

# 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 Distinctions

**David L. Shuman, Martindale-Hubbell® Bar  
Register of Preeminent Lawyers™ and Nominated  
as a 2012 Top Attorney for West Virginia**

- Mr. Shuman received the AV Preeminent status, the highest rating for professional ethics and legal ability by peers. He has become a member on behalf of the firm on the Martindale-Hubbell® Bar Register of Preeminent Lawyers™. Fewer than 5% of all law firms qualify for this distinction, making members of the Martindale-Hubbell Bar Register of Preeminent Lawyers the most respected in the country.
- Mr. Shuman was also nominated as a Top Attorney in West Virginia for Personal Injury and Medical Malpractice Defense.

**William R. Slicer, Martindale-Hubbell® Client  
Distinction Award**

- Mr. Slicer is a member of an elite group of attorneys who have achieved 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.

## SHUMAN, MCCUSKEY & SLICER, PLLC

### AGGRESSIVE REPRESENTATION

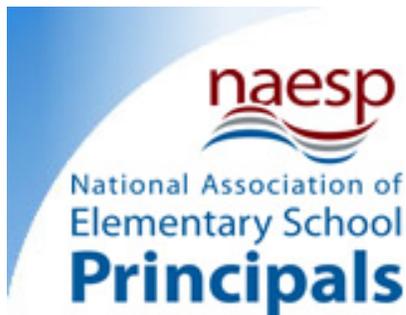
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## SMS News

### SMS Attorneys Author National NAESP “Legal Matters!” Education Law Newsletter.

As a joint initiative of the National Association of Elementary School Principals Foundation (NAESPF) and Shuman McCuskey & Slicer, PLLC, SMS is pleased to announce that it will be publishing *Legal Matters!* Appearing bimonthly, *Legal Matters!* will raise awareness of legal issues in education, identify the resources available to when faced with potential legal liability and discuss best practices generally for educators nationally. For more information, please visit <http://www.naesp.org/>.



### DRI Compendium on Collateral Source Rule.

SMS member Karen McElhinny authored the West Virginia DRI Compendium on the Collateral Source Rule. This publication is the newest addition to DRI’s Defense Library Series and is a product of DRI’s Trial Tactics Committee. DRI is the leading international organization of defense attorneys and in-house counsel. Membership in DRI provides access to resources and tools for attorneys who strive to provide high-quality, balanced and excellent service to their clients and

corporations. DRI is host to more than 25 substantive committees whose focus is to develop ongoing and critical dialogue about areas of practice. For more information, please visit:

<http://dri.org/Store/Product?productCode=2012-04CD>.



### Technology in Litigation.

SMS attorney Natalie C. Schaefer, with the assistance of summer law clerk Callie Waers, authored an article regarding the use of Technology in Litigation in the September 2012 issue of DRI's flagship publication, *For the Defense*, a national monthly magazine. The article focused on the use of social media in the discovery process, as well as the various technological formats available for use in trial. For more information, please visit:

<http://www.shumanlaw.com/files/2012/09/FTD-1209-SchaeferWaers.pdf>.



## **West Virginia Employment Law Update.**

Member Roberta Green and Associate Heather Osborn prepared an update on the law entitled *Selected Employment Law Cases 2012 Supreme Court of Appeals of West Virginia* for the Defense Trial Counsel of West Virginia Employment & Labor Committee. If you are interested in receiving a copy of the update on the law, please feel free to contact either Ms. Green or Ms. Osborn, who will be happy to provide a copy to you.

## **Summary Judgment for Alleged Wrongful Termination.**

Member Roberta Green and Associate Heather Osborn recently obtained summary judgment on behalf of their client in an employment law matter involving allegations of wrongful discharge and the failure of due process in connection with plaintiff's termination from employment.

Ms. Green and Ms. Osborn presented several arguments to the Circuit Court of Brooke County, West Virginia, in support of their client's position that it acted lawfully in terminating the plaintiff's employment, including that their client was not a governmental entity whose employees have due process rights as a matter of law; that plaintiff failed to show that a unilateral contract of employment was created by virtue of an employee handbook; that plaintiff was discharged fairly and legally for poor work performance; and that even if plaintiff was entitled to due process in connection with his termination (which the Court found he was not), the alleged requirement was nonetheless satisfied by his employer in the form of several reprimands, suspension, dismissal, and grievance process. The Court agreed and

granted summary judgment in our client's favor.



## **SMS Lawyer Victories**

### **Defense Verdict in Medical Malpractice Trial.**

SMS Member, Tim Linkous, and Associate Molly Miner obtained a defense verdict on behalf of their client, an emergency medicine physician, in a medical malpractice action. Plaintiff alleged that the care and treatment provided by SMS's client breached the standard of care, resulting in the death of plaintiff's mother. It was asserted that the emergency medicine physician failed to identify an acute abdominal condition in the patient. The emergency room physician determined the patient was stable and admitted her to the hospital for further monitoring and care. Unfortunately, the patient died the next morning. After a six-day trial involving numerous expert witnesses, the jury returned a verdict in favor of the defense.



## **Dismissal for WVRJA Upheld.**

In another victory, Tim Linkous and Molly Miner obtained dismissal for their client, the State of West Virginia and the North Central Regional Jail for improper venue and lack of jurisdiction. The *pro se* plaintiff appealed the decision; however, the plaintiff failed to follow the appellate procedures for perfecting his appeal. A Motion to Dismiss the Appeal for failing to timely file the appeal and for failing to abide by the Rules of Appellate Procedure was granted by the West Virginia Supreme Court of Appeals.

## **Summary Judgment in Consumer Protection Case.**

Congratulations to SMS Attorneys Christopher Sears and Joseph Cramer who successfully obtained summary judgment in favor of an SMS client in a consumer protection case. The SMS client was a healthcare company that had been accused of violating various provisions of the West Virginia Consumer Credit and Protection Act (“WVCCPA”) in its efforts to collect an outstanding bill for healthcare services. The plaintiff alleged that SMS’s client called her seeking payment of the debt after she had advised them she was represented by counsel and placed phone calls to her with the intent to harass, annoy, and abuse her all of which violated the WVCCPA. The plaintiff’s Complaint sought recovery of statutory damages which included penalties of more than \$4,500.00 per phone call plus statutory attorney’s fees. In response to written discovery requests, the Plaintiff admitted that she was not personally obligated on the debt in question but rather that the debt was one belonging to her daughter with whom she resided. Based on this admission, a Motion for Summary Judgment was filed arguing

that the Plaintiff did not fall within the statutory definition of a “consumer” under the WVCCPA because she was not personally obligated to pay the debt nor was she ever alleged to be obligated on the same. Plaintiff’s counsel maintained that she did fall within the statutory definition of a “consumer” under the Act because all of the phone calls were directed to her personally which made her feel as though they were alleging she was obligated to pay the debt. In reply, the creditor argued that the placement of telephone calls alone with nothing more was an insufficient basis upon which an allegation of indebtedness could be surmised. The Court agreed with the creditor’s position and found that the Plaintiff was not a consumer under the Act, did not have standing to bring her claims, and awarded SMS’s client complete summary judgment dismissing the Plaintiff’s Complaint.



## **SMS Obtains Dismissal, Enforcing Arbitration Provision.**

SMS Managing Member John McCuskey and Associate Rob Russell obtained a dismissal of a case arising out of an Individual Retirement Account (“IRA”). The Agreement had an arbitration provision that precluded the subject lawsuit. The Court agreed that, due to the arbitration provision of the agreement, which was found to be clear and unambiguous and enforceable under the Federal Arbitration Act, the case

had to be dismissed and arbitration was compelled.



## Legal Developments

In *Akers v. CSX*, No. 11-0385 (Filed September 25, 2012), the West Virginia Supreme Court of Appeals affirmed a denial of new trial to the plaintiff after a defense jury verdict in a repetitive stress injury case. The plaintiff challenged an *in limine* ruling that prohibited the plaintiff from using a company survey done at a different division and at different times than the plaintiff's work during cross examination. The plaintiff filed a motion for new trial, alleging that the circuit court committed error by not admitting into evidence a 1994 safety assessment report related to the defendant's company. As noted, the plaintiff wanted to admit this report during the cross-examination of the defendant's expert witness to impeach his credibility and rebut one of the company's defenses to the claim.

Finding no abuse of discretion, the Supreme Court stated:

Our review, therefore, of the underlying decision is discretionary. Under the particular facts and circumstances of this proceeding, we find no error in the circuit court's decision to prohibit the petitioner from cross-examining the respondent's expert witness using the report of a 1994 safety assessment report of another

division of the respondent. The record clearly supports the conclusion that the circuit court weighed the relevance of the report to the evidence and found it to be irrelevant. We cannot conclude that the circuit court's failure to allow cross-examination was wrong. The circuit court's decision is affirmed.

In *Meadows v. Massey Coal Services*, No. 11-0631 (Filed September 24, 2012), the Court in a *per curiam* opinion reversed summary judgment in a deliberate intention case, finding that even though the testimony of plaintiff supported the defense version of the case, the circuit court erred in not considering other witnesses who supported the plaintiff's version of the case. The Court concluded:

Arnazzi makes clear that a plaintiff, when responding to a summary judgment motion, may rely upon evidence obtained from a defense witness to establish the existence of a disputed issue of material fact relating to proximate cause. In the case before us, the circuit court had evidence tending to show that an unsafe working condition was a proximate cause of the incident. Plaintiff's expert relied on the facts related by three witnesses who work for the Coal Company. He opined, based on the Coal Company's version of the disputed facts, that the incident was contributed to by a berm that did not meet MSHA requirements, insufficient lighting, and the lack of a spotter to assist the Plaintiff in maneuvering around the dump pit. The Plaintiff has demonstrated the existence of a "genuine issue of fact," Syllabus Points 3 and 6, *Aetna Casualty and Surety Company*, *supra*, and the circuit court's order granting summary judgment must therefore be reversed.

In *CSX v. Smith*, No. 11-0694 (Filed June 7, 2012), the Court affirmed a verdict in a sexual harassment case. In *Smith*, a fellow employee made disparaging sexual comments to the plaintiff, and when she complained, he was disciplined but not fired. He was transferred and due to his union seniority, ended up being under plaintiff's supervision. He was overheard to blame her for losing his job. She was told to take time off, offered transfers and ultimately ended up at a prior location with a pay cut. The opinion suggests that she was being harassed via phone calls and car tampering by an unidentified perpetrator. She was also suspended for using taxis, although the case indicates she had permission to do so. She sued CSX. At trial the jury awarded \$1,557,600 in compensatory damages and also found CSX's "actions in this matter w[ere] malicious, oppressive, wanton, willful, reckless or with criminal indifference to civil obligations" and awarded Ms. Smith \$500,000 in punitive damages."

On appeal, the Court found sufficient evidence for the jury to decide the case based on the sexual comments, the harassment outside the workplace and the employer's response. The Court also rejected challenges to jury instructions, especially when considered in total.

The Court also found punitive damages were warranted based upon evidence that CSX failed to discipline the employee for his history of sexually harassing comments despite its stated zero-tolerance policy, negligently retained him, subjected plaintiff to a hostile work environment, attacked her character when it accused her of dishonesty and theft related to the taxi use, its eventual retaliatory discharge of the plaintiff, and its failure to investigate or adequately respond to plaintiff's report of harassment.

Quarterly Quote: "It only takes a single thought to move the world." -- *Anonymous*

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