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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DANIEL BERG, INDIVIDUALLY AND AS THE EXECUTOR OF THE ESTATE OF SHARON BERG A/K/A SHERYL BERG,
Petitioner

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY, INC.
Respondent

PETITION FOR ALLOWANCE OF APPEAL

No. ____________

PETITION FOR ALLOWANCE OF APPEAL FROM THE OPINION AND ORDER OF THE SUPERIOR COURT DATED JUNE 5, 2018 AT DOCKET NO. 713 MDA 2015 REVERSING THE JUDGMENT OF THE COURT OF COMMON PLEAS OF BERKS COUNTY AT DOCKET NO. 98-813

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<u>TEXT OF THE ORDER SOUGHT TO BE REVIEWED</u>

Judgment vacated. Case remanded for entry of judgment in favor of Appellant. Jurisdiction relinquished.

Judge Ott joins the opinion.

President Judge Emeritus Stevens files a dissenting opinion.

/s/

____

Joseph D. Seletyn, Esq.
Prothonotary

QUESTIONS PRESENTED FOR REVIEW

1. It is a bedrock principal of appellate review that issues of fact are resolved exclusively in the trial court. Pennsylvania's bad faith statute, 42 Pa.C.S.A. § 8371, authorizes the trial court to find that the insurer has acted in bad faith toward the insured. Consequently, does 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?

2. Pursuant to *Rancosky v. Washington Nat'l Ins. Co.,* 170 A.3d 364 (Pa. 2017), a plaintiff in a bad faith claim under 42 Pa.C.S.A. § 8371 must present clear and convincing evidence that the insurer (a) lacked a reasonable basis for denying benefits under the policy, and (b) knew or recklessly disregarded its lack of a reasonable basis. In addition, self-interest or ill will is not a prerequisite to prevailing. Consequently, did 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?

3. 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?

4. When a Superior Court panel is "deadlocked" and unable to reach a majority decision, may the court reassign the matter to a panel that includes one judge from the deadlocked panel, contrary to Internal Operating Procedure 65.5F, which requires that the matter be heard by the court *en banc* or by another three-judge panel?

<u>STATEMENT OF THE CASE</u>

I. Factual History

This matter arises from a dispute over Nationwide's handling of Petitioners' (the "Bergs") claim for property damage arising from a September 4, 1996 collision in which their 1996 Jeep Grand Cherokee was extensively damaged. (R.1001a)

Nationwide assumed responsibility for repairing the vehicle through its "Blue Ribbon Repair Program" ("BRRP"), a "direct repair program" in which damaged vehicles are taken to BRRP facilities for appraisal and repair. Nationwide offers participating claimants a BRRP guarantee on the repairs. Nationwide receives discounted repair rates from BRRP facilities in exchange for the referrals. Nationwide oversees the discounted repairs by sending field-inspectors, known as Property Damage Specialists ("PDS") or "reinspectors," to conduct "reinspections" to ensure compliance with its cost-containment objectives. Exhibit "A" at *30-35 (*Majority*).

The Bergs agreed to participate in Nationwide's BRRP. Nationwide's appraiser at the BRRP facility, Body Shop Manager Douglass Joffred, notified Nationwide that the Bergs' Jeep was "a total loss since unibody [frame] is twisted." *Id*. at *17. Nationwide elected to have the Jeep repaired for financial reasons, *id*. at *23, and had it shipped to another repair facility

because the BRRP facility was unable to attempt the complex structural repairs. *Id.* at *19.

The repairs, expected to take 25.5 days, lasted four months, and were reinspected numerous times by Nationwide's PDS, including near the end of the protracted repair period. *Id.* at *34. The parties agree that the vehicle was released to the Bergs from Nationwide's BRRP facility on December 30, 1996, in an unsafe condition with structural repair failures. *Id.* at *29.

II. Procedural History

This lawsuit was filed May 4, 1998, with a bad faith claim pursuant to 42 Pa.C.S.A. § 8371, an Unfair Trade Practices and Consumer Protection Law claim under 73 P.S. §201-2(4)(xxi), and fraud and conspiracy claims. The trial was bifurcated. Following five days of testimony in 2004 a jury found Nationwide violated the catchall fraud/deceit provision of the UTPCPL.

The second trial phase for bad faith proceeded in 2007. Following four days of additional testimony Nationwide was granted a directed verdict. The trial court, not ruling on the merits but rather as a matter of law, determined that this was not an "action arising under an insurance policy," but rather one arising under a collision repair guaranty. The trial court also ruled that the Bergs waived all appellate issues for failing to properly serve a timely filed

Rule 1925(b) Statement. (Stallone, J.). The Superior Court affirmed the finding of waiver.

This Court granted review of the waiver issue and remanded to the Superior Court to review the merits of the appeal. *Berg v. Nationwide Mut. Ins. Co.,* 6 A.3d 1002 (Pa. 2010)("*Berg I*"). The Superior Court determined that the trial court erred on all issues raised on appeal and remanded for a new trial. *Berg v. Nationwide Mut. Ins.,* 44 A.3d 1164, 1176-77 (Pa. Super. 2012))("Berg II").

The case was assigned to Judge Jeffrey Sprecher. After reviewing the record from all three trial phases,[1] Judge Sprecher concluded that Nationwide committed insurance bad faith because: (1) Nationwide improperly interfered in the appraisal process to override the opinion of the assigned appraiser that a motor vehicle was a structural total loss; (2) Nationwide risked the safety of its insured by allowing the vehicle to be released from its direct repair facility in a dangerous condition despite knowing the structural repair efforts failed; (3) Nationwide concealed its knowledge of the vehicle's condition when the Bergs discovered the

[1] The record from the first two trial phases was entered into evidence by Nationwide in lieu of repeating prior testimony. (RR.2587a-90a). Four additional witnesses testified on remand, three on liability and an economist on damages. (RR.2581-82a).

structural defects, further delaying its obligation to replace the vehicle; and (4) Nationwide paid its attorneys more than $3 million in their efforts to price the Bergs out of court based upon the company's documented strategy to apply, "[c]ontinued reinforcement of Nationwide being a 'defense-minded' carrier in the minds of the plaintiff legal community." (R.2167a). Judge Sprecher awarded $3 million in attorney's fees and $18 million in punitive damages. Nationwide appealed.

Two panels of the Superior Court were assigned to decide this case. The first panel was comprised of Judges Victor Stabile, Jack Panella, and James Fitzgerald. At oral argument held February 2, 2016, Judge Panella announced that his daughter was employed by Nationwide and he would recuse himself if desired. Neither party requested recusal and argument proceeded to conclusion.

On May 1, 2017, the Superior Court issued an Order announcing a deadlock after Judge Panella elected to recuse himself. The Order transferred venue from the Middle District to the Eastern District for reassignment to a new panel with an argument date beginning October 10, 2017. *See* Exhibit "D." On August 31, 2017, the list of judges on the new panel was published, revealing that Judge Stabile was assigned to the new

panel with Judges Ott and Stevens. Judge Fitzgerald was not assigned to the new panel.

The Bergs filed an Application for Relief requesting, *inter alia*, that the alternate judge already assigned to the argument list replace Judge Stabile. The Application was denied September 19, 2017. *See* Exhibit "E."

On June 5, 2018, Judge Stabile authored the Majority Opinion granting Nationwide JNOV. President Judge Emeritus Correale Stevens filed a Dissenting Opinion. The majority reached the following conclusions:

- Insurers "must act in good faith towards their insureds regardless of whether loss claims are processed through a third-party repair facility or through a direct repair program," *Majority* at *5 (citing *Berg II*, 44 A.3d at 1173);
- The "standard of review requires us to defer to findings supported in the record and draw reasonable inferences in favor of Plaintiffs…. After an exhaustive review of the very large record in this case, we believe we have no choice but to vacate," *id.* at 59;
- Nationwide concealed a reinspection report entered into the claim file before this lawsuit was filed that confirmed the structural repair failures, *id*. at *40-41, *48-50;

- Nationwide never produced other evidence, including BRRP reinspection reports and photographs of the Jeep's twisted frame, *id*. at *48-50; and,
- The trial court based its decision to award statutory fees to the Bergs pursuant to 42 Pa. C.S.A. § 8371, in part, upon the fact that Nationwide had paid its retained attorneys $3 million, *id*. at *53.

In his dissent, President Judge Emeritus Stevens identified "ample evidence" supporting the "verdict and damage award," noting that the $21 million judgment "does not shock this Court's sense of justice." Exhibit "B" at *1, *10, ("*Dissent*"). The Dissenting Opinion also concluded:

- "[T]he trial court provide[d] citation to ample evidence from the certified record to support its verdict and damage award in favor of the Bergs," *id*. at 1; and,
- "The trial judge's reasoning applied to the issues [Nationwide] has raised on appeal [was] sound," *id*. n1.

This Petition for Allowance of Appeal follows.

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

In accordance with Pa. R.A.P. 1114, this Court should exercise its discretion and permit an appeal of this matter for the following reasons.

- The holding of the Superior Court conflicts with *Rancosky's* holding that a plaintiff in a bad faith claim must present clear and convincing evidence that the insurer (a) lacked a reasonable basis for denying benefits under the policy, (b) knew or recklessly disregarded its lack of a reasonable basis, and that (c) self-interest or ill will is not a prerequisite to prevailing. Consequently, the majority erred by (a) reweighing the evidence upon appeal, and (b) holding an insurer that did not return a vehicle to its insured in a safe condition as required by national insurance standards and practices, and pursuant to its duty of good faith and fair dealing, was not liable for bad faith.
- The question presented, *i.e.,* whether an appellate court may substitute its analysis of the record, when the evidence must be viewed in the light most favorable to the verdict winner, is of substantial importance because litigants must be assured that trial court or jury verdicts will not and may not be retried on appeal by the appellate courts.
- The Superior Court departed from accepted judicial practices, as outlined in the dissenting opinion of Judge Stevens, by substituting its factual findings and conclusions for those of the trial court, which were supported in the record to the extent that two of the four Superior Court judges who reviewed the record agreed that ample evidence supported the finding of bad faith.
- The Superior Court's published Opinion conflicts with this Court's holdings in *Fire Association v. Rosenthal*, 108 Pa. 474 (Pa. 1885), and *Keystone Paper Mills Co. v. Pennsylvania Fire Ins. Co.,* 291 Pa. 119 (1927), which now constitute industry standards published in the national insurance law treatises. This Court should therefore grant review to clarify whether its prior holdings remain good law. Otherwise, the Superior Court's Opinion may well be understood to reverse 130 years of this Court's jurisprudence.
- The questions presented are of such substantial public importance as to require prompt and definitive resolution by this Court, *to wit,* the

issues presented impact the future of the bad faith statute because if the Majority Opinion stands, insurers will be emboldened to apply strategies similar to the strategy applied here by Nationwide, and lawyers will be less likely to undertake similar cases on behalf of other policy holders because the financial risk is too great.

- The Superior Court may not disregard its Internal Operating Procedures by permitting a judge from a deadlocked panel to sit on a newly-convened panel on the same appeal, over the objection of one party, and then author the majority opinion. Otherwise the public may question what may appear to be a bias in the justice system favoring one party over another.

*****

I. It is a bedrock principal of appellate review that issues of fact are resolved exclusively in the trial court. Pennsylvania's bad faith statute authorizes the trial court to enter a finding of bad faith if it is supported by clear and convincing evince. Consequently, the Superior Court abused its discretion by reweighing and disregarding competent clear and convincing evidence introduced in the trial court and relied upon by the trial court.

Pennsylvania's bad faith statute, 42 Pa.C.S.A. § 8371, authorizes a trial court to award punitive damages and assess court costs and attorney fees against an insurance carrier, "if the court finds that the insurer has acted in bad faith toward the insured." Bad faith claims are decided by the trial court judge, not a jury. *See, e.g., Mishoe v. Erie Ins. Co.*, 824 A.2d 1153 (Pa. 2003).

In *Rancosky,* this Court held that "[I]n order to recover in a bad faith action, the plaintiff must present clear and convincing evidence that (1) the insurer did not have a reasonable basis for denying benefits under the policy

and (2) the insurer knew of or recklessly disregarded its lack of a reasonable basis. *Rancosky*, 170 A.3d 364, 365 (Pa. 2017). In addition, "[P]roof of an insurance company's motive of self-interest or ill-will is not a prerequisite to prevailing in a bad faith claim[,]" though such evidence is probative of the second prong of the bad faith test. *Id.*

"The clear and convincing evidence standard is the highest standard of proof for civil claims[...] and requires evidence so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy of the truth of the precise facts in issue." *Grossi v. Travelers Pers. Ins. Co.*, 79 A.3d 1141, 1165 (Pa. Super. 2013).

In *Buckley v. Exodus Transit & Storage Corp.,* 744 A.2d 298 (Pa. Super. 1999), the Superior Court summarized that an appellate court's review of post-trial motions seeking judgment notwithstanding the verdict is limited to situations when no two reasonable minds could agree:

> A JNOV can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for JNOV, we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict. In so doing, we must also view this evidence in the light most favorable to the verdict winner, giving the victorious party the benefit of every reasonable inference arising from the evidence and rejecting all unfavorable testimony and inference. ***Id.*** … If any basis exists

> upon which the jury could have properly made its award, then we must affirm the trial court's denial of the motion for JNOV. A JNOV should be entered only in a clear case.

Buckley, 744 A.2d 298, 304-05 (internal citations omitted).

Because (1) Judge Stabile and Judge Fitzgerald differed as to whether Nationwide was entitled to JNOV, and (2) Judge Stevens' dissent noted that there was ample evidence to support the trial court verdict and findings, the Superior Court majority erred by substituting its findings for that of the trial court.

The Majority admits it reanalyzed and reweighed the evidence, but also noted that their decision to "vacate the judgment [is] because the record does not support ***many of the trial court's critical findings of fact***. We are cognizant of the standard governing our review, and we have not reached our decision lightly. We understand that the trial court, as fact finder, was free to choose which evidence to believe and disbelieve. Likewise, we understand that our standard of review requires us to defer to findings supported in the record and draw reasonable inferences in favor of Plaintiffs." *Majority* at *59 (emphasis added).

The purpose of appellate review is not for the appellate court to substitute its findings for those of the trial court. While the majority claimed

that "[t]he trial court engaged in a limited and highly selective analysis of the facts and drew the most malignant possible inferences from the facts it chose to consider," *id.* at *60, Judge Stevens' dissent (reformatted for ease of this Court's review) affirms that the trial court's decision is amply supported in the record, and that the Majority's substitution of its analysis for the trial court's is an abuse of discretion:

- There is ample evidence to support the trial court finding that Nationwide's appraiser considered the Bergs' vehicle a total loss, including claims log entries on September 10 and 11, 1996, *Dissent* at *2-4;
- The fact that Nationwide transferred the Jeep to K.C. Auto Body creates a reasonable inference that Nationwide overruled the assigned appraiser's assessment of a total loss, *id.* at *4;
- Citing *Berg II*: "[t]he Nationwide claims log suggests that this move was ordered because 'Nationwide will never recover the difference in salvage value,'" *id.*;
- The evidence, when viewed in a light most favorable to the Bergs, indicates that the initial appraisal was that the car was a total loss, *id.* at *5;
- The finder of fact, not the Superior Court, is the proper arbiter of truth and is free to make credibility determinations, *id.*;
- Judge Stevens disagrees with the Majority's determination that there was "no support" in the record for a finding that Witmer, on behalf of Nationwide, in fact, vetoed the assigned appraiser's

total loss evaluation, which is belied by the Majority's own citation to Witmer's claim log entry of September 24, 1996, and admission that "the record supports a finding that Appellant [Nationwide] deemed repairs more cost effective than a total loss," *id.*;

- Judge Stevens disagrees with the Majority's statement that the record contains "no evidence" to support a finding that the Bergs' vehicle was "beyond repair," *id.*;
- The Majority concedes that "the record confirms only that Lindgren and/or K.C. Auto Body failed to repair the Jeep properly," which is evidence that two auto repair shops were unable to repair the vehicle satisfactorily and supports the trial court finding that the Jeep was "beyond repair" and shows bad faith on the part of Nationwide, *id.*;
- Thus, there is sufficient evidence in the record to support the trial court's determination that Nationwide was motivated by monetary gain not to declare the Jeep a total loss, and, therefore, acted with reckless disregard in not thoroughly inspecting the ongoing repairs, *id.* at *6;
- The Majority agrees that Nationwide inexplicably and repeatedly refused to comply with discovery requests to produce an unredacted claims log; yet, the Majority finds no proof of bad faith in its doing so because "in [its] view" the claims log contradicts the trial court's finding that Nationwide "vetoed" Joffred's total loss appraisal, *id.* at *7;

- The trial court reached its punitive damages award after considering matters outside the record, but those matters are irrelevant and unnecessary because the record evidence supports the punitive damages award, *id*. at *7-10.

Evaluation of the weight of the evidence is exclusively for the fact-finder, which is free to believe all, part, or none of the evidence, and to assess the credibility of the witnesses. *Commonwealth v. Johnson*, 668 A.2d 97, 101 (Pa. 1995). Questions concerning inconsistent testimony and improper motive go to the credibility of the witnesses. *Commonwealth v. Boxley*, 838 A.2d 608, 612 (Pa. 2003). An appellate court cannot substitute its judgment for that of the fact-finder on issues of credibility. *Commonwealth v. Pronkoskie*, 445 A.2d 1203, 1206 (Pa. 1982).

In a prior published Opinion ***in this case***, the Superior Court reversed a directed verdict for Nationwide, citing evidence ***in this record*** that supports the trial court's current findings as follows:

> Much of the evidence introduced by the Bergs at the bifurcated trial regarding Nationwide's conduct in connection with the processing of their repair claim satisfies the *Toy* definition of bad faith under section 8371. For example, the Bergs offered evidence to show that … the appraiser (Mr. Doug Joffred) initially concluded that the vehicle's frame was too twisted and thus could not be repaired…. **N.T., 12/13-17/04, at 209, 241, 299, 629, 729.** According to the Bergs, however, the evidence shows that Nationwide reversed this appraisal and (without advising the

> Bergs) instead ordered that the vehicle be sent to another repair facility to attempt structural frame repairs…. **N.T., 12/13-17/04, at 630, 641, 685-86.** The Nationwide claims log suggests that this move was ordered because "Nationwide will never recover the difference in salvage value." …**N.T., 12/13-17/04, at Exhibit 8 p.65.** The Bergs argue that Nationwide sent the vehicle to another repair facility to avoid having to pay the cost of a total loss payment at that time, as would have been required under the insurance policy if the vehicle could not be repaired.
>
> The Bergs also presented evidence to show that after four months of attempted repairs, Nationwide returned the vehicle … even though its representatives had actual knowledge that the repairs had failed and that the vehicle's frame was structurally unsound. **Uncontested Facts at ¶ 6…. N.T., 12/13-17/04, at 387-88; 892-96**. Despite this knowledge, Nationwide again failed to advise the Bergs of any problem with their vehicle, according to the Bergs in its continuing effort to avoid having to incur a total loss payment under the insurance policy…. **N.T., 12/13-17/04, at 387-88.** Finally … the Bergs attempted to offer evidence that when they filed suit, Nationwide utilized a litigation strategy emphasizing a lack of cooperation with policyholders retaining legal counsel and aggressive efforts in handling cases under $25,000 to create a "defense-minded" perception in the legal community…. **N.T., 6/5-11/07, at 106-111.**
>
> For all of these reasons, we conclude that the trial court erred in entering a directed verdict in Nationwide's favor with respect to the Bergs' section 8371 claims.

Berg II, 44 A.3d at 1177 (internal citations omitted)(emphasis added).

Despite the Superior Court's conclusion in *Berg II* – based upon the same record presented to the Superior Court on the second appeal – the

Majority believes not only that the trial court err, but so did the prior Superior Court panel. This conclusion highlights why this Court should grant review to address situations when appellate courts reweigh evidence and reach conclusions that are appropriately left to the trial court.

II. The Majority substituted its own interpretation of the evidence, usurping the trial court's fact-finding authority.

The Majority determined that the record contains "no support" for the finding that Nationwide improperly "vetoed" a total loss appraisal. *Majority* at *22. *See also* Findings of Fact 31-37. Instead, citing conflicting testimony in the record, the Majority concluded that the total loss documented in the claim file was merely a preliminary determination by the assigned appraiser, Doug Joffred, and that once Joffred completed a teardown *he* determined the vehicle was not a total loss. *Majority* at *13-*25, *49-*50.

The trial court concluded, however, that there was credible evidence that Joffred had performed a teardown *before* reporting to Nationwide that the vehicle was a total loss, the type of factual conclusion that is left to the factfinder. The conclusion that Nationwide improperly interfered in the appraisal process to override a total loss appraisal is supported by the (1) claims file notes, (2) testimony of Adjuster Witmer, (3) testimony of Appraiser Joffred, (4) testimony of BRRP Director Jones, and (5) Pennsylvania's

Appraiser Act. Despite these bases for the trial court's opinion, the Majority reweighed the evidence and concluded that Nationwide did not improperly override a valid total loss appraisal in bad faith to the Bergs.

The Majority also concluded there was "no evidence" to support Finding of Fact 1 that the Jeep was beyond repair and, therefore, a structural total loss. *Majority* at *28. This reweighed fact is incorrect. First, Judge Stevens explained that "evidence that two auto repair shops were unable to repair the vehicle satisfactorily supports the finding by the trial court the Jeep was 'beyond repair' and shows bad faith on the part of Nationwide." *Dissent* at *5. Second, the Jeep was declared a structural total loss by the assigned appraiser, *i.e.,* the damage was beyond repair. Third, Nationwide refused to produce the photographs of the Jeep's twisted frame as it existed when Joffred declared the Jeep a structural total loss because of a twisted frame. *See* Findings of Fact 82, 84-85.

Without this concealed photographic evidence, the trial court was left to consider the circumstantial evidence, and in doing so concluded that the vehicle was beyond repair and a total loss. The Majority concluded to the

contrary, despite Nationwide's refusal to comply with Court Orders compelling production of the photos.[2]

III. Although Pennsylvania law imposes a duty on an insurer that elects to repair, rather than replace, damaged property to have the repaired property returned in a safe condition, Nationwide elected to repair the Berg's vehicle after it was declared a structural total loss and returned it in an unsafe condition. Despite this, the Superior Court abused its discretion and disregarded Pennsylvania law, finding that Nationwide had no such duty and therefore there was no bad faith.

The Majority ruled that insurers have no duty "to inspect an insured vehicle [for quality repairs] prior to its return," and thus cannot be found in bad faith for failing to do so. *Majority* at *37-*38. This conclusion contradicts Pennsylvania law and insurance industry standards.

The legal premise that an insurer exercising an option to repair a motor vehicle must return that vehicle in a serviceable condition is well-settled insurance law. Couch on Insurance, the national reference source on insurance law, recognizes:

> … 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

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[2] Despite two Orders and a motion for sanctions (RR.664a; 662a; 644a; 655a), Nationwide refused to produce these photographs and other evidence, including reinspection reports corresponding to the reinspections PDS admittedly performed during the repair process. Inexplicably, the Majority faults the Bergs for failing to procure this evidence. *Majority* at *35.

> relieved of this duty merely because it chooses to select an independent contractor to make the repairs, and refrains from exercising any supervision over his work.

12 Couch on Insurance *3d*, § 176:41, p.176-39. *See also* *id.* *Duty to Act Reasonably and to Restore to Same Condition*, *Generally*, § 176:32, pp. 176-30 to 176-31.

Similarly, Appleman on Insurance states:

> If the insurer elects to repair, such repairs must make the car as serviceable as it was before the loss. Moreover, the insurer has been held to be obligated to replace the automobile where it could not make such repairs as were sufficient to restore the automobile to its condition prior to being damaged.

6 Appleman, Insurance Law and Practice § 4005, p. 726.

In 1885 this Court defined an insurer's obligation in Pennsylvania when it chooses to repair property:

> When an insurer elects to repair under a clause in the policy giving that right, the conditions of the contract which before were alternate, are thereby resolved into an absolute agreement. It must be assumed that the election was made in view of all such matters, as in the law or otherwise may affect the transaction, and the principles of law incident to the alternative chosen are alone applicable. The amount of the loss ceases to be a question; there can be no inquiry as to that. The original contract, by virtue of the election, is a contract to rebuild, and the rights and responsibilities of the parties are to be measured accordingly.

Fire Association v. Rosenthal, 108 Pa. 474, 478 (1885).

In *Keystone Paper Mills Co. v. Pennsylvania Fire Ins. Co., et al.,* 291 Pa. 119 (1927), this Court again determined:

> The insurance company, under the option to repair or rebuild, if it elects to avail itself of the privilege is not only bound to put the property in substantially the same state or as good as it was before the fire, but the insurer cannot avail itself of any relieving circumstances unless such repairs make the property as serviceable as it was before the loss.

Id. at 125.

Insurance contracts are presumed to have been drafted with reference to substantive law, including court interpretations of material terms, and such laws enter into and form a part of the contractual obligation as if explicitly incorporated into the contract. *Frey v. State Farm Mutual Automobile Insurance Co.,* 632 A.2d 930, 933 (Pa. Super. 1993).

Nationwide drafted the Bergs' insurance policy in accordance with these well-settled legal precepts, thus reserving for itself either of the following options when a collision loss occurs:

> 1. Pay [the insured] directly for the loss;
> 2. Repair or Replace [the insured's] auto or its damaged parts;

(RR.2444a).[3]

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[3] Nationwide did not pay the Bergs directly for the loss. Instead, Nationwide delivered the claim payment to its BRRP facility "by check, dated April 14, 1997." The check was not "made jointly payable to Plaintiffs." (Finding 47;

The trial court correctly determined that since Nationwide chose to repair the Jeep at its BRRP facility, after its appraiser declared it a structural total loss, Nationwide had a duty to verify the BRRP repairs were successful. Finding 25. The trial court also relied upon the Bergs' liability expert, James Chett, CPCU, who confirmed this industry standard, and "opined that Defendant's conduct was reckless" because "it placed or allowed an unsafe vehicle to be placed on the highway." *Id.* at 69-71. Judge Stevens also recognized the "reckless disregard" attached to any conclusion that Nationwide had no duty to thoroughly inspect the ongoing repairs and in Nationwide's "failing to ascertain whether the vehicle was crashworthy" after it had been declared a structural total loss due to a twisted frame. *Dissent* at *5-*6.

The Majority absolved Nationwide of this well-established duty because, according to the Majority, Nationwide's "contractual obligation under the policy" was merely "to pay to repair the Jeep." *Majority* at *36. Relying upon this erroneous legal conclusion, the Majority then found that because "[Nationwide] did not promise to inspect an insured vehicle prior to its return," it had no duty to do so, and thus cannot be liable for bad faith. *Id.*

R.1925a).

at *37-*38.

The Majority's erroneous legal conclusion, that Nationwide had no duty beyond *paying* for the repairs, mirrors the opinion of Nationwide's liability expert, former Insurance Commissioner Constance Foster, who testified for Nationwide a second time during the remand trial.[4] Foster's testimony contradicts industry standards and the binding precedent of this Court:

> And one thing that I should clarify that's very important. Nationwide's original obligation under the policy is simply to pay for the repair. It has no obligation to make sure that the repairs are done appropriately.

(RR.2779a). The Majority thus adopted Foster's opinion as its legal conclusion:

> Given its potentially significant ramifications, we do not believe that an intermediate appellate court is the appropriate body to pronounce, based on the testimony of a single witness [James Chett, CPCU], that such a duty [to inspect] exists.

Majority at *38, n.20.

The duty the Majority is concerned with creating was established in Pennsylvania 130 years ago and is now a national standard in claims

[4] Ms. Foster also testified in 2007, offering her opinion that this lawsuit over a collision claim was not "an action arising under an insurance policy," but rather one arising under the BRRP repair guaranty. The Superior Court reversed in 2012, crediting Ms. Foster for the trial court erroneously adopting as its legal conclusion this, "novel theory of statutory interpretation." *Berg II*, 44 A.3d at 1172.

practices. The Majority Opinion is thus inconsistent with the insurance policy, this Court's binding precedent, and insurance industry standards elucidated in the leading treatises. Therefore, the trial court and the Dissent correctly found that Nationwide recklessly ignored its contractual and legal duties to the Bergs in bad faith.

IV. The record supports the trial court's finding of a reckless disregard of a lack of a reasonable basis in Nationwide's handling this claim. The Majority abused its discretion by substituting its interpretation of the evidence to grant Nationwide JNOV.

It is hornbook law that the weight of the evidence is exclusively for the fact-finder, which is free to believe all, part, or none of the evidence, and to assess the credibility of the witnesses. *Commonwealth v. Johnson*, 668 A.2d 97, 101 (Pa. 1995). Questions concerning inconsistent testimony and improper motive go to the credibility of the witnesses. *Commonwealth v. Boxley*, 838 A.2d 608, 612 (Pa. 2003). An appellate court cannot substitute its judgment for that of the fact-finder on issues of credibility. *Commonwealth v. Pronkoskie*, 445 A.2d 1203, 1206 (Pa. 1982).

As noted above, in its prior published Opinion ***in this case***, the Superior Court reversed a directed verdict for Nationwide, citing evidence ***in the record*** that supports the trial court's corresponding findings of fact.

Notwithstanding these citations to the record identified in *Berg II*, the Majority Panel determined that the record contained "no evidence" of these exact same facts/findings. The Majority is legally and factually wrong. As detailed above, the trial court's findings on these precise facts are supported by clear and convincing evidence. The following will identify ample evidence supporting the trial court's finding of a reckless disregard to the Bergs' physical safety, and to their rights under the law, namely that: (1) Nationwide must have known the structural repairs failed when the Jeep was released to the Bergs from its BRRP facility; and, (2) Nationwide spent $3 million applying against the Bergs the same documented strategy it applied against its insured in *Bonenberger v. Nationwide Mut. Ins. Co.*, 791 A.2d 378 (Pa. Super 2002), and that it continued applying that strategy against the Bergs after *Bonenberger* was published in 2002.

A. Despite knowing that the structural repair efforts failed, Nationwide permitted the vehicle to be released from its BRRP facility, recklessly risking a highway catastrophe to avoid paying a total loss.

The Majority Opinion determined, "[t]he record contains **no evidence** that the extent of the faulty repairs would have been evident during a visual inspection when the repairs were nearly complete, much less that Appellant knew or should have known about the faulty repairs." *Majority* at *35

(emphasis in original). The record demonstrates, and the trial court found, however, that Nationwide knew the structural repairs failed because it inspected the repairs throughout the 4-month repair period. Finding 42.

The following undisputed facts support the trial court's finding in this regard: the assigned appraiser declared the Jeep a total loss due to a badly twisted frame, *Majority* at *17; Nationwide decided to repair the Jeep, *id.* at *23; the frame damage was too complex for its BRRP facility to repair, *id.* at *19; repairs were expected to take 25.5 days but lasted four months, *id.* at *37; and, Nationwide reinspected the repairs several times, including a reinspection near the end of the protracted repair period, *id.* at *34.

The record demonstrates that any failure to reinspect the Jeep prior to permitting its release from the BRRP facility, under these undisputed facts, constitutes a reckless disregard to the Bergs' financial interest in the vehicle, and to their safety. Moreover, because of the complexity of the frame damage, the reasonable inference to be drawn from the undisputed evidence is that Nationwide did reinspect the frame repairs because Nationwide issued a BRRP guarantee on the repairs, and so Nationwide would have naturally looked at the frame repairs during its reinspections before and/or

after the vehicle was reassembled. The Majority determined, however, such an inference required an impermissible amount of "speculation." *Id.* at *37.

Additional evidence of record includes the fact that one of the twisted frame rails giving rise to the total loss appraisal was never repaired or replaced, a fact that would have been of import to Nationwide since it paid for new rails. (RR.1338a; 1799a). Stephen Potosnak, one of Nationwide's PDS who inspected the repairs days before this lawsuit was filed, identified this precise issue during his visual-only, *post-repair* reinspection, confirming not only that a frame rail was not properly repaired *or* replaced, but also that the front wheels were "substantially" misaligned, as follows:

> … I DID NOT DISCUSS TRUCK OR FINDINGS WITH [POLICY HOLDER]. HAD TRUCK ON LIFT. RT FNDR HANGING OUT FROM REAR EDGE. RF MLDG HANGING LOOSE. HOOD GAPS UNEVEN ON BOTH SIDES. UPON LOOKING AT FRONT TIRES/**WHEELS, LF IN SUBSTANTIALLY IN COMPARISON TO RF.** 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…. APPEARS UPPER BODY SWAY WAS NOT PULLED COMPLETELY BACK BEFORE REPLACEMENT OF PARTS BEGAN…. WAITING FOR CALL BACK FROM SHOP WITH DECISION.

Finding of Fact 52. (RR.1809a) (emphasis added).

The trial court found that if Potosnak was able to observe these structural repair issues during his post-repair reinspection, without removing sheet-metal, the same defects would have been observable to other PDS reinspecting the repairs during the 4-month repair period, including when the repairs were nearly complete. *See* Findings of Fact 41-48.

Additionally, the Bergs introduced the testimony of David Wert, a repair technician at the subject BRRP facility who witnessed the repairs from his adjacent repair-bay. *See* Opinion at 7. Wert confirmed Nationwide reinspected the repairs several times, including near the end of the repair period, and at least one PDS "didn't appear happy" during a reinspection. *Majority* at *32-*35.

According to the Majority, however, "the record does not evidence what those people saw, or whether the faulty repairs would have been observable when the repair job was nearly complete." *Id.* at *35-*36. The Majority cites the self-serving testimony of Nationwide employees claiming PDS reinspections were merely to "ensure the body shops prepared fair estimates," to make "sure the estimate was written correctly," and that the PDS "really weren't looking for deficiency." *Id.* at *35.[5]

[5] The Majority supports its decision with a factual error, mischaracterizing Stephen Potosnak as the PDS who reinspected the Jeep "while the Jeep was

Nationwide's self-serving testimony was contradicted by Nationwide's BRRP Director, Dean Jones, CPCU:

> Q. Sir, was the focus of these [PDS] reinspections to determine how much the shop was using or reducing leakage?
> **A. No, it was to ensure that the vehicles were being repaired properly.**
> Q. So then **if I had some written reinspection reports they would show that one of the focus was quality of repairs?**
>
> **A. Yes.**

(RR.942-43a)(emphasis added).[6]

The BRRP form-document for the reinspection reports, to which Jones alluded, further supports the trial court's finding that Nationwide must have known the structural repair efforts failed. The document focuses upon "quality of repairs" exactly as Jones stated. Specifically, the BRRP form-document used for the reinspections not only *require* PDS to analyze the adequacy of unibody frame repairs, and proper wheel alignment, but also to identify the date and name of each reinspector, as follows:

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under repair." *Majority* at *30-*31. Potosnak, however, specifically testified he was *not* PDS until "late '97 through late '98," which was well after the Berg repair efforts were exhausted in 1996 (RR.1070-71a).

[6] The Majority was dismissive of Jones' testimony, mischaracterizing him as "Plaintiffs' claims consultant." *Majority* at *32. Jones was never Plaintiffs' claims consultant. Jones oversaw Nationwide's "material damage claims" at the state-level, managing state-wide BRRP operations "until August of '96," which is the month prior to the Bergs' loss. (RR.882-83a). Jones then became the direct supervisor to Witmer, the assigned adjuster. (R.894a). The Bergs called Jones "as-on-cross." (RR.876a).

EVALUATION OF MATERIAL DAMAGE LOSS

Vehicle Owner: ____________________ Repair Shop: ____________________

Vehicle Make: ____________ Year _____ Model ____________ Mileage ________

Repair Inspection:

Prior ________

During ________

Post ________

Type of Loss:

COLL ________

FTC ________

PD ________

REPAIR EVALUATION					
LOSS CONTROL			LOSS CONTROL		
A-ADEQUATE	A	I	I - INADEQUATE	A	I
Used Parts			Repair Time		
Alter Market			Paint Time		
Rechrome			Paint & Material		
Overlap & Included			Unibody Repairs		
Wheel Alignment			Items Left Open		
Repair vs. Replacement			Supplemental Repairs		

DETAILED AREAS OF DISCREPANCY

____

____

____

____

____

Evaluator ____________________ Date of Inspection ____________

(RR.2155a).[7]

Because the Jeep was reinspected numerous times, the trial court reasonably concluded that PDS reinspection reports should exist in the claim file. Finding of Fact 82. Despite a motion for sanctions and two orders, Nationwide refused to produce any reinspection reports or notes

[7] This BRRP form-document is part of Trial Exhibit 34, an 8-page packet circulated to the BRRP facilities titled, "BLUE RIBBON REPAIR SERVICE." (RR.2148-56a).

corresponding to the numerous reinspections admittedly performed. *See* Opinion at 45.[8]

The Majority nevertheless determined that the "record contains **no evidence** that the extent of the faulty repairs would have been evident during a visual inspection when the repairs were nearly complete…." *Majority* at 35 (emphasis in original).

Every automotive professional who inspected the repairs identified repair issues without removing sheet-metal, i.e. visual-only inspection. See Potosnak (RR.1809a); Phillips (RR.1149a); Shaw (identified unrepaired frame damage) (RR.1970a); and, Anderton (RR.1575a) (identified "repair problems" during his initial, visual-only inspection). *See also* Findings of Fact 41-47 (itemizing extensive structural repair failures identified by visual-only inspections). As this Court has long recognized, "[i]t is vain to say one looked but did not see what was obvious." *Martino v. Adar*, 63 A.2d 12, 13 (Pa. 1949); *Canery v. SEPTA*, 406 A.2d 1093, 1096 (Pa. Super. 1978) ("a wrongdoer may not avoid liability by saying he did not see what was plainly

[8] The Bergs' document request sought "any and all records referring or relating to the Plaintiffs." (RR.664a). An Order entered March 15, 1999, overruled Nationwide's objection subject only to attorney-client privilege. (RR.662a). A motion for sanctions was filed. (RR.644a). A second Order was entered March 31, 2000, mandating Nationwide's compliance with the original Order. (RR.655a).

visible to him”). Despite overwhelming evidence supporting the finding that Nationwide not only knew the structural repairs failed but also thereafter concealed evidence of its knowledge, the Majority usurped the authority of the trial court and reversed this well supported finding.

B. The trial court’s finding that Nationwide applied against the Bergs its documented corporate strategy to resist paying meritorious claims, without a reasonable basis, is well-supported by the record.

On April 28, 1998, a few days before this lawsuit was filed, PDS Potosnak reinspected the Jeep, entering a report in the claim file confirming the accuracy of the structural repair issues reported by the Bergs. *See* Finding 52. Nationwide did not promptly honor the claim by finally conceding the vehicle was a total loss, as appraised nineteen months earlier. Nationwide did not even advise the Bergs that Potosnak’s reinspection confirmed the structural repair failures. Instead, Nationwide feigned ignorance and forced the Bergs to file this lawsuit while having absolutely no basis for doing so. Nationwide thereafter concealed the Potosnak Report through five years of litigation by redacting it from its claim file pursuant to an improper assertion of attorney-client privilege. *See* Findings of Fact 52-57; RR.1191-94a.

The Majority misapprehended the significance of this evidence:

> we do not understand the significance of Appellant's failure to inform Plaintiffs of Potosnak's report. Plaintiffs' expert inspected the Jeep in November of 1997 and found it unsafe to drive …. The record, therefore, does not show that Appellant jeopardized Plaintiffs' safety by failing to inform them of the results of Potosnak's inspection.

Majority at *41. The question of whether the Bergs knew of the failed repairs is not determinative of Nationwide's bad faith. The question is, what basis did Nationwide have to not pay the claim upon receipt of Potosnak's reinspection report, particularly given what was contained within its claim file regarding the initial structural total loss appraisal, and that it now knew, beyond doubt, that the structural repair efforts doomed to fail, did in fact fail.

Bad faith is actionable regardless of whether it occurs before, during or after litigation. *O'Donnell v. Allstate Ins. Co.,* 734 A.2d 901, 906 (Pa. Super. 1999) ("[W]e refuse to hold that an insurer's duty to act in good faith ends upon the initiation of suit by the insured."). In *Hollock v. Erie Ins. Exch***.**, 842 A.2d 409, 415 (Pa. Super. 2004), the Superior Court confirmed that when an insurer engages in "a blatant attempt to undermine the truth finding process," such conduct may support a finding of insurance bad faith. *Id.* at 415.

In *Berg II*, the Superior Court stated:

> the Bergs contend that the trial court erred in refusing to admit evidence that Nationwide paid its attorneys $922,654.25 to defend the lawsuit, allegedly pursuant to a documented litigation strategy to deter the filing of small value claims….
>
> Based upon *Bonenberger,* we agree and conclude that on retrial the Bergs should be permitted … to introduce evidence regarding Nationwide's alleged litigation strategy in an effort to establish bad faith conduct under section 8371.

Id., 44 A.3d at 1176-77.

After review of the entire record, the trial court concluded that the evidence of this strategy's application was clear. *See* Opinion at 48. *See also* Findings of Fact 64-88. *See also Dissent* at *8-*10 (citing evidence of this strategy's application). The Majority rejected this finding, *Majority* at *49-*52, and ignored the law of this case by concluding *Bonenberger* "cannot form the basis for a finding of bad faith in this action." *Id.*, at *51.

The strategy was circulated to personnel as an appendix to Nationwide's "Best Claims Practices Manual, and is titled "PENNRO LITIGATION STRATEGY–1993" ("PENNRO").[9] *See* Findings of Fact 66, 80-85. (RR.2167-70a).

PENNRO section one, titled "Claim Handling Philosophy and Strategy for 1993 and Beyond," requires personnel to apply, "[c]ontinued

[9] PENNRO stands for Pennsylvania Regional Office. (RR.1163a)

reinforcement of Nationwide being a ‘defense-minded’ carrier in the minds of the plaintiff legal community.” Bullet one, subsection two, “Litigation Avoidance,” instructs personnel to:

> [i]mplement a more aggressive posture in handling cases of lesser probable exposure (ie: cases not exceeding $25,000.00). Create and reinforce a defense minded perception.

(RR.2167). The trial court understood PENNRO’s goal is to force claimants to accept less-than-fair value on their claims because lawyers will not, and cannot, litigate where the expected contingency-fee is outweighed by the artificially inflated cost and risk of litigating against such a strategy. *See* Opinion at 47-52.

Nationwide was warned to stop applying PENNRO a second time, post-*Bonenberger*, when this case was remanded for a new trial in 2012, wherein the Superior Court ruled that evidence of the strategy’s continued application is admissible. *Berg II*, 44 A.3d at 1177. Nationwide nevertheless continued forcing unnecessary motions, continued violating discovery orders, continued concealing evidence of its bad faith, and continued presenting false testimony in clear defiance of *Berg II*. *See* Finding of Fact 83; Conclusion 13; Opinion at 39-40, 45-46.

After review of the entire record (Finding of Fact 64), the trial court found that Nationwide continued applying PENNRO "after the *Bonenberger* decision was announced" (Conclusion 13), and ultimately paid its attorneys over $3 million applying the strategy in this case. Opinion at 17-18; Findings of Fact 83-86; Opinion at 39-40, 45-46. The trial court justifiably recognized PENNRO as a substantial and continuing harm upon the civil justice system. *See* Verdict at 37-42; Opinion at 21-33.

Consistent with the directive in *Berg II*, a document request was served upon remand seeking any evidence Nationwide had instructed personnel to stop applying PENNRO after *Bonenberger*. An Order, entered August 23, 2013, notified Nationwide that if such documents were not produced, "[p]laintiffs will be permitted to make reasonable argument pertaining to the absence of said documents." (RR.2949a). Nationwide produced no evidence and the trial court made an appropriate adverse finding. *See* Finding 81; Opinion at 47-49. The trial court thus concluded that the "policies" within PENNRO were in fact applied in this case, "and continued after the *Bonenberger* decision was announced." Conclusion 13.

The test for determining sufficiency of evidence is whether, viewing the evidence in the light most favorable to the verdict winner and drawing all

proper inferences favorable therefrom, the trier of fact could have determined that all elements of the claim have been established. The proper application of this test requires the court to evaluate the entire trial record and all evidence received, in the aggregate and not as fragments isolated from the totality of the evidence. *See Commonwealth v. Harper*, 403 A.2d 536, 538 (Pa. 1979). The record thus supports the finding that Nationwide paid its attorneys $3 million not only to conceal what it knew, and when, but also as an investment strategy to price claimants out of court to send a message of deterrence to the plaintiffs' bar, so that Nationwide could willfully undervalue other claims in bad faith. *See* Opinion at 17.

V. The Superior Court violated its Internal Operating Procedures by assigning the same judge to the panel created after the first panel was deadlocked, contrary to Superior Court IOP 65.5F.

This Court oversees the daily operations of Pennsylvania's Unified Judicial System,

> which provides a broad perspective on how the various parts of the system operate together to ensure access to justice, justice in fact, **and the appearance that justice is being administered even-handedly**. *See* Pa. Const. art. V, § 10 (judicial administration).

In re Bruno, 101 A.3d 635, 664 (Pa. 2014) (emphasis added).

Additionally, courts are to avoid even the appearance of bias or

impropriety. *McFall, In Interest of*, 617 A.2d 707, 713 (Pa. 1986) ("[A]ny tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias.").

Internal Operating Procedures help provide even-handedness in decisions and the avoidance of even the appearance of bias or impropriety. One such Rule is Superior Court IOP 65.5F which compels the Court to create "another panel" where one judge becomes unavailable and the other two deadlock, resulting in no majority decision:

> If, following argument or submission, a member of the three judge panel assigned to decide an appeal becomes unavailable, and the remaining two judges are unable to decide the appeal, they shall request the President Judge or his/her designee to either reassign the appeal for reargument or submission before another panel, or they may request that the appeal be reargued before a court en banc. If the full court shall decline to accept the appeal for reargument before a court en banc, the President Judge or his/her designee shall reassign the same to another three judge panel for reargument or submission and decision.

The first Panel "deadlocked" after one judge became unavailable because of recusal and the other two failed to reach a consensus.[10] The Court entered an Order on May 1, 2017, transferring the case from the Middle to the Eastern District for reargument with a new Panel convening

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[10] Judge Panella recused himself. After fifteen months Judges Stabile and Fitzgerald remained deadlocked.

October 10, 2017. *See* Exhibit "D."

On August 31, 2017, the Court identified the members of the new Panel, which indicated that Judge Stabile, one of the deadlocked judges from the original Panel, was assigned to the new Panel. Because there was an "alternate" judge listed on the daily argument list, the Bergs filed an Application for Relief requesting, *inter alia*, that the alternate judge be assigned to the new Panel to replace the deadlocked judge to expeditiously resolve the concern that Judge Stabile had reached a decided position before deliberations commenced.

The Court denied the application. *See* Exhibit "E." Judge Stabile authored the Majority Opinion entering JNOV in favor of Nationwide. *Majority* at *61.

Webster's Dictionary defines "another" as: "1. not the same: different." *See* Webster's Twentieth Century Dictionary, Unabridged, Second Edition, (1961), p. 75. If a Panel includes a judge from a prior panel, part of the panel is the same. Thus, one party will have to persuade one judge while the other must persuade two. To demonstrate even-handedness and fairness, especially where one judge assigned to the new panel already has a decided position, three judges without any existing position on the outcome of the appeal should be assigned.

Otherwise, it may appear to the public that a bias or uneven-handedness exists towards one party over the other. This Court recognizes "the importance of ensuring that the judicial system maintain an appearance of fairness." *Reilly v. SEPTA*, 489 A.2d 1291, 1297 (Pa. 1985). Therefore, in order to appear impartial, the Court must consider the view of "how a detached observer--the common law's "reasonable man"--would appraise it." *Reilly*, 479 A.2d 973, 980 (Pa.Super. 1984).

Five judges heard argument in the Superior Court. The record establishes that two judges supported reversal while two clearly did not. Because JNOV should only be granted where "no reasonable minds could disagree," *Condio v. Erie Ins. Exch.*, 899 A.2d 1136, 1141 (Pa. Super. 2006), the split among the Superior Court judges is tantamount to an admission that reasonable minds could, and in fact, did disagree. Consequently, the Superior Court erred by reassigning Judge Stabile to the second panel, contrary to IOP 65.5F. This decision, particularly in light of Petitioners' timely filed objection and Judge Stabile's authorship of the majority opinion, created an appearance of impropriety and was error. More importantly, the decision and the resulting opinions confirm that this Court should grant allocatur and address whether JNOV was improperly granted.

CONCLUSION

For the foregoing reasons, Petitioners request that this Honorable Court grant this Petition for Allowance of Appeal to advance public safety, protect consumer access to the courts, and to avoid even the appearance of impropriety.

Respectfully submitted,

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Attorneys for Petitioner

Dated: September 7, 2018

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

Mayerson Law, P.C.

/s/ Benjamin J. Mayerson

BENJAMIN J. MAYERSON
Attorney for Petitioner

Dated: September 7, 2018

CERTIFICATE OF WORD COUNT COMPLIANCE

In accordance with the Pennsylvania Rules of Appellate Procedure, counsel for Petitioner Daniel Berg, Individually and as the Executor of the Estate of Sharon Berg a/k/a Sheryl Berg, certifies that this Petition for Allowance of Appeal complies with the length limitation of Pa. R.A.P. 1115(f) because this application contains 8,455 words (not to exceed 9,000 words), excluding the parts of the Petition exempted by Pa. R.A.P. 1115(g).

Respectfully submitted,

Mayerson Law, P.C.

/s/ Benjamin J. Mayerson
____
BENJAMIN J. MAYERSON
Attorney for Petitioner

Dated: September 7, 2018