

# SMS QUARTERLY

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



**Shuman,  
McCuskey  
& Slicer** PLLC

## IN THIS ISSUE:

Cover Story: 2010 Marks 100 Years  
Of Shuman Law Services in WV

Page two: SMS Recognizes Mothers

Pages two through three: SMS  
Lawyer Victories

Page three: SMS Member  
Welcomes New Arrival

Page four: WV Legal Developments

Page five through six: SMS Lawyer  
Highlight, Mark Browning

Page six: Quarterly Quote

## 2010 Marks 100 Years Of Shuman Law Services In West Virginia

Though Founding SMS Member David L. Shuman has successfully practiced law in West Virginia for 38 years, the Shuman family celebrates the 100<sup>th</sup> year of representing WV clients in 2010.

“My grandfather, Albert Shuman, started his practice in Monongalia County after graduating from the West Virginia University College of Law in 1910,” stated Shuman. “Since then, my family continually maintained at least one actively practicing lawyer in this State.”

Mr. Shuman started his legal career 38 years ago in 1972, and his practice focuses upon the representation of physicians and other health care providers. He regularly speaks to physician groups regarding medical malpractice and legislation affecting their practices.

Mr. Shuman’s son, David Shuman, is enrolled in law school and is anticipated to graduate in 2011. He currently plans on continuing the Shuman tradition and practicing in West Virginia.

## SHUMAN, MCCUSKEY & SLICER, PLLC CONVENIENT LOCATIONS

1411 Virginia Street, East, Suite 200  
Charleston, West Virginia 25301-3081  
Telephone: 304-345-1400  
Facsimile: 304-343-1826

1445 Stewartstown Road, Suite 200  
Morgantown, West Virginia 26505  
Telephone: 304-291-2702  
Facsimile: 304-291-2840

## SMS RECOGNIZES MOTHERS

For those of you who regularly follow the SMS Quarterly, you know that its publication normally occurs in April. However, with Mother's Day just around the corner on May 9, 2010, we wanted to take time to recognize SMS mothers in this edition.

There are few vocations as important or difficult as being a mother. Love, patience, kindness, discipline, understanding, correction, gentleness, teacher – these terms and characteristics are all evoked by the term “mother.” SMS extends its warmest wishes to its attorneys and staff who are mothers:

### SMS Charleston Office:

- Elizabeth Lawton, Esq.
- Lou Ann S. Cyrus, Esq.
- Karen T. McElhinny, Esq.
- Heather B. Osborn, Esq.
- Trina Grigsby, RN
- Carla Keene
- Sarah Morris
- Lori McCoy
- Amanda McCarty
- Robin Martin
- Beth Manoni
- Debbie Naylor
- Melody McCormick
- Sandy Milam
- Donna Blackwell
- LuAnn Searls
- Nancy Miller
- Donna Holstine
- Ann Hinkley
- Jennifer Clark

### SMS Morgantown Office:

- Jennifer L. Tampoya, Esq.
- Jenny L. Wroblewski, Esq.
- Polly Southern, RN
- Paula Williams
- Beverly Goodwin
- Carol Michael

## SMS Lawyer Victories

### Dismissal of Ophthalmologist Because Plaintiff Expert Could Not See Negligence

Congratulations to SMS Member Karen T. McElhinny on obtaining the voluntary dismissal of all claims against her client, a local ophthalmologist, in an accommodative intraocular lens case.

The Plaintiff alleged that she was not a candidate for cataract surgery and that the physician improperly failed to document a vitreous prolapse. However, after Plaintiff's expert witness conceded that the physician did not deviate from the standard of care and that the Plaintiff had “pretty good” uncorrected visual acuity, Plaintiff's counsel agreed to dismiss the case, with prejudice.

### No Adjustment of Statute of Limitations in Chiropractic Malpractice Case

SMS Member Timothy R. Linkous and Associate Molly Miner recently obtained summary judgment on behalf of their client, a local chiropractor, based upon the statute of limitations.

The Plaintiff alleged that one day after her last treatment on March 17, 2006, she immediately noticed significant symptoms later identified as Horner's Syndrome. However, she did not serve her Notice of Claim until March 21, 2008.

In response to the Motion for Summary Judgment, the Plaintiff argued that she was upset, crying and confused during her deposition. However, her deposition was videotaped. Video clips from the deposition were played to the Court at the hearing, and they clearly demonstrated that the Plaintiff understood the questions being asked.

Judge Russell Clawges, Jr. granted the Motion and dismissed the case, and the Plaintiff recently filed an appeal.

**An Eye for an Eye: Dismissal of Ophthalmology Case Arising out of Correctional Facility**

SMS Member Karen T. McElhinny and Associate Jason Wandling recently obtained a dismissal Order for their client, a medical provider in the matter styled Ballinger v. Dagher, et al.

Their client, a private general ophthalmologist who performed two eye examinations on the Plaintiff while the Plaintiff was incarcerated at Mt. Olive Correctional Center, was dismissed when a federal court in Charleston determined that the physician did not act improperly by failing to perform a corneal transplant demanded by the Plaintiff.

**Cash Missing, But Dismissal Found**

Congratulations to SMS Member Hon. John F. McCuskey and Associate Jason Wandling who obtained the dismissal of their client, the City of South Charleston, from an interesting case.

The Plaintiff in Bradberry v. South Charleston voluntarily dismissed his case after SMS defended the city against claims that one of its police officers improperly seized cash from the Plaintiff's hotel room during a drug investigation. As part of the dismissal agreement, the Plaintiff agreed that the city did not act wrongfully.

If you are counting, this is the second success story with which Associate Jason Wandling (pictured below) has been involved... but he is not finished...



**Scabies Plus AIDS Equals Dismissal...**

In Best v. Rubenstein, et al., SMS Member Dwayne E. Cyrus and Associate Jason Wandling successfully moved to dismiss the Plaintiff's constitutional claims.

The Plaintiff brought his action against several officials of the West Virginia Division of Corrections as well as various medical providers alleging, among other things, that his constitutional rights were violated.

The United States District Court for the Southern District of West Virginia turned aside Mr. Best's claims that prison officials violated his constitutional rights by failing to properly treat scabies and to administer AIDS medication in a timely fashion. The other Defendants, the Plaintiff's medical providers, remain in the case.



(Dwayne E. Cyrus pictured above)

**Another New Arrival...**

SMS extends its congratulations to SMS Member Brian J. Warner on the arrival of his daughter, Lilly Louise Warner, on April 29, 2010 at 11:53 am (8 lbs., 1 oz.; 20.5 inches long). We wish you the best on this exciting journey.

## Legal Developments

In this edition of the SMS Quarterly, we have selected to bring to your attention several recent decisions from the Supreme Court of Appeals of West Virginia. Those decisions are as follows:

**Ramey v. Contractor Enterprises, Inc.**  
(WVSC January 2010 Term, No. 34804)

In Ramey, the Plaintiff was working at a mine site when he fell off an 80 foot high wall thereby sustaining significant injuries. The Plaintiff was positioned on a 23 inch ledge between mining equipment and the edge of the high wall without any safety equipment. The Plaintiff brought a deliberate intent civil action against his employer, and summary judgment was granted after there was no evidence established to suggest that the employer had “actual knowledge of the specific unsafe working condition and the risk it posed before injury occurred.” W.Va. Code §23-4-2(d)(2)(ii)(A-E). There was also no evidence to suggest that the employer intentionally exposed the Plaintiff to the unsafe working condition. The Supreme Court of Appeals of West Virginia affirmed the summary judgment based upon these grounds.

**Goldizen v. Grant County Nursing Home**  
(WVSC January 2010 Term, No. 34888)

In Goldizen, summary judgment was granted after a physician who signed a death certificate changed his opinion as to the cause of death during a deposition. Based thereon, the circuit court concluded that no genuine issue of material fact existed as to the Plaintiff’s causation theory, and it granted summary judgment as to the Plaintiff’s claims. The Supreme Court of Appeals of West Virginia reversed the summary judgment and stated, “the fact remains that under our law, a ‘certified copy of a vital record issued in accordance with [West Virginia law]... shall be *prima facie* evidence of the facts stated in the record.’” This is an important opinion in any wrongful death case inasmuch as death certificates are often inaccurate.

**Perrine et al. v. E.I. DuPont De Nemours and Company, et al.**  
(WVSC January 2010 Term, Nos., 34333, 34334, and 34335)

This is an important case to read for multiple issues, including statute of limitations procedure, punitive damages, medical monitoring, and the admission of expert testimony. The analysis of this opinion, which is over 170 pages in length, is beyond the scope of this document. Here are some highlights:

- If a circuit court concluded, as a matter of law, that a case is not barred by the statute of limitation and a judgment occurs, the WVSC may conditionally affirm the judgment and remand for a jury trial solely on the statute of limitation issue.
- It appears that this case loosened the standards for admissibility of expert opinions.
- Punitive damages may not be awarded on a cause of action for medical monitoring.
- The standard to obtain medical monitoring does not appear to be very high.

---

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.

## SMS Lawyer Highlight

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



### Mark Browning

SMS Member Mark Browning began working with founding Member David L. Shuman in September 1985. Mark was born in Dayton, Ohio. He graduated from the University of Kentucky College of Law in 1985, and also received his Bachelor of Arts Degree with Highest Distinction in Political Science from UK in 1980. As an undergraduate at UK, Mark was inducted into Phi Beta Kappa, and received the first Amry S. Vandebosch Award in 1980 from the UK Political Science Department, recognizing Mark as the best political science graduate for that year. (Vandebosch was instrumental in the drafting of the United Nations Charter in San Francisco in 1945 and was on the UK faculty for many years).

Mark is licensed to practice law in West Virginia, Kentucky and Texas, as well as admitted to practice before the US Court of Appeals for the Fourth Circuit and the United States Supreme Court.

Upon joining Mr. Shuman in 1985, Mark worked with members of the firm defending Eichleay Corporation in a \$32 Million business interruption claim brought by Kaiser Aluminum in Jackson County. The case lasted some two and one half years, and culminated in a defense verdict for Eichleay. Mark has said that it was the perfect case to learn all aspects of civil discovery and trial practice as he was required to travel the country taking well over fifty depositions with some of the best attorneys in West Virginia, Pennsylvania, and California.

Over the years, Mark has worked on a variety of cases for the firm ranging from complex product liability actions to mass tort litigation defending West Virginia physicians. Statewide class actions focusing upon diet drugs (phentermine and fenfluramine), Rezulin, and Oxycontin have all been defended zealously by Mark, and each resulted in agreements whereby our physician clients were indemnified completely by the pharmaceutical companies that manufactured the drugs. Recently, Mark worked on behalf of a West Virginia cardiologist who was sued for medical malpractice for prescribing diet drugs to a Mercer County teacher who died of a heart attack in her classroom. He was successful in having the United States District Court for the Eastern District of Pennsylvania, with Chief Judge of the Diet Drug MDL presiding, dismiss the action in its entirety, barring any further actions against the cardiologist in any court, as the nationwide class action settlement barred the filing of state court medical negligence actions.

Most recently, Mark defended HNTB Corporation in a negligence action brought by West Virginia American Water Company. The trial of the action lasted three and a half weeks before Judge O.C. Spaulding and resulted in a defense verdict for HNTB, which was subsequently affirmed by the Supreme Court of Appeals of West Virginia.

SMS lawyers often consult with Mark regarding questions concerning removal jurisdiction of the federal courts. He has studied these cases over the years, kept abreast of recent developments, and can provide valuable insight as to whether a case may be successfully removed to federal court in most instances.

In the late 1980s, Mark successfully removed a state court negligence action against a Japanese fireworks manufacturer to federal court based upon the admiralty jurisdiction of the court as the injury to the plaintiff occurred on a barge on the Kanawha River during the Charleston Sternwheel Regatta.

Mark served as President of the Kanawha County Bar Association in 1995, and he served as a member of the Board of Governors of the Defense Trial Counsel of West Virginia for ten years. He was West Virginia's state representative to the national Defense Research Institute from 2000-2004. Currently, he serves on the Board of the Charleston Vandavia Rotary Club, and he is West Virginia's state representative for the United States Supreme Court Historical Society.

Mark is a very active member of Christ Church United Methodist in Charleston, serving on the Staff Parish Committee, the Administrative Board, and the Finance Committees. He sings in the Chancel Choir, regularly serves as the Liturgist on Sunday mornings, and is the lay representative of Christ Church to the West Virginia Annual Conference of the United Methodist Church. He is also a Freemason.

Mark's passions in life include his love of history and his collection of well over 1000 volumes of antiquarian books on all aspects of American history. He regularly attends meetings of the Theodore Roosevelt Association and the Winston Churchill Center. In 2004, he traveled to Portsmouth England, crossed the English Channel, toured the beaches of Normandy, and followed the footsteps of the Third Army across France to Berlin Germany. At Normandy, Mark was selected to deliver a prayer at the American Cemetery above Omaha Beach at Colleville-sue-Mer France.

He is also an avid collector of classic movies, and he has seen nearly every movie starring actors such as Spencer Tracy, James Stewart, Robert Taylor and Charlton Heston. He is a member of the American Film Institute, and, in 2006, he attended the Lifetime Achievement Dinner honoring Sean Connery.

Mark follows the exploits of the University of Kentucky Wildcats yearly, and has attended five Final Fours. He also enjoys Major League Baseball and is a fan of the Reds and the Yankees, and, together with his brother Douglas, who resides in Dallas, he manages to see the Cowboys play a game during most seasons.

**Quarterly Quote:** "Men are what their mothers made them." -- Ralph Waldo Emerson

Visit SMS on the web at [www.shumanlaw.com](http://www.shumanlaw.com)