SMS Quarterly

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SMS Firm News

SMS Lawyers Licensed in Multiple Neighboring States

In 2008, Shuman, McCuskey & Slicer, PLLC expanded the geographical locations in which it provides services for clients. SMS is known for its quality legal services in West Virginia, and now its clients enjoy representation in Kentucky, Ohio and Virginia.

Christopher Sears, an SMS Member in the firm's Charleston office, obtained admission to the Ohio Bar last year. Timothy Linkous, an SMS Member in the firm's Morgantown office, became licensed in Virginia in December 2008. Mark Browning, an SMS Member in the firm's Charleston office, has been a member of the Kentucky Bar since 1985.

"Our West Virginia locations are in very close proximity to other states," remarked founding member William Slicer. "Enlarging the geographical area in which we practice was a logical and progressive step. Clients are taking advantage of this move as we are already representing clients in states other than West Virginia."

If you would like more information about SMS lawyers, their areas of practice, or the states in which they are licensed, please contact one of our lawyers or go to www.shumanlaw.com.

SMS Family Lends a Helping Hand With New Hire

Beginning in January 2009, the SMS Morgantown Office hired Cliff Linkous, a mentally disabled individual with Williams' Syndrome, to assist with various office tasks.

Cliff is the brother of Timothy Linkous, an SMS Member in the Morgantown Office. "Cliff is a wonderful person who is extraordinarily friendly and thoughtful to those around him," commented Linkous. "We have always been close with one another, but, frankly, I never thought we would work in the same office. It is truly a blessing for me."

Cliff is enrolled with PACE TEC, Inc., a nonprofit Community Rehabilitation Program that assists individuals with disabilities to reach their desired level of vocational accomplishment and to afford them with opportunities to enhance their quality of life. PACE TEC assists those individuals to find employment in their communities.

"I knew that Cliff was actively searching for a situation that best suited him, and he was having some difficulty locating employment with demands he could physically meet," stated Linkous. "One day, he just asked me whether our Morgantown office could use some extra help for several hours each week, and we needed someone to assist with shredding, copies and other small tasks. It was a perfect fit."

Cliff is an avid fan of the West Virginia University Mountaineers and the WVU Marching Band. He loves to listen to his collection of over 500 musical albums, and he is an active member of his church. When he is not listening to music or participating in a church activity, he can often be found at Milan Puskar stadium watching the Mountaineer football team practice and interacting with coaches. SMS welcomes Cliff into its family.

SMS Lawyer News

With the holidays in November and December, Court activity was slower than in previous months. However, SMS lawyers did not slow down from their commitment to aggressive representation of clients. Here are a few of the success stories from the last quarter of 2008:

Deliberate Intent Mining Case Dismissed on Summary Judgment

Congratulations to Associate Christopher Negley who recently obtained an Order granting a Motion for Summary Judgment in a deliberate intent case filed in the Circuit Court of Raleigh County, the Honorable Judge Robert A. Burnside presiding.

The lawsuit arose out an incident wherein the Plaintiff was injured by a moving mine machine that was powered by a trailing electrical cable. The Plaintiff's job assignment was to walk beside or behind the machine to keep the power cord from being run over by the machine and to keep the cord out of water on the mine floor.

Rather than walk near the machine, the Plaintiff stepped onto the machine to ride on it while controlling the location of the cord.

There was a low clearance between the machine and the mine roof, and when the machine entered a dip or decline in the floor, it would tilt and reduce the clearance between the top of the machine and the mine roof. The Plaintiff was injured on such an occasion while he was riding on the machine.

In deposition, the Plaintiff testified that it was his decision to ride on the machine rather than walk beside or behind it. He never testified that any person in authority instructed him to ride the machine. To the contrary, the Plaintiff's immediate supervisor testified that he instructed the Plaintiff not to ride on the machine, and he also informed the Plaintiff of the dangers associated with that behavior.

In opposing the Motion, the Plaintiff made several arguments, including that the Defendant knew of the danger associated with riding the machine, that the Defendant filed a false report with MSHA, that the faulty electric cable and the manner in which it was used were a dangerous condition, and that hearsay evidence established that the Plaintiff's boss instructed the Plaintiff to ride on the machine. The Court rejected all of these arguments, and entered summary judgment in favor of the Defendant.

Division of Corrections Case Dismissed

Firm Member Dwayne Cyrus and Associate Jason Wandling obtained a dismissal in a civil rights case for a corrections officer employed by the West Virginia Division of Corrections. The Plaintiff, an inmate at the facility where the officer worked, alleged that the officer attempted to choke the inmate, beat the inmate's head against a wall, and harassed the inmate by spraying liquids on him with an improvised device crafted from a surgical glove, and dumping the inmate's food tray on his head.

The Federal Court dismissed the case after brief discovery revealed that the Plaintiff could prove no set of facts that would give rise to a legitimate claim against the WVDOC or its officers.

Court Orders Depositions of WV Mine Inspectors

Associate Christopher Negley recently obtained a ruling allowing WV mine inspectors to be deposed. Federal law generally prohibits the depositions of federal mine inspectors, and when the West Virginia Office of Miners Health Safety & Training was asked to allow its inspectors to be deposed, it refused.

Mr. Negley then subpoenaed the inspectors for depositions, and WVOMSHT moved to quash the subpoena citing multiple grounds for the Motion. After considering the arguments and applicable law, the Circuit Court of Boone County, the Honorable Judge William Thompson presiding, denied the Motion, and the depositions went forward.

Legal Developments

For those of us who regularly practice and/or have cases involving the interpretation of insurance policies, the following decision will provide useful information. The case summary and analysis was prepared by Attorney Robert Russell and edited by Member Timothy R. Linkous.

American Modern Home Ins. Co. v. Jeff Corra, et al.,
The Supreme Court of Appeals of West Virginia, December 15, 2008

The Supreme Court of Appeals of West Virginia wrapped up an active session this Fall, as the Court prepared to welcome Justices Workman and Ketchum to its ranks. In one of the late opinions of the session, this one authored by outgoing Chief Justice Maynard, the Court again addressed the question of what is an "occurrence" within the meaning of a policy of liability insurance. In *American Modern Home Ins. Co. v. Jeff Corra, et al.* (W.Va.Sup.Ct., December 15, 2008), the Court was presented with a certified question from the United States District Court for the Southern District of West Virginia. The certified question concerned whether "knowingly permitting an underage adult to consume alcoholic beverages on a homeowner's property constitutes an 'occurrence' within the meaning of the . . . homeowner's policy at issue in this case?"

Several underage individuals attended a party at the home Jeff Corra and at the invitation of his daughter. Mr. Corra was present at the home, although he was apparently outside burning brush during much of the evening. One of the underage individuals, Courtney McDonough, consumed part of a beer that she took from Mr. Corra's refrigerator. Several of the individuals, including Ms. McDonough, then left to purchase alcohol using a fake identification of one of the party goers. They then returned to Mr. Corra's residence where Ms. McDonough consumed several more beers. Several individuals, including the eventual plaintiff and plaintiffs' decedents, then left in a car driven by Ms. McDonough. They were involved in an automobile accident in which two were killed and one seriously injured. Ms. McDonough pleaded guilty to two counts of driving under the influence causing death and one count of driving under the influence causing injury. Mr. Corra was charged and convicted of four counts of knowingly providing alcohol to underage persons.

The estates of the two deceased passengers and the injured passenger gave notice to Mr. Corra that they intended to make claims against his homeowner's policy with American Modern Home Insurance Company. They alleged that Ms. McDonough had consumed alcohol as a social guest on Mr. Corra's property. American Modern filed an action in the United States District Court for the Southern District

of West Virginia against Mr. Corra, Ms. McDonough and the putative plaintiffs, seeking a declaration that the injuries to the putative plaintiffs and their decedents were not covered by the homeowner's policy issued to Mr. Corra and that American Modern had no duty to defend or indemnify Mr. Corra against such claims.

American Modern filed a motion for summary judgment, arguing that the injuries were not caused by an "occurrence" under the terms and conditions of the policy. The policy defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in . . . bodily injury; or . . . property damage." The district court then certified the question to the West Virginia Supreme Court of Appeals.

After tracing the jurisprudential history of terms such as "occurrence" and "accident" in West Virginia, the Court concluded that coverage does not exist where the injury is the result of such conduct on the part of a homeowner. The Court explained that "we believe it obvious that where a homeowner engages in conduct knowingly, that conduct clearly cannot be said to be unexpected and unforeseen from the perspective of the homeowner." In so doing, the Court focused on the conduct of the homeowner and not the alleged injury that resulted therefrom.

The holding in *American Modern* could signal a departure from a fairly recent decision by the Court. Looking at the same definition of "occurrence" in *Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W.Va. 250, 617 S.E.2d 797 (2005), the Court determined that the suicide deaths by two inmates at the Randolph County Jail were not deliberate, intentional, expected, desired, or foreseen by the Randolph County Commission and, therefore, there is potential insurance coverage under the Commission's Commercial General Liability policy. In *Columbia Casualty*, the allegations against the Commission included negligence, but also deliberate indifference to the civil rights of the inmates – a fact that the United States District Court for the Northern District of West Virginia seized upon in deciding against coverage and defense of the insured.

In both *Columbia Casualty* and *American Modern*, the Court evaluated the "occurrence" from the perspective of the policy holder. However, the Fourth Circuit's certified question in *Columbia Casualty* asked whether the suicidal deaths were "occurrences" under the applicable policy while the Southern District's certified question in *American Modern* asked whether the homeowner's conduct of "knowingly permitting" the consumption of alcohol on his property constituted an "occurrence." The Court in *American Modern* did not address the distinction between the instant certified question and that in *Columbia Casualty*. Likewise, the Court in *American Modern* did not discuss the traditional approach in West Virginia of resolving doubts regarding insurance coverage in favor of an insured. *See, e.g.*, Syl. Pt. 5, *Tackett v. American Motorists Ins. Co.*, 213 W.Va. 524, 584 S.E.2d 158 (2003).

Only time will tell whether the Court addresses the apparent conflict between the holdings in *Columbia Casualty* and *American Modern*. Policy holders and insurers, alike, should consult their policies and counsel regarding this and other ramifications of the West Virginia Supreme Court of Appeals' decision in *American Modern Home Ins. Co. v. Jeff Corra, et al.* (W.Va.Sup.Ct., December 15, 2008).

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

Quarterly Quote: "The power of the lawyer is the uncertainty of the law." – Jeremy Bentham

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