235 A.3d 1223 (Mem)
Supreme Court of Pennsylvania.

Daniel BERG, Individually and as the Executor of the Estate of Sharon Berg a/k/a Sheryl Berg, Appellant
v.
NATIONWIDE MUTUAL INSURANCE COMPANY, INC., Appellee

No. 33 MAP 2019
|
Argued: November 21, 2019
|
Decided: August 25, 2020

Appeal from the Order of the Superior Court at No. 713 MDA 2015, dated June 5, 2018, Reconsideration denied August 8, 2018, Vacating the April 21, 2015 Judgment entered of the Berks County Court of Common Pleas, Civil Division, at No. 98-813 and Remanding. Jeffrey Sprecher K., Judge

Attorneys and Law Firms

Amy Bach, Esq., Meghan Katherine Finnerty, Esq., Offit Kurman, P.A., Plymouth Meeting, for United Policyholders, Amicus Curiae.

A. Lauren Carpenter, Esq., Marc J. Sonnenfeld, Esq., Morgan Lewis & Bockius LLP, Philadelphia, for The Pennsylvania Chamber of Business and Industry, Amicus Curiae.

Scott B. Cooper, Esq., Schmidt Kramer, P.C., Harrisburg, James C. Haggerty, Esq., Haggerty, Goldberg, Schleifer & Kupersmith, P.C., David Samuel Senoff, Esq., First Law Strategy Group, LLC, Philadelphia, for The Pennsylvania Association for Justice, Amicus Curiae.

Steven Burgess Davis, Esq., Karl Stewart Myers, Esq., Stradley, Ronon, Stevens & Young, LLP, Philadelphia, for Ins. Federation of PA, American Property Casualty Ins. Assoc., National Assoc. of Mutual Ins. Cos., Amicus Curiae.

Kenneth Robert Behrend, Esq., Pittsburgh, Benjamin Jay Mayerson, Esq., Pottstown, for Daniel Berg, Appellant.

Michael Scott Doluisio, Esq., Robert C. Heim, Esq., Jeffrey Johnston Masters, Esq., Ellen Louise Ratigan, Esq., Dechert LLP, Philadelphia, for Nationwide Mutual Insurance Company, Appellee.

ORDER

PER CURIAM

AND NOW, this 25th day of August, 2020, the Court being divided in a fashion which prevents a majority disposition, the appeal is DISMISSED. The application to file a post-argument submission is DISMISSED as moot.

Justice Donohue did not participate in the consideration or decision of this matter.

OPINION IN SUPPORT OF REVERSAL

JUSTICE WECHT

Twenty-four years ago, Sharon Berg was involved in a collision while driving a vehicle insured by Nationwide Mutual Insurance. Although there were no injuries, the vehicle sustained extensive damage. After a botched repair job, the vehicle remained uncrashworthy. Yet Nationwide knowingly permitted its insured to continue driving this vehicle, while refusing to acknowledge what it already knew: that the repairs had failed. [1] Sharon and her husband, Daniel Berg, eventually sued Nationwide for insurance bad faith. *See* 42 Pa.C.S. § 8371. After three trials and multiple appeals, the trial court made extensive factual findings and legal conclusions to support a judgment in bad faith against Nationwide. The Superior Court reversed, finding no record support for the trial court's judgment. The Bergs appealed to this Court. Being divided in a fashion which prevents a majority disposition, this Court is dismissing the Bergs' appeal. Because we would find ample evidentiary support for the trial court's judgment, we would reverse the order of the Superior Court and remand to the Superior Court for consideration of Nationwide's outstanding appellate issues.

I. Background

The genesis of this lengthy litigation was a car accident on September 4, 1996, when Sharon was driving a Jeep Grand Cherokee that she leased and which Nationwide insured. The Nationwide policy covered losses caused by collision, and obligated Nationwide to "repair or replace [the] auto or its damaged parts." [2] After contacting Nationwide to report the

accident, the Bergs took their damaged vehicle to Lindgren Chrysler-Plymouth, Inc. ("Lindgren"). Lindgren was an established participant in Nationwide's direct repair program, known as the "Blue Ribbon Repair Program" ("BRRP").

Through the BRRP, Nationwide entered into a confidential contractual relationship with participating shops like Lindgren, with Nationwide receiving a discount on parts and other cost savings. In exchange, Nationwide would refer its policy holders to contracted shops participating in the BRRP for appraisal and repair. The program purports to benefit policy holders as well, because shops participating in the BRRP provide both appraisals and repairs without the need for the customer to take the vehicle from one place to another. A Blue Ribbon appraisal, from a Blue Ribbon repair facility, is backed by Nationwide's Blue Ribbon Guarantee. N.T., 6/5/2007, at 35; R.R. 1964a.

After four months of repairs, Lindgren returned the Jeep to the Bergs. Right away, the Bergs noticed problems with their vehicle, prompting them to return to Lindgren several times to remedy structural issues that Lindgren had not resolved. Although Lindgren assured them that it had corrected the problems, this was not the case.

In October 1997, the Bergs received a telephone call from David Wert, a former employee of Lindgren. Wert reported that the Lindgren employees who worked on the Jeep may not have repaired the Jeep's structural failures. Alarmed by this revelation, as well as the repair issues they had experienced, the Bergs retained counsel and prepared to file suit against Lindgren. On November 25, 1997, Donald Phillips inspected the Jeep on behalf of the Bergs, and, on December 23, 1997, Charlie Barone conducted a second inspection for the Bergs. Both inspections concluded that the Jeep was not safe to drive given the inadequate structural repairs. On January 23, 1998, the Bergs filed a writ of summons against Lindgren. In March of 1998, the Bergs purchased another vehicle to drive, having come to understand that the Jeep was unsafe.

During pre-complaint discovery, the Bergs deposed employees of Lindgren and learned that Doug Joffred, the appraiser assigned to assess the Jeep, initially had declared that the Jeep was a structural total loss due to its twisted frame. It was only when Nationwide's claim representative, Doug Witmer, was dispatched to review this assessment that Nationwide decided to repair, rather than replace, the damaged Jeep. Also unbeknownst to the Bergs, Nationwide had moved the Jeep to another facility to attempt structural repairs. On April 28, 1998, Bruce Bashore, who managed statewide BRRP operations for Nationwide, had the Jeep inspected by one of Nationwide's property damage specialists, Stephen Potosnak. Potosnak documented extensive structural repair failures in a report in Nationwide's claims log.[3] Nationwide did not disclose the Potosnak report to the Bergs or inform them of the structural defects he observed.

On May 4, 1998, the Bergs filed suit against Nationwide and Lindgren. As to Nationwide, the complaint raised claims sounding in contract, negligence, fraud, civil conspiracy, insurance bad faith,[4] and pursuant to the Unfair Trade Practices and Consumer Protection Law ("UTPCPL").[5]

These claims arose from Nationwide's handling of the Bergs' first-party collision claim. In particular, in their final amended complaint, the Bergs alleged that, after the accident, Nationwide acted in bad faith in not effectuating "the prompt, fair, and equitable settlement of [the Bergs'] claim where [Nationwide's] statutory and contractual duty to do so is reasonably clear." Eighth Amended Complaint ¶ 93; R.R. 609a-10a. According to the Bergs, Lindgren initially appraised the Jeep as a structural "total loss." *Id*. ¶ 13; R.R. 581a. The Bergs averred that Nationwide interfered with the total loss appraisal and later returned the Jeep despite known structural repair deficiencies that left the Jeep in a dangerous condition. *Id*. at ¶¶ 15-18, 26, 27; R.R. 581a-582a, 584a.

After the Bergs filed their complaint, Bashore requested the opportunity to have an independent expert inspect the Jeep. Implying that he was not already aware of repair deficiencies notwithstanding the Potosnak report, Bashore assured the Bergs that, if this inspection revealed problems, Nationwide would have the problems corrected or, if the Jeep could not be repaired, that it would purchase the vehicle. 2004 Tr. Ex. 15 (letter dated 5/19/1998); R.R. 1891a.

On August 21, 1998, Nationwide's expert, William Anderton, conducted a visual inspection of the Jeep, and confirmed that the Jeep had not been repaired adequately. Because Anderton was unable to complete a full inspection, counsel for the Bergs and Nationwide began to discuss (and to disagree), about what to do with the Jeep when the Bergs' lease expired in December 1998. Nationwide indicated its intent to purchase the Jeep so that its experts could complete a full inspection. Counsel for the Bergs, concerned about Nationwide's willingness to preserve the integrity of the Jeep and to make it available for inspections by the Bergs, sought assurances from Nationwide about the Jeep's storage. Meanwhile, Nationwide sent a check

for $18,000, representing the actual cash value of the Jeep at that time, to Summit Bank, the title holder. The Bergs' counsel, remaining unsatisfied with Nationwide's willingness to preserve the integrity of the Jeep, indicated that the Bergs may want to exercise their option to purchase the Jeep. Nationwide sent a letter to Summit Bank, in which it insisted that Summit Bank honor Nationwide's purchase, and threatened legal action.

After Nationwide purchased the Jeep, the parties agreed that they would split the storage costs. On April 20, 1999, Anderton completed a full inspection of the Jeep on behalf of Nationwide. Like Potosnak, Anderton confirmed that the Jeep's primary structural components remained significantly misaligned with no identifiable benefit from Lindgren's structural repair attempts. Notwithstanding the Potosnak report and Anderton's two inspections, Nationwide filed an answer to the Bergs' complaint on January 20, 2000, denying allegations that the vehicle was unsafe.

In 2004, the trial court bifurcated the trial. The claims for common law fraud, conspiracy, and liability under the UTPCPL proceeded to a jury trial before Judge Stallone, while the trial court reserved the bad faith claim against Nationwide for a bench trial. Following several days of testimony, the jury found by clear and convincing evidence that Nationwide had violated the UTPCPL by "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201-2(4)(xxi). The jury reached a defense verdict on the common law fraud and civil conspiracy counts, and awarded damages of $1,925 against Lindgren and $295 against Nationwide.

In 2007, the trial court held a bench trial on the insurance bad faith claim. At the conclusion of trial, the trial court granted a directed verdict for Nationwide based upon the court's mistaken belief that the case did not involve an "action arising under an insurance policy" as required by Section 8371. Rather, according to the trial court, the action arose under Nationwide's BRRP, which, the court believed, was not part of Nationwide's automobile insurance policy. Further, the trial court held that the jury's verdict in the Bergs' favor on their UTPCPL claim against Nationwide was not sufficient evidence, in and of itself, to support a finding of bad faith. [6]

Meanwhile, Nationwide sought permission from the trial court to dispose of the Jeep, asserting that it no longer held any evidentiary value. The trial court permitted the disposal, agreeing with Nationwide and also observing that the Bergs had not paid their half of the storage fees.

On appeal, the Superior Court vacated and remanded for a new trial on the bad faith claim, holding that the trial court erred in granting a directed verdict for Nationwide. *Berg v. Nationwide Mut. Ins. Co.*, 44 A.3d 1164, 1176-70 (Pa. Super. 2012) ("*Berg I*"). Contrary to the trial court's opinion, the Superior Court believed that the Bergs' bad faith claim was premised upon Nationwide's failure to comply with its contractual obligations under the insurance contract, including the obligations of good faith and fair dealing. *Id.* at 1172. The insurance policy obligated Nationwide to repair damage "caused by collision or upset," and the BRRP was one method for Nationwide to fulfil this contractual obligation. *Id.* at 1173. Unlike the trial court, the Superior Court held that there was nothing to suggest that the Bergs' participation in the BRRP would constitute a waiver of the Bergs' right to assert a claim under the policy. *Id.*

The Superior Court further held that, under Section 8371, a plaintiff may attempt to prove bad faith by demonstrating that the insurer violated related statutes and regulations. *Id.* at 1174. The Bergs contended that Nationwide violated two statutory provisions: the catchall provision of the UTPCPL, 73 P.S. § 201-2(4)(xxi), and the Pennsylvania Motor Vehicle Physical Damage Appraiser Act, 63 P.S. §§ 861-63 ("Appraiser Act"). The Superior Court agreed with the Bergs that the jury verdict in their favor on the UTPCPL claim constituted "*some* evidence of bad faith conduct by Nationwide," 44 A.3d at 1175 (emphasis in original), but acknowledged that the probative value of this evidence "may be somewhat limited" because the jury was not asked to specify what conduct by Nationwide it found to be fraudulent or deceptive under the UTPCPL. *Id.* Nevertheless, such evidence of bad faith was sufficient to preclude entry of a directed verdict in Nationwide's favor. *Id.*

Examining the record, the Superior Court found that much of the Bergs' evidence satisfied the definition of bad faith under Section 8371. *Id.* at 1176. The Superior Court directed that, upon remand, the Bergs should be permitted to introduce evidence of Nationwide's litigation strategy to support their claim of bad faith. *See* *Bonenberger v. Nationwide Mut. Ins. Co.*, 791 A.2d 378, 381-82 (Pa. Super. 2002) (affirming the award of bad faith damages for conduct that included the use of an internal practice manual detailing aggressive

litigation tactics by Nationwide that were designed to create a perception of Nationwide as a "defense-minded carrier" within the legal community).

Upon remand for a new trial on the bad faith claim, the case was assigned to Judge Sprecher. In the interest of expedience, the parties agreed that Judge Sprecher would read the testimony from the 2004 and 2007 trials, rather than recalling those witnesses who had already testified. In December 2013, Judge Sprecher received numerous additional exhibits and presided over three more days of testimony. The witnesses included Nationwide's liability expert, Constance Foster, two witnesses to testify about Nationwide's attorney's fees, and an expert witness for the Bergs to testify regarding damages.

On June 21, 2014, Judge Sprecher entered judgment in favor of the Bergs and awarded $18 million in punitive damages and $3 million in attorney's fees. Nationwide filed a post-trial motion seeking entry of judgment in its favor notwithstanding the verdict ("JNOV"), or a new trial. The trial court denied the motion.

On appeal, the Superior Court reversed. *Berg v. Nationwide Mut. Ins. Co.*, 189 A.3d 1030 (Pa. Super. 2018) (*Berg II*). The majority granted JNOV to Nationwide, finding that Nationwide did not act in bad faith because Nationwide's duty under the policy was limited to paying for repairs to the Jeep; Nationwide had no duty to inspect Lindgren's repairs for quality; and there was no evidentiary support for the trial court's award. In particular, the Superior Court found insufficient evidentiary support for the trial court's findings that Nationwide vetoed Lindgren's initial total loss appraisal in order to save money; that Nationwide forced Lindgren to repair the Jeep knowing that it could not be restored to its pre-accident condition; that Nationwide knowingly allowed Lindgren to return the unsafe and uncrashworthy Jeep to the Bergs; or that Nationwide's conduct during the course of litigation was further evidence of Nationwide's bad faith. Judge Stevens dissented, finding "ample evidence" to support the trial court's award. *Id.* at 1061 (Stevens, J., dissenting). On March 29, 2019, the Court granted allowance of appeal. [7]

II. Standard of Review

We begin with the well-established proposition that the fact-finder is free to believe all, part, or none of the evidence, and to assess the credibility of the witnesses. *Commonwealth v. Johnson*, 542 Pa. 384, 668 A.2d 97, 101 (1995). Questions about inconsistent testimony and motive go to the witnesses' credibility. *Commonwealth v. Boxley*, 575 Pa. 611, 838 A.2d 608, 612 (2003).

The standard of review for an appellate court is an abuse of discretion. "If the factual findings are supported, appellate courts review to determine if the trial court made an error of law or abused its discretion." *In re Adoption of S.P.*, 616 Pa. 309, 47 A.3d 817 (2012). With respect to the trial court's factual findings on appeal from a bench trial, the appellate court "must attribute to them the same force and effect as a jury's verdict." *Rizzo v. Haines*, 520 Pa. 484, 555 A.2d 58, 61 (1989). In doing so:

> [W]e view the evidence and all reasonable inferences therefrom in the light most favorable to the ... verdict winners. We will only upset those findings if there is insufficient evidence, or if the trial court committed an error of law. In reviewing the findings, the test is not whether we would have reached the conclusion of the trial court, but rather whether we reasonably could have reached the same result. We will not substitute our judgment for that of the trial court.

Id.

When the trial court sits as finder of fact, appellate courts defer to the trial court in matters of fact and credibility that are supported by the record and free of legal error. *Rizzo*, 555 A.2d at 61; *Commonwealth v. Pronkoskie*, 498 Pa. 245, 445 A.2d 1203, 1206 (1982) (observing that an appellate court cannot substitute its judgment for that of the fact-finder on issues of credibility). The Superior Court, as an error-correcting court, may not expand upon its own standard of review when reviewing the decision of a trial court sitting without a jury.

In insurance bad faith cases, the appellate court's narrow standard of review is particularly significant because the

insured has no right to a jury trial. *Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 824 A.2d 1153, 1161 (2003). When an insured obtains a bad faith verdict in a bench trial, appellate courts should only reverse in the most egregious of cases when the trial court has committed reversible error. If an appellate court is not held to the abuse of discretion standard of review, then a bad faith verdict winner will have no confidence in the verdict. As an error-correcting court, the Superior Court should, as this Court has held, afford the trial court's findings of fact the same weight and effect as a jury verdict, and should only disturb the trial court's findings if they are unsupported by competent evidence or the court committed legal error. *Rizzo*, 555 A.2d at 61.

In this case, the Superior Court not only invalidated the trial court's verdict, but also took the remarkable step of directing judgment in Nationwide's favor. Once the trial court enters a finding of bad faith, the insurer cannot secure JNOV in the appellate court unless the insurer is entitled to judgment as a matter of law, or the evidence was such that no two reasonable minds could disagree that the outcome should have been in the insurer's favor. *Rohm & Haas Co. v. Continental Cas. Co.*, 566 Pa. 464, 781 A.2d 1172, 1176 (2001). Reviewing a motion for JNOV, the appellate court must consider the evidence in the light most favorable to the verdict winner, who must receive "the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor." *Moure v. Raeuchle*, 529 Pa. 394, 604 A.2d 1003, 1007 (1992) (citing *Broxie v. Household Finance Co.*, 472 Pa. 373, 372 A.2d 741, 745 (1977)). Any doubts must be resolved in favor of the verdict winner, and JNOV should only be entered in a clear case. *Id.* Finally, an appellate court's assessment of the evidence is not to be premised upon how the members of the court would have resolved the case had they been sitting as fact-finder, "but on the facts as they come through the sieve of the [fact-finder's] deliberations." *Id.* (citing *Brown v. Shirks Motor Express*, 393 Pa. 367, 143 A.2d 374, 379 (1958)).

Before we proceed, we must address the degree of deference that we owe to Judge Sprecher's factual findings and credibility determinations. As noted, there were three trials in this case. In 2004, the case proceeded to a jury trial over which Judge Stallone presided on several of the Bergs' claims. In 2007, the bad faith claim was tried in a bench trial also before Judge Stallone. And, upon remand in December 2013, Judge Sprecher heard several additional days of testimony before reaching his verdict.

Nationwide asserts that, because Judge Sprecher did not see any of the fact witnesses from the 2004 or 2007 trials, and, instead, merely read their testimony from the transcripts, Judge Sprecher's credibility determinations are not entitled to ordinary deference on appeal. *See* Brief for Appellee at 23 (citing *Commonwealth v. $6,425.00 Seized From Esquilin*, 583 Pa. 544, 880 A.2d 523, 531 n.7 (2005) (holding that, in the absence of "demeanor-based credibility determination[s] made by the trial judge," the court's reasons for ruling as it did were "subject to objective evaluation")). The Bergs argue that Nationwide waived this argument by failing to bring it to the trial court's attention.

Although Nationwide raises an interesting argument in the abstract, a review of the record demonstrates that the parties themselves agreed, in the interest of expedience, that Judge Sprecher should read the transcripts instead of calling the witnesses anew. Indeed, it was counsel for Nationwide that acknowledged this agreement and moved the prior testimony and exhibits into evidence. *See* N.T., 12/17/2013, at 7; R.R. 2587a (counsel for Nationwide referring to a prior agreement between the parties and moving into the record the transcripts and exhibits from the 2004 jury trial and the 2007 bad faith trial); Brief for Appellant at 6 n.2 (asserting that the parties had agreed that Judge Sprecher would read the prior testimony rather than recalling witnesses in 2013).

Agreeing with Nationwide's argument, the Opinion in Support of Affirmance ("OISA") posits that, because the parties proceeded on the record, Nationwide may have assumed that Judge Sprecher's subsequent findings would not be entitled to deference on appeal. The difficulty with this position is that Nationwide made no attempt to challenge the deference to which Judge Sprecher's findings were entitled. The default role of appellate courts is to defer to the trial court in a bench trial in matters of fact and credibility. *Rizzo*, 555 A.2d at 61. The Court contemplated a departure from the default standard of deference in *Esquilin*, which was a forfeiture case decided under the forfeiture statute, where the trial court's findings were based upon documentary evidence rather than testimonial evidence. Reading the same documents, the Commonwealth Court reversed the trial court's judgment. Upon further appeal, this Court reversed the Commonwealth Court, holding that the trial court properly considered the totality of the evidence and drew logical inferences from the evidence presented. In doing so, this Court observed the following:

> Of course, in many instances, the trial judge in a forfeiture proceeding hears live witnesses and is in a position to render demeanor-based credibility determinations. In such instances, the usual deference applicable to credibility determinations may be dispositive. In the case *sub judice*, however, there was no demeanor-based credibility determination made by the trial judge, and his reasons for ruling as he did are subject to objective evaluation.

Id. at 558 n.7, 880 A.2d 523 (internal citations omitted).

To the extent that *Esquilin* would support affording less deference to a trial court's interpretation of transcripts than to "demeanor-based credibility determinations," *id.*, it can hardly be argued that Nationwide's counsel should have been confident that, in the event of an adverse verdict, an appellate court would invoke *Esquilin* to depart from the generally applicable standard of review. By agreeing to have the trial court incorporate the record, the parties gambled on a verdict in their favor. Had Nationwide won, it would be advocating for the default standard of review. By agreeing to have the trial court incorporate the existing record, there is no indication that either party contemplated that an adverse verdict would be subject to attack on appeal in terms of the standard of appellate review. Nationwide's counsel surely was aware of the applicable standard of appellate review. Nationwide cannot participate in the trial court's review of the record without objection and then argue that, because the trial court reviewed the record, its findings are not entitled to deference.

Nor did Nationwide otherwise raise this issue below. *See* Rule 1925(a) Op. at 2 (listing Nationwide's issues, including the allegation that the trial court's findings were not supported by the record). Nationwide made no argument to the trial court that its findings were not entitled to deference, did not raise this issue in its Rule 1925(b) Statement, *see* Pa.R.A.P. 1925, and provided the trial court with no opportunity to address it. Issues not raised in the lower court are waived for purposes of appellate review, and cannot be raised for the first time on appeal. Pa.R.A.P. 302(a); *see also Trigg v. Children's Hosp. of Pittsburgh of UPMC*, —— Pa. ——, 229 A.3d 260, 268-69 (2020) (holding that the plaintiffs waived appellate review of issue of trial judge's lack of personal observation of demeanor of prospective juror during voir dire).

On appeal, the Superior Court resolved Nationwide's appellate issues purportedly without departing from the default standard of appellate review. The Superior Court understood the standard of review to require it to assess whether the trial court's findings are supported by competent evidence, to grant the trial court's findings of fact the same weight and effect as a jury's verdict, not to pass upon the credibility of witnesses, and not to substitute its judgment for that of the trial court as fact-finder. *Berg II*, 189 A.3d at 1036 (citing *Mohney v. Am. Gen. Life Ins. Co.*, 116 A.3d 1123, 1130 (Pa. Super. 2015)); *id.* at 1038 (citing *Brown v. Progressive Ins. Co.*, 860 A.2d 493, 502 (Pa. Super. 2004) (noting that an appellate court will reverse a finding of bad faith where the trial court's critical factual findings are either unsupported by the record or do not rise to the level of bad faith)). The Superior Court also correctly observed that, because the Bergs prevailed before the trial court, it was required to view the evidence and all reasonable inferences therefrom in a light most favorable to the Bergs. *Id.* (citing *Rizzo*, 555 A.2d at 61).

To the extent that this Court has not been precise about the degree of deference owing to a trial court's cold-record assessments, *see* OISA at 5, n.4, we would not modify the appellate standard of review in a case where the parties agreed to proceed on the cold record and the ultimate losing party waived any challenge to appellate deference to the trial court's factual findings on the basis of that review. [8]

Moreover, by the time Judge Sprecher was called upon to resolve this case, he had the benefit not only of the 2004 jury trial and the 2007 bad faith trial, but also of the critical analysis of the Superior Court in *Berg I,* the addition of forty-five new exhibits, and the testimony of four additional witnesses, including an expert witness for Nationwide who offered further testimony on liability. Indeed, as the trial court observed, "only the tip of the iceberg of the bad faith evidence was discovered and known to plaintiffs' counsel and to the court when the jury and Judge Stallone tried this case in 2004." Rule 1925(a) Op., 7/22/2015, at 39; *see also id.* at 33 (observing that the trial court "reviewed thousands of pages of transcripts and depositions, familiarized itself

with the contents of dozens of motions, answers, and other pleadings contained in 35 boxes and accordion files"). All of this evidence would have provided context for the trial court's understanding of Nationwide's conduct. Under the peculiar circumstances of this case, there is no basis to lessen the level of deference we would afford to the trial court's findings. [9] , [10]

It is well-established that an insurer must act with the "utmost good faith" toward its insureds. At the heart of this case is the bad faith statute, under which a court may award damages "[i]n an action arising under an insurance policy" if the court finds "that the insurer has acted in bad faith toward the insured." 42 Pa.C.S. § 8371. *Cowden v. Aetna Cas. & Sur. Co.*, 389 Pa. 459, 134 A.2d 223, 228 (1957).

By the time the legislature enacted Section 8371 in 1990, providing a statutory remedy for an insurer's denial of benefits in bad faith, the term "bad faith" had acquired a particular meaning in the context of allegations made by an insured against an insurer. *Toy v. Met. Life Ins. Co.*, 593 Pa. 20, 928 A.2d 186, 195-97 (2007). Bad faith "concerned the duty of good faith and fair dealing in the parties' contract and the manner by which an insurer discharged its obligations of defense and indemnification in the third-party claim context or its obligation to pay for a loss in the first party claim context." *Id.* (citing, *inter alia*, BLACK'S LAW DICTIONARY 139 (6th ed. 1990) (defining bad faith in the insurance context as "any frivolous or unfounded refusal to pay proceeds of a policy")). The law implies the duty of good faith into every insurance contract, such that the breach of that obligation is a breach of the contract. *Gray v. Nationwide Mut. Ins. Co.*, 422 Pa. 500, 223 A.2d 8, 11 (1966).

To prevail upon a claim of bad faith under Section 8371, a plaintiff must demonstrate, by clear and convincing evidence, two elements: "(1) that the insurer had no reasonable basis for denying benefits under the policy and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim." *Rancosky v. Washington Nat'l Ins. Co.*, 642 Pa. 153, 170 A.3d 364, 377 (2017). "[P]roof of the insurer's subjective motive of self-interest or ill-will, while perhaps probative of the second prong of the above test, is not a necessary prerequisite to succeeding in a bad faith claim." *Id.*

III. Arguments

Having established that Judge Sprecher's findings are entitled to deference, we now turn to the parties' arguments. Nationwide argues that there is no record support for many of the trial court's factual findings, and that the trial court therefore abused its discretion and issued a manifestly unreasonable judgment. In addition, Nationwide asserts that there was no bad faith in its failure to verify the quality of the repairs before Lindgren returned the Jeep to the Bergs. According to Nationwide, its obligation was merely to pay for repairs, and it had no additional duty also to inspect those repairs. [11]

According to the Bergs, there is ample evidentiary support for the trial court's findings that Nationwide: (1) engaged in bad faith by unlawfully interfering with the opinion of the assigned appraiser that the Jeep was a structural total loss; (2) secretly directed that the Jeep be moved to another shop in order to attempt structural repairs; and (3) placed its insured at substantial risk by permitting the vehicle to be returned in a dangerous condition. The Bergs assert that Nationwide compounded these harms through a litigation strategy designed to price them out of court. Finally, the Bergs argue that Nationwide had a duty to restore the Jeep to a safe and serviceable condition. [12]

Because our standard of review requires us to examine the record to determine whether there is clear and convincing evidence to support the trial court's findings, we undertake a careful examination of the trial court's findings and their record support.

IV. Factual findings

Judge Sprecher entered two opinions in this case: the decision and verdict on June 21, 2014 ("Verdict Op."), and the Rule 1925(a) opinion on July 22, 2015. Contained within these opinions are numerous findings of fact and citations to the record, which may be organized into four factual conclusions: (1) Nationwide overrode Lindgren's initial total loss appraisal in order to save money; (2) Nationwide forced Lindgren to repair the Jeep knowing that the Jeep could not be restored to its pre-accident condition; (3) Nationwide knowingly allowed Lindgren to return the unsafe and uncrashworthy Jeep to the Bergs; and (4) Nationwide's conduct during the course of

litigation was further evidence of Nationwide's bad faith. We consider in turn the record support for each of these critical findings.

A. Nationwide overrode the initial total loss appraisal in order to save money

The first disputed fact resolved against Nationwide concerns an appraisal created by Lindgren on September 10, 1996. According to the trial court, Doug Joffred, who was the manager and appraiser for Lindgren, initially appraised the Jeep on September 10, 1996, as a structural total loss because, after taking the vehicle apart, Joffred observed that the frame was twisted. Verdict Op. at 1, 3, 5; Rule 1925(a) Op. at 5. Totaling the Jeep as a structural total loss would have resulted in a loss of $25,000, which represented the actual cash value of the Jeep. Verdict Op. at 5 (concluding that "the Jeep must have been found by [Joffred] to be damaged to the point that, regardless of the cost to [Nationwide], the Jeep was too damaged to safely drive").

The trial court found that, upon receiving this appraisal, Nationwide's claim representative, Doug Witmer, visited Lindgren to inspect the damage. Witmer objected to the total loss declaration, and opined that the vehicle might be repairable. Verdict Op. at 1, 4, 5, 13-14; Rule 1925(a) Op. at 6. Recognizing that Lindgren lacked the equipment necessary to straighten the bent frame, Witmer directed the transfer of the Jeep to K.C. Auto Body ("K.C. Auto"), without the Bergs' knowledge or consent, to attempt to have the frame straightened. Verdict Op. at 10, 11, 15. In reaching his conclusion, Witmer did not conduct his own appraisal of the loss "or even pick up a tool." Verdict Op. at 4, 14.

According to the trial court, on September 20, 1996, ten days after Joffred's initial total loss appraisal, Joffred authored a second appraisal declaring that the Jeep could be repaired at a cost of $12,326. Verdict Op. at 5, 6 ("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."). The trial court found that Witmer vetoed the initial total loss appraisal because repairing the Jeep, rather than totaling it, saved Nationwide half of the Jeep's actual cash value, in addition to discounts captured through the BRRP. *Id.* at 14, 15. The September 10, 1996 appraisal and accompanying photographs disappeared and were not produced during this litigation. *Id*. at 6. It was not until the expiration of the Bergs' three-year lease of the Jeep that Nationwide declared the Jeep to be a total loss when it purchased the Jeep from Summit Bank.

The Superior Court relied upon Joffred's 2004 testimony to conclude that Joffred's initial assessment of the Jeep as a total loss was only a preliminary impression. According to the Superior Court, by the time Joffred drafted the appraisal on September 10, 1996, he had decided that the Jeep could be repaired at an estimated cost of $12,326. *Berg II*, 189 A.3d at 1039, 1043 n.10. Concluding that the evidence of record did not support the trial court's finding that Nationwide vetoed Joffred's total loss appraisal, the Superior Court reached the opposite conclusion—that, as of September 10, 1996, Lindgren and Nationwide agreed that the Jeep was not a structural total loss.

The Bergs' evidence supports the trial court's finding. Michael Grumbein, a property damage specialist for Nationwide, testified generally about the nature of the BRRP. Grumbein testified that it was Nationwide, not the BRRP appraiser, who had the final say about whether a car was a structural total loss. N.T., 12/13/2004, at 129; R.R. 829a. Grumbein described the process in general terms, testifying that, when the BRRP independent appraiser perceived a vehicle to be a total loss, the appraiser was required by Nationwide to complete the written appraisal and send it to Nationwide's claim representative. N.T., 12/13/2004, at 117, 121, 129-30; R.R. 817a, 821a, 829a-30a. After the appraiser notified Nationwide of a total loss appraisal, Nationwide would send a claims representative to the shop to meet with the assigned appraiser. N.T., 12/13/2004, at 121; R.R. 821a. Ultimately, whether a vehicle was totaled was Nationwide's decision because it was Nationwide paying for the loss. N.T., 12/13/2004, at 124; R.R. 824a. If there is a dispute between the appraiser participating in the BRRP and Nationwide, "Nationwide has the final say." N.T., 12/13/2004, at 129; R.R. 829a.

This general process was consistent with what the trial court found happened with respect to the Bergs' Jeep. Joffred was the appraiser and body shop manager at Lindgren, Nationwide's Blue Ribbon shop, who was responsible for appraising the Jeep. When Joffred inspected the Jeep on September 10, 1996, he believed that it was a structural total loss, meaning that it was damaged to the point that it could not be repaired, because "the whole body is twisted." N.T., 12/15/2004, at 628-29; R.R. 1324a-25a. Joffred telephoned Nationwide that day and relayed that he had completed an appraisal of the Berg's Jeep and taken photographs of the damage. N.T., 12/15/2004, at 623; R.R. 1319a. Joffred

informed Nationwide that, as the assigned appraiser, he believed the Jeep was a total loss. N.T.,. 12/15/2004, at 628; R.R. 1325a. According to Joffred, he created a written appraisal on September 10, 1996, which he then forwarded, along with the photographs, to Nationwide. N.T., 12/15/2004, at 623-25; R.R. 1320a-22a. Acknowledging that the written appraisal of September 10, 1996, had disappeared, Joffred testified that he was unsure what had happened to it, as his copy was missing, and, when he attempted to print it out, "it would come up a different date, the date I printed it." N.T., 12/15/2004, at 625; R.R. 1322a. [13]

Joffred only changed his appraisal after meeting with Witmer from Nationwide. N.T., 12/15/2004, at 629; R.R. 1326a. This was not the first total loss appraisal Joffred had changed at the direction of Nationwide. N.T., 12/15/2004, at 638; R.R. 1334a. Indeed, Joffred believed that he worked for Nationwide, not the Bergs, and that it was his job to appraise insured losses for the confidential discounts that Nationwide received on parts and labor through the BRRP. N.T., 12/15/2004, at 631; R.R. 1327a.

Joffred's testimony is supported by Nationwide's claims log. An entry on September 10, 1996, at 1:49 p.m., indicates that the Bergs' Jeep is a total loss, and that it is at Lindgren. It also reflects that Lindgren had prepared an estimate. 2004 Tr. Ex. 8 at 69; R.R. 1874a. A minute later, another entry reflects that Lindgren had requested to be compensated for "tear down time," *i.e.,* the time it took for the shop to disassemble a vehicle that will not be repaired because it is a total loss. *Id*. These entries confirm that Joffred believed the Jeep to be a total loss, a belief that was formed only after Joffred had disassembled the Jeep and inspected the frame. Because Joffred believed the Jeep to be a total loss, he requested to be compensated for the time he had spent reaching this conclusion.

The claims log is also consistent with Joffred's testimony that he notified Nationwide of his belief that the car was a total loss, as it indicates that, at 1:50 p.m. on September 10, 1996, Lindgren would forward "estimate and photos." *Id*. Witmer confirmed the claims log, testifying that the log entries indicated that, on September 10, 1996, Joffred declared the Jeep to be a total loss. N.T., 12/14/2004, at 299; R.R. 999a. Nonetheless, Witmer "instruct[ed] the body shop to initiate repairs." N.T., 12/14/2004, at 302; R.R. 1002a. [14]

The next day, Witmer indicated in the claims log that the Bergs also believed that the Jeep should be totaled because the "unibody is twisted." 2004 Tr. Ex. 8 at 67; R.R. 1872a. Among the strongest evidence that Nationwide vetoed Joffred's initial total loss appraisal is an entry in the claims log from September 25, 1996, in which Witmer made an entry reflecting that:

> VEH IS NOT A TOTAL LOSS - I INSPECTED VEH AND TOLD B/S THAT I WOULD ADVISE TO YOU TO HAVE VEH TAKEN TO A SHOP TO HAVE FRAME REPAIRED SINCE THEY OBVIOUSLY CAN NOT DO THE JOB WITH THE EQUIPTMENT THEY HAVE - THE REPAIRS ARE APPROX 50% OF ACV NATIONWIDE WILL NEVER RECOVER THE DIFFERENCE IN SALVAGE VALUE

2004 Tr. Ex. 8 at 66; R.R. 1871a (grammatical errors in original). As the trial court recognized, this entry demonstrates that Nationwide's concern was financial, focusing upon the difference in the cost of totaling the vehicle and the salvage value, instead of the structural integrity of the vehicle.

Mr. Berg testified, consistent with Joffred's testimony, that he believed the Jeep to be totaled based upon the information provided by Joffred. N.T., 12/16/2004, at 808; R.R. 1505a. The Bergs never were provided a copy of the September 10, 1996 appraisal or informed that Lindgren lacked the equipment necessary to straighten out the frame. [15]

In concluding that there was no record support for the trial court's finding that Nationwide vetoed Joffred's total loss appraisal, the Superior Court relied upon Joffred's cross-examination testimony that, although he initially believed that the Jeep was a total loss, he simultaneously prepared a repair estimate. N.T., 12/15/2004, at 663; R.R. 1359a. The Superior Court believed that this demonstrated that Joffred was initially unsure about whether the Jeep was a structural total loss. Further, the Superior Court believed that there was only one appraisal. Although this estimate was created on September 10, 1996, it was printed on September 20, 1996, and bore the date that it was printed rather than the date that it was created. N.T., 12/15/2004, at 672; R.R. 1368a (Joffred acknowledging that an estimate created on September 10th but printed out

on the 20th would bear the date of the 20th). Joffred testified that the estimate did not change from September 10, 1996, to September 20, 1996. N.T., 12/15/2004 at 673; R.R. 1368a. Rather, although Joffred's initial impression was that the Jeep was a total loss, this was not reflected in a written appraisal. N.T., 12/15/2004, at 663-69; R.R. 1359a-64a. After K.C. Auto straightened out the Jeep's frame, Joffred believed the Jeep was repairable. N.T., 12/15/2004, at 684-86; R.R. 1380a-82a. In addition, the Superior Court relied upon the testimony of Witmer, who stated that, when he met with Joffred to discuss the Jeep, they decided together to send the Jeep to K.C. Auto for frame repairs and that, if the Jeep was repairable, Lindgren would repair it. N.T., 12/14/2004, at 337-347; R.R. 1038a-47a.

As is apparent from these conflicting analyses, Joffred answered similar questions differently, depending upon whether they were posed by the Bergs or by Nationwide. Joffred provided answers more favorable to the Bergs when the Bergs were questioning him, and provided contrary answers that were more favorable to Nationwide upon questioning by Nationwide. The trial court accepted Joffred's testimony when it was elicited by the Bergs, and not when it was elicited by Nationwide. By contrast, the Superior Court Majority accepted Joffred's answers when they were elicited by Nationwide, but not when they were elicited by the Bergs.

Although Joffred testified, when questioned by Nationwide, that the total loss appraisal was a preliminary assessment made before he completed the tear down, he testified on cross-examination that he reached his opinion of a structural total loss only after tearing the Jeep apart, when he discerned that the "whole body is twisted." N.T., 12/14/2004, at 629; R.R. 1325a. The trial court found that Joffred's answers to the Bergs were consistent with the claims log, which reflected that Joffred believed the Jeep to be a structural total loss, and with his request for compensation for tear down time based on his belief that the Jeep was a structural total loss. N.T., 12/15/2004, at 675-76; R.R. 1371a-72a; N.T., 12/15/2004, at 711-12; R.R. 1407a.

The trial court was entitled to credit certain aspects of Joffred's testimony, especially when that testimony was consistent with other evidence, such as the claims log. Witmer acknowledged that Joffred had declared the Jeep a structural total loss due to a twisted frame. Moreover, the trial court was entitled to infer that Nationwide overruled Joffred's total loss appraisal because it was Nationwide calling the shots by, for example, directing the transfer of the Jeep to K.C. Auto. "The factfinder can believe all, part or none of the testimony." *Commonwealth v. Pitts*, 486 Pa. 212, 404 A.2d 1305, 1306 (1979). We would hold that, as the appellate court, the Superior Court erred in finding no record support that Nationwide vetoed the initial total loss appraisal in order to save money. [16]

B. The Jeep was not repairable

Next, the trial court found that, immediately following the accident, the Jeep was a structural total loss, as Joffred had surmised. Verdict Op. at 5. The repairs, initially estimated to take twenty-five days, ultimately took four months to complete. [17] *Id*. at 2, 4. The trial court supported this finding with the testimony of William Anderton, Nationwide's automotive expert, who inspected the Jeep on April 20, 1999. Anderton testified that the structural repairs had been unsuccessful, but that Lindgren had the means to make adequate repairs if such repairs were possible. *Id*. at 15-16; Rule 1925(a) Op. at 8.

The trial court found further support in the April 28, 1998 report of Nationwide's expert, Stephen Potosnak. Potosnak's report identified numerous structural deficiencies. Verdict Op. at 19. Potosnak advised Bruce Bashore, Nationwide's claim manager responsible for the BRRP operations in Pennsylvania, that Lindgren had not taken any further action to correct any of these repair defects. *Id*. at 20. Nationwide did not communicate Potosnak's findings to the Bergs or their counsel for five years, until Nationwide was forced to disclose Potosnak's report in response to the Bergs' request for admissions. *Id*. at 7, 20-21. Nationwide did not advise the Bergs that the Jeep was not safe to drive, nor revise its decision that the Jeep was not a total structural loss. Instead, according to the trial court, "[Nationwide] 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." *Id.* at 8.

Donald Phillips inspected the Jeep for the Bergs in November 1997 and found structural problems with the Jeep's unibody, including faulty steering alignment that caused excessive wear and tear on the tires. *Id.* at 16. Based upon this evidence, and the fact that two different repair facilities had tried and failed to repair the Jeep, the trial court concluded that the Jeep was irreparable. [18]

Despite the trial court's factual findings, the Superior Court found no support for the trial court's conclusion that the Jeep

was beyond repair. *Berg II*, 189 A.3d at 1045. The Superior Court opined that the evidence indicated that the Jeep was repairable, but that the repairs had failed. Although it was not disputed at trial that the repairs had failed, the Superior Court held that the Bergs produced no evidence that the Jeep was beyond repair. The Superior Court is incorrect.

It is not disputed that Lindgren lacked the equipment necessary to attempt the frame repairs. Nor is it disputed that the structural repairs failed. Nationwide's expert, William Anderton, confirmed this failure, observing that, upon his inspection, the primary structural components remained significantly misaligned with "no identifiable benefit" from the structural repair efforts required by Nationwide. Phillips agreed. This is consistent with the Bergs' own observations. Shortly after the Jeep was released back to the Bergs in December 1996, the Bergs returned the Jeep to Lindgren on January 2, 1997, to address noises associated with steering and, about a month later, to address the fact that "the tires were literally worn down to the metal." N.T., 12/14/2004, at 386-87; R.R. 1085a-86a. This was also confirmed by Joffred. N.T., 12/15/2004, at 714; R.R. 1410a.

As Judge Stevens observed in dissent in *Berg II*, evidence that the BRRP facility and the independent body shop were unable to repair the Jeep supports the trial court's finding that the Jeep, as Joffred had initially declared, was a structural total loss. *Berg II*, 189 A.3d at 1063 (Stevens, J., dissenting). The record supports the trial court's finding that the Jeep's twisted frame and failed repair efforts circumstantially indicate that the Jeep was beyond repair. We would hold that the Superior Court erred in concluding that there was no record support for this finding.

C. Nationwide knew of the Jeep's condition when it was returned to the Bergs

At the conclusion of the four months that the Jeep was at Lindgren, Lindgren returned the Jeep to the Bergs as if it had been fully restored. Verdict Op. at 15. It soon became clear that the structural repairs had not been effective and that the Jeep was, in fact, uncrashworthy.

According to the trial court, Nationwide was responsible for Lindgren returning the Jeep to the Bergs with faulty repairs. The basis of this finding was two-fold. First, the trial court found that Nationwide was aware that the Jeep had not been adequately repaired. In particular, it was Nationwide, not Lindgren, controlling and directing the repair process. *Id*. at 15. Nationwide decided whether the Jeep could be repaired in the first instance, and had the Jeep removed to K.C. Auto Body. *Id*. Further, pursuant to Lindgren's inclusion in the BRRP, Nationwide's property damage supervisors or property damage specialists performed monthly inspections of Lindgren during the four months that Lindgren was repairing the Jeep, and were monitoring the repair work. *Id*. at 11, 16. The trial court surmised that it was evident that the Jeep was not repaired properly because every subsequent inspection of the Jeep confirmed visible repair failures. *Id*. at 16, 18. The trial court's finding of actual knowledge relied upon testimony from Joffred, Potosnak (a property damage specialist for Nationwide), George Moore (an owner of another shop that participated in Nationwide's BRRP), Michael Grumbein (a damage specialist for Nationwide during the time the Jeep was being repaired), and David Wert (an employee at Lindgren while Lindgren was repairing the Jeep).

Second, the trial court found that, if Nationwide was not, in fact, aware of the faulty repairs, then Nationwide had constructive knowledge of the structural repair deficiencies because it owed the Bergs a duty to monitor the repair process and to ensure that the Jeep was returned to them in a safe condition. *Id*. at 11.

In contrast, the Superior Court majority found no record evidence that the extent of the repairs would have been evident during a visual inspection or that Nationwide should have known about the faulty repairs. *Berg II*, 189 A.3d at 1048. The Superior Court relied upon testimony from Potosnak that the purpose of Nationwide's inspections of Lindgren was to assess newly damaged vehicles and repair estimates. N.T., 12/14/2004, at 373; R.R. 1072a. Moore likewise testified that Nationwide's inspectors monitored the time it took to complete repairs, not the quality. N.T., 6/5/2007, at 76; R.R. 1974a. Grumbein testified that the random inspections were to ensure that the shops were providing fair estimates. N.T., 12/13/2004, at 72, 103-106; R.R. 772a, 803a-06a.

In addition to this evidence, the Superior Court opined that there was no evidence that the faulty repairs would have been observable when the repairs were near completion. Although the Superior Court found record support for the finding that, when Lindgren returned the Jeep to the Bergs, it was not crashworthy, the Superior Court found that the Bergs failed to prove by clear and convincing evidence that Nationwide knew of the Jeep's condition or acted in reckless disregard of

its obligations to its insureds by permitting the return of the Jeep.

Upon review, we would find extensive support for the trial court's finding of actual knowledge. It is not disputed that Nationwide conducted routine inspections of Lindgren while the Jeep was being repaired. The evidence of record supports the trial court's finding that these inspections encompassed inspections of the repair processes. In particular, Dean Jones testified that the purpose of these inspections was "to ensure that the vehicles were being repaired properly." N.T., 12/13/2004, at 242-43; R.R. 242a-43a. As Jones observed, this was consistent with Nationwide's BRRP, which included a "Blue Ribbon Guarantee" on "the appraisal and the quality of the repairs." N.T., 12/13/2004, at 231; R.R. 931a.

George Moore, the owner of another BRRP shop, testified that Nationwide required participating facilities to maintain control logs, which were open to inspection by Nationwide's property damage specialists. N.T., 6/5/2007, at 63-64, 68; R.R. 1971a-72a. David Wert, an employee of Lindgren working adjacent to the Jeep, testified about the problems reassembling the Jeep following the structural repairs. N.T., 12/15/2004, at 541-46; R.R. 1239a-44a. Nationwide's property damage specialists monitored the progress of the Jeep's repairs, and Wert observed them inspect the Jeep. N.T., 12/15/2004, at 547-49; R.R. 1244a-50a. This was in the early stages of the repairs, and they were "in and out" thereafter. N.T., 12/14/2004, at 549; R.R. 1246a.

Michael Grumbein, a property damage specialist for Nationwide, testified that Nationwide conducted random inspections of the Blue Ribbon facilities. N.T. 12/13/2004 at 102-03; R.R. 802-03a, and would inspect ongoing repairs that were in progress, recently completed, or before the repairs were begun. N.T., 12/13/2004, at 103-04; R.R. 803a-04a. The property damage specialist conducting the inspection would bring any repair deficiencies to the shop's attention. N.T., 12/13/2004, at 104; R.R. 805a. These inspections were integral to participation in the BRRP. N.T., 12/13/2004, at 106; R.R. 806a. Joffred also testified that Nationwide conducted random inspections of Lindgren while the Jeep was being repaired. N.T., 12/14/2004, at 643; R.R. 1339a.

In addition, a pamphlet that Nationwide created and provided to participating BRRP shops informed the shops that they were required to maintain a control log for each vehicle referred under the BRRP, to document each reinspection on a provided BRRP form, and to take detailed photographs. 2007 Tr. Ex. 34, at 4, 8; R.R. 2151a, 2155a; 2007 Tr. Ex. 35 at 5; R.R. 2162a. Nationwide mandated its property damage specialists to prepare documents focusing upon the quality of repairs, requiring inspectors to analyze the adequacy of, *inter alia*, unibody frame repairs and wheel alignment. 2007 Tr. Ex. 34 at 8; R.R. 2155a.; N.T. 12/13/2004, at 240-41; R.R. 940-42. Based upon these BRRP requirements as established by Nationwide, the trial court reasonably found that inspections encompassed a review of ongoing repairs and questioned why these documents were missing in this case, in contravention of Nationwide's obligations under the Administrative Code, 31 Pa Code § 146.3. [19]

The record further supports the trial court's finding that, when experts for the Bergs and Nationwide began to inspect the Jeep, the faulty repairs were obvious. As the trial court surmised, the repair failures must also have been visibly evident before the Jeep was returned to the Bergs. For example, the post-repair inspection by Donald Phillips on behalf of the Bergs confirmed the scope of the repair failures as follows:

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

N.T., 12/14/2004, at 441; R.R. 1139a; N.T., 12/14/2004, at 451; R.R. 1149a (confirming that these observations resulted from a visual inspection).

Potosnak likewise observed visible repair failures, including a damaged fan-shroud, a missing frame rail, and misaligned front wheels. 2004 Tr. Ex. 8 at 4-5; R.R. 1809a-10a. Anderton, Nationwide's automotive expert, also confirmed

visible structural repair failures. N.T., 12/16/2004, at 878; R.R. 1575a. The results of multiple inspections of the Jeep confirm the trial court's finding that, if the inspectors were able to observe the structural repair failures during their inspections, the same deficiencies would have been visible to Nationwide's inspectors during the repair period.

This evidence establishes that Nationwide was aware of the initial total loss appraisal; that Nationwide decided to have the Jeep repaired anyway; that Nationwide had to remove the Jeep to another facility to attempt the frame repairs; that the repairs were estimated to take twenty-five and a half days but ultimately took four months to complete; that Nationwide inspected the Jeep during the repair process; and that the repair failures were visibly evident. Further, the parties stipulated that Nationwide promised a Blue Ribbon appraisal from an approved Blue Ribbon repair facility backed by a Blue Ribbon Guarantee. N.T., 6/5/2007, at 35; R.R. 1964a. From this evidence the trial court was entitled to infer that Nationwide, in fact, inspected the frame repairs before the Jeep was returned to the Bergs, and possessed actual knowledge of the repair deficiencies.

The OISA disputes the trial court's conclusion that the repair deficiencies were visible to Nationwide during its inspections, and observes that this conclusion is undermined by the Jeep's passing of state inspections. As detailed herein, however, Potosnak, Anderton, and Phillips were all able to observe repair failures during their visual-only inspections. Moreover, passing state inspection does not negate the extensive, visible repair failures observed by Nationwide's inspectors. The reasonable inference is that the state inspections were relatively superficial.

D. Nationwide's conduct during litigation

Next, the trial court found evidence of bad faith in several aspects of Nationwide's conduct during litigation. In particular, the trial court faulted Nationwide's decision to total the Jeep twenty-eight months after the collision. Rule 1925(a) Op. at 12. Notwithstanding Nationwide's prior decision that the Jeep could be repaired, Nationwide paid $18,000 to Summit Bank to purchase the Jeep itself, and declared that the Jeep was totaled. [20] Verdict Op. at 2. The trial court found that Nationwide waited until the Bergs had paid off the balance of their lease obligations before declaring the Jeep to be a total loss. *Id*. at 7. This caused the Bergs to continue to pay their monthly lease obligations for a faulty, unsafe vehicle, rather than a new vehicle, and to receive no further reimbursement from Nationwide for the lease payments they made for a vehicle that should have been declared a total loss from the outset. *Id*. at 7-10; Rule 1925(a) Op. at 12-14. The trial court found that Nationwide's motive in later destroying the Jeep was to eliminate vital evidence in this case and to avoid any potential liability to a third party who could be injured in the uncrashworthy Jeep. Verdict Op. at 9. The trial court found further evidence of bad faith in Nationwide's failure to disclose to the Bergs the contents of the Potosnak report until five years into litigation. *Id*. at 7, 8, 21.

Proceeding to examine the application of *Bonenberger* to this litigation, the trial court found that Nationwide employed the same litigation strategy in both cases, providing further evidence of Nationwide's bad faith. In *Bonenberger*, the trial court considered evidence of Nationwide's Pennsylvania Best Claims Practice Manual as evidence of bad faith, citing portions of this manual establishing the company's objective to be perceived as a "defense-minded" carrier in the legal community. *Bonenberger*, 791 A.2d at 381. Rather than encouraging case-by-case evaluations, the manual called for aggressive claims handling to catch insureds off guard, and the assignment of cases to defense counsel not prone to exercising independent judgment. *Id*. at 381-82. This manual was found to be relevant and useful in evaluating a bad faith claim. *Id*.

The trial court in this case likewise found that Nationwide's corporate philosophy was relevant to its analysis of bad faith. Observing that the manual was implemented in 1993, and *Bonenberger* was decided in 2002, the trial court found that the strategy criticized in *Bonenberger* was still in place at the time Nationwide was handling the Bergs' claim and for at least six years of the subsequent litigation. Verdict Op. at 26. The trial court's finding was consistent with the Superior Court's holding in *Berg I* that, in accord with *Bonenberger*, the Bergs should be permitted to rely upon Nationwide's litigation strategy as evidence of bad faith. By refusing to settle, even after its own experts found numerous faulty repairs to the Jeep, the trial court believed that, in this case, as in *Bonenberger*, Nationwide engaged in a "scorched earth" litigation strategy. *Id*. at 27. The trial court also found that certain discovery violations further evidenced Nationwide's bad faith conduct during litigation.

The Superior Court found no record support for the trial court's finding that Nationwide acted in bad faith after the Jeep was returned to the Bergs either by purchasing the Jeep and later destroying it or throughout litigation. With respect to Nationwide's decision to purchase the Jeep at the expiration of the Bergs' lease agreement, the Superior Court examined the record and concluded that the Bergs had notified Nationwide of their intent to return the Jeep at the expiration of the lease; Nationwide reached an agreement with Summit Bank to purchase the Jeep; and only after Nationwide reached this agreement and made payment did the Bergs insist on purchasing the Jeep if the parties were unable to reach agreement about storage and preservation. Further, Nationwide only disposed of the Jeep with the consent of Judge Stallone, when the Jeep was of no further evidentiary value and the Bergs had failed to pay their half of storage costs.

With regard to the Potosnak report, the Superior Court found no harm to the Bergs from Nationwide's concealment because the Bergs already knew of the Jeep's repair failures. The Superior Court found no support for the trial court's finding that Nationwide failed to attempt to resolve this dispute in the early stages, because Nationwide did, in fact, offer to pay to have the Jeep repaired at a shop of the Bergs' choice or to purchase the Jeep if it could not be repaired.

With regard to Nationwide's litigation conduct, the Superior Court found no support for the trial court's finding that this conduct supported a finding of bad faith. The Superior Court held as a matter of law that an insurer's discovery practices do not constitute evidence of bad faith under Section 8371 absent the use of discovery to conduct an improper investigation. *Hollock v. Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. 2004); *O'Donnell ex rel. Mitro v. Allstate Ins. Co.*, 734 A.2d 901 (Pa. Super. 1999). Even considering the discovery issues, the Superior Court found that they did not support a bad faith claim. Nor did the Superior Court find evidence of bad faith in Nationwide's litigation strategy, as had been established in *Bonenberger*, because there was no evidence that Nationwide relied upon the condemned Pennsylvania Best Claims Practice Manual in adjusting the property damage claim in this case.

Once again, we would find evidentiary support for many of the trial court's findings. There is no dispute that, in January 1999, Nationwide purchased the Jeep from Summit Bank for $18,000, following the conclusion of the Bergs' lease. Nor is there any dispute that Nationwide concealed the existence of the Potosnak report for five years of litigation. After Potosnak completed his inspection on April 28, 1998, and notified Nationwide that he had confirmed structural repair failures, Nationwide neither conceded that the Jeep was a total loss nor did it apprise the Bergs of Potosnak's findings. Instead, Nationwide answered their complaint denying responsibility for poorly performed repairs or knowledge that the vehicle was unsafe. And on May 11, 2003, Nationwide's corporate designee affirmed under oath that Nationwide lacked knowledge "of any structural defects." N.T. 12/16/2004, at 847; R.R. 1543a-44a. At the outset of litigation, Nationwide redacted the Potosnak report from the claim file and failed to disclose it or mention it in its answers to the Bergs' discovery requests. Nationwide later asserted that it believed the Potosnak report to be protected by attorney client privilege, a claim that Judge Sprecher found to be specious because the Potosnak report was an ordinary claim file entry, not a communication to counsel. Once Nationwide disclosed this report in May 2003, it became clear that Nationwide had been concealing its knowledge of the existence of structural repair failures since the lawsuit was filed in May 1998.

There is also record support for the trial court's finding that corroborating evidence confirmed the existence of several other pieces of evidence that Nationwide failed to produce, including photographs of the Jeep taken at the time Joffred declared it to be a total structural loss; the September 10, 1996 appraisal; and the BRRP documents used by Nationwide in the course of its routine inspections of Lindgren. Verdict Op. at 28-29. With respect to the photographs, when the Bergs first requested those pieces of evidence, Nationwide refused to produce them, filing for a protective order. The court denied the motion. Nationwide then claimed that no photographs existed. The Bergs moved for sanctions. The trial court entered a second order mandating compliance. Nationwide then produced two photographs of poor quality. The trial court was entitled to rely upon this conduct, and to infer from the other evidence the existence and concealment of more photographs. Rule 1925(a) Op. at 45.

In addition, Nationwide failed to disclose $907,543 in attorney's fees until the bad faith trial before Judge Sprecher. Although this amount had been paid on October 6, 2004, Nationwide did not disclose it in any of its answers throughout discovery. Nationwide also made over thirty redactions to the claim file, relying upon attorney-client privilege. Judge Sprecher found that many of these redactions were to log

entries created before litigation commenced. Verdict Op. at 23.

All of this conduct was consistent with the trial court's finding that, beginning in 1993, Nationwide was guided by the terms of the Pennsylvania Best Claims Practice Manual, setting forth the corporate philosophy to reduce the average claim payment to a level lower than their competitors in order to establish itself as a "defense-minded" carrier. Verdict Op. at 23-24; *Bonenberger*, 791 A.2d at 381; 2007 Tr. Ex. 36 at 1-4; R.R. 2167a-70a. In 2013, following *Berg I*, the Bergs served a document request on Nationwide seeking evidence that Nationwide disavowed the corporate strategy criticized in *Bonenberger*. On August 23, 2013, the trial court cautioned Nationwide that, if it failed to produce such evidence, the Bergs would be entitled to rely upon the absence of evidence. Tr. Ct. Order, 8/21/2013; 2013 Tr. Ex. 53; R.R. 2949a. Nationwide was unable to produce this evidence. Accordingly, the trial court made an adverse finding that Nationwide applied the strategy in the Bergs' case, even after *Bonenberger* was decided. Verdict Op. at 35-36; Rule 1925(a) Op. at 47-49.

It is further undisputed that Nationwide paid its attorneys over $3 million in this case, which the trial court found was consistent with its claims strategy to price plaintiffs out of court by sending a message of deterrence to the plaintiff's bar. Verdict Op. at 41; Rule 1925(a) Op. at 15-17, 51-52.

Reviewing the record, there is evidentiary support for the trial court's finding that Nationwide continued to apply the corporate philosophy that was at issue in *Bonenberger* to the detriment of the Bergs. Verdict Op. at 37-42; Rule 1925(a) Op. at 21-33. The evidence outlined above and relied upon by the trial court demonstrates that, in accord with *Bonenberger* and Nationwide's refusal to pay for the total loss of the Jeep, Nationwide dug in and defended its decision for nineteen years "in a clear effort to price [the Bergs] out of their meritorious claim dispute, and/or conceal evidence necessary to satisfy the heightened burden of proof." Verdict Op. at 27.

Viewing all of this evidence in the light most favorable to the Bergs as the verdict winner, we would find sufficient evidence to support the trial court's factual findings. Joffred initially appraised the Jeep as a structural total loss; the Jeep was not repairable; Nationwide was actually aware of the Jeep's structural repair failures when Lindgren returned the Jeep to the Bergs; and Nationwide's conduct after the Jeep was returned to the Bergs and throughout litigation was consistent with the corporate philosophy at issue in *Bonenberger*. We now consider the legal significance of these facts in the context of a bad faith action.

V. Legal Analysis

To prove insurance bad faith, the Bergs were required to demonstrate that Nationwide lacked a reasonable basis to deny benefits under the insurance policy, and that Nationwide knew of or recklessly disregarded its lack of a reasonable basis. *See* *Rancosky*, 170 A.3d at 377. To this end, the Bergs were not required to prove that Nationwide was motivated by self-interest or ill will, although such evidence may be probative of the second prong. *Id.* And, as the Superior Court held in *Berg I*, and which Nationwide does not dispute, the Bergs may attempt to prove bad faith by demonstrating that the insurer violated related statutes and regulations. *Berg I*, 44 A.3d at 1174.

We would agree with the trial court that the factual circumstances established above support the trial court's judgment that Nationwide engaged in bad faith by recklessly disregarding several legal duties.

First, Nationwide recklessly disregarded its duty to process, adjust, and resolve the Bergs' claim, as demonstrated by its disregard of the initial total loss appraisal of its BRRP appraiser in contravention of the Appraiser Act. In the interest of public safety, the Appraiser Act requires appraisers to prioritize the operational safety of a vehicle:

> The appraiser shall furnish a legible copy of his appraisal to the repair shop selected by the consumer to make the repairs and also furnish a copy to the owner of the vehicle. This appraisal shall contain the name of the insurance company ordering it, if any, the insurance file number, the number of the appraisers license and the proper identification number of the vehicle being inspected. All unrelated or old damage should be

> clearly indicated on the appraisal which shall include an itemized listing of all damages, specifying those parts to be replaced or repaired. Because an appraiser is charged with a high degree of regard for the public safety, the operational safety of the vehicle shall be paramount in considering the specification of new parts. This consideration is vitally important where the parts involved pertain to the drive train, steering gear, suspension units, brake system or tires.

63 P.S. § 861(b).

Recognizing the inherent conflict of interest created by the insurance industry's interest in cost-containment and the public interest in quality repairs, the Appraiser Act insulates appraisers from the influence of outside pressure by requiring the independence of appraisers. In particular, every appraiser shall do the following:

> (1) Conduct himself in such a manner as to inspire public confidence by fair and honorable dealings.
>
> (2) Approach the appraisal of damaged property without prejudice against, or favoritism toward, any party involved in order to make fair and impartial appraisals.
>
> (3) Disregard any efforts on the part of others to influence his judgment in the interest of the parties involved.
>
> (4) Prepare an independent appraisal of damage.

Id. § 861(f)(1)-(4).

The related regulations likewise recognize the inherent conflict that would arise if the appraiser was beholden to the insurance company, and similarly obligated the appraiser to focus upon the public's safety interest:

> (f) In addition to the requirements in section 11 of the act (63 P. S. § 861), an appraiser shall:
>
> > (1) Not have a conflict of interest in the making of an appraisal. This chapter and the act, and this section in particular, shall be strictly interpreted to protect the interest of the consumer and place the burden upon the appraiser to eliminate any conflict of interest in the making of an appraisal.

31 Pa. Code § 62.3(f)(1).

Consistent with the legislative intent to insulate appraisers from external influences, every appraisal must be signed by the independent appraiser before being submitted to the insurer or consumer. *Id.* § 62.3(a)(1). The appraiser is required to obtain the owner's consent before moving a vehicle from one place to another. *Id*. § 62.3(f)(2). Every total loss evaluation must be provided to the insured. *Id*. § 62.3(e)(7). And the appraiser is required to assess the vehicle to be a total loss in two circumstances: first, when the cost of repairing the vehicle exceeds its appraised value less salvage value (*i.e.*, the vehicle is an economic total loss), *id*. § 62.3(e); second, when the vehicle cannot be repaired to its pre-damaged condition (*i.e.*, the vehicle is a structural total loss), *id*.

Here, Joffred, the assigned appraiser with Lindgren, Nationwide's BRRP facility, initially declared the Jeep to be a structural total loss. Joffred notified Nationwide of this appraisal. Rather than deferring to the professional opinion of its assigned and purportedly independent appraiser, Nationwide dispatched Witmer to Lindgren in order to reassess this appraisal, and to render the final decision about the fate of the Jeep. Witmer ultimately decided to attempt to repair the Jeep. Witmer indicated in Nationwide's claims log that he made this assessment because the repair costs were half of the assessed value and Nationwide would never recover the difference in salvage value. This demonstrates that, while Joffred was concerned with the structural integrity of the vehicle (whether it was a structural total loss), Witmer was concerned solely with the economic assessment (whether it was an economic total loss).

As the trial court found, Nationwide's motive in vetoing the total loss appraisal was to save money, as repairing the Jeep would cost half as much as totaling the Jeep. Nationwide stood to benefit from the decision to repair the Jeep in part because of the cost savings it would realize from having its BRRP facility perform the repairs. In contrast, Nationwide would have to pay market value on a total loss. This conflict created a financial incentive to repair structurally impaired vehicles despite the safety concerns of the assigned appraiser.

The process established by Nationwide and implemented in this case was that the purportedly independent appraiser working at a facility participating in Nationwide's BRRP would make an initial assessment of the vehicle and, if that

assessment was that the subject vehicle was a total loss, then Nationwide would dispatch a claims representative to second guess that appraiser and ultimately make the final determination about whether to pay for a total loss or repair the vehicle.

This process was contrary to the Appraiser Act, which requires appraisers to be independent. Joffred believed himself to be working for Nationwide, not the Bergs. Nationwide apparently agreed, and unlawfully interfered with the appraiser's independent initial opinion that the Jeep was a total structural loss due to its twisted frame. The appraiser that Nationwide contracted with and assigned to appraise the damage to the Bergs' Jeep was not independent.

The process established through Nationwide's BRRP and used in this case is also contrary to the regulation, which requires the independence of appraisers in order to protect consumers, 31 Pa. Code § 62.3(f)(1), bars the removal of a vehicle without the owners' consent, *id*. § 62.3(f)(2), and requires the owner to be apprised of a total loss appraisal, *id*. § 62.3(e)(7). Nationwide and Lindgren not only failed to provide the Bergs with the initial total loss appraisal, they also directed the Jeep to be removed to K.C. Auto without the Bergs' consent to attempt structural repairs.

This process was likewise contrary to the BRRP itself, which promised policy holders the convenience of obtaining an independent appraisal at the same facility that would ultimately complete the repairs. Despite this promise, under the reality of Nationwide's Blue Ribbon scheme, the role of the appraiser was merely advisory, relegated to making a preliminary assessment and then ceding authority to Nationwide's claims representative.

Appraisers are not beholden to insurance companies. They are independently licensed and disciplined. They must be independent and provide independent appraisals. It is their duty to ensure that the vehicles are in a safe and serviceable condition. Nationwide had no reasonable basis to circumvent the independence of its assigned appraiser, and it recklessly disregarded its obligation to maintain the appraiser's independence. Rather than deferring to the appraiser's concern for the safety of the Bergs and the public, Nationwide instead focused upon its own self-interest and recklessly disregarded its obligation to pay for a structural total loss. As the trial court found, Witmer's concern was purely financial, placing Nationwide's economic concerns over the safety needs of the insured and the public. An insurer will be held to have acted in bad faith if it fails to "accord the interest of its insured the same faithful consideration it gives its own interest." *Cowden v. Aetna Cas. & Sur. Co.*, 389 Pa. 459, 134 A.2d 223, 228 (1957). The trial court was entitled to rely upon evidence that Nationwide vetoed the total loss appraisal, and chose instead to focus on its own financial concerns at the expense of the safety of the insured and the public, in order to establish bad faith.

Second, Nationwide had no reasonable basis for returning the Jeep to the Bergs despite known structural repair deficiencies that left the Jeep in a dangerous condition, and it recklessly disregarded its lack of a reasonable basis. The Bergs' action was brought on a contract for collision insurance. The "collision coverage" provision of the policy obligated Nationwide to "pay for loss to your auto caused by collision or upset." 2007 Tr. Ex. 47 (Nationwide Policy) at 10; R.R. 2442a. In another provision pertaining to "Limits of Payments," the policy afforded Nationwide the following options when a loss occurs: "1. Pay [the insured] directly for a loss; 2. Repair or replace [the vehicle] or its damaged parts." 2007 Tr. Ex. 47 (Nationwide Policy) at 12; R.R. 2444a. Nationwide elected not to fulfil its contractual obligations by paying the Bergs directly for their loss. Nor did Nationwide elect to replace the Jeep. Rather, Nationwide elected to repair the Jeep or its damaged parts.

Couch on Insurance explains the consequences of an insurer's decision to repair, rather than to replace:

> Where the insurer exercises its option to repair, it is in the same legal position as any person making repairs, insofar as liability to strangers is concerned. Consequently, where a collision insurer has agreed to repair and actively takes the matter in hand, making all necessary arrangements, the reasonable conclusion is that the insurer thereby assumes the duty of having the repairs made with due care; and it is not relieved of this duty merely because it chooses to select an independent contractor to make the repairs and refrains from exercising any supervision over its work.

12 COUCH ON INSURANCE 3d, § 176:41 (footnotes omitted).

Consistent with Couch on Insurance, this Court has long recognized an insurer's obligation when it elects to make repairs, holding that this decision by the insurer becomes a contract to repair, "and the rights and responsibilities of the parties are to be measured accordingly." *Fire Assoc. v. Rosenthal*, 108 Pa. 474, 1 A. 303, 305 (1885). In *Keystone Paper Mills Co. v. Pennsylvania Fire Insurance Company*, 291 Pa. 119, 139 A. 627, 629 (1927), this Court recognized that an insurer electing to repair "is not only bound to put the property in substantially the same state or as good as it was before the [loss], but the insurer cannot avail itself of any relieving circumstances unless such repairs make the property as serviceable as it was before the loss."

Other jurisdictions have likewise held insurers liable for the quality of repairs. *See Mockmore v. Stone*, 143 Ill.App.3d 916, 97 Ill.Dec. 939, 493 N.E.2d 746, 747 (1986) ("[T]he insurer's election to repair the vehicle together with its selection of the means by which such repairs are to be accomplished imposes a contractual liability for damages resulting from negligent repairs."); *Venable v. Import Volkswagen, Inc.*, 214 Kan. 43, 519 P.2d 667, 674 (1974) ("When an insurer exercises its option to repair under the contract of insurance it assumes the duty and responsibility to restore the property to its former condition and value. It is immaterial how it attempts to fulfill that duty, whether by agent or independent contractor."); *Gregoire v. Ins. Co. of N. Am.*, 128 Vt. 255, 261 A.2d 25, 28 (1969) (holding that, where the insurer informed the policy holder that "they would repair it and guarantee it," the insurer was "under the duty to have complete and adequate repairs made so that the truck would be restored to its condition prior to the accident"); *State Farm Mut. Auto. Ins. Co. v. Dodd*, 276 Ala. 410, 162 So.2d 621, 626 (1964) ("It is the general rule that where a policy gives the insurer an election to repair or pay, the exercise of the option to repair converts the original contract into a contract to repair, subject of course to various refinements and exceptions."); *Buerkle v. Superior Court of Los Angeles Cty.*, 59 Cal.2d 370, 29 Cal.Rptr. 509, 379 P.2d 941, 943 (1963) (rejecting the argument that the insurer's obligation was satisfied by paying for the repairs because the insurer's decision to repair and to make all necessary arrangements meant that the insurer assumed the duty of having repairs made with due care); *see also Samuels v. Ill. Fire Ins. Co.*, 354 S.W.2d 352, 357 (Mo.App. 1962) (holding that, when the plaintiffs elected to have insurer repair their property, "the policy became, in effect, a contract for repairs —a building contract imposed by law") (emphasis omitted).

Contrary to Nationwide's position and the holding of the Superior Court, Nationwide was not merely obligated to pay for repairs. The contractual language at issue obligated Nationwide either to pay the insured directly for the loss or to "repair or replace [the] auto or its damaged parts." Nationwide chose the latter option, making it responsible to ensure that the vehicle was repaired to the condition it was in before the loss. Nothing suggests that Nationwide's contractual obligation was satisfied merely by paying for the repairs; rather, Nationwide affirmatively obligated itself to repair.

Nationwide engaged in a course of conduct consistent with the obligation to repair. After the accident, Nationwide's agent referred the Bergs to Lindgren, assuring them that Lindgren would "do everything turn key from appraise it through to repair it." N.T., 12/15/2004, at 725; R.R. 1420a. It was Nationwide, through Witmer, that directed Lindgren to initiate repairs, taking the matter in hand and overruling the assessment of the independent appraiser. When Witmer realized that its BRRP facility lacked the equipment required to attempt to straighten out the Jeep's frame, Witmer directed the Jeep to be transferred to an independent facility to attempt the repairs that Lindgren "obviously" was not equipped to perform. 2004 Tr. Ex. 8 at 65; R.R. 1870a. Nationwide did so without obtaining the Bergs' consent to move their vehicle. The Jeep was then returned to Nationwide's BRRP facility to be restored to its pre-accident condition.

Through Nationwide's BRRP, Nationwide offered a Blue Ribbon Guarantee of the quality of these repairs. At trial, Nationwide described its Blue Ribbon Guarantee as "a guarantee that Nationwide offers its policyholders who elect to participate in the program that guarantees that Nationwide will ensure that the repairs are done properly and timely." N.T., 12/14/2004, at 403; R.R. 1101a-02a. Joffred stated that the BRRP was designed to inspire the confidence of policy holders in the quality of the repairs. N.T., 12/15/2004, at 646; R.R. 1342a. Indeed, Mrs. Berg confirmed that she placed her trust in Nationwide, testifying that Nationwide's designation of Lindgren as a Blue Ribbon Repair facility, as well as the assurance of Nationwide's agent that Lindgren would appraise the car and complete the repairs, gave her confidence in Lindgren. N.T., 12/14/2004 394-95; R.R. 1093a-94a ("[I]f Nationwide was going to suggest that they were a blue ribbon

facility, they had to be the best. So I had nothing but complete trust in that decision.").

Nationwide assumed the duty of having quality repairs made through the Blue Ribbon Guarantee, its decision to disregard the opinion of the assigned independent appraiser and have the Jeep repaired, and its removal of the Jeep to another facility. Accordingly, Nationwide took the matter in hand and made the necessary arrangements, assuming the duty of having the repairs made with due care. 12 COUCH ON INSURANCE 3d, § 176:41. Nationwide is not absolved of this duty because it chose to select an independent contractor to make the repairs. *Id*. To the contrary, Nationwide imbued Lindgren with its Blue Ribbon Guarantee, elevating the confidence its policy holders would otherwise have had in the shop, and encouraging them to rest easy, believing that everything would be taken care of for them.

Once Nationwide chose to repair the Jeep at its BRRP facility, with its Blue Ribbon Guarantee, it had the affirmative duty to verify the quality of the repairs. When an insurer elects to "repair" a vehicle under an insurance contract, directs the decision-making process from the appraisal through the completion of the repairs, through a program designed to afford control over this process and to provide a guarantee of the repairs, and is aware of the quality of the repairs, then the insurer is responsible for ensuring that the vehicle is returned to its insured in its pre-damaged condition. This is consistent with the insurance regulations, which recognize that the insurer electing "to repair in a first-party claim" has the duty "to cause the damaged automobile to be restored to its condition prior to the loss." 31 Pa. Code § 146.8(f).

Consistent with that duty, Nationwide routinely inspected the quality of repairs. But despite knowledge that the repairs had failed, Nationwide permitted Lindgren to release the Jeep to the Bergs. In addition to the initial total loss declaration by Joffred, which Nationwide vetoed, Nationwide knew that the Jeep's frame was twisted so badly that the BRRP facility could not even attempt the repairs. And Nationwide examined the Jeep and the repairs several times during the repair process. Permitting the Jeep to be released to the Bergs despite visible repair failures under such circumstances supported the trial court's finding that Nationwide knowingly disregarded the Bergs' safety and financial interest in the Jeep.

Nationwide had no reasonable basis for failing to restore the Jeep to its pre-damaged condition, and acted with reckless disregard of this duty in permitting the Jeep to be returned to the Bergs while it remained uncrashworthy. The Bergs' insurance expert, James Chett, confirmed the industry standard that insurers "have an obligation to make certain that vehicles are repaired and they're repaired safely." N.T., 6/6/2007, at 177; R.R. 2001a. Chett opined, and the trial court agreed, that "Nationwide's conduct was reckless in that it placed or allowed to be placed on the highway an unsafe vehicle." N.T., 6/6/2007, at 176; R.R. 2000a. Chett's testimony, accepted by the trial court, establishes Nationwide's reckless disregard for its duties under the insurance contract by failing to ascertain whether the vehicle was crashworthy before the vehicle was returned to the Bergs.

The failed repairs compromised the safety of the Bergs and increased the risk to third parties from a loss of control resulting from the Jeep's steering issues. As Mrs. Berg testified, the Jeep's steering was compromised after the accident and attempted repairs. N.T., 12/14/2004, at 387; R.R. 1086a. Fortunately, no one was injured. But Nationwide was aware that the repairs had failed, that the Jeep was not crashworthy, and that the Jeep therefore posed a danger on the road. By permitting the Jeep's return to the Bergs, Nationwide demonstrated reckless indifference to its insured.

By electing to compensate the Bergs for their loss by repairing the damaged Jeep, taking the matter in hand by overruling the assessment of the purportedly independent appraiser, offering a guarantee on the quality of repairs, and knowingly permitting the Jeep to be returned to the Bergs with faulty structural repairs, Nationwide acted with reckless disregard for its lack of reasonable basis for failing to fulfill its contractual obligation to repair the Jeep. When Nationwide recklessly disregarded this duty, it disregarded a contractual obligation it owed as a fiduciary for its insureds in violation of Section 8371. As the Superior Court recognized in *Berg I*, if the Bergs could prove that their Jeep initially was declared a total loss, but returned to them when Nationwide knew or should have known that the structural repairs had failed, these facts would demonstrate bad faith. *Berg I*, 44 A.3d at 1176. Rather than safeguarding the safety of its insureds and the public in accord with their own Blue Ribbon Guarantee, Nationwide prioritized its own self-interest in cost-savings.

The OISA would disagree that Nationwide assumed the duty to repair. OISA at 15. To the extent that this position is premised upon the OISA's disagreement that it was Nationwide controlling and directing the repair process, we emphasize that the facts of this case demonstrate that, using its BRRP facility, Nationwide overruled the total loss appraisal,

directed the transfer of the Jeep to K.C. Auto, made the decision to repair, inspected the faulty repairs throughout the repair process, and was aware of the repair failures. It is well-settled in our precedent and across the nation that an insurer exercising its contractual option to make repairs must return the vehicle in a safe and serviceable condition. *See, e.g., Keystone Paper*, 139 A. at 629; *see also* 31 Pa. Code § 146.8(f) ("When the insurer elects to repair in a first-party claim, the insurer shall cause the damaged automobile to be restored to its condition prior to the loss at no additional cost to the claimant other than as stated in the policy and within a reasonable period of time.").

Unlike the OISA, we do not believe that we should be swayed by Nationwide's threat that holding it to a duty to inspect will increase expenses, premiums, and wait times. OISA at 16, n.15. Nationwide itself offered the repair guarantee and is aware of its repair obligation to return the vehicle in a safe and serviceable condition. And as is evident from this record, Nationwide already routinely deploys adjusters and inspectors to its BRRP facilities.

The OISA likewise disagrees that Nationwide possessed knowledge of the repair deficiencies. OISA at 16, n.15. As explained in Section IV. C., however, there is extensive support in the record that Nationwide's inspections afforded Nationwide actual knowledge of the repair deficiencies. Nationwide's claim managers performed routine monthly inspections of the BRRP facilities; the BRRP standards required facilities to maintain a control log detailing the quality of structural repairs; reinspection reports required Nationwide's inspectors to analyze the adequacy of unibody repairs and proper wheel alignment; and Wert observed inspectors for Nationwide inspect the repairs in the beginning, middle, and end of the repair process. The purpose of the routine inspections, according to Nationwide's BRRP State Director, Dean Jones, was "to ensure that the vehicles were being repaired properly." N.T., 12/13/2004, at 242; R.R. 942a-43a. Further, Nationwide would have known that an insurer exercising its contractual option to make repairs must return the vehicle in a safe and serviceable condition.

To the extent the OISA questions whether Nationwide's duty to inspect could have arisen from the BRRP, or that the BRRP can be considered part of the insurance contract, it is apparent that the BRRP was the method by which Nationwide chose to honor its contractual obligation to repair. Nationwide created this program for its own benefit as well as to benefit its policyholders. To incentivize policyholders to use the program, it offered "a guarantee that Nationwide offers its policyholders who elect to participate in the program that guarantees that Nationwide will ensure that the repairs are done properly and timely." N.T., 12/14/2004, at 403; R.R. 1102a. As a national insurer, Nationwide would be expected to know that an insurer exercising its contractual option to make repairs must return the vehicle in a safe and serviceable condition. Nationwide cannot avoid liability for failing to return the Jeep in a safe and serviceable condition merely because it contracted with a third party to make the repairs. [21] Moreover, it is law of the case that the BRRP was one method by which Nationwide could fulfill its contractual obligation to make repairs. *Berg I*, 44 A.3d at 1173.

A third basis for agreeing with the trial court that the evidence demonstrates Nationwide's bad faith is the jury's verdict in 2004, based upon clear and convincing evidence that Nationwide violated the UTPCPL by engaging in unfair practices. The $295 awarded was premised upon Nationwide's purchase of the Jeep prior to trial, thereby reducing the damages presented to the jury. In *Berg I*, the Superior Court recognized that the jury's finding in the Bergs' favor constituted some evidence of bad faith. *Id*. at 1175.

Like the Superior Court in *Berg I*, we would conclude that much of the evidence introduced by the Bergs regarding Nationwide's conduct in processing their repair claim satisfies the definition of bad faith under Section 8371. In particular, as we have described, the evidence shows that Nationwide reversed Joffred's initial total loss appraisal and instead ordered the Jeep taken to K.C. Auto to attempt the structural frame repairs, all in order to avoid paying the cost of a total loss. Further, after four months of attempting repairs, Nationwide returned the vehicle to the Bergs despite actual knowledge that the repairs had not been successful. Even following the Potosnak report, Nationwide failed to advise the Bergs of any problems associated with the Jeep in its continuing effort to avoid a total loss payment. The jury's verdict on the UTPCPL claim lends additional support to the trial court's finding of bad faith.

A fourth, and final, supported basis for the trial court's finding of bad faith is Nationwide's conduct during litigation. After the Bergs' lease expired and throughout litigation, Nationwide implemented a litigation strategy premised upon a lack of cooperation with its policy holders and the elevation of its needs above those of the insured. Indeed, the evidence supports the trial court's conclusion that Nationwide applied

the corporate strategy that the Superior Court had condemned in *Bonenberger*. Verdict Op. at 27-30, 35-36.

In *Bonenberger*, the Superior Court described Nationwide's 1993 Pennsylvania Best Claims Practice Manual, which "was used by Nationwide's employees as their primary guide in evaluating, valuing and negotiating claims." *Bonenberger*, 791 A.2d at 381. The manual set forth the company's philosophy, "which was to reduce the average claim payment to a level first consistent with then lower than major competitors, and to be a 'defense -minded' carrier in the minds of the legal community." *Id.* The Superior Court roundly criticized this corporate philosophy:

> Individuals expect that their insurers will treat them fairly and properly evaluate any claim they may make. 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." Rather, it has a duty to compensate its insureds for the fair value of their injuries. Individuals make payments to insurance carriers to be insured in the event coverage is needed. It is the responsibility of insurers to treat their insureds fairly and provide just compensation for covered claims based on the actual damages suffered. Insurers do a terrible disservice to their insureds when they fail to evaluate each individual case in terms of the situation presented and the individual affected. Thus, a company manual, which dictates a certain philosophy in claims handling, may be relevant and useful in evaluating a bad faith claim.

Id. at 382.

Following *Bonenberger*, the Superior Court has held that the conduct of insurers with regard to bad faith litigation may itself be conduct "arising under an insurance policy" pursuant to Section 8371. *Hollock*, 842 A.2d 409; *O'Donnell*, 734 A.2d 901.

In *O'Donnell*, the insured submitted a claim to the insurance company. The insurer did not deny the claim, but engaged in conduct that the insured considered to be arbitrary and oppressive. When the insured commenced a bad faith claim, two of the claims arose from the insurer's conduct in defense of the lawsuit. The insured argued that the insurer issued frivolous interrogatories and failed to accept or deny the claim after the insured submitted to a lengthy deposition. The Superior Court found no limiting language in Section 8371 that would preclude reliance upon litigation conduct as evidence of bad faith. *Id.* at 906 ("The plain language of ... section 8371 clearly reveals the lack of any restrictive language limiting the scope of bad faith conduct to that which occurred prior to the filing of a lawsuit."). Moreover, the court observed, Section 8371 was designed to remedy all instances of bad faith. Accordingly, the Superior Court held that "[a]n action for bad faith may also extend to the insurer's investigative practices," *id.*, and "the conduct of an insurer during the pendency of litigation may be considered as evidence of bad faith under section 8371." *Id.* The Superior Court cautioned, however, that it was skeptical of the degree to which discovery practices that are subject to the exclusive remedy of a protective order provided by the Rules of Civil Procedure could support a claim for bad faith. *Id.* at 909. Accordingly, the Superior Court refused to recognize the specific practices at issue in *O'Donnell* as grounds for a bad faith claim.

In *Hollock*, the insured relied upon the insurer's litigation conduct that the trial court believed was an intentional cover-up and derived from an intent to conceal the conduct of the insured's employees. 842 A.2d at 415. Because the Rules of Civil Procedure provided no remedy for the insurer's blatant attempt to undermine the truth-determining process, the Superior Court did not find *O'Donnell* controlling. *Id.* Contrary to Nationwide's assertion, in neither of these cases did the Superior Court establish a bright-line rule that

an insurer's conduct during bad faith litigation is inadmissible in support of bad faith.

The Bergs' evidence supports the trial court's conclusion that Nationwide employed a corporate strategy to resist meritorious claims consistent with the Best Claims Practices Manual that was roundly criticized in *Bonenberger*. Although the original claim was for only $25,000, Nationwide spent nineteen years fighting this case rather than settle, choosing to send a message to the plaintiff's bar about Nationwide's willingness to spare no expense litigating small claims. Moreover, the trial court was entitled to make an adverse finding resulting from Nationwide's failure to produce evidence that it instructed its employees to cease applying the litigation strategy criticized in *Bonenberger* and to conclude that the strategy was applied here.

The trial court recognized Nationwide's strategy as a substantial and continuing harm upon the civil justice system. Verdict Op. at 37-42; Rule 1925(a) Op. at 21-33. As in *Hollock*, the insurer's blatant attempt to undermine the truth-determining process supports the finding of insurance bad faith.

The trial court fairly focused upon the Potosnak report as the "apex of [Nationwide's] bad faith." Rule 1925(a) Tr. Ct. Op. at 42. Not only did Nationwide know of the repair failures disclosed in this report, but they covered up their knowledge for years. Nationwide answered the complaint denying knowledge of repair failures, and later withheld the Potosnak report during litigation through a spurious assertion of attorney client privilege. It was not until five years into the litigation that Nationwide produced the Potosnak report to support denials for requests for admissions.

Once Nationwide had the findings of Potosnak, whatever reason Nationwide may have believed that it had to continue to deny payment of the claim disappeared. At the very least, the Potosnak report substantiated Joffred's initial assessment that the Jeep was a structural total loss due to the twisted frame. Nationwide knew as of April 28, 1998, that the structural repair efforts had, in fact, failed, and that they had no reasonable basis to argue otherwise.

The Superior Court majority in *Berg II* found no significance in Nationwide's concealment of the Potosnak report because the Bergs already were aware of the repair deficiencies on their own. *Berg II*, 189 A.3d at 1051. But the question is not whether the Bergs also knew of the failed repairs. Clearly, they did. The question in a bad faith action focuses upon whether Nationwide had a reasonable basis to deny payment of the claim once it received the Potosnak report, especially when the repair failures documented therein confirmed the initial total loss appraisal. [22]

In addition, as the Superior Court recognized in *Berg I*, Nationwide misled the trial court in the 2007 trial by arguing that the BRRP was somehow different from and therefore not a part of the Bergs' insurance policy. *Berg I*, 44 A.3d at 1171-72. Even after the Superior Court's decision in *Berg I* remanding for a new trial on the bad faith claim, and recognizing that Nationwide's litigation strategy would be at issue, Nationwide continued to conceal evidence. Prior to the 2013 bench trial, Nationwide provided inaccurate information regarding the amount it had paid to defend this case. For example, Nationwide's responses to interrogatories regarding the payment of expert witnesses disclosed only $27,376. The Bergs served a subpoena on one of Nationwide's experts, Constance Foster, to dispute this amount. Nationwide moved to quash the subpoena but amended their response to add another $109,864 in expert fees.

In addition, the Bergs sought a designated witness to disclose the amount of attorney's fees during trial. Despite this, Nationwide claimed at trial that its designated witness was unavailable. The trial court ordered the witness's appearance. During testimony, the witness was unable to articulate the precise amount of legal fees, but approximated about $2.5 million in fees. The Bergs demonstrated that this amount was understated by nearly $1 million due to a single invoice from October 6, 2004, for an additional amount that had not been provided by Nationwide during discovery.

Finally, the record supports the trial court's finding that Nationwide paid its attorneys over $3 million as a strategy designed not only to conceal its knowledge about the repair failures in the Jeep, but also to make known its willingness to price plaintiffs out of court. All of this conduct evidences ill will and supports the trial court's bad faith judgment.

The OISA would hold that post-litigation conduct is inadmissible to demonstrate insurance bad faith. OISA at 19. No one is asking for such a rule in this case. Moreover, such a holding would be contrary to our precedent and to the law of the case. *See, e.g.*, *O'Donnell*, 734 A.2d at 906 (declining to hold that an insurer's duty to act in good faith ends upon

the filing of a lawsuit); *Bonenberger*, 791 A.2d at 378; *Hollock*, 842 A.2d at 415 (litigation conduct can support a finding of insurance bad faith); *Berg I*, 44 A.3d at 1176-77 (agreeing that the Bergs should be able to introduce evidence of Nationwide's litigation conduct as probative of bad faith).

VI. Conclusion

A trial court presiding over the bad faith trial is "not ... permitted to reach its verdict or decision merely on the basis of guess or conjecture." *Marrazzo v. Scranton Nehi Bottling Co.*, 422 Pa. 518, 223 A.2d 17, 21 (1966). Rather, "there must be evidence, direct or circumstantial, upon [which] logically its conclusion may be based." *Id.* This means that "the evidence presented must be such that by reasoning from it, without resort to prejudice or guess," the fact-finder can reach the conclusion sought by the plaintiff. *Smith v. Bell Tel. Co.*, 397 Pa. 134, 153 A.2d 477, 479 (1959). This does not mean that the trial court's conclusion is the only conclusion "which logically can be reached." *Id.* at 480. The facts are for the fact-finder "in any case whether based upon direct or circumstantial evidence where a reasonable conclusion can be arrived at which would place liability on the defendant." *Id.*

Reviewing the voluminous record in this case, we are convinced that there was evidence sufficient to enable the fact-finding judge, "without resort to any guess [or] conjecture," to conclude that Nationwide's conduct with respect to the handling of the Bergs' claim amounted to bad faith. The trial court provided exhaustive findings of fact and conclusions of law documenting the evidence of Nationwide's conduct and demonstrating its bad faith. All of this evidence, and the trial court's legal conclusions derived therefrom, support the trial court's determination that Nationwide, with knowing and reckless disregard, elevated its own financial interests above the interest of its insured, and placed its insured and the public at risk of injury or death, in order to save itself money on a collision claim.

Indeed, Nationwide's self-interest is apparent in many of the trial court's extensive factual findings and legal conclusions. Nationwide's financial self-interest caused it to override the opinion of its independent appraiser and to knowingly allow the Jeep to be returned to the Bergs in a dangerous condition. By initially choosing to save itself $12,500 by repairing rather than replacing the Jeep, Nationwide made its own interests paramount. This self-interest further motivated Nationwide to engage in a litigation strategy to price policy holders out of claim disputes.

We cannot agree with the Superior Court majority that Nationwide is entitled to judgment as a matter of law or that the evidence was such that no two reasonable minds could disagree that the verdict should have been in Nationwide's favor. *Rohm*, 781 A.2d at 1176. The Superior Court majority reversed the trial court's decision based on Nationwide's own evidence. But the veracity of Nationwide's evidence was not accepted by the trial court which, sitting as fact finder in this bench trial, was the sole arbiter of credibility. *See Commonwealth v. Johnson*, 542 Pa. 384, 668 A.2d 97, 101 (1995). Questions pertaining to inconsistent testimony and improper motive go to the credibility of witnesses. *Commonwealth v. Boxley*, 575 Pa. 611, 838 A.2d 608, 612 (2003). The trial court was free to disregard Nationwide's evidence.

Consequently, we would reject the Superior Court's analysis and Nationwide's arguments as an attempt to impugn the trial court's factual findings and legal conclusions on the basis of evidentiary weight. An appellate court cannot substitute its own assessment of credibility for that of the fact-finder. *Commonwealth v. Pronkoskie*, 498 Pa. 245, 445 A.2d 1203, 1206 (1982).

Based upon its holding, the Superior Court never reached Nationwide's challenge to the trial court's award of punitive damages and attorneys' fees and interest. These issues remain unresolved. Accordingly, we would vacate the Superior Court order granting JNOV to Nationwide, affirm the trial court's bad faith judgment, and remand to the Superior Court for consideration of Nationwide's outstanding challenges.

Justice Mundy joins this opinion in support of reversal.

OPINION IN SUPPORT OF AFFIRMANCE

CHIEF JUSTICE SAYLOR

As a threshold matter, the Justices supporting reversal observe that, "[b]efore we proceed, we must address the degree of deference that we owe to [the trial judge's] factual

findings and credibility determinations." Opinion in Support of Reversal ("OISR"), *Op.* at ——. The Justices then conclude that great deference should be accorded to those findings. *See id.* at —— – ——, —— (referring to the trial court as "the sole arbiter of credibility").

There is, however, an outstanding claim of judicial bias on the part of the trial judge that hasn't yet been addressed in the appellate review process. *See Berg v. Nationwide Mut. Ins. Co.*, 189 A.3d 1030, 1060 (Pa. Super. 2018) ("Given our conclusion that the record does not support the trial court's necessary findings of fact to establish bad faith, *we need not further address this issue*," *i.e.*, Appellee's argument that "the trial court's disposition of this case was motivated by partiality, prejudice, bias, or ill will"). Accordingly, to the extent that the trial court's credibility judgments are material, as the Justices in a reverse posture find to be the case, *see* OISR at —— – ——, I fail to see how the deference issue can be appropriately resolved at this juncture. Instead, I conclude that, at minimum, the case should be remanded to the Superior Court to resolve this challenge before unlimited deference would be conferred, even to supported findings. *See* OISR, *Op.* at —— – ——. [1]

Significantly, I find the claim of partiality to be colorable. For example, in his opinion addressing the matters complained of on appeal, the trial judge inexplicably engaged in a protracted we-the-consumer discourse spanning six pages of the opinion, *see Berg v. Nationwide Mut. Ins. Co.*, No. 98-813, *slip op.* at 27-32, 2015 WL 5319726 (C.P. Berks July 22, 2015), mostly under the heading of "Good Faith vs Bad Faith." *Id.* at 28. The following brief passage is illustrative of this far longer soliloquy:

> The consumer buys insurance on good faith, hope, trust and expectation that at critical times the company will set itself apart from other companies on service, legal representation, and prompt consideration of losses. *We* trust that the company will be on *our* side and go to bat for *us*, that they will be there just like a good neighbor or family member ....
>
> *We* just had an accident. *We* are scared. *We* need a company "Driven to be the best." *We* may have hurt someone or worse. ... *We* are sick about it. *We* want a company that will keep its promises and step up in *our* time of need. *We* need help and *we* need it now. "It's at times like this that [company] sets itself apart." *We* can trust them; after all they advertise that "they insure over 40,000,000 people worldwide." ...

Id. at 28 (emphasis added).

The trial judge's decision to so prolifically step out of the judicial role and align himself personally with the interests of insurance consumers, such as the Bergs, is very troubling. *Accord Berg*, 189 A.3d at 1057-60. [2] Along these lines, the judge also took the opportunity to make light of various marketing practices employed by insurance companies via his depiction of "vacationing pigs singing 'boots and pants,' cavemen playing golf," "cone-headed husband and wife," and "other nonsense props and storylines." *Id.* at 27-28. As Nationwide observes, these advertisements are those of *other* insurance companies, and in any event, the line of discourse is otherwise entirely irrelevant to the present litigation. *See* Brief for Appellee at 24. [3]

I have other differences with the OISR's approach to deference. First, the Justices supporting reversal recognize that, ordinarily, when (as here) factual assessments by a trial judge are made on a cold record, these findings are subject to less deferential review by Pennsylvania appellate courts, since these courts are able to review the evidence on the same terms as the trial judge. *See* OISR, *Op.* at —— (citing *Commonwealth v. $6,425 Seized From Esquilin*, 583 Pa. 544, 558 n.7, 880 A.2d 523, 531 n.7 (2005)). According to the OISR, however, Appellee waived the entitlement to this less-deferential review, since Appellee agreed that the trial judge could review the cold record from the previous trial in the first instance. *See id.* at —— – ——.

In the context of a consensual agreement to incorporate the prior record on retrial, however, it is unclear what Appellee was supposed to do in terms of issue preservation. Perhaps the OISR is suggesting that Appellee's attorneys should have apprised Appellant's counsel of all legal ramifications of the agreement that they both made, including the impact upon the deference afforded by appellate courts. Instead, at least as a general rule, I believe counsel on both sides of any litigation should be charged with the obligation to review their agreements and assess the legal consequences on their own. In the absence of some indicia of artifice or trickery, this Court should be able to expect that competent attorneys are aware (or would make themselves aware) of the ramifications of their agreements with their adversaries. The alternative of requiring the mutual exchange of some sort of cautionary warnings amongst opposing attorneys in civil litigation would seem to me to be both impractical and imprudent. [4]

Further, the Justices supporting reversal find that, because additional evidence, including some live testimony, was submitted to the fact-finder upon the retrial, "there is no basis to lessen the level of deference we afford to the trial court's findings." OISR, *Op.* at ——. In this regard, those Justices credit the trial court's assertion that the original trial record contained "only the tip of the iceberg" of the bad faith evidence. *Id.* at —— (quoting *Berg v. Nationwide Mut. Ins. Co.*, No. 98-813, *slip op.* at 39, 2015 WL 5319726 (July 22, 2015)). Most of the live testimony and exhibits presented on retrial, however, concerned *post*-litigation conduct and damages. *See* OISR, *Op.* at ——. Thus, I fail to see why the ordinary standard of deference pertaining to cold-record factual determinations should not pertain relative to the crucial *pre*-litigation conduct in issue. Moreover, I hold a different view than the Justices in a reverse posture -- as expressed later in this opinion -- concerning the appropriate treatment of post-litigation-conduct evidence in insurance bad-faith litigation.

Again, the Justices supporting reversal acknowledge that the deference issue is central to their own treatment of this appeal. *See, e.g.*, OISR, *Op.* at —— – —— (highlighting the critical role of the fact-finding function to the proper outcome). For my part, however, I agree with the Superior Court's assessment of the evidence in many respects, particularly to the degree its opinion reveals the lopsidedness of the trial court's findings relative to the actual record. In this regard, I view some of the key findings as being clearly erroneous and the weight of the evidence concerning others as clearly favoring Appellee.

By way of an example that I believe is central to a better understanding of the case, I regard the trial court's material finding that the Bergs' Jeep was not repairable as being wholly unsustainable. Significantly, this finding was based, in large part, on the court's determination that two body shops -- Lindgren and K.C. Auto Body Shop -- were unable to straighten the twisted frame of the Berg's Jeep. *See Berg*, No. 98-813, *slip op.* 6 (July 22, 2015); *see also id.* at 10 (depicting K.C. Auto Body Shop as "[t]he facility that did the structural repair"); OISR, *Op.* at —— (explaining that the trial court relied on "the fact that two different repair facilities had tried and failed to repair the Jeep," in support of its conclusion that the vehicle couldn't be repaired).

According to the only specific evidence on the point, however, K.C. Auto Body's Shop's assignment was only a preliminary one, in that the shop was subcontracted -- and paid only $330 by Lindgren -- to "pre-pull" the Jeep's frame to "relieve stress from it." N.T., Dec. 15, 2004, at 574 (testimony of David J. Bowen, manager of K.C. Auto Body Shop), *see also id.* at 576, Ex. 16; *id.* at 540 (reflecting the testimony of former Lindgren employee David Wert that the Bergs' vehicle was sent to K.C. Auto Body Shop only for a "rough pull"). At the outset, it would be very difficult to imagine -- even in 1996 -- that a body shop would commit to undertake the complex planning, measuring, and repair work necessary restore a twisted unibody frame to manufacturer specifications for $330. [5]

Notably, the role of a rough repair is confirmed, along the following lines, in prominent teaching manuals:

> [o]ne of the most important parts of the overall repair is to rough repair the frame prior to removing any part or section of it. To the uninformed individual, this may seem like a total waste of time and energy. However, this must be done to relieve the stresses that resulted from the twisting throughout the frame and structural members of the vehicle during the collision. Removing a section of -- or cutting into - - the damaged rail without first taking the necessary stress relieving steps will likely result in the entire frame unwinding like a loose spring.

ALFRED THOMAS & MICHAEL JUND, COLLISION REPAIR AND REFINISHING, A FOUNDATION COURSE FOR TECHNICIANS 543-44 (3d ed. Cengage Learning, Inc. 2018).

As such -- and as the manager of K.C. Auto Body Shop testified without contradiction -- pre-pulling is only a preliminary step in the attempt to return a damaged vehicle frame to manufacturer specifications. *See* N.T., Dec. 15, 2004, at 574. Moreover, the only record evidence concerning the matter affirmed that this rough-repair procedure applied to the Bergs' vehicle was successful. *See id.* at 575; *see also id.* at 685 (reflecting the opinion of Lindgren's manager, Douglas Joffred, that the Jeep was repairable when it was returned

from K.C. Auto Body Shop). Accordingly, the trial court's assertion that K.C. Auto Body Shop attempted -- and failed -- to straighten the frame is entirely unfounded.

Significantly, as well, a rough repair aids in determining whether a vehicle is a total loss in the first instance, depending on how the damaged frame responds to stress relief. *See* N.T., Dec. 16, 2004, at 904 (reflecting the uncontradicted testimony of a collision damages consultant); *see also* N.T., Dec. 15, 2004, at 640 (relating Joffred's testimony that "it was to be determined after the pull what had to be repaired"). This sheds light on the problem Appellee faced after having been apprised of Joffred's initial assessment that the vehicle was a total loss, in that the rough repair had not yet been attempted, and Lindgren apparently lacked the necessary equipment to undertake it (at the very least with respect to the damage to the roof). *See supra* note 5.

Lindgren's subsequent, gross mishandling of the frame repairs also illustrates the lack of record evidence to support the trial court's finding that K.C. Body Shop's efforts were unsuccessful, as well as the court's broader finding that the Jeep was unrepairable. Although somewhat underdeveloped on the following points, the record discloses that technician Richard Wenrich performed most of the repair work at Lindgren and that he lacked previous experience working, on a Jeep Grand Cherokee, with the degree of damage presented. *See* N.T., Dec. 15, 2004, at 613. More importantly, by his own admission, he employed only rudimentary two-dimensional, point-to-point measuring tools to assess the frame's alignment.

In this regard, Wenrich specifically testified that he used only a measuring tape and tram gauge to monitor the width from the centerline. *See id.* at 614. In collision repair, the centerline is "an imaginary line that runs through the middle of the vehicle from the front to rear and from the floor to the roof," which is "used as a reference point to measure and monitor all of the vehicle's width measurements and to determine any side-to-side movement or deviation from the vehicle specifications." THOMAS & JUND, COLLISION REPAIR AND REFINISHING 433. While many frame-alignment machines incorporate the measuring capabilities necessary to determine the centerline, measurements can also be performed manually. The most basic equipment needed, however, is some sort of manual mechanical measuring system capable of demarcating the otherwise invisible centerline, which typically would involve the use of at least multiple centering gauges. *See id.* at 434-35.

In other words, measuring tasks essential to repairing the frame of the Bergs' vehicle simply couldn't be performed with the point-to-point equipment that Wenrich said he used exclusively. *See id.* at 614 (reflecting Wenrich's own concession that a technician must know the width of the vehicle from the center on either side in order to restore it to original specifications).

Implicit in Wenrich's testimony, as well, is that no further corrective manipulation of the frame occurred at Lindgren's facility after the vehicle was returned from K.C. Auto Body Shop. [6] Instead, it appears that Lindgren discerned, based on inapt measuring techniques, that the $330 rough pull performed by K.C. Auto Body Shop had somehow restored the frame to perfect alignment. *See* N.T., Dec. 15, 2004, at 702 (reflecting Joffred's extraordinary claim that "when [the Jeep] came back [after the rough pull at K.C. Auto Body Shop] everything was in alignment."). In other words, the record strongly suggests that Lindgren didn't implement precision alignment techniques and associated measuring necessary to restore the vehicle to its original dimensions.

Thus, in my view, far from demonstrating that the Bergs' Jeep was unrepairable, as the trial court found and the OISR credits, the evidence concerning the repair efforts instead strongly suggests only that those efforts never stood a chance of succeeding on their own account. [7]

As an aside, inconsistently with much of the above evidence, the trial court repeatedly stated that "Lindgren did not even attempt to repair the structural damage" to the Bergs' Jeep. *Berg*, No. 98-813, *slip op.* at 39 (July 22, 2015). This finding is also clearly erroneous, not the least since it is undisputed that Lindgren removed and replaced one of the frame rails and performed work on other structural components. *See, e.g.*, N.T., Dec. 15, 2004, at 542-543. [8]

What is relatively clear on the present record, however, is that Lindgren's efforts to repair the frame were utterly substandard, and accordingly, the trial court's reliance on those efforts as support for its conclusion that the Bergs' Jeep was unrepairable is deeply flawed. [9] Moreover, as the Superior Court explained, most of the affirmative evidence presented at trial on the point -- including testimony from witnesses presented by both sides of the litigation -- explicitly supports the contrary conclusion, *i.e.*, that the Jeep was repairable. *See Berg*, 189 A.3d at 1044-45.

Relative to the pre-litigation conduct, the non-repairability finding is a prominent feature in the court's bad-faith analysis, since it casts the position of Appellee's claims representative Doug Witmer that repairs should proceed, based on a profit motive, in a nefarious light. In this respect, it is a far different thing for an insurance company to insist on saving money through repairs when repairs are actually feasible than when they are not possible. And the above analysis also speaks to the unevenness of the trial court's approach to its fact-finding function, in terms of the factual distortions the court employed to cast aspects of Appellee's conduct as being reprehensible. [10]

None of the above is meant to say that pre-litigation conduct attributable to Appellee was not unprofessional or otherwise wrongful. Along these lines, I agree with the trial court and the Justices supporting reversal that Witmer did what he said he did, in that he "instructed [Lindgren] to initiate repairs." N.T., Dec. 14, 2004, at 302. This decision was, of course, not Witmer's or Appellee's prerogative at all; rather, the decision belonged to the Bergs. Accordingly, at the very least, when Joffred communicated his initial opinion that the Jeep was a total loss, Appellee's representatives should have personally apprised the Bergs that the company was taking a contrary position and of their options, particularly after Witmer undertook to involve Appellee in the opinion of an individual who was supposed to serve as a neutral appraiser. [11] Additionally, given the complexity involved in repairing a twisted unibody frame, Lindgren's lack of the necessary equipment to perform an essential task should have been taken as a telltale sign that it wasn't the right facility to accomplish the repairs. Thus, the Bergs should have at least been advised that a second appraisal could be secured from a repair facility that was equipped to address the relevant frame damage, if it was repairable.

All of this being said, it is clear that the Bergs were otherwise made aware by Joffred of his initial total-loss assessment and that Mr. Berg actually made the decision to proceed with the repairs. *See* N.T., Dec. 15, 2004, at 725-726 (testimony of Mr. Berg). It also appears that Mr. Berg was contemporaneously aware of Witmer's role in the abandonment of Joffred's initial total-loss assessment, and Mr. Berg did speak with Witmer about the prospective repairs, *see id.*, although the details of the conversation remain too vague to support a conclusion that Witmer withheld material information that should have been disclosed by Appellee. And with the above knowledge in hand, Mr. Berg chose to maintain his authorization of repairs by Lindgren. *See id.* at 808 (reflecting Mr. Berg's testimony that, "I commented that I can't believe they are fixing that vehicle, but there is no one here that is going to stand up to Nationwide so I dropped it at that point."). [12]

For these and other reasons, ultimately, as concerns Appellee's pre-litigation conduct, I find myself in agreement with the Superior Court's holding that a bad-faith refusal to pay a claim was not established. [13]

As such, and otherwise, I respectfully differ with the position of the OISR that Appellee assumed the duty to repair that otherwise fell to the repair facility per its contractual agreement with the Bergs. *See, e.g.*, OISR, *Op.* at ——. [14] And I certainly wouldn't find that such duty arises from mere maintenance of a blue-ribbon-type program, which can inure to the benefit not only insurance companies but also repair facilities and consumers. (*See, e.g.*, *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009)). [15]

Regarding the pre-litigation affairs, I also have many factual differences with the OISR's depictions. For example, relative to the attributions of knowledge to Nationwide concerning the condition of the Bergs' vehicle, most of the evidence indicates that the Bergs never, in fact, undertook to make Appellee aware of their problems with the Jeep after the initial repairs, until after they had retained counsel and almost a year after those repairs. *See* N.T., Dec. 14, 2004, at 406, 425-426 (testimony of Mrs. Berg); Dec. 15, 2004, at 729, 753 (testimony of Mr. Berg that "I didn't really even think at all of going to Nationwide"). Indeed, Mrs. Berg characterized this omission as "a big mistake." *N.T.*, Dec. 14, 2004, at 425-26.

And, upon the initial report of repair issues by the Bergs' counsel, Appellee was advised that recourse was being sought only against Lindgren and further admonished not to contact that facility. *See* Letter by Benjamin Mayerson, Esquire, to Doug Witmer dated Nov. 3, 1997, N.T., Dec. 14, 2004, Ex. 7. It was only through an eve-of-litigation missive that Appellee was first put on notice of any invocation of its Blue Ribbon Guarantee or additional claim against the company after its payment for the initial repairs. *See* Letter by Benjamin Mayerson to Ron Stitzel, dated Apr. 22, 1998, N.T., Dec. 14, 2004, Ex. 11. [16]

To the extent that an unduly aggressive claims handling strategy is being attributed to Appellee, *see* OISR, *Op.* at —— – ——, —— – ——, I emphasize that this analysis doesn't

relate to the pre-litigation conduct. Indeed, the Bergs' counsel was "willing to stipulate that the Best Claims Practices and litigation strategy was not utilized by Doug Witmer in this case." N.T., June 5, 2007, at 129.

Consistent with the above, I credit the assessment of Appellant's own lead counsel, who testified under oath that, as of April 22, 1998 -- that is, over a year after the repairs and eight business days before the Appellant and Mrs. Berg commenced the litigation -- "[t]here was no bad faith at that point." N.T., June 7, 2007, at 453. [17]

The above highlights a pervading issue in this case, in that the role of Appellee's *post*-litigation conduct has essentially taken on a life of its own. In this respect, it is worth noting, as Appellant himself relates, that actual damages on the underlying insurance claim were "nominal." Brief for Appellant at 3. And much of the proliferation of the record -- as well as the acrimony and the delay -- stems from the fact that the Bergs were permitted to focus so greatly on conduct which occurred under threat of imminent litigation and during the pre-trial proceedings, when Appellee was represented by outside counsel.

Such point is underscored by the following, remarkable interchange between the Bergs' claim and litigation consultant and Appellee's counsel:

> [Consultant]: What I felt happened in this case with the defense is that the Bergs got left behind and the issue became between Nationwide and Plaintiff's law firm.
>
> [Appellee's counsel]: I agree with you.

N.T., June 5, 2007, at 257.

These circumstances seem to me to illustrate a very good reason for implementing a rule -- which appears to be the majority approach in other jurisdictions -- that evidence of post-litigation conduct is generally inadmissible in insurance bad-faith litigation. *See, e.g.*, *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 520-22 (Ky. 2006). As a threshold matter, I believe that the governing bad-faith statute in Pennsylvania is ambiguous in terms of conveying legislative intent on the subject. *Accord* *Hollock v. Erie Ins. Exch.*, 588 Pa. 231, 237, 903 A.2d 1185, 1189 (2006) (Cappy, J., dissenting to the denial of discretionary review). In the absence of clear statutory direction, other courts have relied on a litany of other policy reasons to support such a general prohibition, including: the irrelevance, or tangential relevance, of the broader range of post-litigation conduct, *see, e.g.*, *Palmer by Diacon v. Farmers Ins. Exchange*, 261 Mont. 91, 861 P.2d 895, 915 (1993); the central role of counsel, particularly outside counsel, in making strategic and tactical decisions, *see, e.g.*, *Knotts*, 197 S.W.3d at 521-22 ("The insurer relies heavily on its attorneys using common litigation strategies and tactics to defend[ ]"); the chilling effect on zealous advocacy fostered by penalizing a defendant for litigation decisions, *see, e.g.*, *Timberlake Const. Co. v. U.S. Fidelity and Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995) ("Insurer's counsel would be placed in an untenable position if legitimate litigation conduct could be used as evidence of bad faith."); and the availability of other measures, such as attorney sanctions, to address inappropriate litigation conduct, *see* *Knotts*, 197 S.W.3d at 522 ("The Rules of Civil Procedure control the litigation process and, in most instances, provide adequate remedies for improper conduct during the litigation process."). For all of these reasons, I am of the view that evidence of post-litigation conduct should be limited to proof of a bad-faith refusal to settle the underlying insurance claim on reasonable terms during the litigation. *Accord* *Knotts*, 197 S.W.3d at 522-23. [18]

In terms of the trial court's actual treatment of the post-litigation conduct, I find this to be highly relevant to the unresolved claim of judicial bias. For example, whereas the trial court found as a fact that Appellee exhibited bad faith "in its litigation strategy by refusing to settle," *see, e.g.*, *Berg*, No. 98-813, *slip op.* at 16 (July 22, 2015); *see also id.* at 37, the Bergs didn't develop a record about settlement negotiations. Indeed, as Appellee emphasizes, the company offered to present evidence to rebut the trial court's unsupported finding at the post-verdict motions stage; however, the court refused to entertain this. *See* Brief for Appellee at 30 (citing Defendant's Reply Memorandum of Law in Further Support of its Motion for Post-Trial Relief dated Sep. 10, 2014, in *Berg*, No. 98-8143, at 19). [19]

To the degree that the trial court and the Justices supporting reversal have otherwise attributed great fault to Appellee relative to the length of the litigation, I find that the Superior Court has offered a more accurate portrait, *see Berg*, 189 A.3d at 1051-57, and I would allocate fault to both sides of the litigation. Along these lines, I believe that Appellee's argument, as follows -- incorporating material findings by the

judges presiding over discovery and the first trial -- should be given greater account:

> The parties engaged in extensive discovery and briefing from the inception of the litigation through 2003. R.3a-14a. The Bergs took an extraordinarily burdensome approach, serving over 100 subpoenas on governmental entities throughout the country and some Indian tribes. R.6a-9a. They also served 110 interrogatories, 22 deposition notices, 125 requests for production of documents, and 131 requests for admissions. R.4707a-37a. The judge who oversaw discovery chastised the Bergs for this egregious behavior, writing, "[t]he delay stemming from Plaintiffs' pre-trial practice cannot be excused." R.689a. Judge Stallone, who presided over the first trial in this case, wrote, "the pleading and discovery states of this lawsuit took an inordinate amount of time to complete, driven in part by the multiple, ill-advised attempts by counsel for the Bergs to turn this case into a class action lawsuit." R.2561a.

Brief for Appellee at 14; *see also id.* at 20 (observing that the Bergs' failure to serve the original trial judge with their statement of matters complained of on appeal "tacked on *years* to this litigation") (emphasis in original).

Difficulties with the Bergs' approach to the litigation are further illustrated by the initial trial judge's repeated expressions of frustration, particularly with their development of damages evidence relating to the conduct of the litigation:

> Your position and [your co-counsel's] position and your witnesses[']] positions are not the same. You say one thing, he says something else and that's the way it's been throughout this entire proceeding. I'll tell you, I hope the Supreme Court reads this record and they ought to hand down a crown for me to wear on my last day on Earth, one that I can put into the coffin and hold because that's what I deserve for just sitting and listening to this stuff.

N.T., June 7, 2007, at 341. [20]

In summary, I wouldn't undertake to review the level of deference owing to a factfinder while a colorable challenge to his impartiality remains extant. I also believe the evidence of post-litigation conduct in the form of asserted discovery violations and the like should not have been considered by the trial court in assessing Appellee's good or bad faith in addressing the Bergs' insurance claim. Relative to Appellee's pre-litigation conduct, I agree with the Superior Court that the evidence, as concerns several essential findings, is insufficient to support the verdict. Thus, I would affirm the intermediate court's order, albeit that I accede to the dismissal, since a majority disposition cannot be attained.

Finally, it should be noted that the Bergs withdrew their breach of contract and negligence claims against Appellee prior to the jury trial. *See* N.T., Dec. 13, 2004, at 18. As such, the OISR's approach of interjecting a finding of a breach of a duty to repair deriving from the insurance contract would seem to me to be substantially problematic, relative to Appellee's right to a jury trial on the surrendered contract claims.

Justice Baer joins this Opinion in Support of Affirmance.

All Citations

235 A.3d 1223 (Mem)

Footnotes

1 This recitation of facts derives from the trial court's supported findings.

2 2004 Trial, Ex. 47 (Nationwide's insurance policy) at 12; Reproduced Record ("R.R.") at 2444a; Tr. Ct. Op., 6/21/2014, at 12.

3 The claims log reflects that Potosnak observed the following repair deficiencies and reported them to Bashore:

> 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

> [sic] comparison to RF, which is even with edge of FNDR, (makes rear appear shifted to right). RF apron and rail not replaced, RT apron still split in several areas. RT rail 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 viewd [sic] from rear, appears front sheetmetal shifted to LT. Conclusion, appears upper body sway was not pulled completely back before replacement of parts began.

2004 Tr. Ex. 8, at 4-5; R.R. 1809a-10a (capitalization modified).

4 The insurance bad faith statute provides as follows:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S. § 8371.

5 The UTPCPL defines "[u]nfair methods of competition" and "unfair or deceptive acts or practices" to include "[e]ngaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201-2(4)(xxi).

6 When the Bergs appealed this ruling, the trial court held that the Bergs had waived their appellate issues by failing to file a Rule 1925(b) statement. *See* Pa.R.A.P. 1925(b). The Superior Court affirmed. This Court granted allowance of appeal and reversed, remanding the matter to the Superior Court for resolution of the Bergs' appellate issues. *See* *Berg v. Nationwide Mut. Ins. Co.*, 607 Pa. 341, 6 A.3d 1002 (2010).

7 The Court granted review of the following issues:

> a. [D]oes an appellate court abuse its discretion by reweighing and disregarding clear and convincing evidence introduced in the trial court upon which the trial court relied to enter a finding of insurance bad faith?
> b. [D]id the Superior Court abuse its discretion by reweighing and disregarding clear and competent evidence upon which the trial court relied to support its finding of insurance bad faith [pursuant to the standard set forth in *Rancosky v. Washington Nat'l Ins. Co.*, 642 Pa. 153, 170 A.3d 364 (2017)]?
> c. Does an insurer that elects under an insurance contract to repair collision damage to a motor vehicle, rather than pay the insured the fair value of the loss directly, have a duty to return the motor vehicle to its insured in a safe and serviceable condition pursuant to national insurance standards, and pursuant to its duty of good faith and fair dealing?

Berg v. Nationwide Mut. Ins. Co., Inc., 205 A.3d 318 (Pa. 2019) (*per curiam*).

8 The OISA asserts that Nationwide alleged judicial bias before the Superior Court, and that the Superior Court did not resolve this claim. OISA at 1-2. Believing that the Court should not decide how much deference to afford the trial court, the OISA advocates for a remand to the Superior Court to resolve this outstanding issue. *Id*. at 2. Nationwide did not, however, raise a stand-alone claim of judicial bias in its Rule 1925(b) Statement. Rule 1925(a) Op. at 2 (citing Nationwide's Rule 1925(b) Statement). Indeed, the only outstanding issues for which Nationwide presently believes a remand is appropriate are its challenges to the trial court's punitive damages, attorneys' fees, and interest. Brief for Appellee at 62-63.

9 Further reaching an issue that is not before us, the OISA finds merit in Nationwide's allegations of partiality. OISA at 2-3. We share the OISA's concern for the trial court's irrelevant musings, as these "tangential discourse[s]," *Berg II*, 189 A.3d at 1061, n.1 (Stevens, P.J.E., dissenting), detract from the core legal analysis and, as Nationwide and the OISA observe, are irrelevant to the present litigation. We would not, however, venture to resolve an issue that is not before us.

10 The OISA opines that the problem of deferring to the trial court is "magnified" because Judge Stallone found no bad faith. But Judge Stallone's finding was premised upon an error of law, which the Superior Court

promptly corrected. *Berg I*, 44 A.3d at 1176-79. Judge Stallone did not reach the merits or enter any findings of fact. In an opinion authored by now-Justice Donohue, the Superior Court recognized not only the legal error in Judge Stallone's analysis, but also the merit of the Bergs' allegations of bad faith. *Id*. at 1176 (finding that much of the Bergs' evidence satisfied the definition of bad faith). Because Judge Stallone did not examine whether the evidence demonstrated bad faith, only Judge Sprecher's findings are relevant to this analysis.

11 The Insurance Federation of Pennsylvania, the American Property Casualty Insurance Association, and the National Association of Mutual Insurance Companies have filed an *amicus curiae* brief in support of Nationwide, arguing that there is no legal obligation for insurance companies to perform post-repair vehicle inspections.

12 United Policyholders and the Pennsylvania Association for Justice have filed *amicus* briefs on behalf of the Bergs, arguing that the evidence supports the trial court's bad faith judgment.

13 The OISA believes that the record is not clear as to whether Joffred submitted a written appraisal on September 10, 1996. Insurance regulations require appraisals to be signed and in writing. 31 Pa. Code §§ 62.1, 62.3(a)(1). And Joffred testified that the September 10, 1996 appraisal was in writing. N.T., 12/15/2004, at 707-08; R.R. 1402a-04a; N.T., 12/15/2004, at 623; R.R. 1319a; N.T., 12/15/2004, at 625-26; R.R. 1321a-22a.

14 The OISA, like the Superior Court, would find that Joffred prepared a repair estimate on September 10, 1996. But it is not disputed that Joffred's initial assessment was that the Jeep was a structural total loss, a conclusion Joffred reached only after he had “torn [the Jeep] apart.” N.T., 12/15/2004, at 629; R.R. 1325a. Consistent with this assessment, Joffred requested to be compensated for disassembling the Jeep, a request that confirms the initial total loss assessment. To the extent there is conflicting testimony about whether an estimate was prepared on September 10, 1996, it is worth noting that this estimate had been generated using Nationwide's automated appraisal software, which Nationwide required Joffred to use and which would generate repair estimates based upon pre-programed rates. N.T., 12/15/2004, at 631-32; R.R. 1327a-28a. The estimate generated by the software would have accounted for the economic feasibility of repair, not the safety or structural integrity of the Jeep, and does not undermine Joffred's testimony that he initially assessed the Jeep as a structural total loss.

15 The OISA is critical of the trial court's finding that the Bergs were not provided with a copy of the September 10, 1996 appraisal. OISA at 14, n.11. Witmer testified that he never informed the Bergs of the initial total loss appraisal. N.T., 12/14/2004, at 366; R.R. 1065a-66a. Although Mr. Berg testified regarding conversations he had with Joffred, he did not testify that he received an appraisal. N.T., 12/15/2004, at 725-26; R.R. 1421a-22a. And while Joffred testified that he did not inform the Bergs of the initial total loss appraisal, N.T., 12/15/2004, at 703; R.R. 1399a, Joffred also speculated that the Bergs “would have” received a copy of the initial appraisal on September 10, 1996. N.T., 12/15/2004, at 692; R.R. 1388a. From this evidence, the trial court was entitled to make a finding that the Bergs were not provided with a copy of the initial total loss appraisal. Verdict Op. at 14.

The OISA also would find that the Bergs consented to the repair. OISA at 14. Although the Bergs believed, based upon conversations they had with Joffred, that Joffred initially assessed the Jeep as a total loss, N.T., 12/15/2004 at 725-26; R.R. 1421a-22a, the Bergs were never informed, by anyone, that this assessment was because the Jeep was a *structural* total loss due to the twisted frame. Joffred testified that he withheld this information even after Mr. Berg questioned the wisdom of repairing the Jeep. N.T., 12/15/2004, at 703; R.R. 1399a. It was not until a pre-complaint deposition that the Bergs learned that Joffred initially declared the Jeep to be a structural total loss due to the twisted frame.

Mr. Berg's testimony was contradictory on whether he wanted the Jeep to be repaired. Although he initially testified that he wanted the repairs completed, N.T., 12/15/2004, at 725-27; R.R. 1418a, the following day he clarified that he did not want the Jeep repaired, and that, given Joffred's assertion that the Jeep was totaled, he was surprised that Nationwide wanted to repair it. N.T., 12/16/2004 at 808; R.R. at 1505a.

The OISA also critiques as “clearly erroneous” the trial court's finding that the Bergs were not made aware that Joffred believed the Jeep to be “a structural total loss because the frame was twisted.” Rule 1925(a)

Op. at 14. However, it is apparent from the trial court's opinions that it believed, based upon the testimony, that, although the Bergs were aware that Joffred had "totaled" the Jeep, they were not aware that this was a structural assessment based upon the twisted frame.

Our review examines whether the trial court reasonably could have reached its conclusions. *Bergman v. United Services Auto. Ass'n*, 742 A.2d 1101, 1104 (Pa. Super. 1999) ("The test is not whether we would have reached the same result on the evidence presented, but rather, after due consideration of the evidence which the trial court found credible, whether the trial court could have reasonably reached its conclusion.") (quoting *Terletsky v. Prudential Property and Cas. Ins. Co.*, 437 Pa.Super. 108, 649 A.2d 680, 686 (1994)). On this record, the trial court's conclusions are reasonable.

16 The OISA would also find, as the Superior Court did, that Joffred ultimately agreed with Witmer about the feasibility of repairing the Jeep. OISA at 13, n.11. As detailed above, reading the record in the light most favorable to the Bergs as verdict winner supports the trial court's findings.

17 During this time, Nationwide provided the Bergs with only thirty days of rental car coverage. Verdict Op. at 15.

18 The OISA would conclude, as the Superior Court did, that the trial court's conclusion that the Jeep was not repairable is unsustainable. OISA at 6. The OISA focuses upon the distinct roles of Lindgren and K.C. Auto. But evidence that the Jeep was not repaired after K.C. Auto pulled the frame and Lindgren attempted repairs is consistent with the trial court's conclusion that the Jeep was beyond repair. The trial court's finding is further bolstered by Joffred's testimony that "no matter what it took to fix [the Jeep], it shouldn't have been fixed." N.T., 12/15/2004, at 628; R.R. 1325a. Viewing this circumstantial evidence in the light most favorable to the Bergs as the verdict winners supports the trial court's finding that the Jeep was not repairable.

19 This provision provides that "[t]he claim files of the insurer shall be subject to examination by the Commissioner or by his appointed designees. The files shall contain notes and work papers pertaining to the claim in the detail that pertinent events and the dates of the events can be reconstructed." 31 Pa. Code § 146.3.

20 The value of the Jeep had depreciated from $25,000 to $18,000 during the remainder of the Bergs' lease.

21 Unlike the OISA, we do not believe that the Bergs' decision to withdraw their breach of contract claim removed Nationwide's breach of the insurance contract as evidence of bad faith. OISA at 23. Indeed, bad faith is premised upon "an action arising under an insurance policy." 42 Pa.C.S. § 8371.

22 The OISA emphasizes that Potosnak, whose inspection was completed a mere four days before the Bergs filed suit, did not conclude that the Jeep was a total loss. OISA at 18, n.17. But the fact remains that Potosnak's report substantiated the initial total loss assessment and made clear that the prior repairs had failed to return the Jeep to a safe and serviceable condition. Potosnak identified extensive structural repair failures, and reported these failings to Bashore. This should have caused Nationwide to act on the knowledge that their insureds were and had been driving a structurally unsafe vehicle, yet it did not. The filing of the lawsuit did not preclude Nationwide from reassessing its prior position. Instead, Bashore implied to the Bergs that he knew nothing of the failed repairs and did not offer a replacement vehicle. 2004 Tr. Ex. 15 (letter dated 5/19/1998); R.R. 1891a.

1 As developed in the text of this opinion, below, several of the trial court's credibility assessments discussed by the Justices supporting reversal are not as relevant to my own analysis, since I agree with the Superior Court that there is a lack of sufficient evidence to support key findings.

2 *See also Berg*, 189 A.3d at 1061 n.1 (Stevens, P.J.E., dissenting) ("[I]t is noted with displeasure [the trial judge's] tangential discourse concerning insurance companies, most concentrated on pages twenty-one through thirty-three of his July 23, 2015, Opinion, as well as peppered throughout his June 23, 2014, and July 23, 2015, Opinions, is irrelevant, unnecessary to the disposition of the issues, and should have been excluded.").

3 One might say the judge's empathy with consumers is understandable in one sense, since we are all insurance consumers by necessity. But this issue must be viewed from the perspective of the insurance company as a party to the litigation haled into court by individual consumers and entitled to a neutral decision-

maker. Along these lines, judges who unavoidably have personal interests overlapping with the subject matter of litigation are required to assiduously put these aside in the performance of their judicial duties. Notably, there would be little doubt that an appearance of impropriety would arise if a judge presiding over bad-faith litigation, who was a former insurance lawyer, engaged in lengthy discussion of just how committed such companies are to exceeding their obligations to insureds. It seems to me that the trial judge's approach of allying with consumer interests here should be of similar concern.

The problem with the trial judge's poor judgment is magnified, given that the predecessor judge had found, on much the same record as concerns the pre-litigation circumstances, that the Bergs were not denied any benefits under their insurance policy with Appellee. *See* *Berg v. Nationwide Ins. Co.*, No. 98-813, *slip op.* at 16, 18, 2011 WL 7497163 (C.P. Berks June 3, 2011) (Stallone, J.). By contrast, on remand, the substitute judge issued a series of findings of reprehensible conduct on Appellee's part, giving rise to the OISR's conclusion that Appellant elected and breached the repair option under its insurance policy with the Bergs. *See* OISR, *Op.* at ——.

4 I do appreciate that there are good reasons to accord a fair amount of deference, on appellate review, to a trial court's cold-record factual determinations. *See, e.g.*, *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 574-75, 105 S. Ct. 1504, 1512, 84 L.Ed.2d 518 (1985) (explaining that, in the federal system at least, "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility," but also reflects that "[d]uplication of the trial judge's efforts ... would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources"). I also recognize that this Court's decisions haven't presented a refined analysis of *the degree* of deference owing to an unbiased judge's cold-record assessments.

In any event, my only intention at present is to respond to the waiver analysis of the Justices supporting reversal, as well as to reiterate my concern about applying deferential review where there remains an outstanding and colorable challenge to the trial judge's neutrality.

According to the Justices in a reverse posture, the concern with the trial judge's neutrality isn't presently before this Court. *See* OISR, *Op.* at —— n.9. But Appellee has specifically raised the matter in its brief in its arguments about the amount of deference to be allocated to the trial court's findings. *See, e.g.*, Brief for Appellee at 18-19, 24 (asserting that the trial judge's "factual findings warranted careful scrutiny because of his demonstrated animus toward insurance companies including Nationwide").

5 Parenthetically, there is a lack of clarity as to specifically why the vehicle was sent to K.C. Auto Body Shop. Although there was some evidence that Lindgren didn't possess a frame alignment machine, *see* N.T., Dec. 15, 2004, at 542 (testimony of David Wert), testimony from Lindgren's manager, Douglas Joffred, suggests that the Lindgren did have equipment capable of aligning vehicle frames, but that this equipment was insufficient to address the roof damage. *See* N.T. Dec. 15, 2004, at 639, 683-84; *see also infra* note 6.

6 Again, contrary to implications that can be drawn from Joffred's testimony, *see supra* note 5, Wert testified that Lindgren didn't possess a frame alignment machine in relevant time period. *See* N.T., Dec. 15, 2004, at 542. At one point in its opinion, however, the trial court accepted that Lindgren had all the equipment necessary for "holding, pulling, and measuring most vehicles ... including plaintiffs' Jeep." *Berg*, No. 98-813, *slip op.* at 8 (July 22, 2015). *But see Berg,* No. 98-813, *slip op.* at 10 (June 24, 2015) ("It is ... 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[.]"). The trial court grounded its assumption that Lindgren had the necessary equipment upon testimony from Appellee's collision damages consultant, William Anderton. *See* N.T., Dec. 16, 2004, at 894-895 (reflecting Anderton's testimony that Lindgren had a "car aligner universal bench system" in its shop at the time of the repairs). However, the basis for Anderton's assessment about what equipment Lindgren had at the time of the repairs is unclear.

In any event, as reflected in the following exchange with counsel, it was certainly Anderton's understanding, consistent with the other evidence, that no frame-alignment machine was ever used on the Bergs' Jeep while at Lindgren:

> Q. Did you wonder why Lindgren didn't pull [the frame]?
>
> A. There could have be a variety of reasons and the least of which might have been that their equipment was already tied up with another repair. The equipment should be used during the assembly process so if they have one bench the equipment could be under another vehicle at that time and therefore inaccessible for the length of time that this vehicle would have needed a repair.

N.T., Dec. 16, 2004, at 895.

7 Notwithstanding this conclusion, the Bergs' post-repair problems with the vehicle should be kept in perspective. For example, whereas the OISR indicates that they repeatedly returned it to Lindgren "to remedy structural issues," OISR, *Op.* at ——, Mr. Berg described two repair visits, one to address a failure of the headlights and the other for drifting, noise, and tire wear. *See* N.T., Dec. Dec. 15, 2004, at 727-28, 753-54. However, after the tires were replaced and wheel alignment was performed, Mr. Berg related, the vehicle "was driving fine," and he and Mrs. Berg "drove it a lot," *i.e.*, nearly 20,000 miles. *See* N.T., Dec. 14, 2004, at 407 (testimony of Mrs. Berg). Notably, as well, as of the time the Bergs were contacted by former Lindgren employee David Wert with information about irregularities in the repair efforts, "there was no knowledge that there was anything wrong with the vehicle." N.T., Dec. 15, 2004, at 754 (testimony of Mr. Berg).

8 It is worth noting that, even if the Jeep's frame had been fully aligned after the rough pull, further relevant measurements would be necessary -- and in all likelihood additional frame manipulation would be implicated -- after a segment of the frame had been severed and a replacement piece installed.

9 Furthermore, as Appellee observes, the notion that a failure to repair equates to non-repairability is also a non sequitur in the first instance. *See* Brief for Appellee at 35 ("[T]he mere fact that a repair shop *did not* repair the Jeep properly is a far cry from clear and convincing evidence that it *could not* be repaired[.]") (emphasis in original).

10 The following passage from Appellee's brief -- which concerns the trial court's decision to draw negative inferences about Appellee's intentions based upon the court-approved disposition of the Bergs' Jeep -- presents another ready example of an unwarranted distortion:

> [The trial court] repeatedly faulted Nationwide for spoilating the Jeep, speculating that Nationwide was in a "hurry to destroy" it. *See, e.g.*, 7/23/2015 Opinion, at 10-11. However, Nationwide discarded the Jeep in late 2007, after storing it for nearly *nine years*, during which time each side could do whatever sort of inspection it wanted. Nationwide was justified in disposing of the vehicle, and indeed Judge Stallone ordered that Nationwide could dispose of the Jeep because the Bergs had failed to pay their share of the storage costs. R.2507a-08a. [The trial court's] conclusion that Nationwide spoilated the Jeep is contradicted by evidence and demonstrates bias.

Brief for Appellee at 28 (emphasis in original). The trial court's digression in this regard not only disregarded the law of case, but it also ignored the fact that the Bergs themselves had repeatedly advised Appellee of their own intentions to dispose of the Jeep. *See, e.g.*, Letter by Benjamin Mayerson to Ron Stitzel, dated Apr. 22, 1998, N.T., Dec. 14, 2004, Ex. 11 ("[T]he Berg family is going to sell the Cherokee.").

11 I agree nonetheless with the Superior Court that the weight of the evidence strongly supports Joffred's pervasive testimony that, upon his discussion with Witmer, Joffred agreed that the repair plan was feasible. *See Berg*, 189 A.3d at 1038-43. In this regard, the Justices supporting reversal dismiss the bulk of Joffred's testimony based on his proclivity at trial to agree with those with which he was speaking. *See* OISR, *Op.* at ——. Such trait, however, would seem to lend additional support to the extensive evidence that Joffred also agreed with Witmer.

Moreover, to the extent that the Justices in a reverse posture and the trial court have determined and/or implied that Joffred submitted a *written* total-loss appraisal or assessment to Nationwide on September 10, 1996, *see* OISR, *Op.* at —— – ——, I find no record support for this assertion. Although Joffred repeatedly responded that he submitted an appraisal, he never said that the assessment was in writing. The term "appraisal," although a term of art in the insurance, is ambiguous in that its colloquial meaning would encompass oral statements. Moreover, the explanation that the written repair estimate that Joffred

said he had locked into the computer on September 10, 1996, was the same one that he later printed with the September 20, 1996, date is uncontradicted on the present record. *See* *Berg*, 189 A.3d at 1038-44.

Indeed, as Appellee highlights, a September 10, 1996, entry on the claims log evidences that "they [*i.e.*, Lindgren] have an estimate," N.T., Dec. 14, 2004, Ex. 8 at 69, and a September 12, 1996, entry designates the amount of the estimate as "12K." *Id.* at 67. Accordingly, any suggestion that the $12,326 repair estimate was first prepared on September 20, 1996, *see* OISR, *Op.* at ——, lacks evidentiary support and is refuted by the actual evidence.

In this line of discussion, with reference to the OISR's assertion that "the Bergs were never provided with a copy of the September 10, 1996 appraisal[,]" OISR, *Op.* at ——, in fact, Joffred testified that the Bergs would have been provided his estimate on September 10, 1996. *See* N.T., Dec. 15, 2004, at 692. Accordingly, at the very least, the evidence is ambiguous and/or inconsistent on the point.

12 Given the above, the following finding by the trial court represents another that is clearly erroneous: "The [Bergs] were not even told that the opinion of the assigned appraiser was that the vehicle was a structural total loss because the frame was twisted." *Berg*, No. 98-813, *slip op.* at 14 (July 22, 2015).

13 Since insurers legitimately have an interest and a role to play in deciding what they will pay on any given claim, it is unsurprising that they investigate -- and may question -- total-loss assessments. As a collision repair professional testified at trial: "It's business." N.T., June 5, 2007, at 83 (testimony of George Moore, as presented by the Bergs).

To my mind, in terms of the bad-faith question, the main consideration here is not the fact that Appellee operated on a profit motive -- as it clearly did -- but the degree to which the Bergs were kept informed and were not misled. And again, the record reflects the Bergs were materially apprised at the key decision-making milestones, other than in the decision to subcontract the rough repair. And certainly Lindgren is primarily at fault for this apparent omission, since it accepted custody of the Bergs' vehicle pursuant to appraisal-and-repair agreements and surrendered the actual possession to K.C. Auto Body Shop, while effectively serving as a bailee.

14 In this vein, the OISR broadly asserts that "it was Nationwide, not Lindgren, controlling and directing the repair process." OISR, *Op.* at —— (citing *Berg*, No. 98-813, *slip op.* at 15 (June 14, 2014)). I respectfully disagree, not the least since there is no evidence that Appellee had anything to do with directing the grossly deficient manner in which Lindgren undertook the frame repairs after the Jeep was returned from K.C. Auto Body Shop. *See supra.* At most, it seems to me that the record supports an inference that Appellee negligently facilitated repairs at a shop that lacked the equipment, and inferentially the expertise, to effectuate them.

Negligence, of course, falls short of bad faith. *See* *Rancosky v. Washington Nat'l Ins. Co.*, 642 Pa. 153, 174-75, 170 A.3d 364, 376 (2017). *See generally* *Berg*, 189 A.3d at 1050 (concluding that "the evidence here does not rise above negligence, much less support a finding of bad faith by clear and convincing evidence"). Parenthetically, the OISR pronounces that "Nationwide misled the trial court in 2007 by arguing that the BRRP was somehow different from and therefore not part of the Bergs' insurance policy." OISR, *Op.* at ——. The "somehow" relates to the fact that the blue-ribbon agreement isn't part of the physical policy which is, by law, filed with the Insurance Department. *See* N.T., June 8, 2007, at 626-627 (testimony of Constance Foster, Esquire). And this Court has not passed on the Superior Court's previous determination that the blue-ribbon commitment is part of the policy for purposes of bad-faith litigation, which, I believe, would require an analysis by this Court of the relevant legislative intent.

15 To the degree the Justices supporting reversal treat random inspections conducted by insurance claims representatives at independent repair facilities as tantamount to actual or constructive knowledge of deficient repairs, *see* OISR, *Op.* at —— – ——, —— – ——, I also disagree. Notably -- as Appellee and its *amici* highlight -- to the extent that the insurance industry responds by implementing self-protective measures, this will require close post-repair inspections by insurer representatives, which will increase expenses and potentially premiums, as well as extend the time that insureds must await the return of their vehicles.

On the subject of post-repair inspections, I also note another errant finding by the trial court, as follows: "[E]very subsequent inspection of the Jeep confirmed visible repair failures." OISR, *Op.* at ——(citing *Berg*,

No. 98-813, *slip op.* at 16, 18 (June 24, 2014)). This ignores the uncontroverted evidence that the Jeep passed Pennsylvania state inspection, apparently several times. *See* N.T., Dec. 15, 2004, at 732, N.T., Dec. 16, 2004, at 813. *See generally* 67 Pa. Code § 175.80(e)(5) (prescribing the annual inspection procedure encompassing a "beneath the vehicle inspection," encompassing the requirement to assess the vehicle frame for visible defects).

16 Appellee also explains that it had previously offered its support and assistance to the Bergs, once the company was made aware that there were repair issues with the Jeep. *See* N.T. Dec. 15, 2004, at 590-591 (testimony of Appellee's employee, Ronald Stitzel) & Ex. 8 at 11-12 (claims log). The Bergs, however, who were contemplating suit against Lindgren, not only declined the invitation, but they directed Nationwide to stand aside. *Id.* at 592 & Ex. 8 at 9-10; *see also* Letter by Benjamin Mayerson, Esquire, to Doug Witmer dated Nov. 3, 1997, N.T., Dec. 14, 2004, Ex. 7.

17 The legal analysis of the Justices in a reverse posture appears to confirm the above, as follows:

> The question in a bad faith action focuses upon whether Nationwide had a reasonable basis to deny payment of the claim when it received the Potosnak report [*i.e.*, more than a year after the initial repairs were effected and four business days before the Bergs commenced the litigation] ....

OISR, *Op.* at ——. According to this recitation -- other than the post-litigation conduct -- the case would be about the four business days that passed between Potosnak's inspection of the Jeep and the filing of the Bergs' complaint.

It is also significant that the Bergs had just put Appellee on notice that they should have the Jeep inspected by "an independent expert for purposes of litigation." Letter by Benjamin Mayerson to Ron Stitzel, dated Apr. 22, 1998, N.T., Dec. 14, 2004, Ex. 11. Potosnak, however, was not such an expert, but rather, was Appellee's employee. *See* N.T., Dec. 14, 2004, at 369. Consistent with the Bergs' advice, Appellee proceeded with attempts to schedule the independent-expert inspection, and there is little evidence that its efforts were insufficiently diligent in such regard.

Along these lines, I find Appellee's perspective on the subject to be illuminating:

> Appellant claims that, after Potosnak inspected the Jeep on April 28, 1998, Nationwide "did not promptly honor the claim by finally conceding the Jeep was a total loss" and instead, "forced this lawsuit without any reasonable basis." Br. at 55. However, Potosnak did not conclude that the Jeep was a total loss or could not be repaired. Moreover, after Potosnak inspected the Jeep, he was waiting to learn of Lindgren's plans regarding the vehicle. R.1808-10a. The Bergs, however, sued Nationwide for bad faith seeking punitive damages *just four business days later.* R.40a-88a. The idea that this supposed delay "forced" the Bergs to file suit is preposterous, particularly where the Bergs did not contact Nationwide during those four business days. R.1809a.

Brief for Appellee at 44 (emphasis in original).

18 Evidence pertaining to settlement negotiations would need to be handled carefully, particularly in instances in which insurance bad-faith proceedings might be conducted before a jury, in light of the general prohibition against the admission of such evidence. *See* Pa.R.E. 408(a). Nevertheless, in a bad-faith action in which there is a colorable proffer to demonstrate that a bad-faith refusal to settle an *underlying* claim continued into the litigation, I would hold that the evidence should be admitted.

19 In various passages, the OISR and the trial court have referred to an original claim, by the Bergs, of $25,000. *See, e.g.*, OISR, *Op.* at —— ("Although the original claim was for only $25,000, Nationwide spent nineteen years fighting this case rather than settle[.]"). It should be borne in mind, however, that from the outset of the litigation the Bergs were seeking, *inter alia*, "punitive damages in excess of 50,000" on multiple counts in their complaint. *See, e.g.*, Complaint dated May 4, 1998, in *Berg v. Nationwide Mut. Ins. Co.*, No. 98-813, at 45-46. Given that the attribution to Appellee of an unduly aggressive claims handling strategy relates only to the company's *post*-litigation conduct, *see supra* -- which occurred at a time during which Appellee was being charged with bad-faith conduct relative to its insureds and the stakes had been raised much higher -- the reference to an "original claim [that] was for only $25,000," in association with the criticized strategy, seems particularly inapt. OISR, *Op.* at ——.

20 To the extent the Justices supporting reversal suggest that Appellee's answer to the Berg's complaint falsely denied knowledge about repair issues, *see* OISR, *Op.* at ——, ——, I note that Appellee presents a detailed recitation of the relevant passages of the complaint and answer and concludes, in my view properly, that:

> Nationwide's Answer was an entirely proper response to a paragraph that included multiple intertwined factual and legal conclusions and incorporated by reference a written report. *See* Pa. R. Civ. P. 1029. To the extent a further response was required, Nationwide properly denied that it was responsible, either jointly or severally, for poorly performed repairs (because it did not perform those repairs) or that the vehicle was unsafe (because its experts never reached that conclusions).

Brief for Appellee at 50-51.