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After crash, a long, bruising court battle

BY THE NUMBERS

\$25,000

Cost of replacing the damaged Jeep.

\$3M

Amount Nationwide spent to defend itself from a 1998 claim.

\$18M

Punitive damages.

16-year legal fight ends in judge's scorn and a record judgment against auto insurer.

By Craig R. McCoy
INQUIRER STAFF WRITER

It was a nasty car crash, but not an extraordinary one.

Sherri Berg's Jeep Grand Cherokee was hit hard by a car as she pulled onto a highway. The vehicle spun four times and struck a pole, but no one was hurt.

What was extraordinary was the epic legal fight that followed, pitting a father-and-son law firm in Chester County against an industry giant, Nationwide Insurance.

Nearly 20 years after the accident,

that fight climaxed last month with a court ruling that castigated Nationwide and slammed it with \$18 million in punitive damages.

Experts say it was the largest punitive award ever handed down in Pennsylvania in a suit alleging "bad faith" by an insurer.

The judge in the case determined that Nationwide spent more than \$3 million to defend a claim over a Jeep it could and should have replaced for \$25,000.

He found that the Jeep remained unsafe even after repairs.

Rather than replace it, he said, Nationwide had engaged in an extensive cover-up, hiding crash photos and other relevant information from Berg and her husband.

He said Nationwide followed a written "litigation strategy" that called for it to fight smaller claims tenaciously — even though such a strategy had been denounced by Pennsylvania courts as "unethical and unprofessional."

And Judge Jeffrey K. Sprecher of Berks County concluded his opinion See **CRASH** on A14



Sherri Berg's
Jeep Grand Cherokee was hit by another car.

CRASH from A1

with a caustic list right out of David Letterman's "Top Ten" that he said was Nationwide's message to customers who sued — and to their lawyers:

► "Do not mess with us, if you know what is good for you."

► "You cannot run with the big dogs."

► "There is no level playing field to be had in your case."

► "You cannot afford it and what client will pay thousands of dollars to fight this battle?"

► "So we can get away with anything we want to."

► "You cannot stop us."

Nationwide insists that no one at the firm ever believed the car was unsafe after it was repaired.

It said Berg and her husband, Daniel, put 27,000 more miles on the car after the post-accident repairs — and continued to drive even after a whistle-blower had warned them the car was dangerous.

Plaintiffs faulted

In a statement Friday, a spokesman for Nationwide said the company had not acted in bad faith.

In the company's latest legal filing, lawyer Robert C. Heim blamed the family's lawyers for delays in the case, saying they had filed a blizzard of unnecessary motions and wasted time in a failed effort to turn the lawsuit into a class-action case.

As for the litigation strategy, Nationwide said it had been discontinued before Sherri Berg's crash, and that it had applied only to accidents with injuries.

Sprecher, who has served on the bench since 1992, disagreed. He said the tough litigation strategy was "alive and well" at the time of the crash.

"Nationwide was willing to risk the Bergs' lives to save itself money on a collision claim," he said.

He said the company had bet on the idea that "what plaintiff, and more importantly, what lawyer in his right mind" would pursue such a case year after year?

The lawyers in this marathon were Benjamin J. Mayerson and his father, Hy. After years without a payment, they now stand to profit handsomely. The judge awarded them \$3 million in fees, on top of their share of the punitive award.

Benjamin Mayerson, 46, the lead lawyer in the case, kept it going almost from the moment he got his law degree, despite many reversals. What sustained him?

"It was definitely a visceral anger at what they were doing, and a belief that what was right was right," he said.

His father, 77, put it more simply.

"I'm a lawyer, and that's my job," he said last week.

'Very severe'

It all began Sept. 4, 1996, when a Chevrolet Suburban plowed into the Bergs' new SUV, not far from their home near Reading.

How bad was the damage? "Very severe," Sherri Berg testified later. "If you are hit by a Suburban, which is a large vehicle, there's going to be substantial damage, I feel."

Still, Berg testified, she felt good that she and her husband were insured by Ohio-based Nationwide, as her parents had been before her. At trial, she explained, "Nationwide is on your side, all of that. I trusted it as well as my parents did."

What the Bergs did not know until much later was that the manager of the repair garage had initially declared the car totaled. Its frame was bent, he found; it should be junked.

Nationwide had a different opinion. Without telling the Bergs, it demanded and got a second appraisal that called for the Jeep to be repaired — at a cost of \$12,500, half the cost of sending the Bergs a check to replace the vehicle.

Because the frame could not be straightened and bolt holes on the Jeep's twisted frame could not be lined up, mechanics welded the frame back together. Because the engine would not

SOURCE: Court documents, *Berg v. Nationwide*

drop back in properly, they had to cut away part of a cover so the fan would not strike it.

In court, Sherri Berg testified that the car never seemed right again. A slight turn of the wheel would provoke a loud knocking. After a month on the road, "the tires were literally down to the metal," she testified.

Still, the Bergs stuck with the car. Then they got a phone call from a stranger — David Wert, a former mechanic at the garage who had recently been fired.

"I knew the vehicle wasn't repaired properly," he testified later. "And I knew if it was in a major accident, it would come apart."

In a recent interview, Daniel Berg, 63, recalled: "I got that call, and I got concerned. I thought — great, I am driving my wife and my children and my grandchildren in this thing."

In 1998, the Bergs sued.

That same year, they made the last of 36 monthly lease payments on the Jeep. And after that, as Sprecher noted in his opinion, Nationwide "suddenly changed its mind [and] totaled the car," buying it from a bank for \$18,000.

Nationwide said it bought the car so it could reexamine it as evidence. The judge took a darker view.

"If [Nationwide] had not purchased the Jeep, it risked the Jeep being leased or purchased by an entirely new party," he wrote.

"If the Jeep was not safe on the road, this new innocent party would have exposed the defendant, not the Bergs, to further liability in the event of another collision because the Jeep was not repaired properly. It was not crash-worthy."

After the Bergs put Nationwide on notice that they were planning a lawsuit, the insurer had a damage specialist examine the car.

Among other findings, the specialist said the left and right front wheels were not aligned and the frame remained damaged. Parts that were to be replaced had not been.

Sprecher said the expert's 1998 review found "extensive structural repair failures," but none of his findings were communicated to the Bergs until 2003 on the ground that they were attorney/client material.

Yet in court, a Nationwide official said the assessment was part of a routine claims file, not attorney work product.

While conceding that the specialist found improper repair work, Nationwide said that his report did not conclude the car was hazardous.

In Sprecher's view, Nationwide should have told the Bergs the car was not safe to drive.

"Instead," the judge said, "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."

A damaging document

In the lawsuit, the Mayersons, joined by longtime firm lawyer Margaret Connors, drew upon a damaging Nationwide document turned up in another suit against the firm, by a man hurt in an auto crash in Allegheny County.

This was an appendix to Nationwide's "Pennsylvania's Best Claims Practice Manual." In the other case, a judge in Allegheny County called the document "an embarrassment."

Among other points, the appendix said the Nationwide "claim handling philosophy" was to seek "continued reinforcement of Nationwide being a 'defense-minded' carrier in the minds of the plaintiff legal community."

The memo, dated 1993, three years before the Berg crash, said the firm aimed at "litigation

avoidance" by adopting "a more aggressive posture in handling cases of lesser probable exposure (i.e., cases not exceeding \$25,000)."

High-powered help

According to evidence uncovered during the suit, Nationwide spent more than \$3 million defending itself in the 16-year legal fight with the Bergs, including hiring Constance Foster, a former Pennsylvania insurance commissioner, as an expert witness. Foster was paid about \$725 an hour.

Citing the millions spent and the litigation memo, Sprecher found that Nationwide had engaged in a "clear effort to price plaintiffs out of their meritorious claim dispute."

He noted that the insurer could have totaled the car for \$25,000, but instead chose to repair it for half that.

"The savings of \$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," the judge wrote.

Daniel Berg praised the Mayersons for sticking with the case.

"I can see any other attorney being done 15 years ago," he said. "Ben saw something in this — and the more he dug, the more he found."

Berg's regret, though, is that Sherri Berg never knew the family won the victory. She died of cancer at age 62 on April 25, seven weeks before the ruling.

On Friday, Nationwide's lawyers appealed. They filed a new round of legal papers asking Sprecher to reverse his decision.

✉ cmccoy@phillynews.com
 ☎ 215-854-4821 📧 @CraigRMcCoy