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National News

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Reverse Bifurcation Chosen in Communications Tower Trial

The Legal Intelligencer
By Daniel Casciato
September 21, 2007

Trials ordered by reverse bifurcation are not uncommon, especially those involving medical malpractice cases and asbestos-related cases.

But earlier this summer, to adjudicate an 11-year-old court case over a communications tower, Allegheny County Common Pleas Court Judge W. Terrance O'Brien ordered a jury trial to begin using this procedure. At least one attorney involved in the case said he thought it might be the first instance in Pennsylvania of reverse bifurcation being applied to a case of this nature.

Another local attorney said there were clear advantages to handling the matter in that fashion.

"It's an efficient way to try a case because the courts have had thousands of pending asbestos cases," said Edmund Olszewski, an attorney with Dickie McCamey & Chilcote, who had tried cases ordered by reverse bifurcation before.

Although Olszewski said he finds it interesting that O'Brien ordered this trial by reverse bifurcation, he's not surprised.

"It's certainly foreseeable that this could happen if the judge feels that the case would be most efficiently handled this way," he said.

The case involves a dispute over a communications tower in Boyce-Mayview Park, a public park in Upper St. Clair, a Pittsburgh suburb.

In 1996, residents Thomas S. White, Mark G. Trombetta, Robert E. Faust, Leonard C. Highley, and H. Scott Hawkins filed suit in the Allegheny County Common Pleas Court to challenge the construction of the tower by Crown Communications.

According to the lawsuit, Boyce Park "was conveyed to the township by the county of Allegheny under a deed that limited the use of the

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property to recreation, conservation and historic purposes, and the residents asserted that a communications tower was inconsistent with these deed restrictions."

According to a statement on the township's Web site, the tower was installed because the township was experiencing significant public safety communications problems. The old communications tower was incapable of providing reliable contact between public-safety personnel to the extent that it placed them and residents at risk, the statement said.

Crown proposed to replace the township's emergency communications system in exchange for an easement in the park.

To accomplish this easement, the township enacted several ordinances, including one which exempted the township from all provisions of the zoning code. The township then entered into a lease agreement with Crown for 0.428 acres and obligated Crown to provide the township a public communications system for 911, police, fire and emergency medical services.

After the tower was built, the residents filed suit to have the lease declared null and void and to have the tower torn down.

The township and Crown argued that residents filed their appeals too late and asked that the case be dismissed. The trial court eventually dismissed all five counts of the complaint.

However, on appeal, the Commonwealth Court found that the residents' legal points had merit and remanded the case to Allegheny County Common Pleas Court.

Commonwealth Court found that the township's approval process of the tower agreement violated deed restrictions on the property, that the township's subdivision and land development ordinance weren't followed and that the project was never publicly bid. The state Supreme Court affirmed the ruling.

Earlier this year, O'Brien ordered the first phase of the trial to begin by reverse bifurcation.

Chuck McCullough, township attorney, said that the township and attorneys for Crown proposed that the trial proceed by reverse bifurcation nearly a year ago.

"It's not a common practice, but under the circumstances it certainly made the most sense," added Eric Soller from Pietragallo Bosick & Gordon who is representing Crown Communications.

"Our thoughts are that the affirmative defenses are the most telling aspect of the case and if you find for any one of our affirmative defenses, the case is going to be over with, so why go through the whole thing?" McCullough said. "When we first mentioned this, Judge O'Brien picked up on this really fast and seemed to think it made a lot of sense as well. He had used reverse bifurcation in other cases that he had."

McCullough said that one of their affirmative defenses is that the plaintiffs waited too long to file the suit.

Robert W. Kennedy, one of the two attorneys representing the plaintiffs, said they had no opposition to this.

"From our standpoint, we feel comfortable in attacking the defenses and once it's done we think we have a win," he said.

Kennedy said that he wasn't surprised when reverse bifurcation was mentioned.

"They believe that if they win on any of their affirmative defenses that they are asserting, then the trial is over in their favor," he said. "We also believe that if we prevail, then the trial is over and then the second trial with the time and expenses will not be necessary."

McCullough said that reverse bifurcation was unusual for a case like this.

"I'm not familiar with it being used in a case of this nature ever," he said. "It may be unprecedented in the state."

The first phase of the trial where the jury will determine causation and damages is scheduled to begin Oct. 17.

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"We'll present our defenses to the lawsuit in this phase," said McCullough. "But first we're asking the judge to rule in our motion to dismiss the case."

The second phase, where the jury will decide liability, is scheduled for Dec. 17.

Three of the original plaintiffs have since withdrawn from the suit. Highley and Faust still remain. No settlement was reached with these plaintiffs, according to McCullough.

The plaintiffs are being represented by David Toal and Kennedy of the Toal Law Firm.

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