

The Legal Intelligencer

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Pa. Supreme Ct. Orders Recusal of Entire Montco Bench

A divided state Supreme Court has ordered the entire bench of Montgomery County Common Pleas Court to recuse itself from hearing a dispute between Highway Materials Inc. against Whitemarsh Township and several current and former officials for allegedly delaying the development of HMI's property in the township for the past decade.

Highway Materials, through its attorneys at Sprague & Sprague, sought the recusal against the court through an August King's Bench petition for extraordinary and emergency relief after Montgomery County President Judge Richard J. Hodgson denied the request at the trial level.

Hodgson's colleague on the bench, Judge Kelly C. Wall, is a named defendant in HMI's complaint because of her former role as a supervisor of Whitemarsh Township. Wall took a spot on the 21-judge bench in January 2010.

"As a result of her being a defendant, we asked that the bench be recused based on a conflict of interest," Joseph R. Podraza Jr. of Sprague & Sprague said.

Justices Thomas G. Saylor and J. Michael Eakin dissented from the Dec. 14 per curiam order granting the full-bench recusal. Justice Seamus P. McCaffery did not participate in the decision. His brother, Daniel McCaffery, is representing an attorney from his firm, Sean Kilkenny of Friedman Schuman Applebaum Nemeroff & McCaffery, who is listed as a respondent because of his one-time role as the township's solicitor. That leaves four justices who signed off on the order.

The order directs the court administrator to appoint a judge from another county to preside over the civil proceedings and stays the proceedings until that is done.

"This has been an odyssey that has been going on for almost 11 years," Podraza said.

HMI owns a 309-acre quarry complex in Whitemarsh Township known as the Corson Limestone Quarry. For more than a decade, it has sought approval to develop a 54-acre portion of that quarry where extraction has long since ceased and the site has been backfilled to grade level. HMI wants to build an office park on the site, according to the complaint filed against the township and several former and current officials in December 2009.

The complaint alleges the various township officials "deliberately violated their legal obligation to provide" a good faith review of HMI's permit application and "chose instead to conspire among themselves and with the other defendants named herein to tortiously interfere with HMI's prospective economic advantages and to block HMI from developing anything on its property except single family homes on lots of one acre or more."

The suit seeking damages for the delay in redeveloping the property was filed after another Montgomery County judge, Kent H. Albright, ruled HMI should get a "thorough and objective" review of its permit application — something he said hadn't happened to that point, according to the complaint.

It wasn't until a group of the defendants, Marc B. Kaplin and Neil Andrew Stein of Kaplin Stewart Meloff Reiter & Stein and their client, Donald Cohan, filed preliminary objections to the damages suit that the issue of recusal arose. Podraza said he sought recusal after those defendants requested a hearing on their preliminary objections. It was denied and the petition was filed with the Supreme Court, he said.

Stein had once served as solicitor to the township. He and the firm also represented Cohan, a neighbor who strongly opposed the development of the office park, according to HMI's brief in opposition to their preliminary objections.

In total, there were 35 defendants named in the complaint, including current and former Whitemarsh Township and Whitemarsh Township Planning Commission representatives. A number of attorneys who served as a township supervisor or solicitor at one point or another were also named in the suit. They included Wall, Stein, Kilkenny and Ross Weiss of Cozen O'Connor.

H. Robert Fiebach of Cozen O'Connor is representing Weiss in the case and said they took no position on the recusal issue. Kevan F. Hirsch of Kaplin Stewart is representing his firm and the individual attorneys mentioned. He said they filed a response against granting the recusal, but the Supreme Court disagreed.

Appellate lawyer [Charles "Chip" Becker](#) of Kline & Specter said recusal requests are rare to begin with and usually just seek the recusal of a single judge. To have them granted as to the entire bench is "extraordinary," he said.

He did point to a 3rd U.S. Circuit Court of Appeals case, *McLaughlin v. Fisher*, in which a full out-of-circuit panel was appointed to hear a case in which former Pennsylvania Attorney General Michael Fisher was the defendant. He was a judge on the 3rd Circuit at the time the case was appealed to that court. There was a request — though not technically a recusal motion — by Fisher for an out-of-circuit panel and it was granted, according to the docket. Becker was involved in that case before leaving his old firm.

He said it is "extremely uncommon" for a full-bench recusal motion to be granted and "the granting of a King's Bench petition is extremely uncommon." Becker said it is "interesting and

important that the Supreme Court felt this issue kind of weighty enough that it would grant the petition."

Appellate attorney Howard Bashman said he was able to find about five reported cases that discussed full-bench recusals in Pennsylvania and only some of those actually initiated the recusal. He pointed to one 1999 case in which the Supreme Court appointed an outside judge to handle a criminal case against a Lackawanna County defendant because the defendant had sued all of that county's judges in a separate case.

Both Bashman and Becker said the court seems to grant recusal when a judge in the county has been named as a party in the underlying case.

"It demonstrates how the Supreme Court expects for these things to be handled, which is when a judge serving on the court is actually involved in the litigation, it doesn't look appropriate for colleagues on the same court to be presiding over the case," Bashman said.

Typically, a judge that has a conflict because one of the attorneys in a case is a relative or the judge owns stock in a company that is a party to the case will recuse and another judge on that bench will hear the case, Bashman said.

The rule of necessity doctrine says that if all judges are conflicted in the same way, such as a judge suing for a statewide pay raise that would affect all the judges in a state, then it is appropriate for a judge from that state to preside over the case because someone has to. The preferred method in a case where only one county is affected would be to bring in a judge from another county, Bashman said. Bashman writes an appellate law column for *The Legal* .

John J. Hare, head of Marshall Dennehey Warner Coleman & Goggin's appellate practice, agreed with Bashman and Becker that, though rare, full-bench recusals seem to be most common when a judge on that bench is a party to the litigation.

"You don't want judges sitting in judgment of one of their colleagues," he said.