

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 Attorneys Achieve Highest Ratings

SMS is proud to announce SMS founding member Dave Shuman achieved selection to The Best Lawyers in America® 2013 in the field(s) of medical malpractice. SMS is also proud to announce Morgantown office Managing Member Tim Linkous obtained the AV® Preeminent™ rating from Martindale-Hubbell.



THIS PUBLICATION IS ADVERTISING MATERIAL AND IS NOT INTENDED AS LEGAL ADVICE OR A GUARANTEE OF RESULTS. RESULTS VARY FROM CASE TO CASE. PLEASE CONTACT AN SMS ATTORNEY FOR MORE INFORMATION.

SHUMAN, MCCUSKEY & SLICER, PLLC

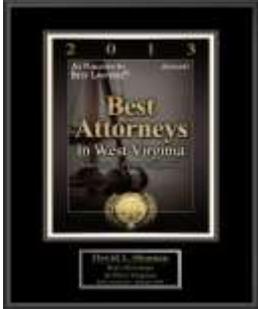
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SMS News

David L. Shuman Nominated As “Best Attorney” in West Virginia.



Dave Shuman was recently selected by his peers for inclusion in The Best Lawyers in America® 2013 in the field(s) of medical malpractice. (Copyright 2013 by Woodward/White, Inc., of Aiken, SC).

Inclusion in Best® Lawyers is based on an exhaustive and rigorous peer-review survey comprising more than three million confidential evaluations by top attorneys. The methodology is designed to capture the consensus opinion of leading lawyers about the professional abilities of their colleagues within the same geographical area and legal practice area. Congratulations to Dave!

SMS Member Tim Linkous Achieved AV® Preeminent™ rating from Martindale-Hubbell.



SMS Member Tim Linkous achieved the peer-reviewed AV® Preeminent™ rating from Martindale-Hubbell. AV Preeminent® is a significant rating accomplishment - a testament to the fact that a lawyer's peers rank him or her at the highest level of professional excellence.

SMS Attorney Charlotte Lane Runs for US Congress.



As Commissioner of the United States International Trade Commission, Charlotte regularly stood up to China's unfair trade practices that cost West Virginians jobs here at home. As the Chairwoman and Commissioner of the Public Service Commission of West Virginia, she improved local infrastructure and delivered water and sewer services to West Virginians who for too long lacked those services. And as a member of the West Virginia House of Delegates, Charlotte worked tirelessly for the best interests of her constituents.

Charlotte is stepping forward as a candidate for Congress so to continue her well-established track record of protecting the interests of West Virginia's residents. For more information, please visit www.laneforwv.com.

SMS Attorneys Present at Rural Water Association Conference.



SMS Members Roberta F. Green, Christopher D. Negley, and Christopher J. Sears attended the 2013 West Virginia Rural Water Association Conference at Snowshoe Mountain, West Virginia, held in early September 2013.

Roberta F. Green, Christopher D. Negley, and Christopher J. Sears made presentations on a variety of employment law topics, including West Virginia's Wage Payment and Collection Act, Fair Labor Standards Act (FLSA) and general employment policy guidelines, including record retention, documentation, and employee oversight.

SMS/Erie Team Wins First Place in Chamber golf tournament.



SMS Member Brian Warner, coupled with members from Erie Insurance Company, won First Place in the Morgantown Chamber of Commerce golf tournament.

SMS Attorney Charlotte Lane Featured in the Opinion Section of the Wall Street Journal.



SMS Attorney Charlotte Lane was recently featured in the Wall Street Journal's Opinion section, discussing patent trolling and the need for reform. In the article, Ms. Lane explains the problem of patent trolling, which include entities set up for the sole purpose of holding U.S. patents, with no intention of ever using the patents to produce anything. Instead, they aggressively pursue legal action against companies that do make products. Patent trolls have a simple scheme: accuse companies of violating their patent,

threaten them with costly court proceedings, and profit by forcing monetary settlements. For more information, please see the October 7, 2013 edition of the Wall Street Journal.

Ms. Lane, former Commissioner with the International Trade Commission, was appointed by President George W. Bush.

Social Media and the Law.

SMS Member Roberta Green published an analysis of the issues surrounding the use of social media in defense litigation in the Fall 2013 Newsletter of the Defense Trial Counsel of West Virginia. The article is titled "Facebook Face-Off: Discovery Conundrums in the Electronic Age." For more information, please visit <http://www.dtcwv.org/>.



SMS Lawyer Victories

SMS Attorneys Obtain Summary Judgment in Medical Malpractice Case.



Member Timothy R. Linkous and Associate Jennifer Tampoya recently obtained summary judgment on behalf of a physician in a wrongful death and medical professional liability action. The Plaintiff alleged that the physician failed to timely diagnose a rare form of bladder cancer.

Based upon the testimony from Plaintiff's expert witnesses, a summary judgment motion was filed arguing that Plaintiff failed to meet the statutorily required threshold on causation. Specifically, it was argued that Plaintiff could not prove that an earlier diagnosis would have resulted in a greater than 25% chance of survival. After considering the arguments of counsel, the Court dismissed the cause of action against Mr. Linkous and Mrs. Tampoya's client and awarded him summary judgment.

Voluntary Dismissal for SMS Client.



Firm Member Natalie C. Schaefer and Associate, Kimberly Bandy, were successful in getting a case against a WV state agency voluntarily dismissed without payment of money to the Plaintiff. The Plaintiff claimed that her employer, an SMS client, was liable to her under deliberate intent theory; however, before discovery even began, the Plaintiff agreed to dismiss the case against our client due to a lack of evidence.

West Virginia Supreme Court of Appeals Rules in Favor of SMS Client.



SMS Attorneys Tim Linkous, Rob Russell, and Molly Miner obtained a defense verdict in a medical malpractice case against the WVUBOG and Dr. Holbert, and an appeal followed. In a recent memorandum decision, the WVSCT found that the Plaintiff “simply failed to meet his burden of proof in this case.”

SMS Attorneys Obtained Dismissal of appeal of Public Employees Grievance Board decision.



SMS Attorneys Chris Negley and Dave Shuman, Jr. obtained a dismissal with prejudice on behalf of the Clay County Health Department of an appeal regarding the decision of the Public Employees Grievance Board.

Double Dismissals for Municipality Clients.



SMS attorneys Dwayne Cyrus and Kimberly M. Bandy obtained dismissal, with prejudice, for their clients, a municipal police department and two of its officers, based upon Plaintiff's failure to appear and prosecute his case of alleged battery by the officers.

Following prompt production of video evidence that contradicted the Plaintiff's claims, Plaintiff's attorney withdrew from representing him and he subsequently failed to pursue the claims on his own behalf, leading to dismissal of the case.

In a separate case, SMS attorneys Dwayne Cyrus and Kimberly M. Bandy obtained a voluntary dismissal, with prejudice, for their clients, a municipal police department and two of its officers, after discovery demonstrated a lack of evidence that the police officers participated in the alleged battery and other alleged violations of the Plaintiff's rights.

Plaintiff initially filed suit against the municipal police department, another law enforcement agency, and several individual law enforcement officers, alleging police brutality and violations of the Plaintiff's rights related to a search of his residence.

Following a lengthy discovery period, Plaintiff acknowledged that there was no evidence of wrongdoing by the municipal police department or its officers, and agreed to dismiss the police department and its officers with prejudice.

Multiple Dismissals for State Agency Client.



SMS attorneys Lou Ann Cyrus, Natalie C. Schaefer, and Kim Bandy have obtained multiple dismissals on behalf of the West Virginia Division of Corrections. In five independent cases, SMS client the WVDOC was dismissed because the respective Plaintiffs failed to properly serve an indispensable party, and the failure to do so warranted dismissal.

West Virginia Supreme Court Win.

SMS Member Roberta Green obtained summary judgment in a wrongful discharge claim arising from the Plaintiff's discharge due to poor work performance. Summary judgment was affirmed on appeal to the West Virginia Supreme Court decision in a 5-0 opinion.



Legal Developments

Samples v. Holbert, affirmed denial of post-trial motions after a defense verdict. The Supreme Court rejected the argument the death certificate should have been excluded and the jury given an adverse inference instruction because the defendant did not order an autopsy, noting, in part, the family refused the autopsy:

[a]s to the death certificate, the law does not support petitioner's contention that an equivocal death certificate is inadmissible. To the contrary, a death certificate is required for every death occurring within the State. W.Va. Code § 16-5-19(a). West Virginia Code § 16-5-19(c)(2) requires that the "person completing the cause of death shall attest to its accuracy..."

The death certificate is prima facie evidence of the facts stated therein, however, the parties are free to present alternative theories for the cause of death. The circuit court permitted petitioner to argue that the death certificate was wrong. All the death certificate did was confirm Dr. Holbert's opinion as to Mrs. Samples' cause of death.

The Court also rejected the challenge to the defendant's testimony (that he was allowed to testify as an expert without "gatekeeping") finding no motion in limine or objection or motion to strike, and citing *State ex rel. Weirton Medical Center v. Mazzone*, 214 W.Va. 146, 587 S.E.2d 122

(2002) for its holding that a medical malpractice defendant may testify as an expert witness in his or her behalf.

The court also rejected challenge to leaving the settling hospital on the verdict form as allowed by 55-7B-9 and noted that because of the verdict on liability there was no prejudice. Finally, the Court rejected the "golden rule" argument finding the defense closing did not implicate the rule.

Friel v. Kenton Meadows, the West Virginia Supreme Court upheld summary judgment in a case involving worker's compensation discrimination and deliberate intent.

The Court noted:

In order to make a prima facie case of discrimination under W.Va. Code, 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W.Va.Code, 23-1-1 et seq.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee." Syl. Pt. 1, *Powell v. Wyoming Cablevision, Inc.*, 184 W.Va. 700, 403 S.E.2d 717 (1991).

The Court also found that the following deliberate intent elements were not satisfied under West Virginia Code §23-4-2(d)(2)(ii)(A) and (B):

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the

high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition; Finally, the Court reiterated the elements for fraud, upholding the lower court's summary judgment on that claim as well.

Garnet Lockard v. Liberty Mutual, the Supreme Court affirmed summary judgment in favor of Liberty Mutual on theories of spoliation and fraud.

The petitioners argued that a spoliation of evidence claim against an insurance company should be legally actionable even when the insurance company eventually pays the plaintiffs. The Court held that petitioners' recovery from Liberty Mutual bars their ability to maintain a spoliation of evidence claim under the facts presented in this case.

Moreover, to the extent that petitioners argue that Liberty Mutual's conduct constitutes an unfair claims practice under West Virginia Code § 33-11-4(9)(f), that argument was rejected because such a claim is barred by West Virginia Code § 33-11-4a(a), which states that "[a] third-party claimant may not bring a private cause of action or any other action against any person for an unfair claims settlement practice."

Thomas v. State Farm, the Court found that an insurance company's failure to use the West Virginia Insurance Commissioner's prescribed forms pursuant to West Virginia Code § 33-6-31d (2011) resulted in the loss of the statutory presumption and a reversion to the standards enunciated in *Bias v. Nationwide Mutual Insurance Co.*, 179 W. Va. 125, 365 S.E.2d 789 (1987).

The only difference between State Farm's form and the Insurance Commissioner's prescribed form is State Farm's inclusion of additional elements that arguably rendered the form difficult to understand and more complicated than necessary. The forms for rejection of underinsured and uninsured motorist coverage signed by Mrs. Thomas, for instance, contain seven columns of information concerning pricing of coverage in differing amounts to be selected by the insured. The Insurance Commissioner's prescribed forms contain only four columns of optional coverage choices available to an insured.

The Court noted that:

It is clear, however, that under the plain language of West Virginia Code § 33-6-31d, an insurer must use the Commissioner's form in order to gain the benefit of the statutory presumption that (1) its offer of UIM coverage was effective, and (2) the insured's rejection of such coverage was knowing and intelligent.

Quarterly Quote: "The way to get started is to quit talking and start doing." --
Walt Disney

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(Natalie C. Schaefer is responsible for this publication. This publication is an advertisement for Shuman, McCuskey & Slicer, PLLC and results may vary from case to case).