Finally, we conclude that the Department has failed to plainly describe its methodologies so that they can be replicated and assessed in compliance with § 46-713(1)(d).

We hold that the Department's 2008 fully appropriated determination for the Lower Niobrara River Basin was invalid. We reverse and vacate the director's order affirming that determination.

REVERSED AND VACATED.

JAMES TIERNEY AND JEFFREY TIERNEY, APPELLANTS,
v. FOUR H LAND COMPANY LIMITED
PARTNERSHIP ET AL., APPELLEES.

798 N.W.2d 586

Filed June 3, 2011. No. S-10-103.

1. **Judges: Recusal.** A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.
2. ____: ____. A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.
3. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
4. **Judges: Recusal: Time.** The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.
5. **Judges: Recusal: Appeal and Error.** A traditional harmless error analysis is inappropriate for review of questions of judicial disqualification.
6. ____: ____: ____. The disqualification of a judge is not a disqualification to decide erroneously. It is a disqualification to decide at all.
7. ____: ____: ____. The three-factor special harmless error test in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988), should be used for determining when vacatur is the appropriate remedy for a trial judge's failure to recuse himself or herself when disqualified under the Nebraska Code of Judicial Conduct.
8. **Judges.** When a judge is biased, his or her personal integrity and ability to serve are thrown into question, placing a strain on the court that cannot easily be erased.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and CARLSON, Judges, on appeal thereto

from the District Court for Lincoln County, JOHN P. MURPHY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

James J. Paloucek, of Norman, Paloucek & Herman Law Offices, for appellants.

Jay C. Elliott, of Elliott Law Office, P.C., L.L.O., for appellees Four H Land Company Limited Partnership and Western Engineering Company, Inc.

Susan C. Williams for appellees Frank Aloi and Aloi Living Trust.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

James Tierney and Jeffrey Tierney brought this action against Four H Land Company Limited Partnership (Four H Land); Western Engineering Company, Inc. (Western Engineering); Frank Aloi, trustee of the Aloi Living Trust; and the Aloi Living Trust (collectively the defendants) to compel them to lower the elevation of a lakeside housing development adjoining the Tierneys' land. The district court granted summary judgment in favor of the defendants, and the Tierneys appealed. While their appeal was pending, the Tierneys discovered that the district court judge who issued the order harbored a personal prejudice against their attorney. We reverse, and remand with directions.

BACKGROUND

AGREEMENT AND PERMIT

The Tierneys are owners of real estate that adjoins 60.8 acres of real property previously owned by Four H Land and currently owned by Aloi, trustee of the Aloi Living Trust, and the Aloi Living Trust. In 1997, the 60.8 acres consisted primarily of an alfalfa field on level ground with a line of cottonwood trees and a road alongside the adjoining edge of the Tierneys' property. The alfalfa field was somewhat lower than the road,

and there were some depressed areas of wetlands. Four H Land and Western Engineering wished to open and operate a sand and gravel pit on the 60.8 acres. When the excavation was complete, they planned to create a lake and fill in the surrounding land for a housing development.

Four H Land and Western Engineering sought a conditional use permit from the Lincoln County Planning Commission (the Commission). The Tierneys objected that the sand and gravel pit would be a nuisance. The Commission granted the permit with the following conditions:

> At the close of each phase of the sand and gravel pit operation the area shall be leveled to its original topography within one year of termination of each phase. The areas not covered by water shall then be covered with four inches (minimum) of topsoil and seeded with appropriate native grasses to prevent erosion of the soil.

The Tierneys appealed the Commission's decision. Eventually, the Tierneys reached an agreement with Four H Land and Western Engineering. The agreement provided more detailed mining operation restrictions and stated in relevant part:

> As the operation in one phase is completed and the operation moves to the next phase, [Four H Land] and [Western Engineering] shall reclaim the land in the phase of prior operations by filling to at least its approximate original topography, covered with a minimum of four (4) inches of top soil and seeded with appropriate native grasses to prevent erosion and to visually restore the site, except the area to be used for a lake.

The terms and conditions of the August 11, 1998, agreement were "to be incorporated into and made a part of the Conditional Use Permit to be approved by the . . . Commission" and "[a]ll of the other terms and conditions contained in the Conditional Use Permit shall apply, except to the extent they are contrary to or less restrictive than the terms agreed to in the settlement of this controversy . . . ." That same date, the conditional use permit was reissued by the Commission. The permit specifically attached and incorporated the August 11 agreement.

After completion of the gravel pit operation, the lake was created and the surrounding land was prepared for the housing development. The lots were raised to comply with flood plain requirements. The parties agree that the lots, which comprise most of the land, are higher in elevation than the previously existing alfalfa field.

The Tierneys brought this action against the defendants on April 9, 2009. They contend that the final elevation of the land violated the agreement because the agreement required a return to the preexisting elevation and the land was 6 to 8 feet higher. Their action was brought before the Honorable John P. Murphy of the Lincoln County District Court, and the Tierneys were represented by James J. Paloucek.

In December 2009, the Tierneys filed a motion for summary judgment and the defendants filed cross-motions for summary judgment. Several depositions were submitted in support of the motions disputing the intent of the permit and agreement. On January 8, 2010, the district court granted summary judgment in favor of the defendants. The court concluded that by virtue of the "at least" language in the permit, the defendants were required to return the land to the original elevation level or higher, and that there was no dispute the elevation was "at least" as high as it was before the gravel pit operation. The court concluded that there was thus no material issue of fact as to whether the defendants had complied with the permit and agreement. The Tierneys appealed.

Bias Against Tierneys' Attorney

While the Tierneys' appeal was pending, on July 13, 2010, Paloucek received a letter from Judge Murphy. In the letter, Judge Murphy wrote, "Because I hold you personally responsible for the Florom fiasco, I am recusing myself from any pending case or any future case involving your law firm." Since that time, Judge Murphy has, in fact, recused himself from all cases involving the law offices of Norman, Paloucek & Herman.

The Tierneys were allowed to amend their assignments of error to allege that Judge Murphy erred in failing to recuse himself, sua sponte, from deciding the case, because such bias

must have existed at the time of the summary judgment hearing. The Tierneys alleged that prior to receiving this letter, they did not know that Judge Murphy harbored prejudice against their attorney.

The source of the alleged bias stems from disciplinary proceedings against a former county court judge, Kent E. Florom. In 2008, Florom became involved in matters surrounding the criminal prosecution and revocation of the teaching certificate of the head coach of the girls' softball team on which Florom's daughter played. Florom tried to use his influence to convince the prosecutor not to press charges and later threatened Paloucek, who served on the school board, stating that Paloucek would make an "enemy" if Paloucek supported the action to remove the coach's teaching certificate.

The Nebraska Commission on Judicial Qualifications (JQC) filed a complaint charging Florom with violations of the Nebraska Code of Judicial Conduct. A hearing was held before a special master appointed by this court, and Paloucek testified at the hearing. The special master concluded there was clear and convincing evidence that Florom's conduct violated the Nebraska Code of Judicial Conduct. By November 5, 2009, the JQC issued the recommendation that Florom be removed from judicial office. On July 9, 2010, we independently reviewed the findings of the JQC and removed Florom from judicial office.[1]

Court of Appeals Opinion

The Nebraska Court of Appeals, in a memorandum opinion, affirmed Judge Murphy's order granting the defendants' motions for summary judgment and denying the Tierneys' cross-motion for summary judgment.[2] The Court of Appeals held that the alleged 8- to 10-foot-high berm complied with the provisions in the conditional use permit requiring a berm at least 6 feet high and that this provision was not contrary to

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[1] See *In re Complaint Against Florom*, 280 Neb. 192, 784 N.W.2d 897 (2010).

[2] *Tierney v. Four H Land Co.*, No. A-10-103, 2010 WL 4354243 (Neb. App. Nov. 2, 2010) (selected for posting to court Web site).

or less restrictive than the terms of the agreement. The Court of Appeals concluded that it did not need to reach the issue of Judge Murphy's failure to recuse himself because it had made an independent determination of the correctness of the grant of summary judgment. We granted the Tierneys' petition for further review.

ASSIGNMENTS OF ERROR

On further review, the Tierneys assert that the Court of Appeals erred in (1) concluding as a matter of law that the berm currently surrounding the lake is in compliance with the initial application and conditional use permit which required a minimum 6-foot berm, (2) affirming the district court's order granting the defendants' motions for summary judgment, (3) affirming the district court's order denying the Tierneys' motion for summary judgment, (4) failing to address the assigned error regarding the district court judge's failure to recuse himself, and (5) failing to find that the Tierneys' due process rights required reversal for new proceedings before an unbiased judge.

STANDARD OF REVIEW

[1] A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.[3]

ANALYSIS

The Tierneys argue that they had a right to have the summary judgment motions decided by a judge who was not disqualified because of admitted bias against their attorney. We conclude that the decision by Judge Murphy should be vacated and that it was error for the Court of Appeals to apply a traditional harmless error analysis to the disqualification issue. Without addressing the underlying merits of this dispute, we reverse, and remand to the Court of Appeals with directions to vacate the judgment and remand the cause for a new hearing.

The Nebraska Revised Code of Judicial Conduct requires that "[a] judge shall hear and decide matters assigned to the

[3] Neb. Rev. Code of Judicial Conduct § 5-302.11(A) (previously found at Neb. Code of Judicial Conduct § 5-203(E)).

judge, except when disqualification is required."[4] The code further states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ."[5] Under the code, such instances in which the judge's impartiality might reasonably be questioned specifically include where "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer . . . ."[6]

[2] We have explained that a trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.[7] By Judge Murphy's own admission, the so-called Florom fiasco caused him to have a personal bias against the Tierneys' attorney. While Judge Murphy did not announce his bias until after Florom was removed from judicial office, a reasonable observer would conclude that this same bias was present when Judge Murphy decided the parties' cross-motions for summary judgment. At the time of the summary judgment hearing, the disciplinary proceedings against Florom were well underway. Paloucek had already testified before the special master, and the JQC had already recommended removal. A reasonable observer would find it unlikely that Judge Murphy was ignorant of the ongoing disciplinary proceedings against his colleague. And a reasonable observer would conclude that Judge Murphy's bias against the Tierneys' attorney was not formed suddenly at the moment Florom was dismissed from judicial office. Judge Murphy should have recused himself from deciding the motions for summary judgment.

[3] Since the Tierneys were unaware of the bias that formed the basis of Judge Murphy's disqualification, they did not waive the disqualification issue by failing to raise it before the motions for summary judgment were decided. A party is said

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[4] Neb. Rev. Code of Judicial Conduct § 5-302.7 (previously found at § 5-203(B)(1)).

[5] § 5-302.11(A) (previously found at § 5-203(E)).

[6] § 5-302.11(A)(1) (previously found at § 5-203(E)(1)(a)).

[7] *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.[8] Once a case has been litigated, an appellate court will not disturb the denial of a motion to disqualify a judge and give litigants "'a second bite at the apple.'"[9]

[4] But, as the court in *Urias v. Harris Farms, Inc.*,[10] explained, the rule that it is generally too late to raise the issue of disqualification after the matter is submitted for decision rests on the principle that a party may not gamble on a favorable decision. This principle does not apply when the facts constituting the disqualification are unknown, because no gamble could have been purposefully made.[11] Instead, the issue of disqualification is timely if submitted at the "'earliest practicable opportunity' after the disqualifying facts are discovered."[12]

In this case, the Tierneys were not delaying raising the issue of Judge Murphy's recusal until they could know whether they would be granted summary judgment. Despite the defendants' argument that it was ostensibly common knowledge that Judge Murphy and Florom were friends, Paloucek could not have known that because of this friendship, Judge Murphy would harbor such bias against him for his unintended role in Florom's disciplinary proceedings. We conclude that the Tierneys raised the disqualification issue at the earliest practicable opportunity after the disqualifying facts were discovered.

[5,6] We must consider, however, whether Judge Murphy's failure to recuse himself is subject to a harmless error analysis. The Court of Appeals did not reach the issue of whether Judge

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[8] See *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[9] *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 450, 778 N.W.2d 115, 120 (2010).

[10] *Urias v. Harris Farms, Inc.*, 234 Cal. App. 3d 415, 285 Cal. Rptr. 659 (1991).

[11] *Id.*

[12] *Id.* at 425, 285 Cal. Rptr. at 664.

Murphy should have recused himself because it concluded that any disqualification, if present, was harmless in light of the Court of Appeals' independent conclusion that the decision granting summary judgment to the defendants was correct. We hold that this type of approach is inappropriate for review of questions of judicial disqualification. As we said in *Harrington v. Hayes County*,[13] where we held that harmless error review was inappropriate for statutory judicial disqualification, "The disqualification . . . is not a disqualification to decide erroneously. It is a disqualification to decide at all."

While we have never specifically addressed whether harmless error review is likewise inappropriate for disqualification under the Nebraska Code of Judicial Conduct, we find that the same reasoning applies.

Most other jurisdictions hold that actions by a disqualified judge are not subject to traditional harmless error review, regardless of whether the disqualification is by statute or judicial code.[14] In *Blaisdell v. City of Rochester*,[15] for instance, the

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[13] *Harrington v. Hayes County*, 81 Neb. 231, 236, 115 N.W. 773, 774 (1908). See, also, *State v. Vidales*, 6 Neb. App. 163, 571 N.W.2d 117 (1997).

[14] See, e.g., *Christie v. City of El Centro*, 135 Cal. App. 4th 767, 37 Cal. Rptr. 3d 718 (2006); *People v. Dist. Ct.*, 192 Colo. 503, 560 P.2d 828 (1977); *Abington Ltd. Partnership v. Heublein*, 246 Conn. 815, 717 A.2d 1232 (1998); *In re M.C.*, 8 A.3d 1215 (D.C. 2010); *Butler v. Biven Software, Inc.*, 222 Ga. App. 88, 473 S.E.2d 168 (1996); *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467 (Ky. 2010); *Blaisdell v. City of Rochester*, 135 N.H. 589, 609 A.2d 388 (1992); *People v. Alteri*, 47 A.D.3d 1070, 850 N.Y.S.2d 258 (2008); *Matter of Estate of Risovi*, 429 N.W.2d 404 (N.D. 1988); *Cuyahoga Co. Bd. of Mental Retardation v. Association*, 47 Ohio App. 2d 28, 351 N.E.2d 777 (1975); *Mosley v. State*, 141 S.W.3d 816 (Tex. App. 2004). See, also, *Hall v. Small Business Admin.*, 695 F.2d 175 (5th Cir. 1983); *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995); Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned*," 14 Geo. J. Legal Ethics 55 (2000). But see, *Ajadi v. Commissioner of Correction*, 280 Conn. 514, 911 A.2d 712 (2006); *H & S Horse Vans v Carras*, 144 Mich. App. 712, 376 N.W.2d 392 (1985); *Sargent County Bank v. Wentworth*, 547 N.W.2d 753 (N.D. 1996); *Reilly by Reilly v. Southeastern Pa. Transp.*, 507 Pa. 204, 489 A.2d 1291 (1985); *State v. Alonzo*, 973 P.2d 975 (Utah 1998).

[15] *Blaisdell v. City of Rochester, supra* note 14.

court was confronted with an action presided over by a judge who should have disclosed to the parties a familial relationship with a member of the law firm that represented one of the parties which would have disqualified him under the applicable judicial code of conduct. Despite the fact that the plaintiff did not raise the issue of recusal until a year after the case was dismissed as barred by the doctrine of res judicata, the court found that the issue was timely. And despite the contention that there was no actual personal relationship between the judge and his relative, the court found there was an appearance of impropriety which should not be overlooked.

The court in *Blaisdell* vacated the order and subsequent related orders without addressing their underlying legal merits. It rejected a harmless error review, saying: "In our opinion, it would be inconsistent with the goals of our code to require certain standards of behavior from the judiciary in the interest of avoiding the appearance of partiality, but then to allow a judge's ruling to stand when those standards have been violated."[16]

In *Cuyahoga Co. Bd. of Mental Retardation v. Association*,[17] the court similarly held that when the undisputed facts are such that a trial judge is under a clear and mandatory duty to disqualify himself under the applicable code of judicial conduct, the judge's attempt to act in violation of that duty by continuing to hear the case will be vacated and the underlying merits of the dispute will not be reached on appeal. The court explained that the canons of judicial conduct are binding and mandatory unless otherwise indicated. These standards were not intended to be "empty admonitions which a trial judge could openly disregard, subject only to retrospective disciplinary action against himself, with no effect upon the improper actions which the canons were designed to protect against."[18]

In *Scott v. U.S.*,[19] the court systematically set forth the reasons it believed that a traditional harmless error analysis

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[16] *Id.* at 594, 609 A.2d at 391.

[17] *Cuyahoga Co. Bd. of Mental Retardation v. Association, supra* note 14.

[18] *Id.* at 33-34, 351 N.E.2d at 782-83.

[19] *Scott v. U.S.*, 559 A.2d 745 (D.C. 1989).

is inappropriate for judicial disqualification issues. First, a traditional harmless error analysis is best suited for review of "'discrete exercises of judgment'" by lower courts where information is available that makes it possible to gauge the effect of a decision on the trial as a whole.[20] Second, the traditional harmless error rule presumes the existence of an impartial judge.[21] Third, a review of the record for actual prejudice under the traditional harmless error standard is inconsistent with the goal of the American Bar Association's Model Code of Judicial Conduct,[22] which is to prevent even the appearance of impropriety.[23]

We agree that a traditional harmless error analysis is inappropriate. Any attempt to determine or ameliorate actual prejudice through a traditional harmless error analysis would undermine the high function of the judicial process that the ethical canons are designed to protect. We must decide, then, what the appropriate test is.

Several courts have adopted the view that all actions by a judge who is disqualified are void per se.[24] However, in *Liljeberg v. Health Services Acquisition Corp.*,[25] the U.S. Supreme Court set forth a more flexible three-factor test to determine when orders issued by a disqualified judge should be

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[20] *Id.* at 750 (quoting *Young v. U.S. ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987)).

[21] *Id.* (citing *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

[22] See, currently, Model Code of Judicial Conduct Canon 2, rule 2.11(a) (2007).

[23] *Scott v. U.S., supra* note 19.

[24] See, e.g., *Christie v. City of El Centro, supra* note 14; *People v. Dist. Ct., supra* note 14; *Butler v. Biven Software, Inc., supra* note 14; *Petzold v. Kessler Homes, Inc., supra* note 14; *Blaisdell v. City of Rochester, supra* note 14; *People v. Alteri, supra* note 14; *Matter of Estate of Risovi, supra* note 14; *Cuyahoga Co. Bd. of Mental Retardation v. Association, supra* note 14.

[25] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

vacated on appeal. The *Liljeberg* test is sometimes referred to as a "special harmless error test."[26]

Based on the appearance of impropriety, the lower appellate court in *Liljeberg* had vacated the trial court's judgment after the appeal was final, pursuant to Fed. R. Civ. P. 60(b)(6). The Supreme Court agreed that the judge should have recused himself. The Court found the judge had violated 28 U.S.C. § 455(a) (2006), which provides that any judge shall "'disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'"[27] The trial judge sat on the board of trustees of a university which stood to benefit from a decision in favor of the plaintiff, but the judge did not become conscious of this connection until after the judgment. The defendants did not learn of the trial judge's interest in the dispute until 10 months after the judgment.

The Court explained that the judge's consciousness of the circumstances creating the appearance of impropriety was not an element of a violation of § 455(a). The Court rejected the argument that if awareness of the conflict is an element of disqualification, the judge is called upon to perform an impossible feat—to recuse himself or herself when not knowing of the need to do so. It is not an impossible feat, the Court explained, because the disqualification provision can be applied retroactively. The oversight can later be rectified so that public confidence in the impartiality of the judiciary is maintained.[28]

The Court explored under what circumstances vacatur was the appropriate method of rectifying such judicial lapses. It concluded that a traditional harmless error analysis robbed the litigants of effective relief, and was inappropriate.[29] But it also

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[26] See *In re M.C., supra* note 14, 8 A.3d at 1232. Accord *U.S. v. O'Keefe*, 169 F.3d 281 (5th Cir. 1999).

[27] *Liljeberg v. Health Services Acquisition Corp., supra* note 25, 486 U.S. at 858.

[28] *Liljeberg v. Health Services Acquisition Corp., supra* note 25.

[29] See *id.*

rejected "a draconian remedy for every violation."[30] Instead, in concluding that vacatur was the proper remedy under the facts presented in *Liljeberg*, the Court considered three factors: (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process.[31] The Court placed special emphasis on this last factor, noting, "We must continuously bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice."'"[32]

The Court first considered the third factor because it was the most important one: The risk that public faith in the judiciary would be undermined as a result of the violation.[33] In this regard, the court noted that, while the case at hand may not have involved actual knowledge of the conflict, it would be difficult for the general public to understand how personal concerns can be so forgotten by busy federal judges. A judge's forgetfulness is "'not the sort of objectively ascertainable fact that can avoid the appearance of partiality.'"[34] The Court also concluded that the violation at issue was "neither insubstantial nor excusable."[35] Instead, the "facts create[d] precisely the kind of appearance of impropriety that § 455(a) was intended to prevent."[36] Thus, this factor weighed heavily in favor of vacating the trial court's judgment.

Second, the Court considered whether denial of relief would produce injustice in other cases. The Court determined that it would not. Quite the opposite, the Court concluded that vacating the judgment would have prophylactic value, since it might encourage future judges and litigants "to more carefully examine possible grounds for disqualification and to promptly

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[30] *Id.*, 486 U.S. at 862.

[31] *Liljeberg v. Health Services Acquisition Corp., supra* note 25.

[32] *Id.*, 486 U.S. at 864.

[33] *Id.*

[34] *Id.*, 486 U.S. at 860.

[35] *Id.*, 486 U.S. at 867.

[36] *Id.*

disclose them when discovered."[37] After finding that the first two factors warranted vacatur, the Court concluded: "It is therefore appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment."[38]

In considering prejudice to the parties, the Court noted that an "analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment . . . than there is in allowing a new judge to take a fresh look at the issues."[39] The Court also pointed out that the parties did not show special hardship by reason of their reliance on the original judgment. Finally, the respondent's request to vacate was timely despite being made for the first time on appeal, because the respondent did not know of the facts surrounding the disqualification until that time. Thus, the Court found no compelling reason not to vacate the lower court's judgment. Several other jurisdictions have adopted the *Liljeberg* special harmless error test in determining whether to vacate court orders by a judge who should have recused himself or herself.[40]

[7] We believe that the *Liljeberg* test is the best means of determining when the rulings of a judge, who should have recused himself or herself, will be vacated, and we hereby adopt it. Applying the *Liljeberg* test to the facts of this case, we conclude that Judge Murphy's order on the parties' cross-motions for summary judgment should be vacated.

First, the risk of undermining the public's confidence in the judicial process is high. Judge Murphy's failure to inform the

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[37] *Id.*, 486 U.S. at 868.

[38] *Id.*

[39] *Id.*

[40] See, *Abington Ltd. Partnership v. Heublein, supra* note 14; *In re M.C., supra* note 14; *Petzold v. Kessler Homes, Inc., supra* note 14; *Mosley v. State, supra* note 14; *Tennant v. Marion Health Care Foundation, supra* note 14.

parties of his bias was "neither insubstantial nor excusable."[41] Whether Judge Murphy was consciously aware of the extent of his bias against Paloucek at the time of the summary judgment hearing, the reasonable observer would question his impartiality in light of his subsequent letter and his sua sponte prospective recusal from ever again hearing anything brought by Paloucek or his firm.

[8] Unlike other circumstances leading to an appearance of impropriety which a reasonable observer could conclude had no actual effect on the trial court's judgment, a charge of bias "'must be deemed at or near the very top in seriousness.'"[42] It is the basic precept to our system of justice that a judge must be free of all taint of bias and partiality.[43] Thus, "'bias kills the very soul of judging—fairness.'"[44] When a judge is biased, his or her "'personal integrity and ability to serve are thrown into question, placing a strain on the court that cannot easily be erased.'"[45]

Next, considering the risk to future litigants, we conclude that vacatur will only provide a benefit. Given the importance of the charge of bias, relief in this case will prevent injustice in some future case by encouraging judges and litigants to more carefully examine possible grounds for bias and promptly disclose them when discovered. Thus, under *Liljeberg*, the lower court's judgment must be vacated unless the risk of unfairness to the parties cautions against it.

The defendants have made no showing of special hardship by reason of their reliance on the original judgment. And, as already discussed, although the issue of Judge Murphy's bias was not raised until the pendency of this appeal, the Tierneys raised the issue at their earliest opportunity. There is little to

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[41] See *Liljeberg v. Health Services Acquisition Corp., supra* note 25, 486 U.S. at 867.

[42] *McKenna v. Delente*, 123 Conn. App. 137, 144, 1 A.3d 260, 266 (2010).

[43] See *People v. Dist. Ct., supra* note 14.

[44] *McKenna v. Delente, supra* note 42, 123 Conn. App. at 144-45, 1 A.3d at 266.

[45] *Id.* at 145, 1 A.3d at 266.

lose and much to be gained by letting a different judge examine the parties' motions for summary judgment.

We find it unnecessary and inappropriate in this case to address the underlying merits of the motions. An analysis of whether Judge Murphy's decision was correct could not adequately erase the taint of his bias or the appearance of such bias. Not only for the sake of the parties, but for the public as a whole and its faith in the judicial system, we conclude that the Court of Appeals' judgment must be reversed. We express no implicit or explicit approval of the Court of Appeals' legal conclusions regarding the construction of the permit and contract here in dispute, but hold that the Court of Appeals erred in applying a harmless error analysis to Judge Murphy's failure to recuse himself from the summary judgment hearing.

CONCLUSION

We find the grounds alleged under the Nebraska Code of Judicial Conduct sufficiently serious to warrant vacatur. We reverse, and remand to the Court of Appeals with directions to vacate the judgment below and remand the cause for a new summary judgment hearing before another judge to be appointed by this court.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROBERT J. PIERSON, RESPONDENT.

798 N.W.2d 580

Filed June 3, 2011. No. S-10-304.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the Counsel for Discipline must establish a charge by clear and convincing evidence.
3. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.