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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

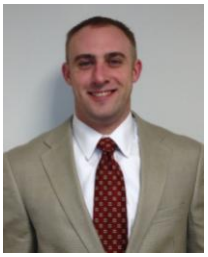
Shuman, McCuskey & Slicer PLLC

SMS Is Pleased to Welcome Its Newest Attorneys!

SMS is pleased to announce three lawyers recently joined our firm: Phil Sword and David L. Shuman, Jr. in our Charleston office and John Blanc in our Morgantown office.

With the continued economic downturn, many law firms are cutting lawyers from their rosters and, in turn, decreasing their ability to offer a wide range of services and experienced lawyers to their clients. However, SMS is committed to providing the best quality and most comprehensive legal representation to its clients regardless of the current economy.

If you have not already met or worked with Phil, David, or John, we look forward to introducing them to you in the very near future.



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SMS News

SMS Walks for Alzheimer's

In October, SMS attorneys and staff participated in Charleston's Walk to End Alzheimer's. The Alzheimer's Association Walk to End Alzheimer's™ is the nation's largest event to raise awareness and funds for Alzheimer's care, support and research. Held annually in more than 600 communities nationwide, this inspiring event calls on participants of all ages and abilities to reclaim the future for millions. Together, we can end Alzheimer's disease, the nation's sixth-leading cause of death.

SMS Attorneys Again Author National NAESP "Legal Matters!" Education Law Newsletter.

In January, SMS attorneys Natalie C. Schaefer and Kim M. Bandy authored an article regarding evaluations of education staff.

As a joint initiative of the National Association of Elementary School Principals Foundation (NAESPF) and Shuman McCuskey & Slicer, PLLC, SMS continues to publish *Legal Matters!* which appears bimonthly. *Legal Matters!* raises awareness of legal issues in education, identify the resources available to when faced with potential legal liability and discuss best practices generally for educators nationally. For more information, please visit http://www.naesp.org/.

Morgantown Office Focuses on Volunteering.

Every holiday season, our Morgantown office staff is offered one day off from work in exchange for one day of volunteerism at a charity of their choice. Sandy Strickler volunteered at the Mary Babb Cancer Center for the "Comfort Fund." This program provides toys, food and other necessities to assist families who are having a difficult time while going through cancer treatments during the year. This year there were three families selected with one or both of the parents receiving treatment with children to support. A wish list was provided by each child, and Ms. Strickler assisted in obtaining items from the wish lists, as well as food and necessary assistance with utilities.

SMS Attorney Publishes Article on West Virginia's Importance in International Trade.

SMS attorney Charlotte R. Lane was featured in the Fall 2012 issue of CAPACITY, a publication of the Robert C. Byrd Institute. Ms. Lane's article focuses on West Virginia's importance in the international trade arena. Ms. Lane joined the firm following her eight years as a Commissioner on the United States International Trade Commission (USITC). She was appointed to the USITC by President George W. Bush and confirmed by the United States Senate.

RCBI
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SMS Lawyer Victories

Summary Judgment in Religious Discrimination Case Upheld By Fourth Circuit.

Member Dwayne Cyrus and Associate Kim Bandy were recently successful in defending a matter on behalf of a State agency before the U.S. Fourth Circuit Court of Appeals. Mr. Cyrus had previously won a motion for summary judgment on behalf of the agency in District Court and plaintiff had appealed to the Fourth Circuit. The case involved an inmate who alleged that his constitutional right to practice his Taino religion was unduly burdened by the corrections facility when the Plaintiff was not permitted to smoke cigars, grow his hair long and listen to salsa music without limit. The Fourth Circuit upheld the District Court's finding that the Plaintiff's constitutional rights were not violated as a matter of law and that the Defendant was entitled to qualified immunity.

Dismissal under West Virginia's Medical Professional Liability Act.

Members David L. Shuman and Roberta F. Green achieved dismissal of a medical professional negligence claim based on the plaintiff's failure to comply with the pre-suit requirements of West Virginia's Medical Professional Liability Act (MPLA). Specifically, the SMS attorneys challenged plaintiff's position that the administration of a medication to a patient who allegedly was allergic to it fell within the common knowledge exception to the mandate for a pre-suit attestation of error from an appropriate medical expert, *i.e.*, a Screening Certificate of Merit (SCOM). Plaintiff had agreed to provide an expert eventually on the alleged permanent damage sustained by the patient, although no such information was provided pre-suit. Argued Mr. Shuman and Ms. Green, the medical evidence did not support plaintiff's allegation of allergic reaction in that none of the four treating physicians diagnosed the reaction at that time. Additionally, the patient's subsequent medical records did not reflect continuing medical conditions or problems, contrary to plaintiff's allegations. Therefore, a SCOM was a necessary predicate to suit. The Circuit

Court of Raleigh County, West Virginia, agreed, finding that a dismissal was warranted in this instance.

Dismissal of PSD With Prejudice.

Member Roberta Green and Associate Heather Osborn obtained a voluntary dismissal, with prejudice, of their client, a Public Service District, in an action involving a claim by plaintiff that she inadvertently stepped into a hole at or near a meter well, causing her to fall while taking out her garbage. Plaintiff alleged that the PSD failed to maintain the area at issue.

Ms. Green and Ms. Osborn filed a motion to dismiss on behalf of the PSD, contending that, under West Virginia law, while a PSD is required to respond to consumer complaints, which the PSD timely did, plaintiff had failed to identify any prior knowledge that the PSD had of an issue or problem at this location, failed to identify a specific duty the PSD had to do something preemptively, and failed to identify the source of any duty beyond that identified by and complied with by the PSD. Based on the arguments of Ms. Green and Ms. Osborn, plaintiff agreed to voluntarily dismiss her claim against the PSD.

Voluntary Dismissal of Medical Malpractice Claim.

SMS Member Mr. Linkous and Associate Ms. Tampoya recently obtained a voluntary dismissal of a plaintiffs' medical malpractice claim against SMS's client, a physician. Plaintiffs alleged that our client, an emergency medicine physician, breached the standard of care in ordering nitroglycerin for a patient who presented to the emergency department complaining of chest pain and shortness of breath. At mediation, the plaintiffs' agreed to voluntarily dismiss our client.

Legal Developments

In *RK v. St. Mary's Med. Center*, filed November 15, 2012, No. 11-0924, the West Virginia Supreme Court of Appeals reversed the dismissal of a complaint for breach of medical record confidentiality finding the action was not preempted by HIPAA and not subject to the MPLA. The Court specifically stated:

> Based upon the foregoing authority, we conclude that state common-law claims for the wrongful disclosure of medical or personal health information are not inconsistent with HIPAA. Rather, as observed by the court in *Yath*, such state-law claims compliment HIPAA by enhancing the penalties for its violation and thereby encouraging HIPAA compliance. Accordingly, we now hold that common-law tort claims based upon the wrongful disclosure of medical or personal health information are not preempted by the Health Insurance Portability and Accountability Act of 1996.

On the applicability of the Medical Professional Liability Act, the Court noted:

> Examining the factual circumstances in which this Court has found the MPLA to apply, we agree with the circuit court that the allegations asserted in the instant case, which pertain to the improper disclosure of medical records, does not fall within the MPLA's definition of "health care," and, therefore, the MPLA does not apply. Accordingly, we affirm the circuit court's order insofar as it refused St. Mary's motion to dismiss for failure to comply with the pre-suit requirements of the MPLA.

In *Jenkins v. City of Elkins*, filed November 15, 2012, No. 11-1059, the Court affirmed summary judgment, finding that UIM coverage is only available where there is a viable claim against a tortfeasor. The Court issued several new syllabus points:

2. Under the definition of uninsured motor vehicle contained in W. VA. CODE § 33-6-31 (c) (1998) (Repl. Vol. 2011), uninsured motor vehicle coverage is triggered when a person sustains an automobile injury or loss that is caused by a tortfeasor who is immune from liability.

3. The phrase "legally entitled to recover" contained in the uninsured motorist statute, W. VA. CODE § 33-6-31(b) (c) (1998) (Repl. Vol. 2011), is construed to mean that an insured is entitled to uninsured coverage merely by establishing fault on the part of the tortfeasor and the amount of the insured's damages. Under this definition, the fact that a tortfeasor is immune from liability will not preclude recovery of uninsured motorist benefits.

4. An uninsured motor vehicle policy exclusion for a government owned vehicle is against the public policy of this State and is therefore void and unenforceable.

5. An employer's insurance policy that excludes coverage for auto medical payment benefits to an employee who sustained an injury arising out of and in the course of employment is only enforceable to exclude medical payment coverage for that part of a claim that exceeds the amount subrogated by the employer's workers' compensation carrier.

In *State Farm v. Schatken,* filed November 16, 2012, No. 11-1142, the Court addressed the "non- duplication" provision in the plaintiffs' State Farm policy which provided UIM coverage. The Court held State Farm appropriately applied the provision to reduce the available coverage to the plaintiff by her receipt of med-pay benefits and a settlement from the primary tortfeasor. "We find that the application of the non-duplication provision in State Farm's policy is not an attempt to reduce the 'monetary extent of its coverage,' as in *Cunningham*, but rather prevents double

recovery of damages, and is therefore governed by our analysis in *Youler*." State Farm did not improperly reduce its coverage, but "[r]ather, after calculation of the gross settlement value of Mrs. Schatken's injury claim, reductions were made for the tortfeasor's liability limits and the medical payments coverage, to achieve a 'net' settlement value upon which the offers were being made."

The Court held that a "non-duplication" of benefits provision in an underinsured motorist policy which permits an insurer to reduce an insured's damages by amounts received under medical payments coverage does not violate the "no sums payable" language of W. Va. Code § 33-6-31(b), insofar as it does not serve to reduce the underinsured motorist coverage available under the insured's policy.

Sayre v. Westfield, filed November 26, 2012, No. 11-1135, arose from an underlying motor vehicle accident, which ultimately led to the Plaintiff/Petitioner filing a "bad faith" suit against Westfield. The Petitioner appealed an Order from the Circuit Court of Jackson County which granted Westfield's Motion to Dismiss or, in the alternative, Motion for Summary Judgment.

The Petitioner's son had passed away from injuries sustained in an automobile accident. The Petitioner's son was a guest passenger in a vehicle owned by James Smith and being operated by Ryan Smith. Ryan Smith and the Smith vehicle were covered by an automobile insurance policy issued by Westfield. Petitioner and Westfield reached a settlement for the policy's full person liability coverage of $100,000.00. Petitioner also asserted a claim for the UIM coverage in the Smith/Westfield policy. Westfield agreed to waive subrogation on the liability limits and agreed to pay the UIM claim within sixty (60) days of being provided notice pursuant to W. VA. CODE 33-6-31e. Additionally, although not required by statute, Westfield tendered a check for the full UIM per person limits within the same sixty (60) day time frame. Petitioner also requested a "one-third attorney fee", which Westfield refused to pay, leading to the filing of Petitioner's Complaint. In the Complaint, the Petitioner asserted claims of breach of contract, common law bad faith and violations of the West Virginia Unfair Claims Settlement Practices Act.

One of the issues on appeal was whether the Petitioner's son (and therefore Petitioner as the son's Estate representative) could assert a common law bad faith claim since he was only a Class II insured based on his status as a guest passenger -- there was no contract of insurance between Petitioner's son and Westfield.

The Supreme Court upheld the Circuit Court's decision and found that Petitioner could not maintain a common law bad faith claim under *Hayseeds* because "petitioner had already received a check for the full underinsured motorist coverage before he filed suit" and the only remaining disagreement was to attorney's fees.

Likewise, the Supreme Court found that Westfield's compliance with W. VA. CODE 33-6-31e and tendering of a check for the UIM limits prevented Petitioner from being able to maintain a claim for alleged UTPA violations.

Shoemaker v. Everett, filed November 26, 2012, No. 11-1652, arose out of a motor vehicle accident that involved Mr. Shoemaker's vehicle colliding with the rear of the vehicle being driven by Matthew Everett. Mr. Everett contended that his vehicle experienced an unexpected

downshift, causing him to lose control of his vehicle. Mr. Shoemaker was traveling on the roadway and came around a turn and collided with the stopped vehicle of Mr. Everett.

At the time of the accident, Mr. Shoemaker was seventy-nine years old. He passed away twenty-two months after the accident and prior to the filing of the lawsuit. His cause of death (according to his death certificate) was "acute myocardial infarct" (i.e. heart attack) caused by "years" of "coronary artery disease." Mr. Shoemaker's personal representative filed suit alleging negligence and wrongful death, claiming that Mr. Shoemaker's injuries sustained in the accident limited his physical activity and, therefore, contributed to his heart attack and death. The Circuit Court granted partial summary judgment with respect to the wrongful death claim prior to trial.

At trial, the jury awarded $9,000.00 in past medical expenses, $0 for pain and suffering, $0 for mental anguish, and $0 for loss of enjoyment of life. Counsel for Mr. Shoemaker's Estate did not introduce a single medical record into evidence at trial.

The jury apportioned 45% negligence to Mr. Shoemaker for the accident, which percentage of negligence was used by the Circuit Court to reduce the amount of the jury verdict for the Estate representative. Consequently, Mr. Shoemaker's Estate was awarded approximately $4,950.00 in damages, plus pre-judgment interest.

The Supreme Court upheld the Circuit Court's partial summary judgment order that had dismissed the wrongful death claim, holding that the "petitioner failed to produce evidence suggesting a causal link between the reduced activity and spinal stenosis in a seventy-nine-year-old man, and a fatal heart attack caused by 'years' of 'coronary artery disease.'"

The Supreme Court also refused to disturb the jury's award of only $9,000.00 in past medical expenses, despite the fact that Petitioner had authenticated $21,743.49 in medical bills. The Supreme Court rejected this assignment of error: "we cannot conclude that the jury verdict was so low that, under the facts of this case, reasonable men could not differ about its inadequacy."

The Supreme Court in *Cunningham v. Thomas Memorial Hospital*, filed November 20, 2012, No. 11-0398, affirmed summary judgment in favor of Thomas Memorial Hospital, finding no actual employment or agency relationship, or joint venture, between a hospital and physicians employed by companies who had contracts with the hospital to provide surgical and hospitalist physicians.

In *Cunningham*, the plaintiff was admitted to Thomas through its emergency department, and required a surgical consult. The general surgeon on call was Dr. Fogle, who was employed by Delphi, which had a contract with TMH to provide two doctors to take ED surgical call. Fogle performed surgery, and the plaintiff developed an abscess. He was also seen by Doromal, the other Delphi doctor, as well as Tarakji and Rittinger, who were employed by Hospitalist Medicine Physicians of Kanawha County, PLLC (HMP) which contracted with TMH to provide a hospitalist program.

Cunningham sued TMH, the four doctors, Delphi and HMP, and "sought to hold Thomas Hospital vicariously liable for the alleged negligence of Drs. Tarakji, Rittinger and Fogle on the theory that the doctors were employees or actual agents of the hospital, or that the doctors and corporate

defendants Delphi and Hospitalist Medicine were engaged in a joint venture with the hospital."

The Supreme held, in a per curiam decision,

"[W]e find the Circuit Court of Kanawha County did not err in granting summary judgment in favor of Thomas Hospital based upon the circuit court's conclusion that Drs. Fogle, Tarakji and Rittenger were not agents or actual employees of Thomas Hospital. We further find that the circuit court did not err in concluding that Thomas Memorial was not engaged in a joint venture with the other defendants to this action. Accordingly, the circuit court's order of February 3, 2011, is affirmed."

First, the court noted that a theory of ostensible agency is prohibited by W. VA. CODE § 55-7B-9 (2003) (Repl. Vol. 2008), noting the physicians carried $1M in insurance coverage.

Discussing plaintiff's claim of actual agency, the Court applied the four part test of *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990): "(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…."

Selection and engagement: The Court found the physicians were not selected by TMH, but by Delphi and HMP. Even though the hospital evaluated the physicians, according to the deposition testimony, Delphi and HMP were responsible for selection.

Payment of compensation: The physicians were also compensated by Delphi and HMP and not TMH, nor did the hospital bill for their services or pay their insurance.

Power of dismissal: The hospital did not have the power to terminate the physicians. Under the contracts, the physicians were required to maintain certain qualifications, and if they did not, the contracts provided Delphi/HMP would resolve the issue or find a substitute physician. "There is nothing in [either] agreement that granted Thomas Hospital the authority to terminate [the physicians'] agreement[s] with Delphi or [HMP]…"

Power of control: As to control, the court found no evidence the hospital selected the physicians for the patient or that any of the physicians was a "manager" of the hospital (finding management duties and compensation for them came from Delphi and HMP and not TMH). As to actual control, the court scrutinized the evidence, finding none: "Moreover, we have carefully and thoroughly reviewed the record in this case and find no evidence to establish a question of fact with regard to the element of control exercised by the hospital over Drs. Fogle, Tarakji and Rittinger. On the contrary, the evidence is clear that the hospital merely exercised a level of control commensurate with that approved by this Court in *Shaffer v. Acme Limestone Co., Inc*. To reiterate, under *Shaffer*, Thomas Hospital was permitted to exercise "broad general powers of supervision and control as to the results of the work so as to insure satisfactory performance of the contract[.]" Syl. pt. 4, *Shaffer*, 206 W. Va. 333, 524 S.E.2d 688."

State Farm Mut. Auto. Ins. Co. v. Marks, No. 12-0304 (November 15, 2012): Since 2010, the Supreme Court of Appeals of West Virginia has now delivered three separate opinions regarding whether medical protective orders are valid and enforceable to

limit the dissemination and retention of medical records obtained through discovery. In *State Farm Mut. Auto. Ins. Co., v. Bedell*, 697 S.E.2nd 730 (W. Va. 2010), the Supreme Court held that the petitioner had failed to demonstrate good cause for the issuance of a medical protective order as it prevented State Farm from electronically storing medical records and information. (This case is now referred to as *Bedell 1*.) In *State Farm Mut. Auto. Ins. Co., v. Bedell*, 719 S.E.2d 722 (W. Va. 2011)(now referred to as *Bedell 2*), the Supreme Court revisited a subsequent medical protective order in the same case, but this time held that the Petitioner had in fact sustained her burden of showing good cause for the issuance of a medical protective order. Thus, while the petitioner had failed to satisfy the good cause requirement set forth in *Bedell 1*, the Court in *Bedell 2* found that the petitioner had requested a medical protective order to insure the confidentiality of her and her deceased husband's medical records and that the Circuit Court explicitly detailed the good cause demonstrated by the petitioner. Consequently, the Supreme Court in *Bedell 2* found that the medical protective order issued by the Circuit Court was entirely proper. Having found no abuse of discretion by the Circuit Court, the Supreme Court denied the Writ of Prohibition that had been requested by State Farm.

Now, in 2012, the Supreme Court has delivered still another opinion regarding medical protective orders. The *Marks* Court stated that medical protective orders have been entered in lawsuits filed by plaintiffs seeking compensation for the injuries they have sustained in motor vehicle accidents caused by other motorists. Repeatedly, insurers have requested this Court and other courts in the United States to invalidate these medical protective orders as burdensome, unnecessary, restrictive, intrusive, and/or unconstitutional. Yet, each time the Supreme Court of Appeals of West Virginia has examined these medical protective orders, it has upheld the medical protective order as substantively valid and enforceable as a proper exercise of the issuing Court's supervisory authority over discovery in general. Consequently, in the *Marks* decision, our Supreme Court once again refused to invalidate a medical protective order.

In *Marks*, there were actually two separate cases appealed together because of the similarity of their fact patterns. In one case, State Farm sought a Writ of Prohibition to prevent the Circuit Court from enforcing a medical protective order. In the companion case, Nationwide appealed the Circuit Court's decision to grant a medical protective order, arguing that the order was too restrictive because it affected its ability to retain and report information to governmental agencies regulating insurers and to retain and utilize such information in its claim files. In both instances, however, the Supreme Court ruled against State Farm and Nationwide, denying the writ of prohibition and affirming the Circuit Court's ruling about the validity of medical protective orders.

With regard to the subject medical protective orders in which State Farm and Nationwide sought appellate relief, the Court found that both State Farm and Nationwide advanced numerous propositions to the Court regarding the effect medical protective orders might have on their mandatory, statutory reporting obligations - the perceived burdens attending their compliance with such orders; alleged constitutional implications related to enforcement of the orders and the attendant limitations on the use of the medical information subject thereto; the lack of good cause for the order's issuance against insurance companies in light of the Insurance Commissioner's promulgation of privacy

regulations; and a request for a definitive definition of "medical record." Each of these individual assigned errors were reviewed by the Court and in each and every instance the Supreme Court rejected the argument set forth by State Farm and Nationwide.

The Court stated:

"While we appreciate the insurer's lament that compliance with this provision of the protective order may prove to be difficult, we do not believe that difficulty equates to impossibility. Modern information systems are remarkable in their ability to maintain large quantities of data in a finite space and to share this information electronically with virtually any other data system in the world. Such systems also are invaluable in their ability to be programmed to satisfy the exact needs of a precise user. From the representations of State Farm and Nationwide, it appears that neither insurer currently has in place software or hardware components that would allow them to extract protected medical records and medical information from their electronic claims files that would permit them to comply with the return or destroy provisions of the subject protective orders. That does not mean, however, that slight technological modifications could not be developed to address this contingency to permit the generation of reports of protected materials that would allow the extraction of such documents upon the expiration of an order of protection. Thus, for the same reason we previously have denied relief on this basis, we again find this contention to be without merit."

Quarterly Quote: "It is the spirit and not the form of law that keeps justice alive." -- *Earl Warren*

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