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MORE INFORMATION

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Court Upholds ATV Exclusion

In a case successfully litigated by this firm, the West Virginia Supreme Court of Appeals has upheld exclusionary language in State Farm's auto policy with respect to all-terrain vehicles.

State Farm's policy excludes uninsured motorist coverage when ATVs are operated off-road. The Court held this exclusion is clear and unambiguous and does not violate the uninsured motorist statute in *Boniey v Kuchinski*, (No. 34152, W.Va., filed May 14, 2009).

The issue arose when an insured was injured while riding as a passenger on an uninsured ATV while on an off-road trail. The Circuit Court of Brooke County found the exclusion violated the "spirit and intent" of the uninsured motorist statute, W.Va. Code §33-6-31(b). The Supreme Court reversed finding an ATV is not an "uninsured motor vehicle" pursuant to the statute.

Writing for the unanimous Court, Chief Justice Brent Benjamin found that the policy underlying the UM statute is to protect innocent victims from negligent drivers who failed to comply with liability insurance requirements imposed by the State's Motor Vehicle Safety Responsibility Law. That law, however, only applies to motor vehicles which are required to be registered and licensed. Because ATVs are not required to be registered and licensed, they are exempt from the financial responsibility statute. As such, an ATV does not meet the definition of an uninsured motor vehicle.

"Where no liability insurance coverage is required … obviously no uninsured motorist coverage is mandated to provide the equivalent of such coverage. Consequently, it would not further the purpose of the uninsured motorist statute to construe the statute to require uninsured motorist insurance to cover these motor vehicles which are not required by the financial responsibility law…" the Court held. The Court further held that the principal purpose of mandatory insurance is to protect the public injured on public highways. That purpose is not advanced, the Court held, by requiring an auto policy's UM provisions to cover off-road ATVs.

Fourth Circuit Holds Racing Officials Are Not Exempt Employees

In a case successfully litigated by this firm, the U.S. Court of Appeals for the Fourth Circuit has permitted four former employees of Charles Town Racing and Slots to pursue their Fair Labor Standards Act claims.

At issue in *Desmond v. PNGI Charles Town Gaming, LLC,* (No. 08-1216, 4th Cir., decided April 30, 2009), was whether horse racing officials were administrative positions thus exempt under FLSA. The affected employees worked as placing judge, paddock judge, horse identifier, and clerk of scales during horse races, collectively referred to as racing officials. The plaintiffs alleged they were improperly denied overtime pay as required by FLSA.

The District Court granted summary judgment to Charles Town Gaming finding the position of racing official met the requirement for an administrative exemption because their jobs were non-clerical, non-manual work related to the production of live horse races and as such were "directly related to the management or general business operations" of the racetrack. The District Court also held the racing officials exercised discretion and independent judgment such as correctly identifying the order of finish of the horses and the duty to insure compliance with regulations relating to jockeys and horses which the Court found were "indispensable" to gaming operations at the track.

The Fourth Circuit rejected these arguments stating: "Looking to the 'significance' or 'indispensability' of a position within a company's business operations diverts attention from the requisite inquiry. Both the FLSA and its regulations make clear that an employee is exempt based on the type of work performed by that individual, not whether business practice or applicable law require a particular position to exist." Drawing an analogy to a manufacturing production line, the Court held that while their job roles were necessary for live horse racing, their jobs were not related to management of general business functions of the company. As such, the former employees were not exempt employees.

Summary judgment was therefore reversed and the case remanded for further proceedings.

Chinese Drywall Property Damage Trials To Begin

Following Hurricane Katrina and other storms in recent years, homeowners rebuilt with what is now alleged to be contaminated Chinese drywall. Property damage trials in the mass tort litigation have been consolidated in federal court in New Orleans and should begin within the next 6 months.

Plaintiffs' liaison counsel Russ Herman stated that up to 80,000 Gulf Coast homes may have been damaged by the allegedly toxic drywall. "The Chinese drywall has impurities in it, particularly high sulfur content," Herman said. "When there's a lot of heat and humidity, sulfur produces gas, can corrode plumbing and electrical systems and cause physical injuries." Class-action suits allege that Knauf Gips KG, a German drywall manufacturer, used tainted drywall from its Chinese subsidiary. Others involved in the litigation include national home builder Lennar Homes, which has sued Knauf over the drywall.

"This is a real, triple insult - to have your home destroyed by Katrina, then to live in a formaldehyde FEMA trailer and then to rebuild your home with toxic materials," Herman said. "It's just nasty."

Personal injury trials will be scheduled after the property damage trials, Herman said.

U.S. Supreme Court Finds Benjamin Should Have Recused Himself

A divided Supreme Court of the United States has held that Justice Brent Benjamin of the West Virginia Supreme Court of Appeals should have recused himself in a $50 million appeal involving Massey Coal due to extensive campaign contributions from Massey CEO Don Blankenship during the 2004 judicial elections. *Caperton, et al. v. A.T. Massey Coal Co., Inc.,* (No. 08-22, decided June 8, 2009). Writing for the majority, Justice Anthony Kennedy held: "Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal."

The issue first began when Blankenship contributed $3 million to the Benjamin campaign where he unseated former Justice Warren McGraw. The campaign occurred after the verdict which found Massey liable for fraudulent misrepresentation, concealment and tortious interference with contract in favor of Hugh Caperton, a small coal mine operator. Knowing the case would be on appeal, Blankenship made contributions to the Benjamin campaign. His contributions exceeded the total of all other Benjamin supporters and by Benjamin's own election committee.

On appeal, Caperton moved for Benjamin's recusal due to these contributions citing the Due Process Clause and the Code of Judicial Conduct. Benjamin, however, refused and the verdict was overturned. Benjamin twice more refused to recuse himself during rehearings which again reversed the verdict against Massey. Later, Justice Benjamin wrote an opinion defending his actions.

Although not questioning Justice Benjamin's impartiality and his own findings of no bias, the Court nonetheless concluded that the Due Process Clause incorporates the common law principle requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case. The question, the Court held, was whether "under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden."

The Court focused on the disproportionate amount of contributions from Blankenship and its influence on the outcome of the election as well as the temporal relationship between the contributions, Benjamin's election and the pendency of the appeal. "There is no allegation of a *quid pro quo*," the Court held, "but the extraordinary contributions were made at a time when Blankenship had a vested stake in the outcome."

Chief Justice John Roberts authored a dissenting opinion in which he criticized the expansion of recusal situations. "Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge . .. Vaguer notions of bias or the appearance of bias were never a basis for disqualification," he wrote. Roberts criticized the recusal standard of an appearance of bias adopted by the majority arguing the new standard will lead to an increase in recusal motions which he stated will "erode public confidence in judicial impartiality." He then posed 40 questions courts must now determine when considering recusals based upon the disproportionate analysis the majority created to determine if a due process violation has occurred.

Following release of the opinion, now-Chief Justice Benjamin released a statement which stated in part: "I am pleased that the Supreme Court has not questioned my ethics, my integrity, or my personal impartiality or propriety."

The state Supreme Court has now appointed retired Circuit Judge James O. Holliday to sit in place of Benjamin during a rehearing to be held in September.

Court Nullifies Rule 41(b) Dismissals

In reversing a Circuit Court's dismissal of a civil action for non-prosecution, the West Virginia Supreme Court has essentially nullified Rule 41 of the West Virginia Rules of Civil Procedure. At issue in *Caruso v Pearce, et al.*, (No. 34144, W.Va., filed May 4, 2009), was the propriety of a dismissal of a civil action by the Circuit Court of Kanawha County where there had been no activity for 54 weeks.

Rule 41(b) of the West Virginia Rules of Civil Procedure grants a circuit court discretion to dismiss a case when there has been no order or proceeding for more than one year. Pre-dismissal notice is required to give the delinquent plaintiff the opportunity to demonstrate "good cause."

On appeal new counsel for the plaintiff, although in the same law firm, admitted the delay was due to lack of discovery by prior counsel yet argued the trial court was also at fault for not entering a scheduling Order. The Supreme Court agreed.

Justice Menus Ketchum wrote that Rule 16(b) requires trial courts to enter scheduling orders "generally guiding the parties toward a prompt, fair and cost-effective resolution of the case." The absence of a scheduling Order, the Supreme Court held, made it "easy for the attorneys to overlook the fact that the written discovery phase of the case had been completed." The Court repeatedly stated that dismissal came scarcely after the one-year period and was too harsh a sanction. Justice Workman wrote a concurring opinion that the sanction of dismissal was too harsh when the one-year of inactivity had just passed but disagreed that the Circuit Court was at fault.

In a dissenting opinion, Justices Davis and McHugh argued plaintiff had failed to prosecute her case for more than three years and that all activity after the filing of the suit was by co-defendants thus making the dismissal more appropriate.

Martin & Seibert, L.C. represents one of the co-defendants in this action.

Court Refuses to Vacate Judgment

In refusing to vacate a judgment arising from a mechanics lien, the West Virginia Supreme Court has again stated the standard to file a Rule 60(b) motion to vacate a judgment.

In *Builders Service and Supply Co. v. Dempsey,* (No. 34154, W.Va., filed June 22, 2009), the Court held that Rule 60(b) motions are not the appropriate mechanism for the consideration of evidence which was available, but not offered, at the original proceeding. Rather, the rule is designed to address mistakes attributable to special circumstances and not erroneous applications of law.

Where the motion is nothing more than a request that the court change its mind, it is not authorized by Rule 60(b), the Court held.

Manchin Appoints Commission on Judicial Reform

Retired U.S. Supreme Court Justice Sandra Day O'Connor will serve as honorary chair of a new study of West Virginia's judiciary commissioned by Gov. Joe Manchin. O'Connor and nine others constitute the Governor's Independent Commission on Judicial Reform which is tasked with considering whether West Virginia needs an intermediate appellate court, a chancery court for business disputes, whether judges should be appointed rather than elected and campaign finance and disclosure issues.

The Commission will be chaired by former Manchin aide Carte Goodwin. Other members of the Commission are: Mary McQueen, president of the National Center for State Courts; former state Supreme Court Justice John McCuskey; retired Kanawha Circuit Judge Andy MacQueen; former gubernatorial aide Thomas Heywood; State Bar President Sandra Chapman; Charleston trial lawyer Marvin Masters; Dean Joyce McConnell and Associate Dean Caprice Roberts of West Virginia University College of Law.

West Virginia now holds partisan elections for its judicial offices, and its five-seat Supreme Court is its sole appeals court. The Governor has requested a report by November 15, 2009.

Embezzlement Found to be One Occurrence

The U.S. District Court for the Southern District of West Virginia has granted summary judgment to Erie on an employee dishonesty policy finding that multiple checks embezzled by an employee constitutes one occurrence.

In *Beckley Mechanical, Inc. v. Erie Ins. Co.*, (Civil Action No,. 5:07cv652, S.D.W.Va., entered April 9, 2009), the Court interpreted policy language which stated, in pertinent part: "All loss caused by, or involving, one or more 'employees', whether the result of a single act or a series of acts, is considered one occurrence."

The insured's bookkeeper over a period of six years wrote 293 checks to herself. She pled guilty to six counts of embezzlement. Thereafter, the insured sought reimbursement from Erie. Erie paid the per occurrence policy limit of $10,000, and plaintiff sued claiming each check written was a separate occurrence subject to the $10,000 limit.

In granting summary judgment to Erie, Judge Thomas Johnston found the policy language to be clear and unambiguous. Finding that the bookkeeper's acts were "of the same class" and in temporal succession, the Court concluded the embezzlement was one occurrence subject to the $10,000 policy limit.

First-Party Bifurcations Denied In Southern District

The U.S. District Court for the Southern District of West Virginia has now twice denied bifurcation of first-party tort and extra-contractual claims. In *Chaffin v. Watford and Travelers Prop. Cas. Co. of America,* (Civil Action No. 3:08-cv-791), the Court held that bifurcation was neither mandatory nor necessary. The case arose from an underinsured motorist claim where the tortfeasor had already settled.

The Court denied the motion permitting it to be refiled when discovery is complete.

The same conclusion was reached in *Holley v. Allstate Ins. Co.,* (Civil Action No. 3:08-cv-1413), wherein the Court found that the case involved only two parties and the issues were not complex. The case arose from a denial of a homeowners' claim. The Court, Judge Robert Chambers, found there was significant overlap of witnesses and evidence concluding it would be an "undue burden on both Plaintiff and the Court" to bifurcate and stay discovery on the bad faith claim.

Motorists Need Not Signal if Traffic Will Not Be Affected

Motorists in West Virginia are no longer required to use turn signals in all instances. In overturning a DUI conviction premised on an unsignaled turn, the West Virginia Supreme Court in *Clower v. Cicchirillo*, (No. 34329, W.Va., filed May 4, 2009), held that provisions of the West Virginia Code contain exceptions to the requirement of using turn signals when other traffic is not affected by the turn.

In overturning the conviction, the Court considered W.Va. Code §§17C-8-8 and 17C-8-9. The first section of the Code requires a driver to use a turn signal when "other traffic may be affected." W.Va. Code §17C-8-9 simply requires the use of turn signals "when required." In an opinion authored by Justice Menus Ketchum, the Court held the two Code sections must be read in *para materia* and concluded it is "clear" that §17C-8-8 limits a motorist's duty to use a turn signal only to those instances where "any other traffic may be affected by such movement."

Although a criminal/administrative case, the opinion may also have application in auto civil litigation as well.

Judge Berger Nominated for Federal Bench

Circuit Court Judge Irene Berger has been nominated by President Obama to replace retiring Judge David Faber in the United States District Court for the Southern District of West Virginia. Judge Berger has been on the bench in Kanawha County for approximately fifteen years.

Judge Berger is a 1979 graduate of the West Virginia University College of Law and began her legal career as a staff attorney for Legal Aid of Charleston. She then became an assistant prosecuting attorney and, in 1994, joined the U.S. Attorney's Office for the Southern District of West Virginia. She was appointed to the state court bench by Governor Gaston Caperton shortly thereafter.

Senators Robert Byrd and Jay Rockefeller have expressed strong support for Judge Berger in anticipation of the confirmation process by the United States Senate.

IME Physician Held Liable for Malpractice and Wrongful Death in Arizona

In upholding a $5 million jury verdict, the Arizona Court of Appeals has held, even absent a formal doctor-patient relationship, a doctor conducting an Independent Medical Examination owes a duty of reasonable care to his or her patient. In *Ritchie v. Krasner,* (No. 1 CA-CV 08-0099, filed April 21, 2009), the Court upheld a verdict finding a physician partially liable for medical malpractice and wrongful death.

Decedent Jeremy Ritchie sustained a work-related injury to his back and was referred to Dr. Krasner by Paula Insurance, his employer's workers' compensation insurer. Dr. Krasner examined the decedent and found his back injury was "stationary" with "no indication for any work restrictions." As a result, workers' compensation benefits were terminated and the decedent returned to work. Ritchie's condition worsened and he developed a pain syndrome for which another physician prescribed Oxycontin and Oxycodone. Four years after the IME, the decedent died of an accidental overdose of these drugs. Prior to his death, however, the decedent sued the IME physician for medical malpractice. After his death, his parents amended the complaint to also state a claim for wrongful death. The suit alleged the IME physician was negligent in not diagnosing his back condition and that his recommendation of no work restrictions worsened the patient's condition.

On appeal, the Court found that a duty may arise even in the absence of a formal relationship holding when a patient places "oneself in the hands of a medical professional, even at the request of one's employer or insurer, one may have a reasonable expectation that the 'expert will warn of any incidental dangers of which he is cognizant due to his peculiar knowledge of his specialization.'"

Thus, the appeals court could find no error in the jury's finding that the IME physician was partially at fault stating the jury "reasonably could have found it foreseeable that Krasner's report prevented Jeremy from seeking treatment either because he relied on Krasner's report or because Paula [Insurance] relied on the report, causing it to terminate Jeremy's workers' compensation coverage. Further, the jury could have found Jeremy's physical deterioration and reliance on medication foreseeable."

No Private Cause of Action under HIPAA

The U.S. District Court for the Northern District of West Virginia has held that a private cause of action does not exist for HIPAA violations. In *Hines v. Northern West Virginia Operations, Consol Energy, Inc., et al.*, (Civil Action No. 1:08cv144, N.D.W.Va., filed May 1, 2009), Judge Frederick P. Stamp granted summary judgment to the defendants on this issue.

In *Hines*, the pro se plaintiff alleged "civil rights violations" and discrimination when he was discharged from Consolidation Coal Company. He further alleged that one of the individually named defendants spoke to his physicians without his permission.

Defendants were granted summary judgment when the Court found the Act does not provide a private cause of action, but only provides for civil and criminal penalties, the enforcement of which is limited to authorized state agencies or the Secretary of Health and Human Services. Citing similar opinions from other district courts as well, the Court concluded that Congress did not intend for private enforcement of HIPAA.

Underground Storage Tank Class Action Settled

The U.S. District Court for the Southern District of West Virginia has approved a $25 million class action settlement to owners and operators of underground storage tanks in West Virginia that allegedly received contaminated gasoline from Marathon Petroleum Company and its affiliated entities.

In *Loudermilk Services, Inc., et al. v. Marathon Petroleum Co., LLC, et al.,* (Civil Action No. 3:04cv0966, S.D.W.Va., decided March 17, 2009), Judge Robert Chambers found the settlement to be fair and free of collusion. However, while addressing adequacy, the Court found that the plaintiffs were "faced with the reality" they could not demonstrate that any underground storage tank was sufficiently damaged by any conduct of the defendants that it required replacement.

As a result, the Court approved a fund of $15 million for cash settlements and the creation of a separate repair fund of up to $10 million. In May, the Court denied the $6 million fee petition of class counsel, reducing fees to $4.25 million plus $3 million reimbursement of expenses because the recovery to individual class members is uncertain and because "individual class members will only receive a slim fraction of what was expected at the outset of litigation."

Court Affirms No Coverage Under CGL Policy

The West Virginia Supreme Court has upheld summary judgment in favor of a commercial insurer in a declaratory judgment action finding an endorsement limited the coverage territory. In *Blankenship v. City of Charleston, et al.*, (No. 34399, W.Va., filed June 18, 2009), the Court reviewed a commercial general liability policy issued by Evanston Insurance Company to Lakewood Swim Club.

Lakewood operated a concession stand at the Charleston Civic Center as a fundraiser for the swim club located in St. Albans. Plaintiff fell at the concession stand and subsequently filed suit. After Lakewood was brought into the action, it filed a declaratory judgment action against Evanston.

Evanston argued and the Circuit Court of Kanawha County agreed there was no coverage nor duty to defend as the incident did not occur on the insured premises as per a schedule in an endorsement. The Supreme Court affirmed, giving equal weight to the endorsement as to the policy provisions. The Court found that coverage was provided only for bodily injury arising out of ownership, maintenance or use of the St. Albans premises or the project specifically identified in the endorsement which was listed as "private swim club." The Court further found that the complained of activities must also conform with the project identified in the endorsement. The selling of concessions was not identified as the insured project in the endorsement and thus there was neither coverage nor a duty to defend the swim club.

Third Judge to Be Appointed in Monongalia County

Effective July 1, a third judgeship will be created in the Circuit Court of Monongalia County. The West Virginia Legislature created the additional judgeship with the passage of Senate Bill 338 during the regular legislative session.

The additional judgeship came about not as a result of traditional caseload studies, but by lobbying by Chief Circuit Judge Russell Clawges who argued the increasing population of citizens of the county coupled with increasing student population at West Virginia University necessitated the additional judicial position.

Steve Canterbury, state Supreme Court administrative director, said trends for the last several years have shown Monongalia County growing every year. "Every forecast is showing more growth and more business and more people," he said. "You have people coming from out of state and out of county to work there, and that can add to the numbers. And WVU adds to the numbers. Plus, it's a major crossroads of two interstates."

Governor Joe Manchin will now appoint the new judge.

Abu Ghraib Abuse Claims Not Covered

The Fourth Circuit Court of Appeals has refused to extend insurance coverage to torture and abuse claims allegedly caused by employees of the insured, an intelligence support group at the Abu Ghraib prison in Iraq. In *CACI International, Inc. v. St. Paul Fire and Marine Ins. Co.*, (No. 08-1885, 4th Cir., decided May 14, 2009), the Court affirmed summary judgment to St. Paul.

The St. Paul CGL policy at issue covered "bodily injury" caused by an "event." "Event" was defined as an "accident." The coverage territory was limited to the United States, Canada, and Puerto Rico. The policy further provided coverage for covered injury and damages anywhere else in the world caused by events or offenses which happen if they "result from the activities of a person whose home is in the coverage territory, but is away from there for a short time on your business."

When sued by a group of Iraqi detainees, CACI sought coverage under the St. Paul policy and instituted a declaratory judgment action in the Eastern District of Virginia. The district court granted St. Paul's motion for summary judgment finding no duty to defend or indemnify. The district court concluded the "short time" exception did not apply because the alleged activities were not indicative of a brief overseas business trip, but rather a more permanent presence in Iraq.

The Fourth Circuit affirmed noting the allegations of the Complaints themselves foreclose the possibility of coverage under either the territorial provision or the "short time" exception. Further rejecting CACI's argument that supervision of the alleged wrongs occurred in the U.S., the Fourth Circuit held that courts must look to the location of the injury to determine insurance coverage.

Final Orders Required for Appeal
- Unless damages determination is "ministerial"

What constitutes a final order from which an appeal can be taken is in flux in West Virginia. In *Vaughan v. Greater Huntington Park and Recreation District,* (Nos. 33837 and 34327, W.Va., filed May 1, 2009), the Supreme Court held appeals may only be taken from final decisions of the circuit court. "A case is final," the Court held, "when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined."

As a result of this finding, the *Vaughan* Court dismissed an appeal of a wrongful death case finding it was prematurely granted since the appeal concerned a motion in limine and a partial summary judgment order.

However, 12 days later, in *C&O Motors v. WV Paving, Inc.,* (No. 34330, W.Va., filed May 13, 2009), the Court held:

> An order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately appealable. However, an immediate appeal from a liability judgment will be allowed if the determination of damages can be characterized as ministerial. That is, a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs.

The dispute came to the Court after the Circuit Court of Marion County granted partial summary judgment on a liquidated amount for damage to a car dealership's inventory from dust caused by the defendant's road construction. Ultimately, however, the appeal was likewise dismissed as being improvidently granted but on the grounds that the summary judgment order on liability was only a partial summary judgment.

McHugh Appointed as Justice

Gov. Joe Manchin has appointed Senior Status Justice Thomas E. McHugh to fulfill the unexpired term of former Justice Joseph Albright who passed away in March.

Justice McHugh has been filling Justice Albright's seat on the West Virginia Supreme Court of Appeals since he fell ill last year. Justice McHugh will serve on the Court until the 2010 general election at which time a candidate will be elected to serve the remainder of Justice Albright's term which ends in 2012.

By taking the appointment, Justice McHugh is eligible to receive his judicial pension and the Supreme Court salary of $121,000 a year. Justice McHugh, however, was adamant at his appointment proceeding in April that he will not be paid more than other justices. Therefore, he intends to return to the State's General Revenue Fund that part of his salary which exceeds the salaries of his colleagues on the bench.

Justice McHugh served as a Justice of the West Virginia Supreme Court from 1980 through 1997.

Court Compels National Arbitration in Tobacco Litigation

The West Virginia Supreme Court has held that the State Attorney General must arbitrate tobacco claims pursuant to a Master Settlement Agreement.

West Virginia joined 46 other Attorneys General in the litigation which was settled in 1998 under a Master Settlement Agreement. Terms of the Agreement included annual payments into a national escrow account in amounts determined by an independent auditor. A dispute then arose when the auditor requested arbitration per the terms of the Agreement to determine payment to the settling states.

West Virginia sought to be exempt from the arbitration, arguing whether it diligently enforced a statute, which might exempt it from those payments, was a fact question which should be decided locally. The Circuit Court of Kanawha County compelled arbitration which the Supreme Court affirmed.

Writing for the majority, Chief Justice Brent Benjamin held that where a circuit court directs a matter be arbitrated, but does not dismiss the matter from the circuit court's docket, the order is not final. However, the Court may consider the issue if raised via writ of prohibition. In those instances, the Court held the Supreme Court will preclude enforcement of a circuit court's order compelling arbitration only after a *de novo* review of the circuit court's legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court's order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional or common law mandate.

Ultimately, the Court concluded the matter should be arbitrated, in part because the issue would impact other states which were part of the settlement which was contemplated in the Master Agreement.

Discovery Rule Rejected in Wrongful Death Claim

The West Virginia Supreme Court has affirmed the dismissal of a wrongful death suit against the Preston County Commission as untimely and not saved by the discovery rule.

In *Stuyvesant v. Preston County Comm'n*, (No. 34137, W.Va., filed June 9, 2009), the Court held that in a wrongful death action, under the discovery rule, the statute of limitations begins to run when the decedent's representative knows, or by the exercise of reasonable diligence should know: (1) that the decedent has died; (2) that the death was the result of a wrongful act, neglect, or default; (3) the identity of the person or entity who owed the decedent a duty to act with due care and who may have engaged in conduct that breached that duty; and (4) that the wrongful act, neglect or default of that person or entity has a causal relation to the decedent's death.

The issue arose when an inmate hanged himself at the Preston County jail. His estate filed a claim more than two years after his death and alleged the statute of limitations should be tolled because the personal representative did not learn of medical treatment the inmate received until days after the death which thus extended the statute of limitations. The Supreme Court, however, rejected the argument, finding that the medical treatment relied upon by the estate to extend the statute was unrelated and that the plaintiff failed to allege that the prior injuries in any way were related to his death. Thus, the deficient pleading was "woefully insufficient" to extend the statute of limitations, the Court held.

Special Interrogatories Advocated In Coverage Disputes

When an insured controls the defense, the insured likewise bears the burden of allocating a jury verdict between covered and non-covered claims when seeking indemnification from its insurer, held the West Virginia Supreme Court of Appeals. In *Camden-Clark Memorial Hospital Ass'n v. St. Paul Fire and Marine Ins. Co.*, (No. 33909, W.Va., filed June 25, 2009).

The issue arose following a $6.5 million verdict from a wrongful death claim that also alleged the insured hospital altered medical records, withheld information, and encouraged other hospital staff to withhold information.

Of key consideration to the Court was the verdict form in the underlying trial. While the verdict form required the jury to answer questions and allocate damages among various theories of liability such as medical negligence, vicarious liability, the tort of outrage, and spoliation of evidence, the verdict form did not ask the jury to differentiate as to whether liability was being imposed for negligent or intentional conduct.

St. Paul eventually issued a reservation of rights letter indicating coverage would not exist for the spoliation claim nor for punitive damages as a result of intentional conduct. Camden-Clark then filed a declaratory judgment action in the U.S. District Court for the Southern District of West Virginia which certified questions to the West Virginia Supreme Court.

In refusing to shift the burden of allocation to the insurer, the Court noted that in situations where the insurer controls the defense, allocation may fall to the insurer and the Court urged the use of special interrogatories. The Court characterized this as a "duty" to request special interrogatories to clarify coverage of damages. The reason for this, the Court stated, is that when grounds of liability are asserted, only some of which are covered, a "conflict of interest" arises between insurer and insured, and the insurer is in the best position to see that damages are allocated. Not so, the Court held, when the insured controls the defense.

Traffic Fatalities Continue to Decline

The overall number of traffic fatalities in the United States continues to decline. Per statistics released by the U.S. Department of Transportation in July, fatalities reported in 2008 were the lowest since 1961. That trend has continued into the first quarter of 2009 as well.

The Department reported 37,261 fatal traffic accidents in 2008 which was a 9.7% decrease from 2007. Specifically, alcohol-impaired fatalities declined by more than 9%.

The 2008 annual statistics did report, however, that motorcycle deaths increased for the 11th straight year and now account for 14 percent of all highway fatalities

The declining trend continued into the first quarter of 2009 with 7,689 deaths reported. This equates to 1.12 fatalities per 100 million vehicle miles traveled. Transportation Secretary Ray LaHood attributes the decline to a number of factors including increased seat belt use, fewer instances of impaired driving, making roads and highways safer and maximizing vehicle safety.

Summary Judgment To Hotel Affirmed

The West Virginia Supreme Court has affirmed summary judgment to a hotel, finding landowners and occupiers are not liable in negligence for injuries that occur to non-trespassing entrants of their land, unless such landowners or occupiers breach their duty of reasonable care under the circumstances.

In *Crum v. Equity Inns, Inc., et al.*, (No. 34400, W.Va., filed June 22, 2009), the Court upheld summary judgment to a Hampton Inn against a plaintiff who was injured when an improperly installed light fixture fell on his head in a conference room.

The defendant filed a Motion for Summary Judgment supported by a report of an engineer who outlined the negligent installation of the light fixture two years before the defendant purchased the property. The report stated that the negligent installation could not be detected or observed. As a result, the defendant argued it could not be held responsible for failure to inspect and maintain its premises in a safe manner which was the only allegation against the hotel.

In response to the defendant's motion, the plaintiff moved to amend his Complaint to assert strict liability and *res ipsa loquitur* claims. The trial court denied the amendment, which the Supreme Court affirmed, finding that plaintiff's opposition was based on "very loose, generalized assertions" that summary judgment was premature. As to the proposed strict liability claim, the Court held it would not impose strict liability upon hotels and hotel owners

As to the proposed *res ipsa loquitur* claim, the Court held that the principle does not create a cause of action but, rather, is an evidentiary principle permitting a jury to infer negligence. The inference, the Crum Court held, is not a substitute for a factual basis upon which to find negligence.

Justice Margaret Workman dissented, challenging the engineer's report and arguing that hotels should be strictly liable for injuries to guests based on an 1899 statute which she contends is still good law.

No Coverage for Injury During Motivational Speech

The Fourth Circuit has upheld the denial of coverage against a woman injured trying to break a board with her bare hands during a motivational speaking session sponsored by her employer.

In *Reese v. Biro,* (Nos. 08-1535 and 08-1536, 4th Cir., decided May 22, 2009), the Court considered a "participants exclusion" in a commercial general liability policy issued to the trainer. Specifically, the policy excluded coverage for bodily injury sustained by any person while participating in a circus, concert, demonstration, event, exhibition, race, rodeo, show, contest or any activity of an athletic or sports nature." The policy also excluded coverage for certain professional services including motivational speaking.

The plaintiff filed a declaratory judgment action against the speaker and its insurer in South Carolina challenging the exclusions and the District Court granted summary judgment to the defendants, which the Fourth Circuit affirmed, based in part on the plaintiff's own admissions. In her brief, the plaintiff acknowledged "the whole point of th[e] motivational exercise was to teach her that she could achieve something she may have thought beyond her abilities." Thus, the Court concluded the board-breaking exercise was clearly a "demonstration" which was excluded.

Federal Preemption Eliminates State Claim Against Ford

Although reluctantly, the West Virginia Supreme Court of Appeals has held that the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30101, *et seq.*, and regulations promulgated thereunder preempt a state law cause of action.

In *Morgan v. Ford Motor Co.,* (No. 34139, W.Va., filed June 18, 2009), Justice Menus Ketchum concluded a roll-over claim including an allegation of deficient side-window glass was preempted. Thus, summary judgment in favor of Ford was affirmed.

The Court began its analysis stating federal preemption is generally disfavored. The task presented when a federal preemption defense is raised, the Court held, is to determine whether state regulation is consistent with the structure and purpose of the federal statute or regulation as a whole either expressly or impliedly. The *Morgan* Court found implied preemption in the federal Safety Act.

Finding the Court was between "a rock and a jurisprudential hard place," the Court concluded that because the Safety Act gave manufacturers options on side window glass types, permitting the plaintiff to proceed with a state tort action of strict liability would interfere with that federal policy. Thus, the claim was preempted by federal law and summary judgment to Ford was affirmed.

Prior Domestic Abuse Relevant in Pleading Self-Defense

Although in the context of a criminal case, the West Virginia Supreme Court has held that the use of deadly force is justified if the defendant is the victim of abuse. The ruling could, therefore, have ramifications in related civil litigation.

In *State v. Harden,* (No. 34268, W.Va., filed June 4, 2009), the Supreme Court overturned a conviction of first degree murder. The defendant shot and killed her husband while he slept following what the defendant described as a "night of domestic terror." The defendant alleged her drunk husband beat and emotionally abused her for hours before she shot him.

Finding that evidence of prior threats and violence is relevant to negate criminal intent, the Court found that domestic abuse was relevant to demonstrate the lack of malice, intention or awareness. Thus, the Court held defendant's subjective belief that death or serious bodily injury was imminent and that deadly force was necessary included the fact that the decedent had previously physically and sexually assaulted the defendant and had threatened the lives of the defendant and her children. The Court further held that where it is determined that defendant's actions were not reasonably made in self-defense, evidence of prior abuse is nonetheless relevant, and may negate an element of the offense charged, such as malice or intent.

Rather than order a new trial, the Court, in an opinion authored by Justice Menus Ketchum, remanded the case with instructions to the Circuit Court of Cabell County to enter an acquittal and ordered the defendant released from jail.

Super Lawyers 2009

Five attorneys from Martin & Seibert, L.C. have been recognized as leaders in their practice. Walter M. Jones, III, Clarence E. Martin, III, Susan R. Snowden, and E. Kay Fuller have been recognized as Super Lawyers and Michael M. Stevens has been recognized as a Rising Star.

The distinction is of particular note because it is determined by other lawyers in the State with thorough research by the organization thereafter. Factors reviewed include verdicts, settlements, representative clients, honors and awards, scholarly lectures and writings, and community service.

Walter M. Jones, III was recognized as a Super Lawyer due to his extensive class action/mass tort experience. He has managed national class litigation for a number of clients and is actively engaged in developing risk management protocols for national property/casualty insurers. He is also recognized as an outstanding lawyer in the fields of civil litigation defense and insurance coverage.





Clarence E. Martin, III, was also recognized as a Super Lawyer in the field of mass torts as well as eminent domain. Presently, Mr. Martin is currently representing the State of West Virginia and other clients on a number of high profile eminent domain issues in an effort to bring economic and financial expansion to the State.

Susan R. Snowden was recognized as a Super Lawyer in the field of employment litigation from a defense perspective. She regularly defends large employers in employment related matters and also authors a monthly article in a Martinsburg business journal. Her other areas of distinction include insurance coverage and class action/mass tort defense.

E. Kay Fuller received recognition as a Super Lawyer in the field of civil litigation defense. She is actively involved in the defense of insurance carriers on a number of issues of first impression, including coverage and bad faith. She is a widely recognized author and speaker on bad faith issues as well. Other areas of distinction include appellate practice and personal injury defense.

Michael M. Stevens was chosen as a Rising Star, which recognizes lawyers who have distinguished themselves in the first ten years of their practice. He was identified as the only Rising Star in the field of insurance coverage. He, too, is actively involved in a number of bad faith cases across the state, including those with institutional discovery challenges.

"We are honored to be recognized and the fact that we are recognized by our peers makes this distinction much more genuine," said Walter M. Jones, III, the firm's managing shareholder.

In addition to these honors, Susan R. Snowden and E. Kay Fuller have also received separate distinctions by Corporate Counsel magazine. Susan R. Snowden is identified as an outstanding lawyer in the field of employment law while E. Kay Fuller was chosen as an exemplary lawyer in the field of appellate practice.

Court Expands Who May File a Deliberate Intent Claim

In overturning a case released less than three years ago, the West Virginia Supreme Court has expanded the category of individuals who may recover in deliberate intent claims. In *Murphy v Eastern American Energy Corp., et al.*, (No. 33811, W.Va., filed June 23, 2009), the Court permitted an injured employee's estate to file a deliberate intent claim.

W.Va. Code §23-4-2(c) permits an employee, widow, widower, child or dependent to assert a deliberate intent claim. In permitting an employee's estate to pursue the claim, the Court overruled *Savilla v. SuperAmerica, LLC,* 219 W.Va. 758, 639 S.E.2d 850 (2006), finding this is the only method for "vindicating the worker's right."

The claim arose following the death of a 19-year old and pursuit of a deliberate intent claim by the decedent's mother. The employer alleged that the decedent's mother was not a dependent recognized by statute. Relying on Savilla, the Circuit Court of Logan County granted summary judgment to the employer, which the Supreme Court reversed.

The *Murphy* Court essentially adopted Justice Robin Davis' dissent in *Savilla* which argued that the term "employee" in the deliberate intent statute as one who may maintain such a claim must necessarily include the estate of the employee.

The *Murphy* Court considered the doctrine of stare decisis and held: "Our precedents are not sacrosanct." Furthermore, the *Murphy* Court held: "from a pure public policy perspective, it would be an incredible miscarriage of justice for this Court to allow the legally incorrect holding in *Savilla* to stand. The Court in *Savilla* obliterated any means of providing for compensation to those who lose a loved one at the hands of an employer's deliberate intent-type conduct. It is difficult to fathom that West Virginia law would ever allow an employer to act with complete intentional disregard for an employee's life, deliberately intend the employee's death and then be allowed to walk away unscathed by such conduct."

Justice Margaret Workman wrote the majority opinion in *Murphy.* She was counsel for the plaintiff whose claim was denied in *Savilla*.

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Court Reverses Default Judgment

In affirming entry of default, the West Virginia Supreme Court has held that informal communication with the Court rather than the filing of a pleading will not prevent entry of a default as to liability. Thus, the Court affirmed entry of default on liability in *State ex rel. Harper-Adams v. Murray,* (No. 33730, W.Va., filed June 22, 2009). However, the Court reversed entry of default judgment and remanded the case to circuit court for further factual findings.

The issue stems from estate litigation when a substitute administrator sued the original administrator, her sister, alleging embezzlement, conversion, and breach of fiduciary duty. Some claims sought sums certain, others did not. When the defendant failed to answer the Complaint, the plaintiff moved for default which the Circuit Court of Kanawha County granted. When the defendant failed to appear for a hearing, the Circuit Court then awarded default judgment for sums certain and awarded $50,000 in punitive damages in lieu of attorney's fees.

While the Supreme Court affirmed default on liability, it reversed on the issue of damages. In so doing, the Court distinguished between default as to liability and entry of default judgment on damages. A default relates to liability and a default judgment occurs after damages have been ascertained, the Court held.

The *per curiam* opinion states that the term "sum certain" in Rule 55(b)(1) of the West Virginia Rules of Civil Procedure contemplates a situation where the amount due cannot be reasonably disputed, is settled as to amount, ascertained, and agreed upon by the parties or fixed by operation of law. If the damages sought by the party moving for the default judgment are for a sum certain, or an amount which can be rendered certain by calculation, no evidentiary hearing on damages is necessary and the circuit court may proceed to enter judgment. Orders granting default judgments must include findings demonstrating how the amount entered was calculated and rendered certain. Because the Circuit Court did not include these required findings, the Order was reversed and the matter remanded.

As to the award of punitive damages, the Supreme Court found that an award of punitive damages in lieu of attorney's fees was not permissible.

Lightning Strikes Increase Cost of Homeowners Insurance

While lightning presumably never strikes the same place twice, an increase in lightning strikes has hit the insurance industry causing a spike in homeowners claim. Last year, lightning strikes cost more than $1 billion in insured losses. This has resulted in a 13% increase in the cost of homeowners claims, per a statement released by the Insurance Information Institute (III).

An analysis of homeowners insurance data found more than 246,000 lightning claims in 2008, up 39% from 2007. These losses ranged from damage to electronic equipment to structural fires.

The Institute estimates the average lightning claim is $4,329.00. "The record losses are a result, in part, because of the large number of storms occurring last year," said Loretta Worters, vice president of III.

Defense Verdict Reinstated

The West Virginia Supreme Court has reinstated a defense verdict in a medical malpractice action finding that the Circuit Court of Ohio County improperly set aside the verdict based on closing arguments.

In *Smith v. Andreini*, (No. 34271, W.Va., filed June 5, 2009), the Court found defense counsel's attack of plaintiff's counsel and the characterization that plaintiff's counsel accused a defense expert of being a "big, fat liar" were traditional summations of evidence which an average juror could identify.

When defendant's counsel made statements about plaintiff's counsel's approach during closing argument, plaintiff moved for a mistrial which the Court took under consideration. It was not until the jury returned a defense verdict that the trial court declared a mistrial. This was inappropriate, the Supreme Court held.

Motions for mistrial are pre-verdict motions, the Court held. "A mistrial and a new trial are not the same thing in name or effect," wrote Justice Thomas McHugh. "There is a marked difference between a court's granting a motion for a new trial and declaring a mistrial; the former contemplates that a case has been tried, a judgment rendered, and on motion therefor said judgment set aside and a new trial granted, while the latter results where, before a trial is completed and judgment rendered, the trial court concludes that there is some error or irregularity that prevents a proper judgment being rendered." Moreover, the Court held that a mistrial is not appealable while an Order granting a new trial is appealable.

No Coverage for Strip Searches

The Fourth Circuit has upheld an employment-related practices exclusion in a commercial general liability policy. In *Cornett Management Co., LLC v. Fireman's Fund Ins. Co.,* (No. 07-2019, 4th Cir., decided June 22, 2009), the Court held the Hooter's restaurant in Charleston, West Virginia, would not be indemnified for settlement costs and fees incurred in defending sexual harassment and false imprisonment claims that its manager ordered strip searches of female employees.

Cornett carried a CGL policy with Fireman's Fund that contained an Employment-Related Practices Exclusion excluding personal injury coverage arising from "coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or other employment-related practices, policies, acts or omissions."

Cornett argued, and the Fourth Circuit rejected, that the exclusion relates to practices, not acts, and because the franchise does not have a practice of strip searches, the exclusion did not apply. The Fourth Circuit found the clear language of the exclusion applies to acts or omissions as well as practices and policies.

Cornett also argued that intent must be considered before the exclusion would apply. Finding that the employer's act or omission intended to result in coercion, harassment or discrimination, the Court again applied the exclusion. "A manager's act, like the one in this case, which intentionally humiliates, coerces, or harasses an employee, will clearly have an effect on the employment relationship. Such an act, therefore, is employment-related and, under West Virginia law, falls within the language of the ERP exclusion at issue here," the Court held.

Truck Owner Not Liable for Injuries When Truck Is Stolen

Martin & Seibert, L.C. has obtained summary judgment on behalf of a client whose truck was stolen and subsequently involved in a fatal accident. In *Staubs v Johnson, et al., Civil Action* No. 08-C-488, Circuit Court of Jefferson County, WV, entered May 12, 2009, the Circuit Court found that the owner of the truck owned no duty to the children who stole his truck.

In *Staubs,* the vehicle owner parked his truck at his residence, leaving the keys in the ignition to permit later movement of the truck to accommodate visitors coming to a neighbor's house for a funeral. Sometime during the evening, several teenage girls stole the truck and were ultimately involved in a fatal collision. Alcohol was identified as a contributing factor to the accident. The parents of the deceased sued the underage driver and the truck owner among others alleging various theories of negligence.

The Circuit Court, however, granted the truck owner summary judgment because the owner of a motor vehicle does not owe a common law duty of ordinary care to those who participate in the theft of a motor vehicle. The Court further held that one of the injured girls was also a trespasser in the vehicle as she knowingly entered the vehicle knowing the vehicle was stolen. The Court found the truck owner had no duty to the trespasser either.

Finally, the Court rejected any argument of implied permission because the owner left the keys in the ignition finding the act of leaving an ignition key in an unlocked vehicle is not negligence when the vehicle is stolen and that implied permission can only be applied when there is some interaction between owner and driver.

Property/Casualty Insurers Suffer Losses

Insurers showed a net loss after taxes in the first quarter from a combination of underwriting losses and deterioration in investment results. Underwriting losses in the first quarter were four times the losses for the first quarter of 2008. According to ISO and the Property Casualty Insurers Association of America, combined ratio — a key measure of losses and other underwriting expenses per dollar of premium — worsened to 102.2 %. in the first three months of this year, up from 99.9 % for the same period last year. Net investment gains also fell.

Partially offsetting the deterioration in underwriting and investment results, insurers' miscellaneous other income rose and federal income taxes declined.

"Property/casualty insurers absorbed a pounding in first-quarter 2009, as the recession deepened and stock markets tumbled," said Michael R. Murray, ISO's assistant vice president for financial analysis. "The perfect storm that beset the insurance industry in 2008 continued unabated in first-quarter 2009. Yet, aside from some problems in the mortgage and financial guaranty sector, the property/casualty insurance industry emerged intact."

The figures are consolidated estimates for all private U.S. property/casualty insurers based on reports accounting for at least 96% of all business written by such insurers, per the III statement.