JULY 2014

ISSUE NO. 30

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 WELCOMES NEW ATTORNEYS

SMS IS PLEASED TO WELCOME TWO NEW ATTORNEYS IN ITS CHARLESTON OFFICE, JENNIFER G. GRINDO AND DOMINICK R. PELLEGRIN!

Jennifer G. Grindo

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SMS News

SMS Welcomes Two New Attorneys in Charleston.

SMS is pleased to welcome two attorneys to its Charleston, West Virginia office. Jennifer G. Grindo has joined the firm as an associate in the Charleston office. Ms. Grindo's practice focuses primarily on insurance-related defense matters. Ms. Grindo obtained her Bachelor's Degree in Political Science and History from King University in Bristol, Tennessee. While attending King University, Ms. Grindo played for the University's Women's Soccer Team. Ms. Grindo attended West Virginia University College of Law and was admitted to the practice of law in West Virginia in 2002. After law school, Ms. Grindo served as judicial law clerk to the Honorable Gary L. Johnson. Most recently, Ms. Grindo has served as an attorney for the State of West Virginia DHHR, Bureau for Child Support Enforcement for the past 8 ½ years.

Dominick Pellegrin joined the firm as an associate in the Charleston office. Mr. Pellegrin is a graduate of Fairmont State University where he received both a Bachelor of Arts Degree in Political Science, Summa Cum Laude, and a Bachelor of Arts Degree in National Security and Intelligence, Summa Cum Laude. While at Fairmont State University, he was the captain of the Lincoln-Douglas Debate Team and West Virginia State Lincoln-Douglas debate champion in 2008. Mr. Pellegrin obtained his Juris Doctorate, Cum Laude, from the Appalachian School of Law in Grundy, Virginia in 2013. While attending law school, Mr. Pellegrin was a member of the Constitutional Law Moot Court Team and was consistently on the Dean's List.

SMS Participates in the Annual Smoke on the Water Chili Cook-Off.

On July 21, 2014, SMS was once again proud to participate in the annual Smoke on the Water Chili Cook-off to benefit Hospice Care. This year, SMS won the "Best Booth" award!

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.

SMS Sponsors Chestnut Mountain Ranch Community Fundraiser.

SMS proudly served as a sponsor for "A Night at the Ranch." This event is the annual fundraiser for Chestnut Mountain Ranch, a charitable organization that provides a faith based school and home for boys in crisis and in need of hope and healing. "Each year, our firm looks for opportunities to give to our community," said Member Tim Linkous. "This organization makes a major impact on troubled young men, and it helps them turn their lives around toward a positive direction. It is an honor to partner with Chestnut Mountain Ranch this year." For more information about the Ranch and all the program offers, please visit www.chestnutmountainranch.org.

SMS Member Natalie C. Schaefer Presents Seminar on Evidence to West Virginia Attorneys.

On June 27, 2014, Member Natalie C. Schaefer presented a legal seminar entitled "Applying the Rules of Evidence: What Every Attorney Needs to Know." The presentation was designed to share tips with other attorneys on recognizing key evidence and then traversing the obstacle course of qualifying and introducing the evidence at trial.

Legal Developments

Tabata v. Charleston Area Med. Center, In April, the Supreme Court of Appeals of West Virginia diverged from the national trend in privacy law and data breach cases in *Tabata v. Charleston Area Medical Center, Inc*., No. 13-0766 (May 28, 2014). The nationally-recognized decision created two important points of precedent: (1) that plaintiffs have standing to bring claims for breach of the duty of confidentiality against a treating physician and claims for invasion of privacy (against seemingly anyone) absent allegations of special damages; and (2) that West Virginia law is consistent with certifying class actions for the class of people who are allegedly harmed by data breaches, even absent allegations of special damages.

In *Tabata*, Charleston Area Medical Center (CAMC) disclosed records of 3,655 patients on the internet, though no evidence was ever produced to show that there was unauthorized access of the information. Notably, there were also no allegations or evidence of actual damage or injury, other than an increased risk of identity theft in the future. The Court noted that this, alone, would not constitute injury in fact for purposes of establishing standing. Instead, it determined that the patients of CAMC had a concrete, particularized, and actual legal interest in having their information kept confidential. Additionally, *Roach v. Harper*, 143 W. Va. 869 (1958) created "a legally

protected interest in privacy." *Id*. Because West Virginia law, for purposes of standing, defines "injury-in-fact" as an invasion of a legally protected interest, the Court found that breach of a duty of confidentiality and invasion of privacy claims may be brought absent allegations of special damages. See, *Findley v. State Farm Mut. Auto. Ins. Co*., 213 W. Va. 80 (2002). The Court went further, and noted that elements of commonality, typicality, and the predominance of common issues of law or fact were all satisfied, and that the Circuit Court of Kanawha County abused its discretion in finding that the plaintiffs failed to meet the requirements for class certification.

The case builds upon existing West Virginia law that established a private cause of action for disclosure of confidential health information by a treating physician. However, *Tabata* appears to extend to any data breaches through its invasion of privacy claim. Further, it provides grounds to certify class actions based solely on the publication or disclosure of confidential information. Justice Ketchum dissented, noting that discovery produced no evidence that any of the plaintiffs' information had been impermissibly viewed or accessed. He stated, [n]o harm, no foul. The plaintiffs lack standing to sue or represent a class of unnamed plaintiffs."

W. Va. Ex Rel. Montpelier Insurance Co. and Charleston, Revich & Wollitz LLP v. Hon. Louis H Bloom, et. al., No. 13-1172, April 10, 2014, concerns a request for a writ of prohibition, sought by an insurance company (Montpelier), to prevent enforcement of a discovery order entered by the Circuit Court of Kanawha County. The discovery order pertaining to Montpelier requested certain documents which Montpelier alleged were protected by attorney-client privilege and the work product doctrine. The discovery order included copies of billing statements from outside counsel; commercial coverage opinion letters; and training materials provided to or reviewed by Montpelier's outside counsel. The Circuit Court ruled that the attorney-client privilege was waived. The Supreme Court of Appeals of West Virginia held that, even though Montpelier disclosed the recommendations in the opinion letters to its insured, the coverage opinion letters were protected by attorney client privilege because they contained legal advice and were written by outside counsel.

The Court also held that Montpelier's seminar and training materials prepared by outside counsel were protected by attorney-client privilege because they reflected the counsel's "legal opinion on specific topics," and "demonstrat[ed] specific requests by [counsel's] clients for legal opinions on specific subjects."

However, the Court held that the billing statements from Montpelier's outside counsel were not protected by the attorney-client privilege or the work product doctrine because the documents merely provided general descriptions of the work performed, contained no legal theories or conclusions, and were not intended for use in litigation.

Lowe v. Richards and Hegyi, No. 13-0234, April 10, 2014, the Supreme Court of Appeals of West Virginia held that circuit courts in West Virginia have subject matter jurisdiction to resolve an interstate boundary line dispute between private litigants where there is an issue as to whether real property is located in West Virginia or another State. In *Lowe*, the defendant argued that, under W. Va. Code § 29-23-2(a), the Boundary Commission was the proper authority to hear boundary disputes involving private citizens.

The Court disagreed, holding that this statute expressly limits the Boundary Commission's authority to act to situations where it is requested to do so by the governor or legislature. The statute does not authorize private parties to request the Boundary Commission investigate a boundary dispute.

While a circuit court has subject matter jurisdiction to make interstate boundary determinations between private litigants, the states are not bound by this determination. Due to this, the states are not indispensable parties to private litigation requiring interstate boundary disputes.

The Court also held that the states of Virginia and West Virginia were not indispensable parties to the case, and that the Circuit Court erred in dismissing the case on these grounds.

Gray v. Boyd and City of Parkersburg, No. 13-0531, April 10, 2014, while responding to an emergency call, Defendant Boyd of the Parkersburg Fire Department drove a fire truck through a red light at an intersection. Another car collided with the fire truck in the intersection. The fire truck had its emergency sirens and lights turned on, but the truck's traffic control system was not operational.

The circuit court granted summary judgment to Defendant Parkersburg. Gray appealed, alleging that genuine issues of material fact were present. The Supreme Court agreed with Gray and overturned summary judgment, remanding the case for further proceedings. The Court's decision was based upon the presence of conflicting deposition testimony, and conflicting eyewitness accounts.

CashCall v. Morrissey, No. 12-1274, May 30, 2014, the defendant, CashCall, was found liable to the State of West Virginia for consumer protection violations. The paper documents CashCall produced were records for debt collection and lending in West Virginia. Attorneys' fees were also awarded. CashCall appealed the judgment and the award of attorneys' fees.

In a lengthy Memorandum Decision, the Supreme Court of Appeals affirmed the circuit court's rulings. The Court found that CashCall acted in bad faith and that the verdict awarding attorney's fees was proper in this situation.

Kenny v. Liston, No. 13-0427, June 4, 2014, involved the rule against double recovery, which prohibits plaintiffs from collecting more in damages than the actual amount of loss that they incurred. When a plaintiff receives compensation from a joint tortfeasor, the amount of money the plaintiff may collect from other joint tortfeasors is offset by this amount. However, when plaintiffs receive *third party payments, such as insurance payments; employment benefits; or gratuitous services*, the amount of money they may recover in court is *not* offset by these "collateral source" payments. In this case, the plaintiff's medical bills were reduced by an agreement between the hospital and the plaintiff's insurance carrier. The Supreme Court held that the collateral source rule applied to these reductions, and that the plaintiff was entitled to collect the *full* value of the medical bills, which was not to be offset by any insurance payments or reductions.

Hurlbert and Sage Info. Serv. v. Matkovich and Robinson, No. 13-0217, June 6, 2014, involved the issue of whether an out-of-state corporation and its owner could use the West Virginia Freedom of Information

Act (FOIA) to obtain Computer Assisted Mass Appraisal (CAMA) data for all real property in West Virginia or whether that data is exempt from FOIA because it contains confidential tax return information and because it contains personal information about private citizens. The Supreme Court reversed the Circuit Court's decision, finding that the CAMA data is not automatically exempt from FOIA just because it contains some information obtained from tax returns and because it contains some personal information about private individuals. The Supreme Court ruled that the State Tax Commissioner and the Kanawha County Assessor must provide the Petitioners with a Vaughn index outlining the portions of the CAMA database that are exempt from disclosure. The Supreme Court rejected the Respondents' argument that redacting the exempt information would be unduly burdensome and expensive, requiring outsourcing of computer programing services at $203 per hour, noting that under the Court's recent opinion of *King v Nease*, No. 13-0603, a public body can establish fees reasonably calculated to reimburse it for the cost of making reproduction of records in response to a FOIA request.

SER Thornhill v. King, No. 14-0059, June 6, 2014, the West Virginia Supreme Court of Appeals held that an offer of employment in a county does not establish venue in that county and venue cannot be established based upon an offer of employment. The Court's decision was based upon the plain meaning of W. Va. Code W.Va. Code § 56-1-1(a), which states that venue is based upon either the place of the defendant's residence or the location where the cause of action occurred. The Court also determined that the 1986 Amendments to the venue statute did not abrogate the holding in *Wetzel County Savings & Loan Co. v. Stern Bros., Inc*., 156 W. Va. 693, 195, S.E.2d 732 (1973), which held that the places of formation, breach, and manifestation of damages may be used to determine where the cause of action arose. Finally, because Roberts argued in court, but did not state in pleadings, that he was in Kanawha County when he accepted the offer of employment from Thornhill, the Court and held that "'[c]ourts of record can speak only by their records, and what does not so appear does not exist in law.'" Syl. Pt. 2 (quoting Syl. Pt. 3, *Hudgins v. Crowder and Freeman, Inc*., 156 W. VA. 111, 191 S.E.2d 443 (1972).

EQT v. Toney, No. 13-1101, June 13, 2014, the plaintiff filed an action against his employer, EQT, alleging age discrimination, hostile work environment, retaliatory discharge, breach of contract, violating the West Virginia Wage Payment and Collection Act, and intentional infliction of emotional distress. EQT filed a motion to dismiss based upon an alternative dispute resolution (ADR) agreement it had with the plaintiff. The ADR agreement included a phrase covering any claim that is related in any way to an individual's employment with Equitable [now EQT] that is recognized in the federal or state courts where the employee works[.]" The Circuit Court granted this motion and compelled arbitration. The Plaintiff appealed, alleging that EQT did not provide adequate consideration for the ADR agreement.

The Supreme Court of West Virginia held that both parties provided adequate consideration for the agreement because both parties agreed to submit their employment disputes to arbitration. The plaintiff also argued that his participation in the ADR agreement was based upon EQT's requirement that employees sign the ADR agreement in order to become eligible for the company's incentive based bonus plan, but that this bonus plan was an illusory promise. The Supreme Court of Appeals held that the

promise was not illusory, as the petitioner received payment resulting from the bonus plan in the past, and received a bonus for signing the agreement.

The Plaintiff also alleged that the ADR agreement was unconscionable. The Supreme Court of Appeals ruled for EQT again, holding that the Plaintiff's educational record, including an associate degree in petroleum engineering and graduation from the State Police Academy, was evidence that the Plaintiff had an adequate ability to reasonably understand the terms of the contract he entered into.

Beasley v. Mayflower Vehicle Systems, No. 13-0978, June 13, 2014. Prior to the instant lawsuit, the Plaintiff Beasley was awarded $165,000 from his employer, Mayflower, after filing a claim alleging that he was fired for filing a worker's compensation claim, and for making complaints about the safety of the facility. After the verdict, Beasley obtained a memo from Mayflower's General Manager which stated that "[t]he issue that took place with Bobby Beasley . . . was not dealt with correctly[.]" The memo went on to mandate drug and alcohol testing for any associate in a "similar situation."

Beasley then sued Mayflower again, this time alleging fraud, spoliation of the evidence, and intentional infliction of emotional distress. The Supreme Court of Appeals sided with Mayflower, holding that the Plaintiff could not prove fraud because did not rely on Mayflower's alleged misrepresentation, provided no factual support for his civil conspiracy allegation, and failed to provide "even a scintilla of evidence" to show that the Defendants behavior was "extreme and outrageous."

DeBias v. Coastal Lumber, No. 13-0929, June 16, 2014, the West Virginia Supreme Court of Appeals affirmed a circuit court ruling for summary judgment. The Court ruled that the plaintiff could not prevail with his deliberate intent claim because there was no evidence that his employer had actual knowledge that its forklift operators were inadequately trained, and there were no prior accidents or complaints of similar accidents occurring.

Manor Care v. Douglas, No. 13-0470, June 18, 2014, is an appeal of a $91.5 million verdict awarded to the plaintiff, Tom Douglas, for claims of negligence under the MPLA; violations of the West Virginia Nursing Home Act; and breach of fiduciary duty arising from the death of his wife, Dorothy Douglas. Of the $91.5 million, $11.5 million of the verdict was for compensatory damages, and the remaining $80 million was for punitive damages.

On appeal, the West Virginia Supreme Court of Appeals vacated $1.5 million in compensatory damages under the Nursing Home Act claim because the verdict form was "fatally vague" in failing to specify what the term "injury" referred to on the verdict form. The Court also vacated $5 million in compensatory damages for breach of fiduciary duty because there was no precedent supporting the claim that the nursing home owed a fiduciary duty to Ms. Douglas. The Court then reduced the punitive damages to maintain the 7:1 ratio of punitive to compensatory damages that existed prior to the vacation of the fiduciary duty and Nursing Home Act claims.

In *West Virginia Regional Jail and Correctional Facility Authority v. A.B.*, No. 13-0037, March 27, 2014, *this decision has been withdrawn, and is no longer precedential. The Court will have a*

rehearing to decide the case. In *A.B.*, the plaintiff was an inmate who claimed that she was sexually assaulted by a correctional officer while incarcerated at Southern Regional Jail. The Supreme Court of Appeals clarified the applicability of the qualified immunity doctrine to state agencies, particularly in the context of an inmate claiming she was sexually assaulted by a correctional officer. The Supreme Court of Appeals also clarified that, in West Virginia, qualified immunity covers the discretionary judgments of "rank-and-file" employees of a state agency, as well as high level officials.

The decision created a three-step test to for determining whether the acts of an employee can give rise to vicarious liability for a state agency: 1) the court should consider whether the act or omission involves a "discretionary governmental function;" 2) if deemed a discretionary function, the court must determine if the plaintiff has shown that the acts or omissions violate a "clearly established statutory or constitutional right;" 3) and the court should determine if the act or omission was in the scope of the employee's duties. The court held that the officer in *A.B.* had general functions which were "broadly" discretionary, that the officer violated a clearly established law, but that the alleged sexual assault fell outside the officer's scope of duty. Therefore, the state agency was immune to the plaintiff's claims for vicarious liability for the officer's acts. *Again, this decision has been withdrawn and will be re-issued upon redetermination.*

Changes to the West Virginia Rules of Evidence.

The Supreme Court of Appeals of West Virginia approved comprehensive revisions to the West Virginia Rules of Evidence. The revisions become effective on September 2, 2014. Most of the changes are stylistic and reflect the desire to make the language more consistent with the federal rules. However, some of the rules have undergone significant modification. Among the most significant changes include the modifications below.

Revised Rule 404 changes the West Virginia's requirements regarding the admittance of evidence pertaining to character evidence and history of criminal acts. Parties wishing to use such evidence must provide "reasonable notice of the general nature and the specific and precise purpose for which the evidence is being offered by the party at trial."

Revised Rule 407 is changed to apply to an "event," instead of just an "injury or harm" in the previous version of the rule. "Defect[s] in a product or its design" and "a need for a warning or instruction" are added to the list of express grounds for exclusion as subsequent remedial measures.

Revised Rule 408 precludes settlement offers from admittance into evidence to prove or disprove the "validity or amount of a disputed claim, the liability of a party in a disputed claim, or to impeach by a prior inconsistent statement or contradiction[.]" The current rules do not include language prohibiting the use of this evidence from being used to "impeach by a prior inconsistent statement . . . ."

Revised Rule 411 is modified to allow the admittance of liability insurance evidence if "a party that places into controversy the issues of the party's poverty, inability to pay, or financial status."

Rule 502 codifies the rules regarding privilege. The rule governs waivers of the attorney-client privilege and the work-product doctrine. It also protects information

which is inadvertently disclosed as long as 1) the disclosure was inadvertent, 2) reasonable steps were taken to prevent disclosure, and 3) reasonable steps are promptly taken to rectify the error.

Revised Rule 606 is modified to allow jurors to testify that a mistake was made in entering the verdict on the verdict form.

Revised Rule 702 increases the trial court's "gatekeeper" function by specifically requiring the court to evaluate expert testimony based upon novel scientific theories.

Quarterly Quote: "In the middle of difficulty lies opportunity."
-- *Albert Einstein*

*In a continuing effort to ensure strict compliance with all applicable ethical rules, SMS attorney victories will no longer be announced in the Newsletter until the current rules regarding attorney advertising are revised to permit such announcements.

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