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SMS QUARTERLY

AN INSIDE LOOK AT YOUR LAW FIRM AND
WHAT ITS LAWYERS ARE DOING TO SERVE YOU

Attorneys at Law

Shuman, McCuskey & Slicer PLLC

Super Lawyers

Congratulations to our 2012 Super Lawyers!

David L. Shuman, Super Lawyer

Timothy R. Linkous, Rising Star

Natalie C. Schaefer, Rising Star

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SMS News

SMS Congratulates its 2012 Super Lawyers and Rising Stars!

SMS founding member David L. Shuman was nominated as a 2012 Super Lawyer for the fourth year in a row!

Congratulations also to Tim Linkous and Natalie C. Schaefer, who were nominated as 2012 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. It is quite a professional honor, and the selection process is multi-phased and includes independent research, peer nominations and peer evaluations.

SMS Assists Hospice Care with Chili-Cook-off

This summer, SMS was proud to participate in the 14th Annual Smoke on the Water Chili Cook-off to benefit Hospice Care.

Hospice Care dedicates itself to easing the pain and suffering associated with terminal illnesses, while providing peace and comfort in order to maximize our patients' quality of life. Hospice Care provides personal and emotional support, allowing the patient and the family to cherish their days with less stress.

SMS Attorney Sings at Law School Commencement

SMS Associate, Kristen Antolini, sang "My Home among the Hills" at the West Virginia University College of Law Commencement on May 12, 2012." Before going to law school, Ms. Antolini attended West Virginia University on a full vocal performance scholarship and graduated with a Bachelor of Arts in Voice in 2005.

SMS Lawyer Victories

Professional Liability Successes - 1? 2? 3? 4? No, 5!!!

Congratulations to founding member Dave Shuman for his recent multiple successes on behalf of several professional clients. First, Mr. Shuman obtained a voluntary dismissal with prejudice for his client, an emergency room physician, in a non-meritorious claim in which the Plaintiff alleged a failure to order an orthopedic consultation upon her presentation to the emergency room with right knee pain and a history of knee surgery.

Mr. Shuman obtained another voluntary dismissal with prejudice for his client, a dentist, in a non-meritorious claim in which the Plaintiff alleged the failure to remove a root tip caused a brain seizure.

Mr. Shuman also obtained a Plaintiff's voluntary agreement to withdraw a dental malpractice claim against his client after the Plaintiff incorrectly claimed she contracted Hepatitis B from the dental staff.

Further, Mr. Shuman obtained a Plaintiff's voluntary agreement to withdraw a medical malpractice claim against his client, an emergency room physician, after the Plaintiff's failure to obtain a properly-credentialed certificate of merit.

Finally, Mr. Shuman once again obtained a Plaintiff's voluntary agreement to withdraw a medical malpractice claim against his client, another emergency room physician, after the Plaintiff's failure to obtain a properly-credentialed certificate of merit.

SMS Attorneys Obtains Dismissal for Municipality, Affirmed at the West Virginia Supreme Court of Appeals

Congratulations to Tammy J. DeFazio and Kristen D. Antolini, who successfully defended the Town of Buckhannon on a claim of alleged negligence against the City when the Plaintiff fell at the City's solid waste transfer station. The Plaintiff appealed the lower court's dismissal of the case. The West Virginia Supreme Court of Appeals affirmed the lower court's dismissal of the action based on immunity under the WEST VIRGINIA GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT, W.Va. Code, 29-12A-1 [1986], *et seq*. The focal point of the West Virginia Supreme Court of Appeals' opinion is West Virginia Code Section 29-12A-5(a)(16) [1986], which provides that: "A political subdivision is immune from liability if a loss or claim results from: . . . (16) The operation of dumps, sanitary landfills, and facilities where conducted directly by a political subdivision[.]"

The significance of the *Posey* opinion is threefold.

First, it adds significant judicial gloss to the phrase "and facilities" as it appears in the foregoing immunity provision. Prior to this decision, it was unclear whether that phrase was restricted to facilities present on the grounds of dumps and/or sanitary landfills. This decision makes clear that a transfer station not operated on the grounds of a dump or sanitary landfill falls within the purview of this provision, provided that the transfer station is necessarily related to a dump or sanitary landfill at another location. Second, the opinion signals a restrictive, as opposed to an expansive, view of *Calabrese v. City of Charleston*, 204 W.Va. 650, 515 S.E.2d 814 (1990), in that it essentially restricts the application of the Calabrese decision to sanitary sewer lines and systems. Third, from a broader perspective, the *Posey* decision underscores the application of the immunity provisions of the Tort Claims Act to instances where plaintiffs' claimed damages are significant and there is no other avenue of recovery available.

SMS Attorney Successfully Defends Employee Grievances

SMS attorney Chris Negley successfully defended an SMS client in two separate termination claims before the WV Public Employee Grievance Board. The decisions in Mr. Negley' s favor are final decisions and, as such, have been reported on the WV Public Employees Grievance Board decisions database and are precedential for future grievances for all public employees.

Legal Developments

In *In re E.B., a minor*, January 2012 Term, No. 101537, the West Virginia Supreme Court addressed the proper manner in which to handle Medicaid subrogation.

In re E.B. involved the settlement by a West Virginia plaintiff in Ohio for a lump sum amount ($3,600,000). The Plaintiff filed a miscellaneous action in West Virginia to approve the settlement. The plaintiff, a Medicaid recipient, could not reach an agreement with DHHR regarding the Medicaid subrogation lien. In sum, the 80-page opinion held that:

4. Pursuant to *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006), the West Virginia Department of Health and Human Resources may obtain reimbursement for medical expenses paid from only that portion of the settlement, compromise, judgment, or award obtained by a recipient of Medicaid assistance that constitutes damages for past medical expenses.

5. West Virginia Code § 9-5-11 (2009) is preempted to the extent that its assignment and subrogation provisions

conflict with federal law. To the extent that our prior decision in *Grayam v. Department of Health and Human Resources*, 201 W. Va. 444, 498 S.E.2d 12 (1997), provided that pursuant to W. Va. Code § 9-5-11 the Department of Health and Human Resources possesses a "priority right to recover full reimbursement from any settlement, compromise, judgment, or award obtained from such other person or from the recipient of such assistance if he or she has been reimbursed by the other person," that holding is overruled.

6. If another person is legally liable to pay for medical assistance provided by the West Virginia Department of Health and Human Resources, the Department possesses a priority right to be paid first out of any damages representing payments for past medical expenses before the recipient can recover any of his or her own costs for medical care.

7. After a settlement, compromise, judgment, or award has been obtained in a Medicaid assistance recipient's claim to recover damages for injuries, disease, or disability, all reasonable efforts should be made to obtain the agreement of the Department of Health and Human Resources regarding the allocation of that portion thereof that represents the recipient's past medical expenses. No such settlement, compromise, judgment or award shall be consummated or judicially approved, if necessary, until the Department has been notified and afforded such opportunity to agree to the parties' allocation of damages or to challenge said allocation.

8. If the Department of Health and Human Resources and the parties cannot agree on an allocation of damages in a settlement context once the Department is notified and provided an opportunity to protect its interest, the parties must seek judicial allocation through the court. If judicial allocation becomes necessary, the trial court is required to hold an evidentiary damages hearing, whereupon all parties and the Department are provided ample notice of the same and are given just opportunity to present the necessary evidence, including fact witness and expert witness testimony, to establish what each contends is an appropriate allocation of damages. In challenging an allocation of damages proposed by the parties, the Department of Health and Human Resources has the burden of proof to establish a proper allocation.

In *National Federation of Independent Business v. Sebelius, et al*., 567 U.S. ___ (2012), the United States Supreme Court upheld almost all of the Patient Protection and Affordable Care Act, 26 U. S. C. §5000A - more generally become known as "ObamaCare."

In *Cline v. Kreasa Reahl*, January 2012 Term, No. 11-0351, the West Virginia Supreme Court of Appeals affirmed the dismissal of a medical malpractice complaint for the Plaintiff's failure to provide a certificate of merit prior to filing suit as required in W.Va. Code 55-7B-6(c).

In *Cline*, the Plaintiff filed a notice of claim, asserting the defendant physician failed to provide informed consent; however, took the position that no certificate of merit was required. The Court found that physicians are under no duty to obtain informed consent for procedures not recommended. Instead, the failure to recommend or perform a procedure must be judged as a matter of standard of care, for which a screening certificate of merit is required.

The Court issued the following syllabus points:

5. The duty of disclosure set forth in *Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982), is predicated upon a recommended treatment or procedure. A jury must assess a physician's failure to recommend a procedure or treatment under ordinary medical negligence principles.

6. "Before a defendant in a lawsuit against a healthcare provider can challenge the legal sufficiency of a plaintiff's pre-suit notice of claim or screening certificate of merit under W. Va. Code, 55-7B-6 [2003], the plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies." Syl. Pt. 3, *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005).

In *Goff v. Penn Mutual Life Ins. Co.*, January 2012 Term, No. 11-1020, the West Virginia Supreme Court held:

3. Upon the death of the insured, a primary beneficiary of a life insurance policy has standing to bring a statutory bad faith claim against the insurer pursuant to West Virginia Code § 33-11-4(9) (2011).

In *Messer v. Hampden Coal*, January 2012 Term, No. No. 11-0469, the Court affirmed a denial of the Plaintiff's motion for a new trial which was premised on the failure of the circuit court to disqualify an electrical engineer for cause in *voir dire*:

8. A prospective juror's eligibility to serve is not ordinarily to be determined by an isolated remark or answer to a single question. Rather, when confronted with a challenge for cause, the trial court should base its decision on the entire *voir dire* examination and the totality of the circumstances. The trial court is in the best position to evaluate a prospective juror's qualifications, and the trial court's decision on this issue will be affirmed absent an abuse of discretion.

In *McPherson v. Bolen*, January 2012 Term, No. 11-0287, the Supreme Court affirmed a jury verdict in a motor vehicle accident. Notably, the Court stated parties do not have to call experts to challenge claims of future injury: "Nothing in *Jordan* or any other case cited by petitioners stands for the proposition that a defendant cannot discredit a claim of causation or permanency by arguing the existence of prior accidents and/or injuries."

In *Bowens v. Allied Warehousing*, January 2012 Term, No. 11-0210, the Court recognized the special employer/borrowed servant in the context of deliberate intention/negligence claims. Plaintiff Bowens was employed by Manpower and assigned to work at Allied's warehouse. The Court noted that "[u]nder the arrangement between Allied and Manpower, Manpower was responsible for payment of employee wages, payroll deductions and payment of unemployment and workers' compensation premiums. Each week, Manpower would submit an invoice to Allied for time and work of all Manpower employees who were assigned to work and who worked for Allied. The amount paid to Manpower by Allied included a premium over Bowen's actual wages to cover the costs of employing Bowens, including payroll deductions, federal and state unemployment compensation, and required payment of workers' compensation premiums."

Bowens was injured when pinned by a forklift run by the supervisor, a fellow Manpower employee named Church. Bowen

filed for worker's compensation, listing Manpower as his employer. He then sued Manpower and Allied for negligence, unsafe workplace, negligent hiring, worker's compensation fraud (related to termination of benefits) and common law fraud. The circuit court granted Allied's motions for summary judgment as to worker's compensation fraud and also as to the negligence claim, finding Allied was a special employer.

Consequently, Plaintiff amended the complaint to assert a deliberate intention claim, which was also dismissed. The Court expressly adopted the "borrowed servant" or special employer rule, finding that Allied was his employer: "Allied's authority to exercise complete supervision and control over Bowens while he was on Allied's premises establishes Allied as Bowen's special employer within the meaning of West Virginia's workers' compensation statutes." Moreover, "[b]ecause Manpower billed Allied to compensate for expenses and profits of this nature, Allied, by proxy, paid for Bowen's workers' compensation coverage. Therefore, Allied should properly share in the immunity afforded under the workers' compensation statute." The Court noted:

8. In determining whether a second employer is a special employer giving rise to a special employment status for workers' compensation purposes, the following factors are dispositive: (1) whether the employee has made a contract of hire, express or implied with the second employer; (2) whether the work being done is essentially that of the second employer; and (3) whether the second employer has the right to control details of the work. When all three of the above conditions are satisfied in relation to both employers, both employers will be liable for workers' compensation and both will have the benefit of the exclusivity defense of tort claims.

9. Whether an individual is a special employee for workers' compensation purposes is generally a question of fact. However, a court may find special employment status as a matter of law where the pleadings, depositions, answers to interrogatories, together with affidavits establish that there is no genuine issue of material fact to the contrary.

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: "Be a yardstick of quality. Some people aren't used to an environment where excellence is expected." -- Steve Jobs

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