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# In the Superior Court of Pennsylvania

No. 713 MDA 2015

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DANIEL BERG, individually and as the Executor of the Estate of SHARON BERG a/k/a SHERYL BERG,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, INC.,
Appellant.

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## BRIEF FOR PLAINTIFFS/APPELLEES

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On appeal from the judgment of the Court of Common Pleas of Berks County, Pennsylvania, Civil Division, dated April 21, 2015 at No. 98-813

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## I. INTRODUCTION

In *Berg* v. *Nationwide Mut. In. Co.*, 44 A.3d 1164 (Pa. Super. Ct. 2012), this Court provided a roadmap to follow in establishing defendant Nationwide's liability for bad faith under 42 Pa. Cons. Stat. Ann. §8371. The trial court scrupulously adhered to that roadmap, reaching the conclusion — inescapable on this record — that Nationwide's conduct toward the Bergs was in bad faith.

After considering all the evidence in this sizeable record, the trial court issued a verdict consisting of 90 separate findings of fact and 19 specific conclusions of law. Once the trial court found Nationwide liable under §8371 for bad faith, the trial court imposed the remedies available under well-established Pennsylvania caselaw: compensatory damages and a punitive damage award that was properly calibrated not only to the plaintiffs' compensatory award (including attorneys' fees) but also to what was necessary to punish Nationwide under the circumstances.

On appeal, the overwhelming majority of Nationwide's presentation is directed toward attacking the trial court's factfinding. Unfortunately, instead of properly viewing the evidence and inferences therefrom in the light most favorable to the verdict-winner, and then asking whether based

on that evidence the trial court's verdict can be upheld, Nationwide engages in the tired, improper, and consistently unsuccessful approach of attempting to relitigate the facts of this case anew on appeal. Even if Nationwide's brief could establish that, if the evidence were viewed in a light most favorable to Nationwide as the verdict-loser, it would deserve to prevail, that is not the relevant inquiry on appeal. Here, as demonstrated below, the trial court's factual findings enjoy more than adequate support in the evidentiary record. As a result, under this Court's precedents, the trial court's factual findings and verdict deserve affirmance.

Likewise, the trial court's award of punitive damages withstands scrutiny under both Pennsylvania law and federal due process principles. This Court's decisions establish that the trial court should take into account the entire compensatory damage award, including the attorneys' fee component, in deciding what amount of punitive damages is proper. The six-to-one ratio comfortably satisfies federal due process concerns and finds plentiful support in the ratios of punitive to compensatory damages that this Court has previously upheld. Perhaps even more importantly, as the trial court properly found, the unsafe condition of the vehicle that Nationwide returned to the Bergs subjected them (two parents and a child)

to the risk of death or serious bodily injuries due to the vehicle's non-crashworthiness.

Last but not least, the trial court's $18 million punitive damages award was necessary to punish Nationwide for its wrongdoing. Nationwide's appellate brief furnishes this Court with further evidence that Nationwide is either unrepentant or in deep denial. Nationwide's wrongdoing was difficult to detect, and cases such as this are rarely brought let alone pursued to completion. Nationwide clearly put its own profits above the safety and well-being of its policyholders and their family. Nationwide is an egregious serial offender in these regards.

For all of these reasons, which are addressed in more detail below, the judgment should be affirmed.

## II. COUNTERSTATEMENT OF THE SCOPE AND STANDARDS OF REVIEW

In *Hollock* v. *Erie Ins. Exchange*, 842 A.2d 409, 414 (Pa. Super. Ct. 2004) (en banc), this Court considered and rejected an appeal in which the insurance company defendant was asserting, as here, that the trial court's findings of fact in favor of the plaintiff in support of a verdict imposing

liability under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. §8371, lacked adequate evidentiary support in the record.

In describing the applicable standard of review, this Court explained:

> We must grant the court's findings of fact the same weight and effect as the verdict of a jury and, accordingly, may disturb the non-jury verdict only if the court's findings are unsupported by competent evidence or the court committed legal error that affected the outcome of trial. . . . [W]e will not substitute our judgment for that of the factfinder. Thus the test we apply is not whether we would have reached the same result on the evidence presented, but rather, after due consideration of the evidence which the trial court found credible, whether the trial court could have reasonably reached its conclusion.

*Hollock*, 842 A.2d at 414 (internal citations and quotations omitted).

In *In re Funds in Possession of Conemaugh Twp. Supervisors*, 753 A.2d 788, 790 (Pa. 2000), the Supreme Court of Pennsylvania recognized that "a judge in a bench trial" is "free to believe all, part, or none of the evidence."

Similarly, in *Rizzo* v. *Haines*, 555 A.2d 58 (Pa. 1989), Pennsylvania's highest court held as follows regarding the standard of review applicable to a trial judge's factual findings in a non-jury trial:

> In reviewing the factual determinations of the trial court sitting as finder of fact, we must attribute to them the same force and effect as a jury's verdict. Accordingly, we view the evidence and all reasonable inferences therefrom in the light most favorable to the Rizzos, as verdict winners. We will only upset the findings if there is insufficient evidence, or if the trial

> court committed an error of law. In reviewing the findings, the test is not whether we would have reached the conclusion of the trial court, but rather whether we reasonably could have reached the same result. We will not substitute our judgment for that of the trial court.

*Id.* at 61 (internal citations omitted).

In *Croyle* v. *Dellape*, 832 A.2d 466, 470-71 (Pa. Super. Ct. 2003) (internal quotations omitted), this Court reiterated that "[w]hen this Court reviews the findings of a trial judge, the evidence is viewed in the light most favorable to the victorious party below and all evidence and proper inferences favorable to that party must be taken as true and all unfavorable inferences rejected."

"[A] reviewing court will not disturb the trial judge's findings of fact unless they are unsupported by competent evidence," *Alberici* v. *Safeguard Mut. Ins. Co.*, 664 A.2d 110, 113 (Pa. Super. Ct. 1995). Moreover, it makes no difference whether the trial judge's findings are based on live testimony or documentary evidence. *See Shepley* v. *Dobbin*, 505 A.2d 327, 329-30 (Pa. Super. Ct. 1986); *see also* Fed. R. Civ. P. 52(a)(6) (providing, in federal appeals, that a trial judge's "[f]inding of facts, whether based on oral or *other evidence*, must not be set aside unless clearly erroneous") (emphasis added).

This Court reviews for abuse of discretion a trial court's decision to award punitive damages on an insurance bad faith claim, while the question of whether a punitive damage award complies with federal due process presents an issue of law as to which this Court exercises *de novo* review. *See Grossi* v. *Travelers Personal Ins. Co.*, 79 A.3d 1141, 1157 (Pa. Super. Ct. 2013).

## III. COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. When the evidence is viewed in the light most favorable to plaintiffs, as verdict-winners, whether the trial judge's extensive and detailed factual findings — that Nationwide hid from its insureds the original appraiser's conclusion, confirmed by the subsequent repeated failed repair attempts in this case, that the vehicle was a structural total-loss that could not be safely repaired; that Nationwide returned to its insureds a vehicle that, unbeknownst to those insureds, had not been safely repaired, thereby placing at risk the lives and physical well-being of the insureds and their family; that Nationwide placed its own pursuit of profits ahead of the financial interests, lives, and physical well-being of its insureds, to whom it owed a fiduciary duty to act in the best interest of;

and that Nationwide repeatedly violated the standards applicable to insurance companies in Pennsylvania, using its superior financial resources to force insureds into litigation to pursue financially unattractive, low-value cases against Nationwide's scorched-earth litigation approach so as to be perceived as tough on plaintiffs' lawyers — furnish clear and convincing evidence in support of the trial court's verdict finding Nationwide liable for insurance bad faith under 42 Pa. Cons. Stat. Ann. §8371?

2. Whether the trial court's $18 million punitive damage award, representing a ratio of six-to-one with the compensatory damage award, satisfies Pennsylvania law and federal due process requirements — where this Court upheld similar punitive awards in other cases; where Nationwide subjected its insureds and their family to the serious risk of significant injury or death, which had it occurred would have justified a compensatory award far in excess of $18 million; where the trial court properly found Nationwide's conduct highly reprehensible because it recklessly endangered the Bergs' lives to further its own financial self-interest, and thereafter leveraged its wealth to punish and deter the Bergs; and where Nationwide is a repeat, serial offender against which a

meaningful punitive damage award is necessary in order to have any punitive or deterrent effect?

3. Whether the trial court awarded a reasonable attorneys' fee based on lodestar factors and the criteria contained in Pa. R. Civ. P. 1717 (titled "Counsel Fees"), and properly considered the fees paid by Nationwide to its counsel in this seemingly endless litigation as a gauge of the award's reasonableness?

## IV. COUNTERSTATEMENT OF THE CASE

### A. Relevant Factual History

Instead of setting forth the facts of this case in the light most favorable to plaintiffs as verdict-winners, Nationwide in its Brief for Appellant offers a factual recitation consisting of the "facts" depicted in the light most favorable to Nationwide, utterly ignoring and omitting all of the contrary and conflicting relevant evidence on which the plaintiffs relied and on which the trial court properly based its findings in plaintiffs' favor.

This Court's function as an appellate tribunal, of course, is not to relitigate the facts of this complex and hotly contested dispute from scratch, but rather to ensure that evidence and inferences therefrom, when viewed

in the light most favorable to plaintiffs as verdict-winners, provide a reasonable basis for the trial court's factual findings in plaintiffs' favor. Unfortunately, Nationwide's Brief for Appellant does not depict the facts in a light most favorable to plaintiffs so as to enable this Court to undertake that inquiry.

Plaintiffs thus begin by summarizing in narrative form the factual findings that the trial court set forth in its verdict. Then, in the Argument section, plaintiffs demonstrate that the findings that Nationwide specifically challenges on appeal all enjoy more than adequate evidentiary support in this record.

The trial court, in its Rule 1925(a) opinion at pages 35-38, listed seven specific factual findings on which the trial court relied in finding Nationwide liable for insurance bad faith under 42 Pa. Cons. Stat. Ann. §8371. The trial court found that Nationwide breached its duty to promptly process, adjust, and resolve the Bergs' claim. (Rule 1925(a) op. at 35) The trial court found that Nationwide concealed from the Bergs that their automobile had been declared structurally unsound and incapable of being safely repaired. (*Id.* at 36) The trial court found that Nationwide had been found liable under the Unfair Trade Practices and Consumer Protection

Law by the jury during an earlier phase of this litigation, which as this Court recognized in *Berg*, 44 A.3d at 1174-75, constitutes evidence of bad faith in violation of §8371. (Rule 1925(a) op. at 36)

The trial court found that Nationwide had violated the Motor Vehicle Physical Damage Appraiser Act (*id.* at 36), which this Court's earlier opinion in this case likewise recognized constitutes evidence of bad faith in violation of §8371. The trial court found that Nationwide had failed to follow its own claims handling guidelines. (Rule 1925(a) op. at 37) The trial court found that Nationwide failed to make a timely offer of settlement. (*Id.*) And, lastly, the trial court found that Nationwide elevated its own interests ahead of the interests of its insured. (*Id.* at 37-38)

The trial court also summarized its most significant factual findings in the conclusion to its Rule 1925(a) opinion:

> No one from defendant warned the plaintiffs that the Jeep was dangerous to drive or that it should be immediately recalled. Even after the Potosnak Report was provided to defendant, it did not immediately total the Jeep and give plaintiffs any remedy. Defendant hid the report from its insured — it hid the fact that the car was defective and un-crashworthy. It did not promptly recall plaintiffs' Jeep and replace this dangerous instrument with a loaner car. Instead, defendant refused to settle this case and poured more money into defending it without ever warning plaintiffs not to drive the Jeep. Defendant simply buried the evidence and hid the fact

> that it knew anything about this report and what it meant to the safety of anyone in a collision. It has been unscrupulous in this litigation by failing to produce documents required by law and by answering dishonestly. Returning the Jeep to plaintiffs with a bent frame that could not protect its occupants in a car crash was nothing short of exposing the insured to an unjustifiable risk of death or injury in the event of a collision.

Rule 1925(a) op. at 52-53.

### 1. The Berg's SUV Is Seriously Damaged In A Collision

On September 4, 1996, Mrs. Berg was involved in a violent crash with another motor vehicle while driving her 1996 Jeep Grand Cherokee. The collision spun the SUV around four times before careening into a pole. (Verdict at 13; R.1001a) The SUV sustained considerable damage, including a twisted frame and damage to its front bumper, front panels, front lamps, cooling system, hood, fenders, electrical system, engine, emissions system, front suspension, alignment on all four wheels, steering column, steering gear and linkage, windshield, fan cowl, grill, instrument panel, restraint system, and unibody system. (R.1796a-1802a)

### 2. Nationwide's Blue Ribbon Repair Program

Nationwide maintains a Blue Ribbon Repair Program. Through it, Nationwide refers insureds to contracted facilities for appraisal and repair. (R.829a, 1000a, 1319a, 1327a) Nationwide induces participation by promising a "Blue Ribbon" appraisal, from an approved "Blue Ribbon" facility, backed by a "Nationwide Blue Ribbon Guarantee." (R.1964a) Nationwide's selection and endorsement of a repair facility communicates to insureds, such as the Bergs, that a given repair facility is competent and capable of performing necessary repairs. In actuality, as the evidence in this case revealed, BRRP facilities are selected by Nationwide based on the facility's willingness to discount the costs of repairs for which Nationwide is financially responsible. (R.1327a-28a) Quality was at most a distant concern.

### 3. Appraiser Declares The SUV A Structural Total Loss

Nationwide assigned Doug Joffred to appraise the SUV. (R.1063a) Joffred had been the manager at Lindgren (Nationwide's BRRP designated facility) for 16 years and had been appraising insured losses at Nationwide's request for years. (R.1000a, 1317a, 1329a) Pennsylvania law

precludes Nationwide from interfering with the appraisal process until the appraisal is complete, signed, and a copy provided to the owner. *See* 31 Pa. Code §62.3(b)(1); Motor Vehicle Physical Damage Appraisers Act, 63 Pa. Stat. Ann. §§851-863.

Joffred was an experienced collision repairman, having been the manager at the facility for 16 years. (R.1000a, 1317a, 1329a) Joffred notified Nationwide that the vehicle was a structural total-loss due to a twisted frame. (R.1872) He reached this view after a "tear-down" to assess the full scope of damage. (R.1325a; 1371a; 1374a; 1407a-09a)

Consistent with the Appraisers Act, Joffred explained that a "structural" total-loss exists where the vehicle is "damaged to the point that no matter what it took to fix it, it shouldn't have been fixed." (Verdict at 13; R.1325a) Nationwide management admitted, at trial, that the SUV was appraised as a structural total-loss. (R.909a-10a, 2097a)

Joffred provided numerous photographs to Nationwide, as required under the BRRP program, documenting the vehicle's damage before and after tear-down. (R.1320a-21a,1874a) The photographs and total-loss appraisal are documented in the claim file. (R.1872a, 1874a) BRRP

standards required photographs of all damage to support the appraisal. (R.2150a)

**4. Bergs Remain Unaware of Nationwide's Total-Loss Override**

Nationwide dispatched claim representative Doug Witmer to meet Joffred about his appraisal. (Verdict at p.13; R.1003a) Witmer confirmed Nationwide knew, prior to arriving, that Joffred had reached a structural total-loss appraisal, as opposed to an economic total-loss, where, for example, an older vehicle is totaled because repair-costs exceed the vehicle's value. (Verdict at 13; R.999a)

Witmer did not write his own appraisal. (Verdict at 14; R.1005a) Witmer did not lift a tool. (Verdict at 14; R.1005-06a) Witmer simply looked at "the power equipment and the miles and such on the vehicle to properly evaluate the ACV [Actual Cash Value] of the vehicle for value." (R.1006a)

Based upon his value-only review, Witmer, on Nationwide's behalf, overruled the structural total-loss and instructed Joffred to initiate repairs. (Verdict at p.14; R.1002-03a) The claim-log confirms the basis for doing so was "Nationwide will never recover the difference in salvage value." (Verdict at 14; R.1871a) Nationwide stood to save about $12,500 as the

result of attempting to repair the SUV, compared to a structural total-loss. (Compare R.1502a (assessed-value) with R.1872a (estimated repair-cost))

Joffred advised Witmer his BRRP facility could not straighten the twisted frame. (R.1335a, 1337a-38a) Without the Bergs' knowledge or consent (R.1338a), Witmer directed the SUV be shipped to another facility to attempt structural repairs. (R.1003a) Pennsylvania requires consent of a vehicle's owner before transporting the vehicle to a different facility. 31 Pa. Code §62.3(f)(2).

Nationwide made the decision to override Joffred and never advised the Bergs of the structural total-loss appraisal. (R.1399a, 1065a-66a) Nationwide withheld this information even though Mr. Berg initially questioned the wisdom of repairing the vehicle (R.1399a) and Pennsylvania law requires the appraisal be signed before submission to the insurer and requires the total-loss evaluation to be provided to the insured. 31 Pa. Code §62.3(a)(1) & (e)(7). Notwithstanding these provisions of Pennsylvania law, under the BRRP the appraiser was not to inform the vehicle's owner of any total-loss declaration. (R.2164a)

### 5. Repairs Took Four Months And Failed

Pursuant to BRRP standards, repairs to the Bergs' vehicle should not have taken longer than 25 days. (Verdict at 15; R.1010a-11a) Instead, repair efforts lasted four months. (Verdict at 15; R.940a)

The Bergs' rental coverage expired after 30 days. (R.1011a) The Bergs requested an extension, but Nationwide refused. (Verdict at 15; R.1084a, 1817a, 1066-67a) The Bergs were forced to rely on Mr. Berg's panel-van, which had no backseat, requiring their son to sit on the floor without a seatbelt when they traveled as a family. (Verdict at 15; R.1084a-85a)

Nationwide contends it was unaware of the resulting structural repair failures. Yet, as the trial court found, Nationwide's Property Damage Specialists ("PDS") performed random inspections throughout the four-month repair period, as was routine practice for all BRRP shops. (Verdict at 16; R.1339a, 1971a-72a, 2150a, 2159a, 888a, 936a-43a, 1522a-24a, 772a-73a, 802a-03a, 1071a-73a)

While working as an employee at the BRRP facility, David Wert witnessed the repairs from his adjacent repair-bay. He confirmed Nationwide's inspections of the Berg vehicle occurred at the beginning,

middle, and end of the four-month repair period (R.1244a-52a) and that the inspector was visibly "unhappy." (R.1249a, 1251a)

Repair efforts were marked by insurmountable issues, which culminated in great difficulty placing the engine back into the engine-cavity after completion of repairs, which in turn caused the fan-blades to loudly strike the fan-shroud once the engine was started. The fan-shroud was cut to silence the banging and, thereby, conceal the failed repairs. (R.1240a-44a)

Subsequent inspections confirmed the scope of failed repairs, including issues with:

> unibody's left stub rail positioning and welding, the radiator support, fan shroud, rear transmission mount, exposed welds, missing welds that were replaced by rivets on the front structures, interference between the steering gear and the cross member, hood misalignment, engine misalignments, parts not replaced but they were represented on the estimate, damaged suspension parts not replaced and on vehicle, poor weld repairs, to the left front stub frame rail, the grill attachment, the headlight mounting and the steering wheel not being centered.

(Verdict at 16; R.1139a (testimony of Donald Phillips, P.E.))

Phillips, who designs, tests, and validates air-bag systems, confirmed substantial safety-risks. (R.1131a, 1144a-48a) Due to the structural changes, "the air bag system and its other related safety features such as the front

crumple zone would not respond or behave as designed from the factory" and would have "reduced strength" and reduced "crashworthiness" as time progressed. (R.1144a-45a)

### 6. The Bergs Observe Initial Defects In The Repairs

After four months of repair efforts, the SUV was returned to the Bergs on December 30, 1996 as if fully restored. Within days, Mrs. Berg returned to Lindgren to address "noise in the steering." (R.1391a) Lindgren confirmed the "power steering pully [that] was bent and the bracket that held the steering pump on the engine." (R.1391a) Lindgren made these additional repairs, informed Nationwide of them, and Nationwide paid for them. (R.1391a-92a)

Shortly thereafter, the Bergs were forced to return again (R.1085-87a), this time because "the tires were literally worn down to the metal." (R.1086a, 1410-11a) The Bergs were told to buy new tires for their unsafe-to-operate, improperly repaired vehicle. (R.1086a-87a)

### 7. Nationwide Refuses To Release Claim File

Several months later, in October 1997, David Wert, now a former Lindgren employee, contacted the Bergs to warn against repair failures. (R.1088a, 1251a-52a) The Bergs retained counsel and a consultant to inspect the repairs, thereby confirming Wert's concerns. (R.1089a, 1139a, 1424a)

On November 3, 1997, the Bergs' counsel contacted Nationwide. (R.1804a) Not yet aware of Nationwide's improper involvement, counsel advised Nationwide of the Bergs' intent to pursue Lindgren. (R.1804a) The Bergs requested Nationwide's claim file. (R.1804a, 1844a) Nationwide failed to respond to that request, but claim file entries on that date confirm a bustle of activity involving four claim managers pointing fingers at one another regarding which manager was responsible for the claim. (R.1822a) It was at this point that the claim file went haywire, with entries on that date curiously repeated over and over. (R.1822a-45a)

Three weeks later, on November 25, 1997, having received no reply, the Bergs faxed another request to Nationwide. (R.2916a) Again, Nationwide did not respond. On December 2, 1997, the Bergs pressed for a reply, citing Nationwide's regulatory obligation to respond within ten workdays, which had already passed. (R.2917a)

Nationwide responded by providing a single repair appraisal dated September 20, 1996. (R.1794a-1802a) Nationwide did not advise of the claim history, including the original structural total-loss appraisal or the need to ship their SUV to a non-BRRP facility due to the extensive damage. Nationwide offered no damage photographs (R.1320a, 1794a-802a) and did not produce the appraisal of September 10, 1996, even though Nationwide's claim file established that such documents existed. (R.1872a, 1874a) The following day, December 3, 1997, Nationwide's management directed Witmer to mail the "paper file" to management. (R.1820a)

**8. Bergs Learn Of Undisclosed Total Loss Appraisal**

On January 23, 1998, the Bergs filed a writ of summons against Lindgren only (R.3a) and deposed Joffred on April 14 (R.1317a), learning for the first time that the SUV was originally declared a structural total-loss and that Nationwide required structural repairs be attempted by a non-BRRP facility. (R.1094a, 1325a) A week later, on April 22, the Bergs requested that Nationwide purchase the vehicle. (R.1882a-83a)

### 9. Nationwide Documents Extensive Defects And Pressures Lindgren To Purchase Vehicle, Without Notice To Bergs

Bruce Bashore was the Pennsylvania BRRP director for Nationwide in 1998, with full access to the claim-log and history of repairs. (R.1172a-74a) Bashore directed Nationwide employee Stephen Potosnak, a licensed appraiser and PDS, to inspect the repairs. (R.1190a-91a, 1809a-10a)

On April 30, 1998, Potosnak entered his findings into the claim file, which Bashore confirmed was an ordinary claim-file entry, not a communication to counsel. (Verdict at 22; R.1809a-10a, 1191a-94a) In that entry, Potosnak summarized, among other things, the substantial repair failures, billing issues, and his conclusions regarding the numerous, substantial defects that he observed on the vehicle and his concerns about the manner in which it was "repaired." (R.1809-10a)

Potosnak reported these defects to Bashore. (R.1809a) Nationwide pressured Lindgren to buy the SUV, but Lindgren refused. (R.1810a, 1808a) Potosnak confirmed he did not discuss his findings with the Bergs. (R.1809a) No one at Nationwide contacted the Bergs to discuss the findings.

### 10. Bergs Are Compelled To File Suit Against Nationwide

While Nationwide secretly pressured Lindgren to buy the SUV, the Bergs were faced with Lindgren's rule to file complaint. (R.3a, 1882a-83a) Thus, on May 4, 1998, the Berg's filed their complaint against Nationwide and Lindgren. (R.3a)

### 11. Nationwide Insists On Additional Inspections Notwithstanding Its Actual Knowledge Of Severe Defects

On May 16, 1998, Nationwide dispatched Terry Shaw to inspect the SUV. (R.1967a, 1969a) Mr. Berg was home waiting but was not alerted that Shaw arrived. (R.1428a) In the mistaken belief that Mr. Berg was not home, Shaw conducted a visual inspection, which confirmed unrepaired frame damage. (R.1970a)

On May 19, 1998, Bashore wrote to the Bergs advising that Nationwide "would like the opportunity to have an independent expert inspect" the SUV, even though Nationwide had already conducted two such inspections. (R 1891a) Bashore represented:

> If the independent expert finds any problems with the repairs that resulted from the above listed accident, Nationwide Insurance will have these problems corrected at a shop of the

> Berg's choice. If the vehicle cannot be repaired to pre-accident condition Nationwide will purchase the vehicle from the Bergs.

(R.1891a) Bashore did not disclose the actual knowledge he already had of defects from Potosnak, Shaw, or from the numerous inspections during the four-month repair period. He made no effort to warn the Bergs of potential safety issues. (R.1891a) Nationwide did not offer a replacement rental vehicle, as requested by the Bergs. (R.1817a)

On June 12, 1998, the Bergs advised Nationwide they would maintain the SUV for an additional 30 days. (R 2919a) On July 6, 1998, Nationwide responded that it would proceed with an inspection, but misrepresented that it would be an "initial inspection," and reserved the right to conduct a "second inspection." (R.2920a) On August 21, 1998, William Anderton performed an inspection and confirmed, consistent with Potosnak's and Shaw's undisclosed reports, that the SUV was not properly repaired. (R.1573a-75a, 2922a)

Once again, Nationwide did not disclose the findings to the Bergs. Instead, Nationwide wrote that the "preliminary inspection" was inconclusive and another inspection would be required "to determine if it

was improperly repaired." (R.2922a) Nationwide claimed this inspection would take two days, requiring it to keep the vehicle overnight. (R.2922a)

### 12. Nationwide Insists On Buying SUV At End Of The Lease

While Nationwide continued to insist on successive, redundant inspections, the Bergs' three-year lease was set to expire December 29, 1998. (R.1418a, 1877a) Thus, on December 11th, the Bergs contacted Nationwide to reach an agreement on preserving the vehicle for further inspection. (R.2924a) Nationwide arranged to take exclusive control of the evidence by purchasing the SUV from Summit Bank. (R.2925a) The Bergs expressed concern about the integrity of the evidence, and indicated they would invoke their right-of-first-refusal, unless secure storage was arranged. (R.2926a-27a, 2928a, 2930a)

Nationwide moved to take control of the evidence by threatening Summit Bank with a lawsuit if it sold the SUV to the Bergs rather than Nationwide. (R.1920a) The bank rebuffed the threat, and agreement was reached to preserve the evidence with a three-way lock. Nationwide took title to the vehicle. (R.2929a-31a)

### 13. Nationwide's Final Inspection

In April 1999, the vehicle was jointly removed from storage for Anderton to conduct another inspection. (R.1576a) Anderton came to the same conclusion as Potosnak had one year earlier, namely: "the vehicle was not repaired completely or properly or accurately." (R.1578a) Anderton confirmed the structural repairs attempted at Nationwide's direction failed; the primary structural components on the front of the vehicle remained "significantly misaligned" with "no identifiable benefit" from the structural repair efforts required by Nationwide. (R.1593a) Nationwide, however, did not advise the Bergs of these conclusions until November 18, 2003, some four years later. (R.2859a)

### 14. Nationwide's Pennro Litigation Strategy

In 1993 Nationwide circulated its "PENNRO LITIGATION STRATEGY," attached to its then-current claim manual, "Best Practices," titled "Claim Handling Philosophy and Strategy for 1993 and Beyond." The strategy directs personnel to apply "[c]ontinued reinforcement of Nationwide being a 'defense-minded' carrier in the minds of the plaintiff legal community." (R.2167a) The strategy further instructs:

> Implement a more aggressive posture in handling cases of lesser probable exposure (ie: cases not exceeding $25,000.00). Create and reinforce a defense minded perception.

*Id.* The "Preface" to the manual states:

> Resource investment will be necessary to achieve the desired result within several listed strategies. However, resource investment was truly limited to key strategic areas.

R.2172a.

Jeffrey Gooderham was involved in developing the manual. *See id.*, Preface at Congratulatory Note. He conceded that the manual does not contain any other philosophy/strategy than the one described above. Gooderham further conceded Nationwide intended for the strategy to be applied against policyholders. (R.1983a-84a)

Four years after the Bergs filed this lawsuit, this Court published *Bonenberger* v. *Nationwide Mut. Ins. Co.*, 791 A.2d 378 (Pa. Super. Ct. 2002), denouncing Nationwide's strategy as documented in that manual. This Court explained:

> Individuals expect that their insurers will treat them fairly and properly evaluate any claim they may make. . . . An insurance company may not look to its own economic considerations, seek to limit its potential liability, and operate in a fashion designed to "send a message." . . . . Insurers do a terrible disservice to their insureds when they fail to evaluate each

> individual case in terms of the situation presented and the individual affected.

*Id.* at 382.

On May 28, 2013, plaintiffs served Nationwide with a document request seeking:

> Any memorandum, written statements, or other documents circulated … after the *Bonenberger* opinion was published … wherein Nationwide instructs its claim departments to stop applying the strategies set forth in the *Bonenberger* Manual.

*See* Omnibus Motion to Overrule Objections, filed 7/5/13, Exhibit 1 (not contained in Reproduced Record).

Thereafter, the trial court entered an order stating:

> Plaintiffs' Motion is denied . . . but Defendant will be precluded from relying upon the requested documents at trial, and Plaintiffs will be permitted to make reasonable argument pertaining to the absence of said documents.

(R.2949a) Nationwide did not thereafter produce any such documents, triggering the negative inference that no such documents exist.

**15. Nationwide Signs False Verification**

With full, documented knowledge of the defective repairs, the original total loss appraisal, its direction to ship the SUV to a non-disclosed

facility, evidence of routine inspections throughout the four-month repair period, Wert's eyewitness report, the Potosnak Report, Shaw's Report, two Anderton Reports, and the Phillips Report, Nationwide launched headlong into this 17-year saga rather than conceding the vehicle was a total-loss. In January 2000, nearly a year after Anderton's second inspection, a year after Potosnak's inspection, and three years after routine BRRP inspections performed during the four-month repair period, Nationwide filed an answer to the Bergs' Eighth Amended Complaint. Therein, Nationwide *denied*, in a pleading verified by Bashore, that the "Jeep was not repaired to the condition that it existed just prior to the damage in question being incurred . . . ." (Verdict at 22; R.584a, 619-20a, 639a)

Nationwide continued thereafter to hide the contents of the claim file. Joffred and Witmer both confirmed they took multiple photographs that were provided to Nationwide. (R.1320a, 1006a) This is confirmed in the claim log. (R.1874a) Yet Nationwide contends it did not have any photographs, which forced the Bergs to file for sanctions. (R.642a-80a) A second order mandated compliance with the first order. (R.682a) Nationwide produced two, poor-quality photographs. (R.1778a) Nationwide has never produced photographs of the vehicle's twisted

frame. Yet everyone admits such photographs exist, as required under the BRRP. (R.2162a, 772a-73a, 914a-17a)

Nationwide also refused to produce claim-log entries, including the Potosnak Report, improperly withheld under nearly invisible redactions. (R.1885a-86a (white-on-white redaction); *compare with* R.1809a-10a (unredacted)) Eventually, counsel for plaintiffs detected the improper redactions, filed a motion for sanctions, and the trial court entered a second order on June 12, 2000 requiring compliance with the prior orders and requiring that all redactions be made in black. (R.682a) Nationwide nevertheless continued to redact numerous non-privileged entries, including the Potosnak Report, pursuant to a meritless assertion of attorney-client privilege. (R.1888a-89a, 1191a-94a)

Counsel for plaintiffs took Potosnak's deposition on October 11, 2000. At that time, the Potosnak Report remained redacted. When asked about alleged defects, Nationwide's counsel, Michael Nelson, interjected:

> MR. NELSON: Counsel, let me make the objection on the record. If you're going to start asking him an expert opinion about an appraisal that he didn't create nor a vehicle he looked at, I'm going to object to him giving that opinion. He's not your expert.

(R.4756a) Thereafter, Potosnak testified:

> A. It's damage I haven't seen. Based on — I have to see the vehicle and see the damage to be able to give you an accurate answer.
>
> Q. If you looked at the estimate of the work done, would that be helpful?
>
> MR. NELSON: Objection.
>
> THE WITNESS: If I didn't see the damage to the vehicle myself with my own eyes, going and looking at somebody else's estimate isn't going to help me. Do you know what I am saying?

(R.4756a)

Under further questioning, Potosnak admitted he had inspected the repairs. (R.4761a-62a) The written report, however, remained redacted until May 5, 2003, a full five years after its creation; ultimately, it was produced as an attachment to admissions. (R.3014a-24a) Nationwide did not choose to unredact it in response to court orders; rather, Nationwide chose to unredact it because Nationwide determined it needed the entry to deflect accusations of a secret inspection. (R.3016a)

Nationwide's improper litigation conduct continued on remand with regard to amounts paid to defend this suit, after this Court determined those amounts were relevant to the disputed issue of whether the *Bonenberger* strategy was applied against the Bergs. *See Berg*, 44 A.3d at

1177. On remand, plaintiffs served Nationwide with six interrogatories seeking amounts it paid to defend this case over specific periods. Thereafter, the trial court entered an order requiring verified answers. (R.2949a) Nationwide thereafter incorrectly verified that it paid only $27,375.72 in expert fees ($24,092.37+$3,283.35). (R.2958a-62a) The Bergs thus subpoenaed the invoices of one expert, Constance Foster. (R.2971a) Nationwide filed a motion to quash the subpoena and amended its verified answer to include an additional $86,509.82 in costs, raising the total to $113,885.54. (R.2981a)

Three of the six interrogatories sought amounts paid to Nationwide's attorneys over specified periods. Again, Nationwide's verified, *amended* answers were not accurate, claiming only $1,173,227.50 paid from 1998 through March 31, 2005. (R.2980a) The verified answer failed to include $901,340.00 invoiced on October 6, 2004. (R.3893a)

Plaintiffs thus served a notice to appear at trial, requiring a designee to provide "accurate and truthful answers to all six interrogatories." (R.3895a) Attorney Sean Costello, as the designee, testified on December 19, 2013 that Nationwide paid its attorneys, to date, a sum total of $2,500,000.00 (R.2728a), which was slightly more than the $2,191,289.10

previously verified as the amount paid through April 24, 2013 (R.2986a), the increase representing fees incurred between April 2013 and December 2013. It was thus mathematically impossible for either the verified responses to interrogatories, or Costello's trial testimony, to have included the October 6, 2004 invoice of $901,340.00.

When presented with an opportunity to explain the $901,340.00 billing entry, Costello acknowledged he was made aware of the discrepancy, and that he knew the issue was raised during the testimony of an earlier witness (Jeanine Snyder), but he, as the designee, nevertheless had no explanation for the discrepancy. (R.2723a-25a) To date, Nationwide has neither denied nor explained the purpose of the $901,340.00 payment, which remains partially redacted. (R.3893a)

Based on all of these facts, as reflected in 90 specific findings of fact, the trial court returned a verdict finding Nationwide liable for insurance bad faith under 42 Pa. Cons. Stat. Ann. §8371 and imposed the remedies specified in that statute. Then, after Nationwide filed a Rule 1925(b) statement disclosing the intention of taking issue on appeal with the trial court's factual findings, the court issued a lengthy and detailed Rule 1925(b) opinion in further support of the judgment.

### B. Relevant Procedural History

On January 23, 1998, Plaintiffs Daniel and the now-deceased Sheryl Berg initiated this action. (R.3a) The Bergs asserted claims against their insurer, defendant/appellant Nationwide Mutual Insurance Co., and against the repair facility, Lindgren Chrysler-Plymouth, Inc. (R.576a-613a) The Bergs sought relief under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. §8371, arising from Nationwide's requiring their vehicle to be repaired after having been declared a structural total-loss, returning the vehicle in an unsafe condition, forcing the Bergs to litigate their meritorious claim over the resulting repair failures, and then applying a strategy to thwart meritorious claims through its superior financial resources. (R.576a-613a)

In December 2004, a jury found Nationwide and Lindgren violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). (R.1932a) In June 2007, the second phase of the bifurcated trial proceeded to address whether to treble the UTPCPL damages and whether Nationwide violated Pennsylvania's insurance bad faith statute. Nationwide moved for a directed verdict on the bad faith claim, which the trial court granted.

On April 17, 2012, this Court reversed and remanded the case for a new trial on the Bergs' bad faith claim. *See Berg*, 44 A.3d at 1179. This Court explained that, in granting a directed verdict to Nationwide, "the trial court adopted . . . as its legal conclusion [a] novel theory of statutory interpretation" in conflict with Supreme Court precedent. *Id.* at 1172. This Court specifically recognized that Nationwide had advanced arguments that misled the trial court. *Id.* at 1171. This Court explained that the trial court's reasoning "reflect[ed] a clear misunderstanding of the nature of the Bergs' claims under section 8371" and concluded that "the trial court erred in multiple respects." *Id.* at 1173, 1175.

This Court provided guidance for the trial court on remand. First, this Court confirmed that *Romano* v. *Nationwide Mut. Fire Ins. Co.*, 646 A.2d 1228 (Pa. Super. Ct. 1994), applies to the Bergs' case, including its holding that statutory violations can be evidence of bad faith. *Id.* at 1175. Second, the jury's undisturbed finding that "Nationwide violated the UTPCPL . . . constitutes some evidence of bad faith." *Id.* Third, this Court recognized that the Bergs' allegations, if proven on remand, would demonstrate bad faith. *Id.* at 1176. The allegations this Court referenced included: (1) the initial appraisal that the vehicle's frame was too twisted and thus not

repairable; (2) Nationwide reversed this appraisal and ordered the vehicle be sent to another repair facility to attempt structural frame repairs without advising the Bergs; and (3) Nationwide did so because it believed it "[would] never recover the difference in salvage value." *Id.* at 1176.

Judge Jeffrey K. Sprecher presided over the bench trial on remand. On June 21, 2014, following a trial at which the parties were permitted to present whatever live testimony they desired and post-trial briefing, Judge Sprecher entered judgment in favor of the Bergs on their insurance bad faith claim, finding as follows:

> after due consideration of Defendant's unfounded refusal to pay a valid claim because it was not economically advantageous to it, the risk of harm to Plaintiffs and the public by allowing a structurally unsound vehicle to be operated and traveling on public roads, and the tremendous obstacles, including concealment of evidence, erected by Defendant which forced Plaintiffs and their counsel to endure more than eighteen years of litigation to achieve justice, this Court [finds Nationwide liable under 42 Pa. Cons. Stat. Ann. §8371].

(Verdict at 42) Judge Sprecher issued 42 pages of detailed findings of fact and conclusions of law. (*Id.* at 1-42) After denying Nationwide's post-trial motion, Judge Sprecher issued an additional 53-page opinion in accordance with Pennsylvania Rule of Appellate Procedure 1925(a).

## V. SUMMARY OF THE ARGUMENT

This case presents the deeply troubling account of an automobile insurer with gargantuan economic power that was not only willing to, but did, place its own pursuit of profits ahead of the safety and well-being of its policyholders. The policyholders in this case, two everyday people who were not automobile technicians, trusted their insurer to deal with them fairly and to protect not only their financial investment in their SUV but also their even greater interest in having a vehicle that was safe to operate.

On appeal, Nationwide attempts to reargue the facts of this case from start to finish, instead of properly focusing on whether the evidence and reasonable inferences therefrom, when viewed in the light most favorable to the plaintiffs as verdict-winners, support the trial judge's factual findings. Plaintiffs demonstrate herein that, when the proper appellate inquiry is conducted, the trial court's factual findings enjoy more than sufficient evidentiary support.

Nationwide fails to argue in its Brief for Appellant that, if the trial court's findings are upheld, the imposition of liability against Nationwide under 42 Pa. Cons. Stat. Ann. §8371 lacks clear and convincing support. Rather, Nationwide argues that, if all factual disputes are resolved on

appeal in Nationwide's favor, it would deserve to win. While that may be true, that proposition is simply irrelevant for purposes of this appeal, because this appellate court does not exist to retry factual disputes, notwithstanding Nationwide's apparent belief to the contrary.

Nationwide's factual challenges to the trial court's bad faith verdict are meritless. The unassailable, material facts confirm numerous instances of actionable bad faith. Nationwide rejected the assigned appraiser's determination, without the Bergs' knowledge, that the SUV was a "structural total loss," meaning it should not be repaired regardless of the cost to try. Nationwide did so for purely economic reasons, namely, it "[would] never recover the difference in salvage value." The resulting repairs were severely defective and, as experts opined, put the Bergs at risk of serious injury or death in any subsequent collision given the uncrashworthy and unsafe condition of the SUV after it had been returned to them as "repaired." Nationwide admittedly had knowledge of the continued defects before litigation, but misled its insureds and pretended it did not know for years. In the ensuing litigation, Nationwide spent years hiding evidence and interfering with the fact-finding process in pursuit of a

calculated and improper litigation strategy. These, and many other facts, more than adequately support the trial court's verdict.

The trial court's imposition of $18 million in punitive damages, which constitutes a mere 0.2% of Nationwide's $9 billion in excess statutory surplus, is appropriate. Punitive damages were properly imposed based on express statutory authority and the amount of attorneys' fees that plaintiffs recovered in damages, and the punitive damage award is more than justified by Nationwide's conduct toward its insureds, which the trial court found was highly reprehensible and demonstrated a "reckless indifference" for the Bergs' well-being. The punitive award is well within authorized ratios to comport with federal due process and all other relevant considerations.

Finally, the trial court's attorneys' fee award was both reasonable and explicitly based on the lodestar and factors set forth in Pennsylvania Rule of Civil Procedure 1717. The trial court considered the successful outcome, the complexity of the litigation, Nationwide's litigation conduct, and the contingent nature of the representation, resulting in a reasonable hourly rate for the actual and necessary hours spent prosecuting this 17-year case, rendered gargantuan thanks to Nationwide's purposeful obstinacy. The

trial court's reference to Nationwide's counsel fees to double-check the reasonableness of the fee award is appropriate and supported by Pennsylvania law.

## VI. ARGUMENT

### A. When The Evidence And The Reasonable Inferences Therefrom Are Viewed In The Light Most Favorable To Plaintiffs As Verdict-Winners, More Than Adequate Evidence Exists To Support The Finding Of Bad Faith

#### 1. Nationwide improperly fails to view the evidence and reasonable inferences therefrom in the light most favorable to plaintiffs as verdict-winners

Nationwide devotes approximately 75 percent of its Brief for Appellant to reargue the facts of this case, as though this Court exists to conduct a trial *de novo* of this factually complex and sharply contested matter. As this Court is well aware, the place where factual disputes are to be resolved is in the trial court, and once such factual disputes have been resolved by the finder of fact — here the trial judge — the only issue properly before this appellate court is whether the evidence and the reasonable inferences therefrom, when viewed in the light most favorable to the verdict winner, furnish a rational basis for the trial court's factual

findings. *See Croyle*, 832 A.2d at 470-71. It is not this Court's role to reweigh the evidence or substitute its judgment for the judgment of the trial court. *See Shamnoski* v. *PG Energy,* 858 A.2d 589, 593 (Pa. 2004) ("conflicts in the evidence are for the trial court to resolve and the reviewing court should not reweigh the evidence") (internal quotations omitted). Rather, this Court can only reverse based on evidentiary sufficiency in a case where absolutely no permissible view of the evidence supports the trial court's findings. *See Alberici*, 664 A.2d at 113. This is not such a case.

Here, the trial court presided over a multiday bench trial and spent "countless hours devoted to this case, including reviewing 16 years of litigation, including voluminous transcripts of testimony and the law." (Verdict at 23) This Court should reject Nationwide's "thinly veiled attempt to impugn the trial court's legal conclusions on the basis of evidentiary weight," just as this Court did when affirming the finding of bad faith in *Hollock*, 842 A.2d at 417.

### 2. The bad faith act, intended to prevent an insurer from breaching its duty to its insureds, should be broadly construed

"[T]he utmost fair dealing should characterize the transactions between an insurance company and the insured," and the insurer must "deal with its insured 'on a fair and frank basis, and at all times, to act in good faith.'" *Berg*, 44 A.3d at 1170 (internal citation omitted). For this reason, the bad faith act "encompasses a wide variety of objectionable conduct." *Mohney* v. *Am. Gen. Life Ins. Co.*, 116 A.3d 1123, 1131 (Pa. Super. Ct. 2015).

For example, bad faith exists where "the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." *Mohney*, 116 A.3d at 1131. When an insurer acts with "the motive of self-interest or ill will," the insurer recklessly disregards its lack of reasonable basis in denying the claim. *Id.* at 1131 n.2. "Bad faith conduct also includes 'lack of good faith investigation into facts, and failure to communicate with the claimant.'" *Id.* at 1131.

### 3. Nationwide's specific factual disagreements with the trial court's findings all lack merit because more than adequate evidence supports all challenged findings

Nationwide's factual assault on the trial court's findings has four aspects to it. First, Nationwide asserts that its decision to repair an SUV that was originally determined to be a structural total-loss and that in fact proved unrepairable cannot support a claim of bad faith. Second, Nationwide maintains that Lindgren's failure to properly repair the SUV cannot support a finding of bad faith against Nationwide. Third, Nationwide contends that it properly lived up to the terms of the Bergs' insurance policy once Nationwide had notice of the faulty repairs. And fourth, Nationwide unrepentantly denies having engaged in additional bad faith conduct during the course of this litigation.

Additionally, Nationwide cannot refrain from unnecessarily and improperly attempting to impugn the integrity of the trial judge who was assigned to adjudicate this case and who, based on the extensive record of Nationwide's wrongdoing, had no alternative other than to return extensive findings cataloging Nationwide's numerous transgressions in violation of Pennsylvania's insurance bad faith statute.

As plaintiffs now turn to demonstrate, more than sufficient evidence exists for upholding the trial court's findings in each of these four areas.

### a. More than adequate evidence supports the trial court's findings that the SUV could not be repaired and that Nationwide directed the override of a proper total-loss determination simply to save money

The trial court found Nationwide acted in bad faith when it overruled the determination of its appraiser, Joffred, that the SUV was a structural total-loss, *i.e.*, it should not be repaired regardless of cost, because it did so for purely economic reasons. (Verdict at 13-14, 26)

Nationwide argues bad faith can be found "only if: (i) the car was not repairable; and (ii) Nationwide knew (or recklessly disregarded) that the Jeep was not repairable." (Brief for Appellant at 26) Even if this were a correct statement of the law (it is not), the test is satisfied.

Nationwide "knew (or recklessly disregarded) that the Jeep was not repairable" because: (1) it was declared a *structural* total-loss because the frame was twisted; (2) Nationwide's own BRRP facility was unable to attempt the necessary frame repairs; (3) the vehicle had to be shipped to a non-BRRP facility to attempt the frame repairs; (4) the repairs should have

taken 25 days but lasted four months; and (5) BRRP routine inspections alerted Nationwide to failed repairs. (Verdict at 16; R.1339a; R.1971a-72a; R.2147a-56a; R.2157a-65a; R.888a; R.891a; R.936a-43a; R.1522a-24a; R.772a-73a; R.802a-03a; R.1071a-73a) Finally, eye-witness David Wert confirmed Nationwide's knowledge of the failed repairs. (R.1235a-70a)

Nationwide's trial expert, Constance Foster, admitted that if Nationwide was aware of the failed repairs, but nevertheless permitted the vehicle to be returned with hidden structural repair failures, this would constitute bad faith. (R.2805a)

Notwithstanding the substantial evidence described above, Nationwide argues it should not be found in bad faith because Joffred's total-loss determination was only a "first impression"; he still had to "tear down" the SUV to make a final determination; and the trial court "fails to deal with Joffred's testimony that the vehicle 'was not a total loss.'" (Brief for Appellant at 27-29) This is simply not true. (Verdict at 13)

Joffred testified at trial in this case as follows:

> Berg's Counsel: Was it your opinion at least when I took your deposition that this was a structural total loss?
>
> Joffred: At the appearance of it, yes.

> Berg's Counsel: And that was — you had already gotten into it at that point, right, you had torn it apart? I'm referring to Line 2.
>
> Joffred: Yes.
>
> Berg's Counsel: You said structural total loss and you said the whole body is twisted, right?
>
> Joffred: Correct.
>
> Berg's Counsel: And do you agree with that today, or do you disagree with that today?
>
> Joffred: I agree.

(R.1324a-25a; *see also* 1408a-09a) Moreover, Nationwide's senior management confirmed their understanding that Joffred, their selected appraiser, determined the vehicle was a structural total loss. (R.909-10a, 2097a)

Rather than relying upon Joffred, the assigned appraiser, Nationwide dispatched Witmer to meet with Joffred to discuss his total-loss determination. (Verdict at 13-14) Witmer did not inspect the vehicle, as Joffred had done, or perform a separate appraisal. (Verdict at 14; R.1005-06a) In fact, Witmer admitted he did not even pick up a tool. (*Id.*) Instead, Witmer focused only on "the power equipment and the miles and such on the vehicle to properly evaluate the ACV [Actual Cash Value] of the vehicle

for value." (R.1006a) Witmer concluded that "Nationwide will never recover the difference in salvage value." (Verdict at 14; R.1872a)

Based on these economic reasons, Witmer admits he "overrode" Joffred's structural total-loss appraisal, which was done for purely financial considerations that have no place in a "structural" determination. (R.1005a) Witmer also admits he "instructed" Lindgren to initiate repairs, and, when Joffred advised he did not have the necessary equipment to even attempt the structural repairs, Witmer directed use of a third party. (R.1002-03a) Witmer did not disclose any of this to the Bergs. (R.1065-66a) Notwithstanding Nationwide's assertions to the contrary, this Court already recognized that Nationwide's violations of statutes relating to insurance claims, including the Appraisers Act, would support a finding of bad faith. *See Berg*, 44 A.3d at 1174-75.

Finally, Nationwide asks this Court to ignore the forest for the trees. The best evidence that the SUV could not be repaired is the evidence that, despite Nationwide's and its repair facilities' best efforts, the SUV was returned in an unsafe and uncrashworthy condition. Nationwide had every opportunity, and indeed far more time than usual, to attempt to repair the SUV so that it was back to its original, safe, crashworthy condition, but

Nationwide failed to do so. Instead, Nationwide lied to the Bergs, leading them to believe that their post-repair SUV was as good as new, when in fact the SUV was plagued by numerous defects, including alignment issues causing unusual tire wear, making it unsafe and uncrashworthy, putting them at serious risk of injury and even death if the vehicle were involved in another crash.

Nationwide's failure to properly repair the SUV is the most persuasive evidence in support of the trial court's finding that the SUV was not capable of being properly repaired. The trial court's finding that Nationwide vetoed Joffred's structural total-loss determination, and did so for economic reasons without the Bergs' knowledge, is more than adequately supported by credible evidence in the record.

**b. More than adequate evidence supports the trial court's findings that Nationwide knew the SUV had not been properly repaired and returned to its safe, pre-accident condition**

Nationwide asserts that, as far as it knew, the SUV was repairable and its policyholder had consented to the repairs. (Brief for Appellant at 29-30) Nationwide maintains that, after the failed repairs had been

attempted, "[it] did not hear anything further about the Jeep until November 3, 1997, when the Bergs' attorney first contacted Nationwide." (*Id.* at 30) The trial court properly found that Nationwide's attempts to deny knowledge of the failed repairs are "both contrary to the evidence and illogical." (Verdict at 11) The trial court recognized, based on all the relevant evidence, that Nationwide either knew or should have known that the SUV had faulty repairs. (Rule 1925(a) opinion at 7)

Nationwide's knowledge of the repairs started when Witmer overrode the structural total-loss appraisal. (Verdict at 11) As explained above, Nationwide improperly interjected itself into the appraisal process and made the decisions, without the Bergs' knowledge, that ultimately resulted in the defective and unsafe repairs. Nationwide cannot avoid the consequences of its improper intervention. *See Mohney*, 116 A.3d at 1135 (requiring insurer to communicate with insureds and conduct investigations honestly); *see also* 31 Pa. Code §62.3 (requiring owner's consent before moving vehicle).

Furthermore, Nationwide knew the repairs were dragging on for nearly four months, though they were projected to take only 25 days. (Verdict at 15; R.940-41a, 1010a-11a) The trial court recognized that, during

those four months, Nationwide supervisors performed routine inspections at Lindgren. (Rule 1925(a) opinion at 6-7) The trial court properly credited the testimony of Wert, a former Lindgren employee, that he saw Nationwide employees reviewing the SUV, including when it was nearly complete. (Rule 1925(a) opinion at 7)

Nationwide attempts to discredit the trial court's reliance upon the inspections by arguing the routine inspections "most often" focused only on "the propriety of estimates before repairs began and, in some cases, the repair procedures the shop utilized." (Brief for Appellant at 30) The SUV was at Lindgren for four months, three months longer than expected. Even if Nationwide's routine inspections "most often" did not involve inspections of repairs, Wert confirmed that, with regard to the Bergs' SUV, the inspections did involve looking at the quality of repairs, to the point of Nationwide's personnel being visibly unhappy at what they saw. (R.1245a, 1249a)

Nationwide attempts to counter Wert's damning testimony with word-games, arguing that Wert only testified that Nationwide was "looking at the Jeep when it was nearly completed," not that the inspector was "reviewing the repairs." (Brief for Appellant at 30) The trial court,

however, permissibly understood Wert's testimony, which followed a discussion of a prior review of the repairs, to mean the inspector was "reviewing the repairs" as opposed to simply admiring the SUV.

Only by asking this Court to improperly reweigh the evidence and adopt an understanding of Wert's testimony that is directly contrary to the trial judge's is Nationwide able to contend that insufficient evidence exists in support of the trial court's findings that Nationwide knew the SUV had not been properly repaired when it was returned to the Bergs. Accordingly, more than sufficient evidence exists to uphold the trial court's challenged findings in this respect.

**c. Because Nationwide knew or should have known of faulty repairs from the outset, the trial court properly found that Nationwide did not act reasonably before and after litigation, and the trial court properly concluded that Nationwide's purchase of the vehicle at the end of the Bergs' lease provided additional evidence of bad faith**

Nationwide's third challenge to the trial court's factual findings requires that this Court first accept Nationwide's assertion that it did not know of the faulty repairs. Because, for the reasons explained immediately

above, Nationwide's second challenge cannot succeed, neither can Nationwide's third challenge.

Nationwide claims it "acted reasonably" once it received notice from the Bergs' counsel in November 1997 about the faulty repairs. (Brief for Appellant at 32) Nationwide's conduct was not reasonable; it was deceptive and disingenuous.

Nationwide relies primarily on Bashore's May 19, 1998 letter to the Bergs to demonstrate Nationwide's reasonableness. Bashore wrote:

> [if] *any problems* with the repairs resulted from the . . . accident, Nationwide Insurance will have these problems corrected at a shop of the Bergs' choice. If the vehicle cannot be repaired to pre-accident condition Nationwide with [sic] purchase the vehicle from the Bergs.

(R.1891a) (emphasis added) However, at the time Bashore composed this letter, in addition to what was available to him in the claim file with regard to the vehicle's appraisal and repair history, he also already had at least two experts inspect the SUV, and both advised him of substantial problems with the repairs. (R.1809-10a, 1970a.) In fact, Potosnak reported directly to Bashore, nearly three weeks earlier, that the defects were so substantial that he was trying to convince Lindgren to buy the SUV. (R.1808-10a) When

Lindgren refused, Nationwide pretended it had no knowledge of any defects or any need to remove the SUV from the road. (R.1808a-10a, 1891a)

Nationwide also maintains:

> [I]t was not until July 6, 1998 that Plaintiffs' counsel, now in full litigation mode, agreed that Nationwide could perform an 'initial inspection' of the Berg's [sic] vehicle.

(Brief for Appellant at 33) This is false. As noted above, the Bergs made the vehicle available to Nationwide for inspections by Potosnak on April 28, 1998 and Shaw on May 16, 1998. (R.1809-10a, 1967a-70a)

Nationwide argues its conduct was reasonable because it bought the SUV in December 1998, before a "full, independent inspection," in order to "preserve the evidence, also fulfilling all possible obligations it had under the Berg's insurance policy." (Brief for Appellant at 33) However, Nationwide cannot explain why it did not purchase the SUV eight months earlier, when Potosnak found that the defects were so substantial that he sought to have Lindgren buy the SUV. Instead, Nationwide waited until it had a self-interest to purchase the SUV. By waiting, Nationwide benefited from the Bergs' continuing to make all the lease payments; every lease payment the Bergs made further reduced the balance owing for Nationwide to purchase the vehicle.

Far from behaving reasonably, the trial court found that Nationwide pretended it did not know about the repair defects, or that the SUV should be taken off the road, and — in utter disregard for the safety and welfare of its insureds — failed even to disclose its findings about the defects to the Bergs, thereby putting them at risk of serious bodily injury or death. This is not reasonable; it is bad faith. *See Mohney*, 116 A.3d at 1131 (failing to communicate honestly to an insured is bad faith).

The trial court's finding that Nationwide's decision to "total" the SUV at the conclusion of the Bergs' lease, rather than after the Potosnak inspection, was evidence of Nationwide's bad faith, is more than adequately supported by the evidence.

**d. The trial court properly found that Nationwide engaged in additional conduct amounting to bad faith during the course of this litigation**

Binding Pennsylvania caselaw confirms the trial court can consider litigation conduct as evidence of an insurer's bad faith. This Court has explained that "the broad language of section 8371 was designed to remedy all instances of bad faith conduct by an insurer, whether occurring before, during or after litigation." *O'Donnell* v. *Allstate Ins. Co.*, 734 A.2d

901, 906 (Pa. Super. Ct. 1999). This Court further explained in *Hollock* that the trial court may consider "conduct engaged in during the litigation of the bad faith claim that far exceeded mere discovery matters" such as attempts "to undermine the truth finding process." *Hollock*, 842 A.2d at 415.

As the trial court in this case recognized, it is impossible to explain Nationwide's conduct in this litigation without concluding that Nationwide was applying the Pennro Litigation Strategy to claims such as the Bergs': two decades of litigation; $3,000,000 in attorneys' fees; concealed photographs; facility records destroyed or hidden; improper redactions to hide damning evidence; the need for multiple court orders and sanctions to obtain routine evidence (still not produced); and six years of appellate review resulting from Nationwide's improperly obtaining a directed verdict by misleading the trial court, all relating to a $25,000 claim dispute? There is no other rational explanation for Nationwide's conduct other than its documented strategy to send a message that it is tough.

Additional evidence that the Pennro Litigation Strategy was applied here is derived from the individual Nationwide assigned to manage the litigation in 1998, David Cole. Cole admits he was familiar with the litigation strategy, that he was in charge of all of Nationwide's in-house

attorneys in Pennsylvania when the strategy was first implemented in 1993, that he approved all invoices paid to retained counsel during the years he managed the file from 1998-2002, and that he supervised retained-counsel. (R.2079a) Who better to apply the strategy than Cole? When asked whether he knew this was going to be a "knock out, drag out case" because it was assigned to him after the Potosnak Report was entered into the claim file, Cole asserted privilege (R.2083a), as he did when asked whether he ever made "any attempt to resolve this case from the time it was assigned to him in 1998, through 2002." (R.2083a-84a)

Nationwide attempts to shift the focus to the Bergs, arguing this litigation lasted "a very long time" because "counsel spent fourteen months pursuing a national class action and five full years were taken up by Plaintiffs' prior appeal." (Brief for Appellant at 24) First, discovery was exchanged and motions filed during the initial 14 months of litigation. (R.662a-63a) Second, instead of settling the case after the Potosnak inspection, Nationwide chose to file preliminary objections to the first complaint, which contained no class allegations. Third, Nationwide reasserted objections to subsequent complaints that had already been asserted and overruled, unnecessarily extending the pleadings stage.

Fourth, Nationwide's assertion that the Bergs are to blame for the "full five years" of appellate review is meritless inasmuch as this Court specifically found that Nationwide caused the prior appeal, by confusing the prior trial judge to erroneously adopt a novel legal theory in conflict with Supreme Court precedent. *See Berg*, 44 A.3d at 1171-72.

In any event, Nationwide misses the bigger point. The vehicle should never have been placed back onto the highways. Unequivocal evidence exists confirming Nationwide knew the structural repairs it required failed. (R.1809-10a). Instead of purchasing the vehicle, Nationwide chose to force litigation. It thereafter feigned ignorance and insisted upon repeated inspections to determine "if" the SUV had "any" repair defects. Even today, Nationwide cites specific items of evidence to its liking as proof of its "good intentions." (Brief for Appellant at 11, 55) But this case does not concern Nationwide's ability to *make* promises. What matters is whether it *fulfills* those promises. In the end, it is Nationwide's conduct following the Potosnak inspection that proves the emptiness of all of Nationwide's prior promises.

Nationwide argues it did not undermine the truth finding process by secreting relevant, inculpatory evidence. The trial court, correctly, disagreed, as the following evidence of record makes clear.

*Potosnak Report*. Nationwide argues its treatment of the Potosnak report is not evidence of bad faith, because the Bergs knew about the inspection; it redacted the report from the Bergs in good faith; and the Bergs subsequently learned about Potosnak's findings in a deposition years later. (Brief for Appellant at 44-45) Nationwide is not only incorrect, but again it misses the point.

Nationwide is obligated "to deal with its insured 'on a fair and frank basis, and at all times, to act in good faith.'" *Berg*, 44 A.3d at 1170. Although the Bergs knew Potosnak inspected the SUV, Nationwide purposefully withheld his findings from the Bergs. Meanwhile, Bashore's May 19th letter misled the Bergs into thinking Potosnak did not find any defects. The subsequent oral summary during a discovery deposition years later, where Potosnak deceptively denies, then admits, seeing the repairs, does not absolve Nationwide. To the contrary, Potosnak's deposition testimony confirms Nationwide's deceit. (R.4756a)

Finally, Nationwide cannot credibly argue its redaction of Potosnak's report was in good faith. Bashore admitted the report was an ordinary claim-file entry, from Potosnak (a non-lawyer) to him (a non-lawyer). (R.1191-94a)

*Photographs of the SUV*. Joffred sent numerous photographs of the SUV to Nationwide, before and after the tear-down. (R.1320-21a; 1874a) Photographs are a centerpiece of the BRRP. (R.2162a) Despite numerous court orders, Nationwide never produced any photograph of the vehicle's twisted frame. In their absence, Nationwide argues, contrary to Joffred's testimony, that the frame was "repairable." The trial court appropriately held Nationwide accountable for hiding the damning photos that admittedly existed.

*September 10, 1996 Estimate*. The trial court had ample evidence to conclude there was an initial appraisal dated September 10, 1996 declaring the SUV a total-loss. First, the law required there be one. (R.3898a); 31 Pa. Code §62.3(a)(2) (must be signed/submitted simultaneously to insurer and insured). Second, a high-ranking Nationwide representative admitted the BRRP procedures require there to be such an appraisal. (R.924a-25a) Third, Nationwide's own claim-log confirms that Lindgren was sending the

September 10, 1996 appraisal. (R.1874a) Fourth, Joffred, the author of the September 10, 1996 appraisal, testified about the existence of that appraisal, that he had a copy but it went missing, and that Nationwide should have had a copy also. (R.1335-37a, 1321-22a, 1402-03a)

Nationwide is obligated by law to maintain its claim file. 31 Pa. Code §146.3. Yet Nationwide posits that the file never contained the photographs of the vehicle's twisted frame, which gave rise to a total-loss appraisal that was overridden because that frame supposedly was repairable. What happened to the "control log" and re-inspection reports? The Bergs produced form copies of these documents (R.2155a), yet Nationwide never explained why the forms used for the Bergs' vehicle were not produced. Understandably, the trial court found Nationwide's attempt to explain away the absence of evidence, which others testified existed, to be unbelievable. Regardless, as reflected in the claim file, Joffred did declare the SUV a structural total-loss on September 10, 1996.

*Nationwide's Disposal of the SUV*. Nationwide asserts that, when it disposed of the SUV, it had permission from Judge Stallone (the prior trial judge) to do so. As Judge Sprecher explained, that does not mean Nationwide's initial, forced purchase and its motive in disposing of the

SUV are inconsistent with the conclusion that Nationwide engaged in bad faith. (Rule 1925(a) opinion at 10) If Nationwide believed that the continued availability of the SUV helped Nationwide's defense, Nationwide would have had every reason and the financial wherewithal to maintain the SUV as evidence. Nevertheless, Nationwide elected not to do so.

**e. Nationwide's improper attacks on Judge Sprecher's impartiality and integrity amount to nothing more than the desperate musings of a disgruntled litigant**

Because Judge Sprecher found Nationwide liable for insurance bad faith, Nationwide hypothesizes that he must be biased against insurance companies and must have had his mind made up from the beginning. Yet Judge Sprecher's verdict, containing 90 specific and well-supported factual findings, and his subsequent Rule 1925(a) opinion, both unquestionably reveal that the verdict and judgment in this case are based solidly on the evidence and on governing law. Lawbreakers such as Nationwide do not deserve to be coddled, and the harsh language Judge Sprecher directed to Nationwide is surely appropriate under the circumstances of this case,

especially given just how unrepentant Nationwide's Brief for Appellant reveals Nationwide to be.

Nationwide may be content to blame the plaintiffs, their lawyers, and the trial judge for the mess of Nationwide's own making from which Nationwide now seeks this Court's intervention to extract itself, but the evidence in this case demonstrates, as the trial court's decision resoundingly confirms, that it is Nationwide itself that is to blame.

An insurer's refusal to accept a total-loss appraisal so rarely ends up in litigation because it simply is not economically feasible for an insured to obtain representation. Nationwide stands before this Court as a repeat, serial violator of Pennsylvania's bad faith law. In addition to rejecting Nationwide's appeal on the merits, this Court should strongly disapprove of Nationwide's personal attacks on the trial judge, who, as the record reflects, was merely performing his judicial obligations as best as he could in this unusual case with an inordinately large record revealing instance after instance of insurer malfeasance and misconduct.

### B. Trial Court's Decision To Award Punitive Damages, And The Amount Of Punitive Damages Awarded, Both Withstand Scrutiny Under Pennsylvania Law And Federal Due Process Principles

Nationwide does not argue on appeal that, if the trial court's factual findings are upheld, clear and convincing evidence does not exist in support of the bad faith verdict. Rather, Nationwide argues that if the trial court's findings are rejected on a wholesale basis, then the bad faith verdict should be overturned.

As this Court has repeatedly held, once a verdict of bad faith has been entered, it is within the trial court's discretion to impose punitive damages, without any further need for the plaintiff to establish additional grounds for imposing punitive damages. *See Grossi*, 79 A.3d at 1156 ("no additional showing beyond establishing bad faith conduct under section 8371 is required to permit the imposition of punitive damages"); *Hollock*, 842 A.2d at 418-19 (same).

Citing *Kirkbride* v. *Lisbon Contractors, Inc.*, 555 A.2d 800, 803 (Pa. 1989), Nationwide asserts that the trial court failed to consider the Pennsylvania standards for imposing punitive damages. Nationwide's assertion is laughable. The trial court found Nationwide's conduct highly

reprehensible and that it was a repeat, serial bad faith offender; that Nationwide subjected its insureds and their family to a substantial risk of serious injury or death; and that given Nationwide's extreme wealth and unapologetic demeanor, a meaningful punitive damages award was needed to have any punitive effect.

In *Hollock*, this Court sitting *en banc* held that the compensatory damages, against which an award of punitive damages on a bad faith claim should be compared, include attorneys' fees awarded to the prevailing plaintiff. *See* 842 A.2d at 421-22. Here, the trial court awarded $18 million in punitive damages, having a six-to-one ratio with the compensatory damage award. In *Hollock* itself, this Court upheld a punitive damage award that was ten times greater than the compensatory damage award. *Id.* at 422. More recently, in *Grossi*, 79 A.3d at 1160, this Court upheld a punitive damage award that was four to five times the compensatory award. And in *Bombar* v. *West Am. Ins. Co.*, 932 A.2d 78, 84 (Pa. Super. Ct. 2007), this Court affirmed a punitive award that was four times the compensatory award.

Outside the realm of insurance bad faith, in *Daniel* v. *Wyeth Pharmaceuticals, Inc.*, 15 A.3d 909 (Pa. Super. Ct. 2011), this Court reinstated

a punitive award of $28 million, slightly more than five times larger than the compensatory award. *See* Dan Packel, *Wyeth Asks Pa. High Court To Drop $8.6M Prempro Punitives*, available online at <www.law360.com/articles/372441/wyeth-asks-pa-high-court-to-drop-8-6m-prempro-punitives> Soon thereafter, in *Kendall* v. *Wyeth*, 2012 WL 112609 (Pa. Super. Ct. 2012) (non-precedential), this Court upheld a $28 million punitive award on $6.3 million of compensatory damages, representing a ratio between four- and five-to-one.

In *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 460 (1993), the U.S. Supreme Court recognized that "[t]aking account of the potential harm that might result from the defendant's conduct in calculating punitive damages" is appropriate when considering an excessiveness challenge to a punitive damage award. In *TXO*, the Court upheld as constitutional a punitive damage award that was 526 times as large as the actual damage award given the vastly expensive potential harm to which the defendant had subjected the plaintiff. *Id.* at 459.

The potential harm to which Nationwide unnecessarily subjected the Bergs and their family in this case was huge. In October 2014, this Court affirmed a jury verdict in favor of the driver and passengers injured in the

rollover of a rental van where the steering wheel locked while being driven on the highway due to the negligence of an automobile repair facility. *See Lewis* v. *Toyota Motor Corp.*, No 1642 EDA 2013 (Pa. Super. Ct. Oct. 2, 2014) (non-precedential) (available at <www.pacourts.us/assets/opinions/Superior/out/J-A06035-14m%20-%201019631132674580.pdf>). This Court affirmed the jury's award of more than $11 million in favor of the driver, who did not suffer life-threatening injuries, and the jury's award of more than $4 million in favor of the other passengers, whose injuries were even less serious than the driver's. Thus, in *Lewis*, the total compensatory damages that this Court upheld for an automobile accident resulting in injuries stemming from improperly performed vehicle repairs was more than $15 million.

Two other appeals currently pending before this Court, *Cancelleri* v. *Ford Motor Co.*, 267 MDA 2015 (Pa. Super. Ct.) (pending), and *Martinez* v. *Am. Honda Motor Co.*, 445 EDA 2015 (Pa. Super. Ct.) (pending), demonstrate that the uncrashworthy nature of a motor vehicle can, not surprisingly, render the occupants quadriplegic. In *Cancelleri*, the jury returned a verdict of $5.9 million in favor of the driver and his wife, both over 80 years old. And in *Martinez*, the jury awarded $55 million to a 57 year old man and his

wife after the man was rendered paralyzed due to the uncrashworthy nature of his motor vehicle.

What these actual jury verdicts in relevant cases demonstrate is that, when the potential damages to the Bergs and their family resulting from the uncrashworthy nature of their SUV, which exposed them to a significant (but thankfully unrealized) risk of serious injury or death had their vehicle been involved in another accident, are taken into account, the ratio between the potential harm and the trial court's punitive damage award is far smaller, perhaps less than one-to-one.

Nationwide urges this Court to view this case as involving a compensatory award of less than $25,000 and a punitive award of $18 million, thereby producing a 720 to 1 ratio. If that were the proper analysis, it would be impossible to fashion an effective penalty to deter Nationwide from its unlawful strategy. It would also invite Nationwide, and other insurers, to continue returning vehicles with hidden structural repair failures to Pennsylvania's highways.

Instead, when this Court properly considers the actual harm caused, which necessarily includes the $3 million in attorneys' fees Nationwide forced to be incurred to remedy its wrongdoing, and the potential damage

(serious personal injury or death) to which Nationwide intentionally subjected the Bergs, the trial court's punitive award unquestionably survives federal due process scrutiny and fits comfortably within the range of what this Court has previously reviewed and upheld.

### C. The Trial Court Did Not Abuse Its Discretion In Deciding To Award Counsel Fees Or In Determining The Amount To Award

Pennsylvania Rule of Civil Procedure 1717 is titled "Counsel Fees," and it provides in full:

> In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors:
>
> (1) the time and effort reasonably expended by the attorney in the litigation;
>
> (2) the quality of the services rendered;
>
> (3) the results achieved and benefits conferred upon the class or upon the public;
>
> (4) the magnitude, complexity and uniqueness of the litigation; and
>
> (5) whether the receipt of a fee was contingent on success.

Pa. R. Civ. P. 1717.

The trial court's "ultimate responsibility" in awarding attorney fees is to be "reasonable." *Birth Ctr.* v. *St. Paul Companies, Inc.*., 727 A.2d 1144, 1161 (Pa. Super. Ct. 1999). In doing so, a court should begin by multiplying the actual number of hours spent by a reasonable rate, the "lodestar," while properly also considering the other Rule 1717 factors. *Id.* at 1160-61.

The trial court did exactly that and explicitly considered the actual hours expended, together with a reasonable rate for this case:

> [T]his court notes that plaintiffs' attorneys put forth 5,689 hours in attorney time. Plaintiffs requested an hourly rate of $525.00 based on the length and complexity of this litigation, the contingent nature of counsel's representation, defendant's aggressive litigation tactics, and the results achieved through the litigation. This amount would merit a legal fees award of $2,986,908.75 before costs. Plaintiffs' costs in the case *sub judice* were $82,942.06; therefore, this court awarded counsel fees of $2,917,058.94, which amounts to an hourly rate of $512.00 for 5,689 hours. This is almost $70,000.00 less than the total fee requested by plaintiffs, and plaintiffs' fees and expenses and advancement of costs are far from over.

(Rule 1925(a) opinion at 18)

Nationwide simply ignores the trial court's analysis, which considers each of the Rule 1717 factors and incorporates them into the lodestar. Significantly, "the degree of success is the critical consideration in determining an appropriate fee award." *Logan* v. *Marks*, 704 A.2d 671, 674

(Pa. Super. Ct. 1997). In that regard, plaintiffs' counsel successfully guided this case over 17 years, through extensive and complex discovery (including concealment of evidence, enhancing the contingency fee risk), a bifurcated jury trial, appellate proceedings resulting in a precedent-setting Superior Court opinion and, finally, a bench trial leading to the vindication of the Bergs' rights and a substantial monetary award. *See Signora* v. *Liberty Travel, Inc.*, 886 A.2d 284, 293 (Pa. Super. Ct. 2005) (considering "unending defense challenges" in awarding fee). Additionally, the efforts of plaintiffs' counsel benefited the public by prompting a precedential appellate court opinion clarifying the scope of the bad faith statute in Pennsylvania and making clear that violating Pennsylvania's Appraisers Act will support a finding of insurer bad faith, thereby advancing and reinforcing safeguards available to the motoring public.

Finally, the amount awarded is no more than the amount Nationwide willingly paid its attorneys, who were paid timely and without risk, over seventeen years. The Bergs' attorneys have worked tirelessly, on a contingency-fee basis, after being retained before November 3, 1997, providing over 18 years of legal services. Their quest for recovery and finality continues.

Ignoring the trial court's analysis, Nationwide erroneously argues the trial court simply awarded to the Bergs the same amount Nationwide paid its attorneys. In actuality, however, the court explained that the "amount of defendant's attorney fees was [merely] one reason for its award to plaintiff." (Rule 1925(a) opinion at 17) This Court approved reference to the time spent by an adversary tenaciously litigating a case in determining the prevailing party's fee award in *Krebs* v. *United Ref. Co.*, 893 A.2d 776 (Pa. Super. Ct. 2006). In *Krebs*, this Court warned that a party "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the other party in response." *Id.* at 793 n.26 (internal quotations omitted).

This Court has recognized the dual purpose of fee shifting provisions in remedial statutes such as the bad faith statute: "to encourage potential plaintiffs to seek vindication of important rights and to deter defendants from conduct violating those rights." *Id.* at 788 (emphasis added). In *Krebs*, this Court held that a fee award should "promote the purposes of the specific statute involved." *Id.* The purpose of the bad faith act is to remedy instances of insurer bad faith, including "tenacious" litigation conduct by an insurer to avoid paying legitimate claims. *See Hollock*, 842 A.2d at 414-

16. Therefore, the trial court's reference to Nationwide's counsel fees, as an objective measure of the reasonableness of the Bergs' counsel's hours and rate, is not only proper, but also promotes the purpose of the bad faith act.

Nationwide audaciously demands the Bergs' fee award be reduced due to the Bergs' alleged "overlawyering," despite a bad faith award based, in part, on Nationwide's own litigation misconduct. This is precisely the type of hypocrisy this Court chastised in *Krebs*, which recognized that "tenacious" litigation tactics by an adversary results in increased fees on both sides. The trial court articulated its findings as to the magnitude, complexity, and uniqueness of this litigation due to Nationwide's overly aggressive tactics "in this impossible enduring case." (Verdict at 31)

Contrary to Nationwide's representations, the 5,689 hours identified in the Bergs' fee petition, and allowed by the trial court, do not include time spent pursuing class action status. (R.3906a, 3921a, 4261a-4441a (reflecting a total of 6,766 hours))

Moreover, this Court recognized the Bergs' two prior trips to the appellate courts, both of which were successful, were necessitated by Nationwide's misleading the trial court into "adopt[ing] . . . as its legal

conclusion [a] novel theory of statutory interpretation" in conflict with Supreme Court precedent. *Berg*, 44 A.3d at 1172.

Billing records need only be detailed enough to allow a neutral judge to make a fair evaluation of the time expended, the nature and the need for the service, and the reasonable fee to be allowed. *See Stremple* v. *Peake*, 2009 WL 174170, *5 (W.D. Pa. Jan. 22, 2009); *see also Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983); *id.* at 441 (Burger, C.J., concurring) ("the party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed").

Here, the trial court reviewed 160 pages of plaintiffs' counsels' billing records, which detailed the date, nature and need for the hours worked in prosecuting this case. (R.3921a, 4280a-441a). Reconstructing time records that are reasonably accurate is an accepted practice. *See Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 109 (3d Cir. 1976); *Anesthesia Servs. & Prods.* v. *Augustine Temperature Mgmt., LLC*, 2012 WL 4863110, at *3-*4 (E.D. Pa. Oct. 15, 2012). The detail in the Bergs' attorneys' billing records more than adequately supports the trial court's award. (R.4280-441a)

For these reasons, the trial court was well within its discretion in deciding to award attorneys' fees in favor of plaintiffs that totaled, when combined with costs incurred, $3 million.

### D. Plaintiffs Disclaim Any Entitlement To Statutory Prejudgment Interest On The Trial Court's Award Of Attorneys' Fees Or Punitive Damages

Based on the plain language of 42 Pa. Cons. Stat. Ann. §8371, plaintiffs agree with Nationwide that an award of statutory prejudgment interest on the trial court's attorneys' fee and punitive damages awards is not permitted. Accordingly, plaintiffs hereby irrevocably disclaim any entitlement to statutory prejudgment interest on the trial court's attorneys' fee and punitive damages awards, making it unnecessary for this Court to resolve the fourth question presented on appeal.

## VII. CONCLUSION

For all of the foregoing reasons, this Court should affirm the trial court's judgment in favor of plaintiffs finding Nationwide liable for insurance bad faith under 42 Pa. Cons. Stat. Ann. §8371, awarding attorneys' fees and costs, and awarding punitive damages.

Respectfully submitted,

Dated: November 10, 2015

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**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitations of Pa. R. App. P. 2135(a)(1) because this brief contains 13,941 words excluding the parts of the brief exempted by Pa. R. App. P. 2135(b).

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## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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