

# 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 Joins the Fight!

SMS proudly participated in Relay for Life in Morgantown and the Race for the Cure in Charleston.



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## **Relay for Life**

On May 20, 2011, Shuman, McCuskey & Slicer, PLLC Relay for Life team walked all night long to raise money for the fight against cancer. There were raffle drawings and various sales all to raise money for the American Cancer Society. The event raised over \$100,000 total, and our team raised and contributed \$1,555.10. The children on our team sold candy bars throughout the community to help raise funds. We also raffled a golf package, a Nascar gear package, and a membership at HealthWorks. It truly was an awesome night!



## **Race for the Cure**

On May 7<sup>th</sup>, SMS participated in the 2011 Komen Race for the Cure. Friends and family were on hand to walk for the cure and work the SMS water station. It was a wonderful cause and we were proud to be a part of it!



## **Recent SMS Events**

On June 18, 2011, SMS participated in the Smoke of the Water Chili Cook Off to support HospiceCare. SMS's "Great Bowls of Chili" booth helped raised money for HospiceCare and we had a great time doing it!



Congratulations to SMS attorney Natalie C. Schaefer for becoming a pro bono volunteer Court-Appointed Special Advocate. After extensive training, Ms Schaefer was recently sworn in as a CASA volunteer by the Honorable Judge Paul Zakaib. Ms. Schaefer explains the importance of being a CASA: "Becoming a CASA volunteer gives me the chance to serve children who are abused and neglected. Through my work as a CASA, I give those children a voice. I don't do it for praise or rewards. The well-being of the child is its own reward."



# Super Lawyers<sup>®</sup>

Congratulations to SMS founding member David L. Shuman, for being nominated as a 2011 Super Lawyer! Congratulations also to Tim Linkous and Natalie C. Schaefer, who were nominated as 2011 Super Lawyer Rising Stars!

Super Lawyers is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high-degree of peer recognition and professional achievement. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations.



## SMS Lawyer Victories

### “Uninsured” Dismissal

Congratulations to Molly Miner who obtained a dismissal of a Third-Party Complaint against John Doe, whereby the Plaintiff was attempting to obtain uninsured coverage. Plaintiff, personal representative of husband’s estate, filed a lawsuit against two defendants (driver of automobile and owner of automobile), arising out the wrongful death of her husband. Plaintiff also served the Complaint on Plaintiff’s insurance company pursuant to the underinsured motorist statute. Then the Defendants filed a third-party complaint against John Doe and served the same on



the insurer, attempting to seek uninsured motorists benefits for John Doe under the Plaintiff’s insurance policy. Ms. Miner moved to Dismiss the

Third-Party Complaint against John Doe and an Order from the Court that Defendants did not have standing to assert a claim for uninsured motorists coverage under Plaintiff’s insurance policy and therefore, the insurer did not have to appear or defend on behalf of John Doe.

The Court granted our motion and ordered that the insurer did not have to appear on behalf of or defend John Doe and found that under W.Va. law only an insured can maintain an uninsured claim, not a third party.

## Unsubstantiated Discrimination

Congratulations to SMS attorney Chris Negley for obtaining a “no probable cause” finding from the Human Rights Commission on a claim of race discrimination for an SMS client. The Commission ultimately concluded that the Complainant’s allegations could not be substantiated.

## PSC Success

Congratulations to Chris Sears and Chris Negley for a PSC victory. After a three-day trial before the West Virginia Public Service Commission, SMS client, the Pocahontas County Public Service District (“PCPSD”), received initial approval to begin the process of constructing a much anticipated and necessary sewage system for the Snowshoe Resort and others residents of Pocahontas County. The sewage system is expected to cost in the neighborhood of 14 to \$17 million and, when built, is expected to meet the needs of the community of 40 years. The PSC rejected the argument of opponents who sought to either place the PCPSD into receivership or to have the PSC order the PCPSD to build another project.



## Legal Developments

The July 2011 Issue of the SMS Quarterly features several decisions from the Supreme Court of Appeals of West Virginia. If you would like more information about these cases or information about other cases recently decided by our high court, please contact an SMS lawyer today.

*McElhinny v. Kanawha County Public Library*, No. 101541, filed May 2, 2011, affirms the dismissal of a consortium claim where the underlying tort claim has been dismissed. This opinion, adopting and affirming an order by Judge Stucky of Kanawha County recognized the purely derivative nature of consortium claims and held that consortium claims do not survive dismissal of the underlying tort claim.

*Stevenson v. Independence Coal Company*, No. 35592, filed April 28, 2011, upheld the circuit court’s determination that the question of proximate cause, even if tenuous, is a jury issue. In *Stevenson*, the Plaintiff was injured when he slipped trying to fix a part on a mantrip. While the Court noted the argument on proximate cause was “marginal” it nonetheless found sufficient evidence of proximate cause to support a \$1.9M jury verdict: “[v]iewing the evidence in the light most favorable to Stevenson, as required by *Fredeking, supra*, the jury heard that it was common knowledge at the mine that the mantrips had recurring brake problems and that, occasionally, a brake head would fall off a mantrip while it was in use. In addition, the jury heard that there were not enough electricians and mechanics to service the mantrips and that, at times, regular hourly workers worked on the brake systems.” The Court therefore affirmed the jury verdict.

*State ex rel Galloway v. McGraw*, No. 11-0187, filed May 16, 2011. In holding that venue was improper in Wyoming County, the Supreme Court concluded: "[a]ccordingly, having determined that Galloway does not reside in Wyoming County and that the cause of action below did not arise in Wyoming County, this Court concludes that the Circuit Court of Wyoming County clearly erred as a matter of law in denying Galloway's motion to dismiss for lack of venue."

In *Witt v. Sutton*, No. 35698, filed April 14, 2011, the Supreme Court affirmed summary judgment for the carrier in a case involving a claim for medical payments coverage. The Court determined the policy language is not ambiguous and precluded medpay coverage where the insured is driving a vehicle owned by his employer. The Court succinctly stated: "The parties' dispute boils down to this: the plaintiff alleged that he was entitled to medical payments coverage after he was accidentally injured while operating a vehicle. State Farm refused to pay, on the ground that the plaintiff's automobile policy excluded medical payments coverage for injuries sustained by the plaintiff while operating a vehicle that was owned by the plaintiff's employer." The Court affirmed summary judgment for the carrier.

The Supreme Court in *McDonald v. City Hospital*, No. 35543, filed June 22, 2011, affirmed the "cap" on noneconomic loss. The Court issued a new syllabus point: "West Virginia Code § 55-7B-8 (2003) (Repl. Vol. 2008), which provides a \$250,000 limit or "cap" on the amount recoverable for a noneconomic loss in a medical professional liability action and extends the limitation to \$500,000 in cases where the damages are for: (1) wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3)

permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life-sustaining activities (both subject to statutorily-mandated inflationary increases), is constitutional. It does not violate the state constitutional right to a jury trial, separation of powers, equal protection, special legislation or the "certain remedy" provisions, W. Va. Const. art. III, § 13; W. Va. Const. art. V, § 1; W. Va. Const. art. III, § 10; W. Va. Const. art. VI, § 39; and W. Va. Const. art. III, § 17, respectively."

If you would like more information about these cases or other WVSC decisions, please contact an SMS lawyer who can provide you with a detailed discussion of the issues and holdings.

**Quarterly Quote:** “Nothing great was ever achieved without enthusiasm.” - Ralph Waldo Emerson  
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(Natalie C. Schaefer is the Attorney responsible for this publication. This publication is an advertisement for Shuman, McCuskey & Slicer, PLLC).