

SMS Quarterly

Shuman, McCuskey & Slicer, PLLC

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SMS Firm News

Tamara J. DeFazio Joins SMS, SMS Morgantown Expands

January first is virtually synonymous with freshness, excitement and anticipation for the good things to come during the new year. For SMS, January 1, 2008 was no exception as it welcomed the addition of Member Tamara J. DeFazio to its growing Morgantown office.

Though she is new to SMS, Ms. DeFazio is a seasoned litigator and no stranger to the courtroom. She has tried numerous cases to verdict and successfully argued many appeals before both the West Virginia Supreme Court and the United States Fourth Circuit Court of Appeals.

“We are committed to providing our clients with the best quality representation possible,” said founding Member John McCuskey, “and the addition of Tammy to our team serves to further our objectives. Her experience and dedication to the legal profession parallel our firm’s foundation, and we are very pleased to have her join us.”

SMS opened its Morgantown office in January 2006 with just one lawyer and with a goal of providing efficient and excellent legal representation to its clients throughout the entire state of West Virginia. Just two years later, SMS and its clients are witnessing the achievement of that goal as there are now five lawyers in the SMS Morgantown office: Timothy R. Linkous, Debra Bowers, Tamara J. DeFazio, Margaret Miner, and Krista Sheets Smith.

SMS is truly pleased to welcome Ms. DeFazio as a Member, and SMS looks forward to continually meeting the needs and surpassing the expectations of its clients.

SMS Lawyers Conclude 2007 With Continued Success

While Thanksgiving and the December Holiday Season consumed most people's attention over the last several months, SMS lawyers never slowed from their aggressive representation of clients. Many of the successful resolution of cases cannot be reported due to confidentiality agreements. However, there are several that are public record and worth noting, and those are reported below.

Jailhouse Rock

Firm Member Dwayne Cyrus and Associate Jason Wandling obtained a dismissal for their client in a case where an inmate sued a political subdivision alleging that he was sexually abused by a prison guard.

The Plaintiff's complaint alleged that the political subdivision was negligent and violated the Plaintiff's federal civil rights. However, Mr. Cyrus and Mr. Wandling argued that the political subdivision was not a "person" for the purposes of Section 1983 liability. Mr. Cyrus and Mr. Wandling also asserted that the political subdivision was immune from the Plaintiff's negligence claims pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act which states that such entities may not be held liable for negligence that occurs on the grounds of jails, places of juvenile detention, workhouses or any other detention facility.

Mr. Cyrus and Mr. Wandling filed a Motion to Dismiss, successfully argued the Motion, and the Court granted the relief they requested.

Going... Going... Gone!

Firm Member Timothy R. Linkous and Associate Margaret Miner obtained the dismissal of their client in a civil action filed against a political subdivision.

The Plaintiffs alleged that a County Commission negligently recorded tax assessments against real estate which deprived the Plaintiffs of notice of property taxes due and owing. Therefore, no one paid real estate taxes on the property for multiple years, and it was eventually sold at an auction held on the Court House steps. The Plaintiffs alleged that the Commission negligently sold the property without proper notice and an opportunity for the Plaintiffs to redeem it.

Mr. Linkous and Mrs. Miner filed a Motion to Dismiss based upon the immunity conferred upon political subdivisions pursuant to the West Virginia Governmental Tort Claims and Insurance Reform Act which immunizes them from claims of negligent assessment or collection of taxes lawfully imposed. The Plaintiffs argued that the immunity was inapplicable because the taxes were not lawfully imposed, and the West Virginia Supreme Court has never interpreted that specific immunity provision.

After the Court considered the pleadings and the arguments of counsel, it agreed with the analysis set forth by Mr. Linkous and Mrs. Miner, and it granted the Motion to Dismiss.

Beer Belly Flop

Associate Heather Lord and Member John McCuskey obtained summary judgment for their client in a declaratory judgment and bad faith civil action involving a slip and fall on spilled beer.

The insured Swim Club was operating a concession stand at the Charleston Civic Center during a concert, and one of the concert-goers slipped on spilled beer in front of the concession stand. The injured party brought a claim against the Swim Club, and its insurer denied the claim because the policy covered bodily injury claims occurring on the designated premises (i.e. the physical location of the Swim Club) or arose out of the designated “project” (i.e. the operation of the private Swim Club).

Ms. Lord and Mr. McCuskey argued that summary judgment was appropriate because the injury occurred while members of the Swim Club were operating a beer concession stand during an event wholly unrelated to the Swim Club, and, thus, it did not arise out of the designated project. They also asserted that the operation of the concession stand was an outside event and a special event about which the insurer was never provided any information to enable it to evaluate the risk.

After considering the pleadings and the arguments of counsel, the Court agreed with Ms. Lord and Mr. McCuskey, and it granted their client (the insurer) summary judgment.

Let Me Out!

Associate Margaret Miner successfully argued a Motion to secure a dismissal of her client with prejudice in a construction negligence case. The Plaintiff alleged that his brand new home was poorly constructed, and he sued the general contractor for damages that he sustained as a result of a roof leak. The general contractor sued Mrs. Miner’s client, a subcontractor, as a third-party defendant, and there were multiple claims among and between the various parties. Mrs. Miner eventually resolved her client’s differences with the general contractor.

However, the home owner refused to release the subcontractor from the case, and he objected to a dismissal with prejudice. The home owner argued that his right of contribution, right of indemnity and/or right to file claims against the subcontractor would be jeopardized if there were a dismissal with prejudice.

The Court agreed with Mrs. Miner, and it permitted the dismissal of her client, with prejudice.

Rx: Lawsuit – No Refills

Member Mark W. Browning recently obtained the dismissal of his clients, a cardiologist and his medical corporation, in a medical professional liability civil action. Mr. Browning successfully argued that the Plaintiff was compensated for his injuries from a federal class action, and, as such, he was precluded from bringing a state medical malpractice claim.

The Defendant-physician was the decedent's cardiologist, and he gave her a prescription for the diet drug, Redux, with three refills. The decedent, a school teacher, took the medication for 135 days, and then died suddenly some four years later in the classroom. The autopsy reported the cause of death as Mitral Valve Prolapse, and the Plaintiff's expert opined that the physician failed to monitor the decedent while she was taking the diet drug, and that he failed to diagnose and treat myxomatous degeneration of the patient's mitral heart valve.

The drug's manufacturer, American Home Products Corporation, had previously entered into a "Nationwide Class Action Settlement Agreement" which released physicians from liability associated with prescribing the drug. In fact, the Plaintiff registered to receive benefits from the class action, and he never opted out thereof.

Mr. Browning then instituted a separate Motion in the United States District Court for the Eastern District of Pennsylvania seeking enforcement of the class action settlement agreement. The Plaintiff argued that the national class action settlement agreement did not apply to the West Virginia cardiologist because the agreement did not include his name as a released party. However, U.S. District Judge Harvey Bartle, III granted Mr. Browning's Motion to enforce the settlement agreement, and he further enjoined the Plaintiff from prosecuting the action in state court. Thereafter, the state court recognized the federal court's Order, and the action was dismissed.

Mr. Browning was not only successful in defending the medical malpractice action, but he also won another victory in the case. Specifically, he argued for and received all attorney fees and defense costs from American Home Products Corporation pursuant to an indemnification agreement.

SMS Attorneys Admitted To 4th Circuit Court Of Appeals

We are pleased to announce that Member Karen McElhinny, Member Timothy R. Linkous and Associate Margaret Miner were recently admitted to practice law before the United States Court of Appeals for the Fourth Circuit. SMS handles virtually all types of civil litigation in both state and federal court.

SMS Is A Firm That Truly Provides Caring and Comprehensive Representation

If you are searching for a medium sized firm with a family aura and enormous attributes, look no further! Allow Shuman, McCuskey & Slicer, PLLC to provide you with what you are looking for.

SMS is a medium size firm by West Virginia standards, and this allows clients to have direct access to the Members representing them while maintaining the efficiency clients have come to expect with the assistance of qualified Associates. SMS also is known for its “family atmosphere.” Not only are SMS lawyers a cohesive group of dedicated individuals, but clients also develop long lasting professional relationships with them.

SMS is unique among law firms because although it is a medium sized firm, it offers clients a very wide range of legal services and litigation representation in every Court that governs West Virginia civil litigation.

If there is a civil action that arises in a Court situated in West Virginia, there is an SMS lawyer who is capable of representing parties through all aspects of the litigation and appeal, including the following Courts:

- Supreme Court of Appeals of West Virginia
- Northern District of West Virginia
- Southern District of West Virginia
- Fourth Circuit Court of Appeals
- United States Supreme Court

Additionally, SMS has attorneys licensed in West Virginia, Kentucky, Pennsylvania, and Ohio. “We find that many of our clients have matters that require attorneys licensed in bordering states,” stated Founding Member William Slicer. “We have successfully handled matters in several bordering states, and we welcome our clients to utilize our services in and out of West Virginia.”

SMS is not the typical medium sized insurance defense litigation firm. While all of the SMS attorneys actively handle insurance defense litigation, SMS offers services in numerous other areas. For instance, SMS attorneys practice in and regularly address legal issues in the following areas:

- Accounting Professional Liability
- Administrative and Regulatory Law
- Appellate Advocacy
- Bank Operations Law
- Cemetery and Funeral Home Law
- Commercial Litigation
- Complex Litigation
- Constitutional Law
- Construction Law
- Contract Law
- Debtor/Creditor Litigation
- Deliberate Intent Litigation
- Dental Professional Liability
- Domestic Litigation
- Education Law and Litigation
- Employment and Labor Law
- Environmental Law
- E&O Litigation
- Estate Litigation and Administration
- Estate Planning
- Farm and Agricultural Litigation
- First Party Bad Faith Litigation
- Flood Litigation
- Health Care Law
- Infant Summary Proceedings
- Insurance Coverage Disputes
- Insurance Defense
- Legal Professional Liability
- Legal Seminar Presentations
- Manufactured Housing Litigation
- Mass Tort and Class Action Litigation
- Medical Professional Liability
- Municipal & County Governmental Liability
- Natural Resources Law
- Nursing Home Negligence
- Personal Injury Litigation
- Predatory Lending Litigation
- Premises Liability Litigation
- Product Liability
- Risk Management Assessments
- Sexual Harassment Litigation
- Sexual Abuse Litigation
- Silica Litigation
- State Governmental Liability

- Trust Formation and Drafting
- Trust Litigation
- Underinsured Motorist Litigation
- Uninsured Motorist Litigation
- Workers' Compensation Law
- Wrongful Death Litigation
- And much more.

If you have any legal need, please feel free to consult one of our many excellent attorneys who will assist you with resolving the issue

Legal Seminars Available

While SMS attorneys actively and aggressively defend numerous cases in the courtroom, they are never too busy to take some extra time to present Legal Seminars to clients.

SMS attorneys regularly give Legal Seminars to clients on a broad range of topics including Estate Planning, Healthcare Law, Insurance Law, Litigation Law Updates, Medical Professional Liability, and much more. If you are interested in a Legal Seminar, please contact one of our attorneys today.

Legal Developments

Recent Decisions from the Supreme Court of Appeals of WV

This section of the SMS Quarterly usually showcases one or two decisions from the Supreme Court of Appeals of West Virginia, and provides a brief summary of a few others that might prove beneficial to our clients. However, in this edition of the SMS Quarterly, we have chosen to showcase only one area of emerging law: the constitutionality of the Medical Professional Liability Act ("MPLA"), specifically Section 55-7B-6. Many of our clients insure health care professionals or are a part of the health care profession itself. Therefore, we present the following discussion of how the constitutionality of the MPLA has been discussed in recent opinions by justices of the Supreme Court of Appeals of West Virginia ("WVSC").

MPLA Amendments: A Lasting Change Or Hanging By A Thread?

After what many recognize as a health care crisis in West Virginia, the Legislature enacted significant changes to the MPLA in 2001 and 2003. Those changes included a pre-suit notice of claim (“NOC”) and a pre-suit certificate of merit (“COM”) from a qualified expert swearing, under oath, that the case has merit. The changes resulted in a decreased number of lawsuits filed against healthcare professionals, physicians returning to the state, and an insurance premium reduction for many insureds. In short, the amendments appeared to have achieved their objective. But the salient question is: will the changes last? The answer lies with the WVSC as it is continually faced with a barrage of appeals raising the constitutionality of the MPLA amendments. How will the WVSC Justices vote with respect to the NOC and COM pre-suit requirements?

The WVSC is composed of five Justices: Robin Davis, Larry Starcher, Elliott “Spike” Maynard, Brent Benjamin and Joseph Albright. Only four of the five justices have made known their positions:

In her concurring opinion in Hinchman v. Gillette, 217 W.Va. 378, 618 S.E.2d 387 (2005), Justice Robin Davis declared her belief that the COM and NOC requirements were clearly unconstitutional. She stated that these provisions found in the MPLA violated the Separation of Powers, the Rule-Making and the Certain Remedy Clauses of the West Virginia Constitution. She reiterated her belief in her dissenting opinion in Davis v. Mound View Health Care, Inc., 220 W.Va. 28, 640 S.E.2d 91 (2006), and in her concurring opinion in Elmore v. Triad Hospitals, Inc., 220 W.Va. 154, 640 S.E.2d 217 (2006).

In his dissenting opinion in Blankenship v. Ethicon, Inc., 2007 WL 3034262 (W.Va.), Justice Larry Starcher stated that he agreed with Justice Davis’ position and added, “The MPLA blatantly tramples upon the separation of powers doctrine.”

In the Hinchman decision, Justice Spike Maynard concurred, in part, and dissented, in part, and he concluded that the COM and NOC requirements of the MPLA are constitutional. Essentially, he stated that the WVSC can make rules pertaining to cases only *after* they are filed, and since the COM and NOC were *pre-suit* requirements, the

WVSC's authority is inapplicable. Rather, the Legislature reserves the power to make rules before a suit is filed, and it did so legitimately in the MPLA.

In the Elmore decision, Justice Brent Benjamin dissented to the majority opinion, and he added that he believes the COM and NOC requirements of the MPLA are constitutional as well. (If you are counting, that is 2 votes in favor of upholding the constitutionality and 2 votes against).

The "swing" vote on this issue comes down to Justice Joseph Albright. Although Justice Albright has not overtly made his opinion known, there are two sources of information that suggest he would find the COM and NOC provisions constitutional.

First, Justice Albright was part of the majority in the Elmore decision (*per curiam*). During its analysis of the pertinent case issues, the Elmore Court stated that, "This Court's constitutional authority to promulgate procedural rules regarding process is expressly limited to 'cases and proceedings, civil and criminal, for all of the courts of the State.'... As a result, since the Legislature has reserved the authority in this province, only the Legislature may provide further clarification regarding the method of service or direction regarding reconciliation of the various provisions of West Virginia Code Section 55-7B-6." In other words, the Elmore Court concluded that the pre-suit requirements were not subject to the Rule-Making Clause for the WVSC. By making this statement, the Elmore Court essentially undercut Justice Davis' arguments and placed its seal of constitutional approval on the COM and NOC requirements. Of course, Justice Davis made it clear that the salient portion of the Elmore decision was merely *dicta* and not controlling. It should be noted that the decision was *per curiam* and the constitutionality issue was not directly before the Court.

Finally, in his Blankenship dissent, Justice Starcher provided insight into how Justice Albright would vote on this issue: "Unfortunately, only a minority of the members of this Court are currently willing to recognize the substantial constitutional problems created by the MPLA." Inasmuch as Justice Starcher and Justice Davis clearly think the COM and NOC requirements are unconstitutional and there is only a minority who believe as such, it must be inferred that Justice Albright believes that the requirements are constitutional.

Therefore, it appears that the COM and NOC provisions are safe for now – or at least until the next WVSC election.

SMS Lawyer Highlight

Member Tamara J. DeFazio

Originally from Clarksburg, West Virginia, Ms. DeFazio graduated Phi Beta Kappa from West Virginia University, and she completed her legal education at the West Virginia University College of Law where she was a member and Manuscript Editor for the West Virginia Law Review.

In addition to providing aggressive legal representation to litigants throughout her 17 year career, she has also lectured to state and county administrators on such topics as the legislative reforms set forth in the West Virginia Governmental Tort Claims and Insurance Reform Act, the law of search and seizure in the schools and the constitutional rights of students.

Ms. Defazio is also active outside the Courtroom. She currently is a Member of the Board of Governors for the Defense Trial Counsel of West Virginia, and she recently completed her tenure with the Salvation Army Board of Advisors in Marion County.

Ms. DeFazio represents a diverse group of clients including municipalities, governmental agencies, health care providers, mental health facilities, and general litigants. Her practice involves insurance defense litigation, professional malpractice, and other civil litigation. Her representative cases include the following:

- Fox v. Castranova, 911 F.2d 722 (4th Cir. 1990) (Affirming summary judgment in favor of defendant police officer);
- Lewis v. WYK Associates, Inc., 4 F.3d 985 (4th Cir. 1993) (Affirming summary judgment in favor of defendant architect);
- State Farm Mutual Automobile Ins. Co. v. Norman, 191 W.Va. 498, 446 S.E.2d 720 (1994) (Upholding physical contact requirement as condition precedent to uninsured motorist coverage);
- Mallamo v. Town of Rivesville, 197 W.Va. 616, 477 S.E.2d 525 (1996) (Affirming summary judgment in favor of defendant municipality);

- Columbia Gas Transmission Corp. v. Drain, 191 F.3d 552 (4th Cir. 1999) (Judgment in favor of gas company reversed on jurisdictional grounds);
- Haney v. Preston County Comm., 575 S.E.2d 434 (W.Va. 2002) (Employer County Commission is exempt from provisions of state overtime law where at least 80% of its employees are subject to federal overtime regulations);
- Arbaugh v. Pendleton Co. BOE, 591 S.E.2d 235 (W.Va. 2003) (No private cause of action exists against a mandatory reporter under W.Va. Section 49-6A-2 for failure to report suspected child sexual abuse);
- Porter v. Grant Co. BOE, 219 W.Va. 282, 633 S.E.2d 38 (2006) (Certified question answered in favor of no liability for BOE during a slip and fall after a winter storm); and
- Barbina v. Curry, 221 W.Va. 41, 650 S.E.2d 140 (2007) (Affirming summary judgment in favor of defendants who allegedly failed to report child sexual abuse).

Ms. DeFazio is a Member of SMS and practices in the SMS Morgantown office.

Quarterly Quote:

“Time is the best teacher, but unfortunately, it kills all of its students.”

– Robin Williams

(Timothy R. Linkous is the member responsible for this publication. This publication is an advertisement for Shuman, McCuskey & Slicer, PLLC).