JULY 2013 ISSUE NO. 27

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

Super Lawyers

Congratulations to our 2013 Super Lawyers!

David L. Shuman, Super Lawyer

Timothy R. Linkous, Rising Star

Natalie C. Schaefer, Rising Star

Congratulations to 2013 Martindale-Hubbell® Client Distinction Award Recipient!

William R. Slicer, 2013 recipient of the Martindale-Hubbell® Client Distinction Award. Less than 4% of the 900,000+ attorneys listed on martindale.com and lawyers.com have been accorded this Martindale-Hubbell® honor of distinction.

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SMS News

SMS Congratulates its 2013 Super Lawyers and Rising Stars!

SMS founding member David L. Shuman was nominated as a 2013 Super Lawyer for the fifth year in a row!

Congratulations also to Tim Linkous and Natalie C. Schaefer, who were nominated again as 2013 Super Lawyer Rising Stars!

Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high-degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations.

Congratulations to 2013 Martindale-Hubbell® Client Distinction Award Recipient!

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Defense Trial Counsel of West Virginia.

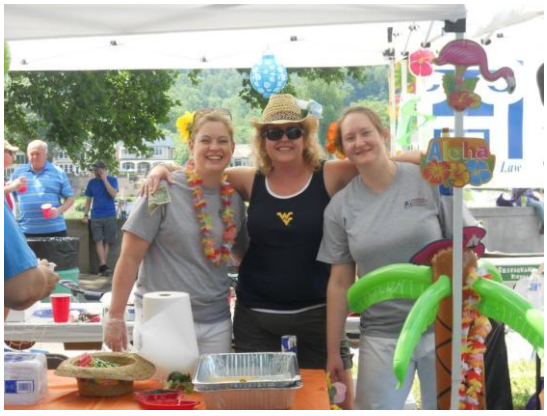
SMS member John F. McCuskey has been selected by and from among his defense counsel peers to serve on the Executive Board of the Defense Trial Counsel of West Virginia (DTCWV). Mr. McCuskey's two-year term began in late 2012. More recently, SMS Member Roberta F. Green was selected to serve on the Executive Board as well, with her two-year term beginning in 2013.

DTCWV was formed in 1981 to bring together attorneys who defend individuals and corporations in civil litigation for the purposes of elevating the standards of West Virginia trial practice; to support and advocate for the improvement of the adversary system of jurisprudence; and to increase the quality of services rendered by

the legal profession to the citizens of West Virginia and beyond.

SMS Assists Hospice Care with Chili-Cook-off.

This summer, SMS was proud to participate in the annual Smoke on the Water Chili Cook-off to benefit Hospice Care.



Hospice Care dedicates itself to easing the pain and suffering associated with terminal illnesses, while providing peace and comfort in order to maximize our patients' quality of life. Hospice Care provides personal and emotional support, allowing the patient and the family to cherish their days with less stress.

Education Law Update

SMS Member Elizabeth S. Lawton, R.N., B.S.N., J.D., and Maggie B. Burrus, J.D. Candidate 2014 (Washington & Lee University), have co-authored "A Hobson's Choice - Compulsory Vaccination and Parental Rights," which is slated to appear in the August edition of *Communicator*, a monthly publication of the National Association of Elementary School Principals(NAESP). The article provides an overview of vaccination laws and addresses legal challenges that have been raised, both successfully and unsuccessfully.

As a joint initiative of the National Association of Elementary School Principals (NAESP) and Shuman McCuskey & Slicer, PLLC, SMS continues to address compelling and timely education issues for NAESP's publication. In general, *Communicator* raises awareness of legal issues in education, identifies the resources available when faced with potential legal liability and discusses best practices generally for educators nationally. For more information, please visit its website, http://naesp.org.

SMS Lawyer Victories

Judgment as a Matter of Law for SMS Client.

SMS founding member Will R. Slicer and associate Philip B. Sword obtained judgment as a matter of law in favor of an SMS client at trial even prior to the close of the plaintiff's case in chief. The Plaintiff, an HVAC service man, sought $2.3 million in special damages from SMS client, a commercial premises owner, for permanent injuries sustained from a 20 foot fall from a ladder. Plaintiff alleged that the owner failed to provide required fixed access to the roof. Judge Evans in Jackson County found no evidence of proximate cause and granted judgment as a matter of law in favor of the SMS client.

Qualified Immunity Dismissal for SMS Client.

Mr. Slicer also obtained a Rule 12(b)(6) qualified immunity win for SMS client the West Virginia State Police. In this case, the Plaintiff alleged that West Virginia State Police failed to timely notify parents that a school counselor had engaged in sexual conduct with a student. Judge Webster of Kanawha County dismissed the case, ruling that the Complaint did not state a claim upon which relief could be granted.

Asbestos Dismissal for SMS Client.

In a trifecta win, Mr. Negley and Mr. Slicer also obtained a pretrial dismissal of an SMS client in asbestos case after the Plaintiff agreed there was insufficient evidence to show that SMS client's product was the source of any asbestos exposure.

Medical Malpractice Dismissal Obtained.

SMS Associate Molly Miner obtained a dismissal of a medical malpractice action because the Plaintiff failed to comply with the West Virginia Medical Professional Liability Act, W.Va. Code 55-7B-1, *et seq*., in failing to provide a screening certificate of merit prior to filing suit.

Civil Rights Dismissal.

Ms. Miner also obtained dismissal, with prejudice, against our client for failing to state a claim and for failing to timely serve the complaint within 120 days. The Plaintiff's complaint alleged civil rights violations pursuant to 42 U.S.C. 1983 and 1985(3). With respect to our client, Plaintiff alleged that our client participated in a domestic violence hearing during which the Plaintiff's civil rights were violated. The Court found that Plaintiff's Complaint failed to set forth any cognizable claim against our client and therefore, dismissed the action pursuant to Rule 12(b)(6).

Employment Grievance Dismissed.

SMS attorney Chris Negley successfully defended SMS client Clay County Health Department involving its decision to terminate its Nursing Director and Sanitarian for searching inappropriate and/or obscene websites on the its computers which are part of the DHHR handbook. The Department acted after receiving a "Network Violation Report" issued by the West Virginia Office of Technology. Carper filed a grievance arguing, among other things, that he did not do this and/or his dismissal was a reprisal for whistle-blowing.

During evidentiary hearings held in April, August and December of 2012, we were able to demonstrate that Carper's computer was used to access inappropriate websites a number of times and that his dismissal was an appropriate remedy for violating known employee standards for computer usage. It is important to note that these decisions are used as *stare decisis* for other grievances. The opinion is available on online at the WV Public Employees Grievance Board website.

Dismissal of Civil Rights Case.

SMS attorneys Lou Ann Cyrus and Kimberly M. Bandy obtained dismissal for their client, the West Virginia Division of Corrections, based upon Plaintiff's failure to comply with the terms of a court order. Following a visit to the site of the alleged events which strongly suggested that the Plaintiff's version of events was impossible, Plaintiff's counsel withdrew from representing her, and the Plaintiff failed to prosecute her case on her own behalf, leading to its dismissal.

Supreme Court Victory!

SMS attorneys Lou Ann Cyrus, Kimberly M. Bandy, and John Blanc successfully defended an appeal in the West Virginia Supreme Court of Appeals and obtained a favorable result for their client, the Director of the West Virginia Division of Natural Resources.

Plaintiff filed suit in 2011, claiming injury from an allegedly dangerous walkway in a state park. Ms. Cyrus and Ms. Bandy moved to dismiss the case on the basis that the Plaintiff had failed to timely file the Complaint, interpreting the provisions of West Virginia Code §55-17-3 which requires pre-suit notice of a claim before filing suit against a government agency. The Circuit Court agreed that, although the Plaintiff had complied with the notice provisions, the case was untimely filed, and it was dismissed with prejudice. Plaintiff's counsel appealed the decision arguing that the dismissal was based upon an incorrect interpretation of W.Va. Code § 55-17-3 because that statute allows for a thirty-day tolling of the statute of limitations in all cases where pre-suit notice is required.

The Supreme Court of Appeals disagreed with Plaintiff's interpretation and affirmed the Circuit Court's decision to dismiss. The decision is significant to any case involving a government agency, because the case clarifies that the statute of limitations is tolled only to the extent necessary to

comply with the notice requirements, and not the maximum thirty-days in every case.

Legal Developments

In *Allen v. Greenbrier County Sheriff's Department, et al*., No. 12-1088, filed June 28, 2013, the Court held that, "[w]hile petitioner cites to our prior holding in Syllabus Point 4 of *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000) (holding that questions of negligence present issues of fact for jury determination when the evidence is conflicting or the facts are such that reasonable jurors may draw different conclusions from them), to argue that questions of negligence are questions of fact to be determined by a jury, the Court notes that the same opinion clearly states that '[t]he determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.' Syl. Pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000)."

In discussing the public duty doctrine, the Court stated that:

the duty to . . . provide police protection runs ordinarily to all citizens and is to protect the safety and well-being of the public at large; therefore, absent a special duty to the plaintiff(s), no liability attaches to a municipal . . . police department's failure to provide adequate . . . police protection. *Rhodes v. Putnam Cnty. Sheriff's Dep't*, 207 W.Va. 191, 194, 530 S.E.2d 452, 455 (1999) (*quoting Randall v. Fairmont City Police Dep't*, 186 W.Va. 336, 346-47, 412 S.E.2d 737, 747-48 (1991)).

In regard to the special duty exception, the Court reiterated the requirements necessary to establish such an exception as follows:

"The four requirements for the application of the 'special relationship' exception to W. Va. Code § 29–12–5 cases are as follows: (1) An assumption by the state governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the state governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the state governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the state governmental entity's affirmative undertaking." Syl. Pt. 12, *Parkulo v. West Virginia Bd. of Prob. and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1996). Syl. Pt. 11, *J.H. v. W.Va. Div. of Rehab. Services*, 224 W.Va. 147, 680 S.E.2d 392 (2009).

Based on this holding, it is clear that this Court has already analyzed the interplay between the public duty doctrine, the special duty exception to that doctrine, and the immunity provided to political subdivisions

for their method of providing police protection. As such, the public duty doctrine does not render West Virginia Code § 29-12A-4(c)(2) null and void.

In *SER Tobby Small v. Clawges*, No. 13-0110, filed June 5, 2013, the Court addressed the interplay between state and federal jurisdiction and res judicata and prohibited a state court from enjoining a party to take certain actions in federal court.

Cherrington v. Erie, No. 12-0036, filed June 18, 2013, overruled prior holdings regarding defective workmanship claims. The Court has brought West Virginia into the majority of jurisdictions by holding that defective workmanship claims causing bodily injury or property damage are now deemed to be "occurrences" under CGL policies:

"Defective workmanship causing bodily injury or property damage is an 'occurrence' under a policy of commercial general liability insurance. To the extent our prior pronouncements in Syllabus point 3 of *Webster County Solid Waste Authority v. Brackenrich and Associates, Inc*., 217 W. Va. 304, 617 S.E.2d 851 (2005); Syllabus point 2 of *Corder v. William W. Smith Excavating Co.*, 210 W. Va. 110, 556 S.E.2d 77 (2001); Syllabus point 2 of *Erie Insurance Property and Casualty Co. v. Pioneer Home Improvement, Inc*., 206 W. Va. 506, 526 S.E.2d 28 (1999); and Syllabus point 2 of *McGann v. Hobbs Lumber Co*., 150 W. Va. 364, 145 S.E.2d 476 (1965), and their progeny are inconsistent with this opinion, they are expressly overruled."

The Court in *Salmons v. State Farm*, No. 12-0891, filed June 7, 2013, affirmed dismissal of a third party bad faith case where the Plaintiff argued it was really first party. The case arises from an automobile accident. Both drivers were insured by State Farm. Salmons settles the case related to fault of other driver and sues State Farm, claiming "first party" bad faith because State Farm insured her. Recognizing elimination of third party bad faith under West Virginia Code § 33-11-4a, the circuit court dismissed under WVRCP 12(c) and the Supreme Court affirmed, despite being insured by State Farm because the claim made was under the other driver's policy, which makes the claim third party only.

CJH v. Quadriple S Farms LLC affirmed a jury verdict in favor of the owners of a hotel damaged because the defendants, who owned the adjacent property, "negligently developed the property, causing the hillside adjacent to petitioner's property to degrade quickly, which increased the water runoff onto petitioner's property. According to the Petitioner, this uncontrolled up-gradient water caused a massive rock fall on December 17, 2008. Petitioner alleged that the degradation of the hillside led to large boulders, debris, mud, and greater quantities of surface water to invade petitioner's property resulting in significant property damage, mold, and ultimately forced the franchise to cease operations in May of 2010. Petitioner sought damages in excess of $2.5 million."

The Court affirmed denial of the post-trial motions, holding, among other things, that the Plaintiff waived any objection to the improper "empty chair" arguments because the Plaintiff introduced the "empty chair" evidence in the first place and therefore waived any objection.

The Court in *WVDHHR v. Payne*, No. 11-1701, filed June 12, 2013, addressed qualified immunity. Payne died after choking on a hot dog at a day center run by D.E.A.F. Investigations showed the facility failed to provide an appropriate diet and had an

untrained convicted felon feeding him, among other deficiencies. Plaintiffs made negligence claims against the DHHR defendants related to "monitoring and enforcement of the applicable standards of care, policies, protocols and management of the subject facility." They alleged generally DHHR was negligent in "'failing to ensure' that DEAF 1) properly trained staff; 2) complied with state and federal regulations; 3) had an adequate workforce; and 4) disclosed 'licensing issues and/or problems" to clients."

The Supreme Court reversed the denial of summary judgment and remanded the case with instructions to grant the motion. The Court found the circuit court order deficient, stating "[t]he order references no 'evidence' which the Paynes 'presented,' much less identifies the 'disputed material facts' which precluded summary judgment."

In particular, the court must identify those material facts which are disputed by competent evidence and must provide a description of the competing evidence or inferences therefrom giving rise to the dispute which preclude summary disposition." Finding that mere negligence claims could not prevail, the Court made a detailed analysis of the evidence, finding the areas of supervision and licensing were discretionary duties, thus concluding the plaintiff's claims of negligence could not prevail.

The Court once again reiterated the difference between qualified immunity and the public duty doctrine. Qualified immunity is, quite simply, immunity from suit. The public duty doctrine is a defense to negligence-based liability, i.e. an absence of duty. *See Holsten v. Massey*, 200 W.Va. 776, 782, 490 S.E.2d 864, 871 (1997) ("The public duty doctrine, however, is not based on immunity from existing liability. Instead, it is based on the absence of duty in the first instance."). This Court dedicated an extensive discussion to the similarities, yet fundamental difference, between the two concepts in *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W. Va. 161, 172, 483 S.E.2d 507, 518: "[The public duty doctrine] is not a theory of governmental immunity, 'although in practice it achieves much the same result.'" (*quoting* Syl. Pt. 1, *Benson v. Kutsch*, 181 W. Va. 1, 380 S.E.2d 36 (1989)). Although both defenses are frequently raised, as in this case, only qualified immunity, if disposed of by way of summary judgment, is subject to interlocutory appeal. All other issues are reviewable only after they are subject to a final order: "In cases where interlocutory review of qualified immunity determinations occurs, any summary judgment rulings on grounds other than immunity are reserved for review at the appropriate time[.]" *City of St. Albans v. Botkins*, 228 W. Va. 393, 397, n.13, 719 S.E.2d 863, 867, n.13 (2011) (emphasis added). *Cf. Fucillo v. Kerner*, No. 11-1783 (W. Va., June 5, 2013) (addressing collateral issue of whether private cause of action exists on interlocutory appeal, where both qualified immunity and collateral issues were disposed of under W.V.R.C.P. 12(b)(6) and collateral issue is dispositive of the case); *Jarvis v. West Virginia State Police*, 227 W. Va. 472, 711 S.E.2d 542 (2010) (same).

The Court noted that "qualified immunity is not a 'one-size-fits-all' proposition. The nuances and variations within our case law have been perpetuated, at least in part, by the highly fact-specific nature of qualified immunity analysis."

State Farm v. Rutherford, No. 12-0655, filed June 7, 2013, was a second appeal of the parties. *State Farm Mutual Automobile Ins. Co. v. Rutherford*, 229 W.Va. 73, __ 726

S.E.2d 41, 46 (2011) (Rutherford I) was back up at the Court after remand for calculation of prejudgment interest on a verdict minus credit for prior settlements. The Rutherford I Court directed "the circuit court should have calculated prejudgment interest on the special damages portion of the $45,000 judgment against State Farm and not the special damages portion of the entire verdict of $175,000." The Court also directed calculation of prejudgment interest on the net verdict based on the ratio of special damages to the entire verdict, which was 97%. After the Circuit Court did just that, Plaintiff again appealed arguing interest should have been calculated on the whole verdict. The Court again held interest was to be applied in accordance with Rutherford I.

Martin v. CAMC, No. 12-0710, filed May 17, 2013, affirmed dismissal of a complaint filed in 2012 over decubitus ulcers the Plaintiff developed during a hospitalization in 2007. The Plaintiff alleged that because he was incompetent, and had a guardian appointed, the statute of limitations was tolled, and the case was timely. His wife was appointed as his guardian in February 2008. The Court rejected this argument, finding the MPLA requires filing within two years of injury, and a filing in 2012 was too late. In a footnote, the court commented "[t]he discovery rule is inapplicable to this case because petitioners do not contest that Mrs. Martin, as her husband's legal representative, was aware of the ulcers Mr. Martin obtained during his hospital stay."

The Court explained, "Petitioners' argument that the general disability savings statute in West Virginia Code § 55-2-15 should toll their claim under the MPLA is unpersuasive. For most general causes of action, those under a disability have up to twenty years to file suit pursuant to West Virginia Code § 55-2-15. However, adults alleging a medical professional liability action under MPLA have a two-year statute of limitations, except in cases where discovery is an issue. To the extent the statutes cannot be construed consistently with one another, the more specific of the two prevails. *Zimmer v. Romano*, 223 W.Va. 769, 784, 679 S.E.2d 601, 616 (2009)("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.").

Petitioners filed suit under the MPLA in 2012. Accordingly, the circuit court properly applied the statute of limitations in dismissing the complaint. See Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure § 12(b)(6)[2], at 388 (4th ed. 2012) ("A statute of limitations may support dismissal under Rule 12(b)(6), where it is evident from the plaintiff's pleading that the action is barred, and the pleading fails to raise some basis for tolling or the like.")."

The Court addressed several dismissals for failure to prosecute. The Court noted that it will "review a circuit court's order dismissing a case for inactivity pursuant to Rule 41(b) under an abuse of discretion standard." *Caruso v. Pearce*, 223 W.Va. 544, 547, 678 S.E.2d 50, 53 (2009). '[T]he plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action . . . .' Syl. Pt. 3, *in part*, *Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339 (1996)." The Court affirmed dismissal for inactivity of 18 months. *See, Black v. GMAC Inc., et al*, No. 12-0360, filed April 16, 2013.

In *State Farm v. Prinz*, the Supreme Court of Appeals found that the Dead Man's

statute, W. Va. Code §57-3-1 (1937), unconstitutionally violates the Court's rulemaking authority. *Prinz* issued two new syllabus points:

6. Because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution, West Virginia Code § 57-3-1 (1937), commonly referred to as the Dead Man's Statute, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence.

7. In actions, suits or proceedings by or against the representatives of deceased persons, witness testimony and documentary evidence pertaining to any statement of the deceased, whether written or oral, shall not be excluded solely on the basis of competency.

Even though WVRE 601 (enacted by the Court) provides that "[e]very person is competent to be a witness except as otherwise provided for by statute or these rules," and the Court noted "we have recognized that Rule 601 of the West Virginia Rules of Evidence generally permits evidentiary statutes like the Dead Man's Statute to be created…," the Court concluded the it conflicts with its Rulemaking authority: "we now find that, because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution, W. Va. Code § 57-3-1, commonly referred to as the Dead Man's Statute, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence."

The Court states "[a]lthough we hold W. Va. Code § 57-3-1 to be invalid and thus, reverse the circuit court's rulings and remand this case for a new trial, we observe that the proffered testimony and evidence at issue must nevertheless be admissible under the remaining Rules of Evidence."

Quarterly Quote: “You miss 100% of the shots you don’t take.” -- Wayne *Gretzky*

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(Natalie C. Schaefer is responsible for this publication. This publication is an advertisement for Shuman, McCuskey & Slicer, PLLC).