

Appeal of Judge's Decision on Recusal Must Wait for Outstanding Motions

An appellate court cannot review a trial judge's decision on recusal until after all the claims and the parties are disposed of, the state Superior Court ruled in a complicated class action involving the destruction of a Montgomery County business complex by a fire and a flood.

The panel of President Judge Correale F. Stevens and Judges Cheryl Lynn Allen and Judith Ference Olson said in an unpublished decision last week that the appeal of four class members of Montgomery County Court of Common Pleas Judge Steven T. O'Neill's decision to not recuse himself from the case must be quashed until after O'Neill or another judge rules on two outstanding motions: whether incentive payments should be paid to the most active members of the class, and on the compensation paid to Gary S. Silow, now a Montgomery County Court of Common Pleas judge, when he was the claims administrator.

The issue of O'Neill's decision on recusal can still be reviewed later, the panel said.

Olson wrote the opinion for the panel. The litigation resulted in a \$35 million settlement in 2008, which O'Neill approved and which Silow administered.

While the Superior Court approved the \$35 million settlement on appeal, the appellate court disagreed with the appellants that O'Neill's decision to not recuse himself has to be decided now.

"We agree with appellants that this case presents a 'somewhat anomalous situation' in that the trial court's order denying the motion to recuse was not filed until after the final judgment was entered in the case and the appeals from the final judgment and all prior interlocutory orders were decided," Olson said. "As a result, the order in question does not fit precisely within the definition of an interlocutory order. However, when the order is viewed in the proper procedural context, it is apparent that it is not a final order but an interlocutory order."

The "'somewhat anomalous situation,'" however, is not O'Neill's fault, Olson said in a footnote, noting that O'Neill made a prompt ruling upon remand and that the motion for recusal was not filed until after O'Neill approved the settlement.

The court categories in which an appeal may be taken in Pennsylvania are a final order, an interlocutory order as of right, an interlocutory order with a trial judge's permission, and a collateral order.

Some courts in the United States, like New York or California, are very liberal in their appeal policy and allow virtually anything to be appealed, but Pennsylvania is very strict about wanting issues to be appealed, except in special classes, until after the final judgment, said **Charles "Chip" Becker** of Kline & Specter, who is representing the class members who opposed O'Neill's recusal.

"This is a thoughtful, careful, spot-on opinion," Becker said. "We have a very traditional framework where, as a matter of policy, we have a very strong preference for only taking appeals from final orders."

The litigation in *In re Bridgeport Fire Litigation* has already made one trip to the Superior Court. In a prior decision, the intermediate appellate court ruled that the certain class plaintiffs and their personal counsel did have standing to seek O'Neill's recusal. On an issue of apparent first impression, the prior Superior Court panel said that trial judges should rule on a motion for recusal before ruling on any other pending motions.

On remand, O'Neill denied the motion for recusal, saying in a July 26, 2011, opinion that "the allegations raised in the instant motion reflect an out-of-context parsing of the voluminous record to create the impression of bias where none exists. Indeed, this court took great effort over many years to fairly and impartially oversee the litigation and eventual resolution of a complex class action that was, at times, made even more complex by 'the difficulties that resulted from [the] departure' of Donald E. Haviland Jr., Esquire from the law firm of Kline & Specter." Haviland originally worked at Kline & Specter when the firm was one of two firms appointed as class counsel, according to the opinion. Haviland ultimately was permitted to represent certain of the class plaintiffs as personal counsel, and it was those plaintiffs who sought O'Neill's recusal.

According to the 2011 opinion, O'Neill recused himself from a related case brought by fire companies that denied they had agreed to be bound by the \$35 million global settlement because "this court, having overseen the settlement process, admittedly was shocked by this development." According to the opinion, O'Neill remarked during a hearing that someone had been disingenuous with the court about how the settlement was handled. While O'Neill said he recused himself in that case because the remark was about a potential witness, he said there was no similar reason he had to recuse himself regarding Haviland's clients.

The Continental Business Center in Bridgeport, Montgomery County, Pa., was destroyed by an electric arc from a circuit breaker panel that hadn't been repaired or replaced following flooding of the business center in 1999 when the Schuylkill River overflowed its banks following the remnants of Hurricane Floyd.

Both Becker and Haviland said the Superior Court did not address whether a judge can partially recuse from a case.

One issue on remand would be the propriety of O'Neill deciding an issue involving a judicial colleague's finances, Haviland said.

"We are hopeful that Judge O'Neill takes the direction of the Superior Court and establishes the schedule promptly so my clients can get a final resolution in this more than a decade-old litigation," Haviland said.