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SPECIAL LEGISLATIVE EDITION

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Shuman, McCuskey, and Slicer PLLC is issuing this Special Edition to report on several new legislative bills that have been signed into law by West Virginia Governor Earl Ray Tomblin in 2015.

Senate Bill No. 3 No Trespasser Liability, effective April 29, 2015.

> *§55-7-27. Liability of possessor of real property for harm to a trespasser.* (a) A possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to a trespasser except in those circumstances where a common-law right-of-action existed as of the effective date of this section, including the duty to refrain from willfully or wantonly causing the trespasser injury; (b) A possessor of real property may use justifiable force to repel a criminal trespasser as provided by section twenty-two of this article; (c) This section does not increase the liability of any possessor of real property and does not affect any immunities from or defenses to liability established by another section of this code or available at common law to which a possessor of real property may be entitled.; (d) The Legislature intends to codify and preserve the common law in West Virginia on the duties owed to trespassers by possessors of real property as of the effective date of this section.

In summary, no possessor of real property will be held liable for injuries sustained by a trespasser, unless those injuries arise from the willful or wanton conduct of the possessor of land or where common-law right of action has already been established. Additionally, a possessor of real property may use justifiable force to repel a criminal trespasser. "The bill codifies a long-standing principle of common law that has been undermined by trial lawyers," Delegate Ray Canterbury, R-Greenbrier, said in a news release. "Most West Virginians will agree that no landowner should be sued by a trespasser who has been hurt when they entered another person's property without permission."

Senate Bill No. 6 Medical Professional Liability Act Amendments, effective March 10, 2015

In the recent Legislative Session, a number of amendments were made to the Medical Professional Liability Act through the passage of Senate Bill Number 6. The changes were not as substantial as previous reforms and were aimed more at clarification and a continuation of the previous Act. A summary of those changes is set forth as follows:

§55-7B-1 Legislative Findings and Declaration of Purpose.

There were no changes of any substance in this Section, most changes were stylistic and there was a paragraph added to recognize that the purpose of the Statute was to continue the

objectives of the Article and to continue the goal of control of the increase of cost and liability insurance while maintaining access to affordable health care by the citizens of our State.

§55-7B-2 Definitions.

A number of changes and clarifications were made to the Definitions Section, including the following:

> *Collateral Source*: The Amendment retained the previous description of collateral source, but it now excludes from the definition any medical bills that are written off, reduced or discounted by any health care provider. As such, write-offs from medical bills will not need to be a part of the post-verdict hearing to adjust for collateral source, rather the amounts written off will simply not be a part of the medical charges presented to the jury.
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> *Health Care*: The definition of health care was broadened to include the process by health care providers and health care facilities for appointment, employment, contracting, credentialing, privileging and supervision of health care providers. Also, the definition now includes any act pursuant to or in the furtherance of a physician's plan of care. The full definition states as follows:
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> (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;
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> (2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services; and
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> (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.
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> *Health Care Facility*: The definition of Health Care Facility was changed to specifically include any pharmacy, end stage renal disease facility, home health agency, child welfare agency, group residential facility, intellectual/developmental disability center or program, ambulatory health care facility, and "any related entity to the health care facility."
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> *Health Care Provider*: The definition for health care provider was amended to specifically include physician assistant, advance practice registered nurse, speech, language, pathologist and audiologist, and occupational therapist. (These individuals were likely covered under the general description of health care provider in the previous Act.) Also, the definition now includes any person supervised by or acting under the direction of a licensed professional or any person providing treatment pursuant to the furtherance of the physician's plan of

care. The effect of this would be to include nurse's aides and other lower level employees working for a health care provider.

Medical Professional Liability: The definition was changed to include, "other claims that may be contemporaneous to or related to alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services."

Related Entity: The amendment added the phrase related entity which it defines as follows: "related entity" means any corporation, foundation, partnership, joint venture, professional limited liability company, limited liability company, trust, affiliate or other entity under common control or ownership, whether directly or indirectly, partially or completely, legally, beneficially or constructively, with a health care provider or health care facility; or which owns directly, indirectly, beneficially or constructively any part of a health care provider or health care facility."

§55-7B-7 Testimony of Expert Witness on Standard of Care.

The previous statute set forth five criteria which, if met, allowed for the admission of expert testimony and allowed for a rebuttable presumption that such testimony would be entered into evidence so long as the expert devoted 60% of his/her time to professional activities involving clinical practice or education at an accredited university. The new statute now also requires that "the expert witness's opinion is grounded on scientifically valid peer-reviewed studies, if available."

§55-7B-7a Access to Medical Records.

The new statute creates this Section which provides for a rebuttable presumption that certain information will not be introduced into evidence unless that information applies specifically to the injured person, plaintiff or plaintiff's decedent (or the information involves substantially similar conduct that occurred within a year of the relevant incident.) That information includes the following:

(1) A state or federal survey, audit, review or other report of a health care provider or health care facility;

(2) Disciplinary actions against a health care provider's license, registration or certification;

(3) An accreditation report of a health care provider or health care facility; and

(4) An assessment of a civil or criminal penalty.

Additionally, this new Section provides that if a health care facility or health care provider demonstrates compliance with State law relevant to minimum staffing requirements that the defendant is entitled to a rebuttable presumption that appropriate staffing was provided.

§55-7B-8 Limit on Liability for Noneconomic Loss.

Caps for non-economic damages remain intact. The $250,000 cap still applies to all medical negligence cases except for wrongful death, permanent and substantial physical deformity, loss of use of limb or loss of a bodily organ system, or permanent physical or mental functional injury that permanently prevents the injured person from being able independently care for themselves, which provides for a $500,000 cap. The only change to the Section provides that the adjustment for inflation via the Consumer Price Index is now allowed to adjust to an amount not to exceed 150% (previous Act provided for 50%).

§55-7B-9c Limit on Liability for Treatment of Emergency Conditions for Which Patient is Admitted to a Designated Trauma Center; Exceptions; Emergency Rules.

The cap applying to cases involving care rendered by trauma centers (as designated by the Office of Emergency Medical Services) remained intact at $500,000. A provision was added which effective January 1, 2016, provides for the adjustment of that cap for inflation in an amount equal to the Consumer Price Index. That adjustment is capped not to exceed 150% of $500,000.

§55-7B-9d Adjustment of Verdict for Past Medical Expenses.

This Section provides as follows:

> A verdict for past medical expenses is limited to:
> (1) The total amount of past medical expenses paid by or on behalf of the plaintiff; and (2) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay.

This seems consistent with the change in the definition of the Collateral Source Rule which will only allow into evidence medical bills that were actually paid by or are still owed by plaintiff or plaintiff's estate.

§55-7B-10 Effective Date.

This Section provides that all changes apply to causes of action filed on or after July 11, 2015.

§55-7B-11 Severability.

This Section contains language similar to previous amendments which provides that if any portion of the Act is held to be invalid, the other Sections will remain in effect.

Senate Bill No. 13 "Open and Obvious" Doctrine Reinstated, effective February 18, 2015.

Senate Bill No. 13 reinstates the "open and obvious" doctrine. By way of background, in 2013, our Supreme Court abolished the "open and obvious" doctrine in *Hersh v. E-T Enterprises, Limited Partnership,* 232 W. Va. 305 (2013), doing away with decades of common law relied upon in premises liability cases. Senate Bill No. 13 states:

> *§55-7-27. Limiting civil liability of a possessor of real property for injuries caused by open and obvious hazards.* (a) A possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers; (b) Nothing in this section creates, recognizes or ratifies a claim or cause of action of any kind; (c) It is the intent and policy of the Legislature that this section reinstates and codifies the open and obvious hazard doctrine in actions seeking to assert liability against an owner, lessee or other lawful occupant of real property to its status prior to the decision of the West Virginia Supreme Court of Appeals in the matter of Hersh v. E-T Enterprises, Limited Partnership, 232 W. Va. 305 (2013). In its application of the doctrine, the court as a matter of law shall appropriately apply the doctrine considering the nature and severity, or lack thereof, of violations of any statute relating to a cause of action.

This Bill was passed after much compromise. Essentially, a possessor of real property does not owe a duty of care to protect others against dangers that are open, obvious, and reasonably apparent to others and the owner or occupant will not be liable for civil damages related to that injury; however, a court shall consider any safety violations that contribute to an injury.

Senate Bill No. 238 Limiting certain county board of education liability arising from unorganized recreation, effective May 26, 2015.

Senate Bill 238 is extensive and adds multiple new code sections. Essentially, Senate Bill No. 238 states that county boards of education may establish and maintain activities such as evening classes, night-school and part-time school. This statute provides county boards the authority to provide its community members free and convenient use of any school property for discussion, recreation and study. County boards of education will not be liable under a theory of vicarious or imputed liability for any loss or injury arising out of organized recreation. In addition, County Boards are not liable for injuries or loss arising from unorganized recreation unless caused by the gross negligence or willful or wanton conduct of the county board. For immunity to apply to

organized recreational activities, a person or group using the facility must have general comprehensive liability coverage and this contract of insurance must provide for the payment of attorney fees, court costs, and other litigation expenses, and the insurance coverage is in the amounts specified by §29-12-5(a). The State Board of Risk and Insurance Management may provide insurance, and the cost of the insurance will be paid by the person requesting coverage.

Senate Bill 344: Duty to Mitigate Damages in Employment Lawsuits, effective June 08, 2015.

Before SB 344, a plaintiff pursuing back pay and front pay in employment cases could obtain a jury award without a reduction for mitigation if the plaintiff was discharged with actual "malice." "Malice" was not defined by the courts, but permitted plaintiffs to obtain both unmitigated back pay and front pay. A recent decision by the Supreme Court of Appeals of West Virginia allowed a plaintiff to receive unmitigated back pay and front pay, along with punitive damages. Thus, a plaintiff pursuing a claim in West Virginia could be awarded punitive damages, as well as front pay extending years into the future with no obligation to mitigate the front pay award.

Senate Bill 344 addressed this windfall by: 1. requiring a plaintiff to act with reasonable diligence to mitigate past and future lost wages; 2. abolishing the "malice" exception to a plaintiff's duty to mitigate; 3. directing that any award of back or front pay be reduced by the amount the plaintiff could have earned with reasonable diligence; and 4. requiring trial courts to make a preliminary ruling on the appropriateness of front pay as an alternative remedy to reinstatement and, if the trial court concludes that front pay is the appropriate remedy, requiring the trial court, and not the jury, to determine the amount of the front pay award.

Senate Bill 421: Punitive Damages Reform, effective June 8, 2015.

§55-7-27. Limitations on punitive damages

(a) An award of punitive damages may only occur in a civil action against a defendant if a plaintiff establishes by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

(b) Any civil action tried before a jury involving punitive damages shall, upon request of any defendant, be conducted in a bifurcated trial in accordance with the following guidelines:

(1) In the first stage of a bifurcated trial, the jury shall determine liability for compensatory damages and the amount of compensatory damages, if any.

(2) If the jury finds during the first stage of a bifurcated trial that a defendant is liable for compensatory damages, then the court shall determine whether sufficient evidence exists to proceed with a consideration of punitive damages.

(3) If the court finds that sufficient evidence exists to proceed with a consideration of punitive damages, the same jury shall determine if a defendant is liable for punitive damages in the second stage of a bifurcated trial and may award such damages.

(4) If the jury returns an award for punitive damages that exceeds the amounts allowed under subsection (c) of this section, the court shall reduce any such award to comply with the limitations set forth therein.

(c) The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or $500,000, whichever is greater.

In summary, an award of punitive damages may only be awarded in a civil action where the plaintiff has established by clear and convincing evidence that the defendant acted with actual malice, or a conscious, reckless, and outrageous indifference to the health or safety of others. In the event that a jury trial involves punitive damages, the trial may be bifurcated at the request of any defendants. The jury shall consider liability for compensatory damages and the amount of compensatory damages to be awarded (if any) first. If the defendant is found to be liable for compensatory damages, the court shall determine whether there is sufficient evidence to proceed to a punitive damages trial. If the court determines that there is sufficient evidence, the same jury presiding over the compensatory damages portion of the case will participate in the second stage of the bifurcated trial and may award punitive damages. The amount of punitive damages may not exceed the greater of four times the amount of the compensatory damages awarded or $500,000, whichever is greater. If the jury returns an award that exceeds the allowed amounts, the court shall reduce the award to comply with the aforementioned limitations.

Senate Bill 542: **West Virginia Consumer Credit and Protection Act ("WVCCPA"), effective June 12. 2015.**

Senate Bill 542 made changes to several provisions of the WVCCPA that govern the collection of consumer debts in the state. Senate Bill 542 made the following significant revisions to portions of the WVCCPA:

1. The WVCCPA now prohibits a debt collector from calling any person more than thirty times per week or engaging any person in telephone conversation more than ten times per week;

2. The Act prohibits a debt collector from calling a consumer at unusual times or at times known to be inconvenient. The bill clarifies that a debt collector may assume that the convenient time for communicating with a consumer is between 8:00 a.m. and 9:00 p.m.;

3. The WVCCPA prohibits a debt collector from communicating with a consumer whenever it appears that the consumer is represented by an attorney. Senate Bill 542 changes the manner in which a consumer is required to provide notice of attorney representation to a debt collector. The Act now requires that a consumer provide written notice, either on paper or electronically, that clearly states the attorney's name, address and telephone number. Senate Bill 542 requires that this notice be sent to the debt collector's registered agent or, if the collector does not have a registered agent within the state, then to the debt collector's principal place of business;

4. The bill also adds a new venue provision to the WVCCPA: *W.Va. Code 46-5-107* that requires any claim brought under the WVCCPA by a consumer founded upon a prohibited debt collection practice, must be filed either in the county in which the plaintiff resides or in the county in which the debt collector has its principal place of business;

5. The bill clarifies that the statute of limitations for claims brought under the WVCCPA is four years from the date the violation occurred. This limitations period is effective for any claims filed after September 1, 2015;

6. The bill also changes the statutory damages a consumer is able to recover against a debt collector who violates certain provisions of the WVCCPA. A consumer is now entitled to recover actual damages plus a flat statutory penalty of $1,000.00 for each proven violation of the Act with an overall cap of $175,000.00.

Senate Bill 542 was passed on March 14, 2015, and signed by the Governor on March 31, 2015. Except for those provisions specifically identified as becoming effective September 1, 2015, the majority of the bill's revisions will take effect June 12, 2015.

House Bill No. 2002 Modified Comparative Fault and Revised Several Liability, effective May 25, 2015.

This new law is extensive and complex. In summary, House Bill No. 2002 rejects joint and several liability and creates a new modified comparative fault standard. Notably, this modified comparative fault standard requires that everyone, even non-parties, be evaluated for the purposes of fault allocation at trial.

Joint liability may still be imposed in a case where two defendants have conspired and deliberately pursued a plan to commit a tortious act or omission; if the Defendant was operating a motor vehicle under the influence; committing criminal conduct; or improperly disposing of hazardous waste.

If the finder-of-fact determines that the fault of the Plaintiff is greater than the combined fault of the Defendants, the Plaintiff will be barred from recovery. If a Plaintiff has made a good faith effort to collect against a Defendant and is unable to do so, the Plaintiff, upon motion within a year after judgment has been entered and filed, may request that the court reallocate any

uncollectible amount among the remaining parties. However reallocation cannot exceed the Defendant's proportional share of fault, nor can damages be apportioned if that Defendant's fault is equal to or exceeds the fault of the Plaintiff. Claims for contribution and indemnity are preserved under the statute as well.

House Bill No. 2011, Revisions to "Deliberate Intent" exception to worker's compensation, effective June 12, 2015.

The Legislature made significant changes to the "deliberate intent" statute. First, the Legislature defined the meaning of "actual knowledge" which is one element that must be shown to overcome worker's compensation immunity. Actual knowledge may be shown by evidence of intentional and deliberate failure to conduct an inspection, audit or assessment required by state or federal statute or regulation and such measures are specifically intended to identify each alleged specific unsafe working condition. Actual knowledge is not established by proof of what an employee's immediate supervisor or management personnel should have known had they exercised reasonable care or been more diligent.

If the specific unsafe working condition is a "commonly accepted and well-known safety standard" the standard must be a consensus written rule or standard promulgated by the industry or business of the employers. If the specific unsafe working condition relates to a violation of a state or federal safety statute, rule or regulation, that statute, rule, or regulation must be specifically applicable to the work and working condition involved, and further, must be intended to address the specific hazard presented by the unsafe working condition.

The legislature has also defined the meaning of "serious compensable injury" pursuant to §23-4-2(d)(2)(ii)(E). A serious compensable injury may be established by one of four methods:

(1) receipt of a final award in the employee's workers compensation claim confirming that the employee sustained permanent physical injury or a combination of physical and psychological injury rated at a total whole person impairment level of at least thirteen percent (13%), or the injury resulted in significant disfigurement or permanent loss of the use of a body organ, function or system.; (2) written certification by a licensed physician that the employee is suffering from an injury likely to result in death within 18 months or less from the date of filing the complaint; (3) the injury is one that meets the definition of sub clause(I)(b); and if (4) an employee suffers from occupational pneumoconiosis and he has been diagnosed with at least (15%) impairment.

These changes will apply to all injuries occurring on or after July 1, 2015.

SMS Firm News

Defense Verdict in Wrongful Death Medical Malpractice Case.

Firm Co-founder and Managing Member David L. Shuman and Associate David L. Shuman, Jr. recently obtained a complete defense jury verdict in a medical malpractice action tried in Kanawha County. The case involved the selection and use of appropriate anticoagulant therapy to treat a dissection of the Plaintiff's decedent's left internal carotid artery. The Plaintiff alleged that the decedent suffered from an underlying bleeding disorder and the Defendant doctor breached the standard of care in failing to consult a hematologist prior to proceeding with anticoagulant therapy. The Defendant argued that the anticoagulant therapy administered was appropriate and necessary to treat the Plaintiff's decedent's left internal carotid artery dissection and a hematological consult was not necessary. After a five day trial, the jury returned a verdict that the Defendant doctor did not breach the standard of care in his care and treatment of the Plaintiff's decedent.

SMS Attorney Joe Cramer Wins on Appeal in Banking Litigation Case.

In *State ex rel U.S. Bank National Association v. McGraw*, Wyoming County sued the defendant banking association and others, claiming they had not been recording assignments with the County Clerk like they were supposed to, thereby depriving the County of fees. The Supreme Court explained (and accepted) that the "Mortgage Electronic Registration Systems, Inc., or "MERS," a private corporation, was created by the mortgage industry to eliminate the need for publically recorded assignments and the expense associated therewith." The Court found it was appropriate to register with MERS, and rejected the County's argument. The Court issued a Writ against Judge (and former Justice) McGraw, finding "The Circuit Court of Wyoming County exceeded its jurisdiction in entering the July 22, 2014, order which denied the trustees' motion to dismiss."

Dismissal Obtained in Dental Malpractice Case.

Firm Member Timothy Linkous and Associate David Butler successfully obtained the dismissal of claims against a dentist for alleged substandard care under the West Virginia Medical Professional Liability Act ("MPLA"). Plaintiff failed to properly and timely comply with the MPLA and its requirement that a notice of claim and screening certificate of merit must be filed before filing a medical professional liability action against a health care provider. As a result, the Court determined that it lacked jurisdiction over the Plaintiff's claims and dismissed the claims presented against the dentist.

Dismissal Obtained For Failure to Prosecute.

Firm Member Natalie C. Schaefer and Associate David L. Shuman, Jr. recently obtained a dismissal with prejudice in a negligence action for Plaintiff's failure to prosecute his claims against SMS's clients. After over a year of Plaintiff's repeated failure to meaningfully prosecute his case, dismissal with prejudice was eventually granted by the trial court.

Multiple Appellate Wins on State Agency Qualified Immunity.

SMS Attorneys Lou Ann S. Cyrus and Kim Bandy obtained several dismissals on appeal to the Supreme Court of Appeals of West Virginia on state agency qualified immunity. In a series of

memorandum decisions, SMS client, a state agency, was dismissed for allegations of negligence based on the sexual misconduct of an employee which fell outside the scope of employment. Without evidence that the state agency violated a "clearly established law" in making discretionary decisions, the agency is entitled to qualified immunity for such otherwise negligent conduct.

SMS Member Dwayne E. Cyrus Obtains AV® rating from Martindale-Hubbell®.

SMS is proud to announce that Dwayne E. Cyrus has obtained the AV® Preeminent® rating from Martindale-Hubbell for ethical standards and legal ability. The AV® Preeminent® rating is a significant rating accomplishment - a testament to the fact that his professional peers rank his at the highest level of professional excellence. Martindale-Hubbell® Peer Review Ratings® are an objective indicator of a lawyer's high ethical standards and professional ability, generated from evaluations by other members of the bar and the judiciary in the United States.

Martindale-Hubbell® Peer Review Ratings® reflect a combination of achieving a very high general Ethical Standards rating and a Legal Ability numerical rating. A threshold number of responses is required to achieve this rating.

Recent 2015 SMS Rankings

SMS Attorneys Selected as Super Lawyers® and Rising Stars

SMS is proud to announce its 2015 nominees for Super Lawyers®. Once again, Founding Member David L. Shuman has been selected as a Super Lawyer® in West Virginia. We are also pleased to announce that Tim Linkous, Natalie C. Schaefer, Joseph T. Cramer, and Kimberly M. Bandy have been selected as Rising Stars. The final published list of Super Lawyers represents no more than 5% of the lawyers in West VIrginia. The Rising Stars selection process is the same as the Super Lawyers selection process, with one exception: to be eligible for inclusion in Rising Stars, a candidate must be either 40 years old or younger or in practice for 10 years or less. All attorneys first go through the Super Lawyers selection process. No more than 2.5% are named to the Rising Stars list.

Shuman, McCuskey and Slicer PLLC Named a 2015 Top Ranked Law Firm™ by Fortune Magazine®

Shuman, McCuskey, and Slicer PLLC has been recognized by Fortune Magazine and American Lawyer Media as a "Top Ranked Law Firm™" for 2015. This recognition is awarded to a select group of law firms in the United States which have ten or more attorneys, of which 33 percent or more are recognized as "AV Preeminent®." According to Martindale-Hubbell®, "the Martindale-Hubbell Peer Review Ratings are an objective indicator of a lawyer's high ethical standards and professional ability, generated from evaluations of lawyers by other members of the bar and the judiciary in the United States and Canada," and "AV Preeminent® is a significant rating accomplishment – a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence." The attorneys at Shuman, McCuskey, and Slicer recognized as AV Preeminent® are Members David L. Shuman, William R. Slicer, Lou Ann S. Cyrus, Dwayne E. Cyrus, Karen T. McElhinny, Timothy R. Linkous, and Natalie C. Schaefer, as well as Of Counsel and co-Founding Member John F. McCuskey.

SMS Selected by the U.S. News & World Report As "Top Law Firm."

Shuman, McCuskey, and Slicer, PLLC was designated a Metro Tier 2 "Best Law Firm" by U.S. News & World Report. The rankings are based on a rigorous evaluation process that includes a collection of client and lawyer evaluations, peer reviews from leading attorneys in their field, and reviews of additional information provided by law firms as part of the formal submission process. To be eligible for a ranking in a particular practice area and metro region, a law firm must have at least one lawyer who is included in Best Lawyers® in that particular practice area and metro. Best Lawyers® is the oldest peer-review publication in the legal profession. A listing in Best Lawyers® is widely regarded by both clients and legal professionals as a significant honor, conferred on a lawyer by his or her peers.

Legal Developments

Barrett v. Retton, No. 14-0047. In *Barrett*, the Court addressed several errors on appeal after a jury trial. One important issue on appeal was the trial court's decision to allow Plaintiffs to introduce evidence of payments made by Defendant's insurer to Defendant's expert witnesses. At trial, the trial court allowed the cross-examination concerning the affiliation of Defendants' witnesses with companies that had received more than $1 million for expert consultations over about a five-year period.

The Court noted that its decision to affirm the trial court's ruling was "[u]nder the limited facts supported by the appendix record on appeal." The Court stated that the trial court appropriately considered this evidence under the directive of Syllabus Point 2, *Reed v. Wimmer*, 195 W.Va. 199, 465 S.E.2d 199 (1995):

> An insured is presumed to be protected from undue prejudice from the admission of evidence of insurance at trial if the following requirements are met: (1) the evidence of insurance was offered for a specific purpose other than to prove negligence or wrongful conduct; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice; and (4) the trial court delivered a limiting instruction advising the jury of the specific purpose(s) for which the evidence may be used.

The Court held that the trial court did not abuse its discretion, "as any information about the relationships between each expert witness and State Farm Auto or its affiliates was offered for the purpose of showing witness bias, a purpose expressly authorized by Rule 411. Furthermore, that evidence was relevant to determinations about the credibility of those witnesses, and the court conducted the appropriate balancing test."

According to the Court, the references to insurance throughout the case were sufficiently restricted to the purpose of evaluating bias, and the trial court gave limiting instructions, directing

that any mention of insurance "was introduced for the sole and only purpose to inform the jury of how this witness may have been paid, so that the jury can consider it in evaluating [the witness's] credibility and believability."

Jennie Brooks, et al. v. City Of Huntington, No. 13-1083 (WORKMAN, J.) (Benjamin, J. concurs) Reversing an order of the Circuit Court of Wayne County granting the city's motion for remittitur following a jury award for the diminished value of the plaintiffs' homes as well as the cost to repair the homes' foundations. Holding in syllabus point 4, that: "When residential real property is damaged, the owner may recover the reasonable cost of repairing it even if the costs exceed its fair market value before the damage. The owner may also recover the related expenses stemming from the injury, annoyance, inconvenience, and aggravation, and loss of use during the repair period. If the damage cannot be repaired, then the owner may recover the fair market value of the property before it was damaged, plus the related expenses stemming from the injury, annoyance, inconvenience, aggravation, and loss of use during the time he has been deprived of his property. To the extent that Syllabus Point 2 of *Jarrett v. E. L. Harper & Son, Inc*., 160 W. Va. 399, 235 S.E.2d 362 (1977) states otherwise, it is hereby modified." Also holding, in syllabus point 5, that: "To the extent that damages for cost of repair to residential real property exceed the fair market value of the property before it was damaged, damages awarded for cost of repair must be reasonable in relation to its fair market value before it was damaged. The measure of reasonable cost of repair damages is an issue for the trier of fact, but may be found to be unreasonable as a matter of law if unreasonably disproportionate to the fair market value of the property prior to the damage." Further holding, in syllabus point 6, that: "Where the owner of residential real property which is damaged can establish that the pre-damage fair market value of the residential real property cannot be fully restored by repairs and that a permanent, appreciable residual diminution in value will exist even after such repairs are made, then the owner may recover both the cost of repair and for such remaining diminution in value."

In *Schumacher Homes of Circleville v. Spencer*, No. 14-0441, the Respondents Spencer signed a form contract with Petitioner Schumacher Homes for the construction of a house. The contract contained an arbitration clause, which contained a "delegation provision." The "delegation provision" arguably required the parties agreed to delegate, from the courts to an arbitrator, any question about the enforceability of the arbitration clause. The Spencers filed a complaint against Schumacher Homes for alleged defects in the house. The circuit court denied Schumacher Homes' motion to dismiss/compel arbitration, finding that the arbitration clause was procedurally and substantively unconscionable. Schumacher Homes appealed, arguing that the trial court should have enforced the delegation provision and referred the parties' claims about arbitrability to arbitration. The Supreme Court affirmed, holding (1) the delegation provision did not reflect a clear and unmistakable intent by the parties to assign to the arbitrator all questions about the enforceability of the arbitration clause; and (2) the circuit court was correct in deciding that the arbitration provision was unenforceable under West Virginia contract law.

In *Williams v. Werner Enterprises, Inc*., No. 14-0212, the Supreme Court of Appeals of West Virginia recently affirmed summary judgment in favor of Werner on the claim of intentional spoliation. Werner was sued for, among other things, intentional spoliation of evidence after

disposing of its tractor trailer after two of its employees died in a single-vehicle accident. In upholding summary judgment, the Court stated that:

> . . . we find no evidence to suggest that when Werner disposed of the tractor-trailer that it had any inkling of (let alone cognizance, awareness, a clear perception, or information that would impel it to inquire, ascertain, or find out about) a pending or potential product liability lawsuit, by the plaintiffs or anyone else. It is only with hindsight that the plaintiffs can justly say Werner "should have known." . . . We agree with the plaintiffs that Werner is a sophisticated entity, with on staff lawyers familiar with trucking accidents. But, until Werner received the letter on February 18, 2009, we can see no evidence indicating Werner perceived or even suspected impending future litigation over tractor-trailer defects by the plaintiffs. All of the evidence of record suggests that when the tractor-trailer was hauled to the landfill, Werner knew only that the plaintiffs had claims for workers' compensation benefits. The remains of the tractor-trailer were irrelevant to that claim.
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> The tort of intentional spoliation is designed to preclude a party from destroying evidence with the intent to harm another party's ability to bring or defend a legal claim. But the tort is not intended to unduly interfere with the rights of individuals to dispose of their property lawfully. Because there is no evidence of record to say Werner was aware, informed, perceived, or had any knowledge that would lead it to the conclusion the plaintiffs had a pending or potential suit when it destroyed the tractor trailer, the circuit court was correct in granting summary judgment.

In *SER Tallman v. Tucker*, the W.Va. Supreme Court addressed the issue of the problems faced with inadequate disclosures of expert opinion by plaintiffs. In *Tallman*, the plaintiff filed a vague expert disclosure. In response, defense counsel requested a full disclosure and objected to producing defense disclosures until it is received. When the plaintiff failed to do so, the defendant moved to strike plaintiff's expert. The court allowed the plaintiff "to supplement her expert witness disclosure of [the expert] by using the contents of the screening certificate of merit [he] prepared and signed…" Defense counsel filed its disclosure and then deposed plaintiff's expert filled with multiple undisclosed opinions. The defense experts reviewed those opinions and then defense counsel filed a supplemental disclosure. Plaintiff's counsel moved to strike the supplemental disclosure and the lower court granted it, requiring the defendant to seek a Writ of Prohibition.

In an opinion written by Justice Davis, the Court issued a Writ, stating "we find as a matter of law that Dr. Tallman seasonably supplemented his expert witness disclosure." The Court further stated:

> We begin by noting that the circuit court's order finds fault with Dr. Tallman for supplementing his expert witness disclosure fifteen days after the discovery cut-off

date. However, the order implicitly pardons Ms. Powell for not filing her initial expert witness disclosure until thirty-three days after the deadline for making such disclosure. The bedrock of our judicial system is fairness to all parties. In our view of the record, fairness was not shown to Dr. Tallman.

In addition to Ms. Powell disclosing her experts thirty-three days after the circuit court's initial scheduling order required her to make such disclosure, Dr. Tallman found Ms. Powell's expert disclosure was deficient. As a result of the inadequacy of Ms. Powell's expert disclosure, Dr. Tallman was forced to file a motion to compel disclosure in a manner that was required by Rule 26(b)(4). We find the late and inadequate disclosure by Ms. Powell was the cause of Dr. Tallman's inability to fully disclose the opinions of his experts within the initial and subsequent discovery cut-off dates.

Moreover:

The critical issue was not that Ms. Powell was merely restating information found in her screening certificate of merit. Rather, the critical issue for Dr. Tallman was that he now knew exactly who Ms. Powell's expert was and what opinions he would rely upon. While it is true that Dr. Tallman could have deposed [plaintiff's expert] Dr. Milewski as soon as he was listed as an expert, a party is not required to depose an expert in the dark. The very basis of expert disclosure under Rule 26(b)(4) is so that a party does not have to go on a fishing expedition in trying to determine what opinions the expert will rely upon at trial.

"*All truths are easy to understand once they are discovered; the point is to discover them*." -- Galileo Galilei

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