

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 Invests To Better Serve Its Clients

Economic trends in recent years have caused individuals and companies to tighten budgets, reduce expenditures, and save costs. Regardless of bull or bear markets, lawsuits and matters requiring legal representation do not cease. In fact, legal matters often multiply in uncertain economic times, and they can create a strain on one's bottom line.

SMS recognizes and appreciates the hardships created by our current economy. While many law firms are conducting business as usual or even enjoying extra profits from increased legal activity, SMS is actively investing to better serve its clients. At the end of 2009, SMS upgraded its computer and data storage systems and is actively examining and implementing other electronic means of improving efficiency for its clients.

"It would be an understatement to say that the 21st Century is dominated by an electronic world," stated Founding Member William Slicer. "Since its inception, our law firm has maintained state of the art electronic systems. Our recent upgrades will ensure that continues."

The electronic upgrades help SMS lawyers keep important client information at their fingertips, communicate with clients, and transmit information and documents to clients, thus saving time and providing the most efficient representation.

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SMS LAWYERS SUCCESSFUL DURING LAST QUARTER OF 2009

Jury Not Convinced by Plaintiff's Strong Arm Tactics

Congratulations to Firm Member Karen Tracy McElhinny and Associate Kim Bandy who recently obtained a defense verdict for the City of Charleston in the Circuit Court of Kanawha County in the case of William Totten v. City of Charleston.



(Pictured: Karen Tracy McElhinny)

Totten sued the City alleging that the City's improper maintenance of its parking garage caused him to slip and fall. However, the jury felt otherwise.

The Plaintiff, a 78 year old man, claimed that his cane got caught in a hole in the pavement near the traffic control arm as he attempted to exit the parking garage through the vehicular entrance, causing him to fall. He suffered a torn rotator cuff on his left shoulder requiring surgery, a cracked nose, multiple abrasions and a laceration to his right knee. He claimed nearly \$25,000 in medical bills.

After considering all the evidence, the jury returned a verdict finding the City of Charleston was not negligent.

"No Insurance Coverage" Declared the Court Without Amusement

Congratulations to SMS Associate Heather B. Osborn who recently obtained an Order granting her client, and insurance company, summary judgment in a declaratory judgment action pending in the United States District Court for the Northern District of West Virginia.

On March 2, 2008, a woman became intoxicated at a bar called Jenny's Mustang Sally's, she left the establishment, and she drove her car into a vehicle causing the death of one person and injuring another. The decedent's estate filed a lawsuit against Jenny's Mustang Sally's and Tri-Area Amusement Company which provided amusement machines such as pool tables, juke boxes, and dart boards to the bar. The Plaintiff alleged that Tri-Area Amusement and the bar entered into a partnership or joint venture, and they all benefited from the sale of alcohol.

United States District Judge Frederick P. Stamp, Jr. considered all of the arguments, and he concluded that Tri-Area Amusement Company's insurer had no duty to indemnify or defend its insured under the circumstances.

Success Sometimes Occurs in Threes...

Congratulations to Member Dwayne E. Cyrus (featured in this edition of the SMS Quarterly) and Associate Jason Wandling who recently obtained dismissals for their clients in three cases.

In Griffin v. Rubenstein, et al., the Plaintiff's probation was revoked because he did not appear for meetings with his probation officer, failed drug tests, and ultimately absconded entirely. On October 19, 2005, police were alerted to his presence at a Bluefield home, and the Bluefield police responded. Mr. Griffin ran from them and jumped out of a window in the house. He broke his leg in the fall.

Despite extensive subsequent medical treatment, he was unsatisfied with his progress and sued various correctional facility Defendants, claiming they acted with deliberate indifference to his serious medical needs. The U.S. District Court for the Southern District of West Virginia granted the Defendants' Motion to Dismiss because the Plaintiff failed to exhaust administrative remedies.

After extensive discovery and briefing, Mr. Cyrus and Mr. Wandling also won summary judgment for the Division of Corrections in Williams v. West Virginia Division of Corrections, et al. In that case, the Plaintiff alleged that the WVDOC and two medical contractors acted in concert to deny him access to proper medication, dental care, emergency and infirmary care related to a back injury, denied him surgery of his left and right eyes, denied him corrective lenses, denied him a colonoscopy, and denied him orthopedic care.

The U.S. District Court for the Southern District of West Virginia allowed the suit to progress against one of the medical providers, but granted the WVDOC's Motion for Summary Judgment, noting, "It is not enough under this standard that the inmate was the victim of negligence or even medical malpractice, and [d]isagreements between an inmate and a physician over the inmate's proper medical care do not state a section 1983 claim unless exceptional circumstances are alleged." The Court reiterated the requirement that DOC officials rely on the judgment of medical providers in the absence of evidence of malfeasance on the part of facility doctors.

Lastly, Mr. Cyrus and Mr. Wandling also extricated the WVDOC from Thomas v. WVDOC, et al., in which the Plaintiff alleged that the Defendants, the DOC and its medical contractor, were deliberately indifferent to his hernia and an alleged heart condition. Mr. Thomas wanted surgery to correct the hernia because he did not, in his expert medical opinion, believe the treatment he was given to be sufficient.

He also advanced the rather outlandish claim that 70 inmates at Mt. Olive died in the last few years due to poor medical care. The Court turned aside his arguments and granted the WVDOC's Motion to Dismiss, finding again that the prison officials are required to rely on the professional judgment of trained medical personnel.

WV Supreme Court Steadily Upholds Immunity and Mandates Dismissal in a Slip and Fall Case

Congratulations to Juris Member Tamara J. DeFazio who obtained a Writ of Prohibition against a circuit court mandating that her client be dismissed from a lawsuit.



(Pictured: Tamara J. DeFazio)

The Supreme Court of Appeals of West Virginia recently mandated the early dismissal of a slip and fall case filed against The City of Charles Town. The decision was based upon the immunity afforded to local governments by West Virginia Code Section 29-12A-5(a)(6).

In a unanimous decision, the Court held that the Circuit Court exceeded its legitimate powers by refusing to dismiss the lawsuit at the pleading stage where the slip and fall occurred on black ice that developed naturally in a parking lot which had not been treated by the City.

The City leased the parking lot and agreed to keep the lot free of snow and ice in the Lease Agreement. Despite the Lease language, the Court mandated the immunization of the City and declined to hold that it had waived its immunity by entering into such an agreement.

The statutory immunity upon which the decision is based was enacted in 1986. However, circuit courts have long been reluctant to immunize local government entities early in the litigation process. Circuit courts have generally found in favor of requiring full discovery before deciding an immunity issue. Such an approach often undermined the public policy underlying governmental immunity as well as the policy goal of containing the cost of liability insurance available for purchase by local governments.

In granting The City of Charles Town's Petition to prohibit the Circuit Court from allowing the action to proceed beyond the pleading stage without first dismissing the claim against the City, the Supreme Court appears to be sending a clear message to West Virginia circuit courts – an early dismissal is mandated where the elements essential to a grant of immunity are readily discernable at the pleading stage. The Supreme Court's willingness to intervene at the pleading stage by granting a Writ of Prohibition without awaiting further development at the circuit court level only serves to amplify this message.

Voluntary Dismissal Obtained in Medical Malpractice Civil Action

Firm Member Timothy R. Linkous and Associate Molly Miner recently obtained the voluntary dismissal of their client from medical malpractice action involving breast cancer.

The Plaintiff claimed that her yearly mammograms were misread by a radiologist for two years prior to her diagnosis of breast cancer. She claimed that an earlier diagnosis would have allowed for a less radical surgery and much better chances of survival.

Mr. Linkous identified an important treating breast imaging specialist early in the litigation, and deposed that physician. The breast imaging specialist attempted to help the patient with her testimony, but, by the end of the deposition, she ultimately admitted that she could find no evidence on prior mammograms consistent with cancer.

After the parties disclosed expert witnesses, the Plaintiff's counsel reluctantly agreed to dismiss the entire case, with prejudice.

SMS Associate Jenny Wrobleski Welcomes New Arrival

SMS would like to congratulate Associate Jenny Wrobleski and her husband, Joe Wrobleski, on the birth of their first child, Mila Katherine Wrobleski. Mila was born on December 27, 2009 at 11:17 pm. She weighed 6 pounds and 9 ounces, and she was 21 inches long.



Both Jenny and Mila are healthy and doing well. SMS wishes Jenny and her family well.

SMS Lawyer Highlight

In each edition of the SMS Quarterly, we introduce you to one of the lawyers at SMS. In this edition, Member Dwayne E. Cyrus is highlighted. Mr. Cyrus practices in the SMS Charleston office.



Dwayne E. Cyrus

Dwayne E. Cyrus joined Shuman, McCuskey & Slicer, PLLC in 1999 and was elected as a Member in 2001. His practice focuses primarily on insurance defense and coverage, including the defense of insurance bad faith litigation. Dwayne has over 20 years of experience in those areas. Also, he has represented physicians and other health care providers in medical negligence cases, and currently he represents a number of State agencies, municipalities and police officers in litigation.

Dwayne received his BBA in Economics from Marshall University and his law degree from West Virginia University. Prior to joining SMS, he served as the Mercer County Assistant Prosecuting Attorney. He also served as in-house counsel for Nationwide Insurance Company, including stints both as claims legal counsel and an attorney in its trial division.

He is admitted to and has appeared in matters before the Supreme Court of Appeals of West Virginia, the United States District Court for Southern District of West Virginia, United States District Court for the Northern District of West Virginia, the 4th Circuit Court of Appeals, and the United States Supreme Court.

Dwayne is the father of four boys, ages 15, 14, 8 and 2, and he is married to fellow SMS Member, Lou Ann S. Cyrus. They attend Bible Center Church. Dwayne is an avid motorcyclist, and he also enjoys attempting to play the guitar and spending time in the weight room.

Quarterly Quote: “Whoever loves discipline loves knowledge, but he who hates correction is stupid.” Proverbs 12:1 (NIV)

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