SMS Quarterly

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SMS Firm News

SMS Welcomes New Associate in Charleston Office

Shuman, McCuskey & Slicer, PLLC is pleased to announce that Kimberly M. Bandy recently joined the law firm as an Associate in the Charleston, West Virginia office.

"When we began speaking with Ms. Bandy about a position with our firm, we thought she would be a perfect addition to our team of lawyers," commented Founding Member John F. McCuskey. "Our instincts proved correct as she has already proven to be a quick study and dedicated to our clients."

Ms. Bandy is a former Law Clerk to the Honorable James P. Mazzone, one of the judges presiding in West Virginia's Northern Panhandle. "Undoubtedly, her experience with Judge Mazzone fostered her ability to readily identify pertinent case issues and analyze those issues from multiple perspectives," McCuskey continued.

For more information about Ms. Bandy, please see this edition's SMS Lawyer Highlight.

SMS Family Grows with Recent Birth

Congratulations to SMS Associate Heather B. Osborn (formerly Heather B. Lord) with the arrival of her baby girl, Amelia Polly Osborn!

Weighing in at a whopping 9 pounds and recording a height of 20.5 inches, Amelia was born on August 29, 2008 to Heather and Evan Osborn. As first time parents, Heather and Evan heard numerous tales about sleepless nights, but Heather reports, "Evan and I are even able to sleep at night!"

There is nothing more precious than human life, something which Heather and Evan are enjoying first hand. SMS joyously congratulates Heather and Evan on a beautiful baby, and we wish them the best on their new journey of parenthood.

Heather is currently taking maternity leave to spend time with Amelia, and she is expected to return in the middle of October.

SMS Lawyer News

With the uncertainty surrounding the economic markets and negative reports dominating American news, it is a pleasure to report positive and encouraging results obtained by SMS lawyers during this last quarter.

SMS lawyers achieved numerous, successful results for their clients in the last three months, and here are but a few:

Jury Renders Defense Verdict at Trial, Assesses 100% fault Against Plaintiff, And Awards Damages to Defendant on Counter-Claim

Congratulations to Associate Jack Hoblitzell who recently obtained a complete defense verdict

and a counter-claim award of damages on behalf of a Defendant following a jury trial on September

The lawsuit arose out of a motor vehicle accident that occurred on December 17, 2004, and liability was disputed. The Plaintiffs, an elderly driver and his wife, were exiting a Shell Gas Station parking lot along Route 19 in Daniels, West Virginia. They turned left and into the lane of the Defendant who struck them from behind.

The Plaintiffs maintained that they pulled out, had established themselves in the roadway, had proceeded down the roadway for a distance, and were rear-ended by the Defendant. They alleged that the Defendant was negligent for failing to maintain control of his vehicle.

Mr. Hoblitzell presented physical evidence and eye witness testimony to establish that the impact was directly in front of the driveway to the Shell Gas Station and that the left rear quarter panel of the Plaintiffs' vehicle was impacted. Mr. Hoblitzell argued that this established the Plaintiffs were still in the process of pulling out of the driveway, they had not completed the turn, and they had not established themselves in the roadway.

Mr. Hoblitzell also argued that the Defendant had the right-of-way as he was traveling south on Route 19, and the Plaintiffs failed to yield the right-of-way in violation of West Virginia Code Section 17C-9-4. As such, he asserted the accident was unavoidable.

The Plaintiffs countered that the Defendant should have slowed down and yielded to them as West Virginia Code Section 17C-6-1 requires when a vehicle is approaching an intersection. The Plaintiffs also argued that other statutes required the Defendant to slow his rate of speed at this intersection to avoid accidents of this nature. The Plaintiffs went as far as to suggest that the Defendant should have swerved into the gas station parking lot to avoid the accident because "the gas pumps weren't that close to the road."

Mr. Hoblitzell successfully convinced the jury of his client's position. The jury returned a defense verdict, assessed 100% fault to the Plaintiffs, and awarded the Defendant damages on his counter-claim for property damage.

16, 2008 in Raleigh County, West Virginia, Judge Kirkpatrick presiding.

Suicide-Wrongful Death Case Dismissed

Firm Member Lou Ann S. Cyrus and Associate Heather Osborn recently were successful in obtaining a dismissal, with prejudice, of a wrongful death case against the West Virginia Department of Health and Human Resources ("WVDHHR").

Plaintiff Clarence Bays, Administrator of the Estate of Billy Bays, alleged that changes made by the WVDHHR to the criteria to qualify for the Medicaid Home and Community Based Age/Disabled Waiver Program resulted in the decedent committing suicide after receiving a letter advising that he "potentially" had been denied benefits under the program.

The Honorable John Hutchison, Judge of the Circuit Court of Raleigh County, granted summary judgment in favor of the WVDHHR, finding that the action taken by the WVDHHR in changing the eligibility requirements was clearly an executive or administrative function of the agency protected by the doctrine of qualified immunity. The Court further found that there was no evidence that the WVDHHR knowingly violated a clearly established law, or that it acted maliciously, fraudulently, or oppressively, thus entitling WVDHHR to qualified immunity.

In addition, the Court held that even if the Plaintiff could get past the common-law doctrine of qualified immunity, the WVDHHR, nonetheless, could not be held liable for the decedent's suicide because the Plaintiff could not show an exception to the general rule that recovery for wrongful death by suicide is not permitted under West Virginia law. Two exceptions to the general rule include: (1) where the defendant had a duty to prevent the suicide from occurring, and (2) where the defendant committed a tortious act that caused a mental condition in the decedent that proximately resulted in an uncontrollable impulse

to commit suicide, or prevented the defendant from realizing the nature of his act.

Finding that neither exception was present in this case, the Court found a second ground for dismissing the WVDHHR with prejudice.

A Literal Run-In with Police results in Summary Judgment and Dismissal

On September 22, 2008, Firm Member Karen McElhinny and Associate Jack Hoblitzell obtained summary judgment in the Circuit Court of Logan County, West Virginia in favor of the Town of Chapmanville and its former employee, Police Officer Billy Browning (no relation to Firm Member Mark Browning).

Plaintiffs Joseph Christian and Paula Estep filed a lawsuit over a motor vehicle accident that occurred on November 6, 2005. At that time, Officer Browning was patrolling for speeders in front of the Chapmanville Middle School during midget league football games that were ongoing. He detected a speeding white Ford (no relation to the O.J. incident) and was about to initiate a pursuit. However, before he could give chase, the Plaintiffs' vehicle passed his location.

Officer Browning pulled out behind the Plaintiffs' vehicle with lights flashing and sirens sounding. While attempting to pass the Plaintiffs' vehicle, Plaintiff Joseph Christian, the driver, turned across traffic into the path of Officer Browning rather than pulling as far to the right of the roadway as required by West Virginia law. Plaintiff Joseph Christian's act resulted in a motor vehicle accident with Officer Browning.

The Plaintiffs filed the lawsuit claiming that Officer Browning negligently operated his vehicle by crossing a double yellow line and speeding without sirens sounding in violation of West Virginia Code Sections 17C-6-1 and 17C-2-5(c). They also alleged that Officer Browning's alleged negligence resulted in their injuries and damages.

Member McElhinny and Associate Hoblitzell filed a Motion for Summary Judgment arguing immunity conferred by the West Virginia Governmental Tort Claims and Insurance Reform Act.

In granting summary judgment in favor of both Officer Browning, individually, as well as the Town, Judge Perry held that Officer Browning was immune under the Act. Further, he ruled that Plaintiffs' evidence regarding Officer Browning's alleged negligence was insufficient to send to the jury, and, therefore, the Town was also entitled to summary judgment.

Specifically, the Plaintiffs admitted to knowing that a police car pursuing a lawbreaker was behind them prior to turning left across traffic because they saw the flashing blue lights. Indeed, the Plaintiffs testified that they thought he was pulling them over. They also admitted to hearing a horn sound just before the collision which the Court noted was evidence that sirens were sounding.

The Court also found that the Plaintiffs' sole evidence that sirens were not sounding was the Plaintiffs' alleged failure to hear them, which, as noted in Cross v. Davis, a 1968 case, is merely evidence that Plaintiffs did not hear the sirens, rather than the sirens not sounding at all. As such, the Court found that Officer Browning was entitled to the exemptions provided to law enforcement officers set forth in West Virginia Code Section 17C-2-5(c).

In the alternative, the Court found that the Plaintiffs' failure to pull to the right of the roadway and stop, as required by law, was a separate, independent act of negligence that constituted an intervening and/or superseding cause of the accident. Finally, the Court held that even if the sirens were not activated, the failure to sound the sirens was not the proximate cause of the accident as a result of the Plaintiffs' admission to seeing Officer Browning behind them with his lights flashing and his active pursuit of their vehicle.

Firm Member Speaks at Annual ANPAC Seminar

Firm Member Lou Ann Cyrus had the pleasure of being a presenter at the American National

Property and Casualty Companies' 2008 Annual Training Conference on June 19, 2008. Mrs. Cyrus spoke to lawyers and claims professionals about utilizing successful ethical decision making when handling claims and files.

Though her presentation was interrupted by a brief power outage and a tornado just blocks away from the Springfield, Missouri Conference Center, Mrs. Cyrus electrified her audience and imparted essential information that was well received.

Legal Developments

For those of us who regularly practice and/or have cases pending in Federal Courts, the following decision from the United States District Court for the Southern District of West Virginia will provide useful information concerning fraudulent joinder. The case summary and analysis was prepared by Associate Kimberly M. Bandy and edited by Member Timothy R. Linkous.

Chad Carden v. Wal-Mart Stores, Inc., et al., Civil Action No. 5:08-0063
U.S. District for the Southern District of West Virginia, Beckley Division
Entered September 5, 2008 by United States Magistrate Judge R. Clarke VanDervort

Plaintiff Chad Carden filed a lawsuit against Wal-Mart for injuries that he sustained in the Wal-Mart parking lot when his friend struck the Plaintiff with his car. The Plaintiff entered the Wal-Mart to retrieve a handicapped accessible cart for his friend, Billy Canaday, while Mr. Canaday parked the car that they arrived in. The Plaintiff then brought the handicapped accessible cart out of the store to his friend. The Plaintiff advised Mr. Canaday that he had parked the car incorrectly, and Mr. Canady then struck the Plaintiff while the Plaintiff was in the parking lot.

The Plaintiff filed the suit in the Circuit Court of Raleigh County against Wal-Mart and Eric Hodge, whom the Plaintiff alleged was an agent of Wal-Mart and whom is responsible for implementing policy and maintaining Wal-Mart property in a safe manner. The Plaintiff asserted that it was against Wal-Mart policy to allow handicapped accessible carts to leave the store. The Plaintiff maintained that by allowing the cart to exit the store, Wal-Mart and Mr. Hodge breached a duty that was owed to the Plaintiff. Wal-Mart filed a notice of removal to the Southern District based upon diversity jurisdiction. Wal-Mart argued that although Mr. Hodge shared West Virginia residency with the Plaintiff, Mr. Hodge had been fraudulently joined to defeat diversity jurisdiction. Thereafter, the Plaintiff filed a motion to remand based upon lack of diversity.

The Southern District first addressed Mr. Hodge's motion to dismiss because if he was not a proper party, then he could not defeat diversity jurisdiction. The Court found that in the intervening time since Mr. Hodge had filed his motion, the Plaintiff had cured the defect in service and effected proper service on him. Thus, the Court found that Mr. Hodge was a proper party and it was appropriate to consider Wal-Mart's claim that he had been fraudulently joined as a party.

In discussing the issue of fraudulent joinder, the Court noted that the burden of proving fraudulent joinder is a heavy one. In order to prove fraudulent joinder, a defendant must show that there is no possibility that the Plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the Plaintiffs' pleading of jurisdictional facts. Relying upon the West Virginia Supreme Court of Appeals' decision in Doe v. Wal-Mart Stores, Inc., 198 W.Va. 100, 479 S.E.2d 610 (1996), the Southern District found that the Plaintiff stated a cause of action against Wal-Mart and its manager.

In Doe v. Wal-Mart Stores, Inc., the West Virginia Supreme Court of Appeals reversed the lower court's dismissal of Wal-Mart and its manager for failure to state a claim in a case where the plaintiff alleged that she was abducted from a parking lot outside the Wal-Mart and sexually assaulted. The Supreme Court of Appeals

held in Doe that Wal-Mart and Wal-Mart's manager could be held liable if they participated in the possession of the parking lot and opened it to business invitees in conjunction with the conduct of their business. Based upon the finding of potential liability for criminal conduct that had occurred in the parking lot in Doe, the Southern District concluded that there was potential liability for negligent conduct occurring in the parking lot. The Southern District Court concluded that Mr. Hodge was not fraudulently joined in the lawsuit, and it remanded the case based upon lack of diversity jurisdiction.

(This article was edited by Member Timothy R. Linkous. This article is not intended to and is not a substitute for the professional legal advice of counsel. If you have questions about this decision or the information contained in this article, you are encouraged to speak directly with a SMS lawyer.)

SMS Lawyer Highlight

Associate Kimberly M. Bandy

Kimberly M. Bandy joined the firm in 2008 as an associate in the Charleston office, and her practice focuses primarily on insurance-related matters. She is a graduate of West Virginia University where she received a Bachelor of Arts degree, *summa cum laude*, in Political Science. While at West Virginia University Ms. Bandy was active in the Debate and Forensics Society.

Ms. Bandy attended Washington and Lee University School of Law in Lexington, Virginia. While at Washington and Lee, she was a student case worker in the Black Lung Legal Practice Clinic where she assisted in representing claimants seeking federal black lung benefits before the United States Department of Labor. She was also assigned to assist the Honorable Michael Irvine and the Honorable Malfourd W. "Bo" Trumbo, Judges of the 25th Judicial Circuit of Virginia, through her participation in the School of Law's Judicial Clerkship Program. Upon graduation from Washington and Lee University School of Law, Ms. Bandy served as judicial law clerk to the Honorable James P. Mazzone, Judge of the First Judicial Circuit of West Virginia.

Ms. Bandy is admitted to practice law before all West Virginia Circuit Courts, the Supreme Court of Appeals of West Virginia, and the United States District Court for the Southern District of West Virginia.

She is originally from Parkersburg, West Virginia, and she now resides in Charleston.

Quarterly Quote: "A judge is a law student who marks his own examination papers." – H.L. Mencken

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