

SMS QUARTERLY

AN INSIDE LOOK AT YOUR LAW FIRM AND
WHAT ITS LAWYERS ARE DOING TO SERVE YOU



**Shuman,
McCuskey
& Slicer** PLLC

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Recent SMS Events

On January 21, 2011, founding member, David L. Shuman, participated in a Dental Professional Liability Risk Management Seminar sponsored by CNA HealthPro. Mr. Shuman addressed the Medical Professional Liability Act issues related to the dental practice in West Virginia. The issues discussed included the current status of the statute of limitations in West Virginia as well as informed consent and record keeping. The importance of record keeping in defending dental malpractice claims was the subject of considerable discussion. Many dentists consider themselves "old school" and their record keeping is less than desirable when confronted with an unhappy and litigious patient. This issue has been addressed in several previous risk management seminars, and Mr. Shuman is attempting to change the culture of the dental practice to include detailed notes concerning informed consent and documentation of procedures performed. Audience participation was enthusiastic and lively.

On January 28, 2011, Natalie C. Schaefer participated in a National Business Institute Seminar regarding Evidence and Expert Testimony Best Practices - Supporting your Case. Ms. Schaefer addressed issues related to successful trial strategies for working with evidence. The issues discussed included maximizing evidence rules at trial, effective pretrial motions practice, and effective use of evidence for jury trials. There was significant discussion among audience members on the

effectiveness of various trial presentation methods.

On March 29, 2011, Natalie C. Schaefer participated in a second National Business Institute Seminar, on this occasion the seminar dealt with Governmental Liability Claims. Ms. Schaefer addressed issues related to popular defenses for governmental liability claims in West Virginia. The issues discussed included the defenses of res judicata, collateral estoppel, the Heck doctrine, the Rooker/Feldman doctrine, statutes of limitations, and notices of claims.

SMS Member Karen Tracy McElhinny has co-authored an article along with Charleston City Attorney Paul Ellis on the anti-subrogation provisions of governmental tort claims acts and federal preemption. The article will be published in the May/June edition of the "Municipal Lawyer," the International Municipal Lawyers Association (IMLA) Magazine. IMLA is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA serves more than 3,400 member municipalities and local n the United States and Canada, and is the only international organization devoted exclusively to addressing the needs of local government lawyers. Further information about IMLA is available at IMLA's website, www.imla.org. If you are interested in learning more about statutory protections for public entities, or if you would like to receive a copy of the article, please contact Karen M c E l h i n n y a t kmcelhinny@shumanlaw.com.

Please contact an SMS lawyer if you would like information about presentations SMS can perform for you or your company. Past presentation topics include updates on West Virginia law, recent decisions from the Supreme Court of Appeals of West Virginia, UIM and UM coverage, Medical Professional Liability, deliberate intent, coal mine safety, employment law, and many more. SMS tailors its presentations to the needs and requests of clients.

SMS Lawyer Victories

“Consent” Sayeth the Jury

Congratulations to Lou Ann Cyrus and Natalie C. Schaefer for their recent victory on behalf of a former West Virginia State Trooper after a jury returned a verdict in their favor! The Plaintiff asserted various constitutional violations arising from a sexual encounter. The main issue to be decided was whether the encounter was consensual.

After a four day jury trial, Ms. Cyrus and Ms. Schaefer obtained an outright defense verdict after the jury deliberated for less than three hours.



Diligence Rewarded

SMS member Tim Linkous and Associate Jenny Wrobleski recently obtained an Order granting a SMS client summary judgment in a motor vehicle accident case. The client was traveling northbound and plaintiff was traveling southbound. The vehicle in front of our client crossed the center line, struck the plaintiff, and then our client’s vehicle struck the vehicle in front of our car. The plaintiff maintained that our client rear-ended the vehicle in front of us and pushed it across the center line. After sending requests for admission to the plaintiff, he failed to response. The Court granted a motion to deem the requests admitted, then granted summary judgment in SMS’s client’s favor. Although there are still claims pending between our client and the vehicle in front of our client, but the Plaintiff’s claims were dismissed, with prejudice.



Integrity Unparalleled

SMS would like to extend another congratulations for another victory to SMS firm member Tim Linkous, who recently won a Board of Medicine case filed against a

physician. A patient twice claimed that a SMS physician client refused to provide her with a complete set of medical records, and filed two Complaints with the West Virginia Board of Medicine. After being provided complete sets of those records to the patient and the Board by firm member Linkous, the Board dismissed the Complaint.

Voluntary Dismissal of Volunteer Fire Department

SMS attorneys Brian Warner and Jennifer Tampoya obtained the voluntary dismissal of SMS client, Star City Volunteer Fire Department, in a case in which the a man was having difficulty breathing and his wife called 911 on more than one occasion. The husband died later of respiratory failure. Despite SCVFD being a volunteer department, the wife sued because it was two minutes away and had a truck with oxygen on it. After many depositions and after convincing Plaintiff's counsel that we had no duty to respond to a 911 call, the plaintiff agreed to voluntarily dismiss our client.

Summary Judgment for Homeowner - "Independent Contractor"

Firm member Dwayne Cyrus and Associate Heather Osborn recently obtained summary judgment in favor of their client, a homeowner, who was sued after an independent contractor installing a new roof on the homeowner's home fell and was injured. Utilizing the "independent contractor" defense, counsel successfully argued that the homeowner did not retain the "power of

control" necessary to make him the plaintiff's employer under West Virginia law. Based on the evidence proffered by counsel in their summary judgment motion, the court found that there was no evidence to suggest that the homeowner controlled the manner of the work being performed during installation of the roof. The court further found that merely discussing the status or progress of the job or requesting that the roofers perform the work neatly and clean up after themselves was not enough to establish "power of control" in the homeowner.



Legal Developments

The April 2011 Issue of the SMS Quarterly features one decision from the Supreme Court of Appeals of West Virginia and one decision from the United States Supreme Court. If you would like more information about these cases or information about other cases recently decided by our high court, please contact an SMS lawyer today.

State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, WVSC January 2011 Term, No. 35738

SER State Farm III is the third occasion the Court had to address several issues related protective orders. In the first case, *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 226 W. Va. 138, 697 S.E.2d 730 (2010), the Court granted a writ, and “agreed that the protective order hindered State Farm’s ability to comply with its statutory obligations and granted a writ of prohibition to prevent the circuit court from enforcing its February 11, 2010, protective order.”

In the *State Farm II* opinion, the Court notes the new order was “strikingly similar to its earlier, February 11, 2010, protective order....” and that “the circuit court again severely restricted the manner in which State Farm could use the medical records and information of Mrs. Blank and her decedent.”

State Farm III issued several new syllabus points, and found “good cause” for the medical record restrictions despite the absence of a record based on the “expectation of privacy.”

As to State Farm’s argument that the Circuit Court order required it to violate its duties under WV and Illinois law, the Court was very concerned about the record, finding the issue was not argued below, stating:

While it is quite laudable that State Farm is concerned about its ability to fulfill its

statutory obligations under both West Virginia and Illinois law, State Farm nevertheless neglected to alert the circuit court as to the conundrum it might face in accomplishing these tasks under the terms of the second protective order. Because the circuit court was not permitted to consider this issue in the course of formulating the terms of its second protective order, it would be inappropriate for this Court to inform the circuit court it has acted wrongly when it did not have an opportunity to address the matter in the first instance. Therefore, because State Farm did not raise this nonjurisdictional issue below, instead raising it for the first time before this Court, we deny the requested writ of prohibition on this ground.

Skinner v. Switzer, 2011 U.S. LEXIS 1905

On March 7, 2011, the Supreme Court announced its decision in *Skinner v. Switzer*. The question in this case is whether “a convicted state prisoner seeking DNA testing of crime-scene evidence [may] assert that claim in a civil rights action under 42 U. S. C. §1983,” or must instead do so “in a petition for a writ of habeas corpus under 28 U. S. C. §2254.”

In an opinion delivered by Justice Ginsburg, the Court held by a vote of 6-3 that federal courts *do* have subject-matter jurisdiction over convicted state prisoner Skinner’s claim and that Skinner’s claim is cognizable in a civil rights action under 42 U. S. C. §1983.

This is an important case for governmental entities. Unless it is construed strictly, it permits §1983 actions to proceed in cases that were traditionally reserved for habeas corpus petitions.

If you would like more information about these cases or other WVSC or USSC decisions, please contact an SMS lawyer who can provide you with a detailed discussion of the issues and holdings.

Quarterly Quote: “Justice denied anywhere diminishes justice everywhere.” - Martin Luther King, Jr.

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(Natalie C. Schaefer is the Attorney responsible for this publication. This publication is an advertisement for Shuman, McCuskey & Slicer, PLLC).