

DANIEL BERG and SHERYL BERG,
Husband and Wife

Plaintiffs

v.

NATIONWIDE MUTUAL INSURANCE
COMPANY

Defendant

COURT OF COMMON PLEAS
BERKS COUNTY, PA

NO. 98-813

CIVIL ACTION

BERKS COUNTY, PA
HARRIET R. SUTTON
PROTHONOTARY

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**PLAINTIFF BERGS'
PROPOSED FINDINGS OF FACT
PERTAINING TO KEY WITNESSES**

A. DEAN JONES, CPCU

Dean Jones, a Charter Property Casualty Underwriter (CPCU), was called by the Bergs as if on cross-examination. Mr. Jones began his employment with Nationwide in 1970. He was a material damage instructor for five and a half years. In 1987 he became a District Claim Manager, supervising regional claim managers, with primary responsibility in the area of automobile damage claims. In 1990, Mr. Jones was promoted to Claims Division Manager, and in 1993 he was promoted to Claims Development Manager.

In 1995, the year prior to the Bergs' loss, Mr. Jones was promoted to Managing Claims Consultant where he managed material damage claims at the state level, including the technical performance of Nationwide's Blue Ribbon Repair Program (BRRP) for the State of Pennsylvania. During this time, Mr. Jones managed BRRP Claim Managers, also known as Property Damage Specialists (PDS), including Michael Grumbein who managed BRRP operations at the subject BRRP facility, and Mr. Potosnak, the property damage manager who inspected the Berg vehicle just prior to this lawsuit being filed.

Mr. Jones testified that he became a Claims Technical Manager one month prior to the Berg loss where he managed ordinary claims adjusters, such as Doug Witmer, the field representative assigned to visit the Berg vehicle after it was appraised as a structural total loss.

See 2004 N.T. 180/4-185 & 203/4-7 (Dean Jones, CPCU).

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

B. MICHAEL GRUMBEIN

Michael Grumbein became employed by Nationwide in 1991. He received three weeks of training on material damage claims in order to secure his Pennsylvania appraisers license, which was required by Nationwide at the inception of his employment. In September of 1995, Mr. Grumbein was promoted to PDS, a management position within Nationwide's BRRP. Mr. Grumbein testified that during the months leading up to the Berg claim he managed BRRP operations in forty BRRP facilities, including the subject facility. In this capacity he "reviewed the estimates and the photos that were sent in [by BRRP facility] and inspected any vehicles that may have been a question as to faulty repairs or anything like that." He reviewed photographs and appraisals "[t]o make sure that the photos supported estimates that the shop was writing on the vehicle." Mr. Grumbein agreed the BRRP was a platform that "operated upon the use of photographs." Mr. Grumbein was managing BRRP operations at the subject BRRP for eight months prior to the Berg loss.

See 2004 N.T. 70/11-71/21; 72/6-73/13; 77/5-8.

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

C. DOUGLASS JOFFRED

Douglass Joffred is Nationwide's assigned appraiser at the subject BRRP facility. At the time of his testimony in 2004, Mr. Joffred had been the body-shop manager at the subject repair facility for sixteen years. Although he had sixteen years of experience managing the subject collision repair facility, he was not a licensed appraiser. Nevertheless, Mr. Joffred had been appraising insured losses at Nationwide's request for several years prior to the Berg loss, and admits he likely wrote hundreds of appraisals without his license during this time period. Mr. Joffred also admits that after he secured his appraisers license he puts the license number on every appraisal he writes as "required by state law."

See 2004 N.T. 129/9-15 (Dean Jones)

See 2004 N.T. 299/17-23 (Claims Adjuster Doug Witmer).

See 2004 N.T. 620/19-25; 622/7-11; 623/18-19; 630/25-631/2; 633/20-634/12 (Douglass Joffred admitting he was not licensed to appraise the Berg loss, etc.).

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

D. DOUG WITMER

Doug Witmer is the Nationwide Claims Adjuster assigned to the Berg collision claim. It was Mr. Witmer who declared the vehicle repairable after Nationwide was notified that the vehicle was declared a structural total loss by its assigned appraiser, Douglas Joffred. Although a licensed appraiser, Mr. Witmer did not write or sign an appraisal after declaring the vehicle repairable. It was Mr. Witmer who directed that the vehicle be taken to another repair facility to attempt the structural repairs that Nationwide's BRRP was unable to attempt.

See 2004 N.T. 296/7-10; 299/7-23; 302/8-10; 363/17-364/7; 365/10-366/3 (Doug Witmer).

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

E. DAVID WERT

David Wert was a repair technician at Nationwide's designated BRRP facility, and witnessed the repairs from his repair bay approximately 25 feet from where the Berg repairs took place. Mr. Wert is the "whistle-blower" who called the Bergs in the fall of 1997, to warn the Bergs that the vehicle was returned to them in a potentially dangerous condition. Mr. Wert testified that Nationwide personnel inspected the repair work throughout the four month repair period. Mr. Wert also testified, under Nationwide's cross-examination, that the Nationwide personnel appeared to be "unhappy" during the inspections. Mr. Wert also admitted he contacted the Bergs to warn of the structural repair failures only after he was fired and involved in a workers compensation dispute.

See 2004 N.T. 538/23-539/22; 547/7-552/20; and 555/13-557/14.

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

F. STEPHEN POTOSNAK

Stephen Potosnak was a PDS for the subject BRRP facility from 1997, through June of 1998. Mr. Potosnak performed random inspections of vehicles being repaired at the subject BRRP facility "several times per month" and would create "monthly performance evaluations." Mr. Potosnak called the performance evaluations "report cards for the shops."

On April 28, 1998, Mr. Potosnak was dispatched by his supervisor, Bruce Bashore, to conduct a pre-suit inspection of the repair work to the subject vehicle. Mr. Potosnak entered a detailed report into the claim file on April 30, 1998, confirming the failed structural repairs. The Potosnak Report was not produced to the Bergs prior to this lawsuit being filed on May 4, 1998. It was thereafter redacted from the claim file pursuant to a bogus assertion of attorney-client privilege. The report was un-redacted on May 5, 2003, five years after it was entered into the claim file, to support Nationwide's denial to Request for Admissions.

See 2004 N.T. 370/19-25; 372/6-16; and 374/16-19.

See also Trial Exhibit No. 8 (Page 4-5 of 70)(un-redacted Potosnak Report).

See also Trial Exhibit No. 46 (Page 4 of 74)(redacted Potosnak Report).

_____ **Accepted.**

_____ **Denied.**

_____ **Modified**

G. BRUCE BASHORE

Bruce Bashore was a BRRP Claim Managers at the time this lawsuit was filed in May of 1998. He supervised the PDS and was one of two people who ran the BRRP for the state of Pennsylvania. Mr. Bashore was the immediate supervisor of Stephen Potosnak, the PDS who conducted the pre-suit inspection of the Berg vehicle on April 28, 1998. Mr. Potosnak's inspection was performed at the direction of Mr. Bashore. The findings documented in the Potosnak Report were not provided to the Bergs at any time prior to this lawsuit being filed, or for many years thereafter. Instead, Mr. Bashore sent a letter to the Bergs' attorneys suggesting he was unaware of "any repair issues." Mr. Bashore also denied knowledge of the failed structural repairs when he verified Nationwide's Answer to Complaint on January 19, 2000. Mr. Bashore knew the structural repair efforts failed on May 19, 1998, when he wrote this letter pretending to be unaware of "any problems with the repairs," and when he verified Nationwide's Answer to Complaint, denying knowledge of failed repairs. These conclusions are proven by the April 30, 1998, Potosnak Report, which was ordered by Mr. Bashore.

See 2004 N.T. 492/21-494/18; 495/17-496/25; 499/14-16 (Bruce Bashore).

See Trial Exhibit No. 15, Letter from Mr. Bashore dated May 19, 1998.

See Trial Exhibit No. 8 (Page 4-5 of 70), Potosnak Report.

See relevant page of amended Complaint and Answer.

Accepted.

Denied.

Modified

H. ATTORNEY DAVID COLE

Attorney David Cole began his employment with Nationwide in 1988 as a claims attorney. Between 1990 through 1996, he was Claims Legal Counsel, where he managed all in-house counsel. Between 1996-2002 Mr. Cole held a position with varying titles, but the essential role was to be assigned and manage “complex litigation.”

Mr. Cole was assigned the Berg claim when this lawsuit was filed in May of 1998, and he continued to manage the Berg litigation from 1998 through September of 2002, when he left his employment with Nationwide. Mr. Cole admits he supervised 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.” Mr. Cole admits retained counsel were under his “supervision” and “did not have free reign.” 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.”

Mr. Cole admits he was aware of the litigation strategy designed to send a message to lawyers. 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. Mr. Cole admits he received the invoices from the retained attorneys in this case and authorized the payments to the retained attorneys. 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?” 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 [in May of 1998] up until the time you left in 2002. Did you send or authorize a written settlement offer?”

See 2007 N.T. 461/18-463/6; 465/7-25; 504/12; 475/9-12; 488/22-25; 489/2-6; 485/18-25; 486/29-487/3; 501/19-502/14; 502/8-14; 504/25-505/5 (David Cole, Esq.).

_____ **Accepted.**

_____ **Denied.**

_____ **Modified.**

I. ATTORNEY JEFFREY GOODERHAM

Attorney Jeffrey Gooderham was Nationwide's Lead Claims Counsel and a member of the committee that developed the claim-manual containing the litigation strategy at issue in this case. Attorney Gooderham's background also includes the following: Claims Attorney; District Claims Manager; Claims Technical Consultant; and Claims Legal Counsel. Mr. Gooderham's supervisor was Attorney David Cole around "1997 or 1998." Mr. Gooderham admitted he is not aware of any company directive being circulated by Nationwide directing personnel to stop applying the litigation strategy at issue in this case after Nationwide was instructed to stop applying the strategy in the matter of *Bonenberger v. Nationwide Mutual Ins. Co.*, 791 A.2d 378 (Pa. Super. 2002).

See 2007 N.T. at 90/11-91/18; 110-118/11.

_____ **Accepted.**

_____ **Denied.**

_____ **Modified.**

J. WILLIAM ANDERTON

William Anderton is Nationwide's automotive expert.¹ In 1976 he began working for a wholly owned subsidiary of Allstate Insurance Company, Tech Core, doing collision research activity with the stated goal "to try and find more economic ways of repairing collision damage," and thereafter "collision research for crash testing and repair procedures development." In the late 70's and 80's, through Allstate's Tech Core, Mr. Anderton began working with I-CAR to improve the structural performance of vehicles, as well as some publications for the repair industry through Tech Core. 2004 N.T. 868/12-869/20. At the time of his testimony in 2004, Mr. Anderton was the owner of a consulting business dealing with, "automotive collision damages, reparability issues, repair procedure development, and/or legal issues." *Id.* at 866/24-867/4.

Mr. Anderton conducted a comprehensive inspection of the vehicle repairs on April 22, 1999,

¹ The following expert witness summaries will contain citations in the body of the summary, rather than at bottom of the summary as done above. The evidence is still attached but offered in the body of the summary to assist the Court in future pinpoint citations to the record.

after this lawsuit was filed. His opinions elicited by Nationwide on direct were that the vehicle was never a structural total loss; that it could have been repaired for amounts written in the available repair appraisals, and that the vehicle was not unsafe to drive. *Id.* at 882/4-885/14.

Under cross-examination, Mr. Anderton agreed the sublet structural repairs required by Nationwide failed. He agreed that parts were “welded in a misaligned state and the componentry that remained with the vehicle and was repaired was not properly aligned prior to the welding of all of the additional structure.” He admitted “the primary structural components on the front of the vehicle are significantly misaligned,” and that the “misalignment involves both repaired welded structure and replaced welded structure.” *Id.* at 890/20-892/10. Mr. Anderton also admitted the primary structural components on the front of the vehicle remained “significantly misaligned **with no identifiable benefit from the sublet repair.**” *Id.* at 895/24-896/9 (emphasis added).

_____ **Accepted.**

_____ **Denied.**

_____ **Modified**

K. DONALD PHILLIPS, PE

Donald Phillips, P.E., is the Bergs’ automotive expert. He is an Accident Reconstructionist and Automotive Consulting Engineer. Mr. Phillips secured his Bachelors of Science and Mechanical Engineering in 1984 from Lehigh University. 2004 N.T. 432/12-19. Between 1986 and 1990, Mr. Phillips worked for Breed Automotive, a company that “designed, tested and validated air bad systems for the major manufacturers.” Mr. Phillips “was in charge of sensor development, analyzing crash tests, understanding occupant dynamics and crash tests. In other words, how the force of the accident gets transmitted through the vehicle.” *Id.* at 433/2-11. Mr. Phillips began his consulting career in 1993. *Id.* at 432/21-22.

Mr. Phillips inspected the vehicle repairs on November 25, 1997, prior to this lawsuit being filed. *Id.* at 440/23-25. His opinions elicited on direct are as follows:

That because the vehicle was outside of the specified tolerances of the original vehicle manufacturer that it would not perform or respond the same way as designed from the factory if it was involved in a subsequent collision. . . . That 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. . . . That because of some the repairs that were not done per specification that corrosion and metal fatigue would set in more quickly therefore reducing the vehicle's strength and its crash worthiness as time progressed. . . . the car was not repaired to original manufacturers tolerances and would not sustain another impact to the same area because of the poor workmanship. In addition, other repairs either not completed or poorly performed complete in an unsafe condition in the performance and safety of the Jeep. . . That 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.

Id. at 445/22-450/11. Mr. Phillips also identified the following additional repair failures:

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

Id. at 441/13-22.

Cross-examination of Mr. Phillips on his opinions was limited. *See id.* at 450/15-452/9.

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

L. JAMES CHETT, CPCU

James Chett, CPCU, testified as an insurance expert for the Bergs. Mr. Chett is a Charter Property Casualty Underwriter (CPCU). Mr. Chett also earned an associate's degree from the Insurance Institute of America in Risk Management. *See* 2007 N.T. 158/19-24. Mr. Chett was retired at the time of his testimony, after more than thirty years of management experience in the insurance industry. Under cross-examination Mr. Chett admitted he had not worked on auto claims to any significant degree since the late 70's or 80's but remained active as a consultant and continuing education courses. *Id.* at 168/6-169/5.

Mr. Chett offered his opinion that "Nationwide's conduct was reckless in that it placed or allowed to be placed on the highway and unsafe vehicle." *Id.* at 176/8-10. Nationwide objected to

this opinion, asserting the witness was not qualified to give an opinion as to whether the vehicle was unsafe and that “his characterization that Nationwide’s conduct was reckless is a legal opinion, not a professional insurance opinion.” *Id.* at 176/16-21. Mr. Chett then offered the basis for his opinion, which included the following:

as an insurer – we have an obligation to make certain that vehicles are repaired and they’re repaired safely So as a manager in my position, and I would expect that every insurance manager’s position, they want to ensure that a car is safely repaired and placed on the highway. And if I can say even further, I think a lay person can tell you whether or not an unsafe car should or should not be on the highway, and I believe that Nationwide knew that the Berg vehicle was unsafe to operate and I will refer to the stipulation [referring to the Potosnak Report].²

Id. at 177/13-178/6.

On cross-examination Mr. Chett was probed as to the foundation for concluding the vehicle was unsafe. Mr. Chett responded as follows:

Twofold. According to the file and the documents that I reviewed, Mr. Wert testified that Nationwide had appraisers, material damage people, in and out of the shop while the vehicle was being repaired. And Mr. Wert, of course, is the individual who informed the Bergs that he felt their vehicle was unsafe. . . . The second basis is the Potosnak stipulation that was read into the record yesterday which identified a multitude of problems with that automobile that he found on his inspection of April, 1998.

Id. at 179/19-180/24. Nationwide’s cross-examination continued, pressing for a stronger basis for Mr. Chett to conclude the vehicle was unsafe. Mr. Chett elaborated as follows after citing to portions of the Potosnak Report:

Your Honor, that’s what caused me to conclude that this vehicle was unsafe. When I saw problems with the sway bar combined with testimony, again, I don’t have it written down, but there was testimony that the car was taken back to the shop several times because the tires were wearing unevenly down to the steel in the tire. And I mean, again, even to a lay person, and I consider myself an expert when it comes to making decisions about whether a car should be replaced or properly repaired, even a lay person has to realize that that vehicle is unsafe.

Id. at 182/7-16.³ After further cross-examination the following ruling was made:

2 At the beginning of 2007 trial phase, the Potosnak Report was read into the record as an uncontested fact.

3 Mr. Chett is referring to trial testimony that both front tires had worn to the metal belts within a short period of time after

The Court is ruling that his opinion with regard to whether or not the automobile was unsafe and therefore whether or not Nationwide was reckless in allowing the vehicle to be placed out on the road again is admissible evidence and that this witness is qualified to give that opinion.

Now, later on in weighing his opinion as to whether or not this was reckless conduct in relation to the other testimony that I've either already heard or will hear in this case, that's quite another thing, okay.

Id. at 225/13-18.

The second opinion permitted was that Nationwide engaged in a "scorched-earth defense of this case." *Id.* at 226/23-25. More specifically, that it was not appropriate to apply a scorched-earth defense in this particular case. During Nationwide's cross-examination, Mr. Chett was asked, "[s]o the basis of your testimony is that Nationwide defended this case and therefore that was improper."

Mr. Chett responded as follows:

That's not quite correct. And I tried to allude to that a little bit earlier, but defending this case and I mentioned in my report, but defending this case and spending a lot of money and a lot of time stretches a small plaintiff's firm. The leverage is with the insurance carrier who has unlimited financial assets and the time. And I've done this. I mean, I'm telling you, when you use your superior assets against another party, you generally are going to prevail over the long haul if you're willing to go [interruption by the Court] . . . Well, Your Honor, I just didn't feel it was reasonable for Nationwide to use all of these assets that they had to delay this case. And if I might also comment, when I looked at the bills, the legal bills, there were certain dates that were of interest to me to see whether or not Nationwide was going to attempt to move this case to settlement or at least to alternative dispute resolution. And the bench marks that I looked at, the first one was the bench mark when Mr. Potosnak looked at that car because in my opinion that car had damage. That wasn't properly fixed. And it would seem reasonable that the insurance company would try and settle the case at that time. Another bench mark was after Mr. Anderton looked at the car and found some problems with the car. If you want to resolve cases, you try to resolve them as soon as you can, because you usually get a less expensive settlement and you limit your legal expenses. And I just didn't see any evidence - [interruption by the Court] . . . Its not just the legal fees. It's the taxpayers expense, you know. It's insane.

Id. at 244/16-246/3; and 248/10-11. Nationwide's counsel pressed as to why Nationwide should be

the vehicle was returned to the Bergs. Doug Joffred admitted the front tires were worn "down to the belt." 2004 N.T. 714/15-21 (admission of D. Joffred). *See also* 387/19-20 ("After the - about 30 days we noticed that the tires were literally worn down to the metal." (Sheryl Berg testimony)).

penalized for zealously defending itself. Mr. Chett explained as follows:

We're talking about the Bergs, the Berg's case, the damage to their car. I didn't see that Nationwide ever repaired that car or replaced that car. I would expect – I would have expected efforts would have been made to take care of the car and take care of the damage to the car. What I felt happened in this case with the defense is that the Bergs got left behind and the issue became between Nationwide and Plaintiff's law firm And we completely forgot about our insured and that's the person to whom you [Nationwide] owe to discharge the insuring agreement.

Id. at 257/6-17.⁴

_____ **Accepted.**

_____ **Denied.**

_____ **Modified**

M. ATTORNEY CONSTANCE FOSTER

Attorney Constance Foster testified as an insurance expert for Nationwide. Attorney Foster is a former Insurance Commissioner. Nearly all of the opinions she offered at trial in 2007, were rejected by the Superior Court. Attorney Foster basically opined that because the bad faith statute applies only to “actions arising under an insurance policy,” and because Nationwide’s BRRP is not identified in the subject insurance policy, Nationwide was insulated from liability for its bad faith conduct because this lawsuit was not “an action arising under an insurance policy.” In rejecting Attorney Foster’s “novel theory of statutory interpretation,” the Superior Court determined not only that this was an action arising under an insurance policy, but also that Nationwide’s violations of the Appraisers Act and the catchall fraud provision of the UTPCL are admissible evidence of insurer bad faith. *Berg* at 1171. The Superior Court tied this finding to the evidence attached to the Bergs’ Trial Brief at Tabs 1-8 (regarding random inspections of the Berg vehicle) as follows:

In the present case, the Bergs contend that Nationwide, by, *inter alia*, interfering with a total loss appraisal on their vehicle and later returning it to them despite known structural deficiencies that left it in a potentially dangerous condition,

⁴ Nationwide’s zealous defense, without regard to the merits of the underlying claim dispute, reflects the litigation strategy documented in its claim manual. The stated goal of the strategy is send a message that Nationwide is 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.” See Pennro Litigation Strategy (Trial Exhibit No. 2), attached to Bergs’ Proposed Findings of Fact at Tab 70.

violated two such statutory provisions: (1) the catchall [fraud] provision of the UTPCPL, 73 P.S. § 201-2(4)(xxi), and (2) Pennsylvania's Motor Vehicle Physical Damage Appraiser Act, 63 P.S. §§ 861-63 (the "Appraisers Act").

With these points in mind, we conclude that the trial court erred in multiple respects.

Id. at 1174-75. Attorney Foster will be supplementing her opinions at the next trial phase. It is unclear whether any of her prior opinions are admissible.

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

Respectfully Submitted,



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Husband and Wife
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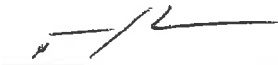
CERTIFICATE OF SERVICE

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

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DOLAN & MAYERSON, P.C.

BY:



Benjamin J. Mayerson
Attorney for Plaintiffs