

"INVIGORATING AND THRILLING"

Main Line attorney appears before U.S. Supreme Court

BY RICHARD ILGENFRITZ

A local attorney recently took on his dream case by presenting an argument at the nation's highest court.

Jason E. Murtagh, 34, of Bala Cynwyd, is an attorney in Paoli with the firm Rubin, Fortunato and Harbison, P.C. and has done a lot of product-liability defense work. These days he's spending time in areas such as employment law, trade secrets and restrictive covenants.

But this recent case was different in that he represented a New York resident on a civil-rights issue. "It's one of those cases that lawyers love," Murtagh said during a recent interview. "It's a fascinating issue of constitutional law."

The fundamental question in the case was whether New York State "despite a federal law to the contrary" could close its courts to certain federal lawsuits. The federal law is commonly referred to as Section 1983 and is designed to protect a person's civil rights. The laws date back more than a century and were designed specifically to address abuses suffered by Southern black Americans, who in the post-Civil War period often were mistreated by government officials, by allowing them to file a suit against the officials who violated their civil rights.

However, in an attempt to curtail what it saw as frivolous suits filed by prisoners, New York enacted a law restricting those suits from state courts. "New York had a law that said you cannot sue a prison guard in state court," Murtagh said when asked to describe the case. "So my guy files a lawsuit in state court under

this federal law."

The state of New York said under its law he could not file those suits in New York state courts.

"The fundamental issue was really about the relative power of the federal government versus the state government," Murtagh said. "That was the issue the Supreme Court had to decide and I think that is why they took the case because if Congress passes a law and gives you a right to file suit and then if each state made its own determination about whether to let you file those suits, then you don't get the national policy that Congress intended."

In the facts of the case, Keith Haywood, an inmate at the Attica Correctional Facility in New York, filed two Section 1983 civil suits against several correctional officers accusing them of violating his civil rights while he was a prisoner.

Murtagh took up the case in the summer of 2007 when someone he knew in New York asked him if he could recommend someone to take the case for free. He nominated himself. At the time, the case was preparing to go before the New York Court of Appeals, New York's highest state court. Murtagh argued the case the next fall. New York's top court sided against Murtagh's client in a 4-3 decision, arguing that New York had this right to prevent the lawsuits in their courts.

Decision to appeal

With what he still believed was a winnable



Jason E. Murtagh

case at the nation's highest court, in early 2008 Murtagh petitioned the U.S. Supreme Court in the hopes they would first agree to hear the case and second overturn the New York ruling. So Murtagh filed the appeal to the Supreme Court.

Once he filed the petition the waiting game began. Each week the judges meet in order to discuss which cases they plan on taking. Cases that will be heard are then posted on the court's Web site at the start of each week.

After the filing the appeal, Murtagh would check the court's Web site weekly to see if he'd made the cut, wondering at times if he would ever get the opportunity to argue his case in front of the highest court in the land.

He had his answer weeks after filing the appeal.

"At 10 of 6 one day the phone rang; it was a 202 number," Murtagh recalled, referring to the area code of Washington, D.C. "And the clerk said this was so-and-so from the United States Supreme Court; 'I just wanted to let you know that we granted certiorari in your case.'"

Murtagh explained that a writ of certiorari is legal speak for "your case will be heard by the Supreme Court." But with one bridge crossed he still had an ocean before him. Now he'd have to prepare for the big show, the nation's highest court. "I probably was most nervous the day I got the call from the clerk of court saying that they had agreed to take the case," Murtagh recalled.

Still, Murtagh had a few last-minute jitters prior to his day in court. "I went over to the court the day before the argument and talked to the security staff, and they were kind enough after the arguments for the day [that]

they walked me into the court and let me stand at the lectern and showed me how to adjust it up and down, showed me how to adjust the microphone, those little silly things. So when I went up to argue the next day I felt like I already knew the space," Murtagh said.

Murtagh said he realized in actually going before those nine justices, his case would become part of the legal history of the United States.

"The Supreme Court is really a different animal altogether than any of those other types of arguments. And the reason is in any other type of argument, the judges are typically looking at what is important in [their particular] case: 'How do we apply the facts to this case?'"

"With the Supreme Court it's different. They are looking at how do we interpret this law in light of the Constitution, the history of legal development and how does our decision here impact the rest of the United States' legal system? So it's not really just about your case," Murtagh said.

But just what was the argument he would take into the court?

"In my case one of the challenges I had to say was, 'Why is it important as to why New York shuts its state courts to Section 1983 lawsuits?'" Murtagh said. "Part of what I had to do was start at the beginning; start with the Supremacy Clause [of the Constitution], which says national laws — laws enacted by Congress and signed by the president — are the supreme law of the land. And if you are going to respect that balance between the national government and the state governments, then one of the things you have to do is ensure uniformity and to make sure states aren't going off on their own, impeding national law because they disagree with it."

Supremacy versus the 10th Amendment

Constitutional experts have often noticed the obvious contradiction between the Constitution's Supremacy Clause and the 10th Amendment.

Where as the Supremacy Clause says the laws issued by the national government are supreme over state laws, the 10th Amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states

respectively, or to the people."

To some experts that means that because the Constitution is a representative document of the people, authority flows up from the people. Then through certain rights that are listed in the Constitution the people grant certain areas of responsibility to the federal government. Those are listed in other parts of the Constitution and include regulating commerce between the states, raising an army and a navy and about two dozen or so others.

People on that side of the argument believe the 10th Amendment means all those other areas are to be regulated by the states.

"Part of the [New York's] argument was because of the 10th Amendment there is a presumption that the state is acting constitutionally," Murtagh said.

To rephrase New York's basic argument, the people, by way of the Constitution, never granted the power to the federal government to order a state to take these types of lawsuits.

"In very simple terms, the way I think of it is the 10th Amendment certainly provides for reservation of rights and privileges but that exists in the absence of anything else," Murtagh said.

"For example, when Congress hasn't spoken on something in the absence of a national law or some other constitutional provision, then the states are fairly free to do what they want. By contrast, once Congress moves into an area and says this is going to be the national law, then the Supremacy Clause makes that supreme. It doesn't exactly trump the 10th Amendment but they act in different spheres."

Murtagh described another aspect that is different about the Supreme Court. This is in how the justices asked questions.

"Sometimes they were asking questions because they needed more information on the case, about my theory of the law, those sorts of things," Murtagh said. "But there were interesting questions where, for example, I had a hunch about which way a particular judge was going on this case and they would ask a question that that seemed to be designed not so much to get information from me but to make a point with other justices. It was sort of cross-communication that goes on through the use of questions."

"It's fascinating the way justices sort of communicate their view of the case — their

view of the law — by asking questions of the attorney. The attorneys, to some extent, feed information in this tennis match between the justices," Murtagh said.

In late May, Murtagh and the rest of the nation heard the results of the case. The judges decided 5-4 in favor of his client.

"The effect of [the ruling] is that he can now go back and file his suit against New York," Murtagh said.

But the case also has larger implications for U.S. jurisprudence.

"It means that anybody who has a claim against a prison employee in New York State at least under federal law could bring that claim in federal court," Murtagh said.

Murtagh described his regular law practice as specializing in any area where arguing and trying a case is involved.

"I tend to be the person you go to when you need somebody to get on their feet and either argue a case or try a case," Murtagh said.

One thing that kind of took him by surprise shortly after he learned the case would be heard was the number of phone calls he got. He not only got calls from reporters, but from constitutional-law professors. One group of professors filed what is commonly called a "friend of the court" brief, essentially arguing why they believe the court should ultimately side with Murtagh. Another group filed the same type of brief explaining how the case would have a broad impact on hundreds of thousands of New York residents.

And what were Murtagh's lasting impressions of going before the highest court in the land?

"I'm certainly keeping my eyes out for any interesting issues for which someone is seeking counsel," he said. "I definitely scan the lower courts' opinions and I'd love to argue there again. It's an incredible intellectual challenge."

"It is an exhausting process to go from taking the case to drafting briefs and relaying the argument and doing moots of your arguments several times and finally arguing," he said.

"It's exhausting but it's also invigorating and thrilling," said Murtagh. "[It's] the most fun you can have as a lawyer."