SMS Quarterly

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SMS Firm News

SMS Founding Member, David Shuman, Named Super Lawyer

Congratulations to Founding Member David L. Shuman for recently being named one of West Virginia=s Super Lawyers. Each year, Super Lawyers Magazine evaluates lawyers in each state to identify those who are recognized as having achieved exceptional status among their colleagues. The designation is based upon information obtained from lawyers= peers as well as independent research of law and politics.

Mr. Shuman=s Super Lawyer selection was announced in the 2009 edition of the Super Lawyers Magazine. The Magazine noted that Mr. Shuman Ais one of West Virginia=s most highly regarded medical malpractice defense attorneys.@ It also noted that he Ahas defended West Virginia physicians successfully for more than 30 years.@

For more information about Mr. Shuman=s selection as a 2009 Super Lawyer, please visit www.superlawyers.com.

SMS Welcomes New *Juris* Members John D. Hoblitzell, III and Brian J. Warner

SMS is pleased to announce that it recently welcomed John AJack@ D. Hoblitzell, III to its membership as a *Juris* Member. AJack is an articulate and solid lawyer, and I have enjoyed working with him over the last six years,@ commented Founding Member William Slicer. AWe are excited that he is now among our membership.@

On June 15, 2009, SMS announced that Brian J. Warner joined the firm as a *Juris* Member. AThe addition of Brian to the firm was logical given the depth of his experience which meshes quite nicely with our firm=s practice areas,@ Slicer stated. Mr. Warner handles a wide range of cases from coal mine regulatory work to deliberate intent, insurance coverage issues, wrongful death, and personal injury matters. He is featured in the Lawyer Highlight of this addition of the SMS Quarterly.

SMS Lawyer Speaks At School Administrators= Conference

Mr. Hoblitzell joined SMS as an associate after graduating from the West Virginia University College of Law in 2003. Since that time, he has successfully defended numerous defendants in deliberate intent, employer liability, professional negligence, construction defect, coal industry liability, and personal injury cases, among others.

The West Virginia Association of School Administrators recently invited SMS Member Tammy DeFazio to speak at its Summer Conference at Stonewall Jackson Resort.

At the Conference, Attorney DeFazio presented an update on the law affecting schools and their administration. The presentation included recent developments in the law of search and seizure, freedom of expression, and liability for sexual misconduct in the context of the school environment.

School Administrators from areas throughout West Virginia were in attendance, and the presentation sparked excellent questions and discussion.

If you would like a legal presentation on issues affecting your business, profession or trade, please contact one of our lawyers.

SMS Lawyers Successful In Second Quarter Of 2009

In the midst of summer vacations and relaxation, SMS lawyers continue working hard to provide their clients with vigorous representation and great success.

We are pleased to share with you a few of the success stories over the last several months:

Two AThumbs Up@ to Members David L. Shuman and Jack Hoblitzell for Obtaining a Dismissal of a Medical Malpractice Case on Substantive Grounds

Congratulations to Founding Member David L. Shuman and *Juris* Member Jack Hoblitzell who recently obtained summary judgment on behalf of their clients in a medical professional liability case filed in the Circuit Court of Raleigh County, West Virginia.

The Plaintiff injured his thumb while splitting wood on January 17, 2007. He was initially treated at Summers County Appalachian Regional Hospital, but as a result of the nature of his injury, the physicians there transferred the patient to be treated at a facility with an on-call orthopedic surgeon. After making several telephone calls to hospitals that refused to accept the transfer, the Plaintiff was accepted at Raleigh General Hospital (ARGH@) and the transfer was made.

Upon the Plaintiff=s arrival to the RGH emergency department, he received treatment for stabilization. Thereafter, a telephone consultation transpired between the emergency medicine physician and the on-call orthopedic surgeon who did not immediately present to the hospital and see the patient. Rather, he instructed the emergency medicine physician to make attempts to reduce the fracture, bandage the fracture, and instruct the patient to see the orthopedic surgeon the following day. The emergency medicine physician followed the instruction of the orthopedic surgeon, and the patient was discharged.

However, rather than following up with the surgeon the following day as instructed, the Plaintiff delayed presenting to the orthopedic surgeon for several weeks. Eventually, the Plaintiff consulted with an orthopedic surgeon, underwent an ORIF, and later had a portion of his thumb amputated.

The Plaintiff filed suit against multiple Defendants, including Mr. Shuman and Mr. Hoblitzell=s client, the company employing the emergency medicine physician. The Plaintiff alleged that the Defendants violated the Emergency Treatment and Active Labor Act (AEMTALA@) by discharging the patient from the ED without first obtaining an appropriate orthopedic consult. He further alleged that the delay in treatment and violations of EMTALA resulted in a permanent injury to his thumb.

Mr. Shuman and Mr. Hoblitzell filed a Motion for Summary Judgment and argued that EMTALA does not establish a national standard of care that must be followed and that no private cause of action existed under EMTALA against their client.

After hearing oral arguments, the Court granted the Motion and ruled that the emergency medicine physician could not be liable for the on-call orthopedic surgeon=s decision not to present to the hospital and see the patient, and the emergency medicine physician did the best he could under the circumstances. The Court further held that the company employing the emergency medicine physician could not be held liable under either EMTALA or W.Va. Code Section 55-7B-1 *et seq*. for the on-call surgeon=s alleged failure to present to the hospital.

With the Court=s order in this case, Mr. Shuman and Mr. Hoblitzell have obtained the third dismissal of 2009 involving claims against emergency medicine physicians.

Defendant in Medical Malpractice Case Dismissed During Deposition of Expert

Congratulations to Firm Member Tim Linkous and Associate Molly Miner who obtained the dismissal of their client, West Virginia University Board of Governors, in a medical professional

negligence action during the middle of the deposition of Plaintiff=s standard of care expert.

The Plaintiff was involved in a motor vehicle accident during a sanctioned racing event. Thereafter, he was taken to Jefferson Memorial Hospital (AJMH@) for evaluation of his back and pelvis pain. The emergency medicine physician ordered plain films of the patient=s spine and pelvis, and he read them as normal. He then discharged the patient home with instructions to rest, apply ice for pain, and return if there were any changes in his condition.

The following day, the staff radiologist (employed by WVUBOG) interpreted the films as being normal. The patient subsequently presented to George Washington University Hospital where he was diagnosed with several fractures of the sacrum, transverse process and S2 vertebral body. The Plaintiff alleged that the films taken at JMH were incorrectly interpreted, and, as a result, he sustained injuries and damages including a longer hospitalization and renal failure. He also made allegations of EMTALA violations.

The Plaintiff identified three (3) expert witnesses, two (2) of whom were designated to testify concerning the interpretation of the radiology films. The depositions of those two (2) expert witnesses were noticed for the same day in Washington, D.C.

Mr. Linkous successfully cross-examined the first expert witness for more than two hours on standard of care, and he was about to begin cross-

The policy of insurance at issue covered the insured=s farm, and it contained a coverage exclusion for any injuries caused by the sale, use, etc. of controlled substances.

Mr. Cyrus successfully argued the coverage position, and the Court upheld and enforced the exclusion finding that it was clear and unambiguous. Thus, summary judgment was granted.

WV Supreme Court Upholds and Affirms Summary Judgment in a Declaratory Judgment Action

examination on the issues of causation and damages when a break was held. During the break, Plaintiff=s counsel agreed to dismiss Mr. Linkous= client in exchange for an agreement not to question the witness any further. Mr. Linkous agreed, and a Stipulation of Dismissal was entered.

Drugs Don=t Pay: Summary Judgment on a Declaratory Judgment Action Finding No Insurance Available

Congratulations to Member Dwayne Cyrus who obtained an Order granting his client summary judgment in a declaratory judgment action.

Plaintiff=s decedent died from an overdose of methadone which occurred when he spent the night alone at the named insured=s house under permission given from the insured=s son. Neither the insured nor his son were at the residence that evening. Plaintiff=s Complaint alleged that the Defendants negligently provided Plaintiff=s decedent with methadone which he ingested causing his death.

The Defendants asserted, and the evidence tended to show, that Plaintiff=s decedent broke into a locked bag in the refrigerator which contained the insured=s son=s methadone obtained from a local clinic in connection with a drug rehabilitation program.

Congratulations to Founding Member Hon. John McCuskey and Associate Heather B. Osborn for their significant victory at the Supreme Court of Appeals of West Virginia in *Blankenship v. The City of Charleston, et al.* (January 2009 Term, No. 34399).

Mrs. Osborn and Mr. McCuskey represented Evanston Insurance Company in the declaratory judgment action and appeal against its insured, Lakewood Swim Club.

The primary issue was whether the insurance policy=s Designated Premises/Project Limitation Endorsement precluded coverage for a bodily injury claim arising out of a slip and fall in beer

during a country music concert at the Charleston Civic Center. The concession stand was being operated by members of the Swim Club, allegedly as a fund raising event.

Mrs. Osborn successfully argued her Motion for Summary Judgment before the Honorable Judge Stucky in the Circuit Court of Kanawha County, West Virginia, and the Swim Club appealed.

The WV Supreme Court requested oral arguments on the appeal, and Mrs. Osborn successfully defended the summary judgment before the high Court. The Court found that the injury arising out of the members= actions of serving beer during a concert, open to the general public, was not an injury that arose out of the insured Aproject,@ defined as a Aprivate swim club.@

The Court=s decision was unanimous, and this case represents a significant victory for insurers.

SMS Prevails in 4th Circuit United States Court of Appeals, Again

SMS attorney Robert Russell appeared in Richmond, Virginia before the US Court of Appeals for the 4th Circuit and for an oral argument which persuaded the Court to rule in favor of his clients, West Virginia University Board of Governors and Michelle Nuss, M.D.

The Plaintiff, a former medical resident, alleged that he was terminated from the program in violation of his Due Process Rights and the Americans with Disabilities Act. Mr. Russell tried the underlying case on behalf of his clients, and he obtained a complete defense verdict. The Plaintiff appealed.

On appeal, Mr. Russell successfully argued that the Federal District Court=s decision should be affirmed, and the 4th Circuit recently entered an Order affirming the decision.

Mass Tort Action Against Two SMS Clients Over A Flood Were Washed Away on Summary Judgment

Congratulations to Founding Firm Member William Slicer and Associate Christopher Negley for obtaining summary judgment for two (2) of their clients in a mass tort, flood litigation.

Mr. Slicer and Mr. Negley represented two separate and distinct companies, Rowland Land Company, LLC (a large land owner that contracts with others to develop its natural resources) and Creekside Energy Development Company (a small landowner who had a contract miner operating an underground mine on its property). Both companies were sued by Plaintiffs in a mass tort action filed by Randolph McGraw in Wyoming County, West Virginia styled *Anita Cecil, et al. V. Bluestone Coal Corp., et al.* (Civil Action No. 04-C-104).

The 2002 flood over which these lawsuits were filed was different than the flood which spawned the case that recently went to the WV Supreme Court.

Mr. Negley obtained affidavits from the clients, and he utilized those affidavits to support Motions for Summary Judgment (AMSJ@). The MSJ filed on behalf of Creekside was based upon the fact that no water left the site on the day at issue. The MSJ on behalf of Rowland stated, in essence, that it would have been geologically impossible for its actions to have caused the Plaintiffs any problems due to Rowland=s location in Raleigh, Boone and Fayette Counties.

The Motions were recently argued before the Hon. Judge Johnson of Nicholas County, West Virginia who was sitting by special assignment (Plaintiffs= counsel=s uncle is now the presiding judge in Wyoming County, and he recused himself from the case). The Plaintiffs argued that the Motions were premature.

However, the Court agreed with the arguments presented on behalf of the Defendants, and summary judgment was granted to both SMS clients.

Another Summary Judgment Awarded on a Declaratory Judgment Action: It=s a Conspiracy!

Firm Member Tim Linkous and Associate Molly Miner obtained an Order granting their client summary judgment in a declaratory judgment action.

The insured, Mr. Barchiesi, filed a Complaint alleging that persons owed him money for the cost of materials utilized in the construction of a home. One of the Defendants filed a Counter Claim against Mr. Barchiesi alleging that he was involved in a conspiracy with the other Defendant to institute the Complaint.

Mr. Barchiesi=s insurance carrier retained SMS to file and pursue a declaratory judgment action. Mr. Linkous argued to the Circuit Court of Ohio County, West Virginia (Hon. Judge Wilson presiding) that the civil conspiracy allegations do not fall within the insurance policy=s definition of bodily injury, property damage, advertising injury, or personal injury.

Though Mr. Barchiesi=s counsel orally defended against the Motion, the Court concluded that summary judgment was appropriate and it recently entered an Order reflecting its decision.

Motion to Dismiss Abuse of Process Claim Granted

Congratulations to Founding Member William Slicer for obtaining an Order granting a Motion to Dismiss on behalf of his client in an abuse of process civil action.

Mr. Slicer represented an individual who was sued for an alleged abuse of process claim (similar to a malicious prosecution cause of action). However, Plaintiffs= counsel failed to file the Complaint Awithin one year from the time the right to bring the action accrued,@ i.e. the statute of limitations for such a claim.

As a result, the Circuit Court of Raleigh County, West Virginia, Hon. Judge Robert A. Burnside, Jr. Presiding, granted the Motion to Dismiss.

Motion to Dismiss Granted for Plaintiff=s Failure to Prosecute and an Abuse of Discovery Process Sanction

Founding Member William Slicer recently obtained the dismissal of his client, R.F. Steiner and Co., from a lawsuit for the Plaintiff=s failure to meaningfully participate in the discovery process.

The Plaintiff, an out of state resident, failed to provide complete responses to discovery requests, failed to adhere to an Order granting a Motion to Compel, failed to provide medical authorizations, failed to appear (twice) for his scheduled deposition, and failed to take advantage of multiple discovery deadline extensions.

As a result and upon a Motion filed on behalf of the Defendant, the Court dismissed the civil action as a sanction pursuant to Rule 37 of the West Virginia Rules of Civil Procedure.

Legal Developments
Focus: Important Decision Affecting Interplay of Insurer and Insured at Trial Where Coverage Issues Exist

The Supreme Court of Appeals of West Virginia (AWVSC@) recently issued an opinion that should be mandatory reading for insurance companies as well as insureds who are regularly involved in litigation. In *Camden-Clark Memorial Hospital Association v. St. Paul Fire and Marine Insurance Co.*, (WVSC No.

33909, January 2009 Term), the WVSC addressed the responsibility of formulating jury interrogatories when there are insurance coverage issues that could be affected by the wording of those interrogatories.

For lawyers, insureds and insurers who have either tried a case or come close to trying a case wherein there exists unresolved reservation of rights and other coverage issues, you understand the importance of jury interrogatories to those unresolved issues. For example, if an insured is being sued for both negligent and intentional conduct, insurers will often issue a reservation of rights on the intentional conduct as most insurance policies exclude such from coverage. What occurs when the jury interrogatory simply asks, "Do you find from a preponderance of the evidence that the Defendant is liable to the Plaintiff for Plaintiff=s injuries?" If a jury were to respond, "yes," are they making a finding of both intentional and negligent culpability? Whose responsibility was it to ensure that the jury interrogatories were sufficiently distinct and detailed so that coverage issues could be resolved? This decision addresses that critical issue.

Camden-Clark Memorial Hospital Corporation ("CCMH") instituted a declaratory judgment action against St. Paul seeking a declaration of insurance coverages available to satisfy a verdict in excess of $6,500,000.00. CCMH had a $2,000,000 SIR and St. Paul provided liability coverage in the amount of $1,000,000 for medical professional injury, bodily injury and property damage, personal injury liability, and advertising injury. St. Paul also provided a $15,000,000 excess liability policy. There were no exclusions for punitive damages, but the policy did exclude coverage for "bodily injury or property damages that=s expected or intended by the protected person." The policy gave St. Paul the right to investigate and associate in the defense of any claim, but the policy did not require St. Paul to provide a defense. In fact, CCMH retained its own counsel for defending the underlying claims arising out of a death following an ORIF surgery to repair a broken ankle. St. Paul did not exercise the right to participate in the litigation defense or trial.

The underlying claims against CCMH included medical negligence, negligent hiring, negligent retention, negligent credentialing, spoliation of evidence, fraudulent concealment, and the tort of outrage. Though the jury verdict form was fairly detailed, it did not ask the jury to differentiate as to whether liability was being imposed for negligent or intentional conduct. In the declaratory judgment action, the United States District Court for the Southern District certified the following questions to the WV Supreme Court:

(1) "Under West Virginia law, when an insured is found liable in tort, and the complaint indicates that the tort could be based on conduct that the insurance policy covers, on conduct that the insurance policy does not cover, or both, and when the jury verdict does not specify which conduct gave rise to the insured=s liability, does the insured bear the burden of proving that the liability was based on covered conduct, or does the insurer bear the burden of proving that the liability was based upon non-covered conduct?"

(2) "Under West Virginia law, when a jury awards punitive damages against an insured, and the punitive damages could be based on a claim covered by the insurance policy, on a claim not covered by an insurance policy, or both, does the insured bear the burden of proving that the punitive damages were based upon a covered claim, or does the insurer bear the burden of proving that the punitive damages were based on a non-covered claim?"

The Court answered, in this case, that the insured had the burden of proof with respect to each certified question. In reaching the decision, the Court reasserted the general rule of law that, "An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion." However, the Court made the following pronouncements of new law:

Syllabus Point No. 5: AWhere a policy of insurance does not impose a duty to defend upon the insurer and the insured has controlled the defense of the underlying claims, if a court determination regarding allocation of a jury verdict between the claims covered by the terms of the policy and the claims not covered by the terms of the policy is sought, the insured has the burden of proof to establish proper allocation.@

Syllabus Point No. 6: AIn order to obtain indemnification under a policy of insurance which does not exclude punitive damages under which there is no duty to defend, an insured who has controlled the defense in a case resulting in a punitive damage award and who seeks a court determination regarding allocation of the award has the burden of proving that the claim or claims on which the punitive damage award is based is covered by the terms of the policy.@

Insurers should take note, however, that the situation presented in the *Camden-Clark* case is not the norm because St. Paul ***did not*** have a duty to defend. The Court stated, AIn light of both our precedent and the authorities cited above, we believe that the insured=s ordinary burden to allocate a verdict between covered and non-covered claims *does not shift to an insurer **unless** the insurer had an affirmative duty to defend the insured under the policy terms*.@ In other words, this decision places the duty on the insurer to ensure that jury interrogatories properly allocate the jury=s verdict between covered and uncovered claims when the applicable insurance policy has a duty to defend clause (and when the insurer Acontrols@ the defense by retaining defense counsel).

This case raises several other critical issues outside the scope of the decision, but important nonetheless. First, most insurance policies contain duty to defend provisions, and, thus, this places an apparent affirmative duty upon insurers to make certain jury interrogatories properly allocate between covered and non-covered claims. Second, the process for insurers to satisfy their obligations is unclear. Although the temptation may be to instruct retained defense counsel to craft interrogatories that satisfy the obligation, doing such would likely place retained defense counsel in an ethical dilemma. Specifically, the sole purpose of drafting interrogatories to distinguish between covered and non-covered claims is to potentially deny insurance coverage, in whole or in part. While the interrogatories are appropriate and necessary for an insurer to protects its rights, it is inappropriate to instruct retained defense counsel to take actions that will potentially jeopardize his/her client=s insurance coverage as doing such would place defense counsel in conflict with the insured.

Therefore, when there are coverage issues involved in litigation and the insurance policy creates a duty to defend the insured, the best approach is for insurers to retain separate coverage counsel to address these issues. Coverage counsel not only has the right to file a declaratory judgment action and join it with the underlying litigation, but such counsel can also intervene in the underlying action, if necessary, to ensure that the insurer=s rights are protected when jury interrogatories are drafted and approved by the trial court.

We recommend that insurers facing these circumstances consult and retain coverage counsel to protect their interests. SMS regularly performs coverage work for its insurance company clients, and we welcome an opportunity to assist you in any way possible should the need arise.

(This article was prepared and 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 the decision or the information contained in this article, you are encouraged to speak directly with an SMS lawyer.)

SMS Lawyer Highlights

The recent months brought with them some new faces to SMS, and we are pleased to introduce our newest *Juris* Member, Brian J. Warner, who works out of our Morgantown office. Jenny Wrobleski recently joined our team as an Associate in the Morgantown office. Additionally, SMS is especially excited about our two Summer Law Clerks, Joseph Cramer and Paul Kettering, who have already proven to be good at identifying important case issues, excellent researchers, and solid writers. Below, you will find a brief introduction to these outstanding additions to the SMS team, and, as you work with these individuals, we are confident that you will be as pleased with their work as we are.

Juris Member Brian J. Warner

SMS is pleased to announce that Brian J. Warner recently joined the firm as a *Juris* Member in the Morgantown office. A native of Madison, West Virginia, Mr. Warner began practicing in 2003. He concentrates his practice on the representation of coal operators and contractors in both civil and administrative matters. However, in addition to his mine safety practice, Mr. Warner maintains a diverse defense practice with clients ranging from national corporations to individuals, and he regularly represents defendants in personal injury, motor vehicle accident, wrongful death injury, and other cases.

Mr. Warner earned his undergraduate degree from West Virginia University where he was a President=s Scholar. He graduated from the West Virginia University College of Law in 2003, and, during his tenure there, was the Associate Editor for the WVU Law Review. He co-authored, AMiner Act: Today and Tomorrow,@ and that article was published in the Fall 2006 West Virginia Executive Magazine. In addition to several organizations related to his law practice, he is also a member of the West Virginia Coal Association and the Energy & Mineral Law Foundation.

Mr. Warner is an avid golfer, though his scorecard rarely reflects his passion for the game. He is married to Laurie Warner who is from Morgantown, West Virginia, and they have a beautiful 14 month old son, Max.

Associate Jenny Wrobleski

Jenny Wrobleski recently joined SMS as an Associate in the Morgantown office. She is a native of West Virginia, and she is originally from Morgantown. Her practice focuses solely on insurance defense litigation, and she represents clients in a wide range of matters from motor vehicle accidents to premises liability, property damage, and other personal injury cases.

Mrs. Wrobleski graduated from West Virginia University where she received a BS degree, *cum laude*. While at West Virginia University, she was active in Gamma Sigma Delta. After graduating from WVU and before beginning her law school career, she lived in Pittsburgh, Pennsylvania where she worked as a Design Consultant for a large imported furniture company.

In 2005, Mrs. Wrobleski started her law school education at the West Virginia University College of Law where she received the Duane Southern Scholarship and was a member of the Moot Court Board. She also held the position of Judge=s Liaison during the 2008 Baker Cup Competition at the law school. She is admitted to practice law before all West Virginia Circuit Courts, the Supreme Court of Appeals of West Virginia, and the US District Court for the Southern District of West Virginia.

Mrs. Wrobleski was recently married to her husband, Joe, who started his dental practice in Morgantown and Kingwood, WV, and they are expecting their first child in December..

Summer Law Clerks Joseph Cramer and Paul Kettering

Joseph Cramer is a Summer Law Clerk in the SMS Charleston office. He is originally from Chambersburg, Pennsylvania, and he obtained a BA in Political Science from West Virginia University in 2007. Before entering law school, Mr. Cramer worked several years as an account manager for Bank of America. He is currently a student at the WVU College of Law and will graduate in 2010. He is an Editor of the West Virginia Law Review, and his article, ACivilizing Criminal Sanctions: A practical analysis of the West Virginia Civil Asset Forfeiture Act@ is slated for publication in Volume 112 of the W.Va. Law Review. In addition to law review, Mr. Cramer is a participant in the VITA program where he helps prepare and file tax returns for low income West Virginians. Last summer, he worked at the Public Defenders office in Martinsburg, WV, where he assisted in the representation of indigent criminal defendants.

Paul Kettering is a Summer Law Clerk in the SMS Morgantown office. He was born and raised in Fairmont, WV, and he obtained his BS in Journalism from West Virginia University in 2007. At WVU, he worked on the sports staff for U92 College Radio and called WVU Baseball and Club Hockey games. In 2007, he was named News Anchor of the Year by the Perley Isaac Reed School of Journalism for his work on WVU News, the Journalism School=s statewide television news broadcast. Mr. Kettering is continuing his education as a member of the WVU College of Law class of 2011. In his free time, he enjoys basketball, reading, and he is an assistant football coach at Fairmont Senior High School.

Quarterly Quote: AThe first to present his case seems right, till another comes forward and questions him.@ B Proverbs 18:17

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