

**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


Reply Brief for Appellants,
Adolph Petzold and Marilyn Petzold

Submitted by:

William W. Allen
Lori B. Shelburne
Gess Mattingly & Atchison, PSC
201 West Short Street
Lexington, KY 40507

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 February 27, 2009: 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.



William W. Allen
Counsel for Appellants

INTRODUCTION

This brief is submitted on behalf of the appellants, Adolph Petzold and Marilyn Petzold (the "Petzolds"). The purpose of this brief is to reply to the arguments advanced in the brief submitted on behalf of the appellee, Kessler Homes, Inc. ("Kessler Homes").

STATEMENT OF POINTS AND AUTHORITIES

POINT I. LIKE THE COURT OF APPEALS, KESSLER HOMES FAILED TO IDENTIFY A SINGLE REASON WHY AN OBJECTIVE OBSERVER WITH KNOWLEDGE OF ALL OF THE FACTS WOULD EXPECT JUDGE GOODWINE HAD KNOWLEDGE THAT MS. CASTLE WAS THE PETZOLDS' ADULT DAUGHTER AT THE TIME SHE RULED.

Dotson v. Burchett, 190 S.W.2d
697, 700 (Ky. 1945) 3

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860-861,
108 S.Ct. 2194, 2203 (1988) 1, 4, 5

POINT II. KESSLER HOMES' ARGUMENT THAT IT PREVAILED IN THE COURT OF APPEALS ON ALL ISSUES IS COMPLETELY ERRONEOUS.

Civil Rule 76.21(1) 7

Commonwealth v. Vester, 956 S.W.2d 204 (Ky. 1997) . . . 7, 8

Eagle Fluorspar Co. v. Larue,
237 Ky. 263, 35 S.W.2d 303 (1931) 7

Hale v. Combs, 30 S.W.3d 146 (Ky. 2000) 7, 8

Nashville, C. & St.L. Ry.Co. v. Banks,
168 Ky. 579, 182 S.W. 660 (1916) 7

Steel Technologies, Inc. v. Congleton,
234 S.W.3d 920, 926 (Ky. 2007) 7, 8

POINT III. KESSLER HOMES' ARGUMENT THAT JUDGE GOODWINE'S BUSINESS RELATIONSHIP WITH THE PETZOLDS' DAUGHTER WAS DISQUALIFYING AS A MATTER OF LAW IS UNAVAILING.

ARGUMENT

- I. LIKE THE COURT OF APPEALS, KESSLER HOMES FAILED TO IDENTIFY A SINGLE REASON WHY AN OBJECTIVE OBSERVER WITH KNOWLEDGE OF ALL OF THE FACTS WOULD EXPECT JUDGE GOODWINE KNEW THAT MS. CASTLE WAS THE PETZOLDS' ADULT DAUGHTER AT THE TIME SHE RULED.

"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. . . [;] 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."

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860-861, 108 S.Ct. 2194, 2203 (1988) (emphasis added).

Judge Goodwine stated she did not know that Ms. Castle was the Petzolds' daughter until Kessler Homes filed its motion for relief from the trial court's final judgment pursuant to CR 60.02. That relationship would not have disqualified Judge Goodwine even if she had known of it. But assuming it might have, no appearance of impropriety could arise unless there are specific facts that would cause an objective observer with knowledge of all of the circumstances to expect Judge Goodwine knew of the relationship at the time she ruled, notwithstanding her denial. In other words, the facts must be such that an objective observer would believe Judge Goodwine lied about her lack of knowledge. It is only under those very extraordinary circumstances that the unusual and extremely harsh remedy of retroactive recusal and vacation of a final judgment should be imposed to preserve public

confidence in the judicial system. That is the substance of the Supreme Court's holding in *Liljeberg*.

In its brief, Kessler Homes ignores these critical elements of the *Liljeberg* analysis and distorts the Petzolds' discussion of that case. Contrary to Kessler Homes' argument, the trial judge's denial of knowledge of potentially disqualifying facts is the beginning, not the end, of the analysis. The next "critically important" step is to identify the facts and circumstances that would cause a reasonable observer to doubt the truth of the trial judge's denial of knowledge. *Liljeberg*, 486 U.S. at 865. Kessler Homes ignores that crucial step in the analysis.

The Court of Appeals stated it had no reason to doubt Judge Goodwine's denial of knowledge. Like the Court of Appeals, Kessler Homes cannot identify a single fact or circumstance that would cause a reasonable observer to doubt Judge Goodwine's denial of knowledge. To the contrary, Kessler Homes proclaims its belief that Judge Goodwine is "a professional and ethical judge" and that it "does not question Judge Goodwine's veracity." Appellee's Brief at 13, 14. Certainly Kessler Homes could not possibly believe that a professional and ethical judge, whose veracity it does not question, would lie on the record about what she knew and did not know at the time she ruled. Kessler Homes' opinion of Judge Goodwine's professionalism, judicial ethics and veracity, with which the Petzolds heartily agree, demonstrates

that even Kessler Homes believes it actually received a fair and impartial trial in this case.

Kessler Homes' belief that it got a fair and impartial trial provides yet another reason why the decision of the Court of Appeals must be reversed. The Court of Appeals stated in its opinion that any doubt about a judge's qualifications to preside should be resolved in favor of the party with good faith doubts based on substantial grounds, citing this Court's decision in *Dotson v. Burchett*, 190 S.W.2d 697, 700 (Ky. 1945).¹ Here, neither Kessler Homes nor the Petzolds have any doubts about Judge Goodwine's qualifications to serve. Further, no objective observer with knowledge that all of the parties to the litigation actually believe the trial judge was fair and impartial during the trial could possibly think otherwise. And yet, the Court of Appeals has vacated a final judgment that all appear to agree was fairly and impartially adjudicated because of the possibility that a hypothetical objective observer "might" think it "somewhat implausible" that Judge Goodwine lacked knowledge. That is no reason to impose the draconian remedy meted out by the Court of Appeals in this case. The decision of the Court of Appeals was erroneous and must be reversed.

A side-by-side comparison of the facts in *Liljeberg* and the facts in this case shows how very different the

¹ The *Dotson* decision has no application to this case, in any event, because it involved the recusal of a judge before he ruled.

circumstances were in the two cases. *Liljeberg* was similar to this case in only one respect and starkly dissimilar in all other respects.

Liljeberg v. Health Serv.

Petzold v. Kessler Homes

Similarity

Trial judge denied knowledge of certain facts at time judgment entered.

Trial judge denied knowledge of certain facts at time judgment entered.

Dissimilarities

Trial judge had a patently disqualifying interest in the outcome of litigation

Trial judge had non-disqualifying relationship with a relative of a party

Trial judge admitted he had actual knowledge of disqualifying facts but had "forgotten" those facts by the time he ruled

All agree the trial judge had no knowledge of allegedly disqualifying facts until after final judgment was entered

Trial judge became aware of patently disqualifying facts before judgment became final but still refused to recuse

Trial judge had no knowledge of allegedly disqualifying facts until after judgment became final and appealable

Trial judge stopped attending Loyola University board meetings and opening the minutes of those meetings, which would have reminded the judge of his interest just before he ruled

Trial judge did not change behavior prior to ruling in a way that gave rise to strong inference of willful ignorance of facts

Trial judge did not exhibit an awareness that his interest in the outcome of the case mandated recusal even after he was "reminded" of his interest in outcome

Trial judge exhibited an awareness of her duty to recuse if her impartiality might reasonably be questioned

Supreme Court identified the forgoing as circumstances that would cause an objective person with knowledge of them to expect the trial judge had knowledge of his interest in the outcome of the case at the time he ruled

Neither the Court of Appeals nor Kessler Homes has identified any circumstance that would cause an objective person with knowledge of them to expect the trial judge had knowledge her former campaign treasurer was the adult daughter of parties to litigation until Kessler Homes filed its CR 60.02 motion

These stark differences between the facts in *Liljeberg* and this case underscore why the Court of Appeals erred by

concluding that the extremely harsh remedy authorized by the Supreme Court in *Liljeberg* was warranted in this case.

While the Court of Appeals relied on *Liljeberg* as authority for its decision, the standard actually adopted by the Court of Appeals in this case does not even remotely resemble the legal analysis in *Liljeberg*. *Liljeberg* requires truly unusual and extraordinary circumstances to warrant the draconian remedy of retroactive recusal and vacating a final judgment; circumstances that would cause an objective observer to believe the judge lied. The Court of Appeals adopted a very different and far more relaxed standard: whether an objective observer "might" find it "somewhat implausible" that the judge lacked knowledge. Such circumstances will be present in every case of this nature. This Court must reverse the decision of the Court of Appeals to conform the law of Kentucky to the sound principles in *Liljeberg*. To fail to do so will leave this Commonwealth with an ill-advised and ill-considered rule that will mandate retroactive recusal in many cases, including this one, in which there is simply no good reason to grant that most extraordinary and harsh remedy.

The authorities cited by Kessler Homes for the general proposition that all litigants, including the Petzolds and Kessler Homes, are entitled to a fair and impartial judge are meritorious but they have no application to the specific facts and issues in this case. Neither the Court of Appeals nor Kessler Homes has articulated any reason why an objective

observer would expect that Judge Goodwine had knowledge that Ms. Castle was the Petzolds' adult daughter prior to the time she ruled. They only articulated reasons why they actually believe Judge Goodwine told the truth and, therefore, that Kessler Homes in fact received a fair and impartial trial. Neither the Court of Appeals nor Kessler Homes has identified any facts or circumstances that could possibly warrant relief under the standards adopted in *Liljeberg*. There are none. The decision of the Court of Appeals was erroneous and must be reversed.

II. KESSLER HOMES' ARGUMENT THAT IT PREVAILED IN THE COURT OF APPEALS ON ALL ISSUES IS COMPLETELY ERRONEOUS.

Kessler Homes has filed what amounts to a combined appellee's brief and cross-appellant's brief. In Parts A and B of its brief, Kessler Homes attempts to respond to the points in the Petzolds' brief addressing the sole issue on which discretionary review was granted: whether the Court of Appeals erred by reversing the Circuit Court's order denying relief pursuant to CR 60.02. In Part C of its brief, Kessler Homes advances arguments that relate to the many other issues it presented to the Court of Appeals but which the Court of Appeals neither addressed nor decided. Since Kessler Homes did not file a cross-motion for discretionary review, this Court is prohibited from considering those additional issues and the issues decided against Kessler Homes are now the law of the case. Therefore, it is neither necessary nor

appropriate for the Petzolds to address those arguments in this 10-page reply memorandum and they decline to do so.

Kessler Homes argues it was not required to file a cross-motion for discretionary review to obtain further review because it prevailed on all issues in the Court of Appeals. That argument is completely erroneous and can be made only by ignoring the venerable principles that recently were reaffirmed by this Court in *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). *Steel Technologies*, and the cases cited with approval therein, remind us 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. See CR 76.21(1); *Nashville, C. & St.L. Ry.Co. v. Banks*, 182 S.W. 660 (Ky. 1916); *Eagle Fluorspar Co. v. Larue*, 35 S.W.2d 303 (Ky. 1931) ("[F]ailure to file a cross-motion for discretionary review precludes further review in this Court.").

Kessler Homes acknowledges that a cross-motion for discretionary review must be filed to preserve a right to further review of issues on which the appellant in the Court of Appeals did not prevail. See Appellee's Brief at 16. Its argument that it prevailed on all issues below, however, is spurious and based on a misleading discussion of this Court's decisions in *Hale v. Combs*, 30 S.W.3d 146 (Ky. 2000) and *Commonwealth v. Vester*, 956 S.W.2d 204 (Ky. 1997). In *Vester*,

this Court held that a party prevailing in the trial court (or administrative agency) need not file a cross-appeal to argue to the Court of Appeals that the lower tribunal reached the right result for the wrong reason. In *Hale*, however, the appellee did not prevail in the Court of Appeals, and this Court held that the appellee was required to file a cross-motion for discretionary review in order to assert that the lower court reached the wrong result on that issue. 30 S.W.3d at 150 n.2. Kessler Homes' stubborn argument that *Hale* and *Vester* support its claim that it prevailed on all issues in the Court of Appeals and, as a consequence, it was not required to file a cross-motion for discretionary review, is simply wrong. Those cases support the opposite conclusion.

Kessler Homes prevailed on only one of the many issues it presented to the Court of Appeals: whether it was entitled to relief from the final judgment entered by the trial court pursuant to CR 60.02. Since the Court of Appeals did not address or decide any of the many other issues presented to it by Kessler Homes, all of those other issues were settled against Kessler Homes, as a matter of law. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 926 (Ky. 2007). It was incumbent on Kessler Homes to file a cross-motion for discretionary review to obtain further review of those issues by this Court. *Id.* Since it failed to do so, further review of those issues by this Court is prohibited. *Id.* Furthermore, the issues that were decided adversely to

Kessler Homes in the Court of Appeals are now the law of the case. *Hale v. Combs*, 30 S.W.3d 146, 150 (Ky. 2000). The decision of the Court of Appeals must be reversed and the judgment of the Circuit Court must be affirmed.

III. KESSLER HOMES' ARGUMENT THAT JUDGE GOODWINE'S BUSINESS RELATIONSHIP WITH THE PETZOLDS' DAUGHTER WAS DISQUALIFYING AS A MATTER OF LAW IS UNAVAILING.

This Court must address the question whether Judge Goodwine would have abused her discretion by declining to recuse herself had she been asked prior to trial only if it determines, within the context of a *Liljeberg* analysis, that a reasonable person with knowledge of all of the facts would expect Judge Goodwine had knowledge Ms. Castle was the Petzolds' daughter at the time she decided the case.

In *Liljeberg*, the judge's interest in the outcome was patently disqualifying. That is not so here. Kessler Homes advances a one-dimensional argument that the relationship between Judge Goodwine and the Petzolds' daughter was such that her impartiality might reasonably be questioned as a matter of law and, therefore, Judge Goodwine would have abused her discretion by denying a timely motion to recuse. Kessler Homes bases that conclusion on its speculation that a campaign treasurer is more connected to a candidate in the public eye than a "mere" financial contributor.

Kessler Homes' speculation ignores the actual nature of the business relationship, as disclosed by Judge Goodwine. The relationship arose by accident. It was purely

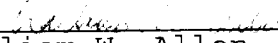
professional. There was no personal or social aspect. Ms. Castle was not a party to the litigation. The Petzolds, who are parties, had no relationship whatsoever to Judge Goodwine.

Judge Goodwine correctly determined that recusal would not have been mandatory had she been asked. Indeed, under the authorities cited by the Petzolds in their brief, recusal would not have been mandatory even if Ms. Castle had been a party to the case. But she was not a party. Her parents were parties. Kessler Homes does not cite to a single case in which an appellate court has held that a business relationship between the trial judge and a relative of a party was disqualifying. Since Judge Goodwine's relationship with Ms. Castle was not disqualifying, there would be no reason to vacate the judgment in this case even if Judge Goodwine had been aware of it at the time she ruled.

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 27th day of February, 2009.



William W. Allen
Lori B. Shelburne
GESS MATTINGLY & ATCHISON, P.S.C.
201 West Short Street
Lexington, KY 40507
Telephone (859) 252-9000
Counsel for Appellants

114apap.bf7
022709