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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 PROUDLY WELCOMES ITS NEWEST ATTORNEYS

PLEASE JOIN US IN WELCOMING OUR NEWEST ATTORNEYS: DAVID BUTLER, MAGGIE BURRUS, AND MICHAEL DUNHAM!

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SMS News

SMS Welcomes New Attorneys.

SMS welcomes its newest attorneys: David Butler in its Morgantown office, and Maggie Burress and Michael Dunham in its Charleston office.

David L.T. Butler joined the firm in April 2014 as an associate in the Morgantown office. Mr. Butler is a 2007 graduate of West Virginia University and a 2010 graduate of the West Virginia University College of Law. Since graduating from the West Virginia University College of Law, Mr. Butler served for two years as the law clerk to the Honorable Lawrance S. Miller, Jr. of the Eighteenth Judicial Circuit of West Virginia and has since engaged in a practice focused on civil defense litigation.

Maggie Burrus joined the firm in 2014 as an Associate in the Charleston office. Ms. Burrus's practice at Shuman, McCuskey, & Slicer focuses primarily on insurance related defense matters. Ms. Burrus attended law school at Washington and Lee University. Ms. Burrus was a Lead Article Editor for the Journal of Energy, Climate, and the Environment, a Finalist in Washington and Lee's Mock Trial Competition, and Mock Trial Administrator for the Moot Court Executive Board. Additionally, Ms. Burrus was a member of the Community Legal Practice Center, a general practice legal clinic dedicated to public service in Rockbridge, Virginia. Ms. Burrus holds a bachelor's degree in International Studies and History from the University of South Carolina. While at the University of South Carolina, Ms. Burrus graduated with magna cum laude honors. She also was honored with the Woodrow Scholarship.

Michael Dunham joined the firm in 2014 as an associate in the Charleston office. Mr. Dunham's practice focuses primarily on insurance related defense matters. Mr. Dunham obtained his Bachelor's Degree in Political Science from West Virginia University. He attended West Virginia University College of Law. While in law school, Mr. Dunham finished third in the Baker Cup Moot Court Competition, and was a member of the Moot Court National Team that participated at the Fourth Circuit Court of Appeals in Richmond, Virginia. Mr. Dunham was also a finalist in the Lugar Trial Association Invitational Tournament. Upon graduating from law school, Mr. Dunham was awarded membership in the prestigious Order of the Barristers.

SMS Congratulates Attorney Elected as Treasurer of Monongalia County Bar Association.

SMS congratulates Morgantown attorney Molly Miner for being elected as Treasurer for the Monongalia County Bar Association.

Monongalia County, West Virginia is located in the 17th Judicial District. The County seat is Morgantown, West Virginia. It is the largest county in the North-Central region of West Virginia and approximately 75 miles from Pittsburgh, Pennsylvania.

Ms. Miner joined the firm in February 2007 as an associate in the Morgantown office. Her practice focuses primarily on civil defense related matters. She is routinely involved in and has experience with matters involving contractors and construction, farm litigation, deliberate intent litigation, wrongful death, medical malpractice defense, personal injury defense, insurance coverage, and governmental tort claims. Mrs. Miner graduated in the top ten percent of her class

from the West Virginia University College of Law in 2006. While in law school, Mrs. Miner served as a Student Attorney in the Legal Clinic, and was responsible for serving the legal interests of indigent clients in pending legal matters encompassing a broad range of topics. Mrs. Miner also served as a Student Volunteer for the Income Tax Assistance Program.

Voluntary Dismissal Obtained for SMS Client.

SMS Member Roberta F. Green achieved voluntary dismissal of a suit filed against SMS's client, a local utility. The plaintiff alleged that a leaking sewer line had caused instability in her property, making her home uninhabitable. SMS engaged an engineering expert who identified pre-existing ground faults and was able to explain the progressive failure of the hillside behind the plaintiff's home. Plaintiff engaged an expert whose opinions were equivocal, but nonetheless she failed to disclose him timely. The utility moved to strike the expert based on the untimely designation, noting as well the expert's equivocal support for plaintiff's claims. While the Court declined to grant the motion to strike, thereafter plaintiff agreed to voluntarily dismiss her claim.

Legal Developments

In *Valentine v. Sugar Rock*, The Court answered a certified question from the Fourth Circuit described as a "complex question which intertwines issues about partnership interests in oil and gas wells, the Statute of Frauds, the common law "mining partnership," and the West Virginia Revised Uniform Partnership Act (W.Va. Code § 47B-1-1, et seq.). The Court's summary of its response is as follows:

The certified question from the federal court essentially has two parts. First, if a person contends he/she owns an interest in a common-law "mining partnership," then does the Statute of Frauds require the person to prove he/she is a partner of the mining partnership through a deed, will, or other written conveyance? We answer this part of the question "yes." A person can only be a partner in a mining partnership if he/she is a co-owner of the mineral interest with the other partners. Hence, proving a partnership interest in the mining partnership requires first proving the person has a deed, will, or other written instrument showing partial ownership of the mineral interest in the land.

The second part of the question is this: if a partnership is a general partnership (as defined in and governed by the West Virginia Revised Uniform Partnership Act), and the partnership owns leases to extract oil and gas from real property, then does the Statute of

Frauds require a person to produce a written instrument to prove he/she is a partner in the general partnership? We answer this part of the question "no." Under the Revised Uniform Partnership Act, W.Va. Code § 47B-2-3 [1995], general partnership property belongs solely to the partnership and not to the partners. A person does not need a deed, will or other written instrument to establish a partnership stake in the general partnership, even if the general partnership owns an interest in real property.

Grim v. Eastern Electric, No. 13-1133 (filed November 3, 20140. The Court affirmed summary judgment for the defendant in a Prevailing Wage Case. Plaintiffs, former workers on a public works project sued to recover "statutory wages and liquidated damages under the Prevailing Wage Act and Wage Payment and Collection Act from the contractor on the project, Eastern Electric, LLC." The Court held:

After a careful review of the briefs, appendix record, and consideration of the arguments of the parties, we hold the circuit court erred in dismissing petitioners' Prevailing Wage Act claims as untimely because the statute of limitations applicable to those claims is five years. We find the record establishes disputed issues of material fact with regard to Eastern Electric's "honest mistake or error" affirmative defense, rendering the circuit court's entry of summary judgment erroneous. Finally, we affirm the circuit court in its dismissal of petitioners' Wage Payment and Collection Act claims. We therefore affirm, in part, reverse, in part, and remand the case for further proceedings.

Glaspell v. Taylor County Bd. Of Education, No. 14-0175 (filed November 3, 2014). The Court affirms summary judgment for the BOE related to a suit by a student injured while being choked as part of a game at school. The Court found insufficient evidence of lack of supervisory coverage, breach of duty to supervise despite evidence the "choking game" had gone on for years, and failure to monitor video feeds. The Court found the plaintiffs did not come forward with sufficient evidence to defeat summary judgment. "As set forth above, it is virtually impossible for school employees to be able to see what every student is doing at every moment throughout the school."

GGNSC Morgantown LLC v. Phillips, https://ecf.wvnd.uscourts.gov/cgi-bin/show_public_doc?2014cv0118-10

Judge Keeley addresses a district court's ability to decide whether an arbitration provision is unconscionable in light of *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010). In *Rent-A-Center*, a 5-4 SCOTUS decided that if a party to an arbitration agreement challenged the enforceability of the arbitration provision - and that provision specifically lists enforceability as an arbitrable issue - a court may decide the question. If, however, the party challenged the enforceability of the entire agreement, an arbiter must decide. Judge Keeley declines to apply *Rent-A-Center*, distinguishing the GGNSC arbitration provision because it failed to specifically list "enforceability" as an arbitrable issue. This left the court free to address the plaintiff's claim of "unconscionability", including a nice discussion of procedural and substantive unconscionability of arbitration provisions associated with nursing home health care forms.

Muzichuck v. Forest Laboratories, Inc., et al. https://ecf.wvnd.uscourts.gov/cgi-bin/show_public_doc?2007cv0016-44

Judge Keeley addresses whether a prescription drug manufacturer may claim the

learned intermediary doctrine as a defense. Under the doctrine, a drug manufacturer does not have to warn customers about potential dangers as long as it warns the prescribing physician. The Supreme Court of Appeals rejected the doctrine in *West Virginia ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899 (W. Va. 2007). However, as the defendant pointed out in this case, several cases after *Karl* have hinted that because *Karl's* underlying rationale relied heavily on the fact that manufacturers sold or advertised directly to consumers, such sales or advertising was a prerequisite. This, the defendant argued, leaves the defense available to drug manufacturers who exclusively use prescribing physicians. Judge Keeley disagreed, finding Karl focused on the defendant's status as a prescription drug manufacturer, not a prescription-drug-manufacturer-who-sells-and-advertises-directly-to-consumers. *Karl* imposed no requirement of direct advertising or sales and, in the end, Judge Keeley emphatically ruled that the learned intermediary doctrine can no longer be asserted by any prescription drug manufacturer in West Virginia product liability litigation.

Quicken Loans v. Brown. The Court addressed a post-remand increase in damages. The Court issued the following syllabus points:

1. "Costs" within the meaning of Rule 24 of the West Virginia Rules of Appellate Procedure include attorney fees when "costs" are defined as including attorney fees in any statute applicable to the case that allows for the recovery of the costs of a proceeding.

2. Pursuant to Rule 24 of the West Virginia Rules of Appellate Procedure, attorney fees and costs may be awarded for appellate proceedings by either this Court or by the trial court following the direction of this Court. Although this Court has the authority to set the amount of an attorney fee award, this Court may, in its discretion, instead direct the trial court to determine the amount of the appropriate attorney fee award on remand.

3. Attorney fees and costs awarded under W. Va. Code § 46A-5-104 (1994) of the West Virginia Consumer Credit and Protection Act are compensatory in nature and shall be subject to offset by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties.

By way of background, the Court explained that in *Quicken I*, plaintiffs settled with all defendants but Quicken Loans, which went to a bench trial after which the circuit court "awarded $596,199.89 to Plaintiff in attorney fees and costs. The court also awarded $2,168,868.75 in punitive damages. The multiplier used by the circuit court in calculating the punitive damages award was 3.53. Quicken's post-trial motion to offset the compensatory damages award against Plaintiff's $700,000 pretrial settlement was denied by order entered May 2, 2011." The Court commented on *Quicken Loans I*:

This is the second time this case has been before the Court. The case was first brought by plaintiffs below and respondents herein, Lourie Brown ("Plaintiff") and Monique Brown, against defendant and petitioner herein, Quicken Loans, Inc. ("Quicken"), in the Circuit Court of Ohio County, Judge Arthur M. Recht presiding. Plaintiff alleged that Quicken committed common law fraud and violated provisions of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), as set forth in Chapter 46A of the West Virginia Code, in connection with a loan agreement between Quicken and Plaintiff. Following a bench trial, the circuit court entered judgment in favor of Plaintiff.

Quicken appealed that judgment to this Court.

The *Quicken II* Court noted:

We decided *Quicken Loans, Inc. v. Brown* (*Quicken I*), 230 W. Va. 306, 737 S.E.2d 640 (2012), on November 21, 2012, affirming the trial court's order, in part, and reversing, in part. The reversal was premised on the following conclusions: the circuit court improperly cancelled Plaintiff's obligation to repay the loan principal; the circuit court failed to support its $2,168,868.75 punitive damages award with the analysis required by *Garnes v. Fleming Landfill, Inc*., 186 W. Va. 656, 413 S.E.2d 897 (1991); and the circuit court failed to offset the compensatory damages award against Plaintiff's pretrial settlement with defendants who did not proceed to trial. We remanded the case to the circuit court for further proceedings consistent with our opinion.

Back on remand to Circuit Court with Judge Sims sitting for the retired Judge Recht, found he had "the authority to refuse to enforce the Note and Deed of Trust, finding that Plaintiff had no legal obligation to repay the Note and that the Deed of Trust should remain a valid lien on the property…" meaning that if the property ever sold, Quicken would get back net proceeds up to $144K. He recalculated and increased the compensatory damages, increased attorneys' fees for the cost of the appeal, found punitive damages and used the multiplier of 3.53 from the prior verdict to recalculate punitive damages, which he increased to $3.5 million. Quicken appealed.

The Court stated that the mandate of the court must be read and applied with its opinion; "when the further proceedings are specified in the mandate, the district court is limited to holding such as are directed." Further, when the Court ordered a limited remand, 'the lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.'" Thus, the *Quicken II* Court stated:

"In *Quicken I*, we affirmed, in part; reversed, in part; and remanded the case with directions. Our remand limited the issues for determination; we directed that the circuit court return the parties to the *status quo* as nearly as possible with regard to the cancellation of the loan principal, that the court conduct a proper analysis under *Garnes*, and that the court offset the compensatory damages award against Plaintiff's pretrial settlement with Quicken's codefendants. We did not remand the case for a new trial. Having examined our mandate and every part of our opinion in *Quicken I*, we determine that the remand was a limited remand."

The *Quicken II* Court found "[t]he circuit court did not comply with this Court's mandate with regard to the parties' obligations under the loan….As we made clear in *Quicken I*, cancellation of the debt is not a permissible remedy in this case. Thus, the circuit court's remedy, which effectively cancels at least some of the debt, is in direct contravention of our mandate. The portion of the circuit court's order creating a lien on the property must therefore be reversed." Thus, "[u]pon remand, the circuit court is directed to order that the loan principal be returned to Quicken by deducting the amount of the loan principal from the Plaintiff's recovery."

On the increase by the circuit court of the compensatory award, the Court held "we agree with Quicken, and we conclude that the circuit court erred by awarding the additional $98,800 in compensatory damages."

As to attorneys' fees, plaintiffs below sought fees for defending the *Quicken I* appeal as well as further fees on remand. The Court's *Quicken I* mandate directed the parties to bear their own costs, which Quicken argued closed the issue. The Court, reviewing Appellate Rule 24, found it neither included nor excluded attorneys' fees, so it looked to the case law and concluded:

"We now hold that "costs" within the meaning of Rule 24 of the West Virginia Rules of Appellate Procedure include attorney fees when "costs" are defined as including attorney fees in any statute applicable to the case that allows for the recovery of the costs of a proceeding."

Since the statutes applicable in *Quicken I* provided for fee shifting "the term "costs" in our mandate in *Quicken I* encompasses attorney fees." The Court recognized its power to award fees on appeal, with the calculation of the amount best left to the trial courts, but concluded "the circuit court abused its discretion by awarding litigation costs for the appellate proceeding. Additionally, because attorney fees are costs in this case, an award of attorney fees for work conducted by Plaintiff's counsel on appeal violates the mandate."

Finding that attorneys' fees may only be awarded to claims connected to statutory claims, the Court determined the issues on *Quicken I* remand, related to litigation of the cancellation issue, punitive damages (because they were related to success on the common law fraud claim) and further pursuit of fees and costs, were not "connected" and therefore not recoverable.

Where counsel has devoted time and resources to an unwinnable claim, such as a claim outside the scope of this Court's limited remand, it is unreasonable and inequitable to award counsel attorney fees and costs for that claim. Therefore, the circuit court abused its discretion by awarding attorney fees and costs for work completed by Plaintiff's counsel on the W. Va. Code § 31-17-17(c) claim.

With respect to punitive damages, the Court found its' review was limited to the *Garnes* factors challenged by Quicken on appeal; "factors not specifically addressed by the petitioner on appeal are waived. Quicken has limited its argument on appeal regarding the excessiveness of the award to only the following factors: the reprehensibility of Quicken's conduct, the financial position of Quicken, the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed, whether the punitive damages bear a reasonable relationship to the harm, and whether punitive damages bear a reasonable relationship to compensatory damages." Other *Garnes* factors were waived. The Court found "Quicken's conduct was reprehensible…,"; "consideration of wealth is appropriate, and here, because wealth did not contribute to the size of the punitive damages award, Quicken cannot support its claim that consideration of this factor contributed to the amount of the punitive damages award…:; "It was therefore appropriate for the circuit court to set a punitive damages award large enough so that a future defendant in a similar situation—a large corporation with extensive assets—who has committed a clear wrong against a consumer will be encouraged to accept a fair and reasonable settlement…" The remaining factors were also against Quicken.

Additionally, while agreeing the award was 124 times the actual damages to plaintiffs (less than $18,000), the Court noted that if the loan was paid it was $520,000, making

the ratio a mere 4.17:1, which is OK in terms of reasonable relationship to harm. Similarly, the Court found the ratio between the compensatory award plus fees to the original punitive award was acceptable at 3.53:1. The Court also concluded the award should not be reduced, but also found the Circuit Court lacked authority to increase the award as it did by applying ratio math.

The Court then held that the award should have been reduced by pretrial settlements with other parties. The Court rejected plaintiff's claims that Quicken waived the issue or was judicially estopped from raising it, and that attorneys' fees were compensatory in nature and therefore subject to offset. Thus, "the circuit court erred by declining to offset the award of attorney fees and costs by the amount of Plaintiff's pretrial settlement." So, the remand order is:

First, we reverse the portion of the circuit court's order creating a lien on Plaintiff's property. We remand with directions to the circuit court to order that the loan principal be returned to Quicken by deducting the amount of the loan principal from Plaintiff's recovery in this case, which includes compensatory and punitive damages.

Second, we reverse the circuit court's award of an additional $98,800 in compensatory damages to Plaintiff pursuant to W. Va. Code § 33-17-17(c). Accordingly, we reduce the compensatory damages award to $17,476.72.

Third, we reverse the circuit court's award of attorney fees and costs for both the first appellate proceeding and the post-appellate proceedings. Consequently, we reduce the total amount of attorney fees to which Plaintiff is entitled to $596,199.89. The parties shall bear their own attorney fees and costs for the present appeal.

Fourth, we reverse the circuit court's increase in the punitive damages award, and we reduce the amount of that award to $2,168,868.75. Having determined that the $2,168,868.75 award is not excessive, we remand with directions to the circuit court to award $2,168,868.75 in punitive damages to Plaintiff.

Fifth and finally, we reverse the circuit court's order refusing to offset Plaintiff's award of attorney fees and costs by the $700,000 pretrial settlement between Plaintiff and codefendants Appraisals Unlimited, Inc. and appraiser Dewey Guida. We remand the case with directions to the circuit court to offset the award of compensatory damages and attorney fees and costs by the amount of the pretrial settlement.

Michael Cantley v. West Virginia Regional Jail 137655 (Wilkinson 11/14/2014). Published opinion after argument: The 4th Circuit held that the law is "clearly established" only if "'the contours of a right are sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (*quoting Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (alterations omitted). We examine whether the law was clearly established as of the time the allegedly unlawful action occurred. *Anderson*, 483 U.S. at 640. In making our inquiry, we "'ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.'" *Lefemine v. Wideman*, 672 F.3d 292, 298 (4th Cir. 2012) (*quoting Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (1999)), vacated on other grounds, 133 S. Ct. 9 (2012). Although the law does not require that there be a prior case identical to the case at bar for the law to be clearly established, *see Hope v. Pelzer*, 536 U.S. 730, 741

(2002), "existing precedent must have placed the statutory or constitutional question beyond debate." *Al-Kidd*, 131 S. Ct. at 2083.

Quarterly Quote: "Character cannot be developed in ease and quiet. Only through experience of trial and suffering can the soul be strengthened, vision cleared, ambition inspired, and success achieved." – Helen Keller