

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
MARILYN R. SUTTON
PROthonotary

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**PLAINTIFF BERGS'
PROPOSED FINDINGS OF FACT**

In a controlling insurance bad faith case, the Superior Court cited with approval to the trial court's findings of fact and law as follows:

In 169 Findings of Fact spread over 50 pages, the court provided an exhaustive discussion of the evidence proffered by both parties, noting expressly whether it found the evidence credible. In its 106 additional Conclusions of Law, the court recognized the controlling standard of proof, as well as statutory authority, the definition of bad faith applied in *Terletsky*, and other case authority. The care with which the court sifted an overwhelming body of evidence is amply demonstrated in the specificity of its observations which, although drawn from contested evidence, are amply supported by the record.

Hollock v. Erie Insurance Exchange, 842 A.2d 409, 418 (Pa. Super. 2004) (*en bank*). With this observation in mind, the Bergs offer the following Proposed Findings of Fact. Evidence of record is attached under corresponding tabs.

Proposed Findings of Fact Pertaining to Key Witnesses, filed separately, provides a background synopsis of each material fact-witness and a summary of the opinions already of record for each expert-witness. This witness-summary is offered as a reference guide, to supplement and/or assist with the following Proposed Findings of Fact.

Proposed Conclusions of Law will also be filed separately.

I. PRELIMINARY STATEMENT ON THE BLUE RIBBON REPAIR PROGRAM

Prior to the Bergs' date of loss on September 4, 1996, Defendant Nationwide Mutual Insurance Company ("Nationwide") developed a direct repair program it titled the Blue Ribbon Repair Program

("BRRP"). Former co-defendant, Lindgren Chrysler Plymouth ("Lindgren"), was one of Nationwide's business partners. Pursuant to this business agreement, Nationwide would refer collision repair business to Lindgren, and in exchange for the referral, Lindgren appraised insured losses at confidential discounts. At the time of the Berg referral, 40% of Lindgren's business came from Nationwide. See Exhibit "A," 2004 N.T. 631/7-632/13 (Lindgren Manager Doug Joffred).¹

At trial in 2004, Nationwide's BRRP facility manager, Doug Joffred, admitted his facility had never been suspended or reprimanded for the job it did on the Berg vehicle. See Exhibit "A," 2004 N.T. 632/14-25 (Doug Joffred)(attached above Tab 1).²

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

II. PROPOSED FINDINGS OF FACT

1. At all pertinent times, the Bergs were insured under a Nationwide insurance policy, which provided coverage for both collision and comprehensive loss, subject to a deductible.

Uncontested Fact, attached hereto at Tab 1.³

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

2. The physical damage coverage section of the policy states the following:

We may:

1. pay you directly for a loss;
2. repair or replace your auto or its damaged parts;
3. return stolen property at our expense and pay for any damage.

Trial Exhibit No. 47 (Page 12 of 36), Nationwide's Century II Auto Policy.

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

1 Lindgren will be referred to as Nationwide's BRRP facility. Doug Joffred was the body shop manager at the BRRP facility, and was also Nationwide's assigned appraiser on the Berg loss. Witness backgrounds are summarized in a separate filing and will thus not be duplicated further.

2 Nationwide filed a cross-claim against its BRRP facility but the business relationship remained intact at the time of trial in 2004. During trial Nationwide nevertheless examined the BRRP facility employees with leading questions, as if they were adverse-witnesses when they were in fact business partners.

3 The Uncontested Facts were read into the record at the start of the second trial phase. See 2007 N.T. 34-40.

3. On September 4, 1996, an insured loss was triggered by a collision causing substantial structural damage to the Bergs' insured vehicle, a 1996 Jeep Grand Cherokee. Nationwide's personnel admitted the collision was "severe in nature," and that the vehicle was impacted by another vehicle on the left side and "spun the policyholder around four times and she hit a pole."

2004 N.T. 300/23-301/6 (admission of Doug Witmer).

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

4. Following the Bergs' collision, but prior to the loss being appraised, Nationwide offered the Bergs its Blue Ribbon Repair Program; Nationwide promised a Blue Ribbon appraisal, from an approved Blue Ribbon repair facility, backed by a Nationwide Blue Ribbon Guarantee.

See Uncontested Fact "3."

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

5. Under the BRRP, Nationwide assigns the appraisal of the loss to its designated BRRP facility. *See* following evidence of record:

2004 N.T. 129/9-15 (admission of Michael Grumbein).

2004 N.T. 623/18-19 & 630/25-631/2 (admission of Doug Joffred).

2004 N.T. 299/17-23 (admission of Doug Witmer).

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

6. Nationwide's assigned appraiser was Doug Joffred, who had been the manager of the designated BRRP facility for 16 years at the time of his testimony in 2004.

See 2004 N.T. 363/17-364/2 (Doug Witmer).

See 2004 N.T. 620/22-23 (Doug Joffred).

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

7. Mr. Joffred notified Nationwide that the vehicle was a structural total loss because, "the whole body was twisted." Mr. Joffred defined a *structural* total loss as, "a vehicle that was damaged to the point that no matter what it took to fix it, (sic) it shouldn't have been fixed."

2004 N.T. 629/6-24 (admission of Doug Joffred).

See also Trial Exhibit No. 8 (Page 67 of 70), claim file entry of 09/11/96: "veh should be a total loss since unibody is twisted."

See also Trial Exhibit No. 8 (Page 69 of 70) (further describing total loss and existence of photographs).

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

8. The total loss appraisal, as documented in Nationwide's claim file, was not disputed by senior management under cross examination.⁴

See 2004 N.T. 209/17-210/14 (admission of D. Jones, CPCU).

See 2007 N.T. 556/16-18 (admission of Nationwide's Designee, Bruce Bashore).

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

9. Upon receiving notification from the assigned appraiser that the vehicle was a structural total loss due to a twisted frame, Nationwide dispatched claim representative Doug Witmer to inspect the damage. Mr. Witmer declared the vehicle repairable and instructed that the vehicle be shipped to another facility to attempt the structural repairs.

See 2004 N.T. 302/8-20 (Doug Witmer).

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

10. Mr. Witmer admitted the vehicle had already been declared a total loss by the time he got to the repair facility to view the damage. *See* 2004 N.T. 299/7-8:

THE COURT: So they declared it a total loss?

THE WITNESS: Correct.

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

11. Prior to unilaterally deciding the vehicle was not a total loss, Mr. Witmer admits he did not

⁴ Nationwide disputes that the vehicle was ever a total loss. *See* opinion testimony of William Anderton. Yet senior management was compelled, under cross-examination, to admit the vehicle had been declared a total loss. The admission of Dean Jones, CPCU, is significant given his extensive background, which includes a Material Damage Instructor for 5 ½ years. *See* biographical summary filed separately.

write and/or sign his own independent appraisal of the loss, or even pick up a tool.

See 2004 N.T. 305/12-15 & 363/20-364/4 (Doug Witmer).

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

12. Although Mr. Witmer vacated the total loss appraisal without writing his own independent appraisal, he knew Pennsylvania law provides that a vehicle can be, indeed should be, a total loss if the assigned appraiser believes the vehicle cannot reasonably be restored. Mr. Witmer's supervisor, Dean Jones, CPCU, agreed.

2004 N.T. 365/12-366/3 (Doug Witmer).

2004 N.T. 268/24-269/2 (Dean Jones, CPCU).

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

13. Mr. Witmer nevertheless quietly resolved a clear conflict of interest in Nationwide's favor, vacated the opinion of the assigned appraiser that the vehicle as a structural total loss due to a twisted frame, and declared the vehicle repairable because "Nationwide will never recover the difference in salvage value."

See Exhibit 8 (Page 66 of 70), claim file entry of 09/24/96.⁵

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

14. The Bergs were not provided a copy of the total loss evaluation as required by the applicable insurance regulations. Indeed, the Bergs were not even told that the opinion of the assigned appraiser was that the vehicle was a structural total loss because the frame was twisted.⁶

See 2004 N.T. 703/18-23 (admission of Doug Joffred).

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

⁵ This fact was cited by the Superior Court as evidence that would satisfy "the *Toy* definition of bad faith under section 8371." *Berg v. Nationwide Mutual Insurance Company, Inc.*, 44 A.3d 1164, 1176 (Pa.Super. 2012), *reargument denied*, (June 29, 2012), *appeal denied*, 65 A.3d 412 (Pa. 2013) ("*Berg*"), *citing*, *Toy v. Metropolitan Life Insurance Company*, 593 Pa. 20, 928 A.2d 186 (2007).

⁶ These events are inconsistent with Nationwide's "duty to deal with its insured on a fair and frank basis." *Berg* at 1170. It is also contrary to the Appraisers Act and the applicable insurance regulations.

See BRRP guideline (total loss handling procedure under BRRP).

See 31 Pa. Code Chapter 62 (total loss evaluation must be provided to the insured within five business days of its completion).

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

15. The Bergs were not advised that the damage to their vehicle was such that the BRRP facility was unable to attempt the repairs.

2004 N.T. 641/20-23 (admission of Doug Joffred).

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

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

16. The Bergs were not advised or consulted with regard to Nationwide's decision to have their vehicle taken to an undisclosed repair facility to attempt structural frame repairs.

2004 N.T. 642/6-13 (admission of Doug Joffred).

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

See 2004 N.T. 395/2-11 (direct testimony of Sheryl Berg).

31 Pa. Code Chapter 62 (consent of the vehicle owner required to move vehicle from one location to another other than the scene of an accident).

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

17. The decision to vacate the total loss appraisal and transport the vehicle to another repair facility was made by Nationwide.

See Exhibit 8, Electronic Claim File (Page 66 of 70), entry of 09/24/96.

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

18. By suppressing the total loss appraisal Nationwide stood to save money on the claim payment via confidential BRRP discounts captured only if the vehicle was repaired, including discounts on parts and labor.

See 2004 N.T. 631/7-25 (admission of D. Joffred).

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

19. Conversely, Nationwide is required to pay market-value on every total loss.
See 31 Pa. Code Chapter 62, at §62.3 (f).

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

20. The attempted repairs to the Berg vehicle took four months.
See Uncontested Fact “6.”

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

21. The repairs, as written in the repair appraisal, should have been complete in less than 30 days, per standard formula.

See 2004 N.T. 310/1-17.

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

22. After the Bergs’ 30 days of rental coverage expired, they were left operating Mr. Bergs’ panel-van, with no back seat. Their teenage son sat on the floor.

See 2004 N.T. 385/5-386/10 (Sheryl Berg).

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

23. The structural repairs attempted at Nationwide’s direction failed; the primary structural components on the front of the vehicle remained “significantly misaligned” with “no identifiable benefit” from the structural repair efforts required by Nationwide. This fact was confirmed by Nationwide’s own automotive expert, William Anderton.

See 2004 N.T. 896/1-5 (admissions of W. Anderton).⁷

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

24. Nationwide *management* knew the repairs failed before the vehicle was released to the Bergs.

⁷ Mr. Anderton offered his opinion that the vehicle was nevertheless safe to operate.

Nationwide knew this because its BRRP claim managers (PDS) performed routine monthly inspections of the repairs throughout the extended, four-month repair period per standard BRRP procedure. See following evidence or record:

1. 2007 N.T. 63/12-68/10 (George Moore, Delaware County BRRP facility manager, authenticating BRRP documents, affirming routine inspections, & use of BRRP log);
2. Trial Exhibit Nos. 34 & 35 (BRRP form documents authenticated by George Moore);
3. 2004 N.T. 188/12-21, 191/1-7, 236/19-43/2 (admissions of BRRP manager, Dean Jones);
4. 2004 N.T. 825/10-827/24 (admission of BRRP manager, Ernest Michael O'Leary);
5. 2004 N.T. 72/3-73/16 & 102/22-103/5 (admission of BRRP manager Michael Grumbein);
6. 2004 N.T. 371/20-372/24 (admission of PDS Stephen Potosnak); and,
7. 2004 N.T. 643/14-17 (admission of the BRRP facility manager, Doug Joffred).

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

25. Consistent with the written BRRP procedure documents, eye-witness David Wert, former repair technician at the subject BRRP facility, witnessed Nationwide personnel performing said inspections at the beginning, middle and end of the four-month repair period. Mr. Wert confirmed that the personnel were visibly angry.

See 2004 N.T. 547-54.

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

26. Mr. Wert described how the engine would not fit into the engine cavity properly. After the engine was in the engine cavity, and attempts to start the engine were initiated, there was a loud banging noise. The noise, it was determined, was the blades of the engine fan hitting the fan shroud (plastic cover). At this point Mr. Wert witnessed the BRRP technician cut the fan shroud to silence the noise and thus conceal the failed structural repairs.

See 2004 N.T. 543/10-547/19.

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

27. The Berg vehicle was returned to the Bergs on December 30, 1996, as if fully restored.

See 2004 N.T. 386/16-387/8 (direct testimony of Sheryl Berg).

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

28. Additional un-repaired damage that must have been visible to Nationwide PDS during the four month repair period includes the following issues:

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.

2004 N.T. 441/13-22 (Donald Phillips, P.E., Berg Expert).⁸

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

29. The Bergs' automotive expert, Donald Phillips, P.E., had several years of experience working for Breed Automotive, a company that "designed, tested and validated air bad systems for the major manufacturers." Between 1986 and 1990, 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."

2004 N.T. 433/5-11.

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

30. Mr. Phillips confirmed the safety issues caused by the failed structural repairs:

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

⁸ Mr. Phillips findings mirror those of Nationwide PDS, Stephen Potosnak, who confirmed similar findings at his inspection on April 28, 1998, after the Bergs retained counsel. If these findings were visible to Mr. Potosnak after the Bergs retained counsel, it stands to reason the deficiencies were also visible to the other PDS conducting inspections throughout the four month repair period. Mr. Potosnak's inspection report is attached below at Tab 43.

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.

2004 N.T. 445/22-450/11.

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

31. The condition of the subject vehicle, as detailed above by Mr. Phillips was available to Nationwide prior to the vehicle being returned to the Bergs on December 30, 1996. It is evident that Nationwide was aware of these repair issues by virtue of the inspections performed by its PDS throughout the four-month repair period, and as confirmed by the eye-witness, David Wert. Mr. Wert further confirmed that Nationwide was visibly angry at what the inspections confirmed. The eye-witness testimony of David Wert, and of routine repair inspections remains uncontroverted by Nationwide; all personnel who testified in this case admitted this was standard procedure under the BRRP. This Court finds that Nationwide was aware that structural repairs it directed failed, and that the vehicle was returned to its insured in a potentially dangerous condition.

See evidence at Tabs 24-26 (including corroborating BRRP form documents).

See also Tab 43 below, attaching inspection report of Nationwide's PDS, Stephen Potosnak.

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

32. Nationwide did not warn or advise the Bergs of the vehicle's condition but instead paid the claim benefit directly to its BRRP facility by check, dated April 14, 1997; the claim payment was not made jointly payable to the Bergs. Nationwide has not offered a reasonable explanation as to why it did not pay for the repairs until April 14, 1997, when the vehicle was released to the Bergs on December 30, 1996.

See Trial Exhibit No. 30 and 31.

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

33. The Bergs returned to the BRRP facility several times to have repair concerns addressed,

including their observation that both front tires had worn down to the metal belts within a short period of time after the vehicle was returned. Specifically, Nationwide's assigned appraiser at the BRRP facility admitted that Mrs. Berg brought the vehicle back to show him that both front tires were worn "down to the belt." Sheryl Berg also testified that after "about 30 days we noticed that the tires were literally worn down to the metal."

2004 N.T. 714/15-21 (admission of Doug Joffred).
2004 N.T. 387/19-20 (direct testimony of Sheryl Berg).⁹

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

34. In October of 1997, the Bergs received a telephone call from a former employee of the BRRP facility, namely David Wert, who warned of the structural repair failures.

2004 N.T. 554/15-21 (direct testimony of D. Wert).

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

35. The Bergs retained legal representation and an automotive consultant to inspect the repairs. The independent review generated a report containing a section titled, "Warning Possible Safety," which recited the following four concerns: "Unrepaired Mechanical Damage Major;" "Unrepaired Structural Damage Major;" "Unrepaired Tire/Wheel Damage;" and "Welds Structural Poor Major."

See Trial Exhibit No. 24 (Report of Charlie Barone offered for course of conduct only, i.e. rebut accusations this suit was filed frivolously or without a proper investigation).

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

36. A letter of representation was faxed to Nationwide on November 3, 1997, advising that the Bergs were preparing a lawsuit to be filed against the repair facility for faulty repair work; requesting a copy of Nationwide's file for the collision claim; and offering Nationwide an opportunity to examine the vehicle. Although the letter of representation instructed Nationwide not to contact the repair facility, the letter did not instruct Nationwide to ignore the situation (as now being claimed by Nationwide).

⁹ 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.

See Trial Exhibit No. 7.

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

37. Additional requests were faxed to Nationwide on November 25, 1997, and December 2, 1997, because Nationwide did not respond to the Bergs' request faxed on November 3, 1997. The fax of December 2, 1997, confirmed numerous phone messages seeking a response, and cited Pennsylvania's Unfair Claims Settlement Practices Act, Title 31 section 146.5, requiring insurer to respond to requests from insured "within 10 working days."

See letters to Nationwide with corresponding dates (proffered at remand trial).

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

38. On December 2, 1997, Nationwide produced a repair appraisal dated September 20, 1996. This was the only repair document produced.

See Trial Exhibit No. 6, letter and Damage Report (appraisal) dated 09/20/96.¹⁰

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

39. Nationwide did not produce the damage photographs or the original appraisal, dated September 10, 1996, as documented in the claim file on that date (claim file entry notifying Nationwide of a structural total loss due to twisted frame).

See Trial Exhibit No. 8 (Page 67, 69 of 70)("show will forward estimate **and photos**")(emphasis added).

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

40. A Writ of Summons was filed only against the BRRP facility, Lindgren Chrysler Plymouth.
See Writ of Summons, filed January 23, 1998.

¹⁰ 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).

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

41. On April 14, 1998, pre-complaint depositions were taken of the repair facility at which time the Bergs discovered, for the first time, that their vehicle was originally appraised as a structural total loss due to a badly twisted frame, but that Nationwide had nonetheless directed repairs be undertaken, and also directed that the vehicle be transported to another, non-BRRP facility, to attempt the structural frame repairs the BRRP facility was unable to undertake.

See April 14, 1998, pre-Complaint Deposition testimony of Douglas Joffred, page 28 (offered for course of conduct to rebut contention that the Bergs filed suit against Nationwide prematurely) (proffered at remand trial).

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

42. On April 22, 1998, the Bergs faxed a letter to Nationwide confirming that the pre-complaint discovery deposition of the BRRP facility took place on April 14, 1998; that that the repair facility secured a Rule to File Complaint requiring the Complaint to be filed no later than May 4, 1998; that both the Bergs and the repair facility inspected the repairs; that Nationwide should consider an inspection as soon as possible; that the Bergs were forced to purchase a replacement vehicle and cannot afford dual car payments; that the Bergs intended to dispose of the vehicle in the next six weeks; that the Bergs were requesting Nationwide purchase the vehicle; and that time was of the essence.

*See Trial Exhibit No. 11, letter to Nationwide of April 22, 1998.
See 2004 N.T. 410/19-411/5 (Sheryl Berg purchased replacement vehicle thus dual car payments).*

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

43. On April 28, 1998, Steve Potosnak, a PDS, inspected the vehicle wherein he confirmed the failed structural repairs, the non-repair of the frame rails, and of other structural components. Mr. Potosnak also noted that structural components that were supposed to have been replaced with new parts remained on the vehicle in an unrepaired condition.

*See Trial Exhibit No. 8 (Page 4 of 70), claim file entry of 04/30/98 (Potosnak Report).
See 2004 N.T. 495/13-496/25 (Bruce Bashore admitting to non-replacement of parts).*

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

44. Nationwide should have attempted to resolve the claim dispute on that date, or shortly thereafter. Instead, the inspection results were withheld from the Bergs and were not produced thereafter, until May 5, 2003, that is, until five years after the inspection report was entered into the claim file. The report was un-redacted on May 5, 2003, to support Nationwide's denial to Request for Admission, which sought an admission that Nationwide arranged for a secret inspection of repairs while vehicle was being inspected by former co-defendant Lindgren.¹¹

See Trial Exhibit No. 13 and No. 14, redacted Activity Log entry of Stephen Potosnak as it existed in this litigation until May 5, 2003; invisible redaction (white on white) and visible redaction (black on white).

See Order of June 12, 2000, requiring visible redactions and compliance with prior Orders.¹²

See Answers to Plaintiffs' March 21, 2003, Request for Admissions (un-redacting Potosnak Report to support denial of secret inspection)(proffered at remand trial).

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

45. Although twice ordered to produce the electronic claim-file, Nationwide redacted the Potosnak Report disingenuously claiming it was protected by attorney-client privilege.

See Bergs' document request at 1, 18, and 20.

See Order of March 15, 1999, denying Nationwide's Motion for Protective Order for all documents "not protected from disclosure by that attorney/client privilege."

See Order of June 12, 2000, filed in response to the Bergs' Motion for Sanctions filed June 8, 2000, mandating Nationwide's compliance with prior Orders.

See Nationwide's Reply at 1, 18, and 20, asserting attorney/client privilege.¹³

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

11 After five years of litigation the Bergs figured out that Mr. Potosnak inspected the vehicle but it was unclear when and how since there was no record of the inspection. Thus, the Bergs served Request for Admissions seeking an admission that Mr. Potosnak secretly inspected the vehicle during the pre-suit inspection by Lindgren, Nationwide's BRRP facility. To support its denial to this request, Nationwide un-redacted the Potosnak Report because the report documented the fact that Mr. Berg delivered the vehicle to Mr. Potosnak for the inspection. Once the Potosnak Report was produced on May 5, 2003, it became clear that Nationwide had been concealing its knowledge of the extensive structural repair failures since before this lawsuit was filed on May 5, 1998. Ironically, the report was concealed for exactly five years to the day.

12 This Order was entered following the Bergs Motion for Sanctions, alleging improper redactions from the claim file.

13 These documents were authenticated per a recent Request for Admission submitted at the remand trial.

46. The Potosnak inspection was performed at the direction of Bruce Bashore, the immediate supervisor to Mr. Potosnak. Mr. Bashore was made aware of Mr. Potosnak's report at 8:00 AM, on April 30, 1998. Mr. Bashore was also made aware that the BRRP facility was refusing to acknowledge any repair issues, and was thus unlikely to repair or replace the vehicle voluntarily.

Uncontested Fact "10" and "11."

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

47. At trial in 2004, Mr. Bashore admitted the Potosnak report was an ordinary claim-file entry, from Mr. Potosnak to Mr. Bashore, documenting structural repair failures and the non-replacement of structural components, rather than a communication to counsel.

2004 N.T. 494-96 (admission of Bashore).

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

48. After the Potosnak inspection on April 28, 1998, that is, on May 19, 1998, Mr. Bashore demanded inspection by an "independent expert." At that time, Nationwide had already documented extensive structural repair failures in the claim file, per Mr. Potosnak, yet Mr. Bashore wrote the following:

If the independent expert finds *any problems* with the repairs that resulted from the above listed accident, Nationwide Insurance will have these problems corrected at a shop of the Berg's choice. If the vehicle cannot be repaired to pre-accident condition Nationwide will purchase the vehicle from the Bergs.

See Trial Exhibit No. 15, letter from Bruce Bashore to the Bergs' counsel (emphasis added).

See Potosnak Report, Trial Exhibit No. 8 (Page 4 of 70), entry of 04/30/98.

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

49. During this time period, the Bergs also made the vehicle available to Nationwide for another inspection by Terry Shaw of Automotive Legal Services. This inspection occurred at the Bergs' home on May 16, 1998, ten days after this lawsuit was filed. Mr. Shaw reported to Nationwide that "the frame rail on the one side there was a mark where it had been twisted and moved" Mr.

Shaw's findings were not provided to the Bergs until the time of Mr. Shaw's testimony at trial in 2007.

See 2007 N.T. 58/5-13 (report to Nationwide of frame rail issue); 45/3-12; 46/5-7; 50/1-11.

See Trial Exhibit No. 33 (surveillance styled photographs of Berg property by Terry Shaw).

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

50. On June 1, 1998, the Bergs were instructed to maintain the vehicle as Nationwide was requiring *another* inspection.

On June 12, 1998, the Bergs notified Nationwide that the vehicle would be maintained for an additional 30 days only.

On July 6, 1998, the Bergs were notified that Nationwide required an "initial inspection," and would likely later require a "second inspection."

See correspondence of counsel (proffered at remand trial).

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

51. Nationwide's expert, William Anderton, was flown in from Chicago and inspected the vehicle on August 21, 1998. Mr. Anderton later described this inspection as a "brief but non-invasive visual inspection."

See first page of William Anderton's report (proffered at remand trial).

See letter from Nationwide's counsel of August 20, 1998 (proffered at remand trial).

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

52. On September 16, 1998, Nationwide notified the Bergs that the August 21, 1998, "preliminary inspection" was inconclusive and another inspection of the vehicle would be required **"to determine if it was improperly repaired."**

See Letter from counsel for Nationwide (emphasis added)(proffered at remand trial).

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

53. The final inspection required by Nationwide was not completed until April 20, 1999.
See 2004 N.T. 879/11 (William Anderton); and Anderton's report (proffered at remand trial).

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

54. Meanwhile, the three year lease on the Bergs' vehicle expired December 29, 1998.
See Exhibit No. 9, lease on the Berg vehicle.

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

55. On December 11, 1998, the Bergs wrote to Nationwide seeking an agreement upon the disposition of the vehicle, given the pending expiration of the three year lease.

On December 24, 1998, Nationwide advised that it purchased the vehicle the day prior.

See letters of counsel attached (proffered at remand trial).

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

56. On December 28, 1998, the Bergs expressed concern that Nationwide would gain exclusive access to the evidence prior to the inspection it had claimed was necessary, and thus suggested a secure storage facility with a three way lock.

On January 6, 1999, the Bergs renewed their efforts to generate a dialogue on the secure storage of the vehicle.

See letters to Nationwide's counsel attached (proffered at remand trial).

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

57. On January 8, 1999, Nationwide confirmed its intentions to take possession of the vehicle and instructed the Bergs to remove their possessions from the vehicle within ten days.

On January 12, 1999, the Bergs notified Nationwide that if it was refusing to store the vehicle with a three way lock until its independent inspection was complete, then the Bergs would exercise their right of first refusal to purchase the vehicle.

On January 13, 1999, Nationwide refused storage via a three way lock, and stated it had a "binding contract" to purchase the vehicle and that it "intends to enforce that agreement."

See letters of counsel attached (proffered at remand trial).

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

58. On January 13, 1999, Nationwide threatened to sue Summit Bank if the vehicle was sold to the Bergs instead of Nationwide.

*See Trial Exhibit No. 27, Nationwide's letter to Summit Bank.*¹⁴

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

59. Nationwide's motivation in purchasing the vehicle does not appear to have been in good faith to the Bergs. Instead, the following sequence of events supports this Court's conclusion that the purchase appears to have been undertaken with ill-will toward the Bergs rather than to make the Bergs whole: Nationwide's initial decision to withhold from the Bergs Mr. Potosnak's inspection findings which confirmed the failed structural repairs; Mr. Bashore's letter of May 19, 1998, plainly suggesting he was unaware of "any repair issues"; correspondence from Nationwide's counsel claiming further inspection of vehicle needed "to determine if it was improperly repaired" ; Nationwide's threat to sue Summit Bank in a failed attempt to gain exclusive control of the evidence prior to the inspection it claimed necessary to determine if the vehicle was improperly repaired; and, Nationwide's subsequent unlawful concealment of the Potosnak Report through the first five years of this litigation.

Indeed, when Nationwide filed its Answer to Complaint a year after it purchased the subject vehicle, it denied the Bergs' allegation of structural repair failures and/or refused to admit any repair issues. The Answer was verified by Bruce Bashore, the same individual who ordered the Potosnak inspection in April of 1998, and thereafter wrote the May 19, 1998 letter, falsely claiming to be unaware of "any repair issues." The Verification was expressly made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

See Nationwide's January 19, 2000, Answer to Complaint at paragraph 27, and verification of Bruce Bashore.

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

¹⁴ Summit Bank rebuked Nationwide's threats of legal force and the vehicle was thereafter secured with a three way lock.

60. The inspection Nationwide demanded on May 19, 1998, was completed April 20, 1999. The findings were not disclosed until November 18, 2003.

See Bergs' Request for Admissions of October 4, 2013, and Nationwide's reply thereto.

See Trial Exhibit No. 15, letter from Bruce Bashore dated May 19, 1998.

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

61. Intentionally left blank.

62. After four days of testimony, the jury found Nationwide liable for fraud under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-2(4)(xxi). *See Berg v. Nationwide Mutual Insurance Company, Inc.*, 44 A.3d 1164, 1168 (Pa.Super. 2012), *reargument denied*, (June 29, 2012), *appeal denied*, 65 A.3d 412 (Pa. 2013) (Verdict of Jury, filed 12/20/2004).

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

63. Nationwide argued to the jury that the Bergs failed to prove fraud by clear and convincing evidence, and that the Bergs have no damages anyway (because Nationwide purchased the vehicle for \$18,000).¹⁵

See 2004 N.T. 1002/1-1003/15 (argument of Nationwide's counsel).

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

64. Nevertheless, the jury returned a damages award to support its finding of fraud. More importantly, the jury's finding of fraud was based upon clear and convincing evidence. The jury was instructed on the Bergs' burden of proof as follows:

In addition, Mr. and Mrs. Berg must also prove the elements of common law fraud, as I

¹⁵ The purchase, mid-litigation, removed the substantial economic damages (\$25,000) existing when this lawsuit was filed, thereby reducing the jury's ability to calculate a material economic harm. In remanding this case, the Superior Court recognized the low verdict as being irrelevant, and specifically called into question Nationwide's continued focus upon the "alleged lack of denial of benefits," which the Court identified as "confusing." *Berg* at 1177. The Court instructed further that the focus is not "whether the insurer *ultimately* fulfilled its policy obligations . . . but rather the *manner* in which insurers discharge their duties . . . during the pendency of an insurance claim, [and] not whether the claim is eventually paid" (emphasis in original). *Id.* At 1178.

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

2004 N.T. 975/20-976/11 (Jury Charge).

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

65. Pursuant to Court Order, Nationwide admitted, via verified response to the Berks' Interrogatories of May 28, 2013, that the amount it paid its attorneys, to defend its handling of this collision claim dispute, through post-trial motions for the jury trial in 2004, was \$1,173,227.50. Nationwide also paid an additional \$110,602.19, in expert witness fees and other expenses, bringing total cost to defend its conduct to \$1,283,829.69.

See Nationwide's verified answers to Interrogatories Served May 28, 2013, at pages 4-5, Supplemental Response to Interrogatories "2" and "3."

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

66. In its verified response, Nationwide admits it paid an additional \$1,018,061.60 between the jury trial in 2004, and the Pennsylvania Supreme Court's denial of its Allocatur Petition on April 24, 2013. The amount is for legal expenses and costs paid *after* a Berks County jury found it liable for fraud under the UTPCPL. There is no evidence that Nationwide ever made a single offer of settlement between the jury trial in 2004, and the subsequent bench trial in 2007.

See Supplemental Response to Interrogatory "6," at page 10, subtracting \$1,173,227.50, from total amount paid, \$2,191,289.10.

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

67. The total amount Nationwide admits paying to defend its deceitful/fraudulent handling of a \$25,000 collision claim, is \$2,191,289.10. This does not include amounts paid after April 24, 2013.

See Nationwide's answer to Interrogatory "6," at page 10.

See also Verdict of Jury, filed 12/20/2004 (affirming fraud/deceit).

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

Note to Court: During the pre-trial hearing of December 4, 2013, it became evident that this Court may not be interested in the specifics of why this litigation became so expensive. This Court may thus find the following Proposed Findings of Fact superfluous. If this is the case, please proceed to Proposed Findings of Fact No. 89.

68. The Bergs allege Nationwide intentionally concealed evidence and engaged in conduct designed to cover-up the conduct of its employees, and that this conduct is consistent with its documented strategy to artificially inflate the cost of litigating claim disputes as a means to “send a message” that Nationwide is a defense-minded carrier in the minds of the plaintiff legal community.

See Trial Exhibit No. 2 (Page 63 of 60)(“PENNRO LITIGATION STRATEGY – 1993).

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

69. Nationwide was instructed, by the Superior Court of Pennsylvania, to stop applying this strategy against its policy holders no later than January, 2002, when the Superior Court published its decision in the matter of *Bonenberger v. Nationwide Mutual Insurance Company*, 791 A.2d 378 (Pa. Super 2002). Therein, the Superior Court confirmed the strategy was in bad faith as follows:

Individuals expect that their insurers will treat them fairly and properly evaluate any claim they may make. . . . An insurance company may not look to its own economic considerations, seek to limit its potential liability, and operate in a fashion designed to “send a message.” . . . Insurers do a terrible disservice to their insureds when they fail to evaluate each individual case in terms of the situation presented and the individual affected. Thus, a company manual, which dictates a certain philosophy in claims handling, may be relevant and useful in evaluating a bad faith claim.

Id. at 382, cited in *Berg* at 1177 (approving the Bergs’ efforts to offer evidence of the litigation strategy for “substantially identical reasons as those outlined in *Bonenberger*”).

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

70. After fully considering all of the credible evidence, this Court makes a factual conclusion that Nationwide implemented this documented strategy in a clear effort to either price the Bergs out of their meritorious claim dispute; conceal evidence necessary to satisfy the heightened burden of proof;

and/or to secure a favorable judgment by misrepresenting the law to this Court. The strategy is printed in Nationwide's Best Claims Practices manual as follows:

I. Claim Handling Philosophy and Strategy for 1993 and Beyond

A. Philosophy

Continued reinforcement of Nationwide being a "defense-minded" carrier in the minds of the plaintiff legal community.....

Strategy

1. Litigation Avoidance

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 Trial Exhibit No. 2 (Page 63 of 60)("PENNRO LITIGATION STRATEGY – 1993).

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

71. The PREFACE to the Manual illustrates Nationwide's *intent* to invest in developing its stated philosophy and litigation strategy as follows:

Resource investment will be necessary to achieve the desired result within several listed strategies. However, resource investment was truly limited to key strategic areas.

Nationwide's in-house counsel, Jeffrey Gooderham, conceded the only litigation philosophy listed in the Manual is the one thus described. Mr. Gooderham further conceded it was intended to be applied against injured policy holders, and not just third party claimants.

See Trial Exhibit No. 2 (Page 1 of 66)(PREFACE to claim manual).

See 2007 N.T. 109-116 (Jeffrey Gooderham admitting no other litigation philosophy listed in the manual, and agreeing strategy was to be applied against injured policy holders).

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

72. Attorney Jeffrey Gooderham admitted at trial in 2007 that he was not aware of any instruction, post-*Bonenberger*, to stop applying the strategy. Mr. Gooderham would know if post-*Bonenberger* directive were circulated because he was Nationwide's Lead Claims Counsel and a member of the

committee that developed the Claim Manual containing the strategy. Attorney Gooderham's background at Nationwide also included the following: Claims Attorney; District Claims Manager; Claims Technical Consultant; and, Claims Legal Counsel.

See 2007 N.T. 89/23-91/21; 102/22-103/3.

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

73. The Bergs served Nationwide with a discovery request seeking documents evidencing a post-*Bonenberger* directive for personnel to stop applying the strategy. Nationwide objected, and the Bergs filed a Motion to Over-Rule Objections. After briefing and argument, a post-remand Order was entered stating the Bergs could argue a negative inference if no documents were produced.

See Order of August 23, 2013.

See Bergs' Request for Production of Documents at No. 2.

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

74. Nationwide has not offered any credible evidence that it circulated a company directive, held training seminars, circulated a company memorandum, issued a statement of policy, or otherwise directed personnel to stop applying the strategy after it was instructed to stop applying the strategy in the matter of *Bonenberger*, affirmed in 2002. Instead, Nationwide produced evidence focused exclusively upon the Manual itself, and not the discrete document attached to the manual as an appendix titled, "Pennro Litigation Strategy – 1993."

Indeed, Nationwide has consistently argued only that the *manual* was discontinued without reference to the *strategy*. *See* attached affidavit of following personnel, which were attached to Nationwide's Motion *in Limine* Pertaining to Post-Payment Conduct, filed November 20, 2013: Bruce Bashore; Stephen Potosnak; Ronald Stitzel; and Douglas Witmer.

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

75. Notably missing from the affidavits provided by Nationwide is Nationwide's in-house counsel, David Cole, who was assigned this case by Nationwide when litigation commenced in May of

1998, and continued managing the litigation through June of 2002. As detailed below, David Cole was familiar with the strategy because he was the “managing claims attorney for all the attorneys in the State of Pennsylvania” when the strategy was first implemented in 1993. 2007 N.T. 485/18-23.

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 for the state of Pennsylvania. Between 1996-2002 Mr. Cole held a position with varying titles, but the essential role was to be assigned and manage “complex litigation.” *Id.* at 465/13-22.

Mr. Cole was assigned the Berg claim when this lawsuit was filed in May of 1998, and he continued to manage the Berg litigation 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.” *Id.* at 475/9-12; 488/22-25; 489/2-6.

Mr. Cole admits he was aware of the litigation strategy, and that he was the “managing claims attorney for all the attorneys in the State of Pennsylvania” when the strategy was first implemented in 1993. *Id.* 485/18-23. Mr. Cole admits he received the invoices from the retained attorneyse and authorized the payments to the retained attorneys. *Id.* at 486/6-487/3. 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 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?” *Id.* at 504/25-505/5.

See 2007 N.T. (David Cole, Esq.).

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

76. In addition to concealing the Potosnak Report through five years of litigation, other evidence

remains missing. Corroborating evidence confirms the following should exist and yet, *after fifteen years of litigation*, has not been produced: more than two photographs of the vehicle's twisted frame taken at the time it was declared a structural total loss (never produced); the BRRP documents used by Nationwide to document the findings of its routine monthly inspections (never produced); and, original, total-loss appraisal, identified in claim-file as being complete on September 10, 1996 (never produced).

See Trial Exhibit No. 8 (claim log entry of 09/10/96, confirming photographs of vehicle).

See pertinent pages of Nationwide's Reply to Request for Admissions Pertaining to Appraisal and Attempted Repairs (mistitled by Nationwide), served September 13, 2013, subheading Missing Evidence (full response not attached here because it is too voluminous having been filled with objection and argument of Nationwide but will be entered into the record at trial).¹⁶

_____ **Accepted**

_____ **Denied**

_____ **Modified**

77. The Bergs allege Nationwide applied its litigation strategy in this case, and that it continued applying the strategy after the Superior Court instructed it to stop applying the strategy in 2004, when *Bonenberger* was published. In support of this contention, the Bergs presented the attorney fees Nationwide paid its attorneys in just two years post-*Bonenberger* (2003-2004), which exceeded \$589,000. The Bergs allege this was paid by Nationwide so that its attorneys would continue applying aggressive litigation tactics against the Bergs.

In further support of their contention, the Bergs also offered Trial Exhibit No. 1, a ten page document created by this Court in 2004, itemizing the Motions *in Limine* filed by Nationwide during this time period. Also offered is Nationwide's most recent Motion *in Limine* Pertaining to Post-Payment Conduct, wherein Nationwide misrepresents the law. *See* Motion at paragraphs 39-40. *See also* Nationwide's Memorandum of Law, misrepresenting the law as follows:

There is no Pennsylvania case law permitting the admissibility of conduct by an insurer during statutory bad faith litigation in a first-party claim that occurred after

¹⁶ The Request for Admissions entered into evidence during remand trial confirm, *inter alia*, the following sequence of events: On November 6, 1998, the Bergs formally requested all damage photographs of the vehicle; On March 15, 1999, an Order was entered denying Nationwide's Motion for Protective Order; on April 14, 1999, Nationwide responded by claiming, "After a thorough investigation, answering defendant has determined that they are not in possession of any photographs, or digitized images, of the vehicle which is the subject of this litigation"; on June 8, 2000, the Bergs filed a Motion for Sanctions; and June 12, 2000, an Order was entered requiring Nationwide to "Fully comply with all Prior Court Orders"; and on June 19, 2000, Nationwide produced only two, poor quality photographs of the damaged vehicle.

the insurer fulfilled any contractual obligations it may have owed to its insureds. To the contrary, courts have strictly limited such claims to those that arise under the subject policy, pursuant to the plain language of the statute.”

Memorandum at 4. The Bergs’ reply to Nationwide’s Motion *in Limine* Pertaining to Post-Payment Conduct, identifies how Nationwide previously misrepresented the law to this Court in its Trial Brief in 2007, causing *six years* of appellate review. The Bergs contend that Nationwide’s refusal to obey Court Orders; concealment of material evidence; relentless motions and argument over settled law; and its material misrepresentations of law, is clear evidence of continued, ongoing application of the litigation strategy post-*Bonenberger*.

See Nationwide Billing Summary (created by Bergs; proffered at remand trial).

See Trial Exhibit No. 1 (Itemization of Nationwide Motions in Limine filed in 2004) (10 page document created by trial court).

See Nationwide’s Motion *in Limine* on “Post-Payment Conduct,” filed in 2013 (making false statements of law regarding *Hollock, supra.*, and *O’Donnell v. Allstate Insurance Co.*, 734 A.2d 901 (Pa. Super. 1999)(not attached hereto but filed of record).

See Bergs’ Reply to Motion *in Limine* on “Post-Payment Conduct,” attaching similar misrepresentations made by Nationwide to this Court in 2007, with regard to *Romano v. Nationwide Mutual Fire Insurance Company*, 646 A.2d 1228 (1994), which necessitated six years of appellate review)(attached below at Tab 91).

See Tab 65 above, Nationwide’s erroneous verified Answers to Interrogatories regarding amounts paid to experts in this case, that were not accurate and supplemented only after the Bergs served a subpoena upon its expert witness to bring her billing invoices to trial, thereby impeaching Nationwide’s court ordered, supposedly verified, responses to interrogatories.¹⁷

¹⁷ There were a total of six interrogatories served upon Nationwide on May 28, 2013. On August 21, 2013, an Order was entered requiring verified responses. On September 20, 2013, Nationwide verified that the total amount it paid its expert witnesses in this litigation was \$27,375.72. *See* “Supplemental Responses to interrogatories “3” and “5.” The Bergs found these figures to be less than credible and thus served a subpoena upon one of Nationwide’s trial experts, Constance Foster. Nationwide filed a Motion to Quash the subpoena and a hearing was scheduled for December 4, 2013. The day prior to the hearing, on December 3, 2013, Nationwide amended its verified response with a “Second Supplemental Response,” wherein Nationwide admitted to an additional \$137,240.28 in expert witness fees and costs. *See* “Second Supplemental Responses to interrogatories “3” and “5.” Even these figures do not appear to be mathematically accurate. More importantly, the size of the “error” regarding expert witness fees appears to be so grossly inaccurate that the remaining answers now appear less than credible. Nationwide has thus been served with a Notice to Appear and to bring the data from its Legal Expense Analysis Program (“LEAP”), which Nationwide identified as a “management information system that stores litigation and expense data for the management of litigation.” *See* Nationwide’s reply to Interrogatory “1,” at page 2. This Notice to Appear was served on December 5, 2013, per the Order entered at the hearing on December 4, 2013, vacating the Subpoena to Constance Foster’s law firm, Saul Ewing.

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

78. It is apparent Nationwide chose to ignore the Superior Court's 2002 *Bonenberger* directive, continued applying the strategy in this and other matters across the state of Pennsylvania, and is a recidivist.

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

79. Nationwide strenuously asserts that the strategy was not applied against the Bergs in this case because the Bergs' claim dispute was over a material damage collision claim, and that the strategy was applied only in claim disputes involving personal injury. *See* Nationwide's Motion *in Limine* Pertaining to Post-Payment Conduct, at paragraph 33. However, the evidence attached to the following Findings of Fact prove the opposite; it proves the handling of the Berg collision claim dispute was immediately transferred away from lower level collision damage personnel upon Nationwide's receipt of the Bergs' letter of representation identifying a potential claim dispute wherein the insured retained legal representation. At that point, the handling of the claim was taken over by higher level personnel in management positions within the company, including Nationwide's in-house attorney David Cole, who was assigned all "complex litigation." The lower level property damage personnel were not permitted to communicate and/or cooperate with the retained attorney.

See evidence attached to the following Findings of Fact directly below.

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

80. On November 3, 1997, Nationwide received a letter of representation from the Bergs' attorney, advising of the faulty repair work, and requesting repair documents. The letter, addressed to Doug Witmer, requested a copy of Nationwide's collision claim-file as follows, "all maintenance records, bills, receipts, estimates and notes or correspondence between you and Lindgren Chrysler-Plymouth as it relates to this claim."

*See Trial Exhibit No. 7 (Letter 11/03/97).*¹⁸

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

81. Mr. Witmer did not respond to the letter. At trial in 2004, when asked why he did not respond to the request for a copy of the repair documents, Mr. Witmer responded that he was not authorized to discuss the claim with the insured's attorney, and was required to involve management. Mr. Witmer's supervisor, Ronald Stitzel was likewise unable to offer a reasonable explanation. To date, Nationwide has not offered an explanation as to why five members of Nationwide's management team needed to be involved in a reply to this request seeking the collision repair documents, particularly if, as now claimed by Nationwide, the entire file was comprised of a single repair appraisal dated September 20, 1996.

See Trial Exhibit No. 8 (Page 40 of 70)(claim log entry of 11/03/1997; Doug Witmer).

See 2004 N.T. 312/9-320/8; and 322/14-323/16 (Doug Witmer).

See Trial Exhibit No. 8 (Page 17 of 70) (claim file entries documenting involvement of following management personnel to respond to request for repair documents: Mike O'Leary; Ed Nieves; Ronald Stitzel; Stephen Potosnak; and Bev Carlson).

See 2004 N.T. 605/19-608/8 (Ronald Stitzel regarding location of complete claim file).

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

82. After no response from Nationwide to the November 3, 1997, request for the repair documents, reminders were faxed on November 25, 1997, and December 2, 1997. The fax of December 2, 1997, confirmed numerous phone messages seeking the repair documents. The letter on December 2, 1997, cited Pennsylvania's Unfair Claims Settlement Practices Act, Title 31 section 146.5, requiring insurer to respond to requests "within 10 working days."

See letters to Nationwide with corresponding dates (to be marked as exhibits at remand trial).

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

¹⁸ The letter also offered Nationwide an opportunity to inspect the vehicle. Nationwide contends the letter directed Nationwide to do nothing inasmuch as the letter requests Nationwide not to contact Lindgren.

83. On December 2, 1997, Nationwide produced an appraisal dated September 20, 1996, and specifically did not produce photographs or an appraisal dated September 10, 1996, as identified as being generated on that date as follows: "TOTAL LOSS . . . CAR IS AT LINGREN THEY HAVE ESTIMATE," and "SHOP WILL FORWARD ESTIMATE AND PHOTOS."

See Trial Exhibit No. 8 (Page 69 of 70).

See Trial Exhibit No. 6, cover letter and first page of appraisal dated 09/20/96.

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

84. Nationwide did not provide a reasonable explanation as to why it has never produced the appraisal that is identified in the claim-file on September 10, 1996, as follows: "SHOP WILL FORWARD ESTIMATE AND PHOTOS."

See insurance regulations to Appraisers Act, 31 Pa. Code Chapter 62 at §62.3 (b)(1)(requiring appraisal be signed prior to submission to insurer and to list all damage).

See 2004 N.T. 224/18-225/7 (Dean Jones admitting there should be appraisal dated September 10, 1996, if Nationwide was following its own internal guidelines, or Pennsylvania law).

See 2004 N.T. 625/15-626/6 (Doug Joffred admitting when he went to secure original appraisal from his filing cabinet it was "missing" and that he changed his opinion of September 10, 1996, for structural total loss, "only after meeting with Nationwide").

See 2004 N.T. 639/12-641/11 (Doug Joffred admitting subject vehicle had roof damage, which was one reason it was shipped to another repair shop, but that appraisal of September 20, 1996, fails to list roof damage, and he is unable to recall whether the roof damage itemized on appraisal dated September 10, 1996).

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

85. Nationwide also did not produce any photographs, as identified in the claim-file on September 10, 1996, as follows: "SHOP WILL FORWARD ESTIMATE AND PHOTOS." The photographs were not produced at any time before this lawsuit was filed. Indeed, the Bergs had to file a Motion for Sanctions to get Nationwide to produce any photographs of the subject vehicle. Specifically, the Bergs served Nationwide with a discovery request seeking all photographs, Nationwide filed a Motion

for Protective Order. The motion was denied as to photographs. But Nationwide then claimed NO photographs existed. The Bergs filed a Motion for Sanctions attaching proof that photographs exist, and a second Order was entered mandating Nationwide's compliance with its prior Order. Thereafter, Nationwide produced only two, poor quality photographs.

See Nationwide's Reply to Request for Admissions Served September 13, 2013 (evidencing continued concealment of photographs of vehicle's twisted frame)(full response not attached because it is too voluminous having been filled with objection and argument of Nationwide).

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

86. Nationwide's production of only two photographs, after a motion for sanctions required a second Order mandating compliance with the prior Order, is evidence of Nationwide's continued application of its litigation strategy. Nationwide's own personnel admitted at trial in 2004, under cross-examination, that there must exist more than two photographs of the damaged vehicle because photographs were a fundamental feature of Nationwide's BRRP; all participating BRRP facilities were required to provide Nationwide with numerous photographs of the damaged vehicles to support and/or correspond to the appraisals being written and submitted to Nationwide. Thus, there could not possibly be only two photographs of the Berg vehicle which was so heavily damaged. *See the following evidence of record:*

Trial Exhibit No. 35 (Page 1,3,5 of 8) (BRRP guideline document requiring numerous photos);
2004 N.T. 72/16-73/13 (admissions of M. Grumbein, as to the need for numerous photographs to support the damage to vehicles);

2004 N.T. at 214-17 (admission by D. Jones that the two photographs produced in this litigation would be completely inadequate and that Nationwide should have more photographs);

2004 N.T. at 305/16-17 (admission of Nationwide's D. Witmer, conceding he himself likely took photographs of the vehicle upon his inspection *after* it was appraised as a total loss by the BRRP facility);

2004 N.T. 623/10-625 (admission of D. Joffred that he personally took more than two pictures of the vehicle; that the pictures would be of "different angles of the car," and that he was required by the BRRP guidelines to "get a photograph of each part of the damage to support the appraisal," and "I would have took more than that because this is after the vehicle was torn apart. I would have had to show original damage first"); and,

Trial Exhibit No. 4, the only two photographs of the damage sustained to this vehicle ever produced by Nationwide in this litigation (after a sanctions order was entered against it).

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

87. No reasonable explanation has been offered by Nationwide as to why there exists only two photographs of the damage to the subject vehicle, or why there is no appraisal of the loss dated September 10, 1996, or earlier. This Court can only conclude this evidence has not been produced because it would have been damaging to Nationwide's position in the litigation, particularly with regard to its assertion that the subject vehicle was never a structural total loss, per the opinion of its automotive expert, William Anderton.

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

88. 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 10, 1996, when the vehicle was first appraised as a structural total loss.

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

89. In the 17 years since the Bergs submitted their collision claim on September 4, 1996, Nationwide has paid its attorneys in excess of \$2,191,289.10 to defend its handling of a \$25,000 collision claim.¹⁹ Even after a jury found its conduct to be fraudulent under the UTPCPL, there is no evidence that Nationwide has ever made any meaningful attempt to settle this suit. Instead, Nationwide has chosen to force the Bergs to either give up because it became too expensive, or press forward to verdict.

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

¹⁹ This amount does not include amounts paid after April 24, 2013.

90. Nationwide's attorneys were paid \$2,191,289 timely, and without risk. This does not include amounts paid from April 24, 2013, through December 20, 2013.

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

91. The Bergs attorneys undertook this case on a contingency fee basis. The risk of losing the case was compounded by Nationwide's concealment of evidence, and its material misrepresentations of the law to this Court, which necessitating six years of appellate review. See Bergs' reply to Nationwide's recent Motion *in Limine* Pertaining to Post-Payment Conduct.

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

92. The Bergs' attorneys have not, to date, been paid for their effort and risk. Instead, they have funded this lawsuit for over fifteen years at tremendous expense and risk.

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

93. Given the above, it would be fundamentally unfair 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. With this observation in mind, this Court will review the Bergs' fee petition, including the number of hours reasonably expended in pursuing this matter, as requested by Nationwide.

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

94. Thereafter, this Court will consider what amount is appropriate to punish Nationwide for its reprehensible conduct in returning a vehicle to its insured in a potentially dangerous condition; forcing its insured to litigate their meritorious claim dispute over a period of time now exceeding 15 years; and, for its repeated acts of bad faith throughout this litigation in concealing material evidence and misrepresenting the law to this Court, necessitating six years of appellate review.

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

Respectfully Submitted,



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DANIEL BERG and SHERYL BERG,
Husband and Wife
Plaintiffs

COURT OF COMMON PLEAS
BERKS COUNTY, PA

v.

NO. 98-813

NATIONWIDE MUTUAL INSURANCE
COMPANY
Defendant

CIVIL ACTION

CERTIFICATE OF SERVICE

BERKS COUNTY, PA
MARIAH R. SUTTON
PROTHONOTARY

2013 DEC - 9 A 11:46


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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 was sent via U.S. First-class Mail, postage prepaid, to counsel of record as follows:

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