DANIEL BERG and SHERYL BERG, Husband and Wife	:	COURT OF COMMON PLEAS
	:	BERKS COUNTY, PA
Plaintiffs	:	
	:	
v.	:	NO. 98-813
	:	
NATIONWIDE MUTUAL INSURANCE COMPANY	:	
	:	
Defendant	:	CIVIL ACTION – LAW

PLAINTIFF BERGS'
PROPOSED CONCLUSIONS OF LAW

1. Pennsylvania's bad faith statute, 42 Pa. C.S.A. §8371, provides:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

(1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.

(2) Award punitive damages against the insurer.

(3) Assess court costs and attorney fees against the insurer.

_____ **Accepted** _____ **Rejected** _____**Modified**

2. In this case, the Superior Court summarized the law of insurer bad faith as follows:

In an early case, this Court looked to Black's Law Dictionary to define "bad faith" as "any frivolous or unfounded refusal to pay proceeds of a policy." *Terletsky v. Prudential Property and Cas. Ins. Co.,* 437 Pa.Super. 108, 649 A.2d 680, 688 (1994), *appeal denied,* 540 Pa. 641, 659 A.2d 560 (1995); *see also Adamski v. Allstate Ins. Co.,* 738 A.2d 1033, 1036 (Pa.Super.1999). In subsequent cases, we have held that to succeed on a claim under section 8371, the insured must show that "the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." *See, e.g., O'Donnell v. Allstate Ins. Co.,* 734 A.2d 901, 906 (Pa.Super.1999) (citing *MGA Ins. Co. v. Bakos,* 699 A.2d 751, 754 (Pa.Super.1997)). To constitute bad faith it is not necessary that the refusal to pay be fraudulent. However, mere negligence or bad judgment is not bad faith. *Bonenberger v. Nationwide Mut. Ins. Co.,* 791 A.2d 378, 380

(Pa.Super.2002). *Id.* The insured must also show that the insurer breached a known duty (*i.e.*, the duty of good faith and fair dealing) through a motive of self-interest or ill will. *Id.*

Berg v. Nationwide Mutual Ins. Co., Inc., 44 A.3d 1164, 1171 (Pa. Super. 2012), reargument denied (June 29, 2012), *appeal denied,* 65 A.3d 412 (Pa. 2013).

_____ **Accepted** _____ **Rejected** _____**Modified**

3. In *Berg* the Superior Court stated as follows:

> Our Supreme Court has long recognized that "the utmost fair dealing should characterize the transactions between an insurance company and the insured." *Dercoli v. Pennsylvania Nat. Mut. Ins. Co.,* 520 **Pa.** 471, 477, 554 A.2d 906, 909 (1989) (quoting *Fedas v. Insurance Company of the State of Pennsylvania,* 300 **Pa.** 555, 559, 151 A. 285, 286 (1930)). Moreover, the insurance company has a duty to deal with its insured "on a fair and frank basis, and at all times, to act in good faith." *Id.; Hollock v. Erie Ins. Exchange,* 842 A.2d 409, 416 (Pa.Super.2004) (holding that an insurer has a duty to act with the utmost good faith towards its insured). The duty of good faith originates from the insurer's status as a fiduciary for its insured under the insurance contract, which gives the insurer the right, *inter alia,* to handle and process claims. *See, e.g., Ridgeway v. U.S. Life Credit Life Ins. Co.,* 793 A.2d 972, 977 (Pa.Super.2002).

Id. at 1170.

_____ **Accepted** _____ **Rejected** _____**Modified**

4. An insurance bad faith case has a higher burden of proof than other civil cases, requiring the insured to prove their case by "clear and convincing evidence." *Berg* at 1176, *citing Adamski v. Allstate Ins. Co.,* 738 A.2d 1033, 1036 (Pa.Super.1999), and *Hall v. Brown,* 363 Pa. Super. 415, 420, 526 A.2d 413, 415 (1987).

_____ **Accepted** _____ **Rejected** _____**Modified**

5. "Bad faith on part of the insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an

insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e. good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith." *Terletsky v. Prudential Property and Casualty Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. 1994)(citing Black's Law Dictionary 139 (6th ed. 1990)).

_____ **Accepted** _____ **Rejected** _____**Modified**

6. An insurance company cannot insulate itself from liability for tortuous conduct by retaining counsel:

> representation is not an excuse for the insurer's failure to perform its obligations under the policy it issued to the insured . . . . And because counsel for the insureds cannot simply make an "end-run" around the insurer's attorney to deal directly with the insurer, the insurer may not hide behind this relationship to argue that it reasonably ignored its obligations under the insurance policy to its insureds . . . . Otherwise, an insurer could simply hire counsel, bury its head in the sand, pay when ordered to do so, retain the use of the insured's money in the meantime, and escape without adverse consequences.

Klinger v. State Farm Mutual Auto. Ins. Co., 115 F.3d 230, 234 (3d Cir. 1997)(F.N. 2).

_____ **Accepted** _____ **Rejected** _____**Modified**

7. Insurance bad faith cannot be precisely defined in all circumstances, however, examples include: "evasion of the spirit of the bargain, lack of diligence and slacking off, **willful rendering of imperfect performance**, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." *See Williams v. Nationwide Mutual Insurance Co.*, 750 A.2d 881, 887 (Pa. Super. 2000)(emphasis added).

_____ **Accepted** _____ **Rejected** _____**Modified**

8. In this case Defendant Nationwide Mutual Insurance Company ("Nationwide") argues that it did not deny its insured, Daniel and Sheryl Berg ("Bergs"), any benefits under the policy, and that the Bergs are not "out of pocket" any money. Nationwide's argument was rejected by the Superior Court as follows:

> we find the trial court's focus on the alleged lack of denial of benefits to be confusing in light of the text of section 8371, which sets forth no such requirement to be entitled to damages for the insurer's bad faith. To the contrary, the focus in section 8371 claims cannot be on whether the insurer *ultimately* fulfilled its policy obligations, since if that were the case then insurers could act in bad faith throughout the entire pendency of the claim process, but avoid any liability under section 8371 by paying the claim at the end. As our Supreme Court in *Toy* explained, the issue in connection with section 8371 claims is the *manner* in which insurers discharge their duties of good faith and fair dealing during the pendency of an insurance claim, not whether the claim is eventually paid. *Toy,* 593 Pa. at 41, 928 A.2d at 199. For purposes of the Bergs' section 8371 claim, whether Nationwide ultimately paid the benefits due under the policy is not the relevant inquiry; instead the dispute is whether Nationwide acted in bad faith in its dealings with the Bergs.

Berg at 1177-78 (emphasis in original), citing *Toy v. Metropolitan Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186 (2007).

_____ Accepted **_____ Rejected** **_____Modified**

9. After four days of testimony a Berks County Jury determined Defendant Nationwide Mutual Insurance Company (hereafter "Nationwide") violated the catchall *fraud* provision of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. §201-2 (4) (xxi). Verdict of Jury, filed 12/20/2004.

_____ Accepted **_____ Rejected** **_____Modified**

10. The jury was instructed that to succeed on their UTPCPL claim, the Bergs must prove the elements of fraud by clear and convincing evidence, which is the same heightened evidentiary standard necessary to prove insurer bad faith. The jury was instructed as follows:

> In addition, Mr. and Mrs. Berg must also prove the elements of common law fraud, as I have given to you a few minutes ago, by clear and convincing evidence in order to prevail on this claim. Since those elements of fraud are also the elements that must be proven with regard to unfair trade practices, I will repeat them to you.

See 2004 N.T. 975/20 – 976/11.

_____ **Accepted** _____ **Rejected** _____**Modified**

11. Nationwide did not challenge the jury's finding of fraud on appeal.

_____ **Accepted** _____ **Rejected** _____**Modified**

12. The jury's finding that Nationwide violated the catch-all fraud provision of the UTPCPL is itself evidence of insurer bad faith. *See Berg* at 1174-75, citing *Romano v. Nationwide Mutual Fire Insurance Company,* 646 A.2d 1228, 1233 (1994).

_____ **Accepted** _____ **Rejected** _____**Modified**

13. The jury's finding was proven by clear and convincing evidence. Nevertheless, this Court does not consider the jury's finding of fraud to be *conclusive* evidence of insurer bad faith. Instead, this Court considers the jury's verdict to be *some* evidence of insurer bad. *Berg* at 1175. This Court thus focused upon the evidence supporting the jury's verdict, together with the admissible evidence submitted during the bench trial in 2007, and the evidence submitted during the trial on remand in 2013.

_____ **Accepted** _____ **Rejected** _____**Modified**

14. This Court considered, as evidence of bad faith, Nationwide's conduct that was contrary to Pennsylvania's *Motor Vehicle Physical Damage Appraiser Act*, 63 P.S. §851-863 ("Appraisers Act"), and the insurance regulations thereto, during the appraisal and attempted repairs to the subject vehicle. As stated by the Superior Court in *Berg*:

> Accordingly, under *Romano*, a plaintiff seeking damages for an insurer's bad faith conduct under section 8371 may, in addition to other available methods, attempt to prove bad faith by demonstrating that the insurer has violated on or more provisions of related Pennsylvania insurance statutes or regulations, even if those provisions do not provide for a private rights of action.

Berg at 1175, *quoting Romano* at 1233.

_____**Accepted.** _____ **Denied.** _____ **Modified.**

15. The Appraisers Act states at Section 3, *Licenses; Examination; Fees*:

(a) No person shall directly or indirectly act or hold himself out as an appraiser unless such person has first secured a license from the commissioner in accordance with the provisions of this act.[1]

_____ **Accepted** _____ **Rejected** _____**Modified**

16. The Appraisers Act states at Section 11, *Compliance With Act*:

(b) .... This appraisal shall contain the name of the insurance company ordering it, if any, the insurance file number, the number of the appraiser's license and the proper identification number of the vehicle being inspected ....

_____ **Accepted** _____ **Rejected** _____**Modified**

17. The Appraisers Act states at Section 11, *Compliance With Act*:

(b) .... the appraisal which shall include an itemized listing of all damages, specifying those parts to be replaced or repaired.

_____ **Accepted** _____ **Rejected** _____**Modified**

18. The Appraisers Act states at Section 11, *Compliance With Act*:

(b) .... Because an appraiser is charged with a high degree of regard for public safety, the operational safety of the vehicle shall be paramount in considering the specification of new parts. This consideration is vitally important where the parts involved pertain to the drive train, steering gear, suspension units, brake systems or tires.

_____ **Accepted** _____ **Rejected** _____**Modified**

19. The Appraisers Act states at Section 11, *Compliance With Act*:

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1 True and correct copies of the Appraisers Act and insurance regulations to the Act, 31 Pa. Code Chapter 62, in effect on the Berg date of loss, September 4, 1996, are attached hereto at Tab 28. *See also* Pretrial Settlement Conference Disposition Order of November 8, 2006, at page 6 (confirming stipulation to relevant version of insurance regulation to the Act).

(f) Every appraiser shall:

1. Conduct himself in such a manner as to inspire public confidence by fair and honorable dealings.
2. Approach the appraisal of damaged property without prejudice against, or favoritism toward, any party involved in order to make fair and impartial appraisals.
3. Disregard any efforts on the part of others to influence his judgment in the interest of the parties involved.
4. Prepare an independent appraisal of damage.
5. Inspect a vehicle within six working days of assignment to the appraiser unless intervening circumstances (i.e. catastrophe, death, failure of the parties to cooperate) render such inspection impossible.

_____ **Accepted** _____ **Rejected** _____**Modified**

20. The appraisal of the Bergs' insured collision loss fits squarely within the definition of *Appraisal*, defined by the insurance regulations applicable to the Appraisers Act as follows:

> A monetary determination of damage incurred by a motor vehicle when the making of such a determination is assigned in order to fix the value of insurance claims. Appraisals shall include a determination whether made by the insurer, its employees, its agents or related entities or made by another individual or entity otherwise assigned to make a determination.

See 31 Pa. Code Chapter 62.

_____ **Accepted** _____ **Rejected** _____**Modified**

21. 31 Pa. Code Chapter 62, at §62.3, *Applicable standards for appraisal*, states:

(a) The appraisal statement shall adhere to the following form:

(2) An appraisal shall be signed by the appraiser before the appraisal is submitted to the insurer, the consumer or another involved party.

_____ **Accepted** _____ **Rejected** _____**Modified**

22. 31 Pa. Code Chapter 62, at §62.3, *Applicable standards for appraisal*, states:

(b) The appraisal statement shall contain the following:

(1) Items necessary to return the vehicle to its condition prior to the damage in question, including, but not necessarily limited to labor involved; necessary painting or refinishing, and all sublet work to be done. .... and all other matters incidental to repair of the incurred damage.

_____ Accepted **_____ Rejected** **_____Modified**

23. 31 Pa. Code Chapter 62, at §62.3, *Applicable standards for appraisal*, states:

(c) In the specification of new or used parts, the following standards shall be used for the appraisal statement:

(1) The operational safety of the motor vehicle shall be paramount especially when the parts involved pertain to the drive train, steering gear, suspension units, brake systems or tires.

_____ Accepted **_____ Rejected** **_____Modified**

24. 31 Pa. Code Chapter 62, at §62.3, *Applicable standards for appraisal*, states:

(f) The following standards shall be used to determine replacement value under policy provisions covering the total loss of a motor vehicle, including an uncovered motor vehicle:

....

(1) If the costs of repair of a motor vehicle exceed its appraised value, less salvage value or the motor vehicle cannot be satisfactorily or reasonably repaired to its condition just prior to the damage in question being incurred, the appraised value of the loss shall be the replacement value of the motor vehicle.

....

(8) A copy of the total loss evaluation sheet shall be given to the consumer by the appraiser or by the insurer within 5 working days after the appraisal is completed. If an offer of settlement is made before the consumer receives the total loss evaluation sheet, the consumer shall be verbally advised of the contents thereof and of his right to receive a copy within 5 days after its completion.

_____ Accepted **_____ Rejected** **_____Modified**

25. 31 Pa. Code Chapter 62, at §62.3, *Applicable standards for appraisal*, states:

> (g) The general standards of behavior of an appraiser shall include the following:
>
> ....
>
> (8) An appraiser or his employer may not recommend or require that repairs be made at a particular place or by a particular individual.
>
> (9) An appraiser may not have a direct or indirect conflict of interest in the making of an appraisal. This chapter and the act, and this section in particular, shall be strictly interpreted to protect the interest of the consumer and place the burden upon the appraiser to fully eliminate conflict of interest in the making of an appraisal. Unless as otherwise specified in this chapter or act, a licensed appraiser may not attempt to directly or indirectly coerce, persuade, induce or advise the consumer that appraised motor vehicle physical damage must be, should be or could be repaired at a particular location or by a particular individual or business.
>
> (10) Before an appraiser authorizes the removal of a motor vehicle from one location to another, the consent of the consumer shall be obtained.

_____ **Accepted** _____ **Rejected** _____**Modified**

PROPOSED CONCLUSIONS OF LAW
APPLICATION OF FACTS TO LAW

26. On September 4, 1996, and for several years prior thereto, Defendant Nationwide and former Defendant Lindgren had a confidential business agreement in place whereby Nationwide referred collision repair work to Lindgren, and in exchange for the referral of business, Lindgren agreed to appraise and repair collision claims at discounted rates.

See 2004 N.T. 631/7-14 (Mr. Douglass Joffred).

_____ **Accepted** _____ **Rejected** _____**Modified**

27. The Bergs' agreement to have their insured loss appraised and repaired by Nationwide's

BRRP facility did not relieve Nationwide of its obligation to treat the Bergs with the utmost good faith, and in compliance with Pennsylvania's bad faith statute, nor did it eviscerate the protections afforded the Bergs under said statute. *See Berg* at 1173, holding that:

> whether processing claims for loss through a third party repair facility or through a direct repair program, insurers must at all times act in good faith vis-à-vis their insureds. Thus, we conclude that the trial court erred as a matter of law in deciding that the Bergs' claims did not 'arise under an insurance policy' for purposes of section 8371.

_____ Accepted **_____ Rejected** **_____Modified**

28. Nationwide's appraisal of the insured loss involved violations of state law, specifically the *Motor Vehicle Physical Damage Appraiser Act*, 63 P.S. §851-863, and regulations thereto, 31 Pa. Code Chapter 62.

See Appraisers Act, a copy of which is attached hereto for ease of reference.

_____ Accepted **_____ Rejected** **_____Modified**

29. First and foremost, Nationwide assigned the appraisal of the Bergs' collision loss to an un-licensed appraiser. This was in violation of the Appraisers Act which precludes any person from appraising an insured loss "unless that person has first secured a license."

See 2004 N.T. 622/4-11 (Nationwide's assigned appraiser, Doug Joffred, admitting he did not have an appraisers license at the time he appraised the Bergs' loss).

See Appraisers Act Section 3. Licenses; Examination; Fees: "No person shall directly or indirectly act or hold himself out as an appraiser unless such person has first secured a license from the commissioner in accordance with the provisions of this act."

_____ Accepted **_____ Rejected** **_____Modified**

30. Although disputed by Nationwide, the Bergs' evidence proves Nationwide knew it assigned the Bergs' collision loss to be appraised by an unlicensed appraiser.

See Appraisers Act at Section 11(b) (requiring that every appraisal "shall" contain the license number of the assigned appraiser).

See 31 Pa. Code Chapter 62, at §62.3, mirroring the language in the act, "An appraisal shall state ... the number of the appraiser's license."

See 2004 N.T. 633/20-23 and 634/8-12 (Mr. Joffred admits that he appraised insured losses at Nationwide's request, without a license, for several years prior to the Berg loss, and that he appraised hundreds of losses without a license during this time period).

See 2004 N.T. 633/14-634/12 (Mr. Joffred admits that since securing his appraisers license he places his license number on the front page of every appraisal he writes. Mr. Joffred also admits none of the appraisals he wrote on Nationwide's behalf for several years prior to securing his license contained a license number as required by state law.)

See 2004 N.T. 89/19-90/20 (Mr. Grumbein, Nationwide's BRRP claim manager, admits he demanded all BRRP facilities to fax in their appraiser's license numbers before the end of July, 1996).

See 2004 N.T. 91/21-93/19 (Mr. Grumbein admits the BRRP *Questionnaire Profile* returned by co-defendant Lindgren, the subject BRRP facility, did not contain the requisite licensing information but was rather left blank).

See 2004 N.T. 94/21-95/2 (Mr. Grumbein admits it was his responsibility to ensure that the people Nationwide was recommending to policy holders as having Blue Ribbon quality were, at the very least, licensed to appraise insurance claims).

See Trial Exhibit No. 6 (Berg appraisal of September 20, 1996, failing to contain the license number of the assigned appraiser, Doug Joffred). [2]

See Appraisers Act, Section 11(b) (every appraisal "shall" contain the license number of the assigned appraiser).

_____ Accepted _____ Rejected _____Modified

31. Nationwide must have known prior to referring the Bergs to have their insured loss appraised by an unlicensed appraiser that a primary purpose of requiring an appraiser to be licensed is to ensure the individual understands the importance of disregarding any efforts on the part of the insurance company to influence his or her judgment, and that the potential for same is very real given the conflicts of interest that often arise in the appraisal of insured collision losses.

See 2004 N.T. 226/2-9 (Mr. Jones, CPCU, former Director of the BRRP and direct supervisor to Mr. Grumbien, admitting the appraiser at the BRRP facility should be licensed, per the Appraiser Act).

See Appraisers Act Section 11 (f), requiring appraisers to comply with the following:

1. Conduct himself in such a manner as to inspire public confidence

2 The terms "Appraisal," "Damage Report" and "Estimate" are used interchangeably by Nationwide. *See* 2004 N.T. 116/4-10 (BRRP claim manager Grumbein agreeing terms are interchangeable).

by fair and honorable dealings.

2. Approach the appraisal of damaged property without prejudice against, or favoritism toward, any party involved in order to make fair and impartial appraisals.

3. Disregard any efforts on the part of others to influence his judgment in the interest of the parties involved.

4. Prepare an independent appraisal of damage.

See Insurance Regulations to The Act, adding the following additional language:

(g)(9) An appraiser may not have a direct or indirect conflict of interest in the making of an appraisal. This chapter and the act, and this section in particular, shall be strictly interpreted to protect the interest of the consumer and place the burden upon the appraiser to fully eliminate conflict of interest in the making of an appraisal.

Nationwide's assigned appraiser did not study or prepare for the licensing examination to secure his appraisers license prior to being assigned the Berg matter, and thus did not have the benefit of this training and knowledge. Nationwide knew this at the time it assigned the Berg appraisal to Mr. Joffred, and should not have interfered with Mr. Joffred's opinion that the vehicle was a structural total loss due to a badly twisted frame.

_____ Accepted **_____ Rejected** **_____Modified**

32. Mr. Joffred admits he changed his opinion that the vehicle was a structural total loss "only after meeting with Nationwide," and that this was not the first appraisal he changed at Nationwide's behest.

See 2004 N.T. 630/17-24 (cross-examination of D. Joffred).

See 2004 N.T. 638/6-11 (cross-examination of D. Joffred).

See Trial Exhibit 8 (Page 66 of 70) (Claim File entry of D. Witmer dated 09/24/96).[3]

3 As detailed below, Mr. Witmer did not write an independent appraisal of the loss when he "examined" the damage, per his log note attached above. This would have been acceptable but would have required that the Bergs be provided a copy of both appraisal opinions. *See* regulation at (f) 14: "No provision of the act or this Chapter shall be construed as prohibiting or in any way limiting the appraisal or reappraisal of damage by any number of licensed appraisers as may be desired by the involved parties." *See also* the Act: "Section 11. Compliance With Act." at subsection (b)(requiring copy of appraisals to be provided to vehicle owner).

_____ **Accepted** _____ **Rejected** _____**Modified**

33. Mr. Joffred admits he did not advise the Bergs that the original appraisal was written as a total loss; this despite Mr. Berg's request that the vehicle not be repaired. Mr. Joffred also admits he did not notify the Bergs that the damage to their vehicle was so extensive that the Blue Ribbon facility was unable to initiate or complete the repairs.

See 2004 N.T. 641/20-23 & 703/18-23 (admission of Mr. Joffred).

_____ **Accepted** _____ **Rejected** _____**Modified**

34. It was a violation of the insurance regulations to the Appraisers Act for Nationwide to have the Berg vehicle shipped to an undisclosed repair facility without the approval and consent of the Bergs. The decision to vacate the total loss appraisal, and the decision to have the vehicle taken to another repair facility to attempt structural repairs the BRRP facility was unwilling to attempt, was made by Nationwide. The Bergs were not consulted or advised of these appraisal and/or repair decisions being made by Nationwide.

See 2004 N.T. 642/6-10 (Mr. Joffred admits he did not request or disclose to the Bergs that their vehicle was being taken to an unapproved repair facility).

See 2004 N.T. 366/12-20 (admission of Doug Witmer).

See §62.3 at subsection (10): "Before an appraiser authorizes the removal of a motor vehicle from one location to another, the consent of the consumer shall be obtained."

See Trial Exhibit No. 8 (Page 66 of 70) (electronic claim file entry of 09/24/96).

_____ **Accepted** _____ **Rejected** _____**Modified**

35. It is evident why the Bergs were not consulted about the decision to have their vehicle taken to a non BRRP facility inasmuch as it would raise questions, by the Bergs, as to the quality of workmanship at the designated "BRRP" facility; the severity of damage to the vehicle's frame; and whether the vehicle should be repaired at all.

_____ **Accepted** _____ **Rejected** _____**Modified**

36. Nationwide knew it was a violation of the insurance regulations to the Appraisers Act for

Nationwide to secure an appraisal, or meet with the appraiser to discuss the appraisal, before the appraisal is finalized and/or signed.

See 2004 N.T. 213/14-17 (admissions of Dean Jones, CPCU).

See 31 Pa. Code Chapter 62 at §62.3(a)(2), "An appraisal shall be signed by the appraiser before the appraisal is submitted to the insurer, the consumer or another involved party."

_____ Accepted _____ Rejected _____Modified

37. The Bergs' evidence supports the conclusion that the appraisal dated September 20, 1996, is not the first appraisal written by the assigned appraiser. Instead, the evidence suggests there is another appraisal, never produced to the Bergs in this litigation, which is identified in Nationwide's claim log on September 10, 1996. This is an important fact because it suggests Nationwide is concealing material evidence, specifically an earlier appraisal that evidenced greater damage and/or with more specificity, including that the damage extending into the vehicle's roof. The earliest appraisal produced in this litigation is dated September 20, 1996, and does not reference any roof damage. One reason the BRRP facility was unable to attempt the repairs was that the damage was so extensive that it extended into the vehicle's roof, which is why Nationwide directed it be shipped to another repair facility to attempt these repairs. It would stand to reason that the appraisal of the loss ought to include this roof damage; the only appraisal produced by Nationwide does not include roof damage.

See Trial Exhibit No. 8 (Page 69 of 70) (claim-file entry of 09/10/96, documenting an appraisal being completed on that date).

See Trial Exhibit No. 6 (first page) (earliest appraisal produced, dated 09/20/96).

See 2004 N.T. 625/15-626/20 (admission of Mr. Joffred that when he went to secure the original appraisal from his filing cabinet it was "missing").

See 2004 N.T. 639-641/11 (Mr. Joffred admitting that roof damage existed but was not identified on the appraisal dated September 20, 1996).

See 2004 N.T. 575/9-11 (cross-examination of former co-defendant KC Auto Body's Manager, David Bowen, confirming the damage extended to the vehicle's roof).

See Appraisers Act Section 11 (b), requiring an appraisal to include "an itemized listing of all damages, specifying those parts to be replaced or repaired."

_____ Accepted **_____ Rejected** **_____Modified**

38. The failure to produce a copy of the original appraisal, referenced in the claim log on September 10, 1996, or to conceal the existence of a total loss appraisal, is a violation of the insurance regulations to the Appraisers Act.

See 31 Pa. Code Chapter 62, at §62.3(f)(8): "A copy of the total loss evaluation sheet shall be given to the consumer by the appraiser or by the insurer within 5 working days after the appraisal is completed."

See also subsection (a)(2): "An appraisal shall be signed by the appraiser before the appraisal is submitted to the insurer, the consumer or another involved party."

_____Accepted **_____ Rejected** **_____Modified**

39. Nationwide's assigned appraiser, Douglas Joffred, admits the frame rail and apron panel, both structural parts, were not replaced with new parts as required by the repair appraisal dated September 20, 1996. Instead, the original parts remained on the vehicle with unrepaired damage. This is not compliant with the intent of the *Appraiser Act* given Mr. Joffred's initial appraisal that the vehicle was a structural total loss due to the frame being so badly twisted and *not* repairable.

See 2004 N.T. 642/14-643/9 (Mr. Joffred admitting he did not replace the structural items as written in the appraisal of September 20, 1996).

See 2004 N.T. 629/17-24 (Mr. Joffred) as follows:

Q Did you tell Nationwide that you thought it was a structural total loss *because the frame was twisted?*
A. Yes.
Q Could you explain to the jury what a structural total loss is?
A It would be a vehicle that was damaged to the point that no matter what it took to fix it it shouldn't have been fixed."

See 2004 N.T. 713/19-23 (Mr. Joffred) as follows:

Q And I think exactly what you said was the whole body was twisted and it was one of those situations that just shouldn't be repaired; is that correct?
A. Yes.

See 2004 N.T. 629/2-11 (Mr. Joffred) as follows:

Q You said structural total loss and you said the whole body is twisted, right?
A Correct.

Q And do you agree with that today, or do you disagree with that today?
A I agree.

See also Appraiser Act at Section 11, Compliance with Act, (b):

> Because an appraiser is charged with a high degree of regard for public safety, the operational safety of the vehicle shall be paramount in considering the specification of new parts. This consideration is vitally important where the parts involved pertain to the drive train, steering gear, suspension units, brake systems or tires.

_____ Accepted _____ Rejected _____Modified

40. After repair efforts failed, the vehicle was nevertheless returned to the Bergs with hidden, undisclosed *structural* repair failures, and with damaged structural parts still on the vehicle and *not* repaired.

See 2004 N.T. 495/20-496/25 (Claim Manager Bruce Bashore admitting the repair deficiencies involved structural items and non-replacement of structural parts).

See Potosnak Report entered into the claim file on April 30, 1998.

_____ Accepted _____ Rejected _____Modified

41. Nationwide's own automotive expert confirmed the structural repair failures were significant, and that the sublet repairs ordered by Nationwide failed. Thus, Nationwide's decision to vacate the total loss appraisal, and its decision to have structural repairs attempted by a non-disclosed repair facility also failed. The vehicle remained a *structural* total loss.

See 2004 N.T. 892/1-10 and 896/1-9 (William Anderton), as follows:

Q Did you not find that the primary structural components on the front of the vehicle are significantly misaligned?
A Yes, sir. They were beyond the tolerances that would normally be allowed and considered acceptable.
Q Significantly so?
A Significantly so.
Q Thank you. And the misalignment involves both the repaired welded structure and replaced welded structure?
A That's correct, sir.

....

Q **... the need for the sublet repair or the ultimate goal of the sublet repair factory facility and the subsequent chassis [*sic*] repair was incomplete and significantly misaligned with no identifiable benefit from the sublet repair?**

A **That was part of my report.**

Q Should that car have been returned to the Bergs to drive?

A Should it have been returned to the Bergs to drive? No, it should have been repaired properly.

Emphasis added.

_____ Accepted **_____ Rejected** **_____Modified**

42. The failed structural repairs and the non-repaired structural components compromised the vehicle's safe operation.

See 2004 N.T. 714/15-21 (admission of Nationwide's assigned appraiser, Mr. Joffred, that the Bergs returned the vehicle to him shortly after repairs were complete at which time he admitted the vehicle's front tires were worn to the metal belt).

See 2004 N.T. 387/5-388 (direct testimony of Plaintiff Sheryl Berg confirming within one month of operating the vehicle following the repair efforts, the front tires wore to the metal belts).

See 2004 N.T. 442/1-3 (opinion of the Bergs' automotive expert, Donald Phillips, P.E., that the replacement tires already evidenced "feathering and coupling, which means that the front end steering geometry was not correct so it was not wearing evenly.")

See 2004 N.T. 446/1-10 (opinion of the Bergs' automotive expert, Donald Phillips, P.E., confirming the repair deficiencies impacted safety features of the vehicle "because of the structural changes that have now taken place in the vehicle that the air bag system and its other related safety features such as the front crumple zone would not respond or behave as designed from the factory.")

See 2004 N.T. 449/24-450/11 (opinion of the Bergs' automotive expert, Donald Phillips, P.E., confirming that because the vehicle was not restored to the original manufacturers tolerances, it would not sustain another impact to the same area as intended because "the safety of the Jeep is directly tied to the performance of the crumple zone and the timely deployment of the air bag as the forces are transmitted through that crumple zone.")

See Appraisers Act at Section 11, *Compliance With Act*:

> (b) .... Because an appraiser is charged with a high degree of regard for public safety, the operational safety of the vehicle shall be paramount in considering the specification of new parts. This consideration is vitally important where the parts involved pertain to the drive train, steering gear, suspension units, brake systems or

tires.

_____ **Accepted** _____ **Rejected** _____**Modified**

43. This Court finds, as a direct result of Nationwide's violations of Pennsylvania's Motor Vehicle Physical Damage Appraisers Act and the regulations promulgated thereto, the subject vehicle was not reasonably appraised; was not reasonably repaired or restored; and was returned to the Bergs with structural repair failures that caused rapid tire deterioration, thus rendering the vehicle unsafe and potentially dangerous.

This Court considers this to be clear and convincing evidence of insurer bad faith.

_____ **Accepted** _____ **Rejected** _____**Modified**

BLACK LETTER LAW
PUNITIVE DAMAGES UNDER THE BAD FAITH STATUTE

44. Pennsylvania's bad faith statute, 42 PA C.S.A. §8371, "empowers the trial court to award punitive damages if the court finds that the insurer has acted in bad faith toward the insured. The statute provides no other language suggesting a pre-condition for the award of punitive damages. Thus, by statutory mandate, a finding of bad faith is the only prerequisite to a punitive damage award under section 8371." *Hollock* at 418, internal citations omitted.

_____ **Accepted** _____ **Rejected** _____**Modified**

45. A punitive damage award under 42 Pa. C.S.A. §8371 does not require a showing of "aggravating circumstances beyond those that justify the award of compensatory damages," and there is no requirement to show "acts of malice, vindictiveness, and a wholly wanton disregard for the rights of others." *Hollock* at 418, internal citations omitted.

_____ **Accepted** _____ **Rejected** _____**Modified**

46. "Although ... a finding of bad faith does not compel an Award of punitive damages, it does **allow** for the award without additional proof, subject to the trial court's exercise of discretion." *Hollock* at 419, emphasis in original.

_____ **Accepted** _____ **Rejected** _____**Modified**

47. "Under Pennsylvania law the size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion." *Hollock* at 419, internal citations omitted.

_____ **Accepted** _____ **Rejected** _____**Modified**

48. "[T]he standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant." *Hollock* at 419, internal citations omitted.

_____ **Accepted** _____ **Rejected** _____**Modified**

49. "[A] reasonable relationship must exist between the amount of the punitive damage award and the twin goals of punishment and deterrence, the character of the tortious act, the nature and extent of the harm suffered by the plaintiff and the wealth of the defendant." *Hollock* at 419, internal citations omitted.

_____ **Accepted** _____ **Rejected** _____**Modified**

50. The following are three important guideposts when considering an appropriate amount of punitive damages:

> (1) the degree of reprehensibility of the defendant's misconduct;
>
> (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and
>
> (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Hollock at 420 (citing *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585, *citing BMW of North America, Inc. v. Gore*, 517 U.S. 559, 560-61, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996)).

_____ Accepted **_____ Rejected** **_____Modified**

51. The "most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Hollock* at 420-21 (citing *Campbell* at 1521).

_____ Accepted **_____ Rejected** **_____Modified**

52. An insurer's affirmative acts of misconduct and concealment of evidence of improper motive are appropriate factors to consider when evaluating the degree of reprehensibility and appropriate size of a punitive damage award. *See Hollock* at 421.

_____ Accepted **_____ Rejected** **_____Modified**

53. "[A]n action for bad faith may also extend to the insurer's investigative practices," and "the conduct of an insurer during the pendency of litigation may be considered as evidence of bad faith under section 8371." *Hollock* at 415, citing *O'Donnell v. Allstate Ins. Co.,* 734 A.2d 901, 907 (Pa.Super.1999).

_____ Accepted **_____ Rejected** **_____Modified**

54. Mere discovery violations that could have been remedied by appropriate discovery motions under the Rules of Civil Procedure should not be considered as evidence of insurer bad faith. *See O'Donnell* at 907.

_____ Accepted **_____ Rejected** **_____Modified**

55. However, where the Rules of Civil Procedure provide no remedy because the insurer's witnesses engaged in a "blatant attempt to undermine the truth finding process" will discovery violations be relevant evidence of insurer bad faith. In such instances, the Court should consider whether the insurer's employees engaged in "an intentional attempt to conceal, hide or otherwise cover-up the conduct of [its] employees" or whether evidence exists "demonstrating that the

insurer was motivated by a dishonest purpose or ill motive, or otherwise breached its fiduciary or contractual duty by utilizing the discovery process to conduct an improper investigation." *Hollock* at 415.

_____ Accepted _____ Rejected _____Modified

56. A significant degree of reprehensibility may be proven by "[d]eliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive" which are considered "circumstances ordinarily associated with egregiously improper conduct" that may support a large punitive damage award. *See BMW v. Gore* at 580.

_____ Accepted _____ Rejected _____Modified

57. "[W]here the compensatory award is small in spite of the defendant's egregious conduct, it may be appropriate to award a larger amount of punitive damages to limit the defendant's ability to profit from its action and to deter further misconduct. *Matthias*, 347 F.3d 672 at 677. The defendant's wealth may in such an instance become relevant, or its large resources may enable the defendant to mount an extremely aggressive defense, which in turn can prove costly to a plaintiff and potentially deter it from pursuing the matter." *Hollock* at 421 (citing *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, at 677 (7th Circuit Ill. Oct. 21, 2003)).

_____Accepted _____ Rejected _____Modified

58. When focusing upon the actual or potential harm suffered by the plaintiff in order to fashion a constitutionally appropriate punitive damage award, there exists no "bright-line ratio." Nevertheless, few awards exceeding a single-digit ratio of compensatory to punitive damages will satisfy due process. *See Hollock* at 421 (citing Campbell at 1524).

_____Accepted _____ Rejected _____Modified

59. In order to ensure a rational relationship between a punitive award and the actual harm suffered by a plaintiff in a successful bad faith lawsuit, the Court should consider the plaintiff's litigation expenses as part of the compensatory damages.

See Hollock at 422 (awarding $2.8 million in punitive damages when the insured's compensatory damages "were limited to attorneys' fees, costs and interest").

_____ Accepted _____ Rejected _____Modified

PUNITIVE DAMAGES
THREE IMPORTANT GUIDEPOSTS

60. In deciding whether to award punitive damages, and in what amount, this Court considered the following three important guideposts: (1) the degree of reprehensibility of Nationwide's misconduct; (2) the disparity between the actual or potential harm suffered and the punitive damages award; and (3) the difference between the punitive damages awarded and civil penalties authorized or imposed in comparable cases.

_____Accepted _____ Rejected _____Modified

(1) DEGREE OF REPREHENSIBILITY

61. In considering whether to award punitive damages this Court fully considered the extensive evidence offered by Plaintiffs to establish Defendant Nationwide's degree of reprehensibility. After carefully considering all the evidence, including any credible evidence offered by Nationwide, this Court finds Nationwide's reprehensibility to be of a high degree, necessitating a punitive damage award in an amount sufficient to punish and deter similar conduct in the future, while being mindful not to damage Nationwide's financial stability. This Court also was mindful not to exceed a single digit ratio as cautioned by our United States Supreme Court in *BMW v. Gore* and *Campbell v. State Farm*.

_____ Accepted _____ Rejected _____Modified

62. Defendant Nationwide's concealment of the April 30, 1998 claim log entry detailing its knowledge of structural repair failure was not a mere discovery violation. Rather, Nationwide undermined the truth finding process by an intentional attempt to conceal, hide and otherwise cover-up its knowledge of the structural repair failures. Nationwide was motivated by a

dishonest purpose or ill motive, and breached its fiduciary or contractual duty by concealing this material evidence. Years of litigation may have been avoided had Nationwide not embarked upon its path of concealment. The report was available to Nationwide before this lawsuit was filed and Nationwide had no basis to conceal it thereafter.

See Findings of Fact 43-48 citing, *inter alia*, 2004 N.T. 494/7-496/25 (BRRP Manager Bruce Bashore conceding the Potosnak Report was an ordinary claim file entry, not a confidential communication to counsel).

_____ Accepted _____ Rejected _____Modified

63. Nationwide's conduct evinces a heightened degree of reprehensibility. The evidence it was concealing, and the claim it was wrongfully delaying, involved structurally deficient repairs which created a substantial risk that the vehicle was not safe to operate. This finding is supported by the uncontroverted evidence that the tires wore down to their metal belts within a short period of time after the vehicle was placed back on the road. *See* Tab 42, attaching:

See 2004 N.T. 714/15-21 (Nationwide's assigned appraiser, Douglas Joffred, admitting the vehicle was returned shortly after repairs were complete at which time he confirmed that the vehicle's front tires were worn to the metal belt).

See 2004 N.T. 387/5-388 (direct testimony of Sheryl Berg confirming within one month of receiving the vehicle after repairs were complete the tires had worn to the metal belt).

See 2004 N.T. 442/1-3 (opinion testimony of Plaintiffs' automotive expert, Donald Phillips confirming the "tires showed feathering and coupling, which means that the front end steering geometry was not correct so it was not wearing evenly.")

See 2004 N.T. 446 (opinion testimony of Donald Phillips confirming the repair deficiencies impacted safety features of the vehicle "because of the structural changes that have now taken place in the vehicle that the air bag system and its other related safety features such as the front crumple zone would not respond or behave as designed from the factory.")

See 2004 N.T. 450 (opinion testimony of Donald Phillips confirming that because the vehicle was not restored to the original manufacturers tolerances, it would not sustain another impact to the same area as intended because "the safety of the Jeep is directly tied to the performance of the crumple zone and the timely deployment of the air bag as the forces are transmitted through that crumple zone.")

See 2004 N.T. 892/1-10 and 896/1-9 (testimony of Nationwide's automotive expert, William Anderton, confirming *significant* misalignment of the primary structural components and

complete failure of the attempted structural repairs by the sublet facility).

See 63 P.S. Section 861-863, *Pennsylvania's Motor Vehicle Physical Damage Appraiser Act* states, at Section 11, *Compliance with Act*:

> (b) .... Because an appraiser is charged with a high degree of regard for public safety, the operational safety of the vehicle shall be paramount in considering the specification of new parts. This consideration is vitally important where the parts involved pertain to the drive train, steering gear, suspension units, brake systems or tires.

_____ Accepted _____ Rejected _____Modified

64. Significantly, the Bergs' presented clear and convincing evidence that Nationwide was aware of the structural repair failures before the vehicle was returned to the Bergs as having been fully restored, and that it was Nationwide management which was aware of this fact. The evidence proved Nationwide knew the repairs failed because *all* of Nationwide's witnesses admitted that Nationwide's BRRP claim managers (PDS), routinely inspected repairs in progress as standard procedure under its BRRP.

See Finding of Fact "24," and evidence cited in support thereof.

_____ Accepted _____ Rejected _____Modified

65. It is also undisputed that the repairs to the Berg vehicle took four months to complete, providing a large window of time for the vehicle to have been inspected.

See Finding of Fact "20," citing Uncontested Fact "6."

_____ Accepted _____ Rejected _____Modified

66. There were also numerous red flags raised in the appraisal of the vehicle that would have required any conscientious insurer to monitor, including the fact that the assigned appraiser originally declared the vehicle a structural total loss because the vehicle's frame was twisted, and because Nationwide specifically directed the vehicle to be shipped to another repair facility to attempt structural repairs that were so complex that its own designated BRRP facility was unable to perform.

_____ Accepted _____ Rejected _____Modified

67. The Bergs also presented evidence from two independent witnesses. The first was an eye-witness to the repairs, David Wert. Although Mr. Wert was characterized by Nationwide as a disgruntled employee of the subject BRRP facility, his testimony on the relevant issue was credible, namely that Nationwide was aware of the failed structural repairs, including the cutting of the fan shroud to silence the noise caused by the fan blades hitting the fan shroud due to the misalignment of the vehicle's frame. *See* Finding of Fact "25" and "26." Mr. Wert's credibility was supported by the subsequent findings of Nationwide's own automotive expert, William Anderton, who confirmed there was no identifiable benefit from the structural repairs performed by the other, non-BRRP facility. *See* Finding of Fact "23," citing 2004 N.T. 896/1-5 (admissions of W. Anderton). Mr. Wert's credibility was further corroborated by Mr. Potosnak's pre-suit inspection report, which confirmed the damaged fan shroud, described by Mr. Wert as having been sawed off. *See* Finding of Fact 43 citing Trial Exhibit No. 8 (Page 4 of 70) (claim file entry of Potosnak Report).

_____ Accepted _____ Rejected _____Modified

68. The Bergs' second independent witness, George Moore, was a repair facility manager of a BRRP facility in Delaware County. Mr. Moore confirmed not only that the inspections by Nationwide were standard procedure, but also that Nationwide required that a BRRP log be kept available at the facility for Nationwide personnel to use during their inspections. *See* Finding of Fact "24," citing 2007 N.T. 63/12-68/10 (George Moore). Mr. Moore's testimony was corroborated by BRRP documents identifying both the random repair inspections and the BRRP log. *See* Finding of Fact "24," citing Trial Exhibit Nos. 34 & 35 (BRRP form documents). Mr. Moore's direct testimony was also corroborated by Nationwide's own witness, Dean Jones, CPCU, who supervised the BRRP for the State of Pennsylvania at the time of the Berg collision. Mr. Jones' admitted the program operated the same in Delaware County as it did in Berks County, and that the program included both random inspections and a shop log for the PDS to document the findings of the random inspections. *See* Finding of Fact "24," citing 2004 N.T. 188/12-21, 191/1-7, 236/19-43/2 (admissions of Dean Jones, CPCU).

_____ Accepted _____ Rejected _____Modified

69. This Court notes that although the subject BRRP shop log or re-inspection reports on the Berg vehicle have never been produced in this litigation, it is obvious why these documents were not produced as the documents would have been very damaging to Nationwide's position in the litigation. Moreover, the Bergs have proffered extensive evidence of Nationwide repeatedly concealing what it knew about the condition of the vehicle, and when it was known. This is most evident in Nationwide's concealment of the pre-suit inspection report of its own PDS, Stephen Potosnak, who entered a detailed report into the claim file on April 30, 1998. Despite two Orders from this Court requiring Nationwide to produce the contents of its claim file, subject only to the attorney-client privilege, it remains undisputed that Nationwide withheld this material evidence until May of 2003 that is for five years. Mr. Bashore admitted at trial that the Potosnak Report was an ordinary claim file entry, detailing the inspection report he himself had ordered.

_____ Accepted _____ Rejected _____Modified

70. Any contention by Defendant Nationwide that it was *unaware* of the repair failures prior the vehicle being returned to the Bergs is rejected as being not credible and against the great weight of the evidence. More importantly, this Court concludes that Nationwide was aware of a material risk that the vehicle may not be safe to operate. At the very least, there is no evidence that Nationwide ever performed any investigation to determine whether the vehicle was safe to operate with the known structural repair failures prior to the vehicle being released to the Bergs. Having taken no further investigation, and thereafter permitting the vehicle to be returned to the Bergs as if it had been fully restored, evidences a wanton and reckless disregard not just to the Bergs and their family, but to the motoring public in general.

It is impossible for this Court to ignore the undisputed fact that the front tires on the subject vehicle were worn down to the metal belts within a short period after the vehicle was returned to the Bergs. *See* Finding of Fact "33," citing 2004 N.T. 714/15-21 (Doug Joffred), and 387/19-20 (Sheryl Berg). Common sense dictates the conclusion that the front tires wearing to the metal belts would create significant safety concerns, undercutting the opinion of Nationwide's

forensic expert, William Anderton, that the structural repair failures did not pose a safety risk.

It is also impossible for this Court to ignore the testimony of the Bergs' automotive expert, Donald Phillips, P.E., who confirmed the obvious; the unusual tire wear was caused by the failed structural repairs. Mr. Phillips expressed further concern about the vehicle's crash safety features, such as proper air-bag deployment and crash crumple zones, which he felt were compromised as a result of the vehicle no longer being to within a reasonable degree of the manufacturer's original specifications. This too was due to the failed structural repairs. *See* Finding of Fact "30," citing 2004 N.T. 445/22-450/11 (Donald Phillips, P.E.). Mr. Phillips, a physical engineer, has extensive experience working for a company that designed and tested airbags for the major automobile manufacturers. *See* Finding of Fact "29," citing 2004 N.T. 433/5-11 (Donald Phillips, P.E.). This Court finds his testimony on all these points credible. This Court also finds the testimony of Nationwide's automotive expert, William Anderton, that the vehicle was nevertheless safe to operate, not credible. This is particularly true given the undisputed evidence that the front tires on the vehicle wore down to the metal only a short period of time after being returned to the Bergs. This is a clear indication of a serious safety issue.

_____ Accepted _____ Rejected _____Modified

71. Finally, this Court finds the risk for serious harm to have been caused by the failed structural repairs to be two-fold. First, there was the risk posed by the unusual tire wear, increasing the chance of a driver losing control of the vehicle and crashing. Second, as attested to by the Bergs' automotive expert, the risk of injury was increased in a crash because the crash crumple zones and proper air-bag deployment were compromised by the vehicle's condition. This Court finds that Nationwide's actions in this case to be of the highest degree of reprehensibility, commanding a punishment at the highest amount permitted the law, which is a 9 to 1 ratio of the actual harm it caused.[4]

See Findings of Fact 24-33.

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4 *See Hollock* at 421-22 (affirming 10 to 1 ratio where compensatory damages limited to attorney fees, costs and interest, and where insurer did not knowingly place its insured at risk to suffer bodily harm).

_____ **Accepted** _____ **Rejected** _____**Modified**

72. This Court finds the above findings to be clear and convincing evidence of Defendant Nationwide's wanton and reckless disregard for the rights and safety of its insured, Plaintiff Bergs, to whom it owed a duty of good faith and fair dealing. It follows that this is also clear and convincing evidence of insurer bad faith.

_____ **Accepted** _____ **Rejected** _____**Modified**

(2) **DISPARITY - ACTUAL OR POTENTIAL HARM v. PUNITIVE AWARD**

73. This Court considered the second important guidepost, whether an unreasonable disparity exists between the actual or potential harm suffered by the Plaintiffs, and the punitive damage award. While this Court is mindful that most punitive damage awards should not exceed a 9 to 1 ratio to the compensatory damages, this Court finds no disparity between the punitive damage award and the *potential harm* Defendant Nationwide caused in allowing its insured's to operate a vehicle it knew had unresolved structural repair failures. The *potential harm* was serious injury, dismemberment, or death.

_____ **Accepted** _____ **Rejected** _____**Modified**

(3) CIVIL PENALTIES IMPOSED IN COMPARABLE CASES

74. The third of the three important guideposts this Court considered was the civil penalties imposed in comparable cases. This Court considered the $2.8 million punitive damage award entered in a non-jury bad faith case, affirmed by an *en bank* panel of the Superior Court in *Hollock v. Erie,* and *Campbell v. State Farm Mutual Auto. Ins. Co.,* 2004 UT 34, 98 P.3d 409 (Utah), *cert. denied,* 543 U.S. 874, 125 S. Ct. 114, 160 L. Ed. 2d 123 (2004), wherein the Supreme Court of Utah, upon remand from the United States Supreme Court, awarded $9 million in punitive damages for State Farm's handling of a liability claim. Although the punitive damages affirmed in both these cases was supported by conduct that was certainly of a high degree of reprehensibility, neither State Farm nor Erie Insurance Company knowingly placed their insured

in harm's way, as Nationwide did to the Bergs here.[5]

_____ **Accepted** _____ **Rejected** _____**Modified**

75. Nationwide's reprehensibility was compounded thereafter when the Bergs discovered the failed structural repairs. Rather than promptly moving to resolve the claim dispute, Nationwide concealed its knowledge of the failed repairs and forced this lawsuit that now spans more than fifteen years. The evidence proves Nationwide paid its attorneys in excess of $1 million defending its conduct, which a jury confirmed violated the catchall fraud provision of the UTPCPL in 2004. There is no evidence that Nationwide attempted to settle the case after the jury confirmed its conduct was fraudulent and/or deceitful. Instead Nationwide paid its attorneys an additional $1 million defending its fraudulent conduct through a bad faith trial, and through the appellate courts. Even after spending more than $2 million since the lawsuit was filed, there remains no evidence that Nationwide has acknowledged any wrongdoing whatsoever. Indeed, it continues to claim it is the victim of an overzealous prosecution by the Bergs' attorneys (even as it continues to conceal material evidence, and repeatedly misrepresent the law to this Court). It is clear that only the highest penalty permitted under the law will have any impact upon Nationwide.

_____ **Accepted** _____ **Rejected** _____**Modified**

76. Inasmuch as the purpose of this third guidepost (of comparing a punitive damage award

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5 The original punitive damage award affirmed by the Utah Supreme Court in *Campbell* was $145 million. The United States Supreme Court determined this amount was excessive because the ratio exceeded 145 to 1. *See State Farm v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). In *Hollock* the Superior Court affirmed a 10 to 1 ratio where compensatory damages were limited to attorney fees and where the insurer *did not* knowingly place its own insured at risk to suffer physical harm. The Court stated the following with regard to the ratio:

> In this case the compensatory damages in the bad faith action were limited to attorneys' fees, costs and interest, totaling about $278,825. . . . The punitive damages here of $2.8 million represent a 10 to 1 ratio over the compensatory award, which just barely exceeds the "single digit ratio" referred to in *Campbell. Campbell,* 123 S.Ct. at 1524. Considering Erie's reprehensible conduct, its significant wealth, and the limited compensatory award, we conclude that due process is not violated in this case as a result of the disparity between actual or potential harm suffered by the plaintiff and the punitive damage award.

Id. at 421-22.

with civil penalties imposed in comparable cases) appears to be directed toward ensuring the defendant was provided notice that its misconduct might give rise to a substantial financial penalty, this Court notes Pennsylvania's bad faith statute, 42 Pa. C.S.A. §8371, explicitly warns all insurers that treating a Pennsylvania policy holder in bad faith may give rise to a punitive damage award. Since this statute was enacted into law in 1990, Defendant Nationwide knew its conduct toward Plaintiff Bergs may subject it to a punitive damage award.

_____ Accepted _____ Rejected _____Modified

77. Given Nationwide's vast wealth and the manner in which punitive damages were computed in 1990 (based largely on the defendant's wealth), Nationwide's exposure was far greater than it is today because the United States Supreme Court has placed significant limits on the size of the penalties that may be imposed upon very wealth defendants. Specifically, beginning in at least 1996, Nationwide's exposure was capped at a figure approximating a 9 to 1 ratio of the actual harm it caused, with its wealth becoming a less significant factor for courts to consider. *See BMW v. Gore* and *State Farm v. Campbell.*

_____ Accepted _____ Rejected _____Modified

78. And although *BMW v. Gore* certainly limited Nationwide's exposure to a huge punitive damage award, it also established a path for courts to consider when deciding whether to affirm a punitive damage award approaching the maximum ratio of 9 to 1. Thus, as early as 1996, Nationwide knew its conduct in this case could produce a punitive damage award at a 9 to 1 ratio. In *BMW*, a $2 million punitive damage award was reversed where BMW sold a re-painted car, as new. Although not an insurance bad faith case, *BMW* is relevant because the Court's analysis placed Nationwide on notice that its conduct toward the Bergs in this case *would* support a penalty at the maximum ratio of 9 to 1. Specifically, the Court determined the $2 million punitive damage award was excessive as follows:

> In this case, none of the aggravating factors associated with particularly reprehensible conduct is present. The harm BMW inflicted on Dr. Gore was purely economic in nature. The presale refinishing of the car had no

> effect on its performance or safety features, or even its appearance for at least nine months after his purchase. BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others. To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct . . . can warrant a substantial penalty.
>
> . . . .
>
> Finally, the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive . . . Because this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct, we are persuaded that BMW's conduct was not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award.

Id. at 576 and 580. *BMW* stands in stark contrast to the record in this case. Moreover, *BMW* did not involve an insurance company defendant with a statutory duty to treat its insured in good faith and with fair dealings.

_____ Accepted _____ Rejected _____Modified

79. Finally, it is worth noting that in addition to violating Pennsylvania's Appraisers Act, and the UTPCPL, Nationwide's conduct also violated the Unfair Insurance Practices Act, 40 P.S. §§ 1171.1-1171.15, which provides penalties for conduct practiced here by Nationwide, such as forcing a policy holder to institute litigation to receive policy benefits.[6] As noted in *Hollock,* "[u]nder the terms of this Act, the Commissioner may impose a penalty of up to $5000, for each known violation. 40 P.S. § 1171.11. In addition, upon a determination that the Act has been violated, the Commissioner may suspend or revoke the offender's license. § 1171.9. In view of these potentially harsh penalties faced by Erie, we cannot find the punitive damages award unjustified and violative of due process." *Id.* at 422.

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6 Although Nationwide has often claimed that because it purchased the vehicle for $18,000, and paid one month of rental expenses, it did not deny the Bergs any benefits under the policy. However, the purchase took place only after the Bergs filed this lawsuit. It is now undisputed that Nationwide was aware of the vehicle's conduction before the lawsuit was filed but chose to force the Bergs to incur thousands of dollars in litigation expenses prior to purchasing the vehicle. Nationwide also forced the Bergs to pay their final lease payment prior to purchasing the vehicle from Summit Bank. It is difficult to identify what exactly the Bergs gained from Nationwide's purchase, which was done at a time when Nationwide sought to secure exclusive access to the evidence and was denying knowledge of the failed repairs. Based upon the available evidence, one can only conclude that the purchase of the vehicle by Nationwide was done to further Nationwide's own interests, not the Bergs.

_____ Accepted **_____ Rejected** **_____Modified**

PENNSYLVANIA FACTORS

80. This Court considers the standard under which punitive damages are measured in Pennsylvania which requires analysis of the following three factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant. *See Hollock v. Erie*, 842 A.2d at 419.

_____ Accepted **_____ Rejected** **_____Modified**

(1) CHARACTER OF THE ACT

The character of Nationwide's actions is addressed above. *See* Degree of Reprehensibility.

(2) NATURE AND EXTENT OF THE HARM

The nature and extent of the potential harm caused by Nationwide in this case is addressed above. *See* section above on Disparity of Actual or Potential Harm v. Punitive Damages.

(3) THE WEALTH OF THE DEFENDANT

81. Although the relevance of a defendant's wealth has been limited by recent decisions of the United States Supreme Court, it remains in important factor because the origin of a punitive damage award is not only to punish, but also to deter similar future conduct. Accordingly, the amount of the award must be of a sufficient size for the defendant to actually feel it, and a very wealthy defendant may not notice a punitive damage award unless the amount is in a size that is relative to the defendant's wealth. Consideration should also be given to whether the defendant is a recidivist inasmuch as this would illustrate the need for a larger punishment than what might be expected to work with a less recalcitrant defendant.

_____ Accepted **_____ Rejected** **_____Modified**

82. The Bergs presented the opinion testimony of Jeffrey Silver, C.P.A., M.B.A., who detailed

Nationwide's wealth and offered his opinion about whether Nationwide's wealth is sufficiently large to insulate it from feeling a punitive damage award at a lessor ratio. It was Mr. Silver's opinion that given Nationwide's wealth, it was unlikely that a lesser ratio would be felt by Nationwide and that only a higher ratio would have much impact on the company's future behavior. Mr. Silvers also offered his opinion that even a punitive damage award approaching the very highest permissible amount of $18 million, representing a 9 to 1 ratio to the potential compensatory damages, would not jeopardize the company's viability but would certainly be an amount that would be expected to garner the attention of the decision makers in the company to promote change.

_____ Accepted _____ Rejected _____Modified

83. This Court finds Mr. Silver's opinions to be credible and persuasive.

_____ Accepted _____ Rejected _____Modified

84. This Court also concludes that due to the degree of reprehensibility attached to Nationwide's reckless indifference to the safety of its insured by knowingly placing its insured at risk to suffer physical harm and/or death (1996); and by attempting to conceal and cover-up its knowledge of the failed structural repairs (1997); and in forcing this lawsuit given what we now know it knew when this lawsuit was filed (1998); and in applying a litigation strategy *to punish and deter the Bergs* for pursuing their legal rights (1998-2002); and in continuing to apply its bad faith litigation strategy even after the Pennsylvania Superior Court directed it to stop applying the strategy in the matter of *Bonenberger v. Nationwide* (2002-2004); and in continuing to apply the strategy without attempting to resolve the litigation even after a jury found its conduct to be fraudulent under the UTPCPL in 2004 (2004-2007); and in continuing to apply this strategy in the current remand proceedings by continuing to conceal material evidence which includes the most basic evidence in the case, that being appraisal documents and photographs of the damaged vehicle taken contemporaneously with it being declared a structural total loss (1996-2013), this Court can only conclude that Nationwide is a recidivist.

_____ **Accepted** _____ **Rejected** _____**Modified**

85. Given all of the above, including Nationwide's ongoing outward appearance that it believes it has done nothing wrong to the Bergs, this Court concludes that only the highest penalty permitted under the law will further the underling purpose of a punitive damage award, which is to punish and deter similar future conduct.

_____ **Accepted** _____ **Rejected** _____**Modified**

PROPOSED CONCLUSIONS OF LAW
ATTORNEY FEES

86. Pursuant to 42 Pa. C.S.A. §8371, ". . . if the Court finds that the insurer has acted in bad faith toward the insured, the Court may take all of the following actions: . . . (3) Assess court costs and attorney fees against the insurer."

_____ **Accepted** _____ **Rejected** _____**Modified**

87. Our courts recognize that the *contingency* nature of an § 8371 claim for counsel fees and damages increases the likelihood that counsel will work only as diligently as necessary:

> Section 8371's attorney fees and costs provisions vindicate the statute's policy by enabling plaintiffs such as Willow Inn to bring § 8371 actions alleging bad faith delays to secure counsel on a contingency fee. . . . and the structure of § 8371 enlists counsel to perform a filtering function akin to prosecutorial discretion, because rational attorneys will refuse to work on a contingent fee arrangement when their investigation reveals the bad faith allegations of prospective clients to be meritless.

See Willow Inn, Inc. v. Public Serv. Mut. Ins. Co., 399 F.3d 224, 236 (2004).

_____ **Accepted** _____ **Rejected** _____**Modified**

88. Courts have permitted recovery of attorneys' fees not only in connection with the prosecution of a bad faith claim itself, but also for subsequent appeals.

See Bonenberger at 383.

_____ Accepted _____ Rejected _____Modified

89. The Bergs' fee petition represents both actual time expended when copious time records were maintained, together with a fair estimation of time expended before Plaintiffs' counsel began tracking time. Plaintiffs' attorney, Ben Mayerson, offers the following declaration pertaining to Plaintiffs' fee petition, which this court finds credible:

> The billing records submitted in support of Plaintiffs' claim for attorneys' fees and costs that include estimations of time expended were assembled by the attorneys and staff of The Mayerson Law Offices, P.C., during the weeks prior to the pre-trial conference and bi-furcated jury trial that ended on December 17, 2004.
>
> The manner in which these billing records were assembled was to physically review the entire file and estimate the number of hours expended on each task during the early part of the litigation when no formal time records were created, which was then added to the total hours expended in the latter part of the litigation when time records were implemented. The estimated portion does not account for considerable re-drafting and editing of pleadings prior to filing, or of letters prior to mailing. It is a conservative estimation of actual time expended.
>
> The manner in which the billing records were assembled for the period *after* billing records were created contemporaneous with the work performed was for the office staff to gather each attorney's time records for submission. Attorney Ben Mayerson, who performed most of the work, tracked his hours by recording into the computer file the time he began working, the time he stopped working, and when feasible, a brief description of the task being worked upon. Initially, time intervals were recorded in 15 minute intervals always rounding down. For instance, if work began at 9:05 AM, Attorney Ben Mayerson entered 09:15 AM into the time sheet. If the task being worked upon took less than five minutes, and did not generate a document, no fee was claimed. Attorney Ben Mayerson also did extensive work from home when necessary, or when otherwise appropriate. This work was further corroborated by electronic messages sent from home to the office documenting the time of day work began and ended. These electronic messages have been produced to Defendant Nationwide pursuant to Court Order.
>
> Current hours billed are recorded in intervals of one tenth of an hour, rather than in 15 minute intervals. Letters *generated* by the Mayerson Law Offices, P.C. were billed with a minimum of 0.25 hours, while letters received and reviewed by the Mayerson Law Offices, P.C. were billed at a minimum of 0.10 hours. This method is supported by custom and practice as reported by regional law firms that customarily do billable work, and actually represents a conservative method as many firms charge a minimum of 0.30 hours per letter generated.

The reason billing records were not created until midway through this litigation is because Plaintiffs' law firm is a personal injury law firm handling cases for consumers on a contingency fee basis (usually at a rate of 33 - 40% of total recovery), and was not accustom to tracking hours. The Mayerson Law Offices, P.C., does not require a retainer fee, nor are hourly rates generally quoted to clients. This matter was not the typical case handled by this firm inasmuch as it involved, initially at least, allegations of fraudulent collision repairs.

_____ Accepted _____ Rejected _____Modified

90. As established above, the evidence confirms Defendant Nationwide *intended* to make this litigation too expensive for Plaintiffs to pursue, and to use this case as a platform to "send a message" to the Bergs' lawyers and to other similarly situated members of the Plaintiff's Bar, not to file a bad faith suit against Nationwide no matter the validity of the underlying claim, or the degree of Nationwide's misconduct in handling the underlying claim.

_____ Accepted _____ Rejected _____Modified

91. This Court accepts Plaintiffs' contention that Nationwide's in-house attorney, David Cole, was assigned the Berg matter when this lawsuit was filed in May of 1998, and that it was assigned to Mr. Cole because Nationwide intended to apply its litigation strategy in this case.

The following evidence supports this conclusion. Mr. Cole handled the Berg matter from 1998 through September of 2002, when he stopped working for Nationwide. 2007 N.T. 504/12. Mr. Cole admits Nationwide assigned him the "complex litigation," and that it was in this role that he was assigned the Berg matter. *Id.* at 465/19-24. Mr. Cole admits he was supervising the litigation and retained counsel, and that he "advised and supervised the file, advised counsel on what particular discovery motions we wanted filed, what legal issues to address, et cetera." *Id.* at 475/9-12. Mr. Cole admits retained counsel were under his "supervision" and "did not have free reign." *Id.* at 488/22-25. When asked whether he was "intimately involved in the litigation on a daily basis," he replied "as needed sometimes daily, sometimes not, but certainly responsible for the overall supervision of the case, yes." *Id.* at 489/2-6. Mr. Cole admits he was aware of the litigation strategy designed to send a message to lawyers. *Id.* at 485/22-23. Mr. Cole admits he

was aware of it because he was the "managing claims attorney for all the attorneys in the State of Pennsylvania" when the strategy was first implemented in 1993. *Id.* at 485/18-25. Mr. Cole admits he received the invoices from the retained attorneys in this case and authorized the payments to the retained attorneys. *Id.* at 486/29-487/3. Mr. Cole asserted the attorney-client privilege when asked the following question: "So when Nationwide received this case right after their inspection by Mr. Potosnak [April 1998] they (sic) had already concluded this was going to be a knock out, drag out case by sending it to you?" *Id.* at 502/8-14. Mr. Cole also asserted the attorney-client privilege when asked the following question: "Mr. Cole, did you ever make any attempt to resolve this case after it was assigned to you up until the time you left in 2002. Did you send or authorize a written settlement offer?" *Id.* at 504/25-505/5.

Based upon the foregoing, this Court concludes that Nationwide applied the *Litigation Strategy* documented in its *Best Claims Practices* manual against Plaintiff Bergs, through Mr. Cole. This Court also accepts Plaintiffs' contention that Mr. Cole, as Nationwide's State Legal Counsel responsible for managing all of the attorneys employed by Nationwide within the State of Pennsylvania from 1990 through 1996, was in the best position within Nationwide to know the purpose of Nationwide's *Litigation Strategy*, and how to best employ that *Strategy* to achieve its desired results. This Court further concludes that the desired result was to artificially inflate Plaintiffs' litigation expenses because they retained legal representation in a claim dispute with Nationwide. This Court also accepts Plaintiffs' contention that Nationwide purposefully targeted Plaintiff Bergs with this *Litigation Strategy* because the value of their underling claim dispute was less than $25,000, and because the Bergs were suing Nationwide for bad faith. And this Court concludes, as a direct result of Defendant Nationwide's conduct, that all of Plaintiff Bergs legal fees are reasonable.

See also PENNRO LITIGATION STRATEGY, at Exhibit 2, "Continued reinforcement of Nationwide being a 'defense-minded' carrier in the minds of the plaintiff legal community . . . . Implement a more aggressive posture in handling cases of lesser probable exposure (ie: cases not exceeding $25,000.00). Create and reinforce a defense minded perception."

_____ Accepted **_____ Rejected** **_____Modified**

92. It is clear to this Court that Nationwide is engaged in an intentional attempt to cover-up its knowledge that the vehicle was a structural total loss due to a badly twisted frame; that it was aware of the failed structural repairs before the vehicle was returned to the Bergs as if fully restored; and that Nationwide has been attempting to conceal its knowledge of these facts since at least September 11, 1996, when the vehicle was first appraised as a structural total loss.

_____ **Accepted.** _____ **Denied.** _____ **Modified.**

93. In the 17 years since the Bergs submitted their collision claim on September 4, 1996, Nationwide has paid its attorneys in excess of $2 million in a failed attempt to price the Bergs' attorneys out of their meritorious claim dispute, involving a $25,000 loss.

_____ **Accepted.** _____ **Denied.** _____ **Modified.**

94. The Court notes that Nationwide's attorneys were paid timely, and without risk for their work defending Nationwide in this lawsuit.

_____ **Accepted.** _____ **Denied.** _____ **Modified.**

95. This Court also recognizes that the Bergs attorneys undertook this case on a contingency fee basis, at an unimaginable risk. The risk of losing the case was compounded by Nationwide's unlawful concealment of evidence, and repeated misrepresentation of the law to this Court, necessitating six years of appellate review. The Bergs nevertheless overcame these artificial obstacles created by Nationwide.

_____ **Accepted.** _____ **Denied.** _____ **Modified.**

96. Given the above, it would be unreasonable for this Court to award counsel fees to the Bergs in any amount less than Nationwide paid its own attorneys, who were paid timely and without risk for the past 15 years.

_____ **Accepted.** _____ **Denied.** _____ **Modified.**

97. Prior to reaching a final decision on the amount to award the Bergs, this Court considered

the number of hours worked by the Bergs over the past 15 years, which was obviously substantial, and the contingency nature of the work, which as discussed above, was undertaken at substantial risk due to Nationwide's aggressive litigation tactics.

_____ **Accepted.** _____ **Denied.** _____ **Modified.**

Respectfully submitted,

By: _____
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DANIEL BERG and SHERYL BERG, Husband and Wife	:	COURT OF COMMON PLEAS
	:	BERKS COUNTY, PA
Plaintiffs	:	
	:	
v.	:	NO. 98-813
	:	
NATIONWIDE MUTUAL INSURANCE COMPANY	:	
	:	
Defendant	:	CIVIL ACTION – LAW

CERTIFICATE OF SERVICE

I, Benjamin J. Mayerson, Esquire, hereby certify that on the 9th day of December, 2013, a true and correct copy of Plaintiff Bergs' Proposed Conclusions of Law was sent via U.S. First-class Mail, postage prepaid, to counsel of record as follows:

G. Frank McKnight, IV, Esquire
William O. Krekstein, Esquire
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DOLAN & MAYERSON, P.C.

BY: _____
Benjamin J. Mayerson
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