

2002 WL 31465311

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United States District Court,
E.D. Arkansas, Western Division.

LITTLE ROCK SCHOOL DISTRICT
v.
PULASKI COUNTY SPECIAL SCHOOL DISTRICT
NO. 1, et al. Defendants
Mrs. Lorene JOSHUA, et al. Intervenor
Katherine KNIGHT, et al. Intervenor

No. 4:82-CV00866.

|
Oct. 29, 2002.

*ORDER DENYING MOTION FOR HEARING
REGARDING RELEVANCE OF 28 U.S.C. 455 TO THE
PRESENT PROCEEDINGS*

WILSON, J.

*1 1. On July 22-July 24, 2002, an evidentiary hearing was held in this case on the issues raised by Little Rock School District's motion for unitary status.

2. On September 13, 2002, a memorandum opinion was entered which ruled upon the issue of unitary status.

3. Last Friday, October 25, 2002, Joshua Intervenor filed a Motion for Hearing Regarding Relevance of 28 U.S.C. 455 to the Present Proceedings, raising two issues:

a. Whether I should disqualify because approximately fifteen years ago I represented The Honorable Henry Woods, the presiding judge in this case at that time. This representation was in connection with a mandamus petition by the LRSD and Joshua Intervenor (the latter represented by Mr. Walker, among others);

b. Ms. Janet Pulliam, former counsel of record for a

party in this case, joined my staff on September 26, 2002, as a law clerk (she came aboard nearly two weeks after the September 13 Memorandum Opinion).

4. I will deal with the issue involving Ms. Pulliam first. From the outset, Ms. Pulliam has been kept completely separate from this case, and will be in the future. Attached as Exhibits A and B to this order are interoffice memos dealing with this issue. I believe they resolve this question.

*SERVING AS A LAWYER IN THE MATTER IN
CONTROVERSY*

5. I turn now to my representation of Judge Woods in the 1987 mandamus proceeding. LRSD and Joshua Intervenor filed a petition for a writ of mandamus, asking that the Eighth Circuit disqualify Judge Woods. *LRSD v. PCSSD*, 839 F.2d 1296, 1301 (8th Cir.1988).

I entered the case, at that time, for the limited purpose of representing Judge Woods before the Eighth Circuit in connection with the request that he be disqualified. Crucially important is the fact that the mandamus issues had nothing to do with the merits of the underlying case. The mandamus was argued orally before the Eighth Circuit (sitting in Little Rock) on November 3, 1987, and, two days later, the Court handed down its decision, denying the request for mandamus.

The November 5 opinion, *LRSD v. PCSSD*, 833 F.2d 112, 113 (8th Cir.1987), was very brief, and included this language:

Another opinion will be filed in due course further explaining our reasons for the conclusions expressed today with respect to the election and disqualification matters, and addressing as well the other questions raised in these cases.

I was shown as counsel of record “for Judge Woods in mandamus” in the November 5 decision. Thereafter, I had no further involvement.

6. The Eighth Circuit handed down a supplemental opinion on February 9, 1988, *LRSD v. PCSSD*, 839 F.2d 1296 (8th Cir.1988). In this opinion, the Court explained, in more detail, why the petition for mandamus had been denied in the November 5 opinion.

I am not shown as counsel of record in the February 9 opinion.

7. Actually, the answer to Intervenors’ question appears in *LRSD v. PCSSD*, 833 F.2d 112. The court stated:

*2 [A] lawyer with whom Judge Woods once practiced appeared at one time for an *amicus curiae* in a case called *Clark v. Board of Educ. of the Little Rock School Dist.*, No. LR-C-64-155. The District Court first consolidated *Clark* with the instant case, then later severed it and returned it to the docket of another judge. Disqualification is sought under 28 U.S.C. § 455(b)(2), which requires disqualification “where in private practice ... a lawyer with whom [the judge] previously practiced law served during such association as a lawyer concerning the matter.” We disagree with this argument. *Clark* was a closed case, or at most dormant, when it was consolidated with this one, and in any event it has now been severed. We do not think that such a fleeting and tenuous connection between the present case and the judge’s partner’s activities while in practice years ago, was intended by Congress to require recusal.

Id. at 113.

Likewise, my appearance fifteen years ago was brief (“transitory”). I represented none of the parties, and, as stated above, the narrow recusal issue that I addressed on behalf of Judge Woods had nothing to do with the merits of the underlying case.

8. In *United States v. DeTemple*, 162 F.3d 279 (4th Cir.1998), the Court held that the recusal of a district judge was not required when the judge, as a lawyer, represented a creditor of the defendant (in a bankruptcy fraud case) because the creditor’s debt played no part in the defense or prosecution of the case. In other words, the key here is the phrase the “matter in controversy.” In *United States v. Cleveland*, 1997 WL 222533, *11 (E.D.La. May 5, 1997), the Court stated:

In this Court’s view, a former representation should trigger the “matter in controversy” requirement if the issues with which it dealt are put “in issue” in the subsequent case in the sense that they need to be resolved by the judge who is presiding over the subsequent case. If the judge need not resolve an issue that either she or her former partners were involved in, then there is no appearance of impartiality and the purpose of Section 455(b)(2) is satisfied.

In reaching this conclusion, the district judge in Louisiana cited *LRSD v. PCSSD*, 839 F.2d 1296.

WAIVER & ESTOPPEL

9. On top of the fact that my appearance in the case was brief and did not involve, in any way, any of the issues pending before me, a motion to disqualify me under section 455 would not be timely. On January 3, 1984, the Joshua Intervenors, represented by Mr. John W. Walker and Mr. Wiley A. Branton, Jr., filed a Petition to Intervene (docket no. 452). On April 23, 1984, Judge Woods entered an Order (docket no. 470) denying Joshua’s Petition to Intervene. On May 23, 1984, the Eighth Circuit entered an Order (docket no. 565) directing Judge Woods to grant Joshua permission to intervene as parties in this case. Thus, Mr. Walker was counsel of record for Joshua before, during, and after the 1987 mandamus proceeding in which I appeared as counsel for Judge Woods. As the Ninth Circuit pointed out in *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir.1992):

*3 It is true that under section 455 a judge may have an obligation to recuse himself or herself without a motion from one of the parties; it “is self-enforcing on the part of the judge.” However, it does not necessarily follow that a party having information that raises a possible ground for disqualification can wait until after an unfavorable judgment before bringing the information

to the court's attention. It is well established in this circuit that a recusal motion must be made in a timely fashion. "*The absence of such a requirement would result in ... a heightened risk that litigants would use recusal motions for strategic purposes.*" While there is no *per se* rule that recusal motions must be made at a fixed point in order to be timely, ... such motions "should be filed with reasonable promptness after the ground for such a motion is ascertained."

(Emphasis added.) (Citations omitted.)

10. On January 3, 2002, this case was assigned to me by random selection (docket no. 3570). At that time, Mr. Walker knew full well that, thirteen years earlier, I had represented Judge Woods in the mandamus proceeding that *Mr. Walker, himself, helped initiate* in an attempt to have Judge Woods removed from this case. *See LRSD v. PCSSD*, 839 F.2d at 1301. Yet, it was only *after* my September 13, 2002 Memorandum Opinion ruling against Joshua on 5 of the 6 asserted grounds for denying unitary status that Joshua's lawyers chose to file the motion for a section 455 hearing.

If there ever was a case of waiver and estoppel, this is it. I hasten to point out again, however, that even if Joshua had not elected to take a "wait and see approach" to deciding whether to file their section 455 motion, there would be no reason for me to recuse since I have never served "as lawyer *in the matter in controversy.*"

11. In Joshua's section 455 motion, there appears this curious language:

The Court, in writing its Opinion dated September 13, 2002, included virtually all the citations from the Court of Appeals ... hereto but did not refer to, mention or address these two important Opinions in which the Court, participated as a trial attorney in private practice.

Motion at 3.

One reading the above quoted language with a jaundiced eye might take it to suggest that I attempted to hide my 1987 representation of Judge Woods in the mandamus proceeding. I described the language as "curious" since,

as noted, Mr. Walker was counsel of record for Joshua at the time and one of the *moving parties* who filed the petition for writ of mandamus. *See LRSD v. PCSSD*, 839 F.2d at 1301. Thus, it is clear beyond peradventure that Mr. Walker *knew* of my being involved in this case on behalf of Judge Woods. For Joshua's benefit-I will explain my reason for not citing these cases-a reason much less sinister than Joshua may be suggesting: they had no bearing on the unitary status issues that were decided in my September 13, 2002 Memorandum Opinion.

CONCLUSION

*4 12. Since this Order fully sets forth my involvement in, and my knowledge of, the matters raised in Joshua's section 455 motion, there is no reason for a hearing, i.e., there is nothing material I could add to the above. And, in my opinion, I have fully answered the "concerns" of Joshua.

13. If and when Joshua's counsel obtain copies of the briefs I filed in connection with the mandamus issue,¹ I will be willing to look at the issue again *if*, and only if, these briefs reveal that my participation in the case was significantly different from my clear recollection. At that time, however, Joshua's counsel would be required to convince me that raising the question at this late date, after losing, was not for "strategic purposes."

14. Joshua's pleading raises the question of the relevance of 28 U.S.C. 455 to the present proceedings. Answer: none.

SUGGESTION

15. It is obvious that Joshua's counsel feel aggrieved by my September 13, 2002 Memorandum Opinion. I again commend the Eighth Circuit Court of Appeals to them. That Court has had a world of experience in hearing disappointed suitors. In fact, this is its forte.

MEMORANDUM

EXHIBIT A

TO: All Hands at 423 U.S. Courthouse

DATE: September 30, 2002

RE: LRSD case

Janet Pullium was, at one time, one of the attorneys for the Little Rock School District. So, she will not be involved in this case in any way whatsoever, directly or indirectly.

EXHIBIT B

Kay Holt

To: Mary
Johnson/ARED/08/USCOURTS@USCOURTS,
Christa

Newburg/ARED/08/USCOURTS@USCOURTS,
Valerie

09/25/2002 11:13 AM

Glover/ARED/08/USCOURTS@USCOURTS,
Christina

Conrad/ARED/08/USCOURTS@USCOURTS

cc:

Subject: LRSD case

Per Judge

All Citations

When Janet comes on board we've got to put a Chinese wall between her and the LRSD case. She was involved in it at some point.

Not Reported in F.Supp.2d, 2002 WL 31465311

Footnotes

¹ My file has long since been destroyed.