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SMS QUARTERLY

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

Attorneys at Law

Shuman, McCuskey & Slicer PLLC

SMS Is Pleased To Announce Its Newest Addition!

Charlotte R. Lane, Esq.

IN THIS ISSUE:

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SMS News

SMS Welcomes Charlotte R. Lane

SMS welcomes seasoned attorney Charlotte R. Lane back home to Charleston after her completion of years of public service in Washington, DC.

Ms. Lane has unmatched experience in government and regulatory affairs, business strategy services and conflict resolution (mediation and arbitration). She has spent decades both in West Virginia and in Washington working to resolve public, private, personal, corporate, civil, regulatory, administrative, local, and international and other disputes and claims.

Ms. Lane was appointed by the President of the United States to serve as a Commissioner on the United States International Trade Commission, where, for the last eight years, Ms. Lane participated in the resolution of complex trade cases in Washington, DC. Prior to that Presidential appointment, Ms. Lane spent a number of years as a Commissioner and Chairman of the West Virginia Public Service Commission, deciding utility and other regulatory matters.

Dave Shuman Is AV Rated – Preeminent (Again!)

Peer Review Rated PREEMINENT™ Martindale-Hubbell® from LexisNexis® 2012

Congratulations once again to founding member Dave Shuman, who has again retained the Martindale-Hubbell AV Preeminent Ranking. A peer reviewed system, AV Preeminent is a significant rating accomplishment and a testament to the fact that Mr. Shuman's peers rank him at the highest level of professional excellence.

SMS Lawyer Victories

SMS Attorney Obtains Dismissal for Municipality

Congratulations to juris member Chris Negley, who successfully defended the Town of Belle and its Police Department on a claim of harassment. Mr. Negley obtained a dismissal with prejudice for the Town and its Police Department.

SMS Attorneys Obtain Dismissal of Commissioner and Warden in Use of Force Case

SMS attorneys Dwayne Cyrus and Kimberly Bandy recently obtained dismissal of the Commissioner of the West Virginia Division of Corrections, and the Warden of Mount Olive Correctional Center, in a federal lawsuit initiated by a Mount Olive inmate in the United States District Court for the Southern District of West Virginia. The Plaintiff, who was represented by counsel, claimed that he was subjected to unreasonable use of force at the

facility by several correctional officers who were also named as defendants in the suit. The Plaintiff asserted in his Amended Complaint that the Commissioner and Warden should be held liable for the conduct of the officers based upon their supervisory authority over the officers, and because they knew or should have known of alleged prior constitutional abuses in the facility and failed to take action to prevent further abuses.

A motion to dismiss the Amended Complaint was filed on behalf of the Commissioner and the Warden on the grounds that the Plaintiff's claims against them were not even plausible because the Plaintiff made sweeping allegations without any supporting facts to back them up. In granting the Motion to Dismiss, Judge Thomas E. Johnston agreed. The Court stated that the Plaintiff had failed to allege any facts in support of his contention that a "pervasive and widespread pattern" of constitutional abuses existed at Mount Olive, or that the Commissioner or the Warden had any knowledge of a risk of harm to the Plaintiff. In dismissing the Amended Complaint against the Commissioner and the Warden, Judge Johnston affirmed the federal standard that mere conclusory allegations, without factual support, are not enough for a Plaintiff to proceed in federal court as a matter of law.

SMS Attorneys Obtain Defense Verdict

In February 2012, Members Natalie Schaefer and Will Slicer won another jury trial in Kanawha County Circuit Court. The plaintiff alleged that SMS's client, a land developer, had developed land and not maintained proper drainage which thereby caused flooding to plaintiff's property and residence. After six days of trial, the jury rendered a verdict completely relieving the developer of any liability for the alleged damages.

Summary Judgment in Excessive Force/Civil Rights Case

In January 2012 Member Will Slicer and associate Jason Wandling won a summary judgment motion for a city police department wherein plaintiff alleged excessive force and violation of his civil rights during a stop and search. The police department was dismissed on grounds of statutory immunity pursuant to the Governmental Tort Claims and Insurance Reform Act.

Bench Trial Absolves SMS Client of Liability

In February 2012, Associate Brett Mayes successfully defended a marine maintenance shop against allegations of improper repair leading to a blown cylinder head. The bench

trial absolved SMS's client of any responsibility for the alleged damages.

Summary Judgment in Multi-Million Dollar Business Interruption Suit

The federal United States District Court in the Southern District of West Virginia granted summary judgment in favor of three of SMS's insurance company clients on a business interruption claim wherein Plaintiff Corporation alleged in excess of thirty-eight million dollars ($38,000,000.00) in damages. The court stated in the order that the "uncontroverted evidence . . . obliterates Plaintiff's claim of actual loss." This Court in a separate but contemporaneous 38 page order granted SMS's client's motion for default judgment on sanctions as to the business interruption claim.

Thus, plaintiff's business interruption claim was dismissed not only for lack of evidence, but also for discovery abuses which materially prejudiced SMS's clients. The court also granted leave for filing for an award of attorney fees. The court stated in the order, "Plaintiff's spoliation of evidence and overall poor conduct in the course of discovery justified Defendants' motion."

SMS Attorneys Obtain Summary Judgment in Prisoner Assault Case

SMS attorneys Mark Browning and Kimberly Bandy recently obtained a summary judgment on behalf of the West Virginia Regional Jail and Correctional Facility Authority, as well as several Regional Jail employees, in a federal lawsuit initiated by an inmate based upon an injury he allegedly received from another inmate while incarcerated at the South Central Regional Jail. The Plaintiff asserted in his Amended Complaint that the Defendants acted with deliberate indifference to his safety because they knew or should have known of a risk of harm to him from the other inmate in the altercation. The case, which was pending in the United States District Court for the Southern District of West Virginia, was resolved in favor of the defendants on summary judgment because the facts developed during discovery indicated that the Plaintiff could not establish deliberate indifference on the part of the Regional Jail Authority or any of the five employees that were named as defendants. U.S. Magistrate Judge Mary Stanley recommended that the summary judgment motions filed by the Defendants be granted, and Chief Judge Joseph Goodwin agreed with the recommendation and dismissed the case in its entirety.

Constitutional/Civil Rights Trifecta

Partner Dwayne Cyrus and associate Jason Wandling won a motion to dismiss in the Southern District of West Virginia on behalf of a State agency. The Plaintiff, an inmate at a West Virginia corrections facility, alleged physical inmate abuse as a result of a use of force incident. The Plaintiff alleged unreasonable force was used in restraining him

and in escorting him back to his cell after receiving medical treatment. The Court found in the State's favor at the dismissal stage.

Partner Dwayne Cyrus and associate Jason Wandling won a motion for summary judgment on behalf of a State agency. The Plaintiff, an incarcerated person, alleged that his constitutional rights to practice his Taino religion were unduly burdened by the corrections facility when the Plaintiff was not permitted to smoke cigars and listen to salsa music without limit. The Plaintiff's appeal to the Fourth Circuit Court of Appeals is pending.

Partner Dwayne Cyrus and associate Jason Wandling won a motion for summary judgment in another case involving a Plaintiff who alleged that the State of West Virginia violated his constitutional rights by requiring him to stay in a halfway house as a condition of his parole that included Bible studies. The Circuit Court held that the Plaintiff's constitutional rights were not violated as a matter of law and that the Defendant was entitled to qualified immunity.

Legal Developments

SER Mass Mutual Insurance v. Sanders Sanders, January 2012 Term, No. 11-1514, deals with depositions of high ranking corporate official. The West Virginia Supreme Court granted a writ of prohibition prohibiting the deposition of the defendant's President and CEO. To require such a deposition, circuit courts must go through a factual determination of necessity and the Supreme Court issued a new syllabus point on this issue:

3. When a party seeks to depose a high-ranking corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition accompanied by the official's affidavit denying any knowledge of relevant facts, the circuit court should first determine whether the party seeking the deposition has demonstrated that the official has any unique or personal knowledge of discoverable information. If the party seeking the deposition cannot show that the official has any unique or personal knowledge of discoverable information, the circuit court should grant the motion for protective order and first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods. Depending upon the circumstances of the particular case, these methods could include the depositions of lower level corporate employees, as well as interrogatories and requests for production of documents directed to the corporation. After making a good faith effort to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate. If the party seeking the deposition makes this showing, the circuit court should modify or vacate the protective order as appropriate. As with any deponent, the circuit court retains discretion to restrict the duration, scope and location of the deposition. If the party seeking the deposition fails to make this showing, the trial court should leave the protective order in place.

National Union Fire Ins. Co. v. Miller, January 2012 Term, No. 11-0315 (per curiam),

addressed the sovereign immunity of the State. The plaintiff, while riding a bike, ran into a wire strung along the property line of land owned by the state Department of Forestry. The lower court ruled that insurance coverage existed as a matter of law, despite evidence that the wire constituted a "fence," rendering the State entirely immune. Reviewing the policy language in question, which excluded coverage for "fences, or related or similar activities or things," the Court concluded the circuit court erred in determining the state could not prove, via testimony of two witnesses, that the wire was a fence within the meaning of the exclusion, and therefore concluded "a material question of fact exists as to whether the structure which caused the subject injuries was a "fence" or a "related or similar" thing."

All Med, Inc. v. Randolph Engineering Co. Inc. et al., January 2012 Term, No. 11-0074 (per curiam), addresses the issue of agency and affirmed summary judgment for the defendant purported employer. The Court found that an individual, who did *independent* surveying work with the employer's permission, using *his own* equipment, was not acting as an agent for the employer. The Court reiterated the law that there are four general factors which bear upon whether a master-servant relationship exists for purposes of the doctrine of respondeat superior: (1) Selection and engagement of the servant; (2) Payment of compensation; (3) Power of dismissal; and (4) Power of control. The first three factors are not essential to the existence of the relationship; the fourth, the power of control, is determinative. Examining the facts, the court concluded plaintiff did not establish an agency relationship, which is not presumed, and failed to oppose summary judgment with "specific facts which demonstrate that there is a trial-worthy issue that involves a genuine issue of material fact."

Addair v. Litwar Processing, Memorandum Decision, No. 11-0397, In *Addair*, the Supreme Court, affirmed summary judgment for the employer defendants, finding that the circuit court's sanction order striking plaintiffs' experts left them unable to prove their case of chemical exposure.

The Court noted:

Because the plaintiff petitioners have been prohibited from presenting such evidence by virtue of sanctions imposed on them by the circuit court, they are unable, as a matter of law, to meet their burden of proof as to this element of their claim. This inability to make a sufficient showing on an essential element of their case, for which they bear the burden of proof, renders summary judgment proper.

Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 182 L. Ed. 2d 42, 2012 U.S. LEXIS 1076 (2012), In a *per curiam* opinion, the United States Supreme Court vacated the decision of the West Virginia Supreme Court in three suits alleging negligence of a nursing home that resulted in injury to each of the plaintiffs. The West Virginia Supreme Court had previously ruled that mandatory arbitration clauses in nursing home care agreements were void as against public policy when patients have suffered personal injury or wrongful death brought on by the actions of the nursing home or its staff.

The United States Supreme Court ruled that there is a long and clear history of federal case law that governs this issue (the Federal Arbitration Act) and further criticized the West Virginia Supreme Court for ignoring that case law. It held that contracts mandating arbitration - and as authorized by the Federal Arbitration Act, 9 U. S. C. §1 et seq. – were completely valid.

Notably, however, the United States Supreme Court remanded the cases for a determination of whether the arbitration

provisions contained in the nursing home agreements violate public policy *for some reason* other than the blanket prohibition previously made by the West Virginia Supreme Court.

Big Lots v. Arbogast, January 2012 Term, No. 11-1260, the West Virginia Supreme Court was asked to review an Order granting a new trial from a lower court when a jury awarded compensatory damages but awarded ZERO damages in pain and suffering. The Supreme Court reversed, noting that:

"[W]e must consider that the jury heard evidence at trial that challenged Ms. Arbogast' s credibility concerning the level of discomfort and pain she continued to have following the Big Lots incident. The jury also heard evidence suggesting that the pain she would continue to experience was not easily distinguished from her pre-existing nerve injury. Finally, the jury was informed of the fact that Ms. Arbogast may have sustained injury to her knee independent of the Big Lots incident. In light of these factors that the jury was required to weigh, we conclude that the evidence adduced in this case fully supports the jury's decision not to award damages for pain and suffering or for lost enjoyment of life as a result of the checkout incident at Big Lots."

Posey v. City of Buckhannon, September 2012 Term, No. 11-0565, In *Posey*, the Court affirms Rule 12(b)(6) dismissal of plaintiff's complaint, finding that a "transfer facility" for solid waste is subject to the provisions of the Governmental Tort Claims and Insurance Reform Act. Plaintiff "fell from the tailgate of his pickup truck and slid 18 feet down an open pit…." The Court issued a new syllabus point:

3. A transfer station conducted directly by a political subdivision, as a temporary collection site for solid waste to be transported to a dump or sanitary landfill, constitutes a "facility" within the meaning of the immunity provisions provided by W.Va. Code, 29-12A-5(a)(16) [1986], of the West Virginia Governmental Tort Claims and Insurance Reform Act, W.Va. Code, 29-12A-1 [1986], et seq., and to the extent this Court's opinion in *Calabrese v. City of Charleston*, 204 W.Va. 650, 515 S.E.2d 814 (1990), would exclude a transfer station as a "facility" under those statutory provisions, the opinion in *Calabrese* is modified.

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

Quarterly Quote: *"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."* -- Thomas Jefferson

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