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 – LAW

PLAINTIFF BERGS' TRIAL BRIEF

At all times prior to this lawsuit being filed, and for five years after, Nationwide concealed its knowledge that the structural repairs *it* required had failed. Nationwide knew the repairs failed but permitted the vehicle to be returned to its insured with hidden, structural repair failures. This fact sets this case apart from other bad faith cases because this insurer *knowingly* placed its own insured at risk to suffer serious bodily harm.

I. BASIC CHRONOLOGY

- September 04, 1996, date of loss;
- September 10, 1996, assigned BRRP appraiser declares vehicle *structural* total loss;
- September 20, 1996, Nationwide directs repairs be initiated by unapproved facility;
- December 30, 1996, vehicle returned to insured with failed structural repairs;
- November 3, 1997, letter of legal representation faxed to Nationwide;
- May 4, 1998, suit filed against Nationwide and BRRP facility;
- January of 1999, Nationwide purchases vehicle from lessor, Summit Bank, after Bergs pay final installment on three-year lease because Nationwide wanted to preserve vehicle for final inspection; not because it conceded *any* repair issue or to make Bergs whole;
- January 19, 2000, Nationwide files Answer to Complaint, denying knowledge of failed structural repairs (verified by Nationwide's Bruce Bashore).
- May 3, 2003, Nationwide un-redacts April 30, 1998, Potosnak Report to support denial to Request for Admissions, *revealing* its pre-suit knowledge of the failed structural repairs;
- December 20, 1994, jury confirms *fraud* under Pennsylvania's UTPCPL.

II. CASE SUMMARY

Nationwide's bad faith conduct took place during two, discrete time frames. The first occurred during the appraisal and attempted repairs of the subject vehicle. Evidence includes violations of the *Motor Vehicle Physical Damage Appraiser Act*, 63 P.S. § 851-863 ("Appraisers

Act"), and insurance regulations applicable thereto.[1]

Nationwide's assigned appraiser declared the vehicle a structural total loss due to a twisted frame. Nationwide decided, without the Bergs' knowledge or consent, to take the vehicle to an unapproved repair facility to attempt the structural repairs its designated BRRP facility was unable to undertake. The structural repairs failed but the vehicle was returned to the Bergs as if fully restored. Although Nationwide will never concede it knew the vehicle was returned with hidden structural repair failures, the *uncontroverted* evidence and eye-witness testimony proves it did know. *See* Tab 24 (evidence of routine monthly inspections). *See also* Tab 25 (eye-witness testimony of David Wert). After the structural repair efforts failed, good faith required Nationwide to accept that the vehicle was a structural total loss. Instead, the vehicle was returned to the Bergs "despite known structural deficiencies that left it in a in a potentially dangerous condition," which the Superior Court confirmed "satisfies the *Toy* definition of bad faith under section 8371." *Berg* at 1175-76, *citing*, *Toy v. Metropolitan Life Insurance Company,* 593 Pa. 20, 928 A.2d 186 (2007).

The second period of bad faith began when Nationwide received the Bergs' letter of legal representation on November 3, 1997. Thereafter, Nationwide engaged in a cover-up, concealing its knowledge of the failed repairs.[2] Evidence includes, *inter alia*, a deceitful redaction from its claim file of a pre-suit inspection report written by a BRRP claim manager. The report was entered into the claim file on April 30, 1998. The claim manager's report confirmed the failed structural repairs. Rather than working in good faith to resolve the developing claim dispute, Nationwide concealed

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1The Appraisers Act and its regulations focus upon inherent conflicts of interest created by the insurance industry's legitimate interest in containing collision repair costs, and the public's interest in safe, quality repairs. The law requires every appraisal be signed by the appraiser before being submitted to the insurer. Further statutory safe-guards require the putative appraiser pass a written examination to secure an Appraisers License thereby demonstrating knowledge of the conflicts inherent in appraising collision losses for insurance claims. The regulations state it "shall be strictly interpreted to protect the interest of the consumer . . . to fully eliminate conflict of interest in the making of an appraisal." 31 Pa. Code §62.3(9). Important to this matter, section 62.3(f)(1) states, "[i]f the costs of repair of a motor vehicle exceed its appraised value, less salvage value, or the motor vehicle cannot be satisfactorily or reasonably repaired to its condition just prior to the damage in questions being incurred, the appraised value of the loss shall be the replacement value of the motor vehicle." The replacement value of the Berg vehicle was approximately $25,000. Rather than accepting that the vehicle was a structural total loss, Nationwide directed repairs be undertaken and paid only $12,000 in its failed effort to restore the vehicle. In return for their $12,000 claim benefit, the Bergs received a potentially dangerous vehicle whereas Nationwide saved itself $13,000. Violations of the Appraisers Act and its regulations are evidence of insurer bad faith. *See Berg* at 1171.

2 *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 560, 580, 116 S. Ct. 1589, 1592, 1601, 134 L. Ed. 2d 809, ___, ___, (1996) ("Deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive" noted by Court to be "circumstances ordinarily associated with egregiously improper conduct").

that report for five years pursuant to a bogus assertion of attorney-client privilege. During those five years, Nationwide pretended it was unaware that the structural repairs it required had failed, thus forcing the Bergs to litigate their *meritorious* claim dispute.

The pre-suit inspection was performed by Stephen Potosnak, a BRRP Property Damage Specialist ("PDS"). The report was entered into the claim file as a communication from Mr. Potosnak to his supervisor, Bruce Bashore. After five years of concealment, this report was un-redacted, on May 5, 2003, to support Nationwide's denial to Request for Admissions. At trial in 2004, Mr. Bashore admitted the report was an ordinary claim file entry, not a communication to counsel. *See* Tab 43, un-redacted Potosnak Report and trial admission of Bruce Bashore (2004 N.T. 494/7-496/25).

CONSTANCE FOSTER & JURY FINDING OF FRAUD

In addition to Nationwide's violations of the Appraisers Act, a jury found Nationwide violated the catchall/fraud provision of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-2(4)(xxi). Notwithstanding a jury determination of fraud, Nationwide secured a directed-verdict on the issue of insurer bad faith in the next trial phase. The Superior Court reversed, finding the verdict was premised upon the erroneous legal opinions offered by Nationwide's trial expert, former Insurance Commissioner Constance Foster.

In rejecting Ms. Foster's "novel theory of statutory interpretation," the Superior Court determined 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 cited above 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, 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").
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> With these points in mind, we conclude that the trial court erred in multiple respects.

Berg at 1174-75.

III. STRATEGY TO PUNISH LAWYERS

The Superior Court concluded that it was an abuse of discretion to preclude from evidence the amount Nationwide paid its attorneys to defend this case. The Superior Court agreed such evidence was relevant to the disputed issue of whether Nationwide applied its well-documented strategy to artificially inflate the cost of litigating meritorious claim disputes to "send a message" that it is a defense-minded carrier in the minds of the plaintiff legal community.[3]

It is not surprising that the Superior Court determined this was an abuse of discretion as the Court previously instructed Nationwide to stop applying the strategy because it was in bad faith. *See Bonenberger v. Nationwide Mutual Insurance Co.*, 791 A.2d 378, 382 (Pa. Super. 2002). It was thus apparent to the Superior Court that Nationwide had nevertheless continued applying the strategy in defiance of *Bonenberger*. The Superior Court specifically noted that the Bergs were offering the attorney-fee evidence for "substantially identical reasons as those outlined in *Bonenberger*." *Berg* at 1177. The issue presented instantly is whether Nationwide is a recidivist, and if so, to set an effective penalty to deter this particular defendant from similar future conduct.

Using superior financial power as a sword is not a new phenomenon. Other courts have seen it and condemned it. *See Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), wherein noted economist and jurist, Richard Posner, stated as follows:

> Where wealth in the sense of resources enters is in enabling the defendant to mount an extremely aggressive defense against suits such as this by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee. In other words, the defendant is investing in developing a reputation intended to deter plaintiffs. It is difficult otherwise to explain the great stubborness with which it has defended this case, making a host of frivolous evidentiary arguments despite the very modest stakes even when the punitive damages awarded by the jury are included.

Id. at 677. *See also Hollock v. Erie Insurance Exchange*, 842 A.2d 409, 421 (Pa. Super. 2004) (affirming $2.8 million punitive damage award citing *Mathias*).

Nationwide paid its attorneys $1,173,227.50, through post-trial motions for the 2004 jury trial. This excludes sums paid to continue defending its fraudulent conduct, after the fraud was confirmed

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3 The Bergs do not contend that Nationwide should be precluded from entering a meritorious defense to disputed claims. Rather, the Bergs contend Nationwide's strategy is to defend even *meritorious* claim disputes, and to do so with unlawful methods, such as false assertions of privilege, violations of Court Orders, and material misstatements of law.

by a jury in 2004. The total amount paid exceeds $2,191,289.10. *See* Tab 65, Nationwide's verified Answers to Interrogatories Served May 28, 2013, at pages 4 and 10.

IV. CONFLICTING TESTIMONY

Nationwide's Proposed Findings of Fact cite testimony that contradicts testimony cited by the Bergs. In particular, the testimony of Doug Joffred flip-flops, depending upon whether he was cross-examined by the Bergs' attorney, or directed by Nationwide's attorney. Mr. Joffred is an employee of Nationwide's BRRP facility, a former co-defendant in this litigation. Nationwide filed a cross-claim against the BRRP facility, thus enabling it to ask leading questions as if Mr. Joffred was under cross-examination. Although a cross-claim was filed, the co-defendants remained business partners throughout the course of this litigation. Mr. Joffred admitted at trial in 2004, that his facility was never suspended or reprimanded by Nationwide for the Berg repairs, and that 40% of its business was derived from Nationwide referrals. *See* Exhibit "A," above Tab 1 (2004 N.T. 631/7-632/25). The testimony thus elicited should not be considered admissions by an adverse witness. To the contrary, the testimony was elicited via leading questions to a non-adverse witness.

V. DAMAGES

Regardless of any inconsistent testimony, the evidence at Tabs 24 and 25 remains uncontroverted. It proves Nationwide knew the vehicle was returned to the Bergs with hidden structural repair failures. This evidences a heightened degree of reprehensibility, beyond other bad faith cases, because the insurer *knowingly* placed its own insured at risk to suffer physical harm.[4]

The Bergs respectfully request a finding of bad faith be entered against Nationwide, and that the Bergs be awarded attorney fees in an amount not less than the amount Nationwide paid its own attorneys. Nationwide's attorneys were paid timely and without risk, whereas the Bergs' attorneys worked on a contingency fee basis *for sixteen years*. The risk associated with this contingency fee

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4 Nationwide has argued that no one was physically injured and thus a significant punitive damage award is not warranted. Fortunately, no one was killed. But Nationwide did not know whether there would be a subsequent accident when it permitted the vehicle to be returned with hidden structural repair failures. This, by definition, is a reckless indifference to its insured. Nationwide was willing to risk the Bergs' lives to save itself money on a collision claim. And although no one was killed, Nationwide has no one to blame but itself for its potential exposure in this case, which now exceeds $18 million. Nationwide chose to litigate this case rather than *ever* attempting to negotiate a reasonable settlement. In so doing, it spent well in excess of $2 million in a failed attempt to cover-up its knowledge of the failed repairs and to price the Bergs' out of their meritorious claim dispute. Given these facts, which separate this case from all other insurance bad faith cases, a 9 to 1 ratio would most certainly be affirmed on appeal.

was compounded by Nationwide's unlawful concealment of material evidence, and its material misrepresentations of law to this Court which already necessitated six years of appellate review.

Nationwide's conduct calls for a punitive penalty at the maximum amount permitted by law, namely nine times the amount of attorney fees it imposed upon the Bergs over the past 16 years. At the remand trial, the Bergs will offer the opinion testimony of Jeffrey Silver, C.P.A., M.B.A. Mr. Silver will satisfy the legal standard necessary to fix a punitive penalty by providing Nationwide's financial background, which is needed to enter a meaningful, effective penalty. Mr. Silver will also offer his opinion as to whether a punitive penalty at the highest amount permitted by law, that is a 9 to 1 ratio, would have any impact upon Nationwide's financial stability. [5]

Respectfully Submitted,

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5 In *Hollock* the Superior Court affirmed a ratio of 10 to 1 in an insurance bad faith case where compensatory damages were limited to attorney fees, costs and interest, and where the insurer *did not* knowingly place its own insured at risk to suffer physical harm. The Court stated the following with regard to the ratio:

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

Id. at 421-22, *citing*, *State Farm v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (Supreme Court review of $145 million punitive damage award found to be excessive because ratio was 145 to 1).

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

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