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33 MAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA

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 FOR APPELLEE NATIONWIDE MUTUAL INSURANCE CO., INC.

On Appeal from the Judgment of the Superior Court of Pennsylvania at No. 713 MDA 2015 dated June 5, 2018, Vacating the Judgment of the Court of Common Pleas for Berks County, Civil No. 98-813, dated April 21, 2015

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COUNTERSTATEMENT OF THE SCOPE AND STANDARD OF REVIEW

This Court's "scope of review with respect to whether judgment n.o.v. ["JNOV"] is appropriate is plenary." *Shamnoski v. PG Energy, Div. of S. Union Co.*, 858 A.2d 589, 583 (Pa. 2004). The standard of review in examining JNOV is whether "there was sufficient competent evidence to sustain the verdict." *Id.*

Pennsylvania appellate courts routinely perform exacting reviews of trial court records in the bad faith context and elsewhere. *See, e.g.*, *Wenrick v. Schloemann-Siemag Aktiengesellschaft*, 564 A.2d 1244, 1246 (Pa. 1989) (affirming Superior Court's reversal and remanding for entry of JNOV in favor of defendant because "[a]fter carefully scrutinizing the entire record, we agree with the Superior Court that the plaintiff's evidence does not support" trial court's conclusion). Thus, "when reading the record in the light most favorable to the verdict winner," *id.*, this Court will nevertheless overturn factual findings where there is "an abuse of discretion, a capricious disbelief of the evidence, or a lack of evidentiary support on the record for the findings," *Masloff v. Port Auth. of Allegheny Cty.*, 613 A.2d 1186, 1188 (Pa. 1992). A trial court may not "reach its verdict or decision merely on the basis of guess or conjecture[;]…there must be evidence, direct or circumstantial, upon which logically its conclusion may be based." *Marrazzo v. Scranton Nehi Bottling Co.*, 223 A.2d 17, 21 (Pa. 1966).

COUNTERSTATEMENT OF THE QUESTIONS INVOLVED

1. Did the Superior Court correctly determine, based on a meticulous review of the record, that the Trial Court abused its discretion by making critical factual findings that were unsupported by clear and convincing evidence and, in fact, were contrary to or unsupported by the record?

   Suggested Answer: Yes

2. Did the Superior Court correctly apply the proper standard of review when reversing the Trial Court's $21 million bad faith verdict, based upon an underlying jury award of $295, where the Trial Court's factual findings were contrary to the record and its opinion demonstrated palpable animus toward Nationwide and the insurance industry generally?

   Suggested Answer: Yes

3. Does an insurer act in bad faith by not reinspecting the quality of a car repair performed by an independent repair shop to ensure the vehicle is returned to the insured in a safe and serviceable condition?

   Suggested Answer: No

COUNTERSTATEMENT OF THE CASE

I. RELEVANT FACTUAL HISTORY

A. The Accident

On September 4, 1996, Mrs. Sharon Berg was driving her 1996 Jeep Grand Cherokee (the "Jeep") when she was involved in a collision. R.1083a. Mrs. Berg was not injured. *Id.* Mr. and Mrs. Berg (the "Bergs") insured the Jeep through Nationwide. R.2433a-68a.

B. Lindgren Chrysler-Plymouth and Nationwide Agree the Jeep Is Repairable

Following the accident, the Bergs chose to have the Jeep repaired at Lindgren Chrysler-Plymouth ("Lindgren"), a repair shop that the Bergs had used before and in which they "believed." R.1100a; R.1446a-47a. Lindgren was an independently owned repair shop. It served the general public and also did work for Nationwide and other insurance companies. R.1328a; R.1358a.[1]

Lindgren's body shop manager, Doug Joffred, initially inspected the Jeep and, on September 10, 1996, orally communicated to Nationwide his belief that it

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[1] Under Nationwide's Blue Ribbon Repair Program, Nationwide guaranteed repairs performed by certain independent repair shops, including Lindgren, and received discounts on the cost of those repairs. R.931a. Nationwide passed the savings from these discounts on to policyholders in the form of lower premiums. R.1612a. Courts recognize the benefits to consumers from these types of programs. *See, e.g.*, *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009).

was a total loss. R.1359a-64a. He testified, however, that this was his initial impression and not a final determination. R.1359a.[2] Joffred also testified that it was not unusual for him to change his mind when assessing vehicles, because assessing damage is "a judgment call." R.1359a-60a.

On that same day, September 10, Joffred also prepared a repair estimate in the amount of $12,326.54. R.1364a; R.1796a-1802a. He orally informed Nationwide that he had prepared the repair estimate and requested compensation for the cost of tearing down the Jeep "***if***" the vehicle was ultimately determined to be a total loss. R1874a; R.1374a (emphasis added). Nationwide's claim log from September 10 shows:

09/10/1996 01:50PM COFFMAJ1 COFFMAJ1

SHOP ASKED FOR TEAR DOWN TIME TALKED TO RON GAVE OKAY IF TOTAL....SHOP WILL FORWARD ESTIMATE AND PHOTOS.

09/10/1996 01:49PM COFFMAJ1 UNASSIGN COLL Daniel G & Sharon E <Berg

LOSS Reassigned for COLL on Daniel G & Sharon E <Berg to 58LANC-MD - TOTAL LOSS...CAR IS AT LINDGREN.....THEY HAVE ESTIMATE.

R.1874a.

[2] Under Pennsylvania law, this initial impression does not constitute an appraisal because it was never put in writing. 31 Pa. Code § 62.1.

A September 11 entry on Nationwide's claim log confirms that Lindgren already had a "$12k" repair estimate and that Joffred "***feel***[***s***] [the Jeep] ***should*** be a total loss." R.1872a (emphases added).

On September 24, 1996, Nationwide representative Doug Witmer inspected the Jeep with Joffred. R.1871a-72a; R.1039a-40a; R.1377a-78a. The damage to the vehicle included a bent frame. Because Lindgren did not have the equipment to straighten (or "pull") the frame, Joffred and Witmer together *agreed*: (1) to have the vehicle sent to another repair shop, K.C. Auto Body ("K.C."), for the frame repairs; (2) that, if the vehicle was repairable after the pull, Lindgren would repair it in accordance with Joffred's September 10, 1996 $12,326.54 repair estimate; and (3) the vehicle was *not* a total loss at that point. R.1038a-41a; R.1378a-82a. Joffred testified unequivocally that Nationwide did not tell him that the vehicle had to be repaired or twist his arm to say that the vehicle was not a total loss. R.1378a.

In a September 24 entry on Nationwide's claim log, Witmer noted, "VEH[ICLE] IS NOT A TOTAL LOSS," "THE REPAIRS ARE APPROX[IMATELY] 50% OF [THE ACTUAL CASH VALUE]," and "NATIONWIDE WILL NEVER RECOVER THE DIFFERENCE IN SALVAGE VALUE." R.1871a-72a. As Judges Stabile and Ott recognized, this entry simply meant the Jeep did not meet the threshold for an *economic* total loss. R.1004a; R.1037a-38a; Majority at 15. Indeed, Witmer's comment was consistent with

Pennsylvania regulations, which provide that a car is an economic total loss only if the cost of repairs exceeds the appraised value less the salvage value. 31 Pa. Code § 62.3(e).[3] Whether the vehicle would be deemed a structural total loss awaited the result of the frame pull. R.1041a; R.1378a.

C. Lindgren Completes the Repairs

Following the pull, K.C. returned the Jeep to Lindgren. Joffred then "determined conclusively that…it was not a total loss." R.1380a-82a. Joffred also obtained Mr. Berg's permission to repair the Jeep. R.1382a. When he authorized the repairs, Mr. Berg was aware of Joffred's initial impression that the vehicle was a total loss:

> Q What were you told about your vehicle?
>
> A I was told by Mr. Joffred that it was a total loss and that, you know, that that was, I believe, the initial conversation.
>
> …
>
> Q And did you tell him you wanted the vehicle repaired?

---

[3] The Jeep was worth between $23,000 and $28,000 at the time of the accident. R.1038a. Typically, a vehicle is an economic total loss if the cost of the repairs exceeds 80% of the vehicle's pre-accident value. R.1036a. Here, the $12,326.54 repair estimate was far less than 80% of the Jeep's pre-accident value. R.1038a; R.1795a-1802a. Moreover, *no one* testified that the Jeep could not be repaired, *i.e.*, that it was a structural total loss. In fact, the uniform testimony was that it *could* have been repaired. *See infra* Section II.B.2.

A I did, yes.

THE COURT: You told him you wanted it repaired?

THE WITNESS: Yes, correct.

THE COURT: Did you tell him that before he said it was a total loss or after?

THE WITNESS: No, I think it was afterwards, I believe so.

R.1421a-22a.

After finishing the repairs, Lindgren returned the vehicle to the Bergs on December 31, 1996. R.1106a-07a; R.1383a-84a; R.1422a-23a. Nationwide paid for the repairs, less a $500 deductible. R.1062a, R.1371a-72a, R.1429a. Nationwide played no role in performing the repairs.

D. Issues with the Repairs

After receiving the Jeep from Lindgren at the end of 1996, neither the Bergs nor Lindgren contacted Nationwide to report any issues with the repairs. R.1105a; R.1448a-49a; R.1384a. In fact, the vehicle passed the state safety inspection in late 1997. R.1510a. The inspection was not performed by Lindgren. The state safety inspection requires a certified mechanic to inspect many parts of the vehicle, including its frame, fenders, hood, tires, and wheels. 67 Pa. Code § 175.80.

In October or November 1997, after being fired from Lindgren, David Wert told the Bergs that Lindgren had not repaired their vehicle correctly. R.1251a-54a.

Again, the Bergs did not inform Nationwide of what they were told, and Nationwide remained unaware of any repair issues. R.1457a-58a.

On November 3, 1997, the Bergs' counsel, Benjamin Mayerson, contacted Witmer. R.1804a. Mayerson stated that the Bergs planned to sue Lindgren. *Id.* This was the first time Nationwide heard that there were issues with the repairs. R.1285a. Mayerson also instructed Nationwide not to contact Lindgren and that he had retained an expert to examine the Jeep. R.1804a. Mayerson's letter did *not* allege any wrongdoing by Nationwide. *Id*. Donald Phillips, an expert the Bergs retained, inspected the Jeep on November 25, 1997. R.1138a-39a.

On December 3, 1997, Nationwide representative Ron Stitzel called Mayerson and said that Steve Potosnak, a Nationwide employee, would inspect the Jeep. R.1816a-17a. However, Stitzel and Mayerson agreed that "it would not be necessary to have…Potosnak inspect…[the] vehicle at this time." R.1816a. During the conversation, Stitzel advised Mayerson of "Nationwide's commitment to help resolve Mr. Berg's problem in a timely manner." *Id*. On December 23, 1997, a second expert the Bergs retained, Charlie Barone, inspected the Jeep. R.1453a.

E. The Bergs File a Writ Against Lindgren

On January 23, 1998, the Bergs filed a Praecipe for Writ of Summons against Lindgren. R.35a. In March 1998, the Bergs purchased a new Volkswagen

Jetta because they "were advised by someone that had examined [the] Jeep that it was totally unsafe and it needed to be parked and not driven at all." R.1111a.

On April 14, 1998, the Bergs deposed Lindgren personnel. R.1882a. On April 22, Mayerson wrote to Stitzel, stating that he "retained an expert who has indicated that the vehicle is no longer crash worthy" and that the Bergs were "forced to purchase a new vehicle to ensure their safety." R.1882a-83a. Thus, by mid-April, 1998: (1) the Bergs were aware of the purported safety issues; and (2) the Bergs were purportedly no longer driving the Jeep and had *already* taken steps to ensure their safety. Mayerson's letter also, for the first time, placed Nationwide on notice of being sued and recommended that Nationwide have the vehicle inspected by "an independent expert *for purposes of litigation*." R.1882a (emphasis added).

F. Potosnak Inspects the Jeep

After receiving Mayerson's April 22 letter threatening litigation, and before engaging the requested "independent expert," Nationwide had its own employee, Potosnak, inspect the Jeep. R.2093a; R.2782a-83a. Potosnak's inspection was "arranged through [Mayerson]" and took place on April 28, 1998. R.1809a; *see also* R.1076a; R.1078a. Mr. Berg was present for the inspection. R.1490a.

During his inspection, Potosnak put the Jeep on a lift and observed numerous problems with Lindgren's repairs. R.1809a-10a.[4]

G. The Bergs Sue

On May 4, 1998, just four business days after Potosnak inspected the Jeep and before Nationwide had a chance to respond to Mayerson's letter, the Bergs sued Nationwide and Lindgren. R.40a-88a. Their fifteen-count Complaint sought compensatory and punitive damages for, among other things, insurer bad faith. *Id.*

On May 12, 1998, Nationwide representative Bruce Bashore advised Mayerson that, as requested, Nationwide would arrange for an independent expert to inspect the Jeep more fully. *See* R.1203a-04a; R.1891a. That same day, Nationwide retained the requested independent expert, Terry Shaw. R.1807a.

Shaw's inspection was confirmed for May 16, 1998, at the Bergs' residence. R.1969a. When Shaw arrived, however, no one answered the door or his telephone calls. *Id.* Shaw thus could not dismantle the Jeep and could only visually inspect it. *See id.*

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[4] Appellant faults Nationwide because it did not "warn" the Bergs immediately about Potosnak's findings. Br. at 15. There is no evidence that Potosnak believed the Jeep was unsafe. Moreover, the Bergs knew about the repair issues before Potosnak inspected the Jeep. R.1882a-83a.

On May 19, 1998, Bashore wrote to Mayerson, stating that any problems with the repairs would be handled at a shop of the Bergs' choice and that Nationwide would purchase the vehicle if it could not be repaired. R.1891a.

On August 20, 1998, the Bergs filed an amended complaint alleging class action claims against Nationwide. R.94a-133a. That same day, Nationwide confirmed that an independent expert would inspect the Jeep the following day. R.2946a. The independent expert, William Anderton, retrieved the vehicle from the Bergs' residence but was told that he could only perform a visual inspection. R.1573a-74a. Accordingly, Anderton recommended that a second inspection involving the disassembly of the vehicle be performed. R.1575a. Anderton never concluded that the Jeep could not be repaired. (In fact, following further inspections in 1999, Anderton concluded that the Jeep *was* repairable. R.1582a.)

On September 16, 1998, Nationwide proposed to Mayerson that the vehicle "be taken to Lindgren…[to] be disassembled." R.2951a. On October 13, 1998, Mayerson acknowledged that the inspection had been tentatively scheduled for October 28. R.2968a. On October 26, however, Mayerson advised that the Bergs preferred a "neutral location." R.2974a. On October 27, Mayerson wrote that the inspection had to be rescheduled within the next two to three weeks. R.2989a.

H. Nationwide Purchases the Vehicle

On November 17, 1998, having still not been able to have the requested "independent expert" examine the Jeep in full, Nationwide advised Mayerson that it was considering purchasing the vehicle. R.2991a. Nationwide assured Mayerson that, if it purchased the Jeep, measures would be taken to protect the vehicle from damage or tampering. *Id.*

Nationwide purchased the Jeep from Summit Bank for $18,000 on January 8, 1999, and thereby resolved the Bergs' claim for benefits under the insurance policy. R.3011a. That very day, Nationwide told Mayerson of the purchase and where the vehicle would be maintained, and said that "the integrity of this evidence will be maintained at all times." R.2929a. Nevertheless, on January 12, 1999, Mayerson threatened to purchase the Jeep and sell it within 30 days if the parties were unable to reach an agreement regarding storage. R.2930a. In response to Mayerson's threat, Nationwide informed Summit of the binding contract for Nationwide to purchase the Jeep, and insisted that Summit not sell it to the Bergs. R.1920a.

On February 11, 1999, the parties signed a Stipulation and Order providing that they would have equal access to the Jeep and would split the storage costs. *See* R.354a-55a. The Bergs, however, never paid any storage costs. R.2507a.

I. Inspection by Nationwide After Purchasing the Jeep

Nationwide's independent expert, Anderton, inspected the Jeep on April 20, 1999. R.1576a; R.2854a-55a. He concluded that the vehicle was repairable and was not a structural total loss in 1996. R.1578a-82a. Anderton further opined that, although the vehicle was not properly repaired, it was *not* unsafe. R.1582a. The Bergs apparently agreed: By the time Nationwide purchased the Jeep, the Bergs had driven it 6,000 miles since buying the Jetta (despite buying the Jetta purportedly to ensure their safety), R.1497a-98a, and over *27,000 miles* since Lindgren returned the Jeep in December 1996. R.1106a-08a.

II. PROCEDURAL HISTORY

A. Litigation Through the Jury Trial and First Bench Trial

After filing their first Complaint against Lindgren and Nationwide on May 4, 1998, the Bergs amended their Complaint *eight times* over the next seventeen months in a quest to turn this case into a national class action. R.3a-10a. The final version of the Complaint was filed on October 25, 1999, alleging six counts against Nationwide: breach of contract, negligence, fraud, concert of action/conspiracy, violation of the UTPCPL, and insurance bad faith. R.577a-613a. However, the Bergs ultimately dropped their class allegations after many of Nationwide's preliminary objections to prior versions of the Complaint were granted. *Id.*; R.3a-10a. Moreover, before trial, the Bergs voluntarily withdrew their breach of

contract and negligence claims, conclusively resolving any claims under the insurance policy. R.718a-19a.

The parties engaged in extensive discovery and briefing from the inception of the litigation through 2003. R.3a-14a. The Bergs took an extraordinarily burdensome approach, serving over 100 subpoenas on governmental entities throughout the country and some Indian tribes. R.6a-9a. They also served 110 interrogatories, 22 deposition notices, 125 requests for production of documents, and 131 requests for admissions. R.4707a-37a. The judge who oversaw discovery chastised the Bergs for this egregious behavior, writing, "[t]he delay stemming from Plaintiffs' pre-trial practice cannot be excused." R.689a. Judge Stallone, who presided over the first trial in this case, wrote, "the pleading and discovery stages of this lawsuit took an inordinate amount of time to complete, driven in part by the multiple, ill-advised attempts by counsel for the Bergs to turn this case into a class action lawsuit." R.2561a.

Ultimately, the parties agreed to bifurcate the case into two phases. R.696a-97a. Phase I consisted of a jury trial on the Bergs' claims for fraud, conspiracy, and violations of the UTPCPL. *Id.* Phase II consisted of a bench trial on the Bergs' claims for treble damages under the UTPCPL and bad faith. *Id.*

The Phase I jury trial occurred in December 2004 before Judge Stallone. R.701a. The trial included five days of testimony from twenty witnesses,

including Anderton, Bashore, Mr. and Mrs. Berg, Joffred, Potosnak, Wert, and Witmer. R.994a-1130a; R.1172a-1221a; R.1234a-70a; R.1316a-1519a; R.1563a-1603a; R.1609a-17a. The jury returned a verdict in favor of Nationwide and Lindgren on the common law fraud and civil conspiracy counts, but in favor of the Bergs under the catchall provision of the UTPCPL. R.1931a-32a. The jury awarded $295 in damages against Nationwide and $1,925 in damages against Lindgren.[5] *Id.*

The parties filed motions and took additional discovery throughout 2005 and 2006. R.19a-22a. The Bergs settled with Lindgren in December 2006. R.1951a-52a.

The Phase II bench trial occurred in June 2007. R.1956a. Judge Stallone heard testimony from nine witnesses, including Bashore, Mayerson, and Shaw. R.1967a-70a; R.2040a-72a; R.2089a-2108a. On July 10, 2007, Judge Stallone refused to treble the jury's $295 UTPCPL damage award and directed a verdict in Nationwide's favor on the bad faith claim. R.2500a; R.2504a.

On October 29, 2007, nearly nine years after Nationwide began storing the Jeep and providing access to the Bergs, the Trial Court found that the Bergs had

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[5] The jury apparently awarded $295 to compensate the Bergs for the five months' worth of insurance premiums they paid while they could not use the Jeep. *See* R.1440a-41a.

not paid *any* of their share of the storage costs. R.2507a. It authorized Nationwide to dispose of the nearly twelve-year-old vehicle. R.2507a-08a.

B. The Bergs' Appeal Takes Five Years Through No Fault of Nationwide

The Bergs appealed only from the directed verdict on their bad faith claim. R.2511a; R.2522a-25a. The Bergs did not, however, serve the trial judge with a copy of their Rule 1925(b) statement, and therefore the Trial Court deemed their appeal waived. R.2529a-37a. The Superior Court affirmed. *Berg v. Nationwide Mut. Ins. Co.*, 965 A.2d 285 (Pa. Super. Ct. 2008). This Court reversed. *Berg v. Nationwide Mut. Ins. Co.*, 6 A.3d 1002 (Pa. 2010).

On April 17, 2012, on remand, the Superior Court reversed the entry of the directed verdict in Nationwide's favor on the Bergs' bad faith claim. *Berg v. Nationwide Mut. Ins. Co.*, 44 A.3d 1164, 1177 (Pa. Super. Ct. 2012). In its Opinion, the court did not hold that Nationwide violated the bad faith statute. Rather, it held that the jury's $295 verdict on the UTPCPL claim "constitute[d] *some* evidence of bad faith conduct." *Id*. at 1175. The court recognized, however, that "the overall probative value of this evidence of bad faith may be somewhat limited." *Id*. The court also made clear that, "[a]t trial on remand, the Bergs will again have the burden to *prove* their allegations by *clear and convincing* evidence." *Id*. at 1176 (emphases added). The resolution of the Bergs' appeals took five years, on top of the six years that preceded the first trial.

C. The Second Bad Faith Trial Before Judge Sprecher

On remand, following Judge Stallone's retirement, a second bench trial was held in December 2013 before Judge Sprecher. R.2581a. Judge Sprecher did not hear the live testimony that the jury and Judge Stallone heard. Instead, he relied upon transcripts of witnesses who previously testified. He heard live testimony only from two witnesses who testified about attorneys' fees, one witness who testified about punitive damages, and Nationwide's bad faith expert. R.2609a-24a; R.2677a-86a; R.2694a-2730a; R.2737a-2913a.

D. Judge Sprecher's First Opinion

On June 21, 2014, Judge Sprecher found in favor of the Bergs on their insurance bad faith claim. 6/21/2014 Opinion, at 42-43. On the same evidence that the jury concluded did *not* support a finding of common law fraud, Judge Sprecher awarded $3 million in attorneys' fees, $18 million in punitive damages, and an unspecified amount of interest. *Id.* at 43. Judge Sprecher's $21 million verdict was more than *71,000 times greater* than the jury's $295 verdict against Nationwide.

E. Judge Sprecher's Second Opinion

After Nationwide appealed, Judge Sprecher directed Nationwide to file a statement of errors complained of on appeal. R.31a. On July 23, 2015, Judge Sprecher issued a second opinion "supplement[ing]" his first opinion. 7/23/2015 Opinion, at 2. He then dismissed each of the errors of which Nationwide

complained, concluding that they were "without merit," "disingenuous," "ridiculous," "false," and "frippery." *See, e.g.*, *id.* at 5, 10, 40, 46, 50. Judge Sprecher also included a long discussion highly critical of Nationwide and the insurance industry generally. He also included a lengthy discussion of insurance company advertising, personal injury litigation, the merits of capitalism, and numerous other wholly irrelevant topics. *Id.* at 20-31.

F. The Superior Court Vacates the Judgment

On June 5, 2018, Superior Court Majority Judges Stabile and Ott issued a 61-page Majority opinion (the "Majority") scrupulously examining the trial record. Finding that Judge Sprecher's critical findings were unsupported—and often flatly contradicted—by the record, the Superior Court vacated the Trial Court's judgment and remanded for entry of judgment in favor of Nationwide. Justice Stevens dissented.

SUMMARY OF THE ARGUMENT

It is an exceptional case when an appellate court overturns the factual findings of a trial court and enters judgment notwithstanding the verdict. It happens only in cases where the trial judge is so wrong as to key facts or is so biased that the verdict cannot stand. This is such a case.

Here, the trial court entered a $21 million bad faith award based upon virtually the *same evidence* that a jury determined supported only a $295 verdict.

Judge Sprecher did not even attempt to conceal his bias; his opinions are filled with rambling criticisms of the insurance industry and lengthy musings on subjects having nothing to do with this case. Quite clearly, Judge Sprecher was predisposed to make whatever findings he thought necessary to substantiate his unprecedented verdict, regardless of whether those findings were supported by the factual record.

Unlike Judge Sprecher, Superior Court Judges Stabile and Ott based their Majority opinion on an exacting review of the record. Despite Appellant's best efforts to cast doubt on their conclusions, the record amply demonstrates—and Appellant studiously avoids confronting—that crucial Trial Court "findings" were simply wrong:

- **Two separate appraisals.** It was crucial to the Trial Court that Nationwide "vetoed" a September 10, 1996 written total loss appraisal and later "substituted" a previously nonexistent September 20, 1996 repair appraisal containing a $12,326.54 repair estimate. In actuality, the evidence proves conclusively that there was only ever *one* appraisal *prepared* on September 10 containing a $12,326.54 repair estimate and *printed* on September 20, *before* Nationwide even met with Lindgren.

- **Nationwide purchasing the Jeep.** The Trial Court accused Nationwide of purchasing the Jeep to prevent the Bergs from having access to it. Not only is this conclusion unsupported and incorrect, but it does not even make sense: Nationwide purchased the Jeep to *preserve* it as evidence and gave the Bergs unlimited access to it.

- **Spoliation.** The Trial Court's finding that Nationwide spoliated the Jeep was essential to its punitive damages award. However, once again, the Trial Court's conclusion makes no sense. Nationwide only disposed of the Jeep after obtaining court permission to do so.

- **Length of the litigation.** The Trial Court blamed only Nationwide for the length of this litigation. However, much of the length of this litigation is attributable to the Bergs': (1) unsuccessful quest to turn this dispute into a class action, (2) aggressive and overwhelming discovery tactics, and (3) failure to serve the Trial Court with a copy of their Pa. RAP 1925(b) statement, which tacked on *five years* to this litigation.

- **Settlement.** The Trial Court blamed Nationwide for refusing to settle, wrongly concluding that "the only one who could settle this case was Nationwide if it had made a legitimate settlement offer." This statement is baseless, as evidence about the confidential settlement discussions was not introduced during the trial.

Appellant does not even attempt to defend these errors. Instead, Appellant concentrates on the deference owed to lower court findings, omits mention of key evidence, and twists the record to serve his interests. But this is not a case of differing interpretations of evidence; rather, this is a case where the Trial Court's verdict is based on no evidence, insufficient evidence, or incomplete and out-of-context evidence. Affording the Trial Court the degree of deference to which it is entitled, its findings are so deficient that the Superior Court was correct to reverse.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION AND ISSUED A MANIFESTLY UNREASONABLE JUDGMENT.

Nationwide does not dispute that an appellate court "abuse[s] its discretion by reweighing and disregarding clear and convincing evidence introduced in the trial court." Mar. 29, 2019 Order. However, that is not what Judges Stabile and Ott did. An appellate court can and should overturn a trial court's judgment that is

based on erroneous factual conclusions or where a trial court engaged in a "capricious disbelief of the evidence." *Masloff*, 613 A.2d at 1188. As demonstrated throughout this brief, reversal here was warranted.

A. An Appellate Court Must Overturn the Trial Court's Judgment Where the Trial Court Abused Its Discretion.

On appeal from a bench trial, an appellate court must determine whether "there was sufficient competent evidence to sustain the verdict." *Shamnoski*, 858 A.2d at 583. Even "when reading the record in the light most favorable to the verdict winner," *id.*, the appellate court must reverse if it finds "an abuse of discretion or an error of law which controlled the outcome of the case," *Tonkovic v. State Farm Mut. Auto. Ins. Co.*, 521 A.2d 920, 925 (Pa. 1987); *see also Masloff*, 613 A.2d at 1188 (findings of fact should be overturned where there is "an abuse of discretion, a capricious disbelief of the evidence, or a lack of evidentiary support on the record for the findings").

As this Court has held, a trial court abuses its discretion when it "has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." *Harman ex rel. Harman v. Borah*, 756 A.2d 1116, 1123 (Pa. 2000). A trial court may not "reach its verdict or decision merely on the basis of guess or conjecture"; "there must be evidence, direct or circumstantial, upon which logically its conclusion may be based." *Marrazzo*, 223 A.2d at 21. Accordingly, a reviewing

court "will not hesitate to reverse" where a decision is based on findings unsupported by the record. *Lilly v. Markvan*, 763 A.2d 370, 371 (Pa. 2000).

B. The Superior Court Had Good Reason to Review the Record Carefully.

It was particularly appropriate for the Superior Court to examine Judge Sprecher's factual findings carefully. Bad faith must be proven by "clear and convincing evidence." Evidence is clear and convincing only if it is "so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy of the truth of the precise facts in issue." *Grossi v. Travelers Pers. Ins. Co.*, 79 A.3d 1141, 1165 (Pa. Super. Ct. 2013) (quoting *In re Estate of Cella*, 12 A.3d 374, 380 (Pa. Super. Ct. 2010)).

In light of this demanding standard, it is important that an appellate court determine whether factual findings "are supported by competent evidence" and whether "the trial court could have reasonably reached its conclusion." *Mohney v. Am. Gen. Life Ins. Co.*, 116 A.3d 1123, 1130 (Pa. Super. Ct. 2015). A finding of bad faith cannot stand where "critical factual findings are either unsupported by the record or do not rise to the level of bad faith." *Brown v. Progressive Ins. Co.*, 860 A.2d 493, 502 (Pa. Super. Ct. 2004).

Additionally, careful review was warranted because Judge Sprecher did not see *any* of the key fact witnesses testify live, and instead relied primarily upon transcripts from a jury trial in which the jury *rejected* the Bergs' common law

fraud and conspiracy counts, and entered only a $295 verdict. Inexplicably, Judge Sprecher concluded that this same evidence proved bad faith by clear and convincing evidence and warranted a $21 million judgment.

If a judge takes testimony via transcript, the trial judge's credibility determinations are not entitled to deference unless the trial court explains *based upon objective facts* why he made his credibility determinations. *Com. v. $6,425.00 Seized From Esquilin*, 880 A.2d 523, 526, 531 n.7 (Pa. 2005) (where "there was no demeanor-based credibility determination made by the trial judge," the judge's "reasons for ruling as he did are subject to objective evaluation"); *see also Daniels v. W.C.A.B. (Tristate Transp.)*, 828 A.2d 1043, 1053 (Pa. 2003).[6] Remarkably, Judge Sprecher rejected the testimony of various witnesses even though *no* competing evidence was presented and he never saw the witnesses testify live.

Moreover, careful scrutiny by the Superior Court was proper because Judge Sprecher made numerous factual findings without citing the record. *See Stephan v. Waldron Elec. Heating and Cooling LLC*, 100 A.3d 660, 667-68 (Pa. Super. Ct. 2014). Specifically, he provided fewer than twenty record citations in each of his

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[6] *Daniels* was a workers' compensation case where the trial court must issue a "reasoned decision." *Esquilin*, a case with no similar requirement, forecloses any argument that *Daniels* applies only in workers' compensation cases.

lengthy opinions. 7/23/15 Opinion, at 5-9; 6/21/2014 Opinion, at 3-31. Judges Stabile and Ott, on the other hand, cited to the record evidence *142 times*. Majority at 1-61.

Finally, Judge Sprecher's factual findings warranted careful scrutiny because of his demonstrated animus toward insurance companies including Nationwide. *See Harman*, 756 A.2d at 1123. His opinions contain lengthy musings about irrelevant topics, including advertising by Nationwide's competitors, the merits of capitalism, and the publicity this case has received. Some of these digressions went so far as to accuse the insurance industry and Nationwide of violating Pennsylvania antidiscrimination law.[7] These digressions strongly suggest bias. *See* 7/23/2015 Opinion, at 20-31. Even the Superior Court Dissent noted Judge Sprecher's digressions "with displeasure," explaining that they were "irrelevant, unnecessary to the disposition of the issues, and should have been excluded." Dissent at 1-2 n.1.

[7] Judge Sprecher wrote without basis that insurers discriminate based on gender (among other things) to eliminate insureds or raise their rates. 7/23/2015 Opinion, at 20-21. Such discrimination would be unlawful. *Hartford Acc. & Indem. Co. v. Ins. Com'r of Com.*, 482 A.2d 542, 549 (Pa. 1984).

C. Appellate Courts Routinely Reverse Bad Faith Judgments Where the Record Lacks Clear and Convincing Evidence of Bad Faith.

Appellant in effect argues that the Superior Court erred because it reviewed the record to determine if clear and convincing evidence supported the verdict. However, Pennsylvania appellate courts routinely perform exacting reviews of trial court records in the bad faith context and elsewhere. *See, e.g.*, *Wenrick*, 564 A.2d at 1246.

In *Brown v. Progressive Ins. Co.*, for example, the Superior Court evaluated the facts underlying the trial court's bad faith judgment and concluded "[a]fter a thorough review of the record" that the court's "critical factual findings are either unsupported by the record or do not rise to the level of bad faith." 860 A.2d 493, 502 (Pa. Super. Ct. 2004), *allocatur denied*, 872 A.2d 1197 (Pa. 2005). The Superior Court explained that certain of the trial court's findings of fact were not in the record, while other findings were unsupported by the record. *Id.* at 503-08. The Superior Court therefore vacated the judgment and remanded for entry of JNOV in favor of the insurer. *Id.* at 508; *see also Zappile v. Amex Assur. Co.*, 928 A.2d 251, 262 (Pa. Super. Ct. 2007) (finding two of the trial court's four bad faith factual findings were "demonstrably false" and the other two were not supported by clear and convincing evidence), *allocator denied*, 940 A.2d 366 (Pa. 2007); *Condio v. Erie Ins. Exch.*, 899 A.2d 1136, 1150 (Pa. Super. Ct. 2006) (vacating judgment and remanding for entry of JNOV in support of insurer), *allocatur*

denied, 912 A.2d 838 (Pa. 2006); *Morrison v. Mountain Laurel Assur. Co.*, 748 A.2d 689 (Pa. Super. Ct. 2000) (reversing bad faith judgment for plaintiff), *appeal dismissed as improvidently granted*, 772 A.2d 415 (Pa. 2001).

II. THE SUPERIOR COURT CORRECTLY DETERMINED THAT CLEAR AND CONVINCING EVIDENCE OF BAD FAITH IS LACKING.

Here, as in *Brown*, *Condio*, *Zappile*, and *Morrison*, many of the Trial Court's factual findings lacked clear and convincing support in the record. The Superior Court therefore correctly concluded, after a meticulous review of the record, that the Trial Court's verdict should not stand.

A. Appellant Ignores Many of the Trial Court's Significant Errors.

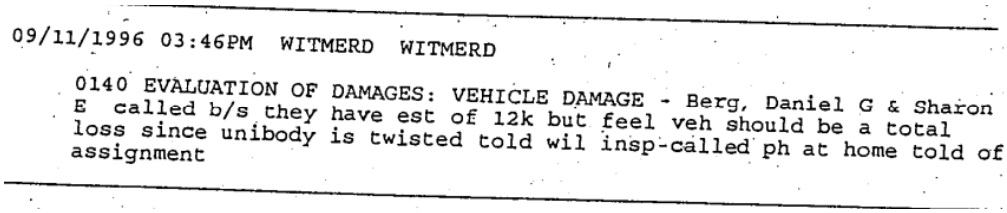
Aware that the Trial Court made a host of indefensible factual findings, Appellant simply chose to ignore many of the Trial Court's most egregious errors.

1. There Was No September 10 Total Loss Appraisal.

Judge Sprecher found that Nationwide "substituted" a written September 10, 1996 total loss appraisal with a different written appraisal containing a $12,326.54 repair estimate dated September 20, and that a September 10 appraisal "disappeared and was never produced by Defendant." 6/21/2014 Opinion, at 6. Judge Sprecher even went so far as to suggest that Nationwide *stole the total loss appraisal out of a cabinet* at Lindgren. 7/22/2015 Opinion, at 5.

If this were true, it would be reprehensible conduct worthy of condemnation. But it is plainly not true. Joffred explained that the one and only estimate was

created and "locked" in the system on September 10, and was merely *printed* on September 20. R.1368a-69a. Further, a September 10 entry on Nationwide's claim log states that Lindgren already had a repair estimate, and a September 11 entry states that Lindgren "***ha***[***s***] ***est***[***imate***] ***of 12k***":



09/11/1996 03:46PM WITMERD WITMERD

0140 EVALUATION OF DAMAGES: VEHICLE DAMAGE - Berg, Daniel G & Sharon E called b/s they have est of 12k but feel veh should be a total loss since unibody is twisted told wil insp-called ph at home told of assignment

R.1872a (emphasis added); *see* R.1874a. The Trial Court's conclusion that the $12,326.54 repair estimate did not exist as of September 10 is a classic example of a "capricious disbelief of the evidence." *Masloff*, 613 A.2d at 1188.

2. Nationwide Did Not Buy the Jeep to Keep It from the Bergs.

Judge Sprecher accused Nationwide of buying the Jeep to keep it from the Bergs. 6/21/2014 Opinion, at 9-10. This conclusion has no basis in the record. Nationwide purchased the vehicle to preserve it as evidence and because Nationwide had not yet been able to have an independent expert perform a full inspection. *See* R.2946a; R.2951a; R.2974a; R.2989a; R.2991a-92a.

Moreover, Judge Sprecher's conclusion makes no sense. It is undisputed that the Bergs had unfettered access to the Jeep from December 1996 through December 1998, including during the months after they sued Nationwide. Moreover, pursuant to a February 11, 1999 Order, the Bergs had equal access to

the Jeep even after Nationwide purchased it. R.354a-55a.

3. There Was No "Spoliation" of the Jeep.

Judge Sprecher repeatedly faulted Nationwide for spoliating the Jeep, speculating that Nationwide was in a "hurry to destroy" it. *See, e.g.*, 7/23/2015 Opinion, at 10-11. However, Nationwide discarded the Jeep in late 2007, after storing it for nearly *nine years*, during which time each side could do whatever sort of inspection it wanted. Nationwide was justified in disposing of the vehicle, and indeed Judge Stallone ordered that Nationwide could dispose of the Jeep because the Bergs had failed to pay their share of the storage costs. R.2507a-08a. Judge Sprecher's conclusion that Nationwide spoliated the Jeep is contradicted by the evidence and demonstrates bias.

4. There Is No Evidence That the Bergs Could Not Afford to Pay Their Portion of the Storage Costs.

Confronted with Judge Stallone's Order allowing Nationwide to dispose of the Jeep, Judge Sprecher doubled down: He concluded in his second opinion that, despite that order, Nationwide was not justified in disposing of the Jeep because the Bergs could not afford to pay their portion of the storage costs. 7/23/15 Opinion at 13. But there was no basis in the record for this conclusion. The Bergs, without justification, paid *none* of the storage costs for nearly nine years, resulting in Judge Stallone ordering on October 29, 2007, that any further failure by the Bergs "will result in the imposition of appropriate sanctions." R.2508a.

5. Nationwide Is Not Solely Responsible for the Length of the Litigation.

On the first page of his first opinion, Judge Sprecher explained that "[t]he ensuing litigation marathon is a significant factor found by this court in resolving the bad faith claim." 6/21/14 Opinion, at 1. Thereafter, Judge Sprecher blamed only Nationwide for the length of this litigation. 7/23/2015 Opinion, at 35-36. However, at the very least, the Bergs share responsibility for the length of this litigation. It is *undisputed* that:

- The Bergs sought to turn this case into a class action and amended the Complaint *eight times* in hopes of doing so. R.3a-10a.
- The Bergs served 110 interrogatories, 22 deposition notices, 125 requests for production of documents, and 131 requests for admission. R.4707a-37a.
- The Bergs served over 100 subpoenas on various governmental entities, and even some Indian tribes. R.6a-9a.
- It took *five years* for the Bergs' appeal of the Trial Court's December 7, 2007 judgment to be resolved, and most of that delay resulted from the Bergs' failure to serve the Trial Court with a copy of their Pa. RAP 1925(b) statement.

Given the Bergs' conduct, Magistrate Judge Lash wrote, "[t]he delay stemming from Plaintiffs' pre-trial practice cannot be excused." R.689a. Likewise, Judge Stallone wrote, "the pleading and discovery stages of this lawsuit took an inordinate amount of time to complete, driven in part by the multiple, ill-advised attempts by counsel for the Bergs to turn this case into a class action

lawsuit." R.2561a. Judge Stallone also rejected the Bergs' claim that Nationwide had engaged in "scorched earth" litigation. R.2015a. Accordingly, there was no evidence, let alone clear and convincing evidence, that Nationwide is solely responsible for the length of the litigation.

6. There Is No Evidence That Nationwide Unreasonably Refused to Settle.

Judge Sprecher also ignored record evidence to conclude that Nationwide "exhibited bad faith in its litigation strategy by refusing to settle." 7/23/2015 Opinion, at 16. To the contrary, Nationwide's attempt to resolve the Bergs' claim is evidenced by Stitzel's December 3, 1997 log entry and Bashore's May 19, 1998 letter. R.1816a-17a; R.1891a. As Appellant admitted, this letter was a "reasonable" attempt by Nationwide to "stand by its customer." R.1494a-96a. The Trial Court also overlooked that Nationwide effectively settled any claim under the insurance policy by purchasing the Jeep in early 1999.

Moreover, Nationwide's counsel represented during the trial that there *had* been settlement discussions regarding the bad faith litigation, but that providing dollar amounts would be improper in a bench trial. R.2070a. In its post-trial Motion, Nationwide even offered to provide evidence of the settlement negotiations to Judge Sprecher. R.4681a. Nevertheless, Judge Sprecher concluded that Nationwide "fail[ed] to make a timely offer of settlement." 7/23/2015 Opinion, at 37. This conclusion is simply untrue.

* * *

Appellant does not even acknowledge these clearly erroneous factual findings. Because these findings were crucial to the Trial Court's verdict, Appellant's failure to address them warrants affirmance of the Superior Court.

B. There Is No Clear and Convincing Evidence Supporting the Few Factual Findings That Appellant Raises.

Instead of attempting to defend these errors, Appellant focuses on a few other issues. As discussed below, however, the Majority properly concluded that clear and convincing evidence does not support even the few factual findings that Appellant elected to address.[8]

1. There Is No Clear and Convincing Evidence That Nationwide "Vetoed" a Total Loss Appraisal.

Appellant maintains that the Trial Court correctly concluded that Nationwide "vetoed" a total loss appraisal. Br. at 38-44. But as Judges Stabile and Ott

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[8] Appellant asserts that an "insurer cannot secure JNOV in the appellate courts by 'citing its own oral testimony to establish a 'reasonable basis' for its actions.'" Br. at 37 (quoting *Hollock v. Erie Ins. Exch.*, 842 A.2d 409, 416 (Pa. Super. Ct. 2004)). However, Nationwide does not rely solely on the testimony of its own witnesses. It also relies upon documents, testimony of non-Nationwide witnesses, admissions by the Bergs, and a host of other evidence. Moreover, in *Hollock*, the trial court saw the witnesses testify live. Here, by contrast, Judge Sprecher did not see the key witnesses live. *See Esquilin*, 880 A.2d at 526, 531 n.7; *Daniels*, 828 A.2d at 1053. Lastly, certain of the Trial Court's factual findings are *completely unsupported*, meaning that there is *no* evidence contrasting Nationwide's evidence.

correctly concluded, the Trial Court "simply ignored a large body of evidence that rendered its findings unsupported." Majority at 24-25.

Nationwide agrees that Joffred's *first impression* was that the Jeep was a total loss. R.1359a; R.1872a. However, as a matter of law, there *never* was a total loss appraisal, structural or otherwise. 31 Pa. Code § 62.1 (appraisal must be in writing). Moreover, it was not unusual for Joffred to change his mind, because assessing damage is "a judgment call." R.1359a-60a. As the Majority found, "Joffred perceived a total loss upon first sight of the Jeep, *but he also prepared a repair estimate*." After further investigation, "he concluded the Jeep was repairable." Majority at 22 n.10 (emphasis added).

Appellant also argues that there must have been a "veto" because Joffred performed a teardown before reporting his initial impression to Nationwide. This issue is a red herring. Joffred ultimately concluded that the Jeep was not a total loss after K.C. straightened the frame, well after any teardown. R.1381a-82a. Moreover, the Trial Court made no findings regarding the timing of the teardown.

Next, Appellant argues that the Trial Court's conclusion that Nationwide vetoed a total loss appraisal is supported by: (1) Witmer's September 24, 1996 claim log notes; (2) Witmer's acknowledgment that Joffred initially believed the Jeep was a total loss; and (3) the fact that the Bergs purportedly were not kept

apprised of the status of the repairs. None of this "evidence" establishes that Nationwide "vetoed" a total loss determination.

First, Witmer's September 24, 1996 claim log note that the Jeep "is not a total loss" and describing the economics of repairing versus replacing the Jeep says nothing about whether the Jeep was a *structural* total loss. Witmer's note dealt with whether the Jeep was a total loss as a matter of economics, understanding that the Jeep was repairable if the frame could be straightened and that they would have to await the results of the frame pull. After the frame pull, *Joffred* concluded that it *was* repairable. *See* R.1038a-41a; R.1378a-82a. Therefore, this claim file note fails to establish that there was a written total loss "appraisal" that Witmer "overrode."[9]

Second, Witmer's acknowledgment that Joffred initially believed the Jeep was a structural total loss is of no moment. Nationwide does not dispute Joffred's initial impression. But he never appraised the Jeep as a total loss and, ultimately, after the frame pull, he decided that it should be repaired in accordance with his repair estimate. Moreover, both Joffred and Witmer testified under oath that there

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[9] As discussed above, *supra* at 6 & n.3, the notation mirrored Pennsylvania regulations and reflected the calculation traditionally used to determine if a vehicle is an economic loss. R.1004a; R.1871a-72a.

was *no* override or veto. R.1040a; R.1378a. No witness ever testified that the Jeep could not be repaired.

Third, Appellant argues that the Bergs were not sufficiently kept abreast of the status of the repairs to the Jeep. However, that argument misses the mark. As an initial matter, this argument—like many of Appellant's arguments—relies upon the Appraiser Act. *See* Br. at 38-42 (arguing that, under the Act, vehicle owners are entitled to receive copies of total loss appraisals and must give consent before a vehicle can be moved). However, as evidenced by the name of the Act itself, the Appraiser Act applies only to *appraisers* such as Joffred, not insurers such as Nationwide. Accordingly, Appellant's reliance on the Act is misplaced.

Moreover, Appellant offers no support for the notion that Nationwide—the insurer—was itself obligated to update the Bergs regarding the status of the repairs. In any event, Mr. Berg, fully aware of Joffred's initial impression that the Jeep was a total loss, authorized Lindgren to repair the Jeep. R.1421a-22a.

Lastly, Appellant's suggestion that Nationwide encouraged Lindgren to repair an unrepairable car does not even make sense. The Bergs' insurance policy also covered bodily injury claims that could result from an unsafe repair—claims that could far exceed any purported cost savings achieved by repairing the vehicle. Allowing an unsafe vehicle to be put on the road is antithetical to Nationwide's business model and would be the height of foolishness.

2. There Is No Clear and Convincing Evidence That the Jeep Was Damaged Beyond Repair.

The second erroneous factual finding that Appellant tries to defend is that the Jeep was damaged beyond repair. As the record establishes, that is simply not the case. *Not a single witness testified that the Jeep could not be repaired*; to the contrary, numerous witnesses, *including the Bergs' own expert*, testified that the vehicle *was* repairable. R.1257a; R.1272a; R.1313a; R.1579a-82a. Moreover, the documented evidence establishes that Lindgren prepared a repair estimate on September 10—a pointless endeavor if the Jeep was unrepairable.

Lacking any support, Appellant fallaciously argues that the Jeep must have been unrepairable because Lindgren and K.C. did not repair it properly. This proposition also seems to have been accepted by the Dissent. Dissent at 5. But the mere fact that a repair shop *did not* repair the Jeep properly is a far cry from clear and convincing evidence that it *could not* be repaired, especially when *every witness*, including the Bergs' expert witness and the "whistleblower" David Wert, testified that it could have been repaired had the repairs been done properly. Similarly, it is an improper use of hindsight to argue that Nationwide acted in bad faith by paying Lindgren to fix a repairable vehicle simply because the repairs failed months later.

Appellant also cites Joffred's preliminary determination that the Jeep was a structural total loss. Br. at 44. However, Appellant conveniently ignores the fact

that Joffred also prepared a repair estimate and later changed his mind and testified that the Jeep "was not a total loss" *because it was repairable*. R.1381a-82a.

Finally, Appellant faults Nationwide for producing only two photographs of the Jeep. However, the relevant Nationwide manual stressed that "[p]hotos sent with the appraisal *should be at a minimum*," and specified that "[y]ou must show *two photos* of the vehicle to include the damaged area." R.2162a (emphases added). Furthermore, because Joffred ultimately determined that the Jeep was repairable *after* K.C. straightened the frame, R.1381a-82a, photographs of the initial damage would be of limited, if any, relevance.[10]

3. There Is No Clear and Convincing Evidence That Nationwide Knew the Jeep Was Unsafe When Lindgren Returned It to the Bergs.

Appellant contends that the Majority erred in concluding that Nationwide was unaware of the repair failures when Lindgren returned the Jeep to the Bergs. Br. at 45-55. The evidence is to the contrary.

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[10] Moreover, discovery errors by counsel do not establish bad faith. *O'Donnell ex rel. Mitro v. Allstate Ins. Co.*, 734 A.2d 901, 909 (Pa. Super. Ct. 1999) (bad faith statute addresses conduct "by an insurer in its capacity as an insurer and not as a legal adversary"); *see Hollock*, 842 A.2d at 415 (discovery practices not evidence of bad faith).

a. There Is No Evidence That Nationwide Knew About the Repair Problems.

There is no direct evidence that the Bergs, Lindgren, or anyone else informed Nationwide of repair issues when the Jeep was at Lindgren. It is likewise *undisputed* that neither the Bergs nor Lindgren contacted Nationwide to report any issues after Lindgren returned the Jeep to the Bergs. R.1105a; R.1124a; R.1448a-49a, R.1384a. Thus, there is no direct evidence, let alone clear and convincing evidence, that Nationwide knew about the repair issues as they arose.

b. The Purported "Undisputed Facts" Do Not Establish Nationwide's Knowledge.

Unable to come forward with direct evidence, Appellant argues that the circumstantial evidence gives rise to a "reasonable inference" that Nationwide must have known about the repair issues. Br. at 47. Appellant relies upon five purported "undisputed facts"—some of which have nothing to do with Nationwide's knowledge—to support this "inference." *Id.*

The first "undisputed fact" is that Joffred "initially declared the Jeep a total loss due to a twisted frame." Br. at 47. However, as discussed above, this was Joffred's initial impression, which he never reduced to writing. What he *did* reduce to writing was the $12,326.54 repair estimate. R.1796a-1802a.

The second "undisputed fact" is that Nationwide "decided to repair the Jeep." As discussed *infra* Section III.A, Nationwide made no such decision.

Rather, after the frame pull, Joffred determined that the Jeep was not a total loss and obtained the Bergs' permission to repair it. R.1381-82a. As Mrs. Berg recognized, Nationwide was merely responsible for paying for the repairs. R.1101a.

The third "undisputed fact" is that "the frame damage was too complex for [Lindgren] to repair." Br. at 47. Lindgren did not have equipment to pull the frame, so it sent the Jeep to K.C. to do that job. R.1038a-39a. There is no evidence suggesting that, after the pull, the repairs were too complex for Lindgren.

The fourth "undisputed fact" is that the repairs "were expected to take 25.5 days but lasted four months." Br. at 47. This fact is irrelevant. As Wert testified, the repairs took four months at least partially because "nobody worked on it for a while. It just sat there and it just sat there, and finally one day they started working on it again." R.1242a.[11] While Appellant attempts to mislead the Court by implying that Wert testified that Nationwide was "visibly 'unhappy'" with the quality of the repairs, Br. at 48, Wert actually testified that Nationwide was "unhappy" with *how long the repairs took*—not the quality of them. R.1249a-51a.

[11] The Dissent seems to have been misled by Appellant's argument that the Jeep could not be repaired because the repairs lasted a long time. Dissent at 6.

The fifth and final "undisputed fact" is that "Nationwide reinspected the repairs several times, including near the end of the protracted repair period." Br. at 47. Not only is this disputed, but it is wrong. The sole support for this purported "fact" is the testimony of Wert, a disgruntled former Lindgren employee. However, Wert never testified that Nationwide knew the *completed* repairs were faulty.

Read fairly, it is difficult to parse when exactly Wert claims Nationwide even "looked at" the Jeep. Initially, Wert testified that he observed a Nationwide employee reviewing paperwork and parts for the Jeep "[i]n the early stages," possibly before Lindgren sent the Jeep to K.C. R.1245a. Wert then stated that he *never* saw Nationwide employees "looking at the vehicle at any point after that again" and that, although Nationwide personnel were "in and out [of Lindgren] all of the time," Nationwide only looked at the Jeep that "one major time." R.1246a. Later, however, Wert testified that unidentified Nationwide personnel looked at the Jeep on other occasions, including toward the end of the repairs. R.1249a-50a.[12]

This inconsistent testimony is a far cry from *clear and convincing evidence* that Nationwide inspected the quality of Lindgren's work throughout the repair

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[12] Judge Sprecher never saw Wert testify, was never able to judge his credibility, and gave no reason as to why he selectively credited certain parts of Wert's testimony and discredited others. *See Esquilin*, 880 A.2d at 531 n.7.

period. Among other things, Wert: (1) could not identify the Nationwide personnel, R.1248a-49a; (2) did not describe the steps Nationwide personnel took, if any, to evaluate the repairs; and (3) most significantly, did not testify that Nationwide evaluated the repairs *after they had been completed*. As Judges Stabile and Ott correctly concluded, there is no clear and convincing evidence showing what, if anything, unidentified Nationwide personnel saw. Majority at 34-35.[13] Appellant's evidence is not clear and convincing. It is, at best, confused and inconsistent.

c. Appellant's Reliance on Jones Misses the Mark.

Appellant next claims that the Majority ignored other evidence that proves that Nationwide knew about the repair issues. Specifically, Appellant argues that the Majority disregarded Dean Jones' testimony and that completed reinspection report forms are "missing" from the claim file. Br. at 47, 51-52. Once again, Appellant's arguments lack support.

Jones testified that *if* a Nationwide representative had reinspected the Jeep, the representative would have focused on the quality of the repairs and completed a

[13] Appellant also argues, without any support, that because Nationwide guaranteed the repairs, it "would have naturally examined the frame repairs before and/or after the Jeep was reassembled." Br. at 47-48. However, there is no evidence that other insurers that guarantee repairs inspect the repairs done by independent body shops.

reinspection report. R.940a-42a. However, he testified that he was *not aware* if the Jeep was ever reinspected by Nationwide and had *no knowledge* regarding what Nationwide knew about Lindgren's repairs. R.941a.

Potosnak, on the other hand, testified that Nationwide representatives typically went to repair shops only to ensure that the shops were complying with their appraisals and to contain costs. R.1071a-72a. Potosnak testified that he would review the quality of repairs "only if there was a complaint filed." R.1072a. Here, of course, Lindgren repaired the Jeep, and there is no evidence that any complaints were raised with Nationwide. Thus, it is no surprise there are no completed reinspection reports. While Appellant argues that reinspection reports "must have existed in the claim file," Br. at 52-53, he fails to establish that a reinspection occurred in the first place.

d. Appellant Failed to Prove That a Visual Inspection Would Have Revealed the Repair Problems.

Lastly, Appellant takes issue with the Majority's determination that there was "**no evidence** that the faulty repairs would have been evident during a visual inspection when the repairs were nearly complete." Br. at 53. As support, Appellant points to Potosnak's,[14] Phillip's, Shaw's, and Anderton's visual

[14] Appellant argues that observations regarding the frame in Potosnak's April 1998 report support the conclusion that defects would have been observable to Nationwide personnel in late 1996. Br. at 49-50. Again, there is no evidence that

inspections between November 1997 and August 1998. Br. at 53-54. For several reasons, Appellant's reliance on these inspections fails.

As an initial matter, the Bergs drove the Jeep nearly 20,000 miles between the completion of Lindgren's repairs in December 1996 and the earliest of these inspections. R.1106a-07a. Such wear and tear on the vehicle over time could have made faulty repairs more evident than when the repairs were completed in 1996.

In addition, these inspections were performed by the Bergs' experts for the purpose of this litigation, and they were undoubtedly aided by Wert's information that the repairs were faulty. Thus, they knew what to look for going into the inspections. In contrast, it is *undisputed* that the Jeep *passed the state safety inspection* in late 1997, R.1510a, and there is no evidence that the certified mechanic who did the safety inspection—and who did *not* have advance knowledge of the repair issues—noticed or raised any issues at that time. *See* 67 Pa. Code § 175.80 (state safety inspection includes inspection of a vehicle's frame, fenders, hood, tires, and wheels).

Most importantly, there is simply no evidence that Nationwide performed an reinspection when the repairs were completed in December 1996. The mere fact

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Nationwide personnel inspected the quality of the repairs while the Jeep was at Lindgren.

that Lindgren failed to repair the Jeep properly does not mean that Nationwide reinspected the vehicle in December 1996, that the repair problems would have been visible through a visual inspection, or that the vehicle was not repairable. Judges Stabile and Ott thus correctly concluded that the Bergs failed to present clear and convincing evidence that Nationwide knew of the faulty repairs.

4. There Is No Clear and Convincing Evidence of Bad Faith Regarding the Potosnak Inspection or During the Litigation.

Appellant next argues that, after being contacted by the Bergs' counsel, Nationwide litigated the case in bad faith. Appellant is wrong.

a. Nationwide Immediately Offered to Help.

Once Nationwide was informed of the issues with the Jeep, it offered the Bergs its support and assistance. R.1816a-17a. The Bergs, however, contemplating suit against Lindgren, directed that Nationwide do nothing. R.1814a-15a.

b. Nationwide Did Not "Force" The Litigation to be Filed.

Appellant claims that, after Potosnak inspected the Jeep on April 28, 1998, Nationwide "did not promptly honor the claim by finally conceding the Jeep was a total loss" and, instead, "forced this lawsuit without any reasonable basis." Br. at 55. However, Potosnak did not conclude that the Jeep was a total loss or could not be repaired. Moreover, after Potosnak inspected the Jeep, he was waiting to learn

of Lindgren's plans regarding the vehicle. R.1808a-10a. The Bergs, however, sued Nationwide for bad faith seeking punitive damages just *four business days later*. R.40a-88a. The idea that this supposed delay "forced" the Bergs to file suit is preposterous, particularly where the Bergs did not contact Nationwide during those four business days. R.1809a.

c. The Potosnak Inspection Was Not Concealed.

Appellant also contends that Nationwide "concealed" the results of Potosnak's inspection when its outside counsel redacted it under an "improper assertion of attorney-client privilege." Br. at 55-56. But Potosnak inspected the Jeep because Mayerson demanded that Nationwide inspect the Jeep "*for purposes of litigation*." R.1882a (emphasis added). Appellant offers no reasoning for his conclusion that the redactions made by trial counsel were not made in good faith pursuant to the attorney-client privilege and work product doctrine.

In any event, the Bergs suffered no harm from the redactions. Potosnak inspected the Jeep *after* the Bergs' expert had already examined it and concluded that there were problems, so the Bergs were well aware of the repair issues. Moreover, Potosnak revealed his conclusions at his October 11, 2000 deposition *more than four years before the first trial*, R.4752a, R.4762a, and Nationwide produced the unredacted Potosnak inspection notes on May 5, 2003, *more than one*

year before the first trial, R.3014a-24a. Thus, any purported discovery violation had no impact on the litigation.

d. As Even the Trial Court Admitted, There Is No Evidence That Nationwide Applied Pennro.

Appellant next asserts that Nationwide implemented the Pennro Litigation Strategy ("Pennro") appended to the Best Claims Practice Manual (the "Manual") at issue in *Bonenberger v. Nationwide Mut. Ins. Co.*, 791 A.2d 378 (Pa. Super. Ct. 2002). There is not a shred of evidence to support this claim.

As an initial matter, Pennro never applied to property claims. Appellant simply ignores:

- Nationwide District Claim Manager Jeffrey Gooderham's testimony that "the Bergs have a material damage case and this [strategy] didn't apply." R.1984a.
- Nationwide claims adjuster Kathleen Holben's testimony that the Manual was applied to "just injury" claims, and "not property damage claims." R.841a.
- Stitzel's testimony that he had never used, referred to, or even seen the Manual. R.1307a.
- Nationwide attorney David Cole's testimony that the Manual "was totally inapplicable to collision loss claims." R.2083.
- Nationwide Vice President of Claims David Bano's sworn affidavit in which he said, "[T]he Manual applied only to bodily injury/casualty claims, and was not applicable to automobile property damage claims." R.2239a.
- The specific company manuals that *did* apply to the Bergs' property damage claim, which do not contain the Pennro strategy. R.2095a (discussing R.2470a-82a and R.2484a-85a).

To rebut this mountain of consistent evidence, Appellant cites only the shaky jury trial testimony of one highly incredible and biased witness, Nationwide Property Damage Specialist Tom Campuzano.[15] After testifying on direct examination that property claims adjusters were given the Manual, Campuzano contradicted himself on cross-examination, admitting that he was *not* given the Manual, but rather "an abridged version on a blue laminated card." R.1162a-63a. Judge Stallone later asked Campuzano whether he was given the Pennro strategy appendix as well, and Campuzano hesitantly said that he "believe[d]" he was—but offered no explanation as to how or why there could be a four-page appendix to a laminated piece of paper. R.1165a-66a. Given this scant evidence, even Judge Sprecher did not rely upon Campuzano's testimony, acknowledging that "*we have no evidence* of [the] Pennsylvania Best Claims Practices Manual controlling and setting policy in property claims adjustments." 7/22/15 Opinion, at 38 (emphasis added). Despite this acknowledgement and all the other contrary evidence, Judge Sprecher somehow managed to find that Pennro applied.[16]

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[15] When Campuzano worked at Nationwide, he received warnings about his performance and scored a "0" in the areas of composure and customer focus. He also received warnings in lieu of termination for, and admitted to, falsifying work records and time logs. At some point, he was demoted. He later resigned and sued Nationwide, against whom he testified in this case. R.1157a-60a.

[16] Appellant quotes page 3 of the Pennro document for the proposition that "all claim divisions will be trained and have access to the system." Br. at 64 (first full

Moreover, the undisputed evidence is that, even for personal injury claims, the Manual was not in effect after January 1, 1996. Appellant simply ignores:

- Holben's testimony that the Manual was in effect "from '93 through the end of '95," R.843a, and that a "corporate version was put out in January of '96" that "superseded" the Manual and Pennro, R.863a.
- Gooderham's testimony that the Manual was no longer used after the corporate version replaced it. R.1981a.
- Bano's sworn affidavit that, "The Manual was not in effect at the time of [the Bergs'] loss on September 4, 1996." R.2239a.

In a desperate attempt to link Pennro to this case, Appellant improperly raises an argument that he has *never* raised before. *See* Pa. RAP 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); *Alkhafaji v. Tiaa-Cref Individual & Institutional Servs., LLC*, 69 A.3d 219, 228 (Pa. 2013). Appellant argues that Nationwide's Loss Expense Analysis Program ("LEAP") is "physical evidence tying PENNRO to this case." Br. at 65. This argument fails on many levels. *First*, as Appellant buries in a footnote, LEAP is not a strategy for the handling of claims or litigation; rather, it is "a management information system that stores litigation and expense data for the management of

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paragraph); R.2169a. Appellant misleadingly omits the beginning part of the sentence, which makes clear that the future use of LEAP (a management information system discussed *infra*) is being discussed, not Pennro: "As the region gains a better understanding of the capabilities of LEAP, all claim divisions will be trained and have access to the system." R.2169a.

litigation." Br. at 64 n.25; R.2956a. Because LEAP is simply a database, it—unlike Pennro—was utilized to store information for both personal injury and property damage cases.

Second, the only mention of LEAP in the Pennro document cautioned *against* using LEAP: "LEAP data *can* be used as a reference, *but* [*LEAP*] *must mature further to provide truly credible statistics*." R.2169a (emphases added). The fact that LEAP contained information that *could* be used for personal injury cases in no way means that Pennro applied to the Bergs' property damage claim.

Third, Appellant's argument that "Cole marked the claim-file [sic] for the LEAP program," Br. at 64, is disingenuous. Not only is LEAP a management information system and not a "program," but Cole simply sent to a "Legal LEAP Clerk" a message that said, "New suit opening." R.1806a. This is *exactly* the type of information that LEAP was intended to gather. R.2956a. It has *nothing* to do with Pennro.

Grasping at straws, Appellant argues that the amount of money Nationwide spent defending itself in this case is evidence that Nationwide applied Pennro and litigated in bad faith.[17] However, Nationwide was well within its rights in

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[17] Appellant argues that Nationwide understated the estimate of its attorneys' fees by approximately $901,000. Br. at 62 n.23. As the Bergs' counsel admitted, however, it was they who prepared the document that failed to reflect the $901,000 entry. *See* R.2613a; R.2625a. The billing records that Nationwide produced

defending this case. From the outset, the Bergs sought to turn this case into a national class action and thereafter sought a massive punitive damages verdict. As the Majority correctly recognized, it would be improper to "arbitrarily impose a limit on the time and resources an insurer spends in defending a bad faith action." Majority at 52. Imposing such a limit would be especially improper here, where the Bergs filed numerous amended complaints and sought wildly overbroad and burdensome discovery.

Lastly, Appellant argues that because Nationwide did not produce evidence showing that "Nationwide instructed personnel to stop applying [the Manual] after *Bonenberger*," the Trial Court properly concluded that the Manual applied. Br. at 65. But the Superior Court's 2012 opinion only permitted evidence regarding the Manual if Appellant "la[id]…a proper foundation." *Berg*, 44 A.3d at 1177. Because Appellant failed to establish that the Manual applied to property damage claims, or was in effect at the time of the Bergs' claim (and Nationwide presented heaps of evidence that it was not), Appellant failed to lay a foundation. *See Stotz v. Shields*, 696 A.2d 806, 808 (Pa. Super. Ct. 1997) (for a proper foundation,

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included the $901,000 entry. *See* R.3033a; R.3872a. Moreover, as it turns out, the entry should have never been included on Nationwide's billing records because it was erroneous. Specifically, the entry reflects 10,604 hours billed by one paralegal for work on a single day. R.3872a.

evidence "must be relevant"). The Majority thus properly concluded that the litigation strategy at issue in *Bonenberger* was not used in this case.

e. Nationwide Did Not Deny Knowledge of the Repair Issues.

Lastly, the Bergs argue that Nationwide falsely denied knowing about the repair issues in its Answer to the Bergs' Complaint. Br. at 16 n.6, 18, 57 n.19 (all citing Finding 58; R.584a; R.619a-20a). This accusation does not withstand scrutiny. The relevant paragraph of the Complaint alleges:

> 27. Solely as a result of the conduct of Defendants, LINDGREN and NATIONWIDE, either jointly or severally, through their agents, servants, workmen or employees, the JEEP was not repaired to the condition that it existed just prior to the damage in question being incurred, and in condition unreasonably safe for it's intended use, having un-repaired structural collision damages, including, without limitation, steering and front suspension/alignment problems, deviations in the left frame rail location, front end shoved to the right, unpredictable handling, premature tire wear, poor performance, and mal-positioned parts, doors, and other components thereof or related thereto, as well as various other mechanical, structural and electrical problems which are currently being investigation. An initial report delineating these problems is attached hereto as "E", as attached to 7th amended complaint.

R.584a. Nationwide's Answer provided as follows:

> 27. The document to which Plaintiffs refer in this averment is in writing and, therefore, speaks for itself. Any characterization by Plaintiffs as to the factual content, or legal significance, of that writing

is hereby denied. Further, the designation of Mr. Barone as an expert, and any opinion given by Mr. Barone, is expressly denied as a legal conclusion. The remainder of this averment is a conclusion of law to which no response is required. To the extent that the court deems a response is required, it is hereby denied.

R.619a-20a.

Nationwide's Answer was an entirely proper response to a paragraph that included multiple intertwined factual and legal conclusions and incorporated by reference a written report. *See* Pa. R. Civ. P. 1029. To the extent a further response was required, Nationwide properly denied that it was responsible, either jointly or severally, for poorly performed repairs (because it did not perform those repairs) or that the vehicle was unsafe (because its experts never reached that conclusion).

C. Even If Some of the Trial Court's Findings Were Correct, the Superior Court Did Not Err in Reversing.

Even if the record supports some of the Trial Court's factual findings—and it does not—the Superior Court still did not err in reversing. Contrary to Appellant's argument, the Superior Court did not "reweigh" the evidence; it performed the entirely appropriate function of determining whether the evidence, construed in favor of Appellant, was *clear and convincing*. *See, e.g.*, *Condio*, 899 A.2d at 1155; *Zappile*, 928 A.2d at 262. It was not. Indeed, it is abundantly clear that the Trial Court faulted Nationwide for a significant amount of "conduct" for which there is no support in the record, and that this "conduct" was integral to its

decision to impose $21 million in damages. Therefore, even if there were clear and convincing support for any of the Trial Court's conclusions—and there is not—this Court should still affirm the Superior Court's decision.

III. NATIONWIDE DID NOT ACT IN BAD FAITH BY NOT VERIFYING THE QUALITY OF LINDGREN'S REPAIRS.

Appellant also argues that Nationwide acted in bad faith by not reinspecting the Jeep and verifying that Lindgren repaired it correctly. There are various problems with Appellant's argument: *First*, Nationwide was merely obligated to pay Lindgren for the repairs on behalf of the Bergs. *Second*, Pennsylvania law does not require an insurer to verify that an independent contractor repaired a vehicle properly. And, *third*, even if this Court were now to declare that an insurer has a duty to reinspect repairs performed by an independent contractor, Nationwide did not act in bad faith by failing to comply with that duty in 1996.

A. Nationwide Merely Agreed to Pay for Lindgren's Repairs.

1. Lindgren—with Authorization from the Bergs—Performed the Repairs.

As the authority Appellant cites makes plain, a purported duty to verify that a vehicle was properly repaired exists only if the insurer elects to repair a vehicle by "actively tak[ing] the matter in hand, making all necessary arrangements" for the repair. 12 Couch on Insurance 3d, § 176:41 (quoted in Br. at 22); *see also* 6 Appleman, Insurance Law and Practice § 4005 (quoted in Br. at 25) (stating that an insurer that "elects to repair" must "make the car as serviceable as it was before the

loss"). Indeed, the cases that Appellant and *amicus* United Policyholders cite all involve insurers who themselves took *affirmative steps* to repair the damaged property. *See, e.g.*, *Mockmore v. Stone*, 493 N.E.2d 746, 747 (Ill. App. Ct. 3d Dist. 1986) (insurer required that "the repairs be undertaken by a particular repair service"); *Venable v. Imp. Volkswagen, Inc.*, 519 P.2d 667, 670 (Kan. 1974) (insurer took it upon itself to facilitate the repairs); *Gregoire v. Ins. Co. of N. Am.*, 261 A.2d 25, 26 (Vt. 1969) (vehicle "was at all times under the sole control and supervision of the insurance company"); *State Farm Mut. Auto. Ins. Co. v. Dodd*, 162 So. 2d 621, 624-25 (Ala. 1964) (even after insured said that he wanted repairs done at a particular shop, adjusters refused and had insurer's preferred shop do the repairs); *Buerkle v. Superior Court of Los Angeles Cty.*, 379 P.2d 941, 942 (Cal. 1963) (insurer "arranged to have [the repair shop] make the necessary repairs," and, along with the repair shop, "had sole control of the inspection and repair of the truck").

Here, Nationwide did not take possession of the Jeep, perform any repairs itself, or instruct the Bergs that they had to take the Jeep to Lindgren. Specifically:

- The Bergs, not Nationwide, selected Lindgren to repair the Jeep. R.1098a-1100a; R.1446a-47a.
- Joffred, not Nationwide, inspected the Jeep and prepared the repair estimate. R.1359a.
- The Bergs authorized the repairs, even after learning of Joffred's initial determination that the vehicle was a total loss. R.1421a-22a.

- Joffred, not Nationwide, "determined conclusively that [Lindgren] was going to fix that car, it was not a total loss." R.1380a-82a.
- Joffred, not Nationwide, obtained Mr. Berg's permission to repair the Jeep after K.C. pulled the frame. R.1381a-82a.
- Lindgren, not Nationwide, performed the repairs on the Jeep.

Even *the Bergs' own actions* confirm that Lindgren, not Nationwide, was responsible for the repairs. When Mayerson sent Witmer a letter concerning the repair issues, he instructed Nationwide *not* to get involved. R.1804a. When Stitzel told Mayerson that Potosnak would inspect the Jeep, Mayerson "agreed that it would not be necessary" to have an inspection at that time. R.1816a. Until Nationwide was sued, it was kept on the sidelines because the Bergs understood that Lindgren, not Nationwide, was responsible for the repairs.

Appellant quotes the Bergs' testimony in an attempt to make it appear that Nationwide required them to use Lindgren. Br. at 23. However, Mr. Berg's conversation was not with anyone from Nationwide. It was with the secretary who worked for the Bergs' independent insurance agent. R.1445a-47a. Contrary to Appellant's suggestion, the secretary told Mr. Berg that *Lindgren—not* Nationwide—"will do everything turnkey from appraise it through to repair it." R.1420a. Moreover, Mr. Berg was *not* told that he had to take the Jeep to Lindgren; rather, he *chose* to take the Jeep to Lindgren because he was satisfied with their prior work and "believed in them." R.1446a-47a.

For her part, Mrs. Berg could not say for certain whether she discussed Lindgren with Nationwide or the independent agent's secretary. R.1098a. Mrs. Berg admitted, however, that no one told her that she had to take the Jeep to Lindgren. R.1099a. She also explained that she *never* contacted Nationwide about the repairs because "all Nationwide was going to do at this point is write that check out when those repairs were completed." R.1101a.

2. The Policy Merely Obligated Nationwide to Pay for the Repairs.

Appellant also relies on the Bergs' insurance policy to argue that Nationwide was obligated to do more than pay for the repairs. Specifically, Appellant argues that, because Nationwide forwarded payment to Lindgren (and not to the Bergs), Nationwide was obligated under the Bergs' insurance policy to reinspect Lindgren's repairs. Br. at 27-28. Appellant is wrong.

The "Collision Coverage" provision of the policy is what obligated Nationwide to "pay for loss to your auto caused by collision or upset." R.2442a. Another provision of the policy, dealing with the "Limits of Payment," merely provides various options for how Nationwide "may" satisfy its obligations. It provides that Nationwide "may: (1) pay you directly for a loss; (2) repair or replace your auto." R.2444a.

Appellant argues that, because Nationwide did not pay the Bergs "*directly*" for the cost of the repairs, it must have elected to repair the Jeep itself and was

therefore obligated to reinspect Lindgren's work. For numerous reasons, Appellant's argument fails. As an initial mater, the provision upon which Appellant relies deals with the "Limits of Payment"—not "Collision Coverage"—and even it does not obligate Nationwide to reinspect work performed by repair shops. Moreover, the mere fact that Nationwide sent a check to Lindgren on the Bergs' behalf—rather than sending the check to the Bergs, who would be obligated to pay Lindgren—does not establish that Nationwide elected to repair the Jeep itself. Indeed, to streamline the payment process, insurers typically pay repair shops directly. Finally, as described above, the Bergs' own conduct, including the testimony of Mrs. Berg, demonstrates that the Bergs always understood that Nationwide was obligated solely to "write th[e] check." R.1101a.

B. Insurers Have No Duty to Inspect Repairs Performed by Independent Contractors.

Appellant also argues that, under Pennsylvania law, an insurer that elects to repair a vehicle has a duty to reinspect and verify repairs performed by an independent contractor, such as Lindgren. Appellant is wrong.

1. Pennsylvania Law Does Not Impose on Insurers a Duty to Verify Repairs Performed by Independent Contractors.

To support their contention that Nationwide acted in bad faith by failing to reinspect Lindgren's repairs, Appellant and *amicus* United Policyholders point to two old and obscure cases—neither of which imposes an duty on insurers to

reinspect repairs performed by independent contractors or even involves insurance bad faith.

Appellant claims that "this Court defined an insurer's obligation when it elects to repair damaged property rather than replace it" in *Fire Association of Philadelphia v. Rosenthal*, 1 A. 303 (Pa. 1885). Br. at 26. *Rosenthal*, however, announces no duty that could be relevant here. *Rosenthal* involved a fire insurance policy, not automobile insurance, and the insurer elected to repair and not merely to pay for the repairs. Moreover, the only issue was the amount of damages that the plaintiff could recover (the cost to repair fire damage or the difference in value before and after the fire)—not whether an insurer was liable for the consequences of a third party's faulty repairs.

Keystone Paper Mills Co. v. Pa. Fire Ins. Co., 139 A. 627 (Pa. 1927), likewise involved a fire insurance policy, not an automobile insurance policy. The insurer in *Keystone never* repaired the damaged property or even contracted with any repairmen to repair the property and, again, the only issue related to the amount of plaintiff's damages. Like *Rosenthal*, *Keystone* did not hold that an insurer has an obligation to reinspect repairs performed by a third party.[18]

[18] Appellant and the Trial Court also cite the testimony of the Bergs' expert James Chett, who opined that such a duty exists. R.2001a. Given that this is an issue of

In the 134 years since *Rosenthal* and the 92 years since *Keystone*, no Pennsylvania appellate court has ever held that an insurer that elects to repair a vehicle has an independent duty to reinspect the vehicle after it has been repaired by an independent contractor. Nor has any Pennsylvania court held that the breach of such a duty amounts to bad faith. Indeed, the Superior Court here correctly noted that, "Neither the trial court, the Bergs, nor the Dissent, cite any legal authority supporting a conclusion that an insurer's duty of good faith and fair dealing encompasses an inspection of repairs prior to returning a vehicle to an insured." Majority at 38. Moreover, Appellant's argument that Nationwide itself had a duty to inspect under Pennsylvania law contradicts the carefully crafted statutory framework governing the respective duties of insurers and repair shops. *See* 37 Pa. Code §§ 301.1 (defining "repair shop"), 301.5 (setting forth the obligations of repair shops). Accordingly, this Court should reject Appellant's argument that Nationwide acted in bad faith by not verifying Lindgren's work.

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law, the Trial Court's conclusion was properly disregarded by the Superior Court. *See, e.g., Dolan v. Hurd Millwork Co., Inc.*, 195 A.3d 169, 176 (Pa. 2018).

2. Adopting a Duty to Verify Would Significantly Alter the Operation of Insurance Companies and Drive up Premiums.

The Court should also reject Appellant's argument because the duty advocated by Appellant would significantly alter the operations of insurance companies and drive up premiums. Appellant's argument, if accepted, would mean that insurers could be liable for bad faith any time a repair shop does a bad job. As a result, insurers would need to verify every repair if they want to avoid bad faith liability. To do so, insurers would need to retain a veritable army of reinspectors, slowing down the claims adjustment process and driving up costs. Indeed, requiring insurers to ensure that the vehicle is in a "safe and serviceable condition" may even require insurers to account for conditions not even related to damages from the accident involved.

Given these "potentially significant ramifications," the Superior Court correctly refused to adopt this new duty, noting that it is not the "appropriate body" to announce this new, sweeping obligation on insurers. Majority at 38 n.5. Indeed, if such a duty is to be adopted, it should be through the enactment of new laws by the Pennsylvania legislature. Only the legislature, after being fully informed of the

costs and benefits, should determine whether to impose these significant changes on insurers and significant costs on policyholders.[19]

C. Even if Nationwide Elected to Repair, Its Actions Do Not Constitute Bad Faith.

Finally, Appellant's argument fails because, even if Nationwide elected to repair the Jeep rather than merely pay for it—and it plainly did not—and even if Pennsylvania law recognized a duty to reinspect the work of an independent contractor—which it does not—any failure by Nationwide to verify Lindgren's repairs does not amount to bad faith.

1. Because Such a Duty Would Be New Under Pennsylvania Law, Nationwide Had a Reasonable Basis for Not Reinspecting the Repairs over Twenty Years Ago.

A finding of bad faith requires clear and convincing evidence that Nationwide lacked a reasonable basis for denying benefits, and *knew or recklessly disregarded* this lack of a reasonable basis. *Rancosky v. Washington Nat'l Ins. Co.*, 170 A.3d 364, 377 (Pa. 2017). Thus, even if the Court now declares that an

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[19] Appellant tries to minimize the burdens associated with this new duty by claiming that the duty arose here because the Jeep took months to repair. However, limiting the duty to situations where a repair takes a long time is unworkable. As an initial matter, insurers would need to guess at the amount of time that will give rise to the duty. More significantly, there will undoubtedly be numerous other situations where bad faith plaintiffs will claim that the duty should apply, such as particularly expensive repairs, vehicles that needed to be re-repaired following initial repairs, or repairs performed by certain repair shops. To avoid bad faith liability, insurers would need to inspect all repairs.

insurer has a duty to ensure that an independent contractor repaired a vehicle properly, Appellant cannot prove bad faith unless Nationwide knew or recklessly disregarded its duty.

As discussed above, the duty upon which Appellant relies plainly did not exist in 1996. Indeed, the Superior Court refused to recognize such a duty in 2018 based upon the facts of this very case. Majority at 38. But even if this Court were to declare that Pennsylvania law imposes such a duty on insurers, the existence of this duty was far from clear in 1996. Accordingly, Nationwide did not act in bad faith by failing to reinspect Lindgren's repair work. *See*, *e.g.*, *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680, 690 (Pa. Super. Ct. 1994) (it was not bad faith for insurer to oppose stacking of uninsured motorist coverage where "[a]t the time of the [insureds'] accident, Pennsylvania law regarding the 'stacking' issue was unsettled").

2. Appellant Conflates a Purported Contractual Duty with Bad Faith.

Moreover, the authorities Appellant and the United Policyholders cite do not involve bad faith claims. Rather, they deal exclusively with claims for breach of contract or negligence. Accordingly, even if Nationwide breached any of the duties that it owed the Bergs (and it did not), such a breach would demonstrate, at most, negligence or breach of contract. *See Rancosky*, 170 A.3d at 378 (Saylor, C.J., concurring) ("[A] finding of bad faith requires more than mere negligence.");

see also Bodnar v. Nationwide Mut. Ins. Co., 2015 WL 5517922, at *14 n.8 (M.D. Pa. Sept. 15, 2015) (explaining that, even if insurer "should have done a deeper factual investigation," bad faith claim fails). As the Superior Court held, "the evidence here does not rise above negligence, much less support a finding of bad faith by clear and convincing evidence." Majority at 38.

Appellant also makes a rambling yet patently false argument that Nationwide necessarily acted in bad faith. Specifically, Appellant argues that Nationwide has a duty to act as a "reasonable insurer" as described in statutes, appellate court decisions, and treatises, and that a breach of that duty necessarily "constitutes a reckless disregard." Br. at 30-35. Appellant's argument finds no support in the law, and for good reason. If Appellant were correct, then *every* breach of an insurance policy or insurance regulation would constitute bad faith *per se* because the insurer failed to fulfill its statutory or contractual duties. That is, quite simply, not the law—and all the cases Appellant cites in support of this argument merely hold that where a statute sets forth the defendant's duties, breach of those duties constitutes *negligence*.

IV. THE SUPERIOR COURT DID NOT REACH NATIONWIDE'S ARGUMENTS REGARDING PUNITIVE DAMAGES, ATTORNEYS' FEES, AND INTEREST.

In its appeal to the Superior Court, Nationwide challenged the Trial Court's finding of bad faith, as well as its awards of punitive damages, attorneys' fees, and

interest. Super. Ct. Opening Brief 51-64. Because the Superior Court found that Nationwide did not act in bad faith, it did not reach these issues. If this Court reverses, it should remand the case to the Superior Court to consider these issues.

CONCLUSION

For the foregoing reasons, Nationwide respectfully requests that this Court affirm the Opinion and Order of the Superior Court.

Dated: September 20, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellee has complied with the 14,000 word limit set forth in Pa. R.A.P. 2135(a)(1). According to the Word Count feature in Microsoft Office Word 2013, Appellee's Brief contains 13,983 words, excluding the parts exempted by Pa. R.A.P. 2135(b).

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PROOF OF SERVICE

Pursuant to Rule 121(d) of the Pennsylvania Rules of Appellate Procedure, the undersigned hereby certifies that on this date, a true and correct copy of the foregoing document was served upon the following parties via PACFile:

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The undersigned hereby certifies that no confidential information is included in this filed document and the filing complies with the Public Access Policy of the Unified Judicial System of Pennsylvania.

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