has not gotten over the last of those four hurdles, or the second of the hurdles for that matter.

The first hurdle is the one where the plaintiff comes close to getting over the hurdle. And the first aspect of the hurdle is whether or not the plaintiff has achieved success on a significant issue in the lawsuit. And civil rights are so important, and Your Honors' regard for those civil rights is so important that it can be

certainly argued that in this case the jury finding creates success on the significant issue. We would say here, however, that if you look at the entire jury verdict and if you look at the jury verdict in the light of the pleadings and the facts, the plaintiff has not even established success on a significant issue.

And that is true for this reason. Hobby was one of only multiple defendants. Hobby was accused, along with the others, of being a member of a conspiracy to deprive Farrar of his civil rights. The jury found that all of the other defendants were conspirators, but that Hobby was not. If Hobby had been found a member of the conspiracy we wouldn't be here today because they would have never reached the issue that was decided against Hobby.

The jury went on to find, however, that the conspiracy did not cause these plaintiffs any damage. In response to a conditioned question they found that Hobby had committed an action under state law which deprived the plaintiff of his civil right, but that that was not the cause of any damage to the plaintiff.

Now, in the light of the pleadings and the evidence that Hobby did nothing alone, there was no evidence that Hobby did anything by himself, the jury's finding is senseless. It just doesn't make any sense. In

the light of the jury's finding that the plaintiffs had proved no damage, it is clear in the light of the evidence, which was largely undisputed, that these defendants did not cause the plaintiffs any damage and that the Farrar's own conduct was the cause of their rather considerable pecuniary damage. And they had considerable pecuniary damage which was constantly emphasized during the trial of the case.

So we contend first of all that if you look at the case as a whole, not just a single jury verdict, that the plaintiffs didn't get over the first hurdle of proving significant success on the material issue in the case.

The second prong of the test is even more clearly applicable to our test, and that is that the plaintiff in the language of Garland received some of the relief which he sought. Here, as I think my friend Mr. Birnberg clearly admits, the plaintiff sought only considerable monetary compensable damages. He got not one penny of compensatory damages.

QUESTION: So it was, the jury then did not award $1.00?

MR. COWAN: No, sir. The jury did not award $1.00, and that's a critical point because the jury was not even charged that they had the option of awarding $1.00, and the plaintiff did not object to the jury charge

on that basis.

QUESTION: They just found no compensatory or punitive damages?

MR. COWAN: Correct. Now, punitive was conditioned on an affirmative finding on compensatory, but the jury found no compensatory damage, which in the light of the evidence can only mean that the jury concluded that the plaintiffs were the authors of their own misfortune.

QUESTION: Do you think the case would really be different if they found the $1.00 nominal damages?

MR. COWAN: Well, at least, Judge, the plaintiff would have the option of arguing that that was some of the relief which I sought. Here --

QUESTION: Well, they did recover $1.00 according to the court of appeals, which is some of the relief they sought under the same light, it seems to me.

MR. COWAN: Your Honor, I would answer that question no for this reason, and the reason relates to a point that we discuss in great detail in our brief, and that is the difference between nominal and compensatory damages. The scholars who have looked at this question for years have said that nominal damages is not just a little bit of compensatory damages.

QUESTION: Well, I understand, but earlier you said, and this is what puzzles me about your argument, if

I remember correctly you said in many if not most cases where nothing is recovered except nominal damages fees could properly be awarded, but not in this case because this case is different.

MR. COWAN: Right.

QUESTION: And the difference, I gather, is the jury didn't do it until after the second, even the jury didn't do it then but it took two appeals to get the dollar recovery.

MR. COWAN: No, Justice Stevens, the critical difference is this. In most cases where nominal damages are awarded the evidence and the jury verdict will establish some specific violation of right which the plaintiff has remedied or he is in the process of remedying. That is not the case here. One cannot look at the evidence or the verdict in this case and establish a single thing that Governor Hobby or any other future or past lieutenant governor can look at and say that's not what I should do.

QUESTION: Well, take Carey against Piphus, those. Would you say fees should have been awarded there? Carey against Piphus.

MR. COWAN: Carey v. Piphus was a much stronger case for attorneys' fees than here, and that goes to Your Honor's first question. There the plaintiffs did not seek

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compensatory damages. They didn't even bother to prove compensable damage. They had identified a specific way in which they were harmed, and they got a judgment which said to that specific defendant don't commit that specific kind of conduct any more. They did in fact send a message, and there are plenty of cases like Carey v. Piphus. And so the court in Carey --

QUESTION: But don't you think the effect of this judgment will be to suggest to the defendant not to do the same thing all over again?

MR. COWAN: Well, Judge, all he did under the undisputed evidence was talk to the press, send a letter to Commissioner Vowell saying look into this situation and consult with the attorney general, and attend a hearing which was conducted by people over whom he had no control. We say that the judgment here sends exactly the opposite message, and the wrong message, which is why you have so many amicus briefs in this case. Because what happened here and what can happen in similar cases sends not the right message, but the wrong message.

QUESTION: Well, it seemed to me what your client should have done was to appeal the jury verdict on sufficiency of the evidence.

MR. COWAN: He should have done.

QUESTION: We take the case based on a finding

that he violated due process rights, procedural due process rights. Carey v. Piphus says this is of great importance, it's of importance all of its own, and I don't think you can impeach the verdict the way you're doing.

MR. COWAN: Well --

QUESTION: We take this case on the assumptions that the lieutenant governor by his activities in this case violated the due process rights of the defendants, of the plaintiffs.

MR. COWAN: Conceded, Your Honor, and I stand corrected in that regard. But my position is that in applying the standard of TSTA v. Garland you need not look at a single jury issue but are permitted to look at the entire four prongs of the TSTA v. Garland standard in determining how you ought to handle this case.

And the third of those standards is the one which Justice O'Connor referred to in some of her questions, and that is is the relief here so de minimis that a fee award is not justified, and that was one of the prongs of the test which Your Honors enunciated in TSTA v. Garland.

QUESTION: Well, on that basis you should say that in any case where only nominal damages are awarded there should be no fee.

MR. COWAN: No, sir.

QUESTION: Well, why not? That's so minimum.

MR. COWAN: Because in many cases where nominal damages are awarded the plaintiff has succeeded by the evidence and the verdict or the court's finding in identifying a specific constitutional violation --

QUESTION: Well, here's, the court of appeals says we have awarded nominal damages not to exceed $1.00 when an infringement of a fundamental right was shown. And because the jury explicitly found that defendant Hobby had violated Farrar's civil rights the jury should have awarded Farrar nominal damages not to exceed $1.00. And it was there for the trial court not to do so when the Farrar's so moved in their motion for a new trial.

Now, the court of appeals said there was a specific finding that the, that your client had violated a fundamental constitutional right.

MR. COWAN: There was such a jury finding, Your Honor.

QUESTION: Well, and the court of appeals certainly accepted it and said that there was. You didn't, you didn't convince the court of appeals that there wasn't any violation of a constitutional right.

MR. COWAN: No, sir, that part was never raised. And in support of Justice Kennedy's statement, in hindsight if Governor Hobby --

QUESTION: You should have cross-appealed, I suppose.

MR. COWAN: If Governor Hobby and his lawyers had foreseen the future they undoubtedly would have raised that point on motion for new trial, motion for judgment notwithstanding the verdict. But in the practical context of this case no one after the jury verdict in this case, and I think I can say this without any dispute, no one foresaw that 15 years later Mr. Hobby would be surprised by an award of $270,000 in attorneys' fees in a case he felt he had won, and which everybody else felt he had won.

QUESTION: Your point is that in this case, unlike in most cases, although the defendant was found guilty of a constitutional violation we have no idea even what that constitutional violation was?

MR. COWAN: Exactly, sir.

QUESTION: And that that's not a situation that will always arise?

MR. COWAN: And that's a situation that will rarely arise, particularly if Your Honors send the type of message that I would respectfully suggest to you that you should send by your --

QUESTION: Now, I presume that if we find that ipso facto nominal damages renders somebody a prevailing party you would continue to make this same argument when

it goes back down on the amount of the fees.

MR. COWAN: We certainly would make an argument based on --

QUESTION: You'd make the same argument. You'd say look --

MR. COWAN: Well, we would make an argument based on Hensley v. Eckerhart below, and here we principally rely on TSTA v. Garland and Hewitt v. Helms.

QUESTION: So if the court of appeals had spelled out here in so many words what this fundamental violation of a fundamental right was, that here's what happened and here's what he did, you would say the, would you say the plaintiff was then a prevailing party?

MR. COWAN: No, Your Honor, because I would still argue that he hadn't gotten over the last two prongs of the test, but I will concede to you that that would be a lot better case for the plaintiff's receiving attorneys' fees than this case. And that, and part of that, Your Honor, rests on Your Honors' decision in Hewitt v. Helms. On Monday I heard Judge Stevens say very rare that we get a four square decision up here, an on all fours case. And I'm sure you don't get the luxury of dealing with cases on the basis of all four decisions.

QUESTION: But this is one, right?

MR. COWAN: No, sir, it's not. But it's mighty

close. Mighty close.

(Laughter.)

MR. COWAN: It's as close, I would submit, as you're ever going to get. And the one, the decision that I would respectfully urge Your Honors is as close as four corners as you're ever going to get is Hewitt v. Helms. And it relates, Your Honor, to the question Judge White asked about whether or not the plaintiff didn't in effect get a declaratory judgment here, and you read Hewitt v. Helms and the answer to that is no.

Helms had a lot better case for attorneys' fees than do the plaintiffs here. Helms got a finding from the court of appeals that the defendants had violated his civil rights in two very specific ways. But when the case went back Helms was out of prison, and the basic fact of Hewitt v. Helms, and Helms probably would have been entitled to a declaratory judgment or he probably would have been entitled to expungment, but the teaching of TSTA v. Garland which used Hewitt v. Helms as an example of de minimis victory is that a mere identification and a finding of a violation of civil rights when it doesn't stop the defendant's conduct, when it doesn't change the relationship, does not get over the de minimis hurdle. Your Honors used that as an example --

QUESTION: But is it not true that your client

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owes the plaintiff $1.00?

MR. COWAN: No, sir.

QUESTION: Did you pay it?

MR. COWAN: No, sir.

QUESTION: You don't think you owe $1.00 after what the court of appeals did?

MR. COWAN: No, sir, because of the exchange which Judge Rehnquist and I had earlier. May I speak to you for a minute about --

QUESTION: Well, they have never, they, your opposition says it isn't worth collecting, I guess.

MR. COWAN: And that proves it's de minimis, Your Honor.

QUESTION: But you know in your brief in opposition at page 5 you say according to the inquiry here is whether Joseph Farrar's recovery of $1.00 in nominal damages constitutes a material alteration, and so forth and so on. But now you're saying there was no recovery of $1.00.

MR. COWAN: No, sir.

QUESTION: Which is not what you said in your brief in opposition.

MR. COWAN: We say in, we raise the point in the brief that the judgment was never --

QUESTION: Well, your brief as I read it assumes

there was recovery of $1.00, and that's what I thought was true. You say it on page 4, the recovery of $1.00 as nominal damages.

MR. COWAN: May I speak to Your Honors as to where, assuming that you agree with me or have some agreement with me in what I'm saying, where we think you ought to go with this case? We think what you ought to do, Your Honors, is say when we decided TSTA v. Garland and Hewitt v. Helms we were serious, we were setting up a standard. The standard does in fact have objective requirements. We think those objective requirements should be looked at and should be met.

We also say to Your Honors that --

QUESTION: Mr. Cowan, I have to interrupt you again, because you really rely on the absence of a judgment. Page 7, you say the Farrar's were granted just one thing, they got $1.00. Then you have a footnote that says in fact the district court never signed a judgment against Hobby for the $1.00. But you don't attach any legal significance to that fact that you make in a footnote, you just sort of point it out.

MR. COWAN: We don't think it's a controlling fact, Your Honor.

QUESTION: You didn't attach any significance to it in your brief in opposition, at least I can't find that

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you did.

MR. COWAN: I'm sure, Your Honor, if that's what, that's the way you read our brief that's the way it should be read.

But one, another thing that our adversary and I agree on is the importance of Carey v. Piphus. Carey v. Piphus we, with respectful for Your Honors, is frequently miscited or overstated. What the plaintiff was attempting to establish in Carey v. Piphus was that constitutional rights were so different from usual rights that the plaintiff was entitled to an award of compensatory damages even if he hadn't proved any.

That approach was rejected, and it was rejected by Justice Powell saying this, rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries, to protect particular interests. Our legal system's concept of damages reflects this view of legal rights. The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty. And we say to Your Honors that the key fact in this case is that the jury's verdict says loud and clear that these defendants and their conduct did not cause any injury to these plaintiffs.

And in the light of that, Your Honor, we say it

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would be inconceivable that the plaintiffs could, using ordinary, standard, common sense language be deemed to be prevailing parties.

Thank you very much.

QUESTION: Thank you, Mr. Cowan.

Mr. Birnberg, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF GERALD M. BIRNBERG

ON BEHALF OF THE PETITIONERS

MR. BIRNBERG: Thank you, Mr. Chief Justice, and may it please the Court:

Let me address that very last point first as a matter of fact and try to clarify, and I think Justice Scalia was particularly interested in this. The specific jury question about the compensatory damages was this, do you find from a preponderance of the evidence that such act or acts were a proximate cause of any damages to plaintiff Joseph Davis Farrar. Now, the jury's instructions, the court's instructions erroneously described proximate cause as requiring foreseeability in the sense that Governor Hobby had to foresee that what he did would cause the type of results that they caused. So the explanation in this particular case for why the jury found a lack of actual damages actually goes to, and this was litigated in the courts below, the erroneous definition of foreseeability. And that is what taints

that whole suggestion --

QUESTION: (Inaudible.)

MR. BIRNBERG: That is correct, and that's the reason the appellate court didn't address it. But that does deprive that very jury instruction of its significance.

QUESTION: Well, just as respondent is stuck with the $1.00 award because it's in the question presented, I don't see what you gain by arguing that there was an improper jury instruction.

MR. BIRNBERG: Then, Chief Justice, I shall not anymore. I shall move on instead to the next point which is I wanted to correct something my very, that Mr. Cowan, very able counsel, but I think he may be confused about the facts of Hewitt against Helms. That's the one he said was the on all fours case. Well, of course in Hewitt against Helms, and it starts with Justice Scalia's comment about the fact this is bizarre, here we have somebody who is claiming to be a prevailing party who had never won anything and lost the judgment.

Hewitt against Helms is the case in which the judgment goes against the plaintiff on qualified immunity grounds and the plaintiff actually won nothing at any time in Hewitt against Helms except an interlocutory declaration by the appellate court that it was okay for

him to maintain his lawsuit, that it couldn't be dismissed on 12(b)(6) grounds.

That certainly is not anything approaching the situation here. In fact we have got exactly the opposite here. We've got a case here in which the plaintiff in fact got the judgment and the respondent is saying nonetheless he is not the prevailing party. It seems to us it's the flip side of the situation that was presented in Hewitt against Helms.

I had started, Justice O'Connor, addressing the two phrases are de minimis and technical, and I think I had addressed the de minimis issue in the context of de minimis non curat lex.

Technical, there's a very interesting thing about all of the cases that you describe in that opinion, and all of them really, in which you suggest that these might be examples of technical victories. And every technical victory has this common thread. They are all cases in which really there was no concrete justiciable controversy. They were all contrived or hypothetical controversies, such as there was the footnote that referred to the old district court opinion where there was a challenge to an ancient curfew law. Nobody had threatened prosecution under the curfew law. Yes, they won a finding that the curfew law had unconstitutional

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aspects to it, but so what, nobody was threatened under that law.

All of those cases, I submit to the Court, where there has been something that one could regard as a technical violation, are cases in which in point of fact they were non justiciable to begin with. The TSTA v. Garland has the example of the one part of the regulation that none of the teachers had ever been denied permission to meet pursuant to, never expected to ask that that particular part of the regulation be implication, and counsel at oral argument conceded that that part of the case did not come across the threshold. It was a hypothetical, theoretical, not real violation.

And that's really the difference here. What we're dealing with here is, and I think this is the threshold, is an actual deprivation, one that the jury has found actually occurred. And in fact the jury instruction, it's not just one, it's two jury questions that find that. The one that we have referred to before where the jury found that Hobby committed act or acts under color of law that deprived the plaintiff of civil rights guaranteed by the Constitution, but there is also, and I think this is a significant one, the very, the second jury question asked whether Hobby was entitled to qualified immunity, and the jury found that he was not.

And when you superimpose that upon the instructions which defined qualified immunity you will find that the qualified immunity instructions required them to find that he knowingly violated a constitutional right, knowing that he had done wrong, and without any good faith or other extenuating circumstances.

So -- I see the red light is on. I appreciate, we would ask the Court that this judgment be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Birnberg.

The case is submitted.

(Whereupon, at 1:58 p.m., the case in the above-entitled matter was submitted.)

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Deceased, Petitioners v. William P. Hobby, Jr.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Marie Federico

(REPORTER)