Journal of Dispute Resolution

Volume 1990 | Issue 1 Article 8

1990

Public's Need to Know vs. Effective Settlement Techniques: The First Amendment Confronts the Summary Jury Trial - Cincinnati Gas and Electric Co. v. General Electric Co., The

Anne E. Billings

NOTES

THE PUBLIC'S NEED TO KNOW VS. EFFECTIVE SETTLEMENT TECHNIQUES: THE FIRST AMENDMENT CONFRONTS THE SUMMARY JURY TRIAL

Cincinnati Gas and Electric Co. v. General Electric Co.[1]

I. INTRODUCTION

With the proliferation of alternative dispute resolution, the summary jury trial (SJT) has become popular in many federal courts as an alternative to litigation.[2] Because of the SJT's trial-like nature, members of the press argue that the first amendment[3] gives the press the right to report on SJT proceedings. In *Cincinnati Gas and Electric Co. v. General Electric Co.*,[4] the Sixth Circuit Court of Appeals addressed the issue of whether the first amendment right of access attaches to a SJT proceeding.

II. THE CASE

In the early 1980's, the Cincinnati Gas and Electric Co., the Dayton Power and Light Co., and Columbus and Southern Ohio Electric Company (utilities companies) jointly undertook construction of the William H. Zimmer Nuclear Power Plant in Ohio.[5] The utilities companies filed an action in July of 1984 against General Electric and Sargent and Lundy Engineers, an architectural and engineering firm, alleging breach of contractual duties and common law regarding

---

1. 854 F.2d 900 (6th Cir. 1988), *cert. denied sub. nom.* Cincinnati Post v. General Electric Co., 109 S. Ct. 1171 (1989).

2. The 1984 Judicial Conference of the United States Report states: "Resolved, that the Judicial Conference endorses the experimental use of summary jury trials as a potential effective means of promoting the fair and equitable settlement of lengthy civil jury trials." *Report of the Proceedings of the Judicial Conference of the United States*, 88 (September 17, 1984).

3. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

4. 854 F.2d 900 (6th Cir. 1988), *cert. denied sub. nom.* Cincinnati Post v. General Electric Co., 109 S. Ct. 1171 (1989).

5. *Id.* at 901.

modifications of the plant.[6] The parties acknowledged early on in the proceedings that the element of confidentiality was essential.[7] Accordingly, on December 6, 1984, the magistrate approved a comprehensive protective order which ensured as much confidentiality as possible during discovery.[8] Nearly three years later, the district court, on June 26, 1987, ordered the parties to engage in a summary jury trial on September 8, 1987.[9] The court's order also stated that the press and public were barred from the proceeding.[10]

Four days before the summary jury trial was to convene, the Cincinnati Post, the Dayton Daily News and Journal Herald, the Columbus Dispatch, and The Cincinnati Enquirer[11] (hereinafter referred to as "the newspapers") moved to intervene for the "limited purpose of challenging the order closing the summary jury trial." [12] The newspapers claimed that the first amendment gave the press and the public the right of access to the proceedings.[13] On September 14, 1987, the district court denied the newspapers' motion to intervene.[14] The court amended its order on October 5, 1987, to (1) restrict communications between mock jurors and the press and the public until the case had ended, and (2) seal the list of prospective and actual jurors until litigation had concluded.[15] The court reasoned that, if identities were disclosed at the present time, it could defeat the confidentiality aspect the parties had desired to maintain.[16] Less than two months after the summary jury trial ended, the parties settled.[17] On November 20, 1987, the court approved the terms of the settlement and dismissed the action with prejudice.[18] However, the court did not dissolve the orders to keep the transcript and jury list sealed, but allowed all the information to remain confiden-

---

6. *Id.* Later, the utilities companies amended their complaint against General Electric to include RICO and fraud claims.

7. *Id.*

8. The agreement held that use of the documents were to be limited to "prosecution or defense of this action," or to "other proceedings arising in connection with the [nuclear] Plant." *Id.*

9. *Id.* at 902.

10. This particular provision read, "The proceedings, and all results thereof, shall be confidential, and shall not be disclosed other than to the parties, their attorneys, consultants and insurers. The jurors shall be appropriately instructed as to such confidential treatments." *Id.*

11. The Enquirer did not join the other newspapers on appeal to the 6th Circuit.

12. At district court, the utilities companies supported the newspapers' attempt to intervene, while General Electric and Sargent & Lundy opposed it. Cincinnati Gas & Electric Co. v. General Electric Co., 117 F.R.D. 597, 598 (S.D. Ohio, 1987). However, all the plaintiffs and defendants were named as appellees on appeal. *Cincinnati Gas & Electric*, 854 F.2d at 900.

13. *Cincinnati Gas & Electric*, 854 F.2d at 901.

14. The court arranged for the parties to provide it with a sealed transcript of the proceedings in the event that the newspapers successfully challenge the district court's order. *Cincinnati Gas & Electric*, 117 F.R.D. at 598.

15. *Cincinnati Gas & Electric*, 854 F.2d at 902.

16. *Id.*

17. *Id.*

18. *Id.*

tial indefinitely.[19] The newspapers appealed both of the District Court's final orders.[20]

The Sixth Circuit upheld the district court's decision that the first amendment right of access does not attach to summary jury trial proceedings.[21] The court based its decision on two factors: (1) it agreed that "'there is no historically recognized right of access to summary jury trials in that this mechanism has been in existence for less than a decade;'"[22] and (2) there is no valid public interest in the "right to know" in the proceedings, since these were private negotiations.[23] Thus, the court held, that, where there is a summary jury trial which the parties agreed would be confidential, there is no first amendment right of access by the press and public.[24]

III. LEGAL BACKGROUND

A. *The Birth of the SJT*

The summary jury trial is one of the newest and most innovative types of alternative dispute resolution.[25] Thomas D. Lambros, Judge for the United States District Court for the Northern District of Ohio, developed the SJT in 1980[26] in response to the high cost of litigation.[27] In his experiences as a trial judge, he came upon a number of cases which he believed should have settled before trial, but did not, because the parties felt they needed to have a jury evaluate the strengths or weaknesses of their claims.[28] Lambros envisioned a settlement technique which would allow parties to have their "day in court" before a jury, but in a streamlined, summarized form.[29] Lambros describes the SJT technique as an "effective tool in overcoming the burden of an ever increasing docket and in reducing juror costs, while not sacrificing the rights of individuals who seek justice through our jurisprudential process."[30]

The Federal Rules of Civil Procedure grant judges the authority to utilize the SJT technique.[31] In fact, the qualities of the SJT fulfill the requirement that the

---

19. *Id.*
20. *Id.* at 900.
21. *Id.* at 901.
22. *Id.* at 903
23. *Id.* at 905.
24. *Id.* at 902.
25. For a full treatment of the summary jury trial, *see* Lambros, *The Summary Jury Trial, A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461 (1984).
26. *Id.* at 461, 463.
27. *Id.* at 463.
28. *Id.*
29. *Id.* at 468.
30. *Id.* at 463-64.
31. *Id.* at 469.

Rules "secure the just, speedy, and inexpensive determination of every action."[32] Rule 16 is the cornerstone upon which the SJT and other settlement techniques rest. The Rule gives the court discretion to hold pre-trial conferences with the parties to discuss such issues as "expediting the disposition of the action,"[33] and "facilitating the settlement of the case."[34] During these conferences the court may discuss with the parties the "possibility of settlement or the use of extrajudicial procedures to resolve the dispute,"[35] and "such other matters as may aid in the disposition of the action."[36] A judge can actually order a summary jury trial in her discretion.[37] Additionally, many local court rules promulgated under Federal Rule of Civil Procedure 83 provide the authority for the SJT.[38] These court rules, along with the court's "inherent power to manage and control its docket,"[39] seemingly validate the use of the SJT. Further, use of the SJT is not peculiar to the federal court system, as a number of state courts are now experimenting with the new settlement device.[40]

The SJT is intended "primarily for cases that will not settle using more traditional methods,"[41] and is usually the final settlement technique employed before the parties resort to litigation.[42] Judges look upon the SJT favorably for being able to accelerate case disposition. Judge Arthur Spiegel uses the SJT in all appropriate cases to help keep his docket open for cases which can be disposed of only by way of trial.[43] He finds the SJT especially appropriate for cases based on circumstantial evidence rather than credibility of witnesses.[44] Lambros characterizes complex cases as being the most fitting for the scheme of the SJT, stating that "the longer the trial, the greater the potential value of the summary jury proceeding."[45] This is because the parties will save time and money by avoiding long, drawn-out litigation.

The summary jury trial process begins once the court orders, or the parties consent, to participate in the procedure. Because the SJT functions in a similar manner to a regular trial, the parties should complete discovery and prepare as if

---

32. FED. R. CIV. P. 1.
33. FED. R. CIV. P. 16(a)(1).
34. FED. R. CIV. P. 16(a)(5).
35. FED. R. CIV. P. 16(c)(7).
36. FED. R. CIV. P. 16(c)(11).
37. FED. R. CIV. P. 39(c).
38. FED. R. CIV. P. 83.
39. Lambros, *supra* note 25, at 469.
40. *Id.* at 476.
41. Lambros, *The Summary Jury Trial - An Alternative Method of Resolving Disputes*, 69 JUDICATURE, No. 5, 286, 287 (February-March 1986).
42. Lambros, *supra* note 25, at 463.
43. Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829, 833 (1986.) Spiegel was the trial judge in the instant case.
44. *Id.* at 835.
45. Lambros, *supra* note 41, at 286-87.

actually going to trial.[46] A few weeks before the SJT is held, the judge will conduct a pre-trial conference to determine the posture of the case.[47] The judge will resolve problems or concerns regarding the evidence to be presented and the opinions to be expressed, make sure there are no pending motions, and set guidelines for the SJT.[48] Finally, counsel must submit to the court trial briefs detailing issues of law and proposing jury instructions.[49]

When the SJT commences, six jurors will hear the case.[50] While the proceedings are closed to the public,[51] the parties must be present unless they obtain excuse by leave of the court.[52] The attorneys will then present abbreviated versions of their case, usually taking one hour each to make their presentations[53] which are normally broken down into opening statements, presentation of evidence, and closing arguments.[54] No witnesses testify and objections are usually minimal.[55] After each attorney has concluded their presentation, the judge gives an abbreviated charge to the jury and excuses them to deliberate.[56] The jury decides three issues: (1) liability, (2) evaluation of plaintiff's damages, regardless of liability, and (3) which party wins, and the amount of recovery.[57] The court encourages the jury to reach a unanimous verdict, but "separate, individual verdicts do afford counsel substantial insight into the individual juror's perceptions and may suggest an equitable basis for settlement."[58] The parties may stipulate that the decision will be binding, but normally this stipulation is not made.[59] The proceeding "in no way affects the parties' rights to a full trial on the merits,"[60] unless the parties agree the SJT proceedings will be binding. Once the jurors reach their decision or decisions, they announce them to the court and the parties. The judge, the attorneys, and the jurors may then engage in post-trial discussion which may "serve as a springboard for meaningful settlement negotiations."[61]

Through the use of a summary jury trial, the parties can begin to see the strengths and weaknesses, as their case unfolds in a way typically ascertainable

---

46. *Id.*
47. Spiegel, *supra* note 43, at 830.
48. Lambros, *supra* note 41, at 287.
49. Lambros, *supra* note 25, at 470.
50. *Id.* at 471.
51. *Id.*
52. *Id.* at 470.
53. *Id.* at 471.
54. Spiegel, *supra* note 43, at 831.
55. Lambros, *supra* note 25, at 471.
56. *Id.*
57. Spiegel, *supra* note 43, at 829.
58. Lambros, *supra* note 25, at 471.
59. *Id.*
60. *Id.* at 469.
61. Lambros, *supra* note 41, at 289-90.

only through a more expensive and time-consuming trial.[62] Having had a taste of how a jury would respond to their cases, the parties are then more willing to settle their claim out of court.[63] Thus, the SJT fulfills the expectations of parties who rely on the "American justice system's concept of ventilation, confrontation, and vindication of rights in a structured adversarial system."[64]

Although the summary jury trial has received glowing reports,[65] it has also been the subject of criticism and controversy. Judge Posner questions whether the Federal Rules of Civil Procedure actually do authorize judges to convene summary jury trials.[66] He also is uncomfortable with the fact that the government subsidizes parties using SJT's by paying for juror costs.[67] Posner also challenges the effectiveness of the SJT, in terms of resource allocation and the number of settlement agreements reached through the process.[68]

Additionally, one commentator on summary jury trials directly contradicts Lambros in asserting that SJT's may not be appropriate for complex cases.[69] He opines that the attorneys may either make an "incomplete development of pertinent facts," or, conversely, "run the risk that the complexity of the case will result in a massive overload of information to the jurors."[70] Despite its criticisms, however, the summary jury trial continues to grow in use in our judicial systems.[71]

B. *The First Amendment Right to Access*

By its own words, the first amendment states that "Congress shall make no law . . . abridging the freedom of . . . the press."[72] In *Craig v. Harney,*[73] the United States Supreme Court emphasized that "[a] trial is a public event,"[74] open to the media. The Court measures the media's right to access by first determining whether the information is within the public domain. In *Estes v.*

---

62. Spiegel, *supra* note 43, at 833.

63. Lambros, *supra* note 25, at 469.

64. Spiegel, *supra* note 43, at 833.

65. *Report of the Committee on the Operation of the Jury System, Proceedings of the Judicial Conference of the United States*, at 88 (Sept. 17, 1984).

66. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 385-86 (1986). It should be noted, however, that the Seventh Circuit determined in Strandell v. Jackson County, Illinois, 838 F.2d 884 (7th Cir. 1987), that judges cannot force parties to participate in summary jury trials; rather, they can only suggest the technique to the parties.

67. Posner, *supra* note 66, at 372.

68. *Id.* at 374-85.

69. Maatman, *The Future of Summary Jury Trials In Federal Courts: Strandell v. Jackson County*, 21 J. MARSHALL L. REV. 455, 483 (1988).

70. *Id.* at 483.

71. *Id.* at 487.

72. U.S. CONST. amend. I.

73. 331 U.S. 367 (1947).

74. *Id.* at 374.

Texas,[75] the Court held that members of the media are "free to report whatever occurs in open court . . . ."[76] If information is available to the public, then it follows that the media is also entitled to access.[77]

In regard to judiciary proceedings other than trials, however, the boundaries are much less defined. *Cincinnati Gas & Electric* was the first instance where the press fought for the right to cover a summary jury trial. In fact, there have not been a great number of situations where the press has attempted to gain access to other types of alternative dispute resolution proceedings. However, the Supreme Court has confronted some cases dealing with the media's first amendment rights involving non-traditional trial situations.

For instance, in *Seattle Times Co. v. Rhinehart*,[78] the Court held that the press has the right to obtain pre-trial discovery documents.[79] It stated that trial courts should balance freedom of expression considerations with the "particular governmental interest involved."[80] And in *Press-Enterprise Co. v. Superior Court*,[81] the Court addressed the issue of whether the press has a qualified first amendment right of access to obtain the transcript of a criminal preliminary hearing. Relying on its previous discussion in *Globe Newspaper Co. v. Superior Court*, 457 U.S.596 (1982), and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), Chief Justice Warren Burger developed a two prong test to apply to first amendment right access cases. First, there must be a "tradition of accessibility" to the type of proceeding in question; and second, a court should consider "whether public access plays a significant positive role in the functioning of the particular process in question."[82] If both prongs are met, the public and press have a right to attend the proceedings.[83]

In the case before it, the Court examined whether there has been a "tradition of accessibility" to the criminal preliminary hearings in California.[84] The Court explored the history of the California judicial system and found that this type of preliminary hearing had traditionally been accessible to the public.[85] The Court's second question was "whether public access to preliminary hearings as they are conducted in California plays a significant positive role in the actual functioning of the process."[86] The Court notes that a criminal preliminary hearing is a crucial and often final step in the criminal process, and that in many cases, it may be the only forum where the public could observe the system

75. 381 U.S. 532, 541-42 (1965).
76. *Id.* at 541-42.
77. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-495 (1975).
78. 467 U.S. 20 (1984).
79. *Id.*
80. *Id.* at 32.
81. 478 U.S. 1 (1985).
82. *Id.* at 8.
83. *Id.* at 9.
84. *Id.* at 10.
85. *Id.* at 10-11.
86. *Id.* at 11.

functioning.[87] The Court also points out that the absence of the jury makes the importance of public access to a preliminary hearing even more significant, since the presence of a jury serves to ensure fairness.[88] Finally, the Court states that the media's coverage of a criminal preliminary hearing was therapeutic to the public because the community could see how the wheels of justice turned.[89] The Court concluded from its analysis that public access to the criminal preliminary proceeding did play a "particularly significant positive role in the actual functioning of the process."[90]

IV. THE DECISION

The newspapers in *Cincinnati Gas and Electric Co.* relied on the *Press-Enterprise* decision in arguing that courts must recognize a qualified first amendment right to access to preliminary judicial proceedings, both criminal and civil. The newspapers also contended that the SJT would likely be the only place where the public could "learn about the facts underlying the crucial and burning public issues which are central to this case."[91] General Electric claimed that the newspapers failed to meet one part of the *Press-Enterprise* test, namely, that there be a "historically recognized right of access" to a similar type proceeding.[92] However, the newspapers countered that they met the more important second prong of the *Press Enterprise* test, which requires that public access to the proceeding play a "particularly significant positive role in the actual functioning process."[93] They gave three reasons why the summary jury trial proceeding was such an important process that it should be accessible to the press and public: (1) the parties were able to stipulate that the verdict would be binding; (2) since the SJT may produce settlement, the public would never know the issues; and (3) because the summary jury trial used a judge to preside over a jury which heard evidence and rendered a verdict, it functioned like a normal trial.[94] The trial court nevertheless denied the newspapers' motion to intervene.[95] The court held that the newspapers, by their approach, had exalted "form over function," and that a summary jury trial, despite all its similarities to a normal trial, was a settlement technique.[96] The court also rejected the newspapers' contentions that the SJT played a significant role in the functioning process, noting that "the proceeding is non-binding and has no effect on the merits of the case, other than to promote

87. *Id.* at 12-13.
88. *Id.*
89. *Id.* at 13.
90. *Id.* at 11.
91. *Cincinnati Gas & Electric*, 117 F.R.D. at 598.
92. *Id.*
93. *Id.* at 599-600.
94. *Id.* at 600.
95. *Id.* at 603.
96. *Id.* at 600.

settlement."[97] The trial judge also "emphasized that the summary jury trial was conducted with the 'cooperation of the parties' and that his order in closing the summary jury trial was in response to General Electric's substantial concerns regarding the potential lack of confidentiality."[98]

On appeal, the Sixth Circuit agreed with the trial court that the newspapers had no first amendment right of access to the summary jury trial.[99] It found that the newspapers could not satisfy either prong of the *Press-Enterprise* test. First, it concluded that there is no tradition whatsoever of allowing the media to cover SJT's since their inception in 1980.[100] The court held that, regardless of how similar the SJT looked to a normal trial, it was nonetheless a settlement technique between two private parties,[101] and traditionally, the press is barred from access to settlement proceedings between private parties.[102] Second, the court could see no significant positive role media coverage could provide in this situation.[103] If the parties were concerned about confidentiality, they may be unwilling to settle if the technique to be used did not provide for confidentiality.[104] Therefore, the court concluded, allowing publicity of the SJT proceedings would hinder the government's interest in encouraging settlements.[105]

Additionally, the court rejects the newspapers' claim that the public had a "right to know" about the SJT proceedings between the utilities companies and General Electric and the architectural firm.[106] It points out that the public would not have access to "observe any negotiations leading to a traditional settlement of the case . . . and the parties would be under no constitutional obligation to reveal the content of the negotiations."[107]

Finally, on appeal the newspapers attempted to analogize the situation found in *Press-Enterprise* with the instant case to contend that the "facilitation of a settlement between the parties has a final and decisive effect on the outcome of the litigation."[108] The court flatly disagrees, noting that the pre-trial proceeding in *Press-Enterprise* "definitely affected the rights of the parties," while the outcome of the SJT would not have any binding effect upon the parties.[109] Moreover, the court emphasizes that "it is the presence of the existence of a

---

97. *Id.* at 602.
98. *Id.*
99. 854 F.2d at 900.
100. *Id.* at 903.
101. *Id.* at 904.
102. *Id.* at 903.
103. *Id.* at 904.
104. *Id.*
105. *Id.*
106. *Id.* at 905.
107. *Id.*
108. *Id.*
109. *Id.* This is true unless the parties had stipulated beforehand that the decision would be binding, which they did not.

court's coercive powers that is the touchstone of the recognized right to access, not the presence of a procedure that might lead the parties to voluntarily terminate the litigation."[110]

Judge Edwards filed a terse, separate opinion from the majority. While agreeing with the majority that a SJT is not required to be open to the public, he maintained that a permanent sealing of the record infringed on the newspapers' first amendment rights, and the public's right to know.[111]

V. ANALYSIS

As noted earlier, the *Cincinnati Gas & Electric* court did not have any case law directly on point to follow. However, the court applied the two-prong test of *Press-Enterprise* to guide its decision-making.

A. *Tradition of Access*

Because there is very little tradition to consider regarding the SJT (it is still less than 10 years old), the court had little precedent to consider in applying the first prong of the test. The only analogous situations the court could find to compare with the SJT were criminal proceedings. In fact, the two-prong test the Sixth Circuit applied was developed by the Supreme Court while deciding a criminal preliminary hearing issue in *Press-Enterprise*. Criminal proceedings cases are easy to distinguish from the situation in *Cincinnati Gas & Electric*. As the Supreme Court notes in *Press-Enterprise*, there is a strong tradition of allowing access to criminal trials and hearings.[112] The policy behind granting the public access to criminal proceedings is to allow citizens to see justice functioning, when the state has brought a charge against a criminal.[113] Finally, if the "State" or the "People" have brought the charge against the defendant, the citizens should have the right to attend the proceedings.

Conversely, during its short history there has been no tradition of access to the summary jury trial. The SJT is a settlement technique used for civil actions between two private parties which can hardly be compared to a criminal proceeding. Although the newspapers argued that the public had great concern over a nuclear power plant in their community, the suit primarily involved a contract dispute between two private parties. The utilities companies also claimed RICO violations by General Electric and Sargent & Lundy,[114] but these claims apparently never materialized since there is no record of criminal charges being brought against the defendants. Had General Electric and Sargent & Lundy been involved in criminal litigation, the public would have almost certainly had access

110. *Id.*
111. *Id.*
112. *Press-Enterprise*, 478 U.S. at 10-11.
113. *Id.* at 13.
114. *Cincinnati Gas & Electric*, 854 F.2d at 901.

to those proceedings.[115] However, this was a civil action in which the parties decided to attempt a settlement before going to court, and maintained they had a right to confidential proceedings.

The *Cincinnati Gas & Electric* court notes that "settlement techniques have historically been closed to the press and public."[116] However, limited instances exist where a court has allowed the press and public access to negotiation conferences. In *Combined Communications Corporations v. Finesilver*,[117] a television station exercised its right under the first amendment to be present at a federal courthouse during negotiations to settle a lawsuit involving a congressional redistricting plan.[118] In that case, five registered voters in Colorado had brought suit against their governor and other government officials for failing to work out a new redistricting plan for Colorado's Congressional districts.[119] The district judge ordered the governor and members of the legislature to meet to work out a compromise. While the judge would not allow a local television station to bring its cameras into the courtroom during the negotiations, the court stated without discussion that the television station and members of the public were allowed to attend the proceedings.[120] Most likely, the court's reasoning for allowing the public access was that governmental entities were involved, making the negotiations a public event.

In *Society of Professional Journalists v. Briggs*,[121] a group of journalists successfully sued to obtain a copy of a settlement agreement in a law suit involving "alleged wrongdoing by public officials."[122] That case, however, hinged on the court's ruling that the settlement agreement was a public document, because the suit involved public entities.[123] The common thread for courts granting the media access seems to be that government entities were involved. The *Professional Journalists* court emphasized that the "core of the First Amendment is access to information about the operation and functioning of government."[124]

In *Cincinnati Gas & Electric*, there were no government agencies directly involved, yet the subject matter of the suit, a nuclear power plant, was, and continues to be, of vital interest to the public. Had General Electric been guilty

---

115. The Supreme Court stated in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." Also, as noted earlier, *Press-Enterprise* decided that the public's right of access attaches at criminal preliminary proceedings as well. *Press-Enterprise*, 478 U.S. at 10-11.

116. *Cincinnati Gas & Electric*, 854 F.2d at 903.

117. 672 F.2d 818 (10th Cir. 1982).

118. *Id.* at 819.

119. *Id.* at 820.

120. *Id.* at 820-21.

121. 675 F. Supp. 1308 (D. Utah 1987).

122. *Id.* at 1309.

123. *Id.* at 1310.

124. *Id.* at 1309 (referring to Justice Stevens' concurring opinion in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 583-84 (1980)).

of violating health or environmental laws, the Nuclear Regulatory Commission or the Environmental Protection Agency would have brought an action, not the utilities companies. In that situation, the public would most certainly have had a right of access to the proceedings, since a government agency was involved. However, since *Cincinnati Gas & Electric* involved neither a criminal proceeding nor a governmental entity as a party, the public policy of facilitating the settlement process between private parties outweighed the public's alleged "right to know."

B. *Significant Positive Role*

The *Cincinnati Gas & Electric* court did not see any significant positive role in the functioning of summary jury trials by allowing the newspapers to obtain the SJT transcript. The parties in this case had a grave concern over confidentiality, and the trial judge willingly obliged to provide closed proceedings and protective orders. This reasoning may seem not to make sense at first glance: If the parties refuse to resolve their dispute through an SJT because media coverage is allowed, they will certainly lose elements of confidentiality anyway if they choose to go to the public forum of a regular trial. However, the trial judge's position is more understandable from the government's point of view. The government has a vital interest in facilitating suits as quickly as possible. If parties are not able to settle out of court, their case will add another burden to the crowded docket. Hence, the second prong of the *Press-Enterprise* test is intended more for the judicial system's benefit than parties' privacy interests. Therefore, the trial court's and Sixth Circuit's deference for and protection of extrajudicial settlement techniques seems valid.

Especially in cases where confidentiality is a vital element, allowing press coverage could very well hinder open, meaningful SJTs. Media access may cause parties to view the SJT more like a trial, and to decide to forego a duplicative settlement technique in lieu of actual litigation. If this happens, the philosophy of the SJT may be short-circuited, and parties may be less willing to be involved in one. Even though the press and public may have a legitimate concern in the substance of SJT proceedings, this does not override the concern to promote settlements before the cases further burden the already crowded court dockets. Therefore, it is difficult to see how the press's involvement in an SJT would play a significant positive role in our judicial process.

Had the parties in *Cincinnati Gas & Electric* agreed to be bound by the jury's verdict in the SJT, the media would have had a more compelling argument for gaining access. Stipulation to a binding decision would seem to bring a proceeding closer to a trial on the merits. It would follow, then, that if the public has a right of access to a trial on the merits, it should also have a right of access to a settlement technique by which the parties have agreed to be bound.

In his dissent, Judge Edwards said that leaving the records closed indefinitely conflicted with the first amendment.[125] He agrees with the majority that the parties' desire for confidentiality should be respected during the SJT.[126] But once the once the parties have worked out a settlement, he could see no reason for keeping the record closed indefinitely.[127] Judge Edwards seems to be ignoring the fact that settlement terms between private parties are not open to the public,[128]regardless of how interesting or important the subject matter is to the public. He was persuaded that the alleged "right to know" interest outweighed the government's policy of encouraging parties to settle disputes in a confidential setting. If Judge Edwards' opinion were followed, however, fewer parties would be willing to try to settle through means of the SJT, knowing they would be deprived of post-settlement confidentiality. This could cut down the technique's effectiveness in unclogging court dockets.

As Posner points out,[129] another valid consideration is that public funds are used to subsidize a private settlement process.[130] Indeed, one could argue that, since the SJT involves a judge and jury paid with tax dollars, the public and press have the right to attend the proceedings. This argument fails, however, when one remembers that the entire judiciary system has been set up to resolve disputes, and that tax dollars are used in many other ways besides financing actual trials. For instance, the trial judge who stops a lopsided trial in its early stages and calls counsel into his or her chambers to encourage a settlement is using the public treasury just as much as when she resides during the trial. The parties who have been permitted to use an empty room in the courthouse for a last-minute settlement effort before trial are using as much electricity as the parties putting on their case in the next room. The public and press would not have a right to barge into court chambers or the private meeting room simply because tax dollars were being used to "subsidize" the parties' settlement attempts. Therefore, the amount of public expenses used to conduct an SJT is not a valid indicator of whether the media has access to the proceeding.

VI. CONCLUSION

The court in *Cincinnati Gas & Electric* decided that the press does not have a first amendment right of access to summary jury trials. The court found that there was neither a tradition of accessibility to the process, nor was there a significant positive function of allowing the press access. The government's

125. 854 F.2d at 905.

126. *Id.*

127. *Id.*

128. The majority had quoted from *Palmieri v. New York*, 779 F.2d 861, 865 (2nd Cir. 1985): "[s]ecrecy of settlement terms . . . is a well-established American litigation practice . . . ." (citations omitted). *Cincinnati Gas & Electric*, 854 F.2d at 903.

129. *See* Posner, *supra* note 66.

130. Of course, the parties still have to bear the cost of attorney's fees.

concern for expediting and encouraging settlements seemed to be the driving force behind the court's decision. The Supreme Court has tacitly given its approval to the Sixth Circuit's holding by denying certiori in the case. For the time being, though, the other federal circuits still have the freedom to decide an SJT access case differently, if given the opportunity. However, the Sixth Circuit's holding is correct when considering the settlement process: Settlement can only be effective when shrouded in terms of secrecy. If courts grant the public access to summary jury trials simply because their subject matter interests the public, the technique will lose its effectiveness in facilitating out of court resolutions. Hence, even though the media may have a strong interest in covering summary jury trials, the Sixth Circuit has set a precedent that the SJT is a settlement process between private parties, and cannot be considered as litigation for first amendment purposes.

ANNE E. BILLINGS