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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.

REPLY BRIEF FOR PLAINTIFFS/APPELLANTS

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 of Berks County, Civil No. 98–813, dated April 21, 2015

Benjamin J. Mayerson
MAYERSON LAW, P.C.
1 North Sunnybrook Road
Pottstown, PA 19464
(610)906-1966

Kenneth R. Behrend
BEHREND LAW GROUP, LLC
The Pittsburgher, Suite 1700
428 Forbes Avenue
Pittsburgh, PA 15219
(412)391-4660

Counsel for Appellants
Daniel Berg and Estate of Sheryl Berg

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I. REPLY ARGUMENT TO NATIONWIDE'S COUNTER STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

1. Reasonable Minds Disagree with Majority

> JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant.

Buckley v. Exodus Transit & Storage Corp., 744 A.2d 298, 304-05 (Pa. Super. 1999)(internal citations omitted).

Nationwide's contention it is entitled to judgment as a matter of law was put to rest in 2012. *See Berg v. Nationwide Mut. Ins.*, 44 A.3d 1164, 1176-79 (Pa. Super. 2012)(**"***Berg II*"). Therein it was determined that in granting Nationwide judgment as a matter of law in 2007 the first trial judge, the Honorable Albert Stallone, had "erred in multiple respects." *Id.* at 1175.[1]

Nationwide's Brief ignores the remaining, limited basis for JNOV, namely that JNOV may be entered only where "no two reasonable minds" could disagree as to entry of JNOV. Nationwide does not address this limited, second standard because reasonable minds did, in fact, disagree

[1] Judge Stallone erroneously granted Nationwide a directed verdict, concluding that this was not "an action arising under an insurance policy," but rather one arising only under a collision repair guaranty. *Id.*

with the Majority. Given Nationwide's refusal to acknowledge this fact, a closer review of the relevant procedural history becomes appropriate.

Nationwide's appeal was originally assigned to Judge Stabile, Judge Panella, and former Supreme Court Justice Fitzgerald. On February 2, 2016, at the inception of oral argument, Judge Panella announced an arguable conflict. Both parties waived the conflict and oral argument proceeded to conclusion. Judge Panella subsequently recused himself and, following fifteen months of deliberation, a deadlock was announced between Judges Stabile and Fitzgerald. *See Per Curiam Order (*May 1, 2017).

Thereafter the matter was reassigned to Judge Stabile, with Judge Ott and President Judge Emeritus Stevens, (who also formerly served on the Supreme Court). Judges Ott and Stabile joined in reversing the trial court and granting Nationwide JNOV. Judge Stevens filed a 10-page Dissent detailing why the finding of insurer bad faith was well-supported and why the $18 million punitive award was appropriate. Dissent at *8, *10. Thus, a second Supreme Court Justice ardently refused to agree with Judge Stabile.

The fact that two former Supreme Court Justices disagreed with Judge Stabile, superimposed upon *Berg II* which culminated in an undivided Superior Court panel finding sufficient evidence in the 2007 record that, if

accepted by the trial court on remand, would support a finding of insurer bad faith, *see Berg II*,[2] contravenes the "reasonable minds" standard. Of the eight appellate judges assigned to review the record, only two determined JNOV was merited. Five "reasonable minds" disagreed.[3]

Nationwide has failed to cite any case adjudging it appropriate for a *divided* Superior Court panel to enter JNOV, which inherently evidences a difference of opinion. Instead, Nationwide tied itself to the first trial judge, the Honorable Albert Stallone, to suggest judicial agreement with the Majority, thus invoking Judge Stallone's name 12 times throughout its Brief. *See* Nationwide Brief, 14-46. Yet Judge Stallone never entered a single finding of fact and it remains unclear what judgment he would have entered on remand pursuant to *Berg II*.

Nationwide also ignores that in *Berg II* the Superior Court determined Judge Stallone did not understand this case. Specifically, the undivided panel explained: (1) "the trial court adopted ... as its legal conclusion [a]

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[2] Judge Strassburger filed a Concurring and Dissenting Opinion. In his dissent Judge Strassburger disagreed as to the ruling requiring *in camera* review of disputed claim file redactions. He joined the Majority "in all [other] respects." *Berg II* at 1180-81 (Dissent).

[3] The eighth, Judge Panella, abstained.

novel theory of statutory interpretation" in conflict with Supreme Court precedent, *id.* at 1172; (2) Nationwide advanced arguments that misled the trial court, *id.* at 1171; (3) the trial court's reasoning "reflect[ed] a clear misunderstanding of the nature of [Plaintiffs'] claims under section 8371," *id.* at 1173; and (4) "the trial court erred in multiple respects." *Id.* at 1175.

This Court also took issue with Judge Stallone's procedural jurisprudence. The limited issue before this Court in 2010 concerned Judge Stallone's finding of waiver under Appellate Rule 1925(b), where court staff declined to disclose the location of Judge Stallone's chambers for service. *See Berg v. Nationwide Mut. Ins. Co.,* 6 A.3d 1002 (Pa. 2010) (plurality opinion)(Todd, J.) ("*Berg I*"). In characterizing the underlying facts, this Court acknowledged that it seemed Judge Stallone had been "secreted away in the bowels of the Berks County Courthouse," *id.* at 1004, and the finding of waiver thus inappropriate because Judge Stallone's Rule 1925(a) Order was itself deficient. *Id.* at 1011.

Moreover, despite the limited record available in 2004, a unanimous jury found "clear and convincing" evidence of fraud pursuant to

Pennsylvania's UTPCPL.[4] (R.1667a, R.1673a, R.1932a) Thus, twelve additional "reasonable minds" determined by clear and convincing evidence that Nationwide had engaged in fraudulent conduct toward its insureds.

The foregoing manifestly demonstrates an abuse of discretion by the Majority in granting JNOV. As acknowledged by Nationwide in its Brief at 21, a court abuses its discretion when it renders 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." *Harmon ex rel. v. Borah*, 756 A.2d 1116, 1123 (Pa. 2000). The Majority's Opinion falls under *Harmon* and should be vacated to protect access to, and the integrity of, our judicial system. *See also* Amicus Brief of The Pennsylvania Association for Justice, cogently stating how the Majority abrogated the century old standard of review in granting Nationwide JNOV, and the harm inherent therein.

[4] Plaintiffs' Brief, at 3, erroneously provides "R.1743-44a" as the record location documenting that the jury's finding of fraud was by "clear and convincing" evidence. The correct record citation is R.1673a.

2. **The Issue of Whether the Standard of Review Permits an Appellate Court to Reweigh Evidence If the Trial Judge Reads Transcripts on Remand Is Waived**

Nationwide now raises the following issue for the first time:

> 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 determination. *Comm. 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).

Nationwide Brief at 23.

Nationwide neither objected on this basis to the trial court's findings nor raised this issue in its post-trial motions or Rule 1925(b) statement, and thus never provided the trial court the opportunity to address the issue. *See* Nationwide's Statement of Errors within Judge Sprecher's 1925(a) Opinion at 2-5. Waiver should thus apply pursuant to Pa. R.A.P. 302(a), "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." *See also* Plaintiffs' Brief at 6, n.2.

Further, neither case cited by Nationwide is on point. *Esquilin* is a forfeiture case under the forfeiture statute wherein the trial court's findings

were based upon documents; there was no testimony, transcribed or otherwise. The Commonwealth Court reversed the trial court's findings, ruling it could read documents as well as the trial court. Rather than affirming the Commonwealth Court panel's fact-finding mission, as implied by Nationwide, this Court reversed, noting: "The common, overriding difficulty in the Commonwealth Court panel's approach here consists in its erroneous erection of artificial and absolutist evidentiary requirements." *Id.* at 534. *Esquilin* is thus relevant instantly only inasmuch as the Majority also erected artificial and absolutist evidentiary requirements.

Daniels limited issue concerned the statutory standard of review in the context of worker's compensation claims pursuant to the Workers Compensation Act, which *requires* the judge/referee to explain why otherwise competent testimony was rejected. *Daniels* has nothing to do with cases outside the workers compensation statutory context where Appellate Rule 1925 dictates the procedures and content of trial court opinions.[5]

[5] Transcripts may well constitute the best evidence on remand. Memories fade; witnesses relocate. Dean Jones was already retired when he testified in 2004. (R.876a, R.880a). Mrs. Berg was herself dying of breast-cancer in 2013. *See Verdict* at 41-42.

3. Insurers Cannot Defend Bad Faith Judgments On Appeal by Focusing Attention Upon the Insured's State of Mind

Our courts have long recognized that an insurer cannot escape liability for its bad faith by pointing a finger of blame at its insured. The proper focus for the purposes of establishing bad faith is the conduct of the insurer. *See Mohney v. Am. Gen. Life Ins. Co.*, 116 A.3d 1123, 1131 (Pa. Super. 2015).

Nationwide has nevertheless repeatedly shifted the focus during these appellate proceedings, blaming Plaintiffs, for example, of filing this lawsuit too early and for the first five years of appellate review. *See* Nationwide Brief at 44, 16, and 29. Nationwide invokes the undersigned's name 28 times, *id.* at 8-54, repeatedly blaming "Mayerson" for Nationwide having not completed a timely inspection of its BRRP repairs.[6] Nationwide invokes the term "class action" seven times. *Id.* at 11-49. Nationwide accuses Plaintiffs of being "extraordinarily burdensome" during discovery at 14, and

[6] Nationwide places significant weight upon one claim log entry by PDS Stitzel purportedly documenting a verbal agreement with the undersigned that PDS Potosnak would not need to inspect the repairs. *See* Nationwide Brief at 8, 30, 54. Nationwide did not confirm the alleged agreement by letter and it is now clear that this self-serving log entry constitutes Nationwide's first delay tactic. Once Potosnak inspected the repairs and confirmed substantial problems Nationwide did not help Plaintiffs but instead concealed the findings. *See* Plaintiffs' Brief at 55. The only purpose for Stitzel's log note was to make Nationwide *appear* reasonable without it having to *be* reasonable.

Nationwide tracked the vehicle's odometer to undermine allegations of unsafe repairs. *See* Nationwide Brief, 13, 42.[7]

None of the above evidentiary issues are relevant to whether Nationwide engaged in bad faith conduct, and more specifically to whether the Majority abused its discretion in granting JNOV. The proper focus is the conduct of the insurer. *See Mohney*, *surpa.* Where, as in this case, such irrelevant evidence was properly disregarded by the trial court, it becomes particularly problematic for such evidence to then be considered by the appellate court in granting JNOV.

4. The Jury Found Clear and Convincing Evidence of Fraud On Approximately Half The Record Available To Judge Sprecher

Nationwide argues that appellate review includes the fact that "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." Nationwide Brief at 18 (emphasis in original). In actuality, the jury had

[7] Tracking the vehicle's odometer while secretly knowing the structural repairs failed, and while refusing to provide a replacement vehicle, is reprehensible. Every mile placed on that vehicle after it was declared a structural total loss rests with Nationwide. Its actions risked not only the well-being of its insured but also the motoring public, particularly since the tires could no longer hold tread/traction thereby increasing the risk of the vehicle impacting another vehicle or pedestrian. (R.1085-87a, R.1410a)

approximately half the evidence in 2004 that was available to Judge Sprecher in 2013, and the jury *still* found clear and convincing evidence of fraud under the UTPCPL. (R.1667a, R.1673a, R.1932a). *See also* Plaintiffs' Brief at 6, n.2; Table of Contents to Reproduced Record (detailing evidence available in 2004, 2007, and 2013); and, *Berg II*.

By way of further clarification, *Berg II* made clear that the nominal jury award was irrelevant since Nationwide purchased the vehicle after this lawsuit was filed, thereby reducing the damages presented to the jury. *Id.* at 1177-78. Our courts recognize that "nominal damages" are not a proper factor to consider in a single-digit ratio analysis. *See Jester v. Hutt,* No. 18-3197, 2019 WL 4050434 (3d Cir. 8/28/2019) (Third Circuit analysis of other jurisdictions, holding single-digit ratio does not apply to nominal damages). *Id.* at *5-*6.

5. The Majority Had Ample Record Citations

Nationwide argues the standard of review permits appellate courts to ignore record citations provided in the verdict winner's appellate brief. Thus, according to Nationwide, JNOV was appropriate because Judge Sprecher cited to the record only 40 times whereas the Majority cited the record 142 times. *See* Nationwide Brief, 23-24.

Judge Sprecher conducted an exhaustive review of the record (*Opinion*, 33) which is evident throughout his Findings. He also deliberated six months before filing his Findings and took another year to file his Opinion. Moreover, Judge Sprecher's forty record citations are not insignificant, particularly once supplemented by the 238 record citations within Plaintiffs' Superior Court Brief.

Nationwide's Brief does not once challenge the accuracy and relevance of Plaintiffs' voluminous record citations. The Majority simply disregarded these record citations, disregarded the century old standard of review, and then improperly supplanted the trial court's findings with its own findings to grant Nationwide JNOV.

6. The "Exacting" Standard of Review Does Not Exist

The standard of review advocated by Nationwide is, as Nationwide identifies it, an "exacting review." *See* Nationwide Brief at 1, 19, 25. It requires review of every factual finding, even if relatively inconsequential, to determine whether each is supported by evidence that is "clear and convincing." Hence rather than being satisfied that an appellate court scrupulously reviews the record to ensure the trial court's finding of bad faith is supported by evidence that is "clear and convincing," Nationwide

posits that every factual finding must also be supported by evidence that is "clear and convincing."

Consistent with this hybrid standard of review, the Majority identified four findings that it concluded were not sufficiently supported, mandating JNOV. *See* Majority at *12-*13, and *60. Plaintiffs disagree that all four facts must be proven by clear and convincing evidence, and instead respectfully submit that one identified finding, if proven by clear and convincing evidence, would support a finding of bad faith, namely whether Nationwide knowingly placed its insureds at risk to suffer injury or death to save itself money on a collision claim.[8] Nevertheless, Plaintiffs scrupulously addressed all four findings identified by the Majority as having inadequate record support. *See* Plaintiffs' Brief, 38-66.

Nationwide's Brief, at 26-31, nevertheless identifies six additional facts it contends were not proven by clear and convincing evidence. Plaintiffs will not be drawn down six additional rabbit holes. Rather, Plaintiffs will address additional factual disputes only if the newly identified finding reasonably falls under the umbrella of the Majority's disputed factual findings. This will

[8] Nationwide's liability expert, Constance Foster, agreed. (R.2803-06a).

follow a supplemental reply to the erroneous contention that insurers have no duty to return vehicles in a safe condition after electing to repair the vehicle through the insurer's direct-repair program.[9]

II. UPON ELECTING TO REPAIR THE JEEP, NATIONWIDE ASSUMED A DUTY TO ENSURE THAT THE VEHICLE WAS RESTORED TO ITS PRE-LOSS CONDITION BEFORE PERMITTING IT'S RETURN TO PLAINTIFFS.

Plaintiffs ask this Court to confirm when an insurer elects to repair a vehicle and participates in the decision-making process of appraisal and repair, the insurer is required to ensure that the vehicle is returned in a pre-collision condition.[10] This concept has existed in Pennsylvania's insurance regulations since 1978. *See* 31 Pa. Code §146.8(f).

Nationwide asks this Court to find: (1) Pennsylvania law does not require an insurer who elects to have a damaged vehicle repaired ensure that

[9] Plaintiffs respectfully submit that the following reply argument will establish that Nationwide must have always known it had such a duty, and that it has thus likewise always known that its arguments to the contrary are baseless. It is through this lens that the factual disputes raised by Nationwide should be viewed.

[10]Contrary to Nationwide's and its Amici's attempts to reframe the question presented to this Court, Plaintiffs are not asking this Court to impose an automatic duty on insurers to inspect all insured repairs. Compare Appellant's Brief at Page 3, Question 3, and Amici, the Insurance Federation, et al., Page 3, with the question accepted in the March 29, 2019 Order.

the vehicle is returned in its pre-collision condition, because this duty would be devastating to insurers[11] and Pennsylvania's economy in general; (2) Nationwide was merely obligated to pay for repairs; and (3) even if this Court confirms insurers have a duty, that duty did not exist in 1996.

Nationwide's arguments are neither supported by the law of Pennsylvania, nor the facts of this case.[12]

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[11]Nationwide asserts it may have to hire an "army of reinspectors." Nationwide's Brief at 59. The manner in which Nationwide chooses to comply with existing Insurance Regulations is irrelevant. Further, it appears that Nationwide already has adjusters in place who are competent to "reinspect." (R.942-43a).

[12] During the trial, Nationwide explained it's Blue Ribbon Guarantee:

> The Blue Ribbon Guarantee is a guarantee that Nationwide offers its policyholders who elect to participate in the program that guarantees that Nationwide will ensure that the repairs are done properly and timely.

(R.1100-01a)

> That the BRRP is not specifically mentioned in the insurance policy or is 'separate from' or 'different than' the insurance policy (as Foster and Bashore testified), are distinctions without any relevant difference in this context.

Berg v. Nationwide, supra, 44 A.3d at, 1173.

1. The Record Demonstrates that Nationwide Took "*Affirmative Steps*" to Repair the Jeep.

The trial court determined that Nationwide elected to have the Jeep repaired under its direction rather than declared a "total loss." (*Verdict*, Findings 33-38)

Nationwide attempts to place the decision to repair on the shoulders of Lindgren and Plaintiffs. The record contradicts this assertion.

The evidence and testimony considered by the trial court confirms that after Lindgren's appraiser informed Nationwide of his belief the Jeep should be "totaled," Nationwide's adjuster became actively involved in the appraisal and repair process, personally inspecting the Jeep, directing the Jeep be moved to a second facility, without the owner's knowledge, so its twisted frame could be "pulled," and spot-checking repairs in progress. (*Verdict*, Finding 34; R.1871a, R.1002-03a)

Contrary to Nationwide's contention, at pg. 54, Plaintiffs reported the loss to Nationwide's "1-800" number and their local Nationwide agent. (R.1420a, R.1093-98a) (Mr. Berg called Nationwide's "1-800" number, but Nationwide wanted to talk to Mrs. Berg since she was involved in the collision. Mrs. Berg testified, "the woman that I spoke to said that if we take

it to a blue ribbon facility they would do the appraisal, they would fix the car and I would basically pick it up and everything would be done"), and (R.1420a) (The Nationwide Insurance Agency recommended having the Jeep towed to Nationwide's BRRP facility - Lindgren - and "they will do everything turnkey from appraise it through to repair it").[13]

2. An Insurer's Duty to Repair Is Not Limited to Fire Insurance.

Nationwide and Amici attack Plaintiffs' reliance upon *Keystone Paper Mills Co. v. Pennsylvania Fire Ins. Co.*, 139 A. 627 (Pa. 1927), and *Fire Ass'n of Phila. v. Rosenthal*, 1 A.303 (Pa. 1885), asserting the cases are irrelevant to *auto* insurance claims. One Supreme Court disagrees, specifically citing *Keystone Paper* as authority for insurers' duties handling automobile insurance claims. *See Interstate Ins. Co. v. Logan*, 109 A.2d 904 (Md. 1954), holding:

> Where an insurance company elects to repair damaged property for an insured, it is bound to put the property back in substantially the same condition or in as good condition as it was in before the loss, and the repairs must make the property as

[13] Conversely, Nationwide contends, "[t]he Bergs, not Nationwide, selected Lindgren to repair the Jeep." *See* Nationwide Brief at 53. Assuming this were even true, Nationwide fails to mention that Plaintiffs' familiarity with Lindgren stemmed from Nationwide previously referring Plaintiffs to Lindgren on a prior BRRP claim. (R.1420-21a).

> serviceable as it was before the loss. *Keystone Paper Mills Co. v. Pennsylvania Fire Insurance Co.*, 291 Pa. 119, 139 A. 627.

Id. at 906.

Similarly, in *Eisenberg v. Motors Ins. Corp.*, 307 N.Y.S.2d 922 (1970), a New York court explained:

> The extent of the obligation when the defendant insurance company elects to repair [an automobile] **is analogous to such obligation when such election is made under the terms of the New York Standard Fire Policy**. This has been analyzed and discussed cogently in Richard's on Insurance (5th Ed. by Warren Friedman, Sec. 554, p. 1963)...

Id. at 926 (emphasis added).

The New York court explained the insurer's duties were "created by defendant's election to make repairs" since:

> This case does not involve an ordinary common-law bailor-bailee relationship, but a relationship arising from an agreement between the insurer, who has been paid and has received a consideration to insure certain results, and the plaintiff.

Id. at 927.

Other States similarly so hold. *See, e.g. Nelson v. Nationwide* 7:12-cv-01965-LSC (N.D. Ala. Dec. 20, 2012) (citing *State Farm Mutual Automobile Ins. Co. v. Dodd*, 162 So.2d 621 (Ala. 1964)); *Home Indem. Co. v. Bush*, 513 P.2d 145 (Ariz. App. 1973); *Travelers v. Parkman*, 300 So.2d 284, 285 (Fla. App. 1974)

(citing APPLEMAN); *Simmons v. State Farm*, 143 S.E.2d 55, 57 (Ga. App. 1965)("Where the insurer elects to repair the damaged automobile and represents, at least tacitly, that it will place the vehicle in the condition that it was in previously, the insured has no choice but to acquiesce" citing Blashfield, CYCLOPEDIA OF AUTOMOBILE LAW & PRACTICE, Vol. 6, p. 500); *Interstate Ins. Co. v. Logan*, 109 A.2d 904, 906 (Md. 1954); *Williams v. Gulf Ins. Co.*, 657 N.E.2d 240, 242 (Mass. App. 1995) (same) (citing COUCH and APPLEMAN); *Dwane v. West Am. Ins. Co.*, 297 A.2d 865, 869 (N.J. Super. 1972) ("If the insurer elects to repair, such repairs must make the car as serviceable as it was before the loss."); *Pierce v. American Fidelity Fire Ins. Co.*, 83 S.E.2d 493, 496 (N.C. 1954); *Van Nes Allen v. Home Indem. Co.*, 604 P.2d 385, 387 (Okla. Civ. App. 1979); *Senter v. Tennessee Farmers Mut. Ins. Co.*, 702 S.W.2d 175, 177 (Tenn. App. 1985); *Great Texas County Mut. Ins. Co. v. Lewis*, 979 S.W.2d 72, 74 (Tex. App. 1998)(citing COUCH and APPLEMAN, "If the insurer elects to repair, such repairs must make the car as serviceable as it was before the loss."); *Moeller v. Farmers Ins. Co. of Washington*, 267 P.3d 998, 1003 (Wash. 2011)("... Certainly, an average consumer would expect to be put in the same

position whether his or her car was "totaled" or repaired."); and, *see also* 46 C.J.S. Insurance §1195(d)(2), at pp. 132--133: Election to Restore or Repair.[14]

Relying on *Perez v AMCO Ins. Co.*, 2009 WL 755228 (N.D. Ill. Mar. 23 2009), Amici, the Insurance Federation, et al., asserts that reliance upon COUCH ON INSURANCE §176:41 is misplaced since it relates solely to "*liability to strangers*". See Amici Brief at 13, fn. 10 (emphasis in Brief).

Amici fail to mention that *Perez* specifically noted the Supreme Court of Illinois in *Mockmore v. Stone*, 493 N.E.2d 746 (Ill.App.Ct. 1986) found COUCH §176:41 specifically applies to first-party automobile insurance claims. *See Perez*, at *8 ("The court in *Mockmore* extended an insurer's duty to make repairs with due care to the owner of an automobile insurance policy, rather than only to strangers.").

Thus, Amici's sole case addressing the applicability of COUCH actually supports Plaintiffs' reliance upon COUCH.

[14] In footnote 12, Amici Insurance Federation, et al., miss the point of the cases cited by Plaintiffs. The point being made is that the legal concept, (where an insurer elects to repair, the vehicle must be returned in a pre-collision condition), has been recognized by courts for decades. It is not a novel concept.

3. Nationwide Argues It Could Not Have Acted Knowingly or Recklessly Since In 1996 Neither Regulations nor Insurance Laws Addressed the Duty at Issue in This Appeal. However, Pennsylvania's Regulatory Scheme Governing Unfair Claims Handling was Enacted In 1978.

Nationwide asserts:

> Appellant's argument that Nationwide had a duty to inspect under Pennsylvania law contradicts the carefully crafted statutory framework governing the respective duties of insurers and repair shops.

Nationwide's Brief at 58.

Nationwide's argument, based solely upon regulations promulgated to address Automotive Industry Trade Practices, ignores statutory framework controlling insurers' duties in claims-handling.

In 1978, Pennsylvania's Insurance Department informed insurers it intended to implement regulations consistent with the NAIC's "Unfair Claims Settlement Practices Model Regulation" since:

> The Department [was] concerned with the lack of standards for claims settlement. **It is felt that the procedures** set forth constitute the minimum standards for sound claims settlement practices and **are not unduly burdensome.**

See 8 Pa. Bull. pp.1722-1724 (June 24, 1978) (emphasis added).

Under the heading, "**Standards for prompt, fair and equitable settlements applicable to automobile insurance**", is the following:

> **When the insurer elects to repair, the insurer shall cause the damaged automobile to be restored to its condition prior to the loss** at no additional cost to the claimant other than as stated in the policy and within a reasonable period of time.

Id. at p. 1723 (emphasis added).

After allowing for comments or objections, the regulation was adopted effective December 16, 1978. *See* 8 Pa. Bull. pp. 3575-3577 (June 24, 1978). The Insurance Department noted, in response to "numerous comments" received from insurers, a specific clarification: the insurer's duty applied to "first-party" claims:

> Section 146.8(f) applies **to first-party** automobile insurance policies which allow the insurer the election to repair; additional reference to first-party claims made it clear.

Id. at 3575 (emphasis added). The adopted regulation reads:

> (f) **When the insurer elects to repair in a first-party claim, the insurer shall cause the damaged automobile to be restored to its condition prior to the loss** at no additional cost to the claimant other than as stated in the policy and within a reasonable period of time.

Id.

This regulation remains in force. *See* 31 Pa. Code §146.8(f).[15]

The "Unfair Claims Settlement Practices Model Regulation" upon which Pa. Code §146.8(f) was modeled, has been adopted in a "substantially similar manner" by twenty-three states, including Pennsylvania. *See* Unfair Property/Casualty Claims Settlement Practices Model Regulation, MDL-902 available at https://naic.org/prod_serv_model_laws.htm.

The Model Regulation is similar, but not identical, to Pa. Code §146.8(f) and includes: "When the insurer elects to repair **and designates a specific repair shop for automobile repairs** …." *See* NAIC, MDL-902, Section 8(G). The Pennsylvania Insurance Department did not adopt this limitation. The Pennsylvania regulation is broader. *Compare* Pa. Code §146.8(f).

Based upon insurers' existing duties under Pennsylvania Insurance Regulations, Nationwide's conclusory statement, (that requiring an insurer

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[15] In 1963 the Department of Justice entered into a Consent Decree with the Association of Casualty and Surety Companies prohibiting insurers across the country from antitrust violations related to controlling and managing car repairs, appraisers, and funneling of automobile repair business to repair facilities selected by insurers. See https://www.justice.gov/atr/page/file/1189311/download. ("Each defendant is enjoined from ... exercising any control over the activities of any appraiser of damage to automotive vehicles ...").

The Association of Casualty and Surety Companies is now known as the "American Property Casualty Insurance Association," and is an Amicus in this case.

electing to repair a vehicle to ensure the vehicle was actually repaired contradicts Pennsylvania Insurance Regulations), should be rejected by this Court.

III. FOUR TRIAL COURT FINDINGS MISCHARACTERIZED AS HAVING INADEQUATE RECORD SUPPORT.

The Majority, at *60, identifies four findings as having inadequate record support. Record citations supporting all four findings are in Plaintiffs' Brief at 36-66. Nationwide claims factual issues remain unresolved, triggering this additional reply.

1. Nationwide Vetoed A Structural Total Loss Appraisal

Record citations supporting this finding are in Plaintiffs' Brief, 38-44. Nationwide nevertheless argues Judge Sprecher "made a host of [other] indefensible factual findings," including that "Nationwide *stole the total loss appraisal out of a cabinet* at Lindgren." Nationwide Brief, 26 (emphasis in original). While not, by itself, determinative of bad faith, there is evidence supporting it.

First, 31 Pa. Code §62.3(a)(1) requires all appraisals be signed "before the appraisal is submitted to the insurer." Nationwide's claim log confirms on September 10, 1996: 1) the vehicle was declared a total loss; 2) the BRRP

facility had an estimate; and, 3) the facility was forwarding the estimate to Nationwide. (R.1874a)

Thus, there should be two copies of the signed September 10 appraisal; the facility's copy and Nationwide's copy. Joffred agreed he had the original, but it went "missing." (R.1322a) He confirmed it was in his "file cabinet," and that Nationwide had "routine access" to that cabinet. *Id.* Dean Jones agreed, if standard procedures were followed, there would be a signed September 10 appraisal. (R.924-25a)

Moreover, all appraisals must include: "[a] description of repairs, known at the time of appraisal, necessary to return the vehicle to its predamaged condition." 31 Pa. Code §62.3(b)(5). The only appraisal produced is dated September 20, and it fails to list roof damage; yet the vehicle was sent to a third party for structural repairs in part because, according to Joffred, his equipment could not repair the roof. (R.1335-37a) When asked whether roof damage was itemized on the September 10 appraisal "that was missing from your file," Joffred replied, "I don't recall." (R.1336a) Joffred never denied its existence but insisted only that it was "missing" from his cabinet.

Nationwide also argues, at 6-7 and 34, that it was Mr. Berg who directed the total-loss repair, not Nationwide. Nationwide fails to disclose that Mr. Berg *immediately* changed his testimony, citing the intervening "eight year[s]" for his confusion. (R.1422a) Under proper application of the standard of review, this conflicting testimony is irrelevant.

2. The Jeep Was Damaged Beyond Repair

Record citations supporting this finding are in Plaintiffs' Brief, 44-45. Nationwide nevertheless argues at 35: "*Not a single witness testified that the Jeep could not be repaired,*" and even, "the *Bergs' own expert,* testified that the vehicle *was* repairable." This is false. Nationwide fails to provide any record citation to Plaintiffs' expert, Donald Phillips, P.E. (R.1131-1150a) Nationwide did not cross-examine Phillips, and Phillips did not testify that the vehicle was repairable. (R.1146a) Plaintiffs nevertheless concede any vehicle could, in theory, be reassembled around a VIN-plate removed from a dashboard – even a vehicle destroyed by fire. That, however, is hardly what Pennsylvania's Appraisers Act contemplates. *See* Plaintiffs' Brief at 38-40.

3. Nationwide Knew the Structural Repairs Failed

Record citations supporting this finding are in Plaintiffs' Brief, 45-55. Nationwide nevertheless argues, at 37-40, that Plaintiffs misrepresented five

disputed facts as being "undisputed." Nationwide is wrong. The Majority acknowledged these five facts have adequate record support and are thus not reasonably disputed. *See* Plaintiffs' Brief, 47.

One, critical, undisputed fact is that Nationwide reinspected the repairs several times, including near the end of the protracted repair period. *See* Majority at *34. Dean Jones confirmed that when such reinspections occur, reinspection reports go in the claim file. (R.940-41a) Jones also confirmed the focus of the reinspections is "quality of repairs." (R.942-43a)

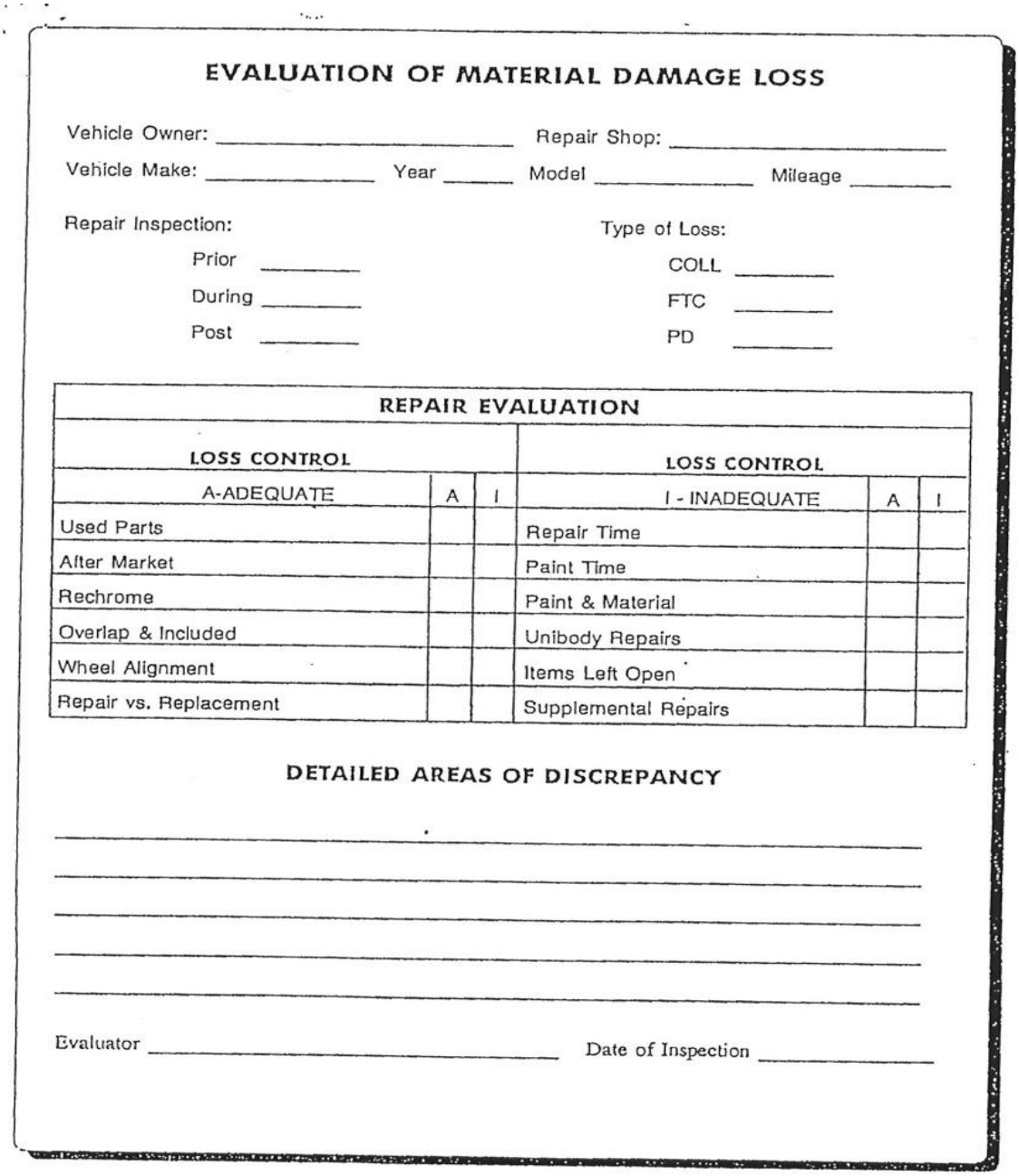
Because every Nationwide witness conceded reinspections were standard BRRP procedure,[16] and because Wert, who worked in the adjacent repair-bay, testified Nationwide reinspected the Jeep numerous times, Judge Sprecher reasonably concluded BRRP reinspection reports must have existed in the claim file but were concealed.[17] (*Verdict*, Finding 82)

The BRRP form for the reinspection reports require PDS to reinspect for, *inter alia,* quality of unibody frame repairs and thus strongly supports

[16] *See e.g.,* Joffred at R.1339a and Jones at R.936a.

[17] *See also* Pa. Suggested Standard Civil Jury Instruction 5.30 (Failure to Produce Evidence – Adverse Inference).

the additional finding that Nationwide must have known about the structural repair failures:



EVALUATION OF MATERIAL DAMAGE LOSS

Vehicle Owner: _____ Repair Shop: _____

Vehicle Make: _____ Year _____ Model _____ Mileage _____

Repair Inspection:

Prior _____

During _____

Post _____

Type of Loss:

COLL _____

FTC _____

PD _____

REPAIR EVALUATION

LOSS CONTROL			LOSS CONTROL		
A-ADEQUATE	A	I	I - INADEQUATE	A	I
Used Parts			Repair Time		
After Market			Paint Time		
Rechrome			Paint & Material		
Overlap & Included			Unibody Repairs		
Wheel Alignment			Items Left Open		
Repair vs. Replacement			Supplemental Repairs		

DETAILED AREAS OF DISCREPANCY

_____

_____

_____

_____

_____

Evaluator _____ Date of Inspection _____

(R.2155a).[18]

Based upon the record evidence, Judge Sprecher thus entered the following finding:

> Defendant knew the repairs failed before the vehicle was released to the Plaintiffs because its BRRP claim managers performed routine monthly inspections of the repairs throughout the extended, four-month [repair] period per standard BRRP procedure. The title of Defendant's personnel performing random inspections of Defendant's Blue Ribbon facilities was Property Damage Supervisor and/or Property Damage Specialist (PDS).

(*Verdict*, Finding 42).

Nationwide also argues, at 38, that Wert testified the PDS was "visibly unhappy" while inspecting the Jeep because the repairs were taking too long

[18] Nationwide BRRP managers falsely testified during discovery depositions that there were no written guidelines or reports measuring BRRP performance. Specifically, during the 2004 trial, *after* this reinspection form and similar BRRP documents were *independently* located by Plaintiffs, Jones was compelled to admit he testified "incorrectly" during his 2002 discovery deposition when he had denied the existence of such documents. (R.887a) Ron Stitzel also denied the existence of such documents in his 2001 deposition, claiming the BRRP was a "handshake type agreement," without any BRRP "guidelines or documents of any kind whatsoever." (R.1293-94a, R.1298a) In actuality, BRRP documents were circulated to Berks County facilities in 1992. (R.1895a) Plaintiffs independently secured the reinspection form (R.2155a) from a former Delaware County BRRP facility manager, George Moore. (R.1971a) Facing this evidence at trial, Jones conceded the BRRP "was managed the same across the entire state of Pennsylvania," thus further supporting Judge Sprecher's finding that reinspection reports for Plaintiffs' Jeep existed and were concealed. (R.888a)

rather than because of the extensive structural repair failures. This was, however, speculation by Wert. An equally reasonable inference is the PDS was angry for the reasons specified in the report of every other automotive specialist who inspected the repairs.[19] Judge Sprecher thus found:

> Damage that showed the Jeep was not repaired must have been visible to PDS during the repair period. This includes the [safety] issues described by Plaintiffs' expert, Donald Phillips, P.E.

(*Verdict*, Finding 43-45).

> Mr. Phillips' findings mirror those of Defendant PDS, Stephen Potosnak, who confirmed similar findings at his inspection … after Plaintiffs retained counsel. If these findings were visible to Mr. Potosnak after Plaintiffs retained counsel, it stands to reason the deficiencies were also visible to other PDS conducting inspections throughout the four month repair period.

(*Verdict*, Finding 46)

Nationwide argues, at 42-43, that the Jeep passed state inspection. As an otherwise newer low-mileage vehicle, and given the undisputed *extensive* structural repair failures, a reasonable inference is that the state inspection was superficial. Nationwide thus elected not to call the inspector at trial,

[19] Judge Stallone's reaction to Nationwide's attempt to obfuscate Wert's testimony during trial confirms Judge Stallone understood the gravity of Wert's testimony. (R.1249-51a)

which speaks volumes insofar as the weight of this evidence. This *hearsay evidence* was thus properly rejected by the trial court and is thus irrelevant. Moreover, every automotive witness confirmed the structural repair failures were readily evident upon a visual-only inspection. *See* Plaintiffs' Brief at 50, and 53-54.

4. Nationwide Applied PENNRO, A Scorched-Earth Litigation Strategy

Record citations supporting this finding are in Plaintiffs' Brief, 55-66. Nationwide disagrees, 43-52. These additional points are pertinent.

The April 30, 1998, Potosnak Report (R.1809-10a) was concealed for five years (R.1888-89a), until May 5, 2003, when Nationwide elected to un-redact it to support denials to Request for Admissions. (*Verdict*, Findings 52-57; R.1191-94a, R.3014-25a). Nationwide claims: 1) the redaction was done "in good faith pursuant to the attorney-client privilege and work product doctrine"; 2) concealment of the report through five years of litigation does not evidence bad faith because Potosnak disclosed some of his findings during his 2002 discovery deposition; and 3) the inspection was never concealed because it was Mr. Berg who delivered the vehicle for the inspection. *See* Nationwide's Brief, 44-45.

The attorney-client privilege argument is addressed in Plaintiffs' Brief at 55-56, and the trial court appropriately denied the work product defense during discovery. *See* trial court discovery order (R.662a), and sanctions order. (R.665a)

The second argument – that the 5-year concealment does not evidence bad faith because Potosnak disclosed some findings during his deposition - is incorrect. Potosnak's October 11, 2000, deposition occurred: 2½ years after his inspection; 1½ years after the Order of March 15, 1999, requiring production of his *written report* (R.662a); and, four months after the June 12, 2000, sanctions Order. (R.682a) Nationwide's un-redaction five years later was done only to protect itself after receiving Request for Admissions (with potential *in camera* review looming), and *not* pursuant to: 1) its duty of good faith; 2) the rules of civil procedure; 3) the discovery order; or, 4) the sanctions order.

More importantly, it was Nationwide's refusal to promptly remove the vehicle from the highway from 1996 through 1998 that Judge Sprecher found highly reprehensible. (*Verdict,* Findings 56-57) (*Opinion*, 7-8) Potosnak's grudging admission, years after the vehicle was removed from the highway, remains irrelevant. And although Potosnak admitted, late in his deposition,

that he had in fact inspected the repairs and found "significant" problems, he characterized those problems as pertaining to "[s]heet metal alignment problems." (R.4762a at 100) Potosnak failed to disclose the unrepaired structural frame damage documented in his written report. (*Verdict,* Findings 52-53)

Third, Nationwide's argument that Mr. Berg delivered the vehicle for inspection, ostensibly proving the Potosnak inspection was never concealed at all, deliberately misses the point. While Mr. Berg delivered the vehicle, Potosnak was never identified as the employee doing the inspection. (R.1490a) Thus, by the time Nationwide produced Potosnak for deposition in 2002, Nationwide knew Plaintiffs had no idea Potosnak had inspected the vehicle in 1998.

Nationwide's deceit thereby rises to a new level during Potosnak's deposition:

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

Potosnak:

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

(R.4756a at 45-46).

Potosnak's testimony is deceitful on its face and this was only possible because his report was not timely produced prior to his deposition, as required by Nationwide's duty of good faith and two court orders. Nationwide's assertion, at 45, that its 5-year concealment, "had no impact on the litigation" is thus dumbfounding because the 5-year concealment exemplifies PENNRO, causing *years* of baseless litigation while needlessly driving up the cost of Plaintiffs' $25,000 claim dispute.[20]

Nationwide nevertheless claims, at 30, that *it* was the party seeking to broker a settlement, and in support of its deceit Nationwide cites

[20] Nationwide had no reasonable basis to deny full payment of the claim immediately upon receipt of the Potosnak Report, particularly given what was contained within its claim file regarding the original declaration of a structural total loss, photographs of the vehicle's twisted frame, and reinspection reports perforce contained within the "paper file." (R.1816a) (*Verdict*, Finding 82). *See also* Plaintiffs' Brief, 13-14.

unsupported contentions of its trial counsel from 2007. Plaintiffs' counsel immediately, but unsuccessfully, attempted to refute this deceit with trial testimony. (R.2071a) On remand, the trial court correctly rejected the unsupported contention of Nationwide's attorney and rightly understood that Nationwide has never attempted to settle this lawsuit. (Conclusions 13-14) (*Opinion*, 37, 48, 51-52) This is consistent with, and thus relevant to, PENNRO. (R.2168a, at "2. Litigation Management").

Nationwide nevertheless insists, at 45-50, that it never applied PENNRO in this case. Citing self-serving testimony and affidavits of company personnel mostly focused upon the claim manual rather than PENNRO itself, Nationwide insists PENNRO was designed only for casualty claims. This issue is thoroughly addressed by Judge Sprecher. *See* Plaintiffs' Brief, 55-66. *See also Nationwide Mut. Ins. Co. v. Fleming*, 992 A.2d 65 (Pa. 2010) (documenting Nationwide's application of PENNRO's "send a message" strategy against defecting agents); (R.2999-3001a, *Fleming Memo*); and *Herd Chiropractic Clinic, P.C. v. State Farm Mut. Auto. Ins. Co.,* 64 A.3d 1058, 1071-72 (Pa. 2013) (Bear, J., dissenting) (documenting insurer's application of similar "scorched earth litigation strategy" to price provider

out of court). Strategies like PENNRO, though reprehensible, are not as obscure as Nationwide pretends.[21]

Nationwide also claims, at 48-49 n. 17, that the $901,543.00 billing entry (R.3893a) not included in the $2.5 million estimate that Nationwide claims it paid to defend this case (R.2727-28a) was a clerical error. This issue is addressed in Plaintiffs' Brief, 61-63.

Moreover, Nationwide *knew* the $901,543.00 discrepancy was at issue. (R.3895a, R.3313-29a, R.2654-2660a) Yet Nationwide's designee offered no explanation. (R.2722-26a) Had Nationwide claimed the billing entry was a clerical error at trial Plaintiffs would have requested *in camera* review because the billing entry is partially redacted (R.3893a) and would have further requested contemporaneous documentation wherein Nationwide disputed the invoice upon receipt.

The contention that the $901,543.00 billing entry is a clerical error, raised for the first time on appeal, is the quintessential "unsupported contention of counsel." After being forced to order Nationwide to testify on

[21] Nationwide argues, at 46, former PDS Campuzano testified equivocally about PENNRO being attached to material damage claim manuals. There was nothing equivocal, particularly when pressed by Judge Stallone. (R.1154-56a, R.1165-66a)

the issue of fees paid (R.2654-60a), Judge Sprecher heard the testimony, reviewed the documents, and justifiably concluded that the true amount Nationwide paid its attorneys through the 2013 remand trial was "well in excess" of $3 million. (*Opinion*, 17, 39-40)

Respectfully submitted,

Dated: October 4, 2019

Benjamin J. Mayerson
MAYERSON LAW, PC
1 North Sunnybrook Road
Pottstown, PA 19464
(610)906-1966

/s/ Kenneth R. Behrend
Kenneth R. Behrend
Behrend Law Group, LLC
The Pittsburgher, Suite 1700
428 Forbes Avenue
Pittsburgh, PA 15219

CERTIFICATION OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

Dated: October 4, 2019

/s/ Benjamin J. Mayerson

Benjamin J. Mayerson
MAYERSON LAW, PC
1 North Sunnybrook Road
Pottstown, PA 19464
(610)906-1966

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

This brief complies with the type-volume limitations of Pa. R. App. P. 2135(a)(1) because this brief contains 6,984 words excluding the parts exempted by Pa. R. App. P. 2135(b).

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Respectfully submitted,

Dated: October 4, 2019

/s/ Benjamin J. Mayerson

Benjamin J. Mayerson
MAYERSON LAW, PC
1 North Sunnybrook Road
Pottstown, PA 19464
(610)906-1966