The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, FRIDAY, OCTOBER 14, 2011 VOL 244 • NO. 74 $5.00 An ALM Publication

In Philadelphia Speech, Breyer Addresses Root Of Judicial Credibility

BY AMARIS ELLIOTT-ENGEL
Of the Legal Staff

Photo by Diego Radzinschi
BREYER

U.S. Supreme Court Justice Steven G. Breyer wants an answer.

He wants to be able to answer the foreign judges who always want to know how the Supreme Court justices are able to get Americans to follow what they say.

During a talk Thursday to the World Affairs Council of Philadelphia, Breyer said that he

Breyer continues on **10**

Breaker Explosion Case Settles for $13.9 Mil.

BY SHANNON P. DUFFY
U.S. Courthouse Correspondent

An industrial software technician who suffered serious burns in a plasma explosion when a high-voltage circuit breaker at an asphalt plant shorted out has secured a $13.9 million settlement in his suit against the plant's owner and operator.

Plaintiffs attorneys Robert J. Mongeluzzi and David L. Kwass of Saltz Mongeluzzi Barrett & Bendesky said the settlement in *Cawthern v. Reading Materials Inc.* was reached after a one-day mediation conducted by Russell M. Nigro, the former Pennsylvania Supreme Court justice.

According to court papers, James Cawthern was an employee of Process Control Solutions and was assigned on Oct. 9, 2009, to tackle software problems at the Reading Materials plant that had effectively shut down its asphalt manufacturing.

MONGELUZZI

KWASS

In the first half of the day, Cawthern fixed the problems with the plant's programmable logic controller — a device that remotely controls the motors that power industrial equipment.

But Cawthern remained on site in order to run tests in the afternoon to ensure that all the problems had been cured.

While eating his lunch in the plant's electrical room, Cawthern suddenly saw sparks and detected the odor of ozone gas, prompting him to shove his co-worker, John Hanlon, out of the room.

But before Cawthern could escape, the high-voltage circuit breaker exploded with an intense heat that caused a plasma blast, meaning that the metal components had vaporized.

In the suit against Reading Materials and its corporate parent, Haines & Kibblehouse Inc., plaintiffs lawyers alleged that the accident was the result of a failure to perform routine maintenance.

The company's chief electrician admitted in his deposition that the maintenance was not performed and testified that the reason was financial, because any work on the electrical system would force "downtime" at the plant.

To prepare for the mediation, Mongeluzzi

***Settlement** continues on* **10**

Justices Asked to End Debate on 'Mineral' Definition

BY ZACK NEEDLES
Of the Legal Staff

The state Supreme Court has been asked to stop a scientific debate over whether the shale in the Marcellus Shale formation is a "mineral" before the debate even begins.

Last month, the state Superior Court allowed a dispute over land rights to move forward so experts could determine whether shale is a "mineral" whose owners would also own the natural gas contained within.

But a petition for allowance of appeal to the Supreme Court filed last week on behalf of the plaintiffs by lawyers at Pittsburgh-based Buchanan Ingersoll & Rooney said the question should not even be considered because it's irrelevant to this case.

Sean W. Moran, chair of Buchanan Ingersoll's energy section and oil and gas practice group, said the firm filed the petition now rather than waiting for a ruling on remand

THE BIG PLAY
THE MARCELLUS SHALE AND THE LAW

in hopes of cutting off the litigation before the plaintiffs incur "significant unnecessary expert and legal costs."

Kevin M. Gormly, an Indiana, Pa.-based oil, gas and mineral law attorney who is not involved in the case, told the *Pennsylvania Law Weekly*, an affiliate of the *Legal*, last month that a determination by Pennsylvania courts that shale is a mineral could conceivably cause "title chaos" in the state.

But Moran declined to speculate on that possibility Thursday, saying he was confident the courts would not reach that conclusion.

In September, a three-judge panel in *Butler v. Charles Powers Estate* unanimously reversed a Susquehanna County trial judge's order sustaining the plaintiff's preliminary objections to a request for declaratory judgment filed by the heirs of a landowner's estate who claimed the exception in the land deed reserving "minerals" entitled them to a piece of the

***Marcellus Shale** continues on* **9**

INSIDE THE LEGAL

www.thelegalintelligencer.com

Marcellus Shale

continued from **9**

Gantman misconstrued the *Hoge* ruling.

According to the plaintiffs, the court in *Hoge* was asked to interpret the term "gas," not "mineral."

"In particular, the court needed to determine whether the parties intended the reservation to permit the surface owner to extract only the natural gas located underneath the coal vein, or also permitted the surface owner to recover the coalbed gas contained in the coal vein by stimulating its release through hydrofracturing," the plaintiffs said in the petition, adding that *Hoge* might have applied to *Butler* if Charles Powers had expressly reserved Marcellus Shale, but he did not.

The defendants' attorney, Laurence M. Kelly of Kelly & Kelly in Montrose, Pa., declined to comment on the case but said he would be filing a response to the petition.

Zack Needles can be contacted at 215-557-2493 or zneedles@alm.com. Follow him on Twitter @ZNeedlesTLI. •

Settlement

continued from **1**

said his partner, attorney Eunice Trevor, created a video that included key testimony from several expert witnesses, eyewitness accounts of the accident and footage of Cawthern's treatment for the horrendous burns he suffered.

The video shows Cawthern days immediately after the accident, with third-degree burns over more than 52 percent of his body, and the gruesome procedure of scraping away the burned skin to prepare for grafting.

Cawthern, 64, also speaks on the video, describing the moment when "I sucked what I thought was my last breath of air," and the unimaginable pain he felt in the moments after the accident.

A doctor in the video says Cawthern was in excellent physical shape at the time of the accident, regularly swam a half-mile, wrestled with his grandchildren and worked on converting a dilapidated farm house into a modern home, doing all the construction himself.

The video also describes the extensive lung damage Cawthern suffered when he inhaled the vaporized metal, forcing him to undergo 21 invasive lung procedures and leaving him with a chronic cough and permanently limited lung capacity.

Another doctor describes the brain damage Cawthern sustained, saying his short-term memory is so damaged that he can no longer drive to his office because he cannot remember the way.

Cawthern's wife is also interviewed and says her husband was always active — never watching television or reading — and wonders, "What is his life going to be like now?"

Also in the video, Cawthern's son describes his father's constant work on building his dream home and says "without his hands, he's worthless."

Cawthern's physical therapy sessions are also shown as a doctor explains that he suffered permanent nerve damage that makes it difficult to lift his left leg, forcing him to use a walker.

And the damage to Cawthern's burned hands has left him unable to grip anything, the video shows, as Cawthern attempts to pick up a small bean bag, but can hold it for only a few moments.

Reading Materials' lawyer, Joseph F. Van Horn Jr. of Bodell Bove Grace & Van Horn, could not be reached for comment Thursday.

U.S. Courthouse Correspondent Shannon P. Duffy can be contacted at 215-880-3700 or sduffy@alm.com. •

Breyer

continued from **1**

himself continues to wonder how a branch of government that does not have the power of the sword or the purse and renders unpopular decisions that are sometimes wrongly decided gets the American citizenry to accede to its decisions.

Founding father Alexander Hamilton, writing in the Federalist Paper No. 78, said the fact that the court does not have the power of the sword or the power of the purse was exactly why it should be the branch of government in charge of upholding the Constitution, Breyer said.

The president already has a lot of power and Congress would be unlikely to protect the rights of people who are unpopular just as well as the rights of people who are popular, Breyer said.

"Congress is an expert in popularity ... Believe me, if they weren't, they wouldn't be where they are," Breyer said.

According to Breyer, Hamilton said that there was no one better than the gray, bureaucratic lawyers of the Supreme Court to uphold the Constitution.

But just because the Supreme Court is the right branch of government for the job does not explain why Americans obey its rulings, Breyer said.

Compliance with the court's decisions, he said, has not always been a given.

When Thomas Jefferson was inaugurated as president in 1801, he was prepared to defy the Supreme Court if it ordered that William Marbury should receive his judicial commission signed by former President John Adams — whom Jefferson had defeated and was a bitter political foe of the new president — even though Marbury had not received the commission before Adams' term in office ended.

But Chief Justice John Marshall was clever in reaching a ruling that gave the court the power to review statutes for constitutionality while reaching a result that was in favor of the outcome Jefferson wanted, Breyer said.

Constitutional law professors might say the case means other things, but Breyer said that's what he thinks it means.

Most notoriously, Breyer said, President Andrew Jackson is alleged to have said of the court's decision that it would be illegal to evict the Cherokee from their land: "John Marshall has made his decision. Now let him enforce it."

Instead, Jackson sent federal troops to evict the Cherokee, leading them on the infamous Trail of Tears, Breyer said.

In the modern era, it also was not so certain if the court's dictates would be followed.

In the first few years after the Supreme Court ordered the end of segregation in America's schools, nothing happened, Breyer said.

But in the aftermath of *Brown v. Board of Education*, nine black schoolchildren were enrolled in Central High School in Little Rock, Ark., following a judge's order, Breyer said.

Arkansas Gov. Orval Eugene Faubus ordered state militias to not let the students into the school, but then President Dwight D. Eisenhower decided that he would send 1,000 paratroopers of the 101st Airborne Division of the U.S. Army to enforce the court's order, Breyer said.

Eisenhower chose a unit famous and widely admired for its fighting in the Normandy invasion and the Battle of the Bulge, and he answered the question of foreign judges by showing that the rule of law must be paramount, he said.

That question posed by foreign judges partly comes from the older question of why nine people who are not elected get to set aside laws enacted by Congress, Breyer said.

After being on the bench for almost 20 years, Breyer said he still gets a thrill when he walks into the court to hear oral arguments because more than 300 million Americans with "their 900 million points of view" have decided to resolve their disputes through the court's decisions rather than with guns, riots and mayhem on the streets of America.

Appellate judges are "alone in a room each day with books and briefs and a word processor," Breyer said, so it's important to have what the British call "imagination" for understanding how the words "you enunciate" can impact on millions of Americans.

Breyer was asked about a couple of controversial death penalty cases in which the court denied certiorari: Mumia Abu Jamal, who was convicted of the 1981 slaying of Daniel Faulkner, a Philadelphia police officer, and now will face a new death penalty phase, and Troy Davis, who was executed last month for the 1989 murder of a police officer in Savannah, Ga.

Breyer said that when the court denies certiorari when a prisoner is on the eve of execution that it is extremely unlikely that the case has not been before the court before.

In that instance, it is not that the court will not hear the case, but that it is not hearing the case because there is not anything new in the case, Breyer said.

Most cases heard by the court involve a difference of opinion between lower courts, but most cases appealed to the Supreme Court do not involve that conflict and thus do not get selected to be heard by the justices, he said.

When the justices meet in conference, they have two unwritten rules: one, no one speaks twice until everyone speaks once, and two, tomorrow is another day.

Those rules ensure that justices can reach agreement on opinions even if they disagreed with their colleagues on other opinions, Breyer said.

Breyer said that he published his book, "Making Our Democracy Work: A Judge's View," last year in the hopes of making a "commercial message" that would entice some American citizens to engage with their government.

"People are cynical," Breyer said. "The younger you go the more they are cynical. It's all right to be cynical. But if you're too cynical, there will be no government."

Amaris Elliott-Engel can be contacted at 215-557-2354 or aelliott-engel@alm.com. Follow her on Twitter @AmarisTLI. •

Shwartz

continued from **3**

Menendez spokeswoman Olga Alvarez did not respond to an e-mail requesting further information.

Shipp, who was appointed as a U.S. magistrate judge in 2007, graduated from Rutgers in 1987 and Seton Hall University School of Law in 1994. He clerked for New Jersey Supreme Court Justice James Coleman Jr. from 1994 to 1995, and then joined Skadden Arps Slate Meagher & Flom in New York as an associate from 1995 to 2003, concentrating in employment defense and intellectual property.

Shipp then became assistant state attorney general for consumer protection, and in 2006 the office's liaison to the Juvenile Justice Commission, Alcoholic Beverage Control and Gaming Enforcement, and other divisions of the Department of Law and Public Safety. He also served as counsel to Attorney General Stuart Rabner.

McNulty, who chairs Gibbons' Appellate Practice Group in Newark, has been with the firm since 1998.

After graduating from Yale University in 1976 and New York University School of Law in 1983, McNulty clerked for District Judge Frederick Lacey. He spent 1984 to 1987 at Paul Weiss Rifkind Wharton & Garrison in New York handling litigation. He joined the U.S. Attorney's Office in Newark in 1987, prosecuting cases in the Frauds and Criminal divisions. He served as deputy chief of the Criminal Division from 1991 to 1995 and chief of the Appeals Division from 1995 to 1998.

David Gialanella is a reporter for the New Jersey Law Journal*, a* Legal *affiliate.* •