

# SMS QUARTERLY

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



**Shuman,  
McCuskey  
& Slicer** PLLC

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## SMS Welcomes Lawyers in Charleston and Morgantown

SMS is pleased to announce that two excellent, experienced lawyers recently joined our firm: Natalie C. Schaefer in our Charleston office and Williams “Bill” Adams in our Morgantown office. Natalie and Bill are featured in the SMS Lawyer Highlight.

With the recent economic downturn, many law firms are cutting lawyers from their rosters and, in turn, decreasing their ability to offer a wide range of services and experienced lawyers to their clients. However, SMS is committed to providing the best quality and most comprehensive legal representation to its clients regardless of the current economy. With the addition of Natalie and Bill to our law firm, our dedication to these goals and our clients’ best interests will be served.

“The strong litigation skills and analytic abilities of Ms. Schaefer and Mr. Adams compliment our practice very well,” commented SMS Founding Member John McCuskey. “Both of them hit the ground running and have already proven to be valuable assets to our clients.”

If you have not already met or worked with Natalie and Bill, we look forward to introducing them to you in the very near future.

## SHUMAN, MCCUSKEY & SLICER, PLLC CONVENIENT LOCATIONS

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## SMS Presents to Dieticians

While defense lawyers are often thought of as reactive and only called upon to defend filed lawsuits and claims made, SMS strives to provide clients with a variety of risk management tools to assist with proactive lawsuit and claim prevention.

The SMS Quarterlies showcased some of these efforts in 2010, and this last edition of the year is no exception. Recently, Member Timothy R. Linkous presented to a group of dieticians who are based out of Morgantown and who provide services throughout West Virginia.

“In the health care setting, most people mistakenly believe that physicians and nurses are the only targets of malpractice lawsuits,” stated Mr. Linkous. “This is simply not true. In this litigation climate, all health care professionals remain at risk.”

With the aging population in the United States, long term care facilities, nursing homes and skilled nursing facilities are experiencing an increase of admissions. “The care of these patients necessarily involves a wide range of health care services, and their medical conditions are often very complex,” continued Mr. Linkous. “Clearly, there exists an increase in the number of lawsuits pertaining to these patients and their care. All health care providers in these settings should be taking steps to provide quality care and minimize risk.”

Inasmuch as many of the lawsuits involve the development of significant decubitus ulcers or death as the arguable result of poor nutrition, the evaluations of and recommendations from dieticians become critically important. “The presentation focused upon solid evaluations, important communication among the health care team, and critical documentation,” said Mr. Linkous. “When dieticians and other health care providers adhere to these essential practices, we can defend most lawsuits and, in many situations, lawsuits can be avoided altogether.”

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 Lawyer Victories

### Hide-The-Ball Can Be An Expensive Game

In a \$40 million business interruption lawsuit filed against an SMS client, the United States District Court for the Southern District of West Virginia recently upheld a sanction of \$25,000.00 against the Plaintiff and in favor of our client represented by Founding Member William Slicer.

The Plaintiff marked over one million pages of produced documents as confidential in violation of the Court’s protective order and in violation of Local Rule 26.4, thereby resulting in the sanction. The Court previously awarded \$3,000.00 to our client and against the Plaintiff as a sanction for unreasonable discovery positions.

### Petition For Appeal ... Denied.

In a previous edition of the SMS Quarterly, we reported that Member Timothy R. Linkous and Associate Molly Miner obtained summary judgment on behalf of their client, a chiropractor, based upon the Plaintiffs’ failure to meet the statute of limitations be several days in a medical malpractice case.

The Plaintiffs appealed the decision to the Supreme Court of Appeals of West Virginia. Recently, the high Court denied the appeal, thereby finalizing the judgment of the Monongalia County Circuit Court (Judge Clawges).

## Federal Court Issues Sentence Pertaining To Inmate's Lawsuit Against Regional Jail: Dismissed

Congratulations to Member Timothy R. Linkous and Associate Molly Miner for their recent victory on behalf of the Tygart Valley Regional Jail in a lawsuit filed by an inmate alleging violation of 42 U.S.C. §1983, intentional infliction of emotional distress, and wrongful provision of medical care.

Ms. Miner and Mr. Linkous filed a Motion to Dismiss inasmuch as the Plaintiff failed to appropriately plead his causes of actions and failed to give pre-suit notice of his claims. The Court granted the Plaintiff an opportunity to amend his Complaint, but the Plaintiff failed to do such. As a result, the Court concluded that the Complaint failed to state a claim under Federal Law and the Plaintiff was barred from bringing State claims.

## SMS Lawyer Highlight

In this edition of the SMS Quarterly, we feature the two newest members of the SMS team: Natalie Schaefer and William Adams. If you would like more information about either lawyer, please feel free to visit our website, [www.shumanlaw.com](http://www.shumanlaw.com), or contact one of our Members.

### Natalie C. Schaefer

SMS is pleased to welcome Natalie C. Schaefer in our Charleston, West Virginia office. Natalie focuses primarily on defense litigation, including catastrophic loss and wrongful death, as well as the defense of national manufacturers, distributors, and retailers of consumer products involved in construction, mining and industrial accidents. She also defends liability claims involving civil rights, public entities, and governmental agencies. Additionally, she practices energy litigation in cases involving accident investigation and safety compliance.



Natalie obtained her BA in Political Science from West Virginia University in 1999, earning the honor of *cum laude*. She also completed double minors in English and Philosophy. Thereafter, she entered the West Virginia University College of Law.

Natalie's academic achievements and honors continued throughout law school. An Order of Coif and Order of Barristers graduate of the West Virginia University College of Law, she was the 2002 Lugar Trial Association Competition winner and also served as Executive Board Member for the West Virginia University Law Review.

She is admitted to practice before the Supreme Court of Appeals of West Virginia and the United States District Court for the Southern District of West Virginia. She is also a member of Defense Trial Counsel of West Virginia, Defense Research Institute, West Virginia Bar Association, and West Virginia Oil Marketers & Grocers Association.

Natalie is married to Dr. Mark Schaefer, an Assistant Professor of Political Science at Marietta College.

### William S. Adams

SMS also welcomes William "Bill" Adams to our Morgantown, West Virginia office. Bill routinely handles complex defense litigation such as commercial cases, corporate accounting, medical professional liability, engineering, wrongful death, personal injury, construction, shareholder, veterinary malpractice, antitrust, and pharmaceutical litigation. He has successfully defended many cases through trial.

Bill earned his BA in Spanish and BS in Secondary Education (Mathematics and Spanish) from West Virginia University in 1996, earning the honor of *magna cum laude*. During that time, he also obtained a minor in Philosophy.

He graduated from the West Virginia University College of Law in 1999, graduating in the top twenty percent of his class. During his law school tenure, he was a participant in the Moot Court Honorary Board and the Lugar Trial Advocacy Association. He also developed, organized and served as President of the Student Defense Trial Counsel.

Bill is licensed to practice law in West Virginia and Pennsylvania, and he is admitted to practice in the United States District Courts for the Southern and Northern Districts of West Virginia in addition to the Fourth Circuit Court of Appeals. He holds membership with the West Virginia Defense Trial Counsel, West Virginia State Bar, and Monongalia County Bar Association. His experience includes serving as Senior Writ Clerk and Supervising General Writ Clerk with the Supreme Court of Appeals of West Virginia.

Born in Philadelphia, Pennsylvania, Bill was raised in the suburbs. As a result, he is an avid Philly sports fan, and he regularly attends sporting events with his six year old son, Kellen. Bill took Kellen to his first Flyers playoff game when he was one year old, and they have attended at least one game every year since. He also remains actively involved with Kellen's sports activities, including football, wrestling, basketball and baseball.

A student of gastronomy, Bill is passionate about cooking, and he enjoys preparing Italian, Chinese, Mexican, Cajun and seafood meals. He maintains a garden of fresh herbs and vegetables for cooking, and his interests include zymurgy. He will certainly be involved in assisting with the firm's entry in next year's Chili cook off.

Additionally, he trains throughout the year for triathlons and road races, completing 4-5 of each annually. He finished his first Half Iron Man distance triathlon this past July in Sonoma, California.

## 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 (one of which was noted in a previous Quarterly). However, the high Court remained busy this year, and, if you would like more information about recent decision, please feel free to contact one of our lawyers.

### **Ramey v. Contractor Enterprises, Inc.** (WVSC January 2010 Term, No. 34804)

In this *per curiam* decision, the WVSC affirmed a circuit court's order granting summary judgment in a deliberate intent civil action brought pursuant to W.Va. Code §23-4-2(d)(2)(ii). The Court found that the Plaintiffs did not present sufficient evidence to support the requisite elements of the claim, and it reiterated WV law in the following Syllabus Point: "To establish 'deliberate intention' in an action brought pursuant to W.Va. Code §23-4-2(d)(2)(ii), a plaintiff or cross-claimant must offer evidence to prove each of the five specific statutory requirements." (citing Syl. Pt. 2, in part, Helmick v. Potomac Edison, Co., 185 W.Va. 269, 406 S.E.2d 700 (1991)).

Mr. Ramey was employed by the Defendant as a highwall drill operator in Logan County, and he was operating a drill when his job-related accident occurred. Specifically, his employer instructed him on the safe use of a drill, and he was instructed to stay at least four feet away from the 80 foot highwall while drilling holes into the ground. However, Mr. Ramey positioned himself 23 inches away from the edge of the highwall without any safety equipment, and he fell over the 80 foot highwall thereby sustaining serious injuries. The Defendant employer was cited by MSHA for failing to equip its employees with safety belts and lines where there is a danger of falling. After the accident, the employer revised its safety plan to include safety equipment any time an employee comes within six feet of the highwall. Mr. Ramey then filed a deliberate intent action against the Defendant.

At the conclusion of the discovery, the Defendant moved for summary judgment, and the circuit court granted the same finding that (1) there were no facts to show that the Defendant had actual knowledge of any unsafe working conditions and (2) there were no facts to show that the Defendant intentionally exposed Mr. Ramey to the unsafe working condition. The WV Supreme Court affirmed. For those of us defending deliberate intent cases, this is a must read to fully appreciate the Court's rationale. For instance, the Court basically disregarded an affidavit of an former employee who stated that he informed a supervisor at the mine about equipment being too close to the highwall edge. It also disregarded an expert witness disclosure wherein Mr. Ramey stated his expert would testify that the Defendant was required to perform safety inspections, and, if those had been performed and/or performed accurately, this danger would have been discovered. This decision will undoubtedly be cited as a basis for future dispositive motions.

#### **Riffle v. CJ Hughes Construction Company**

(WVSC September 2010 Term, No. 35521)

While the facts of this case may be pertinent to an analysis of other matters on a case-by-case basis, the holding and new Syllabus Point is important for all practitioners. The WVSC held as follows: "When a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is converted into a motion for summary judgment, the requirements of Rule 56 of the West Virginia Rules of Civil Procedure become operable. Under these circumstances, a circuit court is required to give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. In this way, no litigant will be taken by surprise by the conversion. The absence of formal notice will be excused only when it is harmless or the parties were otherwise apprised of the conversion. Once the proceeding becomes one for summary judgment, the moving party's burden changes and the moving party is obliged to demonstrate that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

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**Quarterly Quote:** "We always want the best man to win an election. Unfortunately, he never runs." -- Will Rogers

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