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HEADLINE: ROUTINE SUIT, TURNED FOUL, RAISES FEARS; RECUSAL FIGHTS BRING ACRIMONY TO HOUSTON BENCH

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BODY:

John Wing v. CRSS, Inc. had a brief but tempestuous life.

The breach-of-contract suit went through three Harris County district judges in less than a year, and the defense was furiously trying to get the third judge removed when the case settled.

In the months before the confidential settlement was entered March 1:

* The defense claimed the first judge, 334th District Judge Russell Lloyd, had said CRSS was an "evil" that must be dealt with and that he "sent the case to a buddy who did his dirty work for him."

* The judge to whom Lloyd transferred the case, 165th District Judge Elizabeth Ray, was accused by the defense of huddling with Lloyd about the defendant, whom she hit with a discovery sanction of $ 10,000 plus $ 1,000 a day. Ray angrily recused herself, saying her action "in no way is to be construed as the Court giving any credence to the baseless and false accusations made by the defendants in their motion."

* The third judge to get the case, chief civil administrative judge Sharolyn Wood of the 127th District, failed to tell the defendants that the plaintiffs' lawyer was a partner in the firm that represented her for free -- to the tune of at least $ 700,000 -- in a judicial redistricting suit that ended in 1993. She signed, but apparently never filed, criminal contempt charges against the defense and held an unusual discovery hearing in which the parties filled her courtroom with document boxes and stayed there for days until some discovery was completed.

Wing vs. CRSS, Inc., No. 95-009209, may have ended with a whimper instead of a bang, but its reverberations linger. Lawyers on both sides say -- for different reasons -- that the case shows how Harris County's system for recusing judges or transferring cases can be abused.

The suit comes on the heels of a recusal mess in February featuring 281st District Judge William Bell, who says he was forced to remove himself from a mass-tort case because of undue pressure from other judges. Wood held a hearing and criticized other judges and attorneys for their actions in that case; in Wing she came under some criticism herself.

Both sides claim to be shocked at how the Wing case progressed.

"I was really sickened and appalled by the attacks made by the defense against the judges in this case. What happened was horrible," says lead plaintiff's attorney John E. O'Neill, a name partner in Houston's Clements, O'Neill, Pierce & Nickens. "There were deeply personal attacks on three judges. If that's how the system is supposed to work -- if you're supposed to attack who the judge is until you get a favorable forum -- then it's going to be a really dismal future for the system."

"I've practiced for 10 years and I've never filed a motion to recuse, and I didn't do this one lightly," says Jeffery Nobles, a partner in the Houston office and Dallas' Haynes and Boone, who was brought in by CRSS midway through the litigation to handle appellate issues. "It's really mindboggling to have [the judges] take it so personally. Our motion to recuse Judge Ray was written as diplomatically and gently as I knew how without it losing its teeth."

In court documents, plaintiffs' lawyers accuse the defense of using the series of recusal fights as a crass method of forum-shopping; defense attorneys say each judge who handled the case was angered by the recusal motion against the previous judge and took it out on their client.

"CRSS believes that, by calling this case to trial under these unusual circumstances, Judge Wood is

attempting to penalize it for seeking Judge Ray's recusal," Nobles and fellow defense attorney Dana LeJune, a name partner in Houston's LeJune & Singer, wrote in a Feb. 12 writ of mandamus seeking to have Wood removed. "No other motivation can explain why Judge Wood would attempt to place this 10-month-old case ahead of all the cases that have been properly awaiting trial on the dockets of the 127th District Court for months or years."

"[CRSS'] recurring obsession with ulterior motives seems designed to insure that no judge will ever hear the case because each will become sufficiently offended by the defendants' personal attacks that she or he will feel obligated to step aside," the plaintiffs answered. "The ludicrous character of defendants' insinuation is obvious. Judge Wood is merely trying to hold the parties to a scheduling order that has been in place in this case since September of 1995. . . .While [the plaintiff] will not speculate as to Judge Wood's motives, it would appear that a desire to promote judicial economy and predictability are a more justifiable assumption than petty retribution."

Relevant sections of the Government Code and Rule 18a of the Texas Rules of Civil Procedure, both of which deal with recusals, have some gray areas that need to be clarified, lawyers in the case say. Particularly, when a sitting judge such as Wood is named to take over a case, does a party have a peremptory strike to declare they don't want her, as they would with a visiting judge?

CRSS says yes, but O'Neill argues that such a rule would allow multi-party litigants to reject a string of assignments until they get the judge they want.

Also in question are local Harris County rules that allow judges to transfer cases between themselves -- as Lloyd and Ray did -- and whether Wood has too much power in deciding who gets a case once a judge is recused. Some lawyers say Second Administrative District Judge Tom Stovall, who nominally makes that decision, generally assigns it to whomever Wood wants.

Stovall confirms that Wood generally tells him "what the next open court would be" for a case with a recused judge, just as if the case had been newly filed. But he says she could assign it to whomever she wants and he'd sign off on it.

In the Wing case, he says he remembers talking with Wood after Ray had recused herself. Wood told him no other judge wanted the case.

"She said she had shopped the thing around, through the whole fleet, and no one would take it," Stovall says. "She said, 'I guess I drew the black bean because I'm the presiding judge.' "

Wood's predecessor as chief civil judge -- 269th District Judge David West, now chief of all 59 Harris County district courts -- says he always discouraged judges from transferring cases between themselves without going through a third party such as himself or Stovall.

"I've always been against it and I discouraged it. It's not the way we do business. The system [of using a third party] cleanses things of any taint of personal bias," he says. "As long as I was a reasonably strong leader, it didn't happen very often. I would scold them if I saw it."

The transfer from Lloyd to Ray occurred while West was still chief civil judge.

Joel Androphy, a name partner in Houston's Berg & Androphy who was hired to represent CRSS officials on the criminal and civil contempt claims, says a better system for recusals would be for all suits to be reassigned randomly, rather than naming a new judge.

Nasty Piece Of Work

The Wing case is as nasty a piece of litigation as has been seen in some time in Harris County. The underlying suit -- the merits of which garnered little discussion, as opposed to discovery and recusal matters -- is fairly simple: John Wing, an energy consultant, claimed that CRSS defrauded him out of money he should have gotten for helping put together deals to build cogeneration plants. The contract in question was signed in 1986, a fact that greatly hampered document production, according to the defense.

Wing says in court documents he did not become aware of the alleged fraud until recently.

The case initially was assigned to Lloyd, but the defense said that Mary Lloyd, the judge's wife and an attorney, formerly worked at CRSS, knew about Wing's projects and had hard feelings toward some people at the company.

The issue of Lloyd's removal was handled in such a way as to ensure the whole suit got off on the wrong foot. According to LeJune and his name partner Jeffrey Singer, the defense tried to meet with Lloyd in chambers, with opposing counsel present, to convince him to recuse without their having to file the "not nice" motion publicly.

O'Neill says the defense lied about Ms. Lloyd's relationship with CRSS, and they wanted no part in talking to Lloyd. "We said if they have a motion to recuse they should file it," he says.

The two defense lawyers say Lloyd called them into his chambers -- Singer says they were "astounded" that plaintiffs' counsel were not also present -- and lit into them.

"He said our client was an evil that must be dealt with, and that if he weren't up for re-election he would do it," LeJune says.

Lloyd admits he might have used the term evil, although he disputes that he said anything about re-election. He made his comments only after he transferred the case to Ray, he says. He made the transfer under local Harris County rule 3.2.5, which allows judges to do so if both agree, because he believed no valid motion

to recuse was pending.

"There was a threat to file a motion to recuse, but if there was a motion to recuse on file I would've sent it down to the administrative judge to handle," Lloyd says. "I did the only thing I could do. I sent it to someone whose judgment I trust."

He says he "might've gotten carried away" in lecturing the two defense attorneys after transferring the case. "I told them in no uncertain terms I didn't like what they were doing. They filed this bullshit about my wife. We're making personal attacks on judges now and, I don't know, we didn't used to do that," he says.

Typical of this convoluted case, the two sides disagree on whether a valid recusal motion was ever filed.

After Judge Ray hit them with the $ 10,000 sanction -- which they say played no part in their decision -- the defense filed a motion to recuse her. "From an objective perspective, there is an appearance that Judge Lloyd expressed his anger to Judge Ray and asked for her assistance, which is in violation of Rule 18a. The circumstances of the transfer create an appearance of partiality that mandates Judge Ray's recusal," the Jan. 16 recusal motion states.

"That's absolute bullshit, like we had some kind of conspiracy or something," Lloyd says.

Ray initially refused to recuse herself, then did so -- with the angry notation about "baseless and false accusations" by the defense -- shortly before a recusal hearing was scheduled.

The case then went to Stovall for reassignment and ended up with Wood. But the CRSS lawyers say there is no written order from Stovall giving the case to Wood; there is only a written order from Wood saying Stovall had assigned the case to her.

Voting Rights Suit

Lawyers from both sides say Wood did not inform the parties of her connection with plaintiff lawyer O'Neill's firm. O'Neill was a partner in Houston's Porter & Clements, which represented Wood as an intervenor in a voting rights suit. Wood's main attorney was name partner J. Eugene Clements, who now is a name partner, along with O'Neill, in Clements, O'Neill, Pierce & Nickens.

In March 1993, Wood testified before a Senate subcommittee that Porter & Clements had spent $ 700,000 in attorney time on her case. The 5th U.S. Circuit Court of Appeals rejected Wood's efforts to have the state pay the bill, and O'Neill says the firm was never paid.

O'Neill says he never worked on the voting-rights case.

Wood was asked at the 1993 hearing if Porter & Clements lawyers ever appeared before her. She said it had happened once, and both sides refused her offer to have the case transferred.

In any case, CRSS believed that they had a right to treat Wood as a visiting judge, whose assignment is subject to a peremptory strike by either side, so no reason such as the voting-rights connection is mentioned in court documents.

Nobles says, though, that if the peremptory-strike argument was rejected by the appeals courts, CRSS then would have sought Wood's removal on the fee issue.

"If they had forgiven [the debt] it would've had to be listed on campaign records as a gift," he says. "In my mind the only reason not to mention it is if it has been paid off, and apparently that is not the case."

Wood says her representation by Clements was common knowledge. "How could he [Nobles] not know that I was the intervenor? It's open general knowledge that [Clements] represented all the judges, but it was my name that was used," she says. "Especially that law firm, how could they not know? That's pretty specious. I have to tell people something they already know?"

O'Neill questions the timing of the effort to remove Wood, just as he does the effort to remove Ray. Neither occurred until CRSS began getting hit hard for discovery abuse, he says.

CRSS lawyers dispute that they sought to remove judges as a result of unfavorable rulings.

Future of Litigation

Whatever the reason, the suit has left a bitter taste in the mouths of litigants and judges.

"If what we were looking at is the future of litigation -- complaining no-holds-barred and attacking judges and the system, and that's your duty to your client -- then you are going to be looking at a whole different group of people who are lawyers," O'Neill says. "There's a lot of people out there who aren't willing to play that way."

"It was hell, this whole time period," says Nobles. "[Wood] is a real bad person to be on the wrong side of. We tried to tell the 14th Court of Appeals just how bizarre the whole thing was."

"I was probably wrong to react the way I did," says Lloyd, the first judge to handle the case. "Judges are supposed to sit there and take it in the ass, I guess. But they overstepped the line."

Recusal, says former chief civil judge West, "is an area that is so easy to be abused by lawyers, and it can get an emotionally charged judge excited. If you're the person being told that you can't be fair, it kind of burns your ass. You have to be a little bigger about it than you do on any other issue."

And, beneath all the sound and fury, is the underlying suit. Settled for an undisclosed amount, the suit's merits rarely were an issue during the brief, turbulent life of Wing v. CRSS, Inc. All civil and possible criminal contempt claims were erased as part of the settlement.

"In 12 years of practicing law, I've never had a case that was fought purely on collateral matters like this one," says LeJune.

Whose fault that is, now that the case is closed, will never be finally determined.

Textbook Example of Discovery Spat Gone Nuclear

Should the members of the state Supreme Court's task force on reforming discovery ever become discouraged in their work, they can look to Wing v. CRSS, Inc. for inspiration.

The case is perhaps a textbook example of a discovery fight gone nuclear.

"I've never seen a case that requires this much judicial time without ever looking at the merits," 127th District Judge Sharolyn Wood told attorneys at a Feb. 19 hearing.

Plaintiff John Wing signed a contract to do a year of consulting work with CRSS in 1986 for $ 13,000 a month. If any of the cogeneration energy plants he worked on reached a certain level of cash flow, he was to get a bonus percentage. Only recently, he says, he learned that some of the projects had achieved the necessary goals.

The defense noted that most of the records, if they existed at all, were deep in the bowels of a closed-files warehouse. Strenuous efforts were made to locate relevant documents, they said.

But don't try telling that to plaintiff's attorney John E. O'Neill, a name partner in Houston's Clements, O'Neill, Pierce & Nickens. He says the defense produced 400,000 pages of worthless documents, including party plans for annual meetings and grand openings, requisitions for company uniforms and logos, and "pages and pages about projects in Saudi Arabia in the '70s."

When plaintiffs' attorneys tried to photograph the mountain of irrelevant material that was produced at CRSS' office, the film was confiscated.

Defense attorney Dana LeJune, name partner in Houston's LeJune & Singer, wrote O'Neill that the defense was only required to produce records "as they are kept in the regular course of business."

In a letter written in the middle of a steamy Houston August, LeJune added: "We have done so, with the exception of providing you air-conditioned, comfortable accommodations in which to do your inspection. This has entailed bringing many documents from closed and stored files in warehouses that are not so comfortable."

The courts of appeals in Houston and the Texas Supreme Court got involved in the discovery disputes with regularity.

Wood turned her courtroom into a document-production room for a week in February and hit the defendants with both criminal and civil contempt rulings that were washed away when the case settled.

"I've never seen a case like this, and I can -- I've been around a long time," Wood told defense attorneys. "[T]he things listed under Item 15 were directly ordered by me, from my mouth to your client's ears, standing in front of me, on the record, ordered to produce those in court. And they weren't produced."

The week before, on Feb. 14, Wood decided to take over discovery to an unusual degree, as a transcript shows:

"It looks like they were previously requested in April, and in September they still had not been produced, and so somebody sat there and said, okay, last time I told you to go clean up your room, now let me give you an inventory of what's not picked up," she said.

"And now y'all are sitting there with items that are not picked up. I will look at these documents myself, if I have to, in about two minutes, and I will tell you, I can get through these boxes faster, and somebody better get it moving, because long about four o'clock if there ain't a whole bunch put on the other side of the table, they are going to all start coming through this bench, and . . . you are going to have to start doing it through me. There is no excuse for this. Get it moving. . . .

"Those documents will be extracted, and it's going to get painful and I will use pliers and I won't use anesthetics, if that's what it needs be. Don't monkey with me. Get those documents in here and do it. I don't know if I can underline everything I just said, but I want to make sure that I'm clear. Don't misjudge me, OK? . . . I didn't call you down here for us to sit here and watch you not produce documents. Produce the documents. Hearing is over."

Soon afterwards the case was over, as well. CRSS chose to settle. When LeJune objected and argued to continue the various fights in appellate court, CRSS hired attorneys from Fulbright & Jaworski and quickly reached a confidential settlement with Wing.

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