QURF

6/24/2014

DANIEL BERG and SHERYL BERG,
Plaintiffs

VS.

NATIONWIDE MUTUAL INSURANCE COMPANY,
Defendant

: IN THE COURT OF COMMON PLEAS
: OF BERKS COUNTY, PENNSYLVANIA
:
: CIVIL ACTION-LAW
:
: NO. 98-813

INTRODUCTION

On September 4, 1996, Plaintiff, Sheryl Berg, the policyholder of a collision insurance contract with Defendant, Nationwide Mutual Insurance Company, was driving her 1996 Jeep Grand Cherokee, insured by Defendant, when she was hit by another vehicle; fortunately, neither party was injured in the collision. The only issue in this sixteen-year-old case is if Defendant breached its fiduciary obligation to Plaintiffs. The ensuing litigation marathon is a significant factor found by this court in resolving the bad faith claim brought by Plaintiffs against Defendant. Defendant's fiduciary obligation to Plaintiff arose by the parties entering into a contract whereby the physical damage coverage for the collision required Defendant to, *inter alia*, 1) pay for the loss or 2) repair or replace the damaged parts.

Defendant's first damage estimate, dated September 10, 1996, concluded that Plaintiff's vehicle should be "totaled," the present value, at the time of the collision being $25,000. However, that was not the final resolution. Defendant vetoed this appraisal and a second estimate, ten days later, called for the Jeep to be repaired. This saved Defendant approximately half of the $25,000 expense to replace the Jeep. The repair

process began immediately but took nearly four months until complete. Defendant's position to repair rather than total and replace the Jeep, never changed until the expiration of the lease in December 1998, twenty-eight months after the collision. Until the Bergs completed their remaining monthly payments on the lease agreement with Summit Bank, they were forced to drive what they claim is a defectively repaired Jeep. They further claim that the Jeep, after the four months of attempted repairs was not crashworthy, that it could not withstand a collision because of the permanent frame damage. When all lease payments were paid by Plaintiff, Defendant, in December 1998, suddenly changed its mind, totaled the car, and paid Summit Bank $18,000 to settle the claim and obtain ownership of the Jeep. Defendant's attempt to save one half of the $25,000 cost of replacement by repairing the Jeep was not the end but the beginning of this long, drawn out claim. Defendant's $12,500 repair quickly increased in total cost to the Defendant, to nearly double the original replacement cost of $25,000. However, that increase has proven to be only a drop in Defendant's expenditure bucket. The parties have been in litigation for over 16 years and Defendant has paid in excess of one hundred times the original Jeep replacement costs in legal defense costs alone.

QUESTIONS RAISED

This court must confront the ultimate decision to total the Jeep twenty-eight months after the collision. Is it just a coincidence or evidence of intent by Defendant to punish the Plaintiffs? And/or part of a conscious effort by Defendant to initially save money on the claim which got completely out of hand? As stated, Plaintiffs were not

relieved of their monthly lease payments. They paid the down payment and finished the last of the monthly payments in the thirty-six month long lease when all of a sudden the Jeep was immediately totaled by Defendant. Was this a conscious plan by Defendant to wait until Plaintiffs paid off the lease? Of course, the cost of the lease obligation and the value of the vehicle itself depreciated each month of Plaintiffs' payment and use which reduced the value of Plaintiffs' claim that Defendant was obligated to pay from $25,000 from September 4, 1996 to $18,000 in December 1998. Was this a meaningless coincidence or somehow an intentional act of omission or commission by Defendant?

The said contract is a first party agreement that requires Defendant to compensate and legally represent Plaintiffs in any claim filed for damages sustained in a motor vehicle collision. Defendant's defense is that it totaled the Jeep at this time solely because it wanted ownership of the suspect vehicle to prepare and preserve its defense. Or did Defendant ultimately total the Jeep and secure its ownership to protect itself from any potential future litigation to a third party who next leases or buys the Jeep because the bent frame makes the Jeep unsafe in sustaining a collision?

FINDINGS OF FACT

Defendant, for three years, refused to pay to replace Plaintiffs' Jeep, regardless of the changing circumstances over that time period, including the following findings of fact by this court:

1. Defendant's initial inspection report of September 10, 1996, indicated the Jeep could not be repaired. The report declared it a total loss due to a twisted frame.

2. Instead, Defendant then attempted to repair the Jeep and vetoed the first estimate. The second estimate, of September 20, 1996, called for repairing the Jeep. That estimate, however, did not call for the Jeep to be fixed by taking it to a third party repair facility despite the fact that Defendant immediately concluded that the third party was better equipped for straightening twisted frames because Defendant's Blue Ribbon repair body shop did not have the equipment to correct the defective frame.

3. This repair by a third party was action taken by Defendant without the knowledge or consent of Plaintiffs.

4. Defendant needed nearly four months possession to repair the Jeep. The Jeep was finally returned to Plaintiffs December 30, 1996.

5. Defects were immediately and thereafter regularly reported to Defendant by Plaintiffs who returned the Jeep to the repair shop on several occasions to correct various continuing problems.

6. Defendant finally totaled the car by the end of 1998. It wrote and faxed to Summit Bank on January 13, 1999, a letter threatening strong legal action if Summit Bank did not perform immediately in transferring the automobile to Defendant:

> We insist that this contract be honored and that the title to the vehicle be forwarded to this office immediately. Please understand that if the Bank does not perform pursuant to its agreement with Nationwide, we will initiate the proper legal action to enforce the Company's rights under the contract with Summit Bank.

Referencing Exhibit 27, letter dated January 13, 1999, from Matthew Stool, Esquire, of Post and Schell, PC, on behalf of Defendant, to Bruce Wunsch, Assistant Treasurer of Summit Bank.

BLUE RIBBON REPAIR PROGRAM

7. Defendant partnered with Linden Chrysler Plymouth and developed a direct Blue Ribbon Repair Program.

8. Doug Joffred, the manager of Lindgren's body shop, was the assigned appraiser for the Jeep. He was the appraiser who inspected the Jeep six days after the collision (September 10, 1996 appraisal report) and declared the Jeep a $25,000 total loss. Ten days later, Mr. Joffred revised his report (September 20, 1996) to a repair estimate because it did not meet the 80% economic threshold. If it did, it would be a total loss. Instead, the repair cost was estimated to be only 50% of Jeep's total value. The bottom line is that Defendant would have paid several thousand dollars more if the Jeep had been totaled (it would have had to pay $25,000 minus the salvage value); but by repairing the Jeep at $12,300, Defendant saved nearly $13,000.

FIRST ESTIMATE

9. Mr. Joffred, therefore, did not total it for economic purposes. He is the repair shop manager and knows it would have been too much of a loss to total it if it could have been repaired. But he did total it in his first report, so this court concludes the Jeep must have been found by him to be damaged to the point that, regardless of the cost to Defendant, the Jeep was too damaged to safely drive. This court must conclude thus that the Jeep could not be adequately repaired.

10. On September 10, 1996, Doug Witmer, Defendant's' top adjuster, interceded in Mr. Joffred's first estimate. Mr. Witmer testified that Defendant would

have been unable to recover the difference in the salvage value. Mr. Joffred, thus, revised his estimate from totaling the Jeep to repairing it.

SECOND ESTIMATE

11. Mr. Joffred's report of September 20, 1996, the second estimate, reduced the cost to Defendant to $12,326.54. This second estimate cut Defendant's expenses approximately in half. Although the original estimate was completed on September 10, 1996, it was then vetoed and the September 20, 1996, $12,326 repair estimate report substituted in its place.

12. The September 10, 1996 report disappeared and was never produced by Defendant throughout this litigation.

THE REPAIR

13. Although the testimony was that the repair job should have taken approximately twenty-five days, four months were spent repairing the Plaintiffs' Jeep.

14. Regardless, it is clear that the Jeep was not repaired sufficiently. This is verified by the expert inspection reports, including those of Defendant, most of which call for further repair or replacement of the repaired Jeep. This fact was verified by Defendant's expert, Constance Foster, former Pennsylvania Insurance Commissioner.

15. The testimony is that the frame was not able to be straightened to allow the holes to align for the screws and bolts to be reinserted. That resulted in unusual wear on the front tires in a short period of time. The said bolts could not be inserted in the holes because of the misalignment, so the frame had to be welded together. The

fan blades had to be reduced in length; it continued to make contact with the fan shroud because of this misalignment.

JEEP TOTALED TWENTY-EIGHT MONTHS POST COLLISION

16. One of the most telling portions of the testimony revealed that Defendant did ultimately give Plaintiffs what they demanded — the totaling of the Jeep. Defendant paid the remaining balance on the loan and the cost of the transfer of title in its name. Title of the Jeep was transferred to Defendant in December 1998, ending the repair/totaled debate.

17. Defendant's timing for the totaling of the Jeep meant that the Plaintiffs received no further reimbursement from Defendant for their lease down payment and for all of the 36 monthly lease payments by Plaintiffs on the Jeep.

The Potosnak Report, with its extensive problems with Plaintiffs' Jeep set forth in great detail, was not communicated in any way to the Bergs or their counsel by Defendant for five years until it was forced to do so as a result of Plaintiffs' motions for admissions. This is the first time that the Plaintiffs or their attorney knew anything about it. Only then did Defendant release the report. No one told Plaintiffs that Defendant will fix the problems immediately, that Plaintiffs should take the Jeep to any body shop to repair it, and that Defendant would pay the cost. No one from Nationwide warned the Bergs that the Jeep should not be driven. Plaintiffs were not told to park the Jeep and that Defendant will tow it in for service. Defendant did not immediately total the Jeep and get Plaintiffs another vehicle or pay off the lease and arrange for a replacement. No one instructed Plaintiffs that they should not drive the car and that Defendant would

pay for a rental until the vehicle is finished. Instead, Defendant simply buried the evidence and hid the fact that it knew anything about this report and what it means to the safety of anyone in the Jeep in a collision. Immediately after the inspection, Bruce Bashore knew about everything in the Potosnak Report. Bruce Bashore Page 267, 12-29. Steven Potosnak, Bruce Bashore, and other unnamed employees of Defendant knew of the damaged parts and potential danger of a collision but no action was taken by Defendant to correct this dangerous situation for its policyholders and the cover-up continues. Page 268 1-5. Page 278, 25. Page 279, 1-5. Page 281, 11-12. Defendant's expert, Former Pennsylvania Insurance Commissioner, Constance Foster, on page 203, 14-25, of the notes of testimony for the remanded trial before this court testified as follows: "Well, ultimately to protect the Potsnaks (sic) [she meant the Bergs] and to protect the value of the automobile as potential future evidence, the automobile was purchased by Nationwide." It was Ms. Foster's opinion that the Jeep was totaled and purchased by Defendant to protect the Bergs from future liability.

> THE COURT: Okay. So --
> THE WITNESS: So the Bergs --
> THE COURT: Got the same result. They wanted it totaled, I guess, back -- and they get the result by getting the value of the --
> THE WITNESS: Well, they were -- well, the lease -- by purchasing it, to the extent that the Bergs could have had any liability for returning a car with defective repairs in it, they were relieved of that liability. The Bergs were completely protected by that purchase.

Page 203, 14-25 and page 204, 1-2. The expert witness called by Defendant, Nationwide, the former Insurance Commissioner of Pennsylvania, immediately thereafter raised the liability issue again. "So as of the date that the car was purchased, all the repairs on the automobile had been paid for by Nationwide. The car had been

purchased. The Bergs had been relieved of any potential liability under the lease."

Page 204, 14-17.

> THE COURT: You can tell me all about that. I'll read all about that. We have this witness who's giving an expert opinion and they you can cross-examine.
>
> Continue, please.
>
> BY MR. KREKSTEIN:
>
> Q: Ms. Foster, have all the opinions that you've rendered here today been rendered to a reasonable degree of certainty?
>
> A: Yes.
>
> Q: Within the areas that you've been qualified as an expert witness?
>
> A: Yes, they have.

Page 205, 1-12.

18. Defendant's argument is because it was in the throes of a bad faith claim lawsuit, it bought the Jeep to maintain control over the evidence. This court draws a different conclusion than both Defendant and Ms. Foster for the ultimate resolution of this issue. If Defendant had not purchased the Jeep, it risked the Jeep being leased to or purchased by an entirely new party. If the Jeep was not safe on the road, this new innocent party would have exposed Defendant, not the Bergs, to further liability in the event of another collision because the Jeep was not repaired properly. It was not crashworthy.

19. An additional fact to consider when logically answering why Defendant ultimately totaled the Jeep is that Plaintiffs' attorney made clear his intent to purchase the Jeep himself. Defendant's letter of January 13, 1999 to Summit Bank, as previously referenced, threatened legal action if Summit Bank did not transfer title to Defendant. It was written directly after Attorney Mayerson expressed interest in purchasing the Jeep.

Did Defendant fear that by Plaintiffs' purchasing the Jeep, a full analysis could be done by Plaintiffs in furtherance of this lawsuit? At any rate, the fact is the Jeep was finally declared totaled by Defendant when the lease was finished and the Jeep available for lease or purchase by a third party.

20. Defendant then chose, for whatever reason, to spend an additional $18,000 for what it claimed was to preserve the evidence; yet no action whatsoever was subsequently taken to inspect or further examine or analyze this preserved evidence, at least not that which resulted in further discoverable reports or testimony from January 1999 forward. This raises a further question: is the Jeep still available and preserved as evidence today?

LINDGREN'S LIABILITY

21. Defendant has argued that if anyone is liable to Plaintiffs it is the body shop that is responsible, not Defendant. Defendant claims it is not liable for the Jeep not being completely repaired. There is no question that it is Lindgren's responsibility as the body shop to make sure that the car is repaired totally and fully or that, if it cannot be, that the car be totaled and not returned to the customer. It is also clear that this Jeep could not have its frame straightened by any mechanic utilizing all the equipment at Lindgren, and, therefore, it was sent to K.C. Auto Body, another body shop; but Lindgren's original estimate called for the Jeep to be totaled. Nationwide vetoed the totaling of the Jeep.

22. Nationwide would argue that when it was returned to Lindgren, Lindgren alone knew of the unsafe condition, that Defendant never once inspected it, and that in

addition to never inspecting the repair process, Defendant knew nothing of the repair work on the Jeep in the period of September 6, 1996 to December 31, 1998 when it was being repaired at Lindgren's. This court finds this argument to be both contrary to the evidence and illogical.

23. Plaintiffs did prove that Lindgren's initial estimate calling for the Jeep to be totaled was vetoed by Defendant and that the second appraisal was "reconstructed" with the end game of repairing, not totaling, the Jeep. Further, Plaintiffs did prove that both Defendant and Lindgren knew Lindgren did not have the equipment to straighten the distorted frame and both collaborated in the Jeep being sent to K.C. Auto Parts. Clearly the shots were called by Defendant, not Lindgren.

24. Lindgren is one of Defendant's Blue Ribbon repair shops. A large percentage of its business is from Defendant. Defendant entered into a contractual relationship with Lindgren in which it gets a discount on parts and other benefits. Defendant and Lindgren are clearly aligned. Defendant's inspectors had to be closely monitoring the repair work at Lindgren which is being paid for completely by Defendant. Or if it did not, it owed a duty to its fiduciaries to do so.

25. In order to determine if "it looked like the vehicle was repairable," the Jeep had to be inspected. Lindgren's Mr. Joffred and Defendant's Mr. Witmer both agreed; therefore, regardless if Lindgren did the inspection and Defendant did not; it was Defendant's choice and duty to inspect or to take the risk of relying on Lindgren's inspection. In either case, Defendant is liable for the action or inaction. The findings of this court are that Defendant did inspect the Jeep and even if it did not as it claims, it

should have. It had a duty to the customer to do so. Lindgren is Defendant's Blue Ribbon repair shop.

DRIVABILITY DOES NOT RELIEVE LIABILITY

26. Defendant points out that because Plaintiffs drove the Jeep thousands of miles after the collision, it proves the car was repaired properly. But it does not matter how many miles were put on by Plaintiffs after the repair because that fact means nothing, due to Defendant's own expert's finding that the Jeep was not properly repaired by Lindgren and that it was repairable. Nor did it affect the fact that the frame of the Jeep was damaged and that the difficulty with the airbags deploying on contact both logically lead to the conclusion that the Jeep was not crashworthy and was dangerous to drive because it would not hold up as well as the same Jeep would with no structural damage. Two experts hired by Defendant - Steven Potosnak and William Anderton - each concluded that his inspection showed the frame defect and/or other problems with faulty repair.

THE CONTRACT

27. At all pertinent times, Plaintiffs were insured under Defendant insurance policy number 5837-C-137421, which provided coverage for both collision and comprehensive loss, subject to a deductible. Before her marriage, Mrs. Berg and her family had always insured with Defendant.

28. 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.

29. On September 4, 1996, a major loss was triggered by a collision causing damage to Plaintiffs' insured vehicle, a 1996 Jeep Grand Cherokee. Defendant's personnel, Doug Witmer, the Defendant assigned claims representative, called the collision "severe in nature," and found that the vehicle was impacted by another vehicle on the left side and "spun the policyholder around four times and she hit a pole."

30. Following Plaintiffs' collision of September 4, 1996, but prior to the loss being appraised, Defendant offered Plaintiffs the Blue Ribbon Repair Program (BRRP); Defendant promised a Blue Ribbon appraisal, from an approved Blue Ribbon repair facility, backed by a Defendant Blue Ribbon Guarantee. Plaintiffs agreed to participate in Defendant's BRRP.

STRUCTURAL TOTAL LOSS

31. Under the BRRP, Defendant assigns the appraisal of the loss to its designated BRRP facility. Defendant's assigned appraiser was Doug Joffred, who had been the manager of the designated BRRP facility, Lindgren Chrysler/Plymouth body shop, for sixteen years at the time of his testimony in 2004. Mr. Joffred notified Defendant 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, it shouldn't have been fixed."

32. Upon receiving notification from Lindgren's assigned appraiser that the vehicle was a structural total loss due to a twisted frame, Defendant immediately dispatched claim representative Mr. Witmer to inspect the damage. It was Defendant's Mr. Witmer who objected to the total lost and declared the vehicle repairable and

instructed that the vehicle be shipped to another facility to attempt structural repairs. Mr. Witmer admitted the vehicle had already been declared a total loss by Mr. Joffred by the time he got to the repair facility to view the damage.

33. Prior to unilaterally deciding the vehicle was not a total loss, Mr. Witmer admits he did not write and/or sign his own independent appraisal of the loss, or even pick up a tool. 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, also agreed.

34. Mr. Witmer, nevertheless, vacated the opinion of the assigned appraiser that the vehicle was a structural total loss due to a twisted frame, and declared the vehicle repairable because "Nationwide will never recover the difference in salvage value." Mr. Witmer does not recall if he ever saw the first appraisal of September 10, 1996. Mr. Joffred prepared a second revised appraisal dated September 20, 1996, to repair the Jeep. *See* Exhibit 8 (Page 66 of 70), claim file entry of 09/24/96.

35. Plaintiffs were not provided a copy of the September 10, 1996, total loss evaluation as required by the applicable insurance regulations. The Plaintiffs 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.

36. Plaintiffs were not advised that the damage to their vehicle was such that the BRRP facility did not possess the proper equipment to straighten the frame damage and, thus, was unable to attempt the repairs.

37. Plaintiffs were not advised or consulted with regard to Defendant's decision to have their vehicle taken to an undisclosed repair facility to attempt structural frame repairs. Plaintiffs did not contract with the third party repair facility for the repair of the Jeep. Defendant, alone, made the decision to vacate the total loss appraisal and transport the vehicle to another repair facility.

38. By replacing the September 10, 1996, the total loss appraisal, Defendant 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. Most significantly, the Jeep repairs saved Defendant 50% of the replacement loss or approximately $12,500.00.

39. The repairs, as written in the repair appraisal, were expected to take about twenty-five days to complete, per standard formula. Nevertheless, the attempted repairs took approximately four months to complete. The Jeep was returned to Plaintiffs on December 30, 1996, as if fully restored.

40. After Plaintiffs' 30 days of rental coverage expired, they were left operating Mr. Berg's panel van, with no back seat. Plaintiffs' teenage son sat on the floor. Plaintiff Mrs. Berg requested an extension of her rental period to coincide with Defendant's repair time, but was turned down. She phoned on several occasions to see when the Jeep repairs would be finished.

41. The structural repairs attempted at Defendant'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

Defendant. This fact was confirmed by Defendant's own automotive expert, William Anderton. *See* N.T. 896/1-5 (William Anderton).

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

43. Damage that showed the Jeep was not repaired properly must have been visible to PDS during the repair period. This includes the issues described by Plaintiffs' expert, Donald Phillips, P.E. Mr. Phillips inspected the Jeep, on November 25, 1997, and "specifically I found that there were issues in the repair regarding the unibody." These included

> 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 estimate, damaged suspension parts not replaced and on vehicle, poor weld repairs to the left front frame rail, the grill attachment, the headlight mounting and the steering wheel not being centered.

He found that the "tires showed feathering and coupling, which means that the front end steering geometry was not correct, so it was not wearing evenly." 2004 N.T. 442/1-3.

His opinion was "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."

2004 N.T. 445-446/22-1. "That in all of the post-repair computerized measurement inspections of the vehicle it verified that the front end structure of the vehicle was out of specification and swayed to the right." 2004 N.T. 447-448/24-2.

44. Mr. Phillips had several years of experience working for Breed Automotive, a company that "designed, tested and validated air bag 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 test; in other words, how the force of the accident gets transmitted through the vehicle." *See* N.T. 433/5-11.

45. 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 of 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 crashworthiness 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.
> 2004 N.T. 445/22-450/11.

46. Mr. Phillips' findings mirror those of Defendant PDS, Stephen Potosnak, who confirmed similar findings at his inspection on April 28, 1998 (see Finding of Fact

number 53), after Plaintiffs retained counsel. If these findings were visible to Mr. Potosnak after the Plaintiffs retained counsel, it stands to reason the deficiencies were also visible to other PDS conducting inspections throughout the four month repair period.

47. Defendant did not warn or advise Plaintiffs about the condition of the vehicle 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 Plaintiffs.

48. Plaintiffs returned to the BRRP facility several times to have repair concerns addressed, initially because the head lights were not working and both front tires were wearing down to the metal bolts within a short time after the vehicle was returned.

THE LONG LITIGATION

49. In October 1997, Plaintiffs received a telephone call from David Wert, a former employee of the BRRP facility, who warned them of the structural repair failures.

50. Plaintiffs retained legal representation and an automotive consultant to inspect the repairs. The independent reviewer, Donald Phillips, PE, generated a report containing a section titled "Warning Possible Safety" which recited four concerns: Unrepaired Mechanical Damage Major, Unrepaired Structural Damage Major, Unrepaired Tire/Wheel Damage, and Welds Structural Poor Major.

On November 3, 1997, Plaintiffs' counsel faxed Mr. Witmer of the Defendant the following:

Please be advised that this office represents Daniel Berg in regard to a claim being presented against Lindgren Chrysler-Plymouth arising out of faulty repair work done at their facility.

It is my understanding that you are Mr. Berg's first party property damage adjuster for the claim arising out of this automobile accident.

Please direct all future communications regarding this claim through my offices. Please do not contact Lindgren Chrysler-Plymouth as your communications may have an impact on Mr. Berg's pending litigation against Lindgren. If Lindgren contacts you please direct them to my office and/or forward their correspondence to my office for further handling.

Please forward me a copy of your file including all maintenance records, bills, receipts, estimates and notes or correspondence between you and Lindgren Chrysler-Plymouth as it relates to this claim.

I am preparing a complaint to be filed against Lindgren and the Chrysler Corporation. I have retained an expert to examine the vehicle. If Nationwide requires an opportunity to examine the vehicle please advise.

Please call me so we might discuss this matter further.

51. On April 14, 1998, pre-complaint depositions were taken at which time Plaintiffs discovered, for the first time, that their vehicle was originally appraised as structural total loss due to a badly twisted frame. Defendant 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.

52. On April 28, 1998, Mr. Potosnak, a PDS, inspected Plaintiffs' vehicle at A.W. Golden's. The findings were documented in the claim log on April 30, 1998, as follows:

0100 ADVISORY COMMENTS: TECH MGR. – Berg, Daniel G. & Sharon E. REINSP PH TRUCK 4/28 AT AW GOLDEN'S AS PER REQUEST FROM BEV CARLSON AND BRUCE BASHORE. THIS WAS ARRANGED THROUGH PH'S ATTORNEY, I DID NOT DISCUSS TRUCK OR FINDINGS WITH PH. HAD TRUCK ON LIFT. RT FNDR HANGING OUT FROM REAR EDGE, RF MLDG HANGING LOOSE. HOOD GAPS UNEVEN ON BOTH SIDES. UPON LOOKING AT FRONT TIRES/WHEELS, LF IN SUBSTANTIALLY IN COMPARISON TO RF,

6/24/2814

WHICH IS EVEN WITH EDGE OF FNDR., (MAKES REAR APPEAR SHIFTED TO RIGHT). RF RAIL APRON AND RAIL NOT REPLACED, RT APRON STILL SPLIT IN SEVERAL AREAS. RT TRAIL STILL HAS DAMAGE NEAR SWAY BAR MOUNT. FAN BLADE CLOSER TO LS SIDE OF SHROUD THAN RS, APPEARS TO HAVE CONTACTED SHROUD AT SOME POINT AND BROKE SHROUD NEAR UPPER MOUNTING POINT ON RAD SUPT. AS VIEWED FROM REAR, APPEARS FRONT SHEET METAL SHIFTED TO LT. CONCLUSIONS, APPEARS UPPER BODY SWAY WAS NOT PULLED COMPLETELY BACK BEFORE REPLACEMENT OF PARTS BEGAN. REVIEWED WITH DENNIS AT SHOP SAME DAY 4/28, AND REQUESTED REVIDSED COPY TO SEE IF RT RAIL AND APRON REPLACEMENT WAS REMOVED. REC CALL FROM DOUG AT SHOP 4/29, ATTY HAS ALL PAPERWORK, HE WILL HAVE TO GET REVISIONS BACK FROM HIM. EXPLAINED FINDINGS TO DOUG, SUGGESTED COURSE OF ACTION TO SHOP. DOUG ASKED ME TO CALL GENERAL MGR GREG MILLER AS WELL. I CALLED AND EXPLAINED TO HIM AS WELL. GREG STATED HE HAS CALL INTO ATTY, WILL ADVISE ASAP. SPOKE WITH BRUCE BASHORE AND REVIEWED. WAITING FOR CALL BACK FROM SHOP WITH DECISION.

Mr. Potosnak was also a licensed appraiser. The inspection was performed at the direction of Bruce Bashore, Defendant's Claim Manager responsible for Blue Ribbon operations across the state of Pennsylvania.

53. At the same time that Mr. Potosnak raised these repair issues, he advised Mr. Bashore that the facility had not taken any further action to correct any of these repair defects, as of his inspection of April 28, 1998. Shockingly, no evidence was presented that anyone, anywhere had responded to these concerns from December 30, 1996 to when Defendant finally totaled the car and obtained possession and ownership. In other words, all these warnings of defects, not replacing key auto parts with new ones, and the underlying cited issues of crashworthiness of the "repaired" Jeep, from Defendant's own experts, failed to motivate Defendant to act either reactively or proactively to aid or protect its policyholder.

54. It took five years of litigation for Plaintiffs to learn that Mr. Potosnak had inspected the vehicle. It was still unclear when Mr. Potosnak did the inspection since there was no record of the inspection provided. Thus, Plaintiffs served Requests for Admissions from the Defendant seeking an admission that Mr. Potosnak secretly inspected the vehicle during a pre-suit inspection at the BRRP facility.

55. To support its denial to this request for admission, Defendant un-redacted the report which had been refused release by Defendant at all prior discovery. In other words, Defendant failed to include the report or even mention its existence in answers to all of Plaintiffs' preceding requests for discovery. The report documented that Plaintiffs delivered the vehicle to Mr. Potosnak for his inspection in April 1998.

56. Once the Potosnak Report was finally produced on May 5, 2003, it became clear that Defendant had been concealing its knowledge of the extensive structural repair failures since this lawsuit was filed on May 5, 1998. For five years, Defendant kept the report from discovery because it claimed that the report was protected from release by an attorney/client privilege. That was not a good reason for protection, but even if it were a legitimate protection, Defendant obviously was now willing to forget about that argument in order to show it had not secretly had the Jeep inspected during the repair period. If, in fact, it did have the secret inspection it would have defeated its initial defense that maybe the Lindgren body shop people had known about the fact that the Jeep could not be made safe by repairing it, but Defendant certainly did not know it was not safe to repair it.

57. 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; thus it was not and is not protected by attorney/client privilege.

58. Defendant's Answer to Plaintiffs' complaints was verified by Mr. Bashore. Despite Mr. Bashore's admissions (above), he denied in Defendant's answer filed to Plaintiffs' complaint their allegation of structural repair failures. His contrary answer filed refused to admit any repair issues. The Verification was expressly made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

59. The three year lease on Plaintiffs' vehicle was to expire on December 29, 1998. On December 24, 1998, Defendant wrote to Plaintiffs to inform them that it had purchased the vehicle.

60. In the 2004 jury trial, the jury found Defendant liable for fraud under Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL), 73 P.S. § 201-2(4)(xxxi).

61. Pursuant to court order, Defendant admitted, via verified response to Plaintiffs' Interrogatories of May 28, 2013, that the amount it paid its attorneys, to defend its handling of this claim, through post-trial motions for the jury trial in 2004, was $1,173,227.50. Defendant also paid an additional $110,602.19 in expert witness fees and other expenses, bringing total cost to defend the case to $1,283,829.69.

62. In its verified response, Defendant 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.

63. The total amount Defendant admits paying to defend is approximately $2.5 million plus about $150,000 in expenses and does not include amounts paid after April 24, 2013.

BAD FAITH

64. Plaintiffs allege Defendant 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 Defendant is a defense-minded carrier in the minds of the Plaintiff legal community. After countless hours devoted to this case, including reviewing 16 years of litigation, including its voluminous transcripts of testimony and the law, this court must agree.

65. In the trial before the prior judge, Defendant had approximately thirty redactions to Defendant's claim log which it asserted was protected under attorney-client privilege; however, many of these redactions were to log entries created before the litigation even started.

66. In *Bonenberger v. Nationwide Insurance Company*, 791 A.2d 378 (Pa. Super. 2002), the court found that since 1993 Defendant's representatives had been guided by the terms of its Pennsylvania Best Claims Practices Manual which contained the company's overall philosophy. Portions of this manual set forth the philosophy to

reduce the average claim payment to a level first consistent with then lower than major competitors and to be a "defense-minded" carrier (at 381). The Superior Court instructed Defendant to stop applying this strategy against its policyholders

67. The *Bonenberger* court stated that to succeed in a bad faith claim, the insured must present clear and convincing evidence that the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim. Bad faith in the context of insurance litigation has been defined as any frivolous or unfounded refusal to pay proceeds of a policy. It must be shown that the insurer breached a known duty (*i.e.*, good faith and fair dealing), through some motive of self-interest or ill will (at 380).

68. The *Bonenberger* court decreed that a claim must be evaluated on its merits alone, by examining the particular situation and the injury for which recovery is sought. 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." Thus, a company manual, which dictates a certain philosophy in claims handling may be relevant and useful in evaluating a bad faith claim (at 382).

69. James Nicholas Chett, Plaintiffs' expert in the handling of insurance claims, is retired from the insurance industry. He works part-time as an insurance claims and litigation consultant. He also represents his former employer, Alliance Insurance Company, at mediation and settlement conferences. At Alliance, Mr. Chett wrote the guide which sets forth defense counsel's practices and procedures for their activities and billing. As a consultant, he handled bad faith claims.

70. Mr. Chett opined that Defendant's conduct was reckless in handling this claim because it placed or allowed an unsafe vehicle to be placed on the highway. He stated that an insurer and a representative of an insurer have an obligation to make certain that vehicles are repaired and repaired safely.

71. Mr. Chett testified that it would have been reasonable with a car that was hit as badly as Plaintiffs' Jeep for Defendant to inspect the car and make sure that the repairs were properly done.

72. Mr. Chett stated that bad faith litigation is very expensive, time-consuming, and document intensive. Insurance companies try to discourage plaintiffs from becoming involved in bad faith litigation by fighting them on cases which they believe have a decent chance of winning.

73. In the case *sub judice*, Plaintiffs' underlying claim was meritorious. It is Mr. Chett's opinion that Defendant should not have defended the case the way it was defended. The exorbitant legal expenses show that there was an absence of control over its counsel's activities.

74. Mr. Chett testified that defending this type of case stretches a small law firm's money and time. The insurance carrier has the leverage in bad faith cases because it has unlimited financial assets and time. Generally, the insurance company will prevail over the long haul.

75. Mr. Chett did not feel that it was reasonable for Defendant to use all the assets that it had to delay this case. Defendant did not attempt to move the case to a

settlement or alternative dispute resolution even after the issuance of the Potosnak report or the Anderton report.

76. Mr. Chett testified that Defendant forgot about its insured, and the insured is the person to whom you owe a duty to discharge under the insuring agreement.

77. Defendant's claims strategy, as denounced by the court in *Bonenberger* in 2002, was implemented in 1993. Even if Defendant stopped this strategy as directed by *Bonenberger*, it could only have complied after it received the Superior Court's holding (in 2002). The facts in our case are directly in the period of 1993 to 2002. Plaintiff's Jeep crash was in 1996. Defendant's defense strategy was alive and well and operated per directives consistent with this philosophy all through the United States.

78. Defendant's said claims strategy stands alone as having been in full force and effected during the time period 1993 until it may have been stopped and changed by Nationwide at a later time, after 2002. However, this court finds Defendant was further motivated to repair rather than pay full replacement costs because of the 50% savings to Defendant to repair rather than replace the Jeep. The savings of approximately $12,500 when considered throughout the country for hundreds of other repair claims rather than replacement claims results in hundreds of thousands of dollars being saved by Defendant for each year that this strategy is in place. In addition, the payback to Defendant for parts and labor by each Blue Ribbon repair shop adds thousands of dollars of further motivation to repair, not replace, a policyholder's damaged or destroyed vehicle.

6/24/2014

79. Constance Foster, Defense's expert, explained the Scotched Earth Strategy and argued that the claims manual itself can be used against Defendant as evidence of bad faith. Page 191. She defined the Scotched Earth Strategy as when the defendants are attempting, through various mechanisms, to overwhelm the plaintiffs. Ms. Foster's position is that Plaintiffs put themselves in the difficult position of being overwhelmed by Dependent by filing and refiling eight amended complaints, five of which resulted in Defendant's Preliminary Objections being sustained by the court. However, this court finds that all eight complaints were filed before October 25, 1998. This litigation only began on January 23, 1998. Seventeen of the eighteen years of litigation occurred after the final amended complaint was filed.

80. After fully considering all of the credible evidence, this court makes a factual conclusion that Defendant implemented this documented strategy in a clear effort to price Plaintiffs out of their meritorious claim dispute, and/or conceal evidence necessary to satisfy the heightened burden of proof. The strategy is printed in Defendant'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 (i.e.: cases not exceeding $25,000.00). Create and reinforce a defense minded perception.

81. Defendant 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 either before or after it was instructed to do so by the court in *Bonenberger.* Instead, Defendant 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." Defendant has consistently argued only that the manual was discontinued without reference to the strategy and regardless, even if the strategy was stopped, it existed at least until after the 2002 *Bonenberger* court decision.

82. 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, has never been produced: 1) more than two photographs of the damaged Jeep taken at the time it was declared a structural total loss; 2) the September 10, 1996 appraisal declaring the Jeep a structured total loss was never produced. It was referenced in Defendant's claim file; 3) The BRRP documents used by Defendant to document the findings of its routine monthly inspections were never produced.

83. A fourth source of relevant evidence was also concealed by Defendant. The appellate court referenced that Defendant had spent $922,000 through 2004 to litigate this case rather than settling with its policyholder and that the cost of legal fees and expenses is a relevant issue determining bad faith. Defendant's release of discoverable evidence revealed that amount. However, on retrial before this court, Defendant was shown to have expended almost twice as much to defend the case. It failed to reveal $907,543 that was paid in addition to the $922,000 that the Superior

Court had concluded was relevant. It is found in a line item of Ex. 76 showing this additional payment made on October 6, 2004. It was not included anywhere in the total legal fees and expenses portion of Defendant's answers provided through discovery. It only came to light during the remanded trial before this court in December 2013 when Plaintiff's bookkeeper testified she found this additional entry for litigation defense cost from Defendant's books which had not been disclosed by Defendant despite all extensive discovery requests and requirements of disclosure.

84. Defendant 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. Plaintiffs had to file a Motion for Sanctions to get Defendant to produce any photographs of the subject vehicle. Specifically, when Plaintiffs served Defendant with a discovery request seeking all photographs, Defendant filed a Motion for Protective Order. The motion was denied as to photographs. Defendant then claimed no photographs existed! Plaintiffs filed a Motion for Sanctions attaching proof that photographs exist, and a second Order was entered mandating Defendant's compliance with its prior Order. Thereafter, Defendant produced only two photographs, both of poor quality.

85. Defendant's production of only two photographs, even after a motion for sanctions resulted in a second Order mandating compliance with the prior Order, is evidence of Defendant's continued application of its bad faith litigation strategy. Defendant'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 Defendant's BRRP; all participating BRRP facilities were required to provide Defendant with numerous photographs of the damaged vehicles to support and/or correspond to the appraisal being written and submitted to Defendant. Thus, this court concludes that there had to be more than two photographs of Plaintiffs' vehicle documenting how heavily damaged it was and the many repairs estimated to put it back together. At the depositions scheduled by Plaintiff for discovery early in this case, four of Defendant's high ranking employees testified that the *Bonenberger* tough defense procedures manual was still in full use in claims processing. However, at the first trial in 2004, all four testified under oath they were all mistaken - that the said producers' manual was discontinued.

Plaintiffs were fought by Defendant in every possible way. Defendant had no intent to amicably resolve this dispute. Clearly Defendant's philosophy was to not cooperate in any way with Plaintiffs' litigation and discovery rights.

ATTORNEY FEES

86. Defendant's attorneys were paid in excess of $2.5 million in timely and risk-free litigation fees and expenses. This does not include amounts paid from April 24, 2013 forward which leads this court to total in excess of $3,000,000 for defense rather than resolution of Plaintiff's claim.

87. On the other hand, Plaintiffs' attorneys undertook this case on a contingency fee basis. The high risk of losing the case was compounded by Defendant's concealment of evidence and its iron fisted litigation strategy of sending a

message to Plaintiffs' bar that no one can win in a small claim against Defendant; or even if they can win, they can ill afford the costs of matching litigation expenses with this big corporation.

88. Plaintiffs' attorneys have not yet been paid anything for their effort, expenses, and risk; they have funded this lawsuit for more than sixteen years at astonishing cost, risk, and exposure.

89. Given the above facts, in the interest of fundamental fairness this court is reluctant to award counsel fees to the Plaintiffs in any amount less than Defendant paid its own attorneys who were paid timely and without risk. This court has reviewed the Plaintiffs' fee petition, including the number of hours reasonably expended in prosecuting this complex litigation matter, as well as the fact that Plaintiffs' attorneys advanced all legal fees and costs, have not received any compensation, and were led through a murky, tumultuous sea of litigation facing deadly obstacles every stroke of the way. Their risk in taking this case and then staying with it when hit between the eyes by Defendant's insurmountable defense strategy would have resulted in most attorneys giving up a long time ago. Only an award for representation in this impossible enduring case is fair. It merits that Plaintiffs' counsel receive in compensation what Defendant launched at Plaintiffs to fight them for 18 years at every front.

90. Plaintiffs claim court costs in the amount of $82,941.06 through December 7, 2006.

CONCLUSIONS OF LAW

1. An insurance company has a duty to deal with its insured on a fair and frank basis, and at all times, to act in good faith. *Hillock v. Erie Ins. Exchange*, 842 A.2d 409 (Pa. Super. 2004). The duty of good faith originates from the insurer's status as a fiduciary for its insured under the insurance contract, which gives the insurer the right, *inter alia*, to handle and process claims.

2. In a bad faith case, the insured must prove that the insurer did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim. To constitute bad faith it is not necessary that the refusal to pay be fraudulent; however, mere negligence or bad judgment is not bad faith. The insured must also show that the insurer breached a known duty, such as the duty of good faith and fair dealing, through a motive of self-interest or ill will.

3. In insurance bad faith cases, the insured Plaintiffs must prove the insurers' bad faith by clear and convincing evidence, a higher burden than by preponderance of the evidence.

4. In the case sub judice, the evidence confirms that the vehicle was initially declared a structural total loss due, *inter alia*, to a twisted frame. Defendant directed that the vehicle be repaired and that a new appraisal, consistent with this direction be prepared replacing the initial one. Defendant also conspired with the body shop and its appraiser to take the vehicle, without Plaintiffs' knowledge or authorization, to another repair facility to attempt the structural repairs its designated BRRP facility was unable to

complete. These frame repair efforts failed. This fact was acknowledged by Defendant's automotive expert, Mr. Anderton. Mr. Potosnak clearly communicated to Defendant, and Defendant clearly chose to cover up that fact and not warn or provide notice to Plaintiffs of this known danger. Mr. Potosnak's said report was never voluntarily released to Plaintiffs, but after extensive discovery, request for admissions, and a request for sanctions, Defendant was ordered to release it five years later. Thus, the vehicle was never properly repaired and remained a structural total loss at the time this lawsuit was filed.

5. In refusing to acknowledge that the vehicle was a total loss, either before or after the frame efforts failed, Defendant sought to avoid paying $25,000 on the claim, which was the replacement value of the vehicle; instead, Defendant paid approximately $12,000 in a failed attempt to repair the vehicle. This strategy was communicated throughout the action by Defendant in processing Plaintiffs' claims. If the plan was to save $12,500 in this one case, how much was planned to be saved by Defendant on thousands of claims each year where it is economically the best business practice to repair rather than replace damaged vehicles? This violates the insurance regulations of the Motor Vehicle Physical Damage Appraiser Act, *inter alia*, requiring all damage be appraised on an individual claim basis, not governed by a specific policy or directive.

6. The standard under which punitive damages are measured in Pennsylvania requires an analysis of the following factors:

a. The character of the act;

b. The nature and extent of the harm; and

c. The wealth of the defendant.

7. These standards mirror the following three important guideposts identified by the United States Supreme Court:

a. The degree of reprehensibility of the defendant's conduct;

b. The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

c. The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

8. This court finds a high degree of reprehensibility. It is evident that Defendant knew that the vehicle was returned to Plaintiffs with hidden structural repair failures or in the alternative, Defendant did not care if the frame and all other repairs it *required* were done properly, by Lindgren's body shop. Both scenarios equate to acts of omission or commission in bad faith against the Plaintiffs.

9. This court finds that returning the Jeep to the Plaintiffs with a damaged frame was a safety risk of injury or death to its policyholders in the event of a collision. Shockingly, that very request that the Plaintiffs made of Defendant was never granted to Plaintiffs to benefit them. Ironically, it was finally granted by Defendant only to protect itself from future financial exposure, not to fully compensate Plaintiffs. Instead of replacing Plaintiffs' Jeep in the first place, which would have eliminated this matter from ever being litigated, Defendant replaced the damaged Jeep only after all lease payments were made by Plaintiffs to the bank.

Plaintiffs were not compensated for the down payment, nor were they compensated for the 36 lease payments. The automobile lease was paid off in December 1998 and Defendant at that time finally totaled the Jeep and removed the damaged Jeep off the street and made certain thereby that no third party would ever lease, buy, ride, or drive the dangerous vehicle again. If Defendant had not bought it and a collision occurred with the new owner and/or passengers and the Jeep had not been crashworthy as the Plaintiffs' expert evidence and commonsense logically show, Defendant's exposure to liability and damages to that innocent third party would have been astronomical. Defendant ultimately totaled the Jeep, not to benefit its policyholder or even for the reason that Defendant's lawyer claims. Defendant removed the bent frame Jeep from circulation only to protect itself from further liability and not to preserve the evidence for litigation.

10. The potential harm to the Plaintiffs was serious injury or death.

11. Concealing structural repair failures is reprehensible.

12. In addition to violating the UTPCPL, as determined by the jury verdict, Defendant's conduct also violated the Unfair Insurance Practices Act which provides penalties for conduct practiced in the case *sub judice* by Defendant, such as forcing a policyholder to institute litigation as the only possible means to receive proper policy benefits.

13. The Pennsylvania Best Claims Practices Manual was put into effect in 1993. Plaintiffs' Jeep was damaged in 1996, and litigation in the case *sub judice* began in 1998. The Superior Court filed the *Bonenberger* decision in 2002. Thus, at the time

of Plaintiffs' damages, the manual was still in effect, and this court finds that its policies were used against Plaintiffs and continued after the *Bonenberger* decision was announced. As Mr. Chett remarked in his testimony, there were at least two events during the litigation which he labeled as "bench marks" when defendant should have offered a reasonable settlement or taken the case to alternative dispute resolution: after the issuance of the Potosnak Report and after the issuance of the Anderton Report. Instead of doing this, Defendant continued its defense and continued to hide evidence under the guise of attorney/client privilege.

14. Nationwide has argued that no one was physically injured and thus a significant punitive damage award is not warranted. Fortunately, no one was killed or injured; but Nationwide knew there could 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 $2.5 million in a failed attempt to cover-up its knowledge of the failed repairs and to price the Bergs' out of litigating their meritorious claim dispute.

15. According to the undisputed evidence, Defendant has more than $14 billion in Statutory Surplus, a measure of financial strength as evaluated by regulators and rating agencies. The testimony reveals that Defendant's financial publications

revealed that the $14 billion is three times the amount required by state regulators. Defendant therefore has $9 billion in excess Statutory Surplus beyond that required by state regulators and therefore is a very financially strong business.

16. The parties stipulated that a punitive damage award of $18 million would not impact its financial stability.

17. An $18 million award would equal 0.2% of the $9 billion in excess Statutory Surplus.

18. This court finds that an $18 million punitive damage award, if entered, would have little or no impact upon Defendant's financial stability and, therefore, would not be too high that it would negatively impact on Defendant, but that amount would do what is logically sound: to punish Defendant and warn other insurance companies to follow the law.

19. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation and indeed in some cases of exceptional success an enhanced award may be justified." *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

DISCUSSION

We live in a civilized society in which we solve disputes in a civilized manner through our courts of law. We cannot always level the playing fields of our playgrounds, but we must have a level playing field in our courts. The reality is that the courts may be the only place where such rules that guarantee a level playing field are strictly enforced. If we cannot achieve fair resolutions in our courts, anarchy with retaliation

and retribution will rule the day. Instead, civil disputes must be resolved civilly-not by bullying, economic strength, or by self-help measures and just compensation must be ordered.

Although a crime is a wrong against society that society itself is compelled to prosecute and resolve, a civil harm is a wrong against the individual which may or may not be prosecuted to obtain justice. Society provides the laws, the means, and the venue, but it is up to the victim. Unlike crimes where the victim may or may not want justice but society insists on action being taken, a civil wrong may or may not be pursued; that decision is up to the victim or the victim's family.

If the victim wants to forgive the wrongdoer that is his or her choice, not society's decision. On the other hand, for criminal wrongs, it is best for society itself to pursue prosecuting those criminal acts, irrespective of the victims' desires for relief. The distinction lies in society's valuing justice. The lawmakers have distinguished criminal offenses from civil wrongs by examining (1) the amount and degree of the harm, (2) the culpability of the wrong doer -- whether the harm caused was intentional or resulted from defendant's negligence, and (3) what society wants to accomplish, i.e., to what extent is this type of conduct in need of "guaranteed" future prevention for both this defendant and others to protect society.

Thus, society, through it lawmakers, prioritizes criminal conduct over civil negligence and encourages the justice of civil relief to take place not at society's expense but by the plaintiff himself paying for all the means to prosecute the case. This is not done for criminal behavior because the people's tax dollars pay for the police and

their tools to investigate and bring criminal charges; society even pays for the legal fees of attorneys to prosecute the case. Justice in criminal conduct is society's highest priority. The victim does not bear any expense of paying the costs to file, nor does he or she need to pay for legal representation to prosecute. This system has developed this way over time because a civil wrong is an injustice against the individual while a crime is an act against society and is prosecuted by society.

Criminal and civil have different burdens of proof placed on the moving party. In civil, the plaintiffs prove negligence, causation, and ultimate damages, and award the amount of compensation that is needed for the injuries the defendants caused to the victims to make them whole. A civil plaintiff meets this burden by a tipping of the scales of justice ever so slightly in favor of the plaintiff over the defendant. This is a much lesser burden than a finding of guilt beyond a reasonable doubt which is required of the state's attorney in a criminal prosecution.

The remedies of relief also differ greatly between a civil and a criminal case. Our lawmakers have included punishment as a possible consequence of criminal behavior. Punishment includes fines and costs, imprisonment for durations of time related to the gravity of the offenses, and, even in some cases, the forfeiture of the life of the person who committed the crime by execution. Other criminal penalties include monetary restitution for losses, probation in lieu of jail time, house arrest, etc. Civil penalties are imposed in the spirit of making the victim whole for his or her losses and include compensation for the loss of wages, property damage, the loss of enjoyment of life, and the pain and suffering caused by the defendant's acts.

There are some types of damages that are allowed in special civil cases to send a message by punishing the defendant for egregious conduct that rises above simple negligence. These are exemplary damages to prevent this type of conduct from ever again occurring by the defendant or anyone else. Society sends a message to warn all people and institutions that if they cause similar damage by the same type of egregious behavior, they are going to pay dearly. The goal is to punish the wrong doer and to motivate everyone to make certain that it never happens again.

Punitive damages are permitted only in special cases where absolutely merited. The burden of proof is much higher than by the preponderance of the evidence, which is the burden in civil negligence or contract cases but not as high as proof beyond a reasonable doubt, the burden in criminal cases. Consequently, the importance of awarding punitive damages is great. Punitive damages, when merited, serve a high purpose and are a special relief or punishment rarely applied in our system of jurisprudence. It is exemplary of the highest interest that society has in the civil law and approaches criminal law in its weight in the prosecution of appalling and shocking behavior. It is sometimes the only type of justice available to deter powerful entities from using their position of strength to defeat the lesser party only because that party cannot compete on the same level as the giant. It is the epitome of leveling the unbalanced playing field.

In our case, Nationwide strong armed its own policyholder rather than negotiating in good faith to compensate Plaintiff for the loss suffered in the automobile collision. Plaintiffs paid innumerable premiums to Defendant in order to be covered and

represented in cases such as this. Defendant did not compensate Plaintiffs for their losses. In fact, Defendant applied extensive examples of bad faith in failing and refusing to disclose vital information to its policyholder and violated the rules of civil procedure by the same conduct with regard to discoverable documents and things relevant to the litigation. What Defendant managed to do was send the ultimate message to Plaintiffs, their attorney, and the Plaintiffs' bar in smaller cases of $25,000 or less. It screamed to the litigation world that it is "a defense minded carrier in the minds of the plaintiff legal community." It fully accomplished its goal of broadcasting its litigation avoidance strategy. Simply put, what Plaintiff, and more importantly, what lawyer in his right mind, will compete with a conglomerate insurance company if the insurance company can drag the case out 18 years and is willing to spend $3 million in defense expenses to keep the policyholder from getting just compensation under the contract. Its message is 1) that it is a defense minded carrier, 2) do not mess with us if you know what is good for you, 3) you cannot run with the big dogs, 4) there *is* no level playing field to be had in your case, 5) you cannot afford it and what client will pay thousands of dollars to fight the battle, 6) so we can get away with anything we want to, and 7) you cannot stop us.

Sadly, Defendant did wear down the Plaintiffs. There will be no further litigation because while big corporations live forever, not so for the little policyholder. Mrs. Berg will not have the opportunity to continue this litigation should Nationwide appeal this decision. More importantly, she will never see the case concluded and she will never

receive her due justice. After years of fighting for her life against the ravenous disease of cancer, she died just last month.

In accordance with the forgoing opinion, this court enters the following Verdict:

DANIEL BERG and SHERYL BERG, Plaintiff	: IN THE COURT OF COMMON PLEAS : OF BERKS COUNTY, PENNSYLVANIA
VS.	: CIVIL ACTION-LAW
	: NO. 98-813
NATIONWIDE MUTUAL INSURANCE COMPANY, Defendant	:

VERDICT

AND NOW, this 21 day of June, 2014, after due consideration of Defendant's unfounded refusal to pay a valid claim because it was not economically advantageous to it, the risk of harm to Plaintiffs and the public by allowing a structurally unsound vehicle to be operated and travelling on public roads, and the tremendous obstacles, including concealment of evidence, erected by Defendant which forced Plaintiffs and their counsel to endure more than eighteen years of litigation to achieve justice, this court Orders as follows:

1. Judgment is entered in favor of plaintiffs, Daniel Berg and the late Sheryl Berg and/or the Estate of Sheryl Berg, and against defendant, Nationwide Mutual Insurance Company, Inc., on the bad faith claim under 42 Pa. C.S.A. § 8371.

2. In accordance with this statute, this court awards the following damages to be paid by Defendant to Plaintiffs:

a. Interest on the amount of the claim from the date the claim was made by Plaintiffs in an amount equal to the prime rate of interest plus 3%.

b. Punitive damages in the amount of $18 million.

c. Court costs and attorney fees of $3 million.

BY THE COURT:

JEFFREY K. SPRECHER, J.

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