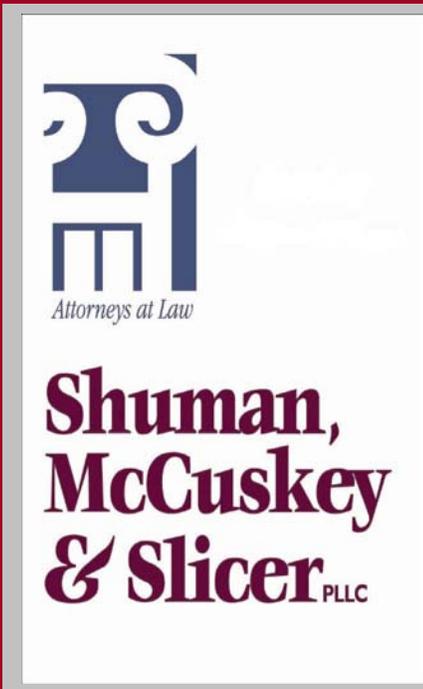


SMS QUARTERLY

AN INSIDE LOOK AT YOUR LAW FIRM AND
WHAT ITS LAWYERS ARE DOING TO SERVE YOU



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SMS Helps Raise Money For HospiceCare With Sponsorship Of 2010 Smoke On The Water Chili Cook-Off

On June 19, 2010, hundreds of people crowded Kanawha Boulevard for the 12th annual Smoke on the Water Chili Cook-Off in Charleston, West Virginia. Shuman, McCuskey & Slicer, PLLC served as a sponsor to the event, and our attorneys and staff also participated in the law firm chili cook-off competition.

“The event raised over \$7,000.00 for HospiceCare, and everyone had an excellent time,” said SMS Member Karen McElhinny.

Though the event occurred on a Saturday, the work and preparation for SMS began on Friday June 18, 2010 at FirmMember Dwayne and Lou Ann Cyrus’ home where firm members, associates and staff gathered to prepare the firm’s chili, a highly secretive and guarded

“Our firm is committed to our community, and being a sponsor to this great event is important to us,” stated Founding Member David Shuman who assisted with the cooking on Friday. “The entire experience also provides an opportunity for our firm to build comradery.”

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SMS tent at the Chili Cook-Off

The 2010 theme for SMS, a past winner of the law firm chili cook-off competition, was “Peace, Love and Chili For All.”

“We really enjoyed this year’s competition, and we are looking forward to June 2011 when we anticipate retaking the title of best chili among the law firms,” concluded Karen McElhinny.

For more information about the Smoke on the Water Chili Cook-Off, please visit the official website: www.smokeonthewater.org.

SMS Lawyers Speak At Conferences

As many of our clients already know, SMS lawyers often address pertinent legal and risk management issues through presentations at conferences and to small groups.

Most recently, Member Karen McElhinny spoke at the annual West Virginia Academy of Ophthalmology meeting. Member Timothy Linkous also spoke to several large gatherings of West Virginia physicians to discuss insurance and legal issues pertinent to their practices. Member Lou Ann Cyrus, Member Dwayne Cyrus, Member Timothy Linkous and Associate Molly Miner attended a Litigation Conference hosted by an insurance company in Springfield, Missouri. Lou Ann Cyrus

presented information pertaining to multiple issues at this annual Conference on several past occasions.

Please contact an SMS lawyer if you would like information about presentations SMS can perform for you or your company. Past presentation topics include updates on West Virginia law, recent decisions from the Supreme Court of Appeals of West Virginia, UIM and UM coverage, Medical Professional Liability, deliberate intent, coal mine safety, employment law, and many more. SMS tailors its presentations to the needs and requests of clients.

SMS Planning Conference

SMS is dedicated to providing our clients with the most aggressive, comprehensive and economical legal representation available. This October, SMS lawyers will gather for a planning conference to discuss the many ways SMS has achieved those goals and to generate new ideas and methods by which our firm continually offers representation second to none.

“We know that plaintiff lawyers are meeting and sharing new ideas to circumvent traditional defense strategies,” said Member Timothy Linkous. “We are seeing more and more plaintiff attorneys refusing to grant access to medical and background information, and circuit courts appear reluctant to force the issue. This is just one example of plaintiff attorneys blocking our damage investigation and defenses, and there are many other such tactics being employed.”

Most recently, plaintiff lawyers succeeded in creating a new third-party cause of action against insurance carriers for violating the West Virginia Human Rights Act, and they are utilizing complaints filed with the West Virginia Insurance Commissioner to bring pressure upon insurers to settle claims.

At the planning conference, SMS lawyers will analyze these new plaintiff tactics and discuss defense strategies to assist our clients in meeting these new challenges.

SMS Congratulates Brad McElhinny

SMS extends congratulations to Brad McElhinny, husband of Firm Member Karen McElhinny, for his recent rise to Managing Editor of the Charleston Daily Mail, a Charleston, West Virginia newspaper.

Brad, a Parkersburg, West Virginia native, joined the Daily Mail's staff in 1994 as a reporter, and he served as the City Editor since 2004. Brad and Karen have two beautiful girls, and they live in Charleston.

SMS Lawyer Victories

Court Throws Out the Trash By Dismissing Slip and Fall Case at Transfer Station

SMS member Tammy DeFazio and Associate Jennifer Tampoya recently secured the dismissal of their client, the City of Buckhannon, based upon statutory immunity.

On July 26, 2010, Judge Keadle granted the City of Buckhannon's Motion to Dismiss, finding that the City is immune from Plaintiff's claim because it falls squarely within the purview of the West Virginia Governmental Tort Claims and Insurance Reform Act. In this case, the Plaintiff went to the City's solid waste transfer station to dump trash. The transfer station has an open pit for dumping waste, and the waste is subsequently transferred to a landfill in a neighboring county. While pulling on a piece of garbage, the Plaintiff lost his balance and fell into the 18 foot deep pit, sustaining injuries.

According to the Tort Claims Act, "[a] political subdivision is immune from liability if a loss or claim results from . . . [t]he operation of dumps, sanitary landfills, and facilities where conducted directly by a political subdivision." W. Va. Code § 29-12A-5(a)(16) (2008). This section of the Tort Claims Act has not been the subject of extensive litigation in this State, only one prior case, Calabrese v. City of Charleston, 515 S.E.2d 814 (W.Va. 1999), having addressed this immunity provision. However, at oral argument, Ms. DeFazio successfully argued that Calabrese was factually distinguishable in that it dealt with a city sewer system and not a waste transfer station.

Moreover, Ms. DeFazio pointed out that the plain language of Section 29-12A-5(a)(16) demonstrates that the words "dumps," "landfills," and "facilities" are not merely used as synonyms of each other, but rather are separate bases for the immunity inherent within Section 29-12A-5(a)(16). Thus, the word "facilities" necessarily refers to those facilities such as the City's waste transfer station which, by its very nature, is a facility used not only for dumping solid waste, but one which is also associated with a sanitary landfill. Furthermore, Ms. DeFazio argued that the Calabrese Court emphasized that the word "facilities" must be read in the overall context of Section 29-12A-5(a)(16), acknowledging the immunity of "landfill- and dump-related facilities."

The Plaintiff unsuccessfully argued that the City's transfer station is not a "facility" within the meaning of the code.

The Court found that the City's waste transfer station is a facility within the meaning of the Tort Claims Act and that the City is immune from suit, and it dismissed the Complaint with prejudice.

Submission of Non-Human Urine in Random Drug Screen Found Sufficient to Terminate Employment.... and Lawsuit

SMS Firm Member Karen McElhinny and Associate Jason Wandling recently obtained summary judgment in favor of their client, the City of Charleston, in a wrongful termination lawsuit.

The Plaintiff, a former City of Charleston employee, sued the City alleging racial discrimination in violation of the West Virginia Human Rights Act and Worker's Compensation Discrimination in violation of West Virginia Code §23-5A-1. Judge Carrie Webster granted summary judgment in favor of the City, dismissing all claims as a matter of law. She found that the Plaintiff could not establish a prima facie case for racial discrimination or worker's compensation discrimination because the City had a legitimate, non-discriminatory reason for terminating the employment, i.e. the fact that he submitted non-human urine in a random drug test.

Legal Developments

In this edition of the SMS Quarterly, we have selected to bring to your attention several recent decisions from the Supreme Court of Appeals of West Virginia. Those decisions are as follows:

Michael v. Appalachian Heating, LLC (*recognizing new cause of action against insurance companies*) (WVSC January 2010 Term, No. 35127)

Since the elimination of statutory “third-party bad faith” claims in West Virginia, plaintiff lawyers have actively sought ways to bring about pressure upon insurance carriers to settle claims. Rumor abound about the possibility of a common law third-party bad faith cause of action (which I still cannot rule out despite a WVSC decision from years ago refusing to recognize such a claim). In the Michael decision, plaintiff lawyers achieved part of their goal as West Virginia now recognizes that insurers are “persons” within the meaning of the West Virginia Human Rights Act, and insurers may be sued for violations of the Act. The new, pertinent Syllabus Points from the case are as follows:

“6. The term ‘person’ is defined by the Human Rights Act, in W.Va. Code §5-11-3(a) (1998) (Repl. Vol. 2006), as ‘one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons.’ Therefore, an insurance company is included within the meaning of the term ‘person’ as used in W.Va. Code §5-11-9(7) (1998) (2006).”

“7. W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act, prohibits unlawful discrimination by a tortfeasor’s insurer in the settlement of a property damage claim when the discrimination is based upon race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status.”

“8. The prohibition of a third-party law suit against an insurer under W. Va. Code § 33-11-4a(a) (2005) (Repl. Vol. 2006), does not preclude a third-party cause of action against an insurer under W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act.”

The facts in the Michael case are fairly straight forward. Appalachian Heating, LLC was hired by the Charleston-Kanawha County Housing Authority to repair climate control units in South Park Village, a public housing development located in Charleston. The Plaintiffs, who are African American, resided together in an apartment located in South Park Village. On November 21, 2006, the apartment in which the Plaintiffs resided caught fire, allegedly due to negligence on the part of Appalachian Heating, causing a total loss of the Plaintiffs’ personal property and rendering the apartment temporarily uninhabitable. State Auto Insurance Co. provided liability insurance coverage to Appalachian Heating, and, following the fire, settled the Plaintiffs’ claims. One Plaintiff received no value for general damages associated with the loss, and two Plaintiffs received a total of \$2,500.00 for general damages associated with the loss. The Plaintiffs claim that because of their race and residence in public housing, State Auto discriminated against them when adjusting their claims.

The Circuit Court (Judge Kaufman) denied a Motion to Dismiss, but certified the issue to the WVSC. The WVSC, when issuing the Syllabus Points above, held that the WV Human Rights Act prohibits discrimination by a tortfeasor’s insurer in the settlement of a property damage claim asserted by a member of a protected class under the Act.

Cunningham v. Hill

(WVSC January 2010 Term, No. 34862)

In this decision, the WVSC held the following, “When two insurers issue separate automobile liability insurance policies upon different vehicles containing underinsured motorist coverages which provide coverage for the same loss, policy language which provides that the limits of underinsured motorist coverage available from all policies shall not exceed the liability limits of the policy with the highest limit of underinsured motorist coverage is not valid and enforceable.” Syl. Pt. 2.

On April 11, 2005, Plaintiff Guy Cunningham was operating a 2001 Mercury Grand Marquis in a southerly direction on U.S. Route 119, in Boone County. At the time, Mr. Cunningham was in the scope and course of his employment with the United States Bureau of Alcohol, Tobacco, Firearms and Explosives. The 2001 Mercury Grand Marquis was owned by his employer, the United States government. Also on that date, Walter Hill was operating a 1997 Chevrolet truck, owned by Beaury Cochran, in a northerly direction on U.S. Route 119. Walter Hill turned the 1997 Chevrolet truck across U.S. Route 119 to enter Big Ugly Road and struck the vehicle operated by Mr. Cunningham. Mr. Cunningham was injured as a result of the collision.

The vehicle operated by Walter Hill was insured under an automobile liability insurance policy issued by West Virginia National Auto Insurance Company. West Virginia National Auto paid its per person liability policy limits of \$20,000.00 to Mr. Cunningham. There was no underinsured motorist coverage upon the 2001 Mercury Grand Marquis operated by Guy Cunningham at the time of the accident.

On the date of the accident, Mr. Cunningham and his wife were the named insured under an automobile liability insurance policy issued by Erie which provided coverage upon a 2001 Chevrolet Silverado and a 2003 Cadillac Escalade. The Erie policy, which was in full force and effect on that date, contained underinsured motorist coverage with limits of \$100,000 per person and \$300,000 per accident. Additionally, on that date, Mr. Cunningham was also the named insured under a liability insurance policy issued by State Farm, which covered a 1995 Harley Davidson motorcycle. The State Farm policy, which was in full force and effect on that date, contained underinsured motorist coverage with limits of \$50,000 per person and \$100,000 per accident.

Both the Erie policy and the State Farm policy contained policy language which limited recovery to the highest liability limits available when more than one policy provided underinsured motorist coverage. Erie paid Mr. Cunningham \$66,667.66 in underinsured motorist coverage benefits and State Farm paid Mr. Cunningham \$33,333.34 in underinsured motorist coverage benefits, so that he received a total of \$100,000.00 in underinsured motorist coverage benefits.

The Plaintiffs filed a Complaint against Erie and State Farm and others alleging entitlement to coverage limits from the underinsured coverage in policies issued to them by each insurer. In issuing the Syllabus Point set forth above, the WVSC concluded the following: “Accordingly, we find that in the circumstances now before us, the policy provisions at issue violate the clear public policy language enunciated in W. Va. Code §33-6-31(b), as the statute plainly provides that ‘*no sums payable as a result of underinsured motorist coverage shall be reduced by payments made under the insured’s policy or any other policy.*’ Because the Cunninghams paid two full premiums for two separate underinsured motorist policies, we find that they are entitled to be fully indemnified.”

This is a decision that should be fully read by all automobile insurers.

SER State Farm Mutual Automobile Insurance Company v. Bedell

(WVSC January 2010 Term, No. 35514)

The SER State Farm v. Bedell decision is the first of what will almost certainly be several decisions regarding the battle over a claimant's and/or plaintiff's medical records. Increasingly, plaintiff lawyers are refusing to permit their clients to execute authorizations for the release of medical records, and they are demanding certain pre-conditions prior to disclosing any such medical records to defendants. Plaintiff lawyers premise the restrictions upon patient confidentiality and the alleged lack of relevancy to the issues being litigated. However, these tactics can be utilized to prevent defendants from legitimately accessing information to develop damage and causation defenses.

In this case, the Plaintiff refused to disclose medical records without an onerous Protective Order precluding the scanning of such records and demanding the destruction of records at the conclusion of litigation. The Circuit Court, over the Defendant's objection, entered the Plaintiff's requested Protective Order. In granting a Writ of Prohibition, the WVSC announced the following Syllabus Point: "7. A court may not issue a protective order directing an insurance company to return or destroy a claimant's medical records prior to the time period set forth by the Insurance Commissioner of West Virginia in §§ 114-15-4.2(b) and 114-15-4.4(a) of the West Virginia Code of State Rules for the retention of such records."

Interestingly, the WVSC appropriately noted the following: "Mr. Thomas's Estate explains that its interests lie in settling Mrs. Blank's claims against it for the insurance policy limits, with a release of the Estate from all personal liability. Counsel for Mr. Thomas's Estate cannot pursue such a settlement, however, without discussing the Blank's medical records with State Farm because, as the insurer, State Farm must agree to any settlement paid from Mr. Thomas's insurance policy. Accordingly, counsel for the Estate is caught in the untenable position of needing to disclose the medical records to State Farm in order to facilitate a settlement, but being unable to do so because, under the protective order, she cannot certify that State Farm would return or destroy the records upon the conclusion of the case. Consequently, the protective order similarly prevents Mr. Thomas's Estate from being able to prepare for trial or take the steps necessary to reach a settlement in the case. For these reasons, the Court concludes that prohibition is the appropriate avenue by which to address this issue."

Ultimately, the WVSC issued the Writ stating that the Defendant could scan the records and the Defendant's insurer could not be prevented from retaining records in accordance with WV Regulations.

If you would like more information about these cases or other WVSC decisions, please contact an SMS lawyer who can provide you with a detailed discussion of the issues and holdings.

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

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