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DISCLAIMER: *The information contained in this newsletter is not intended to constitute legal advice. We do not intend these materials to substitute for legal advice concerning specific cases, involving what may appear to be similar legal issues and factual circumstances. Before acting on any material presented herein, we advise you to seek legal counsel.*

COMMITMENT TO OUR CLIENTS

An automobile driver brought an action against a dump truck driver and its owner for injuries sustained when the dump truck rear-ended his vehicle.

As a result of the accident, Plaintiff suffered minor injuries, including a soft tissue injury to his back. Defendants stipulated to liability and made an offer of judgment to the plaintiff pursuant to Rule 68 of the West Virginia Rules of Civil procedure two months before trial. The plaintiff declined the offer of judgment, and the case proceeded to trial on the issue of damages only. At trial, Defendants, represented by Attorney **Macel Rhodes**, vigorously contested the lost wages and medical expenses claims, and the jury returned a verdict which was significantly less than the offer of judgment. Defendants filed a motion for costs to be recovered against the plaintiff pursuant to Rule 68, which provides that if a defendant makes an offer of judgment as settlement before trial and the plaintiff declines and subsequently obtains a judgment at trial for a lesser amount, the plaintiff must reimburse the defendant for "costs" incurred by the defendant after (CONTINUED ON PAGE TWO)

The United States Court of Appeals for the Third Circuit affirmed the entry of summary judgment for the defendant-employer obtained by Joseph F. Butcher,

wherein the plaintiff-employee asserted claims under the Age Discrimination in Employment Act ("ADEA"), the Pennsylvania Human Relations Act ("PHRA"), and under the Fair Labor Standards Act. The employee, who was terminated as a result of a corporate reorganization, was sixty-one years of age. He asserted that his termination was due to his age. The employee-plaintiff appealed the decision of the United States District Court for the Western District of Pennsylvania. (CONTINUED ON PAGE TWO)



43 year old female sued Costco for a slip and fall in which she claimed to have suffered a herniated lumbar disc that required surgical repair. In addition to the approximate 12k in medical bills, plaintiff asserted the loss of her 53k per year job as a retail manager and impairment of future earning capacity. Plaintiff alleged Costco was negligent for failure to discover and/or remove a "clear, greasy substance" that she believed was dropped by a customer who ate a sample from a cheesecake demo in the store. The defense theme was "Costco is serious about safety". Evidence was introduced demonstrating Costco's exemplary efforts to maintain its' stores including an hourly floor walk to assure that the aisles are clean and free of debris. Evidence was also introduced regarding plaintiffs' pre-existing low back complaints and treatment. The 12 person jury found in favor of Costco and rendered a defense verdict. **Joseph Selep** represented Costco and obtained the defense verdict on their behalf.

KUDOS TO THE CHRISES: See their stories on pages two & three

CHRISTOPHER YOSKOSKY



CHRISTOPHER J. WATSON



CHRISTOPHER VOLTZ



Case Summaries

Case One Continued: making the offer of judgment. The costs were granted by the circuit court, and on appeal, the Supreme Court of Appeals of West Virginia clarified an important unanswered question of law as to what costs were recoverable under Rule 68. The Court determined that “costs” under Rule 68(c) does not normally include attorneys or expert witness fees, unless provided for by statute, but that it does include deposition-related costs and other traditional “court costs,” such as the circuit clerk fees, witness fees, court reporter costs and jury costs. The Court noted that although the costs would almost entirely encompass the amount of the plaintiff’s award, Rule 68 costs are mandatory and that circuit courts enjoy “wide discretion” the specific amount of costs to assess.

JOSEPH SELEP

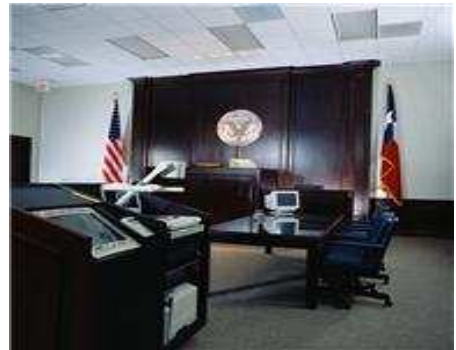


JOSEPH BUTCHER



Joseph Selep, with the assistance of Christina Rogers and Dara DeCourcy, won summary judgment which resulted in the dismissal of their clients, Esther Haguel a/k/a von Waldow and Wesley Spectrum Services, from a lawsuit alleging § 1983, Title IX, and negligence claims. Two minor female plaintiffs and their parents filed suit against Wesley Spectrum Services and Haguel, as well as the Upper St. Clair School District and multiple USC administrators and staff, as a result of alleged rapes which occurred on school ground. The two minor females were students at Upper St. Clair High School and alleged that the defendants failed to take action to stop the male student from assaulting them. Upon the filing of the Motion for Summary Judgment on behalf of Wesley and Haguel, Plaintiffs agreed to voluntarily dismiss the § 1983 and Title IX claims. Following oral argument by **Joseph Selep** regarding the negligence claims, the Court granted summary judgment in favor of Haguel and Wesley Spectrum Services. The Court held that based on the facts of the case, a jury could not find either Haguel or Wesley negligent in the matter, and dismissed them from the case.

Case Two Appeal Continued from Page One: In the appeal, **Joseph F. Butcher** and **Dara A. DeCourcy** represented the employer, wherein the Third Circuit agreed that the employee failed to produce sufficient evidence to prove that the reasons for the termination were pre-textual. Additionally, the Third Circuit agreed that the employee's duties fell within the administrative exemption of the FLSA. The employee was paid in excess of \$455 per week, his primary duties were directly related to the employer's management or general business operations, and his duties required the exercise of discretion and independent judgment with respect to matters of significance. No further appeal was taken by the employee.

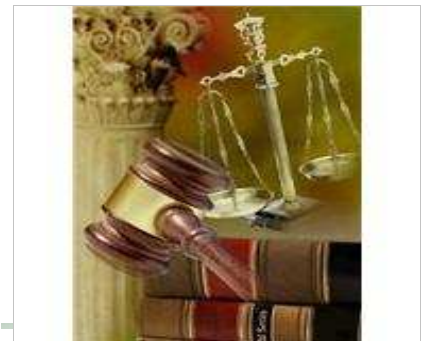


KUDOS TO THE CHRIS', CONTINUED

Zimmer Kunz, PLLC is pleased to announce that Christopher Yoskosky has been invited to join the prestigious Council on Litigation Management. The Council is a nonpartisan alliance comprised of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. Through education and collaboration the organization's goals are to create a common interest in the representation by lawfirms of companies, and to promote and further the highest standards of litigation management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows.

Christopher L. Voltz was recently selected as one of fifteen members of Allegheny County Bar Association Young Lawyers Division (ACBA), Bar Leadership Initiative (BLI) class of 2011-2012. Membership in the BLI program is highly selective. The BLI program brings together groups of young lawyers to learn about the inner-workings of the ACBA and its entities. Each class also has a project for the year. Previous projects of the BLI program include an online listing of the region's judges and their courtroom procedures, a YLD Pro Bono Day, an anti-predatory lending clinic in Homewood, an educational program given to local schools about youth domestic violence, and the “Carnivale!” fundraiser that benefited the ACBA's Loan Repayment Assistance Program.

Mr. Voltz joined Zimmer Kunz in January 2010. His practice is primarily focused on civil litigation including product liability; commercial litigation, insurance defense litigation, and general liability defense. Prior to joining Zimmer Kunz, Mr. Voltz worked at a boutique commercial litigation firm in Pittsburgh where he focused on commercial litigation, employment law litigation and corporate law.



Christopher T. Yoskosky, assisted by Christopher J. Watson, obtained summary judgment in favor of a general contractor in a wrongful death case in which a construction worker fell from scaffolding while working on a high-rise building in Washington County, Pennsylvania. The worker's estate and his purported wife sued the owner of the construction project, the general contractor, the subcontractor in charge of the scaffolding, and another subcontractor retaining the worker's employer, asserting wrongful death and survival claims sounding in

negligence. Plaintiffs premised their claims on an assertion that the various construction companies had negligently installed and utilized the scaffolding from which the decedent fell. Mr. Watson authored and argued a Motion for Summary Judgment, asserting that the general contractor was statutorily immune from the Plaintiffs' claims under Pennsylvania's workers' compensation laws. Mr. Watson also argued that Wife-Plaintiff could not maintain her individual claims because she was never legally married to the decedent, as the decedent's prior marriage was

never dissolved. The Washington County Court of Common Pleas agreed, granting summary judgment and completely dismissing the Estate-Plaintiff's claims against the general contractor. Wife-Plaintiff's individual claims were also dismissed because she was not the legal spouse of the decedent.



Christopher T. Yoskosky and Christopher J. Watson obtained the dismissal of a subrogation plaintiff's claims against an individual arising out of a car versus motorcycle accident. The plaintiff insurance company sought compensation for medical benefits paid on behalf of its subrogor, the motorcycle operator injured in the accident. In a prior lawsuit, the motorcycle operator had executed a release of all claims against the defendant car operator. Mr. Watson argued Preliminary Objections asserting that the plaintiff's claims against

the defendant were barred by its subrogor's release. The Westmoreland County Court of Common Pleas enforced the release, dismissing the plaintiff's claims against the defendant.



On behalf of a trucking company, wherein its truck driver struck a power line at the plaintiff's zinc plant, Joseph F. Butcher, obtained a verdict of over \$150,000 less than the claim asserted by the plaintiff. The two-day trial took place in the Court of Common Pleas of Beaver County, Pennsylvania and the defendant trucking company had admitted liability. The plaintiff asserted damages of approximately \$360,000, which included alleged lost profits and repair damages. The verdict entered was in the amount of \$204,000.

**ZIMMER KUNZ,
PLLC**



We Represent Integrity

In the Court of Common Pleas of Adams County, Pennsylvania, Jeffrey A. Ramaley and Joseph F. Butcher obtained summary judgment on behalf of Progressive Northern Insurance Company with respect to a claim of breach of insurance contract. In the underlying accident, the decedent was involved in a fatal accident while operating a motorcycle owned and insured by his father. The decedent was struck by a pick-up truck. The motorcycle being operated by the decedent was insured by Progress-

sive Northern Insurance Company. The decedent also owned a motorcycle, which was insured by Progressive Northern Insurance Company, as well. In the claim handled by Mr. Ramaley and Mr. Butcher, the decedent's wife and estate sought to recover underinsured motorist coverage. Prior to his death, the decedent had signed a waiver rejecting stacked limits of underinsured motorist coverage and his amount of coverage was \$25,000.00 per person, \$50,000.00 per accident. Additionally, the decedent

and his wife had their own automobile insurance policy to cover their private passenger vehicles with Penn National Insurance Company, wherein they rejected stacking. The Penn National policy provided underinsured motorist coverage in the amount of \$15,000.00 per person and \$30,000 per accident.

The decedent signed a waiver rejecting stacked underinsured coverage limits for his Penn National policy. Penn National

paid \$15,000 to the Plaintiff, which represented the full amount of underinsured motorist benefits under the decedent's Penn National policy.

The Progressive Northern Insurance Company motorcycle policy at issue provided as follows:

OTHER INSURANCE

* * *

If non-stacked coverage is shown on the **declarations page**, the following additional provisions apply:

* * *

2. When there is no applicable insurance available under the First priority, the maximum recovery under all policies in the Second priority shall not exceed the highest applicable limit for any one motor vehicle under any one policy.

Based on this policy language, Progressive Northern Insurance Company paid to the plaintiff \$15,625.00 in underinsured motorist coverage, in accordance with its "Other Insurance" language. The amount paid by Progressive Northern represented its pro rata share of the maximum recovery allowed under all policies in the second priority. The plaintiff asserted that she was entitled to the full \$25,000.00 for underinsured motorist coverage under the decedent's policy with Progressive Northern, because it was asserted that the decedent did not waive inter-policy stacking. Plaintiff advanced statutory construction and public policy arguments in advancing her claim. The court determined that the decedent received the underinsured motorist coverage he chose in making his elections and that the insured did not receive a windfall, distinguishing the facts from those presented in Pennsylvania Supreme Court case law.



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**ZIMMER KUNZ' EMPLOYEES GIVE
BACK TO THE COMMUNITY IN
SUPPORT OF MAKE A WISH**

For the past four years, Zimmer Kunz has been working with the Make-A-Wish Foundation of Greater Pittsburgh to grant wishes to children diagnosed with life threatening illnesses. Support staff members Debbie Somerhalder and Scott Lehner have worked tirelessly organizing various fundraisers such as walk-a-thons, candy and hoagie sales, and Chinese auction basket sales. A particularly fun event is the annual bowl-a-thon that is organized and held at the Coral Lanes & Lounge in West Mifflin, Pennsylvania. Every year, the employees of Zimmer Kunz come together and raise money for Make-A-Wish, whether by monetary donations, donations of items for Chinese auction baskets, and/or selling lottery calendars. Our first year, we were very proud to be able to grant wishes to *two* children. Scott and Debbie's yearly goal is to grant one child's wish, which costs approximately \$3,400. As we are approaching our fifth year of fundraising, the support staff of Zimmer Kunz looks forward to many more years of success in support of this worthy cause.

