

SMS Quarterly

Shuman, McCuskey & Slicer, PLLC

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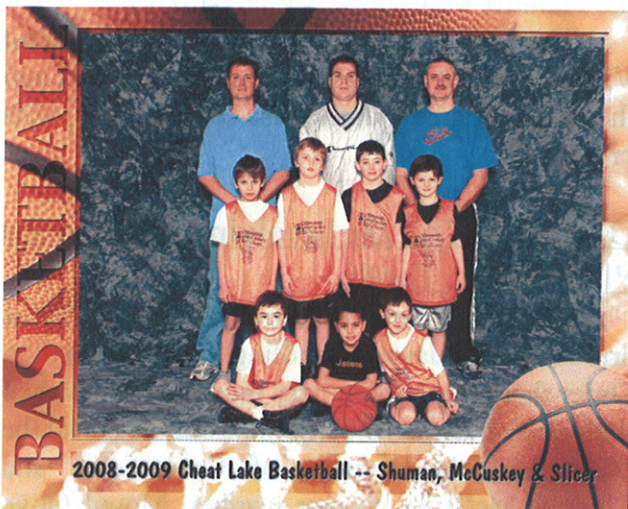
SMS Firm News

SMS Sponsors Second Grade Youth Basketball Team

The Shuman, McCuskey & Slicer Wildcats may not have won the championship in the Cheat Lake second grade youth basketball league, but the team members enjoyed their season.

“We are extremely grateful to Shuman, McCuskey & Slicer for sponsoring our team this year,” commented Coach Dan Moore. “The previous sponsor pulled out at the last minute, and the firm really helped out in a pinch.”

Mr. Moore is pictured below (top left) with the Wildcats.



“Children at this age not only enjoy the competition and fun the game offers, but they also learn the important concept of teamwork,” stated Member Tim Linkous. “We believe it is important that our law firm be involved in our community, and youth organizations provide an excellent means to that end.”

SMS Lawyers Continue Success In First Quarter Of 2009

By the time this edition of the SMS Quarterly is in circulation, most of us will have completed the onerous task of compiling, calculating and filing tax return data. In the wake of that exhausting process, it is always relaxing to read about some good news.

SMS lawyers have enjoyed great success in their cases during the first quarter of this year, and here are just a few of their stories:

Complicated Federal Land Use and Zoning Case Dismissed on Summary Judgment

Congratulations to Tammy DeFazio and Robert Russell who recently obtained an Order granting a Motion for Summary Judgment for the Jefferson County Commission, the Jefferson County Planning and Zoning Commission, and various individuals named in a very complicated Federal land use and zoning case.

The Plaintiff, a property owner seeking to develop his property, was provided less than one-fourth of the development rights he sought. He filed several lawsuits in connection with his development applications over a period of fifteen (15) years. The latest in these actions was a Complaint in the United States District Court for the Northern District of West Virginia. In that Complaint, the Plaintiff alleged that the Defendants violated his First Amendment Rights to petition the Courts in retaliation for his previous lawsuits against the Defendants.

He also alleged violations of his Fifth and Fourteenth Amendment rights to substantive and procedural Due Process. In addition, he alleged conspiracies on the part of the Defendants to violate the aforementioned rights.

Plaintiff claimed that the Defendants violated his Fourteenth Amendment right to equal protection, conspired to deny his access to the United States District Court and neglected to prevent a conspiracy pursuant to 42 U.S.C. §§1985 (2) and 1986. Plaintiff included a claim for violation of the Fair Housing Act against the Defendants. Finally, Plaintiff claimed that the Defendants violated the Fifth and Fourteenth Amendments by taking his property without just compensation.

The Plaintiff requested approximately \$2,000,000 for the takings claim, general compensatory damages in the amount of \$16,500,000, compensatory damages for emotional pain and suffering as well as aggravation of a pre-existing psychological condition in the amount of \$22,000,000, and punitive damages in the amount of \$90,000,000.

As the claims involved a fifteen year period of interactions between the Plaintiff and the Defendants, the discovery in the case was voluminous, to say the least. Approximately 20 depositions transpired and thousands of documents were inspected and exchanged during discovery. The pre-trial phase of the case took over three years to reach the dispositive motions stage.

Attorneys DeFazio and Russell filed comprehensive Motions for Summary Judgment on all issues, and the Plaintiff also filed Motions for summary Judgment.

The United States District Court recently issued an Order granting the Defendants' Motions for Summary Judgment on all issues.

Medical Malpractice Case Dismissed Based on Statute of Limitations and MPLA

Founding Firm Member David L. Shuman obtained a dismissal of his client, a West Virginia

University surgeon, in a medical professional liability civil action.

The Plaintiff was an unrestrained passenger involved in a motor vehicle accident resulting in her ejection from the automobile. She suffered a blunt spinal cord injury and fractures of the cervical vertebra, and she was transported to Charleston Area Medical Center where she received care and treatment from various health care providers on June 16 and 17, 2006.

On August 8, 2008, the Plaintiff served Notices of Claim pursuant to the West Virginia Medical Professional Liability Act, W.Va. Code §55-7B-1 *et seq.*, and she subsequently filed her Complaint on September 24, 2008. In her Complaint, the Plaintiff alleged that her health care providers negligently failed to administer steroids, thus resulting in her injuries.

Mr. Shuman filed a Motion to Dismiss based upon the Plaintiff's failure to serve her Notices of Claim within the applicable two-year statute of limitations. He argued that the Plaintiff failed to demonstrate any circumstances that would justify extending the statute of limitations, and, as such, the Plaintiff's lawsuit was time barred.

The Circuit Court of Kanawha County, West Virginia agreed with Mr. Shuman's position, and the Court ordered that the case be dismissed, with prejudice.

Dismissal of a Case Involving a Pain in the Plaintiff's ... Tooth

Congratulations to Member Lou Ann Cyrus and Associate Jason Wandling who obtained an Order that granted summary judgment in favor of their clients, James Rubenstein, Commission of the West Virginia Division of Corrections, and Thomas McBride, former warden, Mount Olive Correctional Center.

The Plaintiff, an inmate at Mount Olive Correctional Center, alleged that Commissioner Rubenstein, Warden McBride and a contract medical care provider were "deliberately indifferent" to his dental needs. He further alleged that the deliberate indifference resulted in a delay in obtaining necessary dental care and pain.

“Deliberate indifference” is the standard by which the United States Supreme Court of Appeals uses to determine whether prisoners’ rights have been violated.

In Federal Magistrate Judge Clarke Van Dervort’s proposed findings and recommendations, which were adopted by United States District Court Judge Thomas E. Johnston earlier this month, he found that the Plaintiff’s claim failed for two reasons.

First, the Court found that the Plaintiff failed to exhaust the administrative remedies provided by the West Virginia Department of Corrections. Second, the Court found that “it is not evident that Warden McBride or Commissioner Rubenstein did anything directly to cause the delay in treating Plaintiff’s dental problems, interfered with his treatment or were indifferent to or tacitly authorized the circumstances about which the Plaintiff Complains. Therefore, the Court granted summary judgment in favor of the Defendants.

Another Medical Malpractice Case Dismissed Despite Proven Retained Foreign Body

Founding Firm Member David L. Shuman recently obtained another dismissal of a medical professional liability action based upon a statute of limitations argument.

On November 26, 2002, the Plaintiff underwent a procedure during which a piece of a guide wire was inadvertently left inside the patient. The retained foreign body was not discovered until February 5, 2005 when the Plaintiff underwent a second surgical procedure and the foreign body was removed.

The Plaintiff sent a Notice of Claim to the Defendant on February 12, 2007 pursuant to W.Va. Code §55-7B-1 *et seq.*, and the Plaintiff filed a Complaint on April 12, 2007.

Mr. Shuman filed a Motion to Dismiss the Plaintiff’s Complaint because the Defendant health care provider did not have notice of the lawsuit until after the applicable two-year statute of limitations expired.

The Circuit Court of Raleigh County granted Mr. Shuman’s Motion to Dismiss finding that the applicable statute of limitations barred the lawsuit, and the Court dismissed the lawsuit.

SMS Prevails in 4th Circuit United States Court of Appeals

SMS attorney Jason Wandling appeared in Richmond, Virginia before the US Court of Appeals for the 4th Circuit and an oral argument which persuaded the Court to rule in favor of the firm’s client. SMS lawyers Dwayne Cyrus and Jason Wandling successfully appealed a Federal District Court’s denial of a Motion for Summary Judgment based upon qualified immunity in the case of *Robertson v. Elliott*. In the case, the Plaintiffs alleged that their Federal Constitutional rights were violated when they were arrested as part of a drug sting that made use of a confidential informant who, deputy sheriffs learned later, fabricated evidence against the Plaintiffs.

After Mr. Wandling’s oral argument, the Appeals Court reversed and held, “there is no constitutional right that protects the deprivation of liberty as a result of negligently gathered evidence.”

Another Medical Malpractice Case Dismissed, With Prejudice

Congratulations to Founding Firm Member David L. Shuman and Associate John D. Hoblitzell, III for obtaining summary judgment for their client in a medical professional liability civil action. The Plaintiffs filed their Complaint exactly two years after the alleged malpractice, but they failed to serve a Notice of Claim pursuant to W.Va. Code §55-7B-1 *et seq.*

The Circuit Court of Fayette County, West Virginia held that the Complaint cannot serve as the Notice of Claim, and, inasmuch as the Plaintiffs failed to follow the mandatory procedures prior to filing the Complaint, the lawsuit was time barred by the statute of limitations.

Legal Developments

Focus: West Virginia Workers' Compensation

Two recent Federal decisions should assist employers in defense of actions filed by injured employees. The first involved the “deliberate intent” exception to the Workers’ Compensation Act while the second addressed the area of the law involving claims of unlawful termination for workers who are fired after filing workers’ compensation claims.

Normally, any employer who has subscribed to workers’ compensation insurance is immune from lawsuits filed by workers injured in the course of and resulting from their employment. However, the West Virginia Legislature carved out a single statutory exception to the general rule by creating a cause of action for those whose injury was suffered due to the “deliberate intention” of the employer. This area of law has experienced an expansive growth in recent years as injured workers have filed increasing numbers of lawsuits arguing that their employers deliberately injured them.

For years, a troublesome area in defending these cases has been the question of the offset (or credit) each employer receives in these cases. The offset issue occurs because the Act allows an employee to only recover amounts in “excess” of what he or she has received *or will* receive from Workers’ Compensation. Thus, it is paramount that the employer knows the exact amount of benefits the injured employee will receive. That number is then used as the offset in calculating damages.

The more problematic area involves the credit for *future* benefit payments. Often, this amount simply cannot be quantified due to several factors including, e.g., the healing process does not fall into a neat schedule; thus, the question of future benefit payments to the injured worker is often unknown. Moreover, future payments/injury recovery is part of a separate administrative track distinct from the civil action for deliberate intent. Thus, in practical terms, it has been difficult for the employer to assess the offset in severe injury cases (this is especially true in permanent total disability (“PTD”) cases as they are worth hundreds of thousands of dollars to the injured worker).

In the case of *Bernado v. Eastern Associated Coal, LLC* (Civil Action No. 1:08cv221), Judge Keeley ruled in favor of Eastern on its Motion to stay the case while the question of Mr. Bernardo’s request for a PTD and other benefits was being considered by Eastern’s Third-Party Administrator. Judge Keeley’s opinion was squarely on point as she noted that the determination will impact “any calculation of damages” that could be awarded to the Bernardos.

In other words, the Court noted that it is impossible to calculate the employer’s credit for excess damages if nobody knows the underlying damages. The plaintiffs had argued that Eastern’s motion was premature at best since the issue would only become necessary should a trial in the matter actually be held. The Court rejected that argument by finding that should both parties know the actual offset it would assist each in determining the value of the claim for settlement purposes. The Court finally noted that there was no legal requirement for the stay but that it was exercising its discretion due to the interests of judicial economy.

In *Bumgardner v. McElroy Coal Company and Consol Energy Inc.* (Civil Action No. 5:08cv23), the plaintiff alleged that he was terminated after filing for workers' compensation benefits. Of significance to the Bumgardner lawsuit is his claim that he injured his back on the job on August 14, 2007.

However, the record indicates that Bumgardner never told his employer that he hurt his back on the job on that date. Rather, he only told his employer his back was hurting. He then left work and received compensation from a third-party insurance carrier unrelated to workers' compensation. Over the next few weeks Bumgardner was offered transitional work while he was recuperating. He refused stating that he was taking pain medication that would interfere with his driving to the work site.

His employer became suspicious and hired a private investigating firm. This firm taped activities of Bumgardner including his assistance with another individual in putting a roof on a building. His employer then terminated Bumgardner's employment.

On November 20, 2007, nearly three months after he allegedly suffered the back injury, Bumgardner attempted to file a workers' compensation claim. However, he sent it to the wrong party. Consequentially, it was ten months after the alleged accident that his employer was notified of the August 14, 2007, injury. He then filed the aforementioned action for termination due to filing a workers' compensation application.

After a period of discovery, the he employer then moved for Summary Judgment noting that because the employer was never made aware of the injury, it could not be found to have unlawfully discriminated against the plaintiff.

Judge Stamp agreed and granted the employer summary judgment. As the Court noted, the plaintiff never told the company that he had suffered any injury until several months after he had been terminated. As a sidenote, the Court endorsed the concept of surveillance by rejecting a count filed by Bumgardner for "negligent surveillance" which is not considered a tort in any jurisdiction the Court could find.

(This article was prepared by Associate Christopher Negley and edited by Member Timothy R. Linkous. This article is not intended to and is not a substitute for the professional legal advice of counsel. If you have questions about the decisions or the information contained in this article, you are encouraged to speak directly with a SMS lawyer.)

Quarterly Quote: "A lawyer will do anything to win a case, sometimes he will even tell the truth."

– Patrick Murray

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