

SMS Quarterly

Shuman, McCuskey & Slicer, PLLC

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SMS Firm News

J. Robert Russell Joins SMS Morgantown Office

Experience, dedication, skill, efficiency, quality work, and integrity. These descriptive terms encapsulate the newest lawyer to join the SMS team: J. Robert Russell.

On April 1, 2008, SMS welcomed Mr. Russell to its Morgantown, West Virginia office. With almost ten years of civil litigation and trial experience, he provides the quality representation SMS clients have come to expect.

“All law firms are not created equal,” said founding Member John McCuskey. “We make every effort to distinguish SMS from other firms by providing clients with dependable, accessible lawyers who are knowledgeable in a variety of areas. Mr. Russell’s attributes conform well to our model.”

Mr. Russell has tried multiple cases to verdict, and he maintains an active appellate practice as well. He routinely handles a wide assortment of issues and cases, including employment law, civil rights, medical malpractice, zoning, governmental entity litigation, and general civil defense litigation.

“It will not take long for clients to recognize Mr. Russell for his knowledge, experience and capabilities,” said Member Tim Linkous. “He has the talent of being an excellent researcher, a strong oral advocate, and a solid trial lawyer. With that combination of aptitudes, he is well suited for virtually all types of litigation and our practice.”

SMS is truly pleased to welcome Mr. Russell, and we are confident that our clients will enjoy working with him as well.

SMS Lawyers Begin 2008 with Continued Success

It is difficult to believe it is already April 15! If you are like most of us, you are still reeling from completing forms and sending them to the IRS. Luckily, SMS lawyers have several cases of success to share which might serve to ease any lingering tax tension.

Bar Fights Don't Pay

Congratulations to Firm Member Dwayne Cyrus who recently obtained a summary judgment for his client, an insurance agent, in a declaratory judgment action arising out of a bar room brawl.

The Plaintiff lost a bar fight and suffered injuries to his person and a bruised ego. Thereafter, the Plaintiff and the bar owner filed the DJ action against the insurance agent who sold the excess lines policy to the bar owner (Random thought... I wonder if the Plaintiff would have brought a lawsuit if he had won the fight?). In the underlying action, the Plaintiff alleged that the bar owner did not take adequate steps to protect him. The CGL policy had an exclusion for injuries from assault and battery or an insured's failure to protect from the same.

The Plaintiff and the bar owner claimed that the agent was negligent in servicing the policy and that there was a reasonable expectation of coverage. Mr. Cyrus filed a Motion for Summary Judgment arguing that the exclusionary language was clear and that the insured had read and understood the policy exclusion.

The Circuit Court agreed with Mr. Cyrus' argument, and it granted the Motion.

WV Jury Rejects Remote Injury Argument, Awards Nominal Damages

In light of the bad reputation that West Virginia juries have earned with the national media in recent years, congratulations are in order to SMS Member Lou Ann Cyrus who recently persuaded a Putnam County, West Virginia jury to reject a Plaintiff's damage claim for remote injuries at trial.

The case involved a motor vehicle accident wherein the Plaintiff alleged that he suffered a herniated cervical disc and spinal fusion surgery as a result of the event. The Plaintiff was driving a black Chevy Camaro convertible with black brake light covers over his brake lights in stop and go traffic. The insured maintained that she was unable to see the brake lights, and, thus, she rear-ended the Plaintiff. No ambulance was called to the scene, the Plaintiff drove home, and he went to work the next day.

The Plaintiff presented to his family physician four days after the MVA, and his only complaint was sexual dysfunction as a side effect from his anti-depressant medication prescribed two months earlier (Plaintiff was depressed because he wanted his EX-wife back, during the same time that he was living at with his current wife, whom he married in the meantime). The first time the Plaintiff sought treatment for his alleged MVA complaints was fourteen days after the accident. Oh, by the way, the Plaintiff's 70 year old mother was a front seat passenger who was uninjured.

At trial, the Plaintiff presented damages totaling approximately \$120,000, including expenses associated with a spinal fusion surgery, and he claimed that another herniated disc required a second spinal fusion surgery in the future. Plaintiff's treating orthopaedic surgeon could not connect the surgery to the MVA, so the Plaintiff did not call him at trial. Rather, the Plaintiff hired Dr. Luis Loimil, another orthopaedic surgeon, who first examined the Plaintiff six years after the MVA. Dr. Loimil testified that the herniated disc was caused by the MVA, though he had not been provided with Plaintiff's pre-accident records which showed neurological complaints for years prior to the accident.

Mrs. Cyrus called another expert, Dr. Kurvilla John, a neurologist, who performed an IME upon the Plaintiff prior to his surgery. Dr. John opined that the Plaintiff suffered only a cervical sprain or strain from the MVA and that the herniated disc and severe degenerative changes pre-existed the accident. He also opined that the disc herniation was so severe that, had it occurred due to trauma from the MVA rather than gradually over the years, the Plaintiff would have been paralyzed in the MVA.

The pre-trial demand was for the per person liability policy limit of \$100,000, and Mrs. Cyrus filed an Offer of Judgment for \$11,000 four years earlier. The jury awarded the Plaintiff past medical bills and past pain and suffering in the amount of \$3,850.30, and it awarded the Plaintiff's wife nothing for her loss of consortium claim. The jury also found the Plaintiff 10% negligent which reduced the net verdict to \$3,465.30.

The Plaintiff filed a Motion for new trial, and, as a result of the excellent verdict, the case was settled for an amount less than the Offer of Judgment.

Dirty Words Dismissed

Congratulations to Member Dwayne Cyrus and Associate Jason Wandling for obtaining a dismissal for their client, the Department of Corrections, from a 1983 civil action filed by a prisoner.

The prisoner alleged that a corrections officer made racial slurs to the prisoner, and he also alleged liability against the officer's supervisors. Due to the offensive nature of the alleged statements, they are not re-printed herein.

Mr. Cyrus and Mr. Wandling successfully argued that the case should be dismissed. The Court held that the Plaintiff could not satisfy the requisite elements for a supervisory liability claim, and it also held that the Defendants were entitled to qualified immunity.

SMS Attorney Assists Municipality with Project

SMS attorney Christopher Negley, who was appointed as the Attorney for the Town of Belle, West Virginia, recently finalized the Town's Application for a Certificate of Convenience and Necessity for filing with the State's Public Service Commission.

The 2.3 million dollar project has been eighteen months in the making and will allow the Town to construct improvements to its wastewater system. Virtually all municipalities in West Virginia face problems with aging wastewater treatment systems, and SMS is ready, willing and able to provide legal support to assist them.

Mr. Negley was recently appointed as the Attorney for the Town of East Bank, West Virginia.

Leadership West Virginia Names SMS Member Mark Browning to Class of 2008

Mark Browning, Member in the SMS Charleston office, was recently selected to Leadership West Virginia's Class of 2008. A total of forty-nine leaders from the banking, legal, nonprofit, government and other community sectors across West Virginia have accepted invitations to participate in the 18th Class.

Leadership West Virginia is a statewide education and leadership development program affiliated with the West Virginia Chamber of Commerce. The eight month program identifies emerging leaders throughout West Virginia and enhances their knowledge of not only the challenges facing the state, but also its unique attributes and diversity.

Recognizing that the cultivation of new leadership is of utmost importance to West Virginia's future prosperity and progress, "Leadership West Virginia works to develop and motivate a cross-section of leaders who will use their talents and abilities to inspire others and to foster a new spirit of energy, enthusiasm and vitality throughout the state," said Executive Director Pam Farris in a press release. Each year, participants are selected from a list of top-quality applicants from around the state. Farris said class members were selected into the program because they demonstrated leadership skills and experiences in civic activities, public affairs and in their professional careers.

Throughout the year, members of the Class will travel to eight communities in West Virginia to receive broad-based education on critical topics and, at the same time, have

opportunities to hone their leadership skills. The locations and topics for the upcoming 2008 Class training program include: Huntington – Robert C. Byrd Institute & Chesapeake Manufacturing and Energy Session; Morgantown – The WV Roundtable Leadership Conference; Parkersburg – AEP Economic Development Session; Fayetteville – Chesapeake Tourism Session; Wheeling – Steptoe & Johnson Justice System Forum; Morgantown – West Virginia Hospital Association Health Care Session; White Sulphur Springs – Mythology Education and the Arts; and Charleston – Jackson Kelly Government/Commencement Session.

Nurse Paralegal Joins SMS Morgantown Office

In May 2008, SMS will welcome Polly Southern, RN to its Morgantown office as a Nurse Paralegal and Certified Legal Nurse Consultant. With 25 years of experience in hospital and office based nursing, Mrs. Southern has worked in a variety of nursing fields including obstetrics, labor & delivery, assisted living, family medicine, ENT, and surgery.

“She will be able to assist clients and attorneys with medical research, record reviews, developing chronologies, contacting experts, and providing valuable healthcare knowledge,” said Member Timothy Linkous. “We are excited to have her join our team.”

Legal Developments

Recent Decisions from the Supreme Court of Appeals of WV

This section of the SMS Quarterly usually showcases one or two decisions from the Supreme Court of Appeals of West Virginia, and provides a brief summary of a few others that might prove beneficial to our clients. However, a recent decision from the high court of West Virginia could have implications for all of our clients involved in civil litigation. Therefore, in this edition of the SMS Quarterly, we present a summary of Croft v. TBR, Inc., et al., (January 2008 Term, No. 33504), a case addressing offers of judgment. The Croft decision is mandatory reading for all civil litigation attorneys who make offers of judgment, and, importantly, who negotiate settlements and draft settlement agreements.

Decision Addressing Offer Of Judgments Important Not Only To Drafting Such Offers, But Also To Settlement Negotiations And Settlement Agreements

Lawyers cannot make many guarantees to clients because the American civil justice system is, well, unpredictable. However, if you are involved in civil litigation, there is one thing of which you can be guaranteed: there will be an eventual resolution of the case. The resolution may come in the form of a voluntary dismissal, court ordered dismissal, summary judgment, settlement, jury verdict or a combination of those. Over the last ten years, alternative dispute resolution techniques, and mediation in particular, have played an important role in the resolution of cases. In fact, most Courts mandate mediation, and statistics show that the vast majority of cases resolve by way of settlement. Consequently, settlement negotiations and the written agreements consummating settlements are a frequent practice among lawyers, and they are not as simple as perhaps many think.

When two opposing parties involved in civil litigation agree to settle the issues for a specified sum of money, it is over – right? Well, maybe not. In the recent Croft decision which addresses offers of judgments, the Supreme Court of Appeals of West Virginia raised some issues of which all defense lawyers must be cognizant because they necessarily affect settlement negotiations and settlement agreements. The purpose of this article is to describe the Croft decision and shed some essential light upon its implications to settlement negotiations and settlement agreements. ***Ultimately, the take home message for defendants and their lawyers is this: when making settlement offers, making offers of judgment, and drafting settlement agreements, it must be explicitly stated that the sum being offered is inclusive of all plaintiff's attorney fees and litigation costs.***

In Croft, a sexual harassment litigation brought pursuant to the West Virginia Human Rights Act, the Defendants made an offer of judgment to the Plaintiff. An offer of judgment is a litigation tool wherein a defendant offers to allow the plaintiff to take judgment against the defendant for a specified sum of money, and, if the plaintiff fails to accept the offer within 10 days, the plaintiff must pay the defendant's litigation costs incurred after the expiration of the 10 days if the plaintiff does not secure a judgment "more favorable than the offer." W.Va.R.Civ.P. 68(c). According to the Croft Court, all offers of judgment taken against a defendant must include "costs then accrued." However, the Defendants' attorney failed to *explicitly* specify that the offer of judgment included attorney fees, and the applicable statute included a fee shifting provision.

Finding that the Defendants were liable for the Plaintiff's attorney fees in addition to the amount contained in the offer of judgment, the Croft Court stated, "unless a defendant's offer of judgment under Rule 68(a) explicitly provides that the amount of the offer is inclusive of costs and attorney fees, the circuit court should determine the costs and fees in addition to the amount stated in the offer of judgment." The Croft Court specifically noted that while the Defendants' offer of judgment "arguably implies that costs and fees are included..., it does not state it explicitly." Therefore, it remanded the case to circuit court for a determination of reasonable attorney fees for which the Defendants will be liable.

Clearly, offers of judgment, then, must be carefully drafted to explicitly state that the sum specified is inclusive of attorney fees and costs. However, in my opinion, the Croft decision's impact goes well beyond offers of judgment and poses another pitfall for unwary lawyers.

The Croft Court cited to other decisions for the proposition that plaintiffs may be able to obtain attorney fees in addition to the *settlement amount* when written settlement agreements do not explicitly state that the settlement amount is inclusive of plaintiff's attorney fees and costs: "While a plaintiff can, in a settlement agreement, waive his statutory right to seek an award of costs and attorney fees, waiver ordinarily will be found only when it is expressly provided in the terms of the settlement agreement." Hence, if there is a fee shifting statute or provision applicable to a plaintiff's civil litigation claim, defense lawyers must always include a provision in the written settlement agreement that the settlement amount is inclusive of attorney fees and costs.

Crafty plaintiff lawyers – of which there is no shortage in West Virginia – will be aware of the Croft decision and its holding. Therefore, I can envision a situation where a defense lawyer makes an offer to settle a claim involving a fee shifting provision during a mediation and fails to state that the offer is inclusive of attorney fees and costs. A savvy plaintiff lawyer will accept the offer, and then argue to the court that the offer did not explicitly include attorney fees or costs. According to the Croft decision and holdings, the defendant in that scenario may be liable for an amount of money covering plaintiff's attorney fees and costs in addition to the sum offered in settlement.

Accordingly, defense lawyers should be cognizant of the total breadth of the Croft decision. When making settlement offers, drafting settlement agreements or drafting offers of judgment, defense lawyers should make it a routine practice to state that the specified sum is inclusive of attorney fees and costs.

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

SMS Lawyer Highlight

Attorney J. Robert Russell

Mr. Russell joined the SMS Morgantown office on April 1, 2008. He earned his Bachelors of Science in Political Science and Journalism from James Madison University in 1988. During his tenure at JMU, he was a Scholarship Member of the JMU Debate Team and a NDT Qualifier for 3 years. Thereafter, he graduated *Order of the Coif* (top 10%) from the West Virginia College of Law in 1998. He was a member of the West Virginia Law Review and served as its Executive Editor for Publishing during his third year of law school.

In addition to providing quality legal representation to litigants throughout his almost 10 year career, he has also lectured to a variety of audiences on topics such as discrimination, sexual harassment, workers' compensation, public records and open meetings, municipal litigation, the Governmental Tort Claim and Insurance Reform Act, medical professional liability, and warrantless search and seizures in public schools.

Mr. Russell has tried numerous cases, including both jury and bench trials. He brings experience and a knowledge base applicable to a wide variety of issues to SMS. He represents a diverse group of clients including municipalities, governmental agencies, health care providers, mental health facilities, and general litigants. His practice involves insurance defense litigation, professional malpractice, and other civil litigation. His representative cases include the following:

- State ex rel. Regional Jail and Correctional Facility Authority v. Cabell County, et al., 657 S.E.2d 176 (W.Va. 2007);
- T. Weston, Inc. V. Mineral County, 219 W.Va. 564, 638 S.E.2d 167 (2006);
- Porter v. Grant Co. BOE, 219 W.Va. 282, 633 S.E.2d 38 (2006); and
- State v. Rogers, 209 W.Va. 348, 547 S.E.2d 910 (2001).

Mr. Russell is admitted to practice before all West Virginia state courts as well as the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Northern District of West Virginia.

Quarterly Quote:

“The good lawyer is a great salesman.”

– Janet Reno

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