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IN THE SUPREME COURT OF PENNSYLVANIA

DOCKET NO. 33 MAP 2019

DANIEL BERG, INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF SHARON BERG A/K/A SHERYL BERG,
Appellant

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, INC.,
Appellee

BRIEF OF AMICUS CURIAE THE PENNSYLVANIA ASSOCIATION FOR JUSTICE

On Appeal from the Order of the Superior Court dated June 5, 2018 at No. 713 MDA 2015, Reconsideration denied August 8, 2018, Vacating the Judgment of the Berks County Court of Common Pleas, Civil Division, in favor of Plaintiffs-Appellants, entered April 21, 2015 at No. 98-813 and Remanding for Entry of Judgment in Favor of Defendant-Appellee Nationwide Mutual Insurance Co., Inc.

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I. STATEMENT OF INTEREST

The Pennsylvania Association for Justice ("PAJ") is a non-profit organization with a membership of 2,500 men and women of the trial bar of the Commonwealth of Pennsylvania. For over 50 years, PAJ has promoted the rights of individual citizens by advocating unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary – both federal and state. The organization opposes, in any format, special privileges for any individual, group or entity. Through its *Amicus Curiae* Committee, PAJ strives to maintain a high profile in the Courts of the Commonwealth by promoting through advocacy the rights of individuals and the goals of its membership. In this respect, PAJ has an abiding and immediate interest in the development of objectively sound case law under Pennsylvania's bad faith insurance statute, 42 Pa. C.S. § 8371.[1] No one other than the *amicus curiae*, its members or counsel paid or authored, in whole or in part, for the preparation of this *amicus curiae* brief.

II. ARGUMENT

PAJ respectfully supports Mr. Berg and the late Mrs. Berg's (the "Bergs"), efforts to reverse the Superior Court's decision in this case. Specifically, the first two

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[1] To that end PAJ has served as *amicus curiae* in cases related to Pennsylvania's insurance bad faith statute for the better part of the last 15 years, most recently in *Rancosky v. Washington Nat'l. Ins. Co.,* 642 Pa. 153, 170 A.3d 364, 365 (2017) (defining bad faith for purposes of the statute and adopting Pennsylvania Superior Court's definition of bad faith found in *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 437 Pa. Super. 108, 649 A.2d 680 (1994)).

issues this Court allowed appeal. *See Berg v. Nationwide Mut. Ins. Co., Inc.*, ___ Pa. ___, 205 A.3d 318 (2018).

In 2003, this Court put to rest the question of whether a party had a right to trial by jury in insurance bad faith cases brought pursuant to 42 Pa. C.S. § 8371 ("8371") – they do not. *Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 282, 824 A.2d 1153, 1161 (2003) (no constitutional or statutory right to trial by jury for a claim brought pursuant to 8371). Since that time, the Superior Court of Pennsylvania has struggled in its appellate review of 8371 cases choosing at once to acknowledge that it owes deference to the factual findings of the trial courts across the Commonwealth, while simultaneously disregarding clear, convincing and competent evidence found by the trial court (sitting as fact finder without a jury) and substituting its own judgment about the credibility, quality and quantum of evidence previously accepted by the trial court. In so doing, the Superior Court's decisions in 8371 cases have become disposition driven.

This case is no different and represents the culmination of the Superior Court's conflicting, result oriented jurisprudence related to statutory insurance bad faith cases in Pennsylvania.

A. The Superior Court's Standard Of Review As An Error Correcting Court

There can be no serious challenge to the fact that the Pennsylvania Superior Court, as an intermediate appellate court, is a court of error correction. *See In re*

M.P., 204 A.3d 976, 986 (Pa. Super. 2019) *quoting Com. v. Montini*, 712 A.2d 761, 769, (Pa. Super. 1998). As such ". . . it is not the prerogative of an intermediate appellate court to enunciate new precepts of law or to expand existing legal doctrines. Such is a province reserved to the Supreme Court." *Id. quoting Moses v. T.N.T. Red Star Exp.*, 725 A.2d 792, 801 (Pa. Super. 1999). One of the legal doctrines that an intermediate appellate court is prohibited from expanding is its own (or any appellate court's) standard of review as an error correcting court when reviewing the decision of a trial court sitting without a jury in matters like insurance bad faith cases or indeed any civil or criminal matters which require the issuance of findings of fact by the trial court, including, but not limited to: bench trials generally; proceedings to terminate parental rights, or claims under the Pennsylvania Human Relations Act, 3 P.S. §§ 951-962.2.

The universally accepted standard of review for an appellate court, particularly an intermediate appellate court, when reviewing a decision of a trial court is that of an "abuse of discretion" standard. That standard has been enumerated by both this Court and the Superior Court on countless occasions and is best summarized from this Court's decision in *In re Adoption of S.P.*, 616 Pa. 309, 47 A.3d 817 (2011):

> If the factual findings are supported, appellate courts review to determine if the trial court made an error of law or abused its discretion. *Id.*; *R.I.S.*, 36 A.3d at 572. As has been often stated, an abuse of discretion does not result merely because the reviewing court might have reached a different conclusion. *Id.*; *see also Samuel-Bassett v. Kia Motors America, Inc.*, 613 Pa. 371, 34

> A.3d 1, 51 (Pa. 2011); *Christianson v. Ely*, 575 Pa. 647, 838 A.2d 630, 634 (Pa. 2003). Instead, a decision may be reversed for an abuse of discretion only upon demonstration of manifest unreasonableness, partiality, prejudice, bias, or ill-will. *Id.*

Id. at 825 *citing In re: R.J.T.*, 608 Pa. 9, 9 A.3d 1179, 1190 (Pa. 2010). In fact, in her concurring opinion in *In re R.I.S.*, Madame Justice Todd concluded:

> **Indeed, it is difficult to understand how a trial court, in making factual findings, could commit an error of law.** Instead, I favor simply adopting the standard of review as set forth by our Court last year in *In re R.J.T.*, 608 Pa. 9, 26-28, 9 A.3d 1179, 1190 (2010) . . .

Id. at 581 (emphasis added; repetitive quote from *R.J.T.* omitted).

The Superior Court itself, in the context of statutory bad faith cases like this one, has repeatedly announced the same standard:

> All of Erie's questions on appeal challenge the trial court's findings and conclusions following a non-jury trial. **Our review in a non-jury case is limited to "whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in the application of law."** *Bonenberger v. Nationwide Mut. Ins. Co.*, 2002 PA Super 14, 791 A.2d 378, 380 (Pa. Super. 2002). 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 the trial.** *See Terletsky*, 649 A.2d at 686. **It is not the role of an appellate court to pass on the credibility of witnesses; hence we will not substitute our judgment for that of the factfinder.** *See Bonenberger*, 791 A.2d at 381. **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."** *Bergman v. United Servs. Auto. Ass'n*, 1999 PA Super 300, 742 A.2d 1101, 1104 (Pa. Super. 1999).

Hollock v. Erie Ins. Exchange, 842 A.2d 409, 413-14 (Pa. Super. 2004) *alloc. granted* 586 Pa. 262, 893 A.2d 66 (2005) *app. denied* 588 Pa. 231, 903 A.2d 1185 (2006) (emphasis added). In fact, in this case the majority recognized:

> The following standard governs our review of the trial court's verdict:
>
> > Our review in a nonjury case is limited to **whether the findings of the trial court are supported by competent evidence and whether the trial court committed error in the application of law.** 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 nonjury verdict only if the court's findings are unsupported by competent evidence or the court committed legal error that affected the outcome of the trial. It is not the role of an appellate court to pass on the credibility of witnesses; hence we 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.**
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> *Mohney v. Am. Gen. Life Ins. Co.*, 2015 PA Super 113, 116 A.3d 1123, 1130, (Pa. Super. 2015), *appeal denied*, 634 Pa. 749, 130 A.3d 1291 (Pa. 2015). Because Plaintiffs prevailed before the trial court, we view the evidence and all reasonable inferences therefrom in a light most favorable to Plaintiffs. *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 61 (Pa. 1989).

Berg v. Nationwide Mut. Ins., Co., 189 A.3d 1030, 1036-37 (Pa. Super. 2015) (emphasis added). *See also Rancosky v. Washington Nat'l. Ins. Co.*, 130 A.3d 79, 92 (Pa. Super. 2015) (same, *quoting Hollock*, 842 A.2d at 413-14), *aff'd and remanded* 642 Pa. 153, 170 A.3d 364 (2017).

The exposition of the cases above make clear that when an appellate court reviews the findings of a trial-court sitting as fact finder without a jury, that court's standard of review is profoundly circumscribed and cabined by the three following limitations:

1. review is limited to whether the trial court's findings are supported by competent evidence and whether the trial court committed an error of law;

2. the trial court's findings of fact must be granted the same weight and effect as that of a jury verdict and, thus, may only be disturbed if the court's findings are unsupported by competent evidence or the court committed legal error that affected the outcome of the trial; and

3. the test to be applied on appeal is not whether the appellate court would have reached the same result based upon 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.

S.P., 47 A.3d at 825; *R.J.T.*, 9 A.3d at 1190; *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 61 (1989); *Berg*, 189 A.3d at 1036-37; *Rancosky*, 130 A.3d at 92; *Hollock*, 842 A.2d at 413 -14; *Bonenberger*, 791 A.2d at 380-81; *Bergman*, 742 A.2d at1104; *Terletsky v. Prudential Property & Casualty Ins. Co.*, 649 A.2d 680, 686 (Pa. Super. 1994). In fact, these limitations on appellate review of judicial findings have been in place for nearly a century. *See In re Dible's Estate*, 316 Pa. 553, 175 A. 538, 554

(1934) (holding that on appeal of a chancellor's refusal to issue an *devisavit vel non*, ". . . the question for the appellate court to decide is not whether it would have reached the same result had it been acting as chancellor, but rather whether a judicial mind, on due consideration of the evidence as a whole, could reasonably have reached the conclusion of the chancellor[.]" (Citations omitted)).

Finally, and just as significantly, on appellate review, the reviewing court must view the evidence and all reasonable inferences therefrom in the light most favorable to the verdict winners. *Rizzo*, 555 A.2d at 61.

In statutory insurance bad faith cases like this one, the proper application of the standard of review by any appellate court takes on exceptional significance since no insured who brings a bad faith claim against her insurer has any right to trial by jury. *Mishoe*, 824 A.2d at 1161 (no constitutional or statutory right to trial by jury for a claim brought pursuant to 8371). Accordingly, when an insured prevails over her insurer in a bad faith case and obtains a judgment after the bench trial, the reviewing court must only sparingly use its power to vacate and overturn the judgment and verdict of the trial court. And must do so in only the most egregious cases where the trial court committed reversible error. If the reviewing appellate court is not held to this high standard, no verdict winner in an insurance bad faith case (neither insured nor insurer) can have any confidence that such a verdict will be upheld on appeal. Based upon the near century old standard for appellate review of bench trials it is clear

that such a result was never intended for the judgment winner of any bench trial and specifically bad faith cases when this Court decided *Mishoe* some 16 years ago.

To put it plainly: the Superior Court is an error correcting court and as such should not reverse the findings of a trial court sitting without a jury unless the trial court committed an error of law. To do otherwise would transform the Superior Court into something this Court has said it is not. *See Commonwealth v. Dugger,* 506 Pa. 537, 486 A.2d 382, 386 (1985) ("The formal purpose of the Superior Court is to maintain and effectuate the decisional law of this Court as faithfully as possible.")

B. The Superior Court Abused Its Discretion In Vacating The Judgement Of The Trial Court And Remanding For Entry Of Judgment In Favor Of The Verdict Loser

The Superior Court majority in *Berg*, did not merely vacate the judgment of the trial court in favor of Plaintiffs-Appellants, the Bergs, it went a step further and remanded the case to the Court of Common Pleas of Berks County – not for a new trial – but for the entry of judgment in favor of the verdict loser, Defendant-Appellee, Nationwide. Could any other holding be a more quintessential example of an appellate court substituting its judgment for that of the trial court? *See Rizzo*, 555 A.2d at 61. Literally, the Superior Court disregarded the trial court's findings, overturned its judgment and finally supplanted its own judgment for that of the trial court by remanding the case with instructions to the trial court to enter the exact

opposite judgment the same trial court had entered after a verdict in a bench trial. *Berg*, 189 A.3d at 1061.

While the *Berg* majority paid "lip service" to the proper standard of appellate review discussed above, thereafter it quizzically concluded:

> We are cognizant of the standard governing our review, and we have not reached our decision lightly. We understand that the trial court, as fact finder, was free to choose which evidence to believe and disbelieve. **Likewise, we understand that our standard of review requires us to defer to findings supported in the record and draw reasonable inferences in favor of Plaintiffs.** Nonetheless, our case law provides that bad faith claims are fact specific (*Condio*, 899 A.2d at 1143), must be proven by clear and convincing evidence, and that the fact finder must consider "all of the evidence available" (*Berg II*, 44 A.3d at 1179). After an exhaustive review of the very large record in this case, we believe we have no choice but to vacate the judgment. We have quoted extensively from the record in an effort to provide full context for our decision. **We observe that the trial court's opinions, while very lengthy, cite infrequently to the record.**

Id. 189 A.3d at 1060 (emphasis added). Of course, the *Berg* majority's statement above is the preeminent example of a disposition-driven decision, which only five months ago the Superior Court itself recognized is impermissible. *M.P.*, 204 A.3d at 986 ("We note that this ruling, like all of our rulings, may not be disposition-driven.")

In the present case, while stating that the fact finder was free to choose what evidence to believe or disbelieve, the majority then says that because bad faith claims are fact intensive and because the majority cited to the record more frequently than did the trial court, its factual findings are "more correct" than that of the trial court.

While no one will dispute that bad faith claims are "fact intensive," as the Superior Court said in both *Condio v. Erie Ins. Exch.*, 899 A.2d 1136, 1143 (Pa. Super. 2006) and *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 887 (Pa. Super. 2000), neither of those cases held that because bad faith claims are fact intensive that the Superior Court as an appellate court was the court which was permitted to find the facts.[2] Similarly, neither of those cases support the notion that an appellate court can simply disregard the trial court's findings and supplant them with its own. *Id.* Nevertheless, that is what the *Berg* majority did in the present case.

In what reads more like a critique of the trial judge's opinion writing style and thorough disbelief of his findings, the *Berg* majority re-reviewed the record and made entirely new and opposing findings than those of the trial court. The *Berg* court engaged in exactly the type of review that all the cases discussed *supra* in section II.A. admonish appellate courts not to do – it answers the question of whether the appellate court would have reached the same result based upon the evidence presented. Juxtapose that question to the question the Superior Court was legally obligated but refused to answer – after due consideration of the evidence which the trial court found

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[2] In fact, in *Williams* the Superior Court made that statement in the context of the review of the factual sufficiency of a bad faith complaint on review from a trial court's grant of preliminary objections. *Id.* at 887-89. In *Condio*, the Superior Court made that statement in the context of defining bad faith conduct and what evidence a plaintiff had to put forth to successfully establish such a claim. *Id.* at 1143 ("Bad faith claims are fact specific and depend on the conduct of the insurer *vis a vis* the insured." *Quoting Williams*, 750 A.2d at 887).

credible, **whether the trial court could have reasonably reached its conclusion**. *See S.P.,* 47 A.3d at 825; *R.J.T.*, 9 A.3d at 1190; *Rizzo*, 555 A.2d at 61; *In re Dible's Estate*, 175 A. at 554; *Rancosky*, 130 A.3d at 92; *Hollock*, 842 A.2d at 413-14; *Bonenberger,* 791 A.2d at 380-81; *Bergman*, 742 A.2d at1104; *Terletsky*, 649 A.2d at 686.

The *Berg* majority's holding is equivalent to reversing a judgment for plaintiff on appeal from a verdict in a jury trial because the appellate court found the defendant's expert more credible than that of plaintiff's and as a result the judgment is reversed and the case is remanded to the trial court for entry of judgment on behalf of defendant despite a jury finding for plaintiff on the facts. The issue is never whether an appellate court sitting as a "super-trial court" would have reached the same result. The issue is always and only whether, after review of the evidence the trial court found credible, the trial court could have reasonably reached its conclusion. *Bergman*, 742 A.2d at 1104.

The *Berg* dissent penned by Justice Stevens (sitting as President Judge Emeritus of the Superior Court) exposed the legal error committed by the majority in its first two paragraphs:

> **Our standard of review requires affirming the trial court as the finder of fact if there is sufficient evidence in the record to support its findings. Here, the trial court provides citation to ample evidence from the certified record to support its verdict and damage award in favor of the Bergs.**

> **Because it is not this Court's role to usurp the fact-finding power of the trial court by its own interpretation of the factual and testimonial evidence, I respectfully dissent from the Majority's decision to remand this matter for judgment notwithstanding the verdict.[]**

Id. at 1061 (footnote omitted; emphasis added). And Justice Stevens did not simply write a two-paragraph dissent. Just like the majority, he too engaged in a thorough review of the "very large record in this case." (Maj. Op., 189 A.3d at 1060). *See Berg*, 189 A.3d at 1061-65 (Dis. Op.)

Justice Stevens' conclusion after review of the "very large record" was that:

> Upon consideration of that evidence as presented, the trial court reasonably determined Nationwide pursued a litigation strategy that called for aggressive tactics designed to deter one's filing of small claims had been employed in the instant matter. This is especially so in light of the fact that this matter has been unresolved for nearly twenty-two years and that the Potosnak Report which set forth and warned Nationwide of the numerous problems with the Jeep had not been shared with the Bergs for five years. Indeed, the Majority itself acknowledges that "the prospect of years of litigation cuts both ways." *See Berg v. Nationwide Mut. Ins. Co., Inc.*, 713 MDA 2015 at *55.
>
> The majority vacates the judgment "because the record does not support many of the trial court's critical findings of fact." *Id.* at *59 (emphasis added). In doing so, however, the Majority tacitly admits that other critical findings of the trial court are supported by clear and convincing evidence.
>
> **This Court cannot supplant the trial court's findings with its own. Thus, the trial court did not abuse its discretion, and the award of damages does not shock this Court's sense of justice.** Therefore, I respectfully dissent and would affirm the trial court.

Id. at 1065 (emphasis added). As Justice Stevens recognized, once appellate court review becomes a substitution of that court's conclusions for that of the trial court sitting as fact finder, the appellate court commits an error of law. Such a statement of the law cannot be credibly disputed.

Taken to its extreme, the *Berg* majority's holding, if left uncorrected, will allow reviewing courts to simply engage in re-trials of lower court verdicts with the specter of the reviewing court simply substituting its judgment for that of the trial court and thereafter reversing or remanding hard won verdicts, regardless of the fact that the appellate court will not have had the opportunity to see the witnesses, judge their credibility and hear the evidence for itself on anything other than a cold record. As Justice Todd said in her concurrence in *R.I.S.*, "Indeed it is difficult to understand how a trial court, in making factual findings could commit an error of law." *Id.*, 36 A.3d at 581.

In the final analysis, on the first two issues certified on appeal by this Court, the answer is the same: the Superior Court abused its discretion and committed an error of law because it usurped the fact finding role of the trial court and the trial court's own interpretation of factual, documentary and testimonial evidence. As such the decision of the Superior Court should be reversed and the judgment of the trial court reinstated.

III. CONCLUSION

For all the reasons set forth above, the decision of the Superior Court should be reversed and the April 21, 2015 judgment of the Court of Common Pleas of Berks County, Civil Division should be reinstated.

RESPECTFULLY SUBMITTED,

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Dated: July 2, 2019

CERTIFICATE OF WORD COUNT

I certify that this brief includes 3,800 words as calculated with the word-counting feature of Microsoft Word 2016, excluding the materials specified in Pa.R.A.P. 2135(b).

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