SMS Quarterly

Shuman, McCuskey & Slicer, PLLC | Issue No. 8, July 15, 2008

SMS Firm News

SMS Helps Raise Money To Support HospiceCare

There is nothing like the 3 "C's" that allow people to break away from the stresses of litigation: chili, competition and (good) cause. That is exactly what Team SMS did when it competed in the law firm competition of the

2008 Smoke On The Water Chili Cook-Off on Saturday, June 21, 2008, held on the Kanawha Boulevard in Charleston.

Having won the law firm competition last year, SMS team members again made their "stand-up" chili (a secret combined recipe of SMS member, Karen McElhinny and SMS staffer Dee Dizmang with the aid of many SMS helpers), which took 3rd place this year. All proceeds from the event went to HospiceCare of Kanawha Valley.

SMS raised additional money by selling the ever popular "Cinco de Mayo" brownies, the creation of SMS Member Roberta Greene and her husband Hal Foss, as well as rice crispy treats, made by SMS staffer Luann Searls.

SMS member Lou Ann Cyrus said, "It was a great opportunity for us to come together as

a firm for a great cause." And, she added, "We have every intention of taking back the award for the best law firm chili next year!"

Special thanks to all SMS employees who generously donated their time and efforts to the event.

SMS Lawyer News

Congratulations to the SMS lawyers who continue to experience good results and success defending their clients. It is always a pleasure to select a few of the more interesting stories to share with you.

Cold, Hard Justice

Firm Member Lou Ann Cyrus and Associate Jack Hoblitzell recently obtained a voluntary dismissal of the case of Mellinger v. Wood County Board of Education.

Plaintiff Mellinger was a supervisor in the food warehouse for the Board of Education. He was injured when he entered the walk-in freezer while it was being loaded (never a good idea!), and he did not tell the fork-lift driver he was in there (yet, another stroke of brilliance!).

As you could have probably guessed, he was essentially run over by the forklift as it entered the freezer. He received workers' compensation benefits as a result of his workplace injuries. Not satisfied with the compensation he received, he then filed a deliberate intent claim against the Wood Co. BOE claiming that the Board allowed him and other employes to work and operate dangerous machinery (a forklift) without proper training and supervision.

Mrs. Cyrus and Mr. Hoblitzell filed a motion to dismiss/motion for summary judgment asserting that the Board was immune from suit under the Governemental Tort Claims and Insurance Reform Act, WVA Code 29-12A-1, *et seq*, specifically citing the provision setting forth immunity from liability resulting from "any claim covered by any workers' compensation law or employer's liability law." WVA Code 29-12A-5(a)(11).

A hearing was scheduled to occur on July 2. However, before the hearing transpired, Plaintiff's counsel agreed to dismiss the action pursuant to Rule 41 of the West Virginia Rules of Civil Procedure.

Case Dismissed: Expert Credentials Successfully Challenged

Firm Members, David Shuman and Elizabeth Lawton, recently obtained the dismissal of the Marshall University Board of Governors (MUBOG) in a medical professional liability action. The plaintiff was operated on by a physician employed by MUBOG at its Logan area medical center facility. A laparoscopic cholecystectomy was performed on the plaintiff, during the course of which it was discovered that the plaintiff had no gall bladder. A thorough examination was conducted and, unfortunately, during the examination, an injury occurred to the common bile duct.

The plaintiff employed the services of an expert, who is a local practicing physician, who had not performed a surgical procedure in more than 15 years. After a procedural battle conducted under the MPLA concerning the qualifications of the expert to even sign a Screening Certificate of Merit, the Court let the case go forward.

Unfortunately, for the surgeon expert, he was exquisitely carved up during the course of a discovery deposition to the extent that he ultimately admitted that he did not know what the standard of care was for a surgeon practicing in the Logan, West Virginia area, or anywhere else in the United States of America. This testimony occurred after the physician admitted that he had not performed a surgical procedure in more than 15 years and had never laid eyes on the instruments necessary to perform a laparoscopic cholecystectomy.

At a Pre-Trial hearing on dispositive motion, the Court not only barred the expert from testifying at the Trial of the case, but proceeded to dismiss the case because the plaintiff had not maintained the services of an appropriate expert.

Firm Member Speaks at WV Academy of Ophthalmology Annual Meeting

Firm Member Karen McElhinny had the pleasure of being a co-presenter at the West Virginia Academy of Ophthalmology's 2008 Annual Meeting at the Stonewall Resort, June 28th through 29th. Ms. McElhinny spoke to ophthalmologists about preventing surgical site confusion and informed consent, using a case study as an illustration.

SMS members and associates enjoy speaking to groups concerning legal issues. We welcome the opportunity to counsel clients and groups of physicians, business people, government agencies, and insurance entities about best practices, risk management, current legal and medical-legal topics, and ways to avoid litigation.

4 Shuman, McCuskey & Slicer, PLLC Issue No. 8, July 15, 2008

Legal Developments

Recent Decisions from the Supreme Court of Appeals of WV

Once again, there are a several, noteworthy decisions from the Supreme Court of Appeals of West Virginia. Those decisions are reported below.

Yes, even the defense is entitled to fair treatment in opposing a Rule 59 Motion. Neely v. Belk, Inc., No. 33597 (W. Va. 2008), available at 2008 WL 2522841.

In this negligence case based upon a premises liability theory, the Supreme Court of Appeals of West Virginia clarified that the standard by which trial courts must consider Rule 59 motions is in the light most favorable to the party prevailing at trial, even if that party is the defendant. The Court reversed the trial court's decision granting a plaintiff's Rule 59 motion for a new trial, and ordered the unanimous jury verdict for the defendants promptly reinstated.

The plaintiff, Neely, an inveterate shopper, claimed to have been injured by an outer door while exiting the Bridgeport Belk store. Neely claimed that the door had fallen completely off its hinges, striking her right side and knee. (Trial evidence conflicted as to whether the door had actually fallen from its hinges or had merely opened askew, but no evidence was presented as to why the door had fallen.) Neely testified that the Belk incident had left her totally and permanently disabled: she had claimed that she was unable to walk without a limp, unable to shop (her favorite occupation), unable to leave her home, unable to perform routine daily tasks, and unable to enjoy life (no shopping!).

At trial, Neely had presented photographic evidence that showed "some bruising and swelling" around her knee after the accident, and treating physician testimony about her development of "complex regional pain syndrome," characterized by "continuous, intense pain out of proportion to the severity of the injury." Neely had asked for a staggering $900,000 in projected future expenses.

The defense, however, had produced two damning pieces of evidence. First, the defense had showed that just six months prior to the "disabling" incident at Belk, Neely had filed a disability application with Social Security. On her Social Security application, Neely had claimed that she was totally disabled due to anxiety, depression, and panic attacks; that she was unable to do household chores, besides laundry; that she was unable to drive; and that she no longer went shopping (sounds fishy). Second, the defense had displayed two video surveillance tapes, taken one month and ten months after the Belk incident, depicting Neely walking without a limp while shopping for extended periods of time, but limping while at the DMV obtaining a handicapped permit. A unanimous jury verdict for the defendants had followed.

Despite the very real possibility that the jury could have believed the defense's presentation of the facts, the trial court then granted Neely's Rule 59 motion, reasoning "that the evidence produced at trial that a public door to a retail establishment fell on a patron constituted a prima facie case of negligence that places upon the defendants the duty to come forward with evidence to overcome the impact of the prima facie case."

Reversing on appeal, the Supreme Court held that, because the evidence was contradictory on all issues, the trial court had abused its discretion in granting a new trial and had impermissibly substituted its own judgment for that of the jury. The Court emphasized that it is the sole province of the jury to weigh conflicting evidence in determining whether a plaintiff has met her burden in proving all the elements of her claim. Therefore, when such a jury verdict favors the defendants, a trial court must approach a plaintiff's Rule 59 motion in favor of the defendants. "In determining whether there is sufficient evidence to support a jury verdict [in favor of the defendants] the court should (1) consider the evidence most favorable to the [defendants], (2) assume that all conflicts in the evidence were resolved by the jury in favor of the [defendants], (3) assume as proved all facts which the [defendants'] evidence tends to prove, and (4) give to the [defendants] the benefit of all favorable inferences which reasonably may be drawn from the facts proved."

An insurer may not be bound in subsequent litigation by collateral estoppel by the terms of its insured's consent or confessed judgment.

Horkulic v. Galloway, No.'s 33352, 33353 (W. Va. 2008), available at 2008 WL 481000.

This appeal, originally predicated upon a legal malpractice claim against TIG Insurance Co.'s insured, William Galloway, arose when the plaintiffs, the Horkulics, attempted to enforce a settlement agreement against TIG. With this case, the West Virginia Supreme Court decided that an insurer is not bound in subsequent litigation under the doctrine of collateral estoppel by a consent or confessed judgment against an insured party where the insurer was not a party to the original action and where the insurer did not expressly agree to be bound by the consent or confessed judgment.

The settlement agreement had been negotiated between the Horkulics's lawyer and Galloway's TIG-provided lawyer, with TIG participating via its claim representative. TIG had agreed to pay Galloway's policy limits of $500,000, but had repeatedly objected to certain settlement terms, namely that Galloway confess judgment in the amount of $1.5 million in exchange for the Horkulics's agreement not to execute judgment and to voluntarily dismiss their malpractice claim against him, and waiver of Galloway's attorney-client privilege. At bottom, TIG had objected because of a pending, bifurcated bad faith action asserted by the Horkulics against TIG. Post-settlement, the circuit court had granted the Horkulics's Motion to Compel Enforcement. (The court had not allowed TIG to participate in this hearing.) TIG had then been ordered to pay the Horkulics's attorney fees.

The Supreme Court of Appeals of West Virginia granted TIG's request for a writ of prohibition, preventing the circuit court from enforcing its order that TIG pay the Horkulics's legal fees. In addition, the Court found that Galloway's waiver of his attorney-client privilege would not prevent TIG from continuing to assert the quasi-attorney-client privilege and work product doctrine regarding TIG's files. Moreover, the Court found that the Horkulic-Galloway settlement agreement was indeed valid, but reasoned that, because TIG had not been a party to the underlying legal malpractice action and had not been allowed to participate in the motion hearing, the doctrine of collateral estoppel was not applicable and would not bar TIG's continued attack on the consent judgment agreed to by Galloway. According to the Court, TIG's participation in the underlying malpractice action revealed "the classic tripartite configuration in which a party to a bifurcated bad faith action was not a party in the underlying action, despite the reality that such entity furnished counsel for the defendant in that underlying action." Looking to a Colorado case, the Court further explained that an insurer retains the right to challenge a judgment to which its insured has confessed or consented, but to where

the insurer was not a party and had not agreed to be bound. Parties entering into such a consent judgment have no incentive to protect the insurer's rights; they are, instead, motivated to protect the rights of the insured party or to pursue a bifurcated action against the insurer. Thus, collateral estoppel would not prevent TIG, in the pending bad faith action, from attacking the terms of the settlement agreement to which it had expressly and repeatedly objected.

The discovery rule does not toll the statute of limitations when the alleged medical malpractice is admittedly obvious.

Legg v. Rashid, No.33521 (W. Va. 2008), available at 2008 WL 2222020.

In this appeal, the Supreme Court of Appeals of West Virginia upheld summary judgment in favor of the defendant-appellee physician, Richard Rashid, holding that the claim was barred by the statute of limitations because the appellant had discovered his alleged injury more than two years prior to filing his claim.

Dr. Legg, a practicing dentist, had filed his medical malpractice claim in June 2005, claiming that Dr. Rashid had damaged Legg's vision during a 1997 eye surgery by failing to advise Legg to remove his hard contact lenses for a period of at least two months prior to his surgery. (Legg admitted to immediately noticing that his vision was greatly diminished after his bandages were removed, and that his vision was not improved after a second procedure two weeks later.) The trial court granted Dr. Rashid's motion for summary judgment because Legg's claim had been filed after the applicable statute of limitations.

On appeal, Legg invoked the discovery rule, which equitably tolls the statute of limitations until a "claimant knows or by reasonable diligence should know of his claim." Legg claimed that he had not discovered Dr. Rashid's alleged breach of pre-operative procedure until July 2003, when Legg claimed to have visited another eye surgeon who had advised him of correct pre-operative protocol. Legg also contended that Dr. Rashid had fraudulently concealed the real source of Legg's poor vision after his 1997 surgery by suggesting that Legg needed to await new surgical developments not yet available in the United States. (The Court declined to address this latter argument, as it had not been raised in the lower court.)

Dr. Rashid argued that the discovery rule did not apply because Legg knew or should have known of his injury as soon as his surgical bandages were removed in 1997. In the alternative, Dr. Rashid argued that, even if the discovery rule did apply, because Dr. Rashid had consulted the other eye surgeon in December 2002, and not in July 2003 as Legg claimed, his filing still exceeded the statute of limitations and was time barred.

The Court affirmed the judgment of the circuit court, holding that the treatment "Dr. Legg received from Dr. Rashid in January of 1997 was such a failure that Dr. Legg should have recognized that his condition was directly related to Dr. Rashid's alleged malpractice on the day after his surgery." Because Dr. Legg had admitted to immediately recognizing the obviously poor surgical outcome, the discovery rule did not apply and the statute of limitations had expired in January 1999. The Court noted that, even if it gave Legg the benefit of the doubt, Legg was certainly aware of the alleged malpractice by December 2002, and under that time frame should have filed by the end of 2004.

(These article were edited by Member Timothy Linkous. These articles are not intended to and are not a substitute for the professional legal advice of counsel. If you have questions about the decisions or the information contained in these articles, you are encouraged to speak directly with a SMS lawyer.)

SMS Lawyer Highlight

In this issue of the SMS Quarterly, we are featuring our 2008 Summer Associates. Each year, we accept applicants for our Summer Associate Program from multiple law schools. We strive to locate and recruit qualified individuals who we believe possess not only the academic profile that constitutes a solid future lawyer, but also persons who exhibit excellent interpersonal skills that are a must to any litigator. The SMS 2008 Summer Associates fit this criteria, and we are proud to introduce them to you.

Jennifer Deitz

Jennifer Deitz is currently engaged in a summer clerkship in SMS's Charleston office. She is originally from Charleston and graduated salutorian from Capital High School in 1997. She then attended West Virginia University where she graduated with a Bachelor of Arts in Chemistry with a minor in Political Science. Following, graduation from WVU, Ms. Deitz participated in post graduate work in Biological Sciences at Marshall University and attended medical school at Marshall University School of Medicine from August 2003 to March 2005. She then shifted her focus to a career in law. Her background in medical sciences allows her to quickly analyze issues in medical professional liability actions as well as injuries and medical damages in large variety of cases.

Ms. Deitz is currently a rising 3L at the WVU College of Law. She is a member of the Student ABA and this past Spring completed magistrate mediation training sponsored by the Alternative Dispute Resolution Society (ADR) at WVU College of Law. Ms. Deitz will begin mediating magistrate cases for Mononghalia, Marion, and Harrison counties in the Fall of 2008. Aside from law school, she enjoys reading books, running, and riding bikes.

Jennifer Tampoya

Jennifer L. Tampoya is a summer associate in the SMS Morgantown office. Although Mrs. Tampoya is a permanent Morgantown resident, she is originally from Los Angeles, California. She attended UCLA, where she received her Bachelor of Arts in English. After college, Mrs. Tampoya developed a Los Angeles-based, healthcare training business. Seeking a more family-oriented environment, she and her husband, John, closed their business and moved their family to Morgantown in 1998.

That same year, Mrs. Tampoya organized a closely-held business corporation, providing health care services to homebound patients throughout West Virginia. In 2003, Mrs. Tampoya was asked

to serve on the Cheat Neck Advisory Committee to the Monongalia County Planning Commission. She has served as a committee member since that time, helping to draft and revise the now-pending Zoning Ordinance for Monongalia County's planning districts. In 2004, she organized a new small business corporation, offering upscale, personalized fitness services in the Cheat Lake area of Morgantown. Although her husband handles the day-to-day business operations, Mrs. Tampoya has continued in her administrative capacity even after starting law school in 2006.

Mrs. Tampoya will soon be entering her third year of law school at West Virginia University's College of Law. She earned a CALI award for Legal Research & Writing in her first year. During her second year, Mrs. Tampoya served as an Associate Editor for the West Virginia Law Review. Her student note, *What Works, What Doesn't: Revising DUI Laws in West Virginia to Reduce Recidivism and Save Lives*, was inspired by the July 2007 multi-car accident which occurred on Interstate 68 where two fathers and three children were tragically killed by a repeat drunk driver. This article will be published in the fall issue of the West Virginia Law Review. Mrs. Tampoya will serve as a Symposium Editor for the Law Review in her third year.

Mrs. Tampoya and her husband have three children: Sahalie, fourteen; John Connor, eleven; and Rylan, seven. The children attend Trinity Christian School in Morgantown.

J.B. McCuskey

J.B. McCuskey is a summer associate in the SMS Charleston office. He is the son of Founding Member John McCuskey, and he is rising 3rd year student at the West Virginia University College of Law. He attended George Washington High School in Charleston, West Virginia, and then The George Washington University in Washington, D.C., for his undergraduate degree in Political Communication. After college, Mr. McCuskey moved back to West Virginia to work for the re-election campaign of George W. Bush in southern West Virginia, where he was the regional field director, responsible for 8 counties. While working on the Campaign, Mr. McCuskey met his wife, Wendy, who previously moved to Parkersburg from San Antonia, Texas to also become a field director for President Bush.

After the campaign, Mr. McCuskey moved back to Washington, D.C., where he worked in the Pentagon for both the General Counsel of the Army and the Department Of Defense General Counsel. After two years of government service, Mr. McCuskey and his wife moved back to West Virginia and were married. Thereafter, Mr. McCuskey entered law school.

Mr. McCuskey enjoys golf, fly fishing, and watching the Mountaineers, Pirates and Steelers.

Quarterly Quote: "The man who smiles when things go wrong has thought of someone to blame it on." – Robert Bloch

Shuman, McCuskey & Slicer, PLLC locations:

1411 Virginia Street, East, Suite 200
Charleston, West Virginia 25301-3081
Telephone: 304-345-1400
Facsimile: 304-343-1826

1445 Stewartstown Road, Suite 200
Morgantown, West Virginia 26505
Telephone: 304-291-2702
Facsimile: 304-291-2840

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