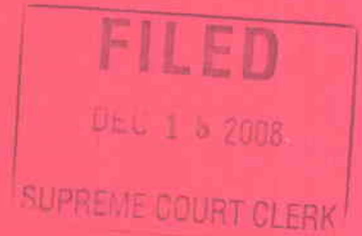
Commonwealth of Kentucky
Supreme Court of Kentucky

2008-SC-000106-DG
(2006-CA-001127, 2006-CA-001179
AND 2006-CA-001928)



ADOLPH PETZOLD AND
MARILYN PETZOLD, *Appellants*

v. Appeal from the Fayette Circuit Court
Action No. 02-CI-004138

KESSLER HOMES, INC., *Appellee*

Brief for Appellants,
Adolph Petzold and Marilyn Petzold

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Certificate required by CR 76.12(6)

The undersigned does hereby certify that copies of this brief were served upon the following individuals by first class mail, postage prepaid on December 15, 2008: Mr. Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Pamela Goodwine, Fayette County Courthouse, Lexington, Kentucky 40507; and Albert F. Grasch, Jr., Grasch & Gudalis, PSC, 302 West High Street, Lexington, KY 40507-1831.

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INTRODUCTION

This is a residential construction case in which the contractor filed a motion for relief from the trial court's final judgment on the grounds that it recently had discovered that the owners' daughter had served as the trial judge's campaign treasurer. On appeal from the trial court's order denying relief, the Court of Appeals vacated the final judgment and remanded the case with instructions that the trial judge retroactively recuse herself and grant a new trial.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes oral argument would be helpful to the Court in deciding the issues presented. This case raises important issues regarding the proper balance between the public interests in the finality of decisions that have been fully and fairly litigated to a final judgment and public confidence in an impartial judiciary. Oral argument will afford the Court the opportunity to fully air and consider these issues.

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STATEMENT OF THE CASE

The Appellants, Adolph and Marilyn Petzold (the "Petzolds"), entered into a contract for construction services with the Appellee, Kessler Homes, Inc. ("Kessler Homes"), to manage the construction of a custom home on the Petzolds' lot in Lexington, Kentucky. During the project, the Petzolds began to raise questions about the quality of the work and Kessler Homes' billings. The Petzolds began withholding payment of portions of Kessler Homes' invoices as to which they had not received satisfactory explanations.

On October 14, 2002, Kessler Homes sued the Petzolds to collect money that Kessler Homes claimed was due under the contract. Record on Appeal from Judgment ("First ROA") at 3. The Petzolds asserted counter claims, in which they alleged various construction defects, including violations of the applicable building code, fraud in connection with numerous over-billings and violations of Kentucky's Consumer Protection Act. First ROA at 18, 46, 442.

The trial court conducted a four-day bench trial. Upon the conclusion of the trial and after considering the parties' post-trial briefs, the trial court entered its opinion, order and judgment on February 3, 2006. The trial court:

- Dismissed Kessler Homes' claims for additional compensation under the contract;
- Found that the Petzolds' roof, which by the time of trial had been leaking into various parts of their home for over 4 years, was not compliant with the applicable building code and awarded the Petzolds the sum of $21,668 as damages;

- Awarded the Petzolds the sum of $8,446 for amounts Kessler Homes had billed them in excess of actual cost during construction, found these over-billings violated Kessler Homes' duty of good faith and fair dealing, but declined to find Kessler Homes was guilty of fraud or assess punitive damages;
- Dismissed the Petzolds' claims for damages for other construction defects, for violation of the Consumer Protection Act, and for damages for loss of use and enjoyment of their home; and
- Found that the Petzolds were entitled to recover their attorney's fees and expenses, expert fees and expenses and costs.

First ROA at 1,242.

On February 13, 2006, both parties filed motions to alter, amend or vacate the Judgment. First ROA at 1,270, 1,331. On May 2, 2006 the trial court entered an amended Judgment, in which it denied Kessler Homes' CR 59 motion and awarded the Petzolds a portion of the professional fees and expenses they had requested. First ROA at 1,387.

On May 31, 2006, Kessler Homes filed a notice of appeal from the Judgment. First ROA at 1,396. That appeal was docketed as No. 2006-CA-001127. On June 7, 2006, the Petzolds filed a notice of cross-appeal. First ROA at 1,403. The cross-appeal was docketed as No. 2006-CA-00179.

On August 18, 2006, Kessler Homes filed a motion with the trial court pursuant to CR 60.02 for relief from the Judgment. Record on Appeal from Order Denying CR 60.02 Motion ("Second ROA") at 7. As grounds, Kessler Homes stated that it recently had learned that the Petzolds' adult daughter, Lisa P. Castle, CPA, had been the campaign treasurer for the trial judge, Hon.

Pamela Goodwine, during her 2003 election campaign. They argued that this business relationship disqualified Judge Goodwine from service in the case, regardless whether she was actually aware of it at the time she decided the case, because the mere existence of the relationship would cause a reasonable person to question her impartiality. As relief, Kessler Homes requested Judge Goodwine to retroactively recuse herself, vacate the Judgment and grant a new trial.

The Petzolds opposed the motion on two grounds. Second ROA at 52. First, no person who was aware of all of the facts could reasonably believe Judge Goodwine knew that her former campaign treasurer was the Petzolds' daughter at the time that she decided the case. Second, a purely business relationship of this nature between the adult daughter of a party and the trial judge does not mandate recusal, regardless whether the trial judge had knowledge of the relationship.

The trial court denied Kessler Homes CR 60.02 motion by order entered on September 7, 2006. Second ROA at 67, a copy of which is attached as Appendix B. In that order, Judge Goodwine disclosed in detail the origin and nature of her business relationship with Ms. Castle. She stated that Ms. Castle became her tax accountant by default when her prior accountant, Richard Bass, left the practice in late 2000 or early 2001. She elected to continue her relationship with his firm, Hisle & Company. Judge Goodwine met with Ms. Castle to discuss preparation of her 2000 income tax return. They did

not know each other prior to that meeting. Their discussions were confined to the business of the preparation of Judge Goodwine's tax return.

When Judge Goodwine ran for circuit judge, she called Ms. Castle to inquire whether she was interested in being her campaign treasurer. Judge Goodwine emphasized in her order that she chose Ms. Castle because she preferred to have a CPA, rather than a personal friend, serve in that capacity and because Ms. Castle had provided satisfactory accounting services for two years.

One of the more significant statements in Judge Goodwine's September 7, 2006 order was her statement that:

> [a]t no time prior to the filing of Kessler Homes' motion to vacate did this Court have any knowledge **or have any reason to have any knowledge** of Ms. Castle's relationship to the Petzolds. (Emphasis added)

Judge Goodwine went on to make three conclusions of law, all of which were correct, for the reasons discussed in this brief. First, Judge Goodwine concluded that, under applicable law, the Court's professional dealings with Ms. Castle did not require her to recuse herself, although she stated that, if she had been asked, she would have done so. Appendix B, Order at 3-4. Second, Judge Goodwine concluded that, because she had no knowledge and no reason to have knowledge of the family relationship between Ms. Castle and the Petzolds prior to the date on which the CR 60.02 motion was filed, her impartiality could not reasonably have been questioned. Appendix B, Order

at 4. Finally, Judge Goodwine found that granting the relief requested by Kessler Homes would impose an unfair hardship on all of the parties. Appendix B, Order at 4. Accordingly, Judge Goodwine denied Kessler Homes' motion for relief from the Judgment. Kessler Homes filed a notice of appeal from that order on September 14, 2006. Second ROA at 80.

The Court of Appeals consolidated Kessler Homes' appeal from the Judgment (2006-CA-001127), the Petzolds' cross-appeal from the Judgment (2006-CA-001179) and Kessler Homes' appeal from the order denying its motion for relief from the Judgment (2006-CA-001928). In an Opinion entered on January 18, 2008, the Court of Appeals vacated the Judgment and remanded the case with instructions that Judge Goodwine recuse herself and grant a new trial. A copy of the Opinion of the Court of Appeals is attached as Appendix A.

At the outset, the Court of Appeals stated that neither trial court nor counsel dispute that, had the "trial judge's relationship to the Petzolds" come to light prior to the entry of judgment, the trial judge "should have, and would have," recused herself. Appendix A, Opinion Vacating and Remanding, at 3. That statement was erroneous in several respects. First, the trial judge had no relationship with the Petzolds. The trial judge's former campaign treasurer was an accountant who, unbeknownst to the trial judge, was the Petzolds' adult daughter. Second, the Petzolds argued to the trial court (Second ROA at 52) and to the Court of Appeals

(Appellees'/Cross Appellants' Brief at 5), that the circumstances of the professional relationship did NOT mandate recusal even if Judge Goodwine had been aware of it. Third, Judge Goodwine agreed and correctly found that the relationship did NOT mandate recusal. Appendix B, Order at 4.

It is critically important to note that the Court of Appeals failed to identify a single fact or circumstance it believed would lead an objective observer to believe Judge Goodwine was lying and that she actually knew of the family relationship. To the contrary, the Court of Appeals stated that it knew of no reason to doubt the truth of Judge Goodwine's assertion that she was unaware Ms. Castle was the Petzolds' daughter. It based that observation on its "atypical" knowledge of the impersonality of judicial campaigns in large metropolitan areas. In other words, the Court of Appeals believed Judge Goodwine because it knew that, unlike in smaller towns, people in Lexington are not likely to know everyone else's extended family. If there is no reason to doubt the trial judge's denial of knowledge of potentially disqualifying circumstances, then there is no reason to question the trial judge's impartiality.

Although the Court of Appeals knew of no reason to doubt Judge Goodwine's veracity, it found that a typical, objective observer in the trial judge's venire "might well" find her assertion that she did not know of the family relationship "somewhat implausible." Appendix A, Opinion, at 5. It did

not explain why its "atypical" knowledge would not be attributed to the hypothetical objective observer with knowledge of all of the circumstances. The Court further found that the same observer "might well" question Judge Goodwine's impartiality because the Petzolds prevailed on "virtually all claims." *Id.*[1] It found these circumstances violated the rule against the appearance of impartiality and that the imposition of the extraordinary and harsh remedy of vacating the Judgment was appropriate in order to preserve public confidence in the impartiality of the judiciary. While recognizing that its ruling erased four years of litigation without finding any culpable behavior by the court, counsel or parties, it nevertheless vacated the Judgment and remanded the case with directions that the trial judge recuse and a new trial be granted. The Opinion is to be published.

The Petzolds filed a timely motion for discretionary review. This Court granted discretionary review by order entered on October 15, 2008. Kessler Homes did not file a cross-motion for discretionary review.

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[1] The Court of Appeals' conclusion that the Petzolds prevailed on "virtually all claims" is not support by the record. Judge Goodwine made numerous rulings that were adverse to the Petzolds. The record also amply reflects that her findings in favor of the Petzolds were well supported by the evidence. Those rulings cannot fairly or properly be considered evidence of bias, especially in the absence of a finding that such rulings are defective or subject to reversal on other grounds. The Court of Appeals made no such finding. To the contrary, the Court of Appeals is deemed to have upheld all other aspects of the Judgment for the reasons stated in Part III of this brief.

ARGUMENT

The decision of the Court of Appeals establishes a new rule in Kentucky that mandates recusal whenever the trial judge is aware that he or she has a purely professional or business relationship with a member of a party/litigant's family. Furthermore, even if the trial judge was unaware of his or her business relationship with a member of a party/litigant's family until after the case was decided, extraordinary relief from the final judgment will nevertheless be granted, the trial judge will be required to retroactively recuse, and a new trial will be granted if the court concludes an objective observer "might" find it "somewhat implausible" that the trial judge was unaware of the relationship.

This decision will unduly limit the trial courts' discretion and increase the number of cases in which recusal will be mandatory. Now, any relationship of a purely professional or business nature between a trial judge and a member of a party/litigant's family will mandate recusal, as a matter of law. That rule will unnecessarily impair the efficient, timely and economical administration of justice in Kentucky.

This decision of the Court of Appeals also provides grounds for draconian relief from final judgments and a new trial if the unsuccessful litigant can uncover a previously unknown business relationship between the trial judge and a member of the adverse litigant's family, even if the trial

judge was totally unaware of that family relationship at the time the case was adjudicated. Under the Court of Appeals' ruling, an appearance of bias arises whenever an objective observer "might" find it "somewhat implausible" that the trial judge was unaware of facts that might require recusal. Vacation of the final judgment and retroactive recusal of the trial judge will be mandatory even if, as the Court of Appeals found here, there is no reason to doubt the truth of the trial judge's denial of actual knowledge. That will result in the wasteful, unjust and unnecessary retrial of an entire class of cases, including this one, that were fairly and properly adjudicated to a final judgment. The harm to the strong public interests in the finality of judgments and the prompt and efficient administration of justice will be immeasurable.

For the reasons stated below, the Opinion of the Court of Appeals misstates the applicable law and reaches an erroneous and ill-advised result that must be reversed.

I. A BUSINESS RELATIONSHIP BETWEEN A TRIAL JUDGE AND A MEMBER OF A PARTY/LITIGANT'S FAMILY DOES NOT MANDATE RECUSAL.

Ms. Castle, the Petzolds' adult daughter, served as Judge Goodwine's tax accountant and former campaign treasurer. As treasurer, Ms. Castle made an in-kind contribution of accounting services, but she and Judge Goodwine had no other personal, social or political relationship. Even if Judge Goodwine had known Ms. Castle was the Petzolds' daughter and had been asked to recuse, under the circumstances and the

applicable law, Judge Goodwine would not have abused her discretion by denying that motion.[2]

Judge Goodwine's disclosures of the origin and nature of her relationship with Ms. Castle revealed nothing more that a purely professional business relationship. The relationship began by chance, when Judge Goodwine's former accountant left and Judge Goodwine elected to remain with the firm. There were few face-to-face meetings. There was no social relationship. Judge Goodwine asked Ms. Castle to be her campaign treasurer because she wanted a CPA rather than a personal friend to perform that function. As treasurer, Ms. Castle signed campaign checks, filed financial reports and reported her activities as an in-kind political contribution. Ms. Castle did not participate in Judge Goodwine's political campaign in any other way. Ms. Castle supported Judge Goodwine's political campaign with a donation of professional services. Many other people supported her campaign with a contribution money.[3]

Judge Goodwine's finding that these circumstances did not require recusal was correct and entirely consistent with Canon 3E of the Code of Judicial Conduct, SCR 4.300, KRS 26A.015,

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[2] The Court of Appeals' stated belief that "neither court nor counsel dispute that had the trial judge's relationship to the Petzolds" come to light prior to entry of judgment, the trial judge "should have" recused herself, Appendix A, Opinion at 3, was erroneous for the reasons set forth in the Statement of the Case.

[3] The Petzolds did not contribute to Judge Goodwine's campaign.

and the principles in *Dean v. Bondurant*, 193 S.W.3d 744 (Ky. 2006).

Canon 3E of the Code of Judicial Conduct states:

> E. Disqualification.
>
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
>
> (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or minor child residing in the judge's household, has any interest, more than a de minimis interest, in the subject matter in controversy or in a party to the proceeding that could be substantially affected by the proceeding;
>
> (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
>> (i) is a party to the proceeding, or an officer, director or trustee of a party;
>>
>> (ii) is acting as a lawyer in the proceeding;
>>
>> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
>>
>> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

The pertinent inquiry is whether Judge Goodwine's impartiality might reasonably be questioned if she presided over a case in which the parents of her former campaign treasurer and personal accountant were parties. The Petzolds contend that, given the purely professional, non-personal, non-social, and limited nature of the business relationship, it could not. Judge Goodwine would not have abused her discretion by so ruling.

It is noteworthy that the Court of Appeals failed to cite any authority from any jurisdiction for the proposition that a judge's (or a judicial candidate's) use of accounting services provided by a relative of a party requires recusal. The general rule is that prejudice growing out of business, political or social relations between judges and parties generally is insufficient to disqualify a judge. *See* 46 Am.Jur.2d, Judges § 141 at 259-60 (2006); *Sears v. State*, 426 S.E.2d 553 (Ga. 1993); *Bonelli v. Bonelli*, 570 A.2d 189, 85 ALR 4th 691, 699 (Conn. 1990). A business relationship between a judge and a relative of a party is not grounds for mandatory recusal under any authority of which the Petzolds are aware.

The conclusion that Ms. Castle's former service as Judge Goodwine's campaign treasurer is not disqualifying is fortified by a comparison of that circumstance to the specific circumstances that are recognized as grounds for recusal under Cannon 3E(1) of the Kentucky Code of Judicial Conduct and the

Commentary thereto. Most of those circumstances involve a relationship of the judge or the judge's relatives to a party to the litigation or to a lawyer involved in the litigation. None of them involve an extra-judicial business relationship between a judge and a relative of a party. Such relationships are too attenuated to require disqualification, especially retroactive disqualification.

As campaign treasurer, Ms. Castle made an in-kind political contribution of accounting services to Judge Goodwine's election campaign. In *Dean v. Bondurant*, 193 S.W.3d 744 (Ky. 2006), this Court recently recognized that a trial judge is not disqualified from hearing cases involving litigants or attorneys who made campaign contributions to the trial judge. Therefore, a trial judge obviously is not disqualified from hearing cases involving litigants whose family members made financial or in kind contributions of accounting services to the trial judge's political campaign.

Judge Goodwine clearly did not abuse her discretion by finding that her retroactive recusal was neither required nor appropriate. That is true regardless whether she had actual knowledge that Ms. Castle was the Petzolds' daughter.

II. NO OBJECTIVE OBSERVER WITH KNOWLEDGE OF ALL OF THE FACTS WOULD EXPECT JUDGE GOODWINE TO HAVE KNOWLEDGE THAT MS. CASTLE WAS THE PETZOLDS' DAUGHTER.

Judge Goodwine stated she had no knowledge and no reason to have knowledge of the family relationship between Ms. Castle and the Petzolds prior to the date on which the

CR 60.02 motion was filed. Appendix B, Order at 3. The Court of Appeals stated that it knew of no reason to doubt Judge Goodwine's statement that she was unaware that her campaign treasurer was also the Petzolds' daughter because it knew about the impersonal nature of judicial campaigns in large cities. Appendix A, Opinion at 5.

There can be no question that Judge Goodwine's impartiality could not reasonably be questioned by anyone if she in fact had no knowledge of Ms. Castle's relationship to the Petzolds at the time she decided the case. Assuming, without conceding, that the family relationship was potentially disqualifying if Judge Goodwine had actual knowledge of it, then the narrow issue raised by this appeal is whether "a reasonable person, knowing all the circumstances, would expect that [Judge Goodwine] would have actual knowledge." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862, 108 S.Ct. 2194, 2203, 100 L.Ed.2d 855 (1988).

No reasonable person, including the Court of Appeals, knowing all the circumstances of this case, as did the Court of Appeals, would expect that Judge Goodwine had actual knowledge that Ms. Castle was the Petzolds' daughter at the time she decided the case. For that reason, Judge Goodwine did not abuse her discretion by denying Kessler Homes' motion pursuant to CR 60.02(f) for extraordinary relief from the Judgment, retroactive recusal and a new trial. Accordingly,

the harsh and erroneous decision of the Court of Appeals must be reversed.

A. Analysis Of The Supreme Court's Decision In Liljeberg v. Health Services Acquisition Corp.

This case raises the issue of when potentially disqualifying circumstances of which the trial judge was unaware at the time the case was decided will nevertheless give rise to an appearance of bias that will mandate the harsh and extraordinary remedy of vacating a final judgment, retroactive recusal, and a new trial in order to preserve public confidence in the impartiality of the judiciary. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61, 108 S.Ct. 2194, 2203, 100 L.Ed.2d 855 (1988), on which the Court of Appeals principally relied, is the only case of which the Petzolds are aware that addresses this issue. For the reasons set forth below, the Court of Appeals misapprehended and misapplied the ruling in *Liljeberg* to the facts of this case and reached an erroneous result.

The toxic brew of facts in *Liljeberg* was very extraordinary and not even remotely similar to those of this case. In *Liljeberg*, the trial judge was a member of the Board of Trustees of Loyola University. Loyola had a direct and significant financial interest in the outcome of a case. As a consequence, the trial judge had a direct and significant interest in the outcome of the case. Following a bench trial, the trial judge decided the case in a way that advanced Loyola's financial interests. When the losing party later

raised the issue, the trial judge admitted he knew about Loyola's financial interest in the outcome early on but that, by the time of the trial, he had "forgotten" about it. *Id.* at 847-849.

The substance of the Court's ruling in *Liljeberg* was that, even if Judge Collins had "forgotten" about Loyola's financial interest in the outcome of the case, the facts of which he actually *was* aware would cause an objective observer to believe he had actual knowledge and, thus, was not impartial. *Id* at 860-61.

In so holding, the Supreme Court stressed that it is "critically important" to identify the facts that would cause the objective observer to question the judge's professed lack of knowledge and, thus, his impartiality.

The Court identified four such facts. First, the Court found it was "remarkable" that a judge, who had regularly attended the meetings of the Board of Trustees since 1977, completely forgot about Loyola's important interest in having a hospital constructed on its property in Kenner.

Second, the Court found it is an "unfortunate coincidence" that although the judge regularly attended the meetings of Loyola's Board of Trustees, he was not present at the January 28, 1982, meeting, a week after the 2-day trial and while the case was still under advisement. The minutes of that meeting reflected that representatives of the University were monitoring the progress of the trial. These

minutes were mailed to Judge Collins on March 12, 1982, but he did not open the envelope until March 24, 1982, after he had ruled. The Court found that if the judge had opened that envelope when he received it on March 14 or 15, he would have been under a duty to recuse himself before he entered judgment on March 16.

Third, the Court found it was "remarkable" and "quite inexcusable" that Judge Collins failed to recuse himself on March 24, 1982.

Fourth, the Court found that, when respondent filed its motion to vacate, the trial judge gave three reasons for denying the motion, but still did not acknowledge that he had known about Loyola's interest both shortly before and shortly after the trial. Nor did he indicate any awareness of a duty to recuse himself in March 1982. Indeed, those facts and circumstances, including his failure to recuse when he became actually aware of his own financial interest as a fiduciary, gave rise to a strong and palpable sense that the trial judge had actual knowledge of the disqualifying information and was in fact biased at the time he ruled. *Id.* at 865-866.

The standard adopted by the Supreme Court in *Liljeberg* was not whether an objective observer "might" find the trial judge's professed lack of knowledge of his patently disqualifying interest in the litigation "somewhat implausible." The circumstances must be such that a reasonable person informed of all of the surrounding facts and

circumstances would <u>expect or believe</u> the trial judge had actual knowledge of the disqualifying facts.

> The goal of section 455(a) is to avoid even the appearance of partiality. **If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation** then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir.1983). Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case **if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge**." 796 F.2d, at 802.

Id. at 860-61 (Emphasis added). *See also*, *Microsoft Corp. v. United States*, 530 U.S. 1301, 121 S.Ct. 25, 26, 147 L.Ed.2d 1048 (2000).

The odor of actual, living, breathing bias created by the extraordinary circumstances and trial judge's conduct in *Liljeberg* was so overpowering that the Supreme Court was compelled to take drastic action to protect the integrity of the judicial process. Simply put, no reasonable person would believe Judge Collins' story that he had "forgotten" the patently disqualifying facts at the time he ruled.

B. The Misinterpretation And Misapplication Of Liljeberg By The Court Of Appeals.

The erroneous decision by the Court of Appeals is grounded in its misinterpretation and misapplication of

Liljeberg to the facts of this case. The standard stated in *Liljeberg* is whether a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge. *Liljeberg* at 860-61. The standard expressed by the Court of Appeals is whether it is "at all unreasonable" that a typical, objective observer in the trial judge's venire "might" find it "somewhat implausible" that Judge Goodwine was unaware that her campaign treasurer's parents were litigants in her court. Appendix A, Opinion at 5. Under that vague and flaccid standard, the extraordinary and harsh remedy of retroactive disqualification, recusal and relief from a final judgment will be mandated in *every* case in which the unsuccessful litigant uncovers[4] potentially disqualifying circumstances after the case is decided, even if the trial judge had no knowledge of those facts when the judgment became final. That puts all final judgments, including the one in this case, which were fairly and properly litigated, at risk of being set aside for a new trial.

Fortunately, *Liljeberg* requires far more than the ability to engage in rank speculation about whether it is reasonable to think that an objective observer might find it somewhat implausible that the judge did not have knowledge. *Liljeberg*

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[4] The Petzolds believe a party moving for relief from a final judgment on grounds of circumstances that allegedly disqualify the trial judge should explain in detail when and how the moving party discovered those facts and should certify that the moving party was unaware of those facts prior to the entry of judgment.

requires that there be specific and palpable facts that would cause an objective observer with knowledge of all of the circumstances to believe that the judge had knowledge. The Supreme Court stressed that it is "critically important" to identify those facts. It is only when those facts are present and identified that the "most extraordinary circumstances" may exist that could warrant the draconian remedy of retroactive disqualification and relief from the final judgment pursuant to CR 60.02.

In her Order, Judge Goodwine stated that she had no knowledge and <u>no reason to have knowledge</u> that Ms. Castle was the Petzolds daughter until after she decided the case. Her statement is fully supported by the record of this case. Indeed, neither the Court of Appeals nor Kessler Homes has identified a single fact that would cause a reasonable observer to believe Judge Goodwine had such knowledge. There are none. To the contrary, the Court of Appeals cited its knowledge of "the workings of a judicial reelection campaign conducted in the relative impersonality of a large metropolitan venire" as a reason why it did <u>not</u> doubt the truth of Judge Goodwine statement that she lacked knowledge of the family relationship. Appendix A, Opinion at 4-5. While the Court of Appeals considered its knowledge of the impersonality of judicial campaigns conducted in large metropolitan cities to be "atypical," knowledge of that fact, along with all of the other circumstances, must be attributed

to the hypothetical objective observer when applying the objective standard set forth in *Liljeberg*. Thus, the Court of Appeals' Opinion actually makes the case for why an objective observer would not believe Judge Goodwine had knowledge of the family relationship. The circumstances that the Supreme Court determined must be present to warrant the extraordinary and harsh relief meted out by the Court of Appeals simply are not present in this case.

Public confidence in the impartiality of the judicial system is an important policy concern. The finality of judgments and the prompt, efficient and economical administration of justice also are important policy concerns. The decision of the Court of Appeals opens the door to attacks on final judgments when there is no good reason to question the trial judge's impartiality. This Court must reverse the decision of the Court of Appeals in this case to restore the proper balance between these policy concerns to protect final judgments from unwarranted attack and to protect the judicial system and litigants from the wasteful and unnecessary relitigation of cases that were fairly and properly adjudicated to a final judgment.

III. FURTHER REVIEW OF ISSUES RAISED BY KESSLER HOMES IN THE COURT OF APPEALS BUT NOT DECIDED BY THAT COURT IS PROHIBITED.

Kessler Homes raised numerous issues and arguments for reversing the Judgment of the trial court in its briefs to the Court of Appeals. The only issue that was actually addressed

or decided by the Court of Appeals, however, was Kessler Homes' appeal from the denial of its motion for relief from the Judgment pursuant to CR 60.02. All other issues raised by Kessler Homes but not decided by the Court of Appeals are treated as having been settled against Kessler Homes. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). Since Kessler Homes did not file a cross-motion for discretionary review, further review of those other issues by this Court is prohibited.

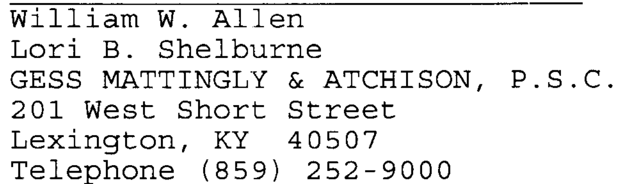
> . . . any issues decided against the Appellees at the Court of Appeals cannot be raised before this Court without a cross-motion for discretionary review. *Perry v. Williamson*, 824 S.W.2d 869, 871 (Ky. 1992)("Our rules are specific that if the motion for discretionary review made by the losing party in the Court of Appeals is granted, it is then incumbent upon the prevailing party in the Court of Appeals to file a cross-motion for discretionary review if respondent wishes to preserve the right to argue issues which respondent lost in the Court of Appeals, or issues the Court of Appeals decided not to address. If the party prevailing in the Court of Appeals wishes further consideration of such issues along with the issues for which discretionary review has been granted, the prevailing party must file a cross motion for discretionary review.") and *Commonwealth Transp. Cabinet, Dept. of Highways v. Taub*, 766 S.W.2d 49, 51-52 (Ky. 1988)("Upon our grant of the Commonwealth's motion for discretionary review, this Court undertook review of the decision of the Court of Appeals. We will not address issues raised but not decided by the Court below. It is the rule in this jurisdiction that issues raised on appeal but not decided will be treated as settled against the appellant in that court upon subsequent appeals unless the issue is preserved by cross-motion for discretionary review. CR 76.21(1); *Nashville, C. & St.L. Ry.Co. v. Banks*, 168 Ky. 579, 182 S.W. 660 (1916); and *Eagle Fluorspar Co. v. Larue*, 237 Ky. 263, 35 S.W.2d 303 (1931).... [F]ailure to file a cross-motion for discretionary review precludes further review in this Court.").

Id. at 926-27. *See also*, 19 S. Snyder, G. Sumner and M. Blickensderfer, Kentucky Practice § 11.5 (2006). Accordingly, the decision of the Court of Appeals reversing the trial court's order denying Kessler Homes' motion for relief from the Judgment must be reversed and the trial court's Judgment must be affirmed in all respects.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the judgment of the Fayette Circuit Court should be affirmed.

Respectfully submitted this 15th day of December, 2008.



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