IN THE SUPREME COURT OF PENNSYLVANIA

No. 569 MAL 2018

DANIEL BERG, individually and as the Executor of the Estate of SHARON BERG a/k/a SHERYL BERG,

Petitioner,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, INC.,

Respondent.

From the Superior Court Opinion Docketed June 5, 2018, on Appeal from the Court of Common Pleas for Berks County's April 21, 2015 Entry of Judgment

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RESPONDENT'S ANSWER TO PETITION FOR ALLOWANCE OF APPEAL

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INTRODUCTION

The Superior Court Majority in its 61-page June 5, 2018 opinion (the "Majority" opinion) scrupulously examined the trial record in this 20-year-old case. The Majority repeatedly emphasized that it was acutely aware of the standard of review for a trial court's findings of fact but explained that, in this case, critical findings by the Trial Court were unsupported, and often flatly contradicted, by the record. The Trial Court had concluded that Nationwide acted in bad faith and should pay $21 million, despite the fact that: (1) no one was injured; (2) in a prior trial, the jury rejected the Bergs' fraud claim and returned only a $295 verdict against Nationwide under the UTPCPL; and (3) the Trial Court did not see any new liability witnesses and relied on the record from the jury trial.

Seeking to resuscitate the Trial Court's erroneous findings, the Petitioner (the "Bergs") have filed a Petition for Allowance of Appeal (the "Petition"). The Petition should be denied, first, because the Bergs have presented no "special and important reasons" warranting review of this fact-intensive appeal. Pa. R.A.P 1114(a). The Bergs' arguments largely boil down to an assertion that the Superior Court's review of the record facts was erroneous. Because this Court, unlike the Superior Court, is not an "error correcting court" and generally does not entertain claims of supposed factual error, the Petition should be denied.

Moreover, the Petitioner is wrong on the law and on the merits. The Bergs seek to confine the Superior Court's review of a trial court's fact finding to a rubber stamping function, arguing that "issues of fact are resolved exclusively in the trial court." Pet. at 3. The Bergs make this argument repeatedly, but that is not the law. Where a trial court abuses its discretion, displays a capricious disbelief of the evidence, or fails to ground its factual findings on evidentiary support, this Court has held that an appellate court need not defer to a trial court's findings of fact. *Masloff v. Port Auth. of Allegheny Cnty.*, 613 A.2d 1186, 1188 (Pa. 1992). Thus, the Majority was right to painstakingly review all of the record evidence and determine whether the Trial Court's findings supported a finding of bad faith.

The Bergs also argue that the Trial Court's findings with regard to *some* of the facts were supported by the record. However, as Nationwide has repeatedly demonstrated and does again below, the Trial Court's findings were not grounded in the record evidence, were often contrary to the true facts, and were colored by the trial judge's hostility towards the insurance industry. Moreover, the Bergs do not even attempt to address many erroneous factual findings that were crucial to the Trial Court's finding of bad faith. For instance, it was critical to the Trial Court that: (1) Nationwide purportedly bought the Bergs' Jeep in December 1998 to keep the Bergs from inspecting it; (2) after buying the Jeep, Nationwide did not inspect it; (3) Nationwide spoliated evidence when (with court permission) it

disposed of the Jeep in 2007; and (4) Nationwide was solely responsible for the length of this litigation and for the case not settling. Despite the importance that these issues played in the Trial Court's unprecedented $21 million verdict, the Bergs do not address any of them, effectively conceding—as Superior Court found—that each of these Trial Court findings was wrong. Likewise, the Bergs simply ignore the trial judge's lengthy and irrelevant criticisms of the insurance industry, which even the dissenting opinion noted were improper.

The Bergs' efforts to manufacture conflicts with opinions from this Court likewise fail. As discussed below, the Majority's opinion in no way conflicts with *Rancosky v. Washington National Insurance Company*. Nor does it conflict with *Fire Association v. Rosenthal* or *Keystone Paper Mills v. Pennsylvania Fire Insurance Company*, which did *not* hold, as the Bergs maintain, that an insurer has a duty to inspect all repairs for which it paid and acts in bad faith whenever it fails to perform such re-inspections. Accordingly, for these reasons and those discussed below, the Petition should be denied.

ARGUMENT

I. NO "SPECIAL AND IMPORTANT REASONS" WARRANT ALLOWANCE OF APPEAL IN THIS FACT-BOUND CASE

In arguing that this fact-intensive appeal warrants this Court's discretionary review, the Bergs contort the case law in an attempt to create legal conflicts and inflate the importance of this appeal to anyone beyond the specific parties

involved. In reality, the Superior Court's opinion was entirely based on its review of the extensive factual record, hence, there is no reason for this Court to review it further.

The Bergs' first two questions for review ask this Court to find that the Superior Court "abuse[d] its discretion by reweighing and disregarding clear and convincing evidence" on which the Trial Court relied. Pet. at 3. As demonstrated below, the Superior Court performed a meticulous and fair examination of the record and all claims of factual error in the Bergs' Petition lack evidentiary support. Even assuming any of the Bergs' factual arguments had merit—and they do not—this Court's review still would not be warranted because this Court does not hear cases to correct errors. *Commonwealth v. Jones*, 988 A.2d 649, 661 n.1 (Pa. 2010) (Castille, J., concurring) ("[T]his Court does not accept a discretionary appeal merely to correct error.").

This case is a classic, fact-bound dispute, important to the parties, but with no further consequence. The Superior Court properly served its role in the Pennsylvania appellate system as an error-correcting court by reversing a trial court opinion that was unsupported by the voluminous record. *Cf. Commonwealth v. Gleason*, 785 A.2d 983, 991 (Pa. 2001) (Castille, J., concurring and dissenting). As such, further review is not warranted.

The Bergs argue that this case 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." Pet. at 11. This argument—which could be raised in *every* case in which the losing party wants this Court to re-examine purported factual errors—misconstrues the nature of appellate review by seeking blind deference to trial courts. It is well established that appellate courts are supposed to review whether factual findings "are supported by competent evidence" and determine whether, on that evidence, "the trial court could have reasonably reached its conclusion." *Mohney v. Am. Gen. Life Ins. Co.*, 116 A.3d 1123, 1130 (Pa. Super. Ct. 2015). Thus, a finding of bad faith cannot stand where "critical factual findings are either unsupported by the record or do not rise to the level of bad faith." *Brown v. Progressive Ins. Co.*, 860 A.2d 493, 502 (Pa. Super. Ct. 2004).

In a thinly veiled attempt to justify further review of this fact-based appeal, the Bergs argue that the Superior Court's ruling somehow conflicts with this Court's opinion in *Rancosky v. Washington National Insurance Company*, 170 A.3d 364 (Pa. 2017). But the Bergs make no argument as to *how* the Superior Court's opinion conflicts with *Rancosky*. Pet. at 11. Indeed, the Superior Court not only properly and thoroughly articulated the legal standard applicable to bad

faith claims, Pet. App'x A at 8-12,[1] it also properly applied that standard throughout its lengthy opinion. There is therefore simply no conflict with *Rancosky*.

As to the Bergs' third question for appeal, the Bergs maintain that the Court should review the Superior Court's conclusion that insurers do not have a duty to re-inspect all repairs for which they paid a repair shop because such a conclusion conflicts with "130 years of this Court's jurisprudence." Pet. at 11. This question does not warrant this Court's review because, as demonstrated below, the cases and treatises the Bergs cite do not stand for the proposition that insurers are required themselves to re-inspect all repairs undertaken by a repair shop for the benefit of their insureds, let alone that the failure to re-inspect all repairs establishes bad faith. Thus, any conflict of the Superior Court opinion with "this Court's binding precedent" is a figment of the Bergs' imagination. Pet. at 26.

Finally, the Bergs argue that this Court should allow the appeal as to their fourth and final question because the Superior Court "disregard[ed] its Internal Operating Procedures" and because the assignment of Judge Stabile to the second panel demonstrates to the public "a bias in the justice system favoring one party

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[1] The relevant Superior Court and Trial Court opinions and orders are included as Appendices to the Petition.

over another." Pet. at 12. As demonstrated below, the panel assignment complied with the Superior Court's Internal Operating Procedures. Moreover, there is no evidence that Judge Stabile was biased against the Bergs. Judge Stabile simply reached a conclusion based upon facts and the law. The fact that he ruled in a manner that the Bergs do not like is a far cry from evidence of bias.

In summary, the Bergs have presented no issues that satisfy the demanding standards set forth in the Rules of Appellate Procedure for the allowance of an appeal. This Superior Court opinion does not conflict with any other Superior Court opinions and the Bergs' attempts to manufacture conflicts with this Court's precedent are transparent and unsuccessful. Pa. R.A.P. 1114(b)(1), 1114(b)(2). This case implicates no issues of first impression or the constitutionality of a Pennsylvania statute. *Id.* at 1114(b)(3), 1114(b)(5). And the Superior Court did not act improperly, let alone depart from accepted judicial practices in a manner which calls for the exercise of the Supreme Court's supervisory authority. *Id.* at 1114(b)(6). Accordingly, there is no reason for further appeal.

II. THE SUPERIOR COURT CORRECTLY EXERCISED ITS OVERSIGHT FUNCTION AND DETERMINED THAT THE RECORD EVIDENCE DOES NOT SUPPORT THE TRIAL COURT'S FACTUAL FINDINGS

Beyond failing because it does not satisfy the Rules of Appellate Procedure's standards for the allowance of an appeal, the Petition also fails because it is not supported by the facts or law. The Bergs' first and second

questions ask this Court to determine whether the Superior Court "abuse[d] its discretion by reweighing and disregarding clear and convincing evidence" on which the trial court relied for its "finding of insurance bad faith." Pet. at 3. The first question is premised on the "bedrock principal [sic] of appellate review that issues of fact are resolved exclusively in the trial court." *Id.* The second question presents the issue by reference to the *Rancosky* standard for bad faith. *Id.* Ultimately, both issues implicate the Superior Court's conclusion, after a meticulous review of the record, that the Trial Court's findings were not supported by or based upon clear and convincing evidence.

Nationwide recognizes that fact-finders are ordinarily entitled to deference. However, factual findings cannot stand where there is an abuse of discretion—including a "manifestly unreasonable" judgment, *Lilly v. Markvan*, 763 A.2d 370, 372 (Pa. 2000)—by the trial court, a lack of evidentiary support, or a "capricious disbelief of the evidence." *Masloff*, 613 A.2d at 1188. Here, there are numerous reasons why the Majority declined to defer to the Trial Court.

A. The Superior Court Had Ample Reason Not to Defer to the Trial Court's Factual Findings

The Bergs claim that the Majority erred by "reweighing and disregarding competent clear and convincing evidence…relied upon by the trial court." Pet. at 12. The Trial Court can hardly be said to have relied upon much evidence, given that it provided less than twenty record citations in each of its lengthy opinions.

Pet. App'x F at 5-9; Pet. App'x G at 3-31. The Majority opinion, on the other hand, cites to the record evidence *142 times*. Pet. App'x A at 1-61. The Majority did not err in discrediting unsupported findings of fact. *See Stephan v. Waldron Elec. Heating and Cooling LLC*, 100 A.3d 660, 667-68 (Pa. Super. Ct. 2014) (appellate court need not credit findings that do not "cite trial testimony, exhibits, or any specific basis for its credibility determinations").

Furthermore, the deference that is normally owed should not apply because Judge Sprecher saw *none* of the key liability witnesses testify live. R.703a-04a; R.1956a; R.2582a; *see Shepley v. Dobbin*, 505 A.2d 327, 329 (Pa. Super. Ct. 1986) (factual findings deserve deference "because [the trial judge] had the opportunity to hear and observe all the witnesses"). He rejected the testimony of various witnesses even though *no* competing evidence was presented and the Trial Court did *not* have an opportunity to make credibility determinations based upon live testimony.

Moreover, the Trial Court's factual findings warranted special scrutiny because of the trial judge's demonstrated animus towards Nationwide and insurance companies generally. Although the Bergs' Petition conspicuously ignores them, both of the Trial Court's opinions contain lengthy musings about irrelevant topics, including criticisms of aspects of the insurance industry that had nothing to do with the case, such as advertising by Nationwide's competitors, the

merits of capitalism, and the publicity that this case has received. These digressions are strongly suggestive of bias. *See* Pet. App'x F at 24-30. As the Majority correctly observed, a judge hearing a bad faith case "should confine his or her analysis to the facts of the case at bar without any consideration of the perceived ills of the insurance industry in general." Pet. App'x A at 58. Even the dissent noted "with displeasure [the trial judge's] tangential discourse concerning insurance companies" and observed that the comments were "irrelevant, unnecessary to the disposition of the issues, and should have been excluded." Pet. App'x B at 1-2 n.1. Given the Trial Court's improper digressions, the Superior Court was correct to review the record with great care and reverse when the record did not support the Trial Court's findings.

B. The Superior Court Carefully Considered the Standard of Review

This is not a case where the Superior Court ignored the standard of review. The Majority explained the deferential standard of review afforded to a trial court's verdict. Pet. App'x A at 8-9. Nevertheless, the Majority acknowledged that it was bound to "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*.'" *Id.* at 11 (quoting *Brown*, 860 A.2d at 502) (emphasis in original). The Majority observed that a trial court cannot "reach its verdict merely on the basis of speculation and conjecture," but instead must have a basis in evidence. *Id.* Later

in its ruling, the Majority emphasized that it was "cognizant of the standard governing our review," explaining that it did not reach its decision to vacate the judgment "lightly." *Id.* at 59.

Unlike the Trial Court's ruling, the Majority's decision was not based upon improper issues not found in the record. Instead, it was the Majority's proper and careful "review of the extensive record" that convinced it that "the trial court's findings are not supported by the facts of record." *Id.* Indeed, only after systematically reviewing the trial court's "limited and highly selective analysis of the facts" and its unsupported conclusions did the Majority correctly conclude that the "appellate standard of review, circumscribed as it is" did not require or even permit the Superior Court to affirm the trial court's decision. *Id.* at 60. The Superior Court's decision was proper and should not be disturbed.

C. The Superior Court's Opinion Does Not Conflict with Its Prior Opinion in this Case

The Bergs maintain that the Superior Court's prior 2012 opinion in this litigation supports the Trial Court's findings, Pet. at 17-18, and that the Superior Court Majority "believe[d] not only that the trial court err [sic], but so did the prior Superior Court panel," Pet. at 19. The Bergs are fabricating a conflict between the two Superior Court opinions.

In its 2012 opinion, the Superior Court addressed the trial court's entry of a directed verdict in Nationwide's favor on the Bergs' bad faith claim. *Berg v.*

Nationwide Mut. Ins. Co., Inc., 44 A.3d 1164, 1173 (Pa. Super. Ct. 2012). The Superior Court reversed the directed verdict, holding that the Bergs' claims arose under the insurance policy and the jury's $295 finding on the UTPCPL claim "constitute[d] *some* evidence of bad faith." *Id.* at 1173, 1175 (emphasis in original).

In their Petition, the Bergs quote a very lengthy passage from the Superior Court's 2012 opinion. Pet. at 17-18. However, this passage was not part of the Superior Court's holding. Instead, the Superior Court was merely describing the evidence that the Bergs *argued* supported their bad faith claim.[2] *Berg*, 44 A.3d at 1175. Immediately *after* the passage quoted by the Bergs, the Superior Court stated "[a]t trial on remand, the Bergs will again have the burden to *prove* their allegations by *clear and convincing* evidence." *Id.* at 1176 (emphasis added). *Nowhere* in its recent opinion does the Superior Court state or imply that it disagreed with the 2012 Superior Court opinion. Rather, as the Majority correctly noted, the previous Superior Court panel merely recognized that a directed verdict

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[2] Indeed, the Bergs have omitted with ellipses citations in the 2012 opinion to their own trial brief, perhaps in an effort to make the passage seem like conclusions of the court, rather than a recitation of their arguments and evidence offered in support.

was improper. Pet. App'x A at 6. Thus, there is simply no conflict between the two Superior Court opinions.

D. The Bergs' Factual Arguments Are Wrong

Although the Bergs raise numerous factual issues regarding the Majority's ruling, they have studiously avoided raising issues regarding some of the most egregious errors made by the Trial Court. For instance, the Trial Court found Nationwide liable because of its spoliation of evidence, refusing to settle, engaging in tactics to lengthen the litigation, and buying the Bergs' vehicle to keep the Bergs from inspecting it. Each of these Trial Court findings was wrong, some of which embarrassingly so.[3] The Bergs failure to address these critical Trial Court findings should itself doom their Petition.

Rather than trying to resuscitate all of the factual findings that were essential to the Trial Court's holdings, the Bergs focus on just a few specific factual issues. As discussed below, however, the Majority properly concluded, based on the record evidence, that clear and convincing evidence did not support the specific Trial Court findings that the Bergs selectively do choose to raise.

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[3] For example, Nationwide bought the Jeep in December 1998 to preserve it as evidence and, per a court order, the Bergs *always* had access to the vehicle. R.0354a-55a. Nationwide did not spoliate the Jeep; rather, it disposed of the vehicle in 2007 after paying to store it for over eight years and only after the prior trial judge signed an order expressly permitting Nationwide to do so. R.2507a-08a.

1. There Is No Clear and Convincing Evidence to Support the Trial Court's Determinations that Nationwide "Vetoed" a Total Loss Appraisal or that the Jeep Could Not Be Repaired

The Bergs maintain that the Superior Court erred in rejecting the Trial Court's conclusion that Nationwide "vetoed" a total loss appraisal. Pet. at 19-20. The Superior Court Majority correctly concluded, after an exhaustive review of the record evidence, that there was no support for the Trial Court's finding that Nationwide ever "overrode" or "vetoed" a total loss appraisal. Pet. App'x A at 24-25. As the Majority concluded, the Trial Court "simply ignored a large body of evidence that rendered its findings unsupported." *Id.*

Here are the record facts regarding the appraisal: On September 10, 1996, Doug Joffred ("Joffred"), the appraiser at Lindgren Chrysler-Plymouth ("Lindgren"), prepared the one and only written appraisal for the Bergs' Jeep. This appraisal stated that it would cost $12,326.50 to repair the Jeep. R.1364a; R.1794a-1802a. The written appraisal did *not* state that the Jeep was a total loss. R.1033a-34a. Moreover, there is no evidence that Nationwide forced Lindgren to create the September 10 repair appraisal. To the contrary, Nationwide's claim log

for September 11—written nearly two weeks *before* Nationwide even met with Lindgren—refers to Joffred's repair appraisal of "12k." R.1872a.[4]

On September 24, 1996, Nationwide representative Doug Witmer ("Witmer") inspected the Jeep with Joffred. R.1871a-72a; R.1038a-40a. The damage to the Jeep included a bent frame. Because Lindgren did not have the proper equipment to have the frame straightened ("pulled"), Joffred and Witmer together *agreed*: (1) to have the Jeep sent to another repair shop, K.C. Auto Body, for the frame repairs, a normal practice within the industry; (2) if the Jeep came back in a repairable condition, it would be repaired by Lindgren in accordance with Joffred's $12,326.50 estimate; and (3) the Jeep had *not* been determined to be a total loss. R.1038a-41a; R.1378a-82a; R.1794a-1802a. Joffred testified unequivocally that Nationwide did not tell him that the Jeep had to be repaired, direct him to repair it, or twist his arm to say that it was not a total loss. R.1378a. After the frame was straightened at K.C. Auto Body, Joffred "determined conclusively" that the Jeep "was not a total loss" and was "repairable." R.1381a-

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[4] Inexplicably, the Trial Court found that on September 20, Nationwide "substituted" a written September 10 total loss appraisal with the $12,326.50 estimate. Pet. App'x G at 6. There is no evidence to support this conclusion, which even the Bergs do not attempt to defend.

82a. As this chronology makes plain, there never was a total loss appraisal, structural or otherwise.

Nationwide does not deny that Joffred testified that his "first impression" on September 10 was that the Jeep was a total loss and that he communicated that impression orally to Nationwide. R.1359a; R.1872a. This "impression" was not a written appraisal. Joffred testified that it was not unusual for him to change his mind, because assessing damage is "a judgment call." R.1359a-60a. As the Majority properly found, "Joffred perceived a total loss upon first sight of the Jeep, but he also prepared a repair estimate. After investigation…he concluded the Jeep was repairable." Pet. App'x A at 22 n.10.

The Bergs maintain that Joffred performed a tear down before reporting his initial impression to Nationwide that the Jeep was a total loss. This issue is a red herring. Joffred made his ultimate conclusion that the Jeep was not a total loss after the frame was straightened at K.C. Auto Body, well after the tear down. Thus, the argument about whether the tear down was performed before or after Joffred reached his initial impression is of no moment. Once the Jeep's frame was straightened, Joffred determined that the Jeep was *not* a total loss and could be repaired. R.1381a-82a.

Unable to confront the true facts, the Bergs broadly state that the Trial Court's 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." Pet. at 19-20. Since the Bergs have provided no citations, Nationwide is left to guess how these broad categories of evidence supposedly lend support to the Trial Court's conclusion.

Although the Bergs do not say so, their reference to the "claim[] file notes" might refer to a September 24, 1996 claim log note from Witmer stating that the Jeep "is not a total loss" and describing the economics of repairing versus replacing the Jeep. R.1871a-72a. However, this notation provides no support whatsoever for the Bergs argument that Witmer overrode Joffred's initial total loss impression. Specifically, the notation has no bearing on whether or not Joffred *agreed* with Witmer and the record evidence demonstrates that he did. Therefore, these claim file notes fail to establish that there was ever a contrary determination that Witmer purportedly "overrode."[5]

Nationwide is also left to guess at which portions of Dean Jones's testimony purportedly support the Bergs' argument. At trial, Jones read into the record what

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[5] Witmer explained that the notation "Nationwide will never recover the difference in salvage value" simply meant that the Jeep, which was repairable, did not meet the economic threshold for declaring it a total loss. R.1004a; R.1871a-72a.

was contained in the claim log. R.909a-13a. As a result, it is unclear exactly how Jones's testimony supports the proposition that Nationwide overrode a total loss appraisal of the Jeep, particularly given that the two individuals involved in the situation—Joffred and Witmer—testified that there was *no* override or veto.

Finally, the Bergs point to Pennsylvania's Appraiser Act without citing to any specific provision. The Appraiser Act, in fact, demonstrates that there was never a total loss appraisal, because the Act requires that an appraisal be in writing and signed by the appraiser. 31 Pa. Code § 62.3(a)(1). Here, there was no written and signed total loss appraisal and Joffred's initial "impression," communicated orally, is not an appraisal under the Act. R.1359a; R.1872a.

Unable to support their argument with the evidence, the Bergs fall back on the argument that the Jeep was not repairable and was therefore a "structural total loss." Pet. at 20. However, not one witness in the case *ever* testified that the Bergs' Jeep could not be repaired: *not* the Bergs' experts, *not* any Nationwide representative, *not* any other fact witness, and *not* even the Lindgren whistleblower who told the Bergs that their Jeep had not been repaired properly (David Wert). In fact, numerous witnesses testified that the vehicle was repairable. R.1257a; R.1272a; R.1313a; R.1579a-82a.

Left without any record support, the Bergs argue that the Jeep must have been unrepairable, because Lindgren did not perform the repairs properly. The

dissent made this same logical error. This argument obviously does not withstand scrutiny. *Every witness* that addressed reparability said that the Jeep was repairable. Moreover, the mere fact that a repair shop did not repair a vehicle properly is a far cry from clear and convincing evidence that no one *could* repair it. Finally, it is an improper use of hindsight to argue that Nationwide acted in bad faith by agreeing (with the appraiser at the Bergs' chosen repair shop) to fix a repairable vehicle simply because the repairs ultimately failed months later.[6]

Finally, the Bergs claim that the lack of photographic evidence of the Jeep's twisted frame demonstrates that the vehicle was a structural total loss that was beyond repair. While the Trial Court faulted Nationwide for producing only two photographs of the Jeep, the relevant Nationwide manual only *required* two photographs of the vehicle's damage. Pet. App'x G at 29; R.2162a. Moreover, Joffred's ultimate conclusion that the Jeep was repairable was made *after* the frame was straightened at K.C. Auto Body, so photographs of the initial damages are irrelevant. R.1381a-82a.

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[6] The Bergs' unsupported claim that Joffred declared the Jeep a structural total loss, Pet. at 20, ignores Joffred's straightforward testimony that the Jeep "was not a total loss" because it was repairable, R.1381a-82a.

2. There Is No Clear and Convincing Evidence that Nationwide Knew the Jeep Was Unsafe When It Was Returned to the Bergs

The Bergs next contend that the Majority erred in concluding that Nationwide was unaware of the repair failures when the Jeep was returned to the Bergs. Pet. at 27. The Bergs are wrong.

As an initial matter, there is no evidence suggesting that the Bergs, Lindgren, or anyone else informed Nationwide of repair issues when the Jeep was still at Lindgren. It is also undisputed that, after they received the Jeep from Lindgren in December of 1996, the Bergs never contacted Nationwide to report any issues with the repairs. R.1105a; R.1124a; R.1448a-49a. Nor did anyone from Lindgren ever tell Nationwide of any problems. R.1384a. In fact, it was not until November 1997, *after* the Bergs had already retained counsel and hired their own expert to inspect the Jeep, that anyone ever told Nationwide about any issues with the repairs. R.1012a; R.1285a; R.1845a. At that time, Nationwide offered to inspect the Jeep and advised the Bergs of Nationwide's commitment to resolve the Bergs' issues. R.1816a-17a. However, counsel for the Bergs—intent on suing Lindgren—declined Nationwide's offer. *Id.*

Despite these undisputed facts, the Bergs argue that Nationwide "must have known the structural repairs failed when the Jeep was released to the Bergs" by Lindgren because Nationwide purportedly "inspected the repairs throughout the 4-

month repair period." Pet. at 27, 28. The Bergs misleadingly cite purported "undisputed facts" to support Nationwide's knowledge. Pet. at 28. Even if they were undisputed, some of the "facts" cited by the Bergs have nothing to do with whether Nationwide knew that the repairs were not properly performed when the Jeep was returned to the Bergs in December 1996. Moreover, the Bergs wildly mischaracterize the record facts.

As demonstrated above, Joffred did *not* "declare[] the Jeep a total loss due to a badly twisted frame" and it was *not* Nationwide alone that "decided to repair the Jeep." Pet. at 28; *see supra* at Section II.D.1. To the contrary, Joffred agreed that the Jeep should be repaired, and the Bergs specifically authorized the repairs for the Jeep. R.1381-82a. The Bergs also mischaracterize the record in arguing that "the frame damage was too complex for [Lindgren] to repair." Pet. at 28. The vehicle was sent to K.C. Auto Body because Lindgren did not have the proper equipment to have the frame straightened. R.1038a-39a. There is no evidence suggesting that, once the frame was pulled by K.C. Auto Body, the repairs were too complex for Lindgren to perform.

Nationwide does not dispute that it took four months, rather than 25 days, for the repairs on the Jeep to be completed. But testimony demonstrates that the Jeep sat at the facility for a long time without anyone working on it. R.1242a. Further, Wert, the Lindgren whistleblower who told the Bergs that their Jeep had

not been repaired properly, testified that Nationwide personnel were not happy with the length of time it was taking to the repair the vehicle. R.1251a. This does not indicate that Nationwide had inspected the Jeep and knew of the problems with the repairs; rather, it shows merely that Nationwide wanted the job to be completed on a timely basis.

Finally, the Bergs argue that Nationwide "reinspected the repairs several times, including a reinspection near the end of the protracted repair period." Pet. at 28. Here, the Bergs are alluding to Wert's testimony. *See also* Pet. at 30. But that testimony does not demonstrate that Nationwide knew the completed repairs were faulty or that the Jeep was allegedly unsafe. It is difficult to parse exactly when Wert claims Nationwide even "looked at" the Jeep. Initially, Wert testified that he observed a Nationwide employee reviewing paperwork and parts for the Bergs' Jeep "[i]n the early stages" of the repairs, possibly before the Jeep was sent to K.C. Auto Body to have the frame pulled. R.1245a. Wert then stated that he *never* saw Nationwide employees "looking at the vehicle at any point after that again" and that, while Nationwide personnel were "in and out" of Lindgren "all the time," Nationwide only looked at the Jeep that "one major time." R.1246a. Later, however, Wert testified that unidentified Nationwide personnel looked at the Jeep on other occasions, including towards the end of the repairs. R.1249a-50a.

This inconsistent testimony is a far cry from clear and convincing evidence that Nationwide actually inspected the quality of Lindgren's work throughout the repair period. Indeed, it is *undisputed* that Wert: (1) could not identify the Nationwide personnel, R.1248a-49a; (2) did not describe the steps they took, if *any*, to inspect and evaluate the repairs; and, most significantly (3) did not testify that Nationwide evaluated the repairs after they had been completed, the only relevant time period. Thus, as the Majority correctly concluded, there is "no evidence" showing what, if anything, unidentified Nationwide personnel may have seen, when they saw it, and whether the repair issues with the Jeep—which *passed* state inspection later in 1997—were observable without partial disassembly or placing the Jeep on a lift. Pet. App'x A at 34-35; R.1510a.

The Bergs next claim that the Majority ignored evidence that proves that Nationwide performed re-inspections of the quality of the repairs. Specifically, the Bergs argue that the Majority disregarded: (1) the testimony of Dean Jones; and (2) a blank re-inspection report form. Pet. at 31-32. Once again, the Bergs' arguments do not find support in the record.

Jones had retired from Nationwide and did not have responsibility for overseeing the Lindgren shop when the Bergs' Jeep was being repaired. R.876a; R.883a. He testified that *if* a Nationwide representative had re-inspected the Bergs' Jeep, the representative would have focused on the quality of the repairs

and completed a re-inspection report. R.940a-42a. Further, he testified that he was *not* aware if the Bergs' Jeep was ever re-inspected and had *no knowledge* that Nationwide actually knew about the quality of the repairs when the Jeep was returned to the Bergs. R.941a.

Nationwide's Steve Potosnak testified that Nationwide representatives typically went to Lindgren only to ensure that the repair shop was complying with its prior appraisals. R.1071a-72a. Potosnak specifically testified that he would review the quality of repairs "only if there was a complaint filed" about a vehicle. R.1072a. Here, of course, there is no evidence whatsoever that any complaints were raised with Nationwide. Thus, it is not surprising that there is no evidence that Nationwide re-inspected the Jeep. Likewise, it makes perfect sense that there are no completed re-inspection reports. Rather than supporting the Bergs' argument, the lack of a completed re-inspection form corroborates, rather than undermines, the fact that no repair inspection took place and that Nationwide was unaware of any issues. While the Bergs argue that "reinspection reports *should* exist in the claim file," Pet. at 32 (emphasis added), they fail to cite any precedent holding that a failure to perform re-inspections constitutes bad faith, as opposed to mere negligence.

Lastly, the Bergs take issue with the Majority's determination that there was no evidence that "the faulty repairs would have been evident during a visual

inspection when the repairs were nearly complete." Pet. at 33. The Bergs point to (1) a report from Potosnak's April 28, 1998 inspection, R.1809a;[7] (2) the inspection performed by their expert, Donald Phillips, on November 25, 1997, R.1139a; (3) a visual inspection by Terry Shaw on May 16, 1998, R.1969a; and (4) an inspection by Nationwide's independent expert William Anderton in August 1998, R.1573a-75a. *See* Pet. at 33. But the Bergs drove the Jeep nearly 20,000 miles between the completion of Lindgren's repairs in December 1996 and the earliest of these inspections, R.1106a-07a, all of which occurred *nearly one year or more after the repairs on the Bergs' vehicle were completed.* Such wear and tear on the vehicle over time could have made faulty repairs more evident. Further, the faulty repairs were not so obvious that the Jeep failed its state safety inspection. R.1510a.

Nationwide does not dispute that the vehicle was not repaired correctly. That does not mean that the problems with the repairs were visible while the

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[7] The Bergs also argue that observations in Potosnak's report regarding frame rails that had never been replaced supports the conclusion that defects would have been observable to Nationwide personnel while the vehicle was at Lindgren. Pet. at 29-30. Again, there is no evidence that Nationwide personnel inspected the quality of the repairs while the Jeep was at Lindgren. Moreover, Potosnak's report occurred long after the repairs on the Bergs' vehicle had been completed, after the Jeep had passed state safety inspection, and after the Bergs drove the vehicle for tens of thousands of miles.

vehicle was being repaired at Lindgren, that Nationwide ever saw any repair problems, or that the vehicle was not repairable. Not one witness for the Bergs or Nationwide testified that the Jeep was unrepairable; instead, numerous witnesses testified that it was repairable. R.1257a; R.1272a; R.1313a; R.1579a-82a. The Bergs continue to be unable to present clear and convincing evidence proving that Nationwide actually observed the completed repairs and knew that they were not properly performed. The Majority's conclusions, therefore, were correct.

3. There Is No Clear and Convincing Evidence of Bad Faith Regarding the Potosnak Inspection or During the Litigation

The Bergs begin their final section regarding factual disputes by claiming that, after Potosnak inspected the Jeep on April 28, 1998, Nationwide "did not promptly honor the claim by finally conceding the vehicle was a total loss" and instead "forced the Bergs to file this lawsuit while having absolutely no basis for doing so." Pet. at 34. The facts relevant to this argument are as follows:

In October or November of 1997, the Bergs learned from a former Lindgren employee (Wert) that their Jeep had not been repaired properly. R.1251a-54a. On November 3, 1997, the Bergs' counsel informed Nationwide that the Bergs intended to sue Lindgren because of the faulty repairs. R.1845a. Their counsel also sent Nationwide a letter stating that the Bergs had retained an expert to inspect the Jeep; this expert (Phillips) inspected the Jeep on November 25, 1997. R.1138a-

39a; R.1804a. Nationwide offered to have Potosnak inspect the Jeep in December 1997, but the Bergs declined the offer. R.1816a-17a.

On January 23, 1998, the Bergs sued Lindgren. R.0035a. On April 22, 1998, the Bergs' counsel informed Nationwide in writing that the Bergs had retained an expert who had concluded that the Jeep was not safe and that the Bergs had already purchased a new vehicle. R.1882a-83a. He recommended that Nationwide have the Jeep inspected "for purposes of litigation." *Id.*

Potosnak inspected the Jeep on April 28, 1998, just six days after the Bergs' counsel sent the litigation letter to Nationwide. R.1809a-10a. The notes from Potosnak's inspection disclose numerous problems with the repairs, but do not specify any safety concerns. *Id.* The Bergs sued Nationwide six days later on May 4, 1998. R.0040a-88a.

a. Nothing About The Potosnak Report Caused This Litigation To Be Filed

As these facts make plain, Nationwide did not "feign[] ignorance and force[] the Bergs to file this lawsuit." Pet. at 34. In fact, the Bergs *filed their lawsuit only three business days after Potosnak performed his inspection*. After Potosnak's inspection on Tuesday, April 28, 1998, Potosnak was waiting to learn Lindgren's plans regarding the vehicle. R.1808a-10a. The Bergs sued Nationwide the following Monday, May 4, 1998, alleging six claims against it, including bad faith, and seeking punitive damages. R.0040a-88a. The idea that such a delay "forced"

the Bergs to file suit is preposterous, particularly where the Bergs did not contact Nationwide during those three days to learn of Nationwide's response before filing suit. R.1809a.

b. There Is No Evidence That Nationwide Acted In Bad Faith After Learning About Repair Issues

The above facts also refute the Bergs' argument that Nationwide acted in bad faith after learning of the repair issues. Critically, once Nationwide was informed of the issues with the Bergs' vehicle, Nationwide offered the Bergs its support and assistance. R.1816a-17a. However, the Bergs—contemplating suing Lindgren—asked that Nationwide do nothing. R.1804; R.1816a-17a; R.1845a. Once the Bergs requested Nationwide's involvement—advising that Nationwide have the vehicle inspected—Nationwide acted within days. R.1809a-10a; R.1882a-83a. However, Nationwide was given virtually no time to resolve the dispute before the Bergs commenced litigation against Nationwide, bringing a fifteen-count complaint against Nationwide and Lindgren and seeking compensatory and punitive damages against Nationwide for bad faith. R.00040a-80a.

The Bergs contend that Nationwide "concealed" the results of Potosnak's inspection by redacting it under an "improper assertion of attorney-client privilege." Pet. at 34. However, Potosnak's inspection was performed after the Bergs' own expert had already examined the vehicle and concluded that there were

problems. Thus, the Bergs knew of the repair issues well before Nationwide knew of them. Moreover, Potosnak's inspection was performed just days after the Bergs' counsel demanded that Nationwide inspect the Jeep "*for purposes of litigation*." R.1882a (emphasis added). The redaction was therefore made in good faith. But *even if* counsel erred in redacting the report, it was a discovery violation that does not support a finding of bad faith. *O'Donnell ex rel. Mitro v. Allstate Ins. Co.*, 734 A.2d 901, 909 (Pa. Super. Ct. 1999) (the bad faith statute addresses conduct "*by an insurer in its capacity as an insurer* and not as a legal adversary" (emphasis added)); *see also Slater v. Liberty Mut. Ins. Co.*, 1999 WL 178367, at *2 (E.D. Pa. Mar. 30, 1999) ("[T]he legislature did not contemplate a potentially endless cycle of § 8371 suits, each based on alleged discovery abuses by the insurer in defending itself in the prior suit.").

Moreover, and importantly, Potosnak was deposed by the Bergs' counsel on October 11, 2000. R.4752a. He testified that he had inspected the Jeep in April 1998 and described in detail various problems with the vehicle's repair. R.4762a. This testimony was provided *more than four years before the first trial in this matter*. Even more, Nationwide produced the unredacted notes from Potosnak's inspection on May 5, 2003, *more than one year before* the first trial. R.3014a-24a. Thus, any purported discovery violation had no impact on the litigation.

The Bergs then fall back on the argument that Nationwide's litigation conduct, through its purported implementation of the strategy at issue in *Bonenberger v. Nationwide Mutual Insurance Company*, supports the Trial Court's finding of bad faith. However, there is not a shred of evidence that Nationwide ever applied the Pennro Litigation Strategy appended to the Best Claims Practice Manual at issue in the *Bonenberger* case (the "Manual") to the Bergs' claim. The Manual never applied to property claims like the Bergs'; rather, it applied only to bodily injury claims. R.841a; R. 1307a; *see also* R.2083a; R.2239a. Moreover, the undisputed evidence is that, even for injury claims, the Manual was not in effect as of January 1, 1996. R.843a; R.863a; R.1981a; R.2239a.

The Bergs argue that because Nationwide did not produce evidence showing that "Nationwide had instructed personnel to stop applying [the Manual] after *Bonenberger*," the Trial Court properly concluded that the Manual applied. Pet. at 38. The Bergs, however, failed to show that the Manual ever applied to property damage claims at all. *See* R.1987a-88a. During the trial, Nationwide introduced the specific company manuals that did, in fact, apply to the Bergs' property damage claim. R.2095a (discussing R.2470a-82a and R.2484a-85a). These manuals do not contain the language to which the Bergs object. R.2470a-82a; R. 2484a-85a. Moreover, the Superior Court's 2012 opinion only permitted evidence regarding the litigation strategy in the Manual if the Bergs "la[id]…a proper

foundation." *Berg*, 44 A.3d at 1177. Because they failed to establish that the Manual applied to property damage claims, or even was in effect at the time of the Bergs' claim, the Bergs failed to lay such a foundation. *See Stotz v. Shields*, 696 A.2d 806, 808 (Pa. Super. Ct. 1997) (for a proper foundation, evidence "must be relevant"). The Majority thus properly concluded that the litigation strategy at issue in *Bonenberger* has nothing to do with this case.[8]

III. THE SUPERIOR COURT CORRECTLY DECLINED TO ADOPT THE FAR-REACHING AND UNSUPPORTED HOLDING THAT AN INSURER ACTS IN BAD FAITH BY DECLINING TO INSPECT THE QUALITY OF EVERY CAR REPAIR

In the Bergs' third question presented for this Court's review, they seek to have this Court declare that Nationwide itself had a duty under Pennsylvania law to *verify* that the vehicle, and presumably every vehicle that gets repaired pursuant to an insurance policy, was repaired properly and that its failure to do so is bad faith. Pet. at 3-4. This question does not warrant this Court's review because no such

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[8] The Bergs' attempt to blame Nationwide for the expense of this litigation fails for additional reasons. The Bergs sought to turn this case into a class action, and amended their complaint eight times in the hopes of doing so. R.0003a-10a. The Bergs served 110 interrogatories, 22 deposition notices, 125 requests for production of documents, and 131 requests for admission on other parties. R.4707a-37a. In addition, they served over 100 subpoenas on various governmental entities throughout the country, and even some Indian tribes. R.0006a-09a. The trial judge who presided over this case before Judge Sprecher flatly *rejected* the Bergs' claim that Nationwide's litigation conduct was improper after observing the Bergs' tactics and the initial bad faith trial first hand. R.2015a

duty exists, and even if it did exist it would not prove that Nationwide acted in bad faith.

A. The Bergs Do Not Cite Any Case Holding that an Insurer Has a Duty To Verify Repairs Performed By Others

To support their contention that Nationwide acted in bad faith by failing to verify the quality of the repairs before the Jeep was returned to the Bergs, the Bergs point to two secondary source treatises and two Pennsylvania breach of contract cases that are ninety and more than 130 years old. Pet. at 21-23. None actually support the Bergs' position.

The treatises merely state that, if the insurer itself agrees to repair and "actively takes the matter in hand, making all necessary arrangements" for the repair, it undertakes the "duty of having the repairs made with due care." 12 Couch on Insurance 3d, § 176:41 (quoted in Pet. at 21-22); *see also* 6 Appleman, Insurance Law and Practice § 4005 (stating that an insurer that "elects to repair" must "make the car as serviceable as it was before the loss"). But Nationwide did not *itself* repair the Bergs' vehicle, it only paid for the repairs. R.1062a. In fact, the *Bergs*—not Nationwide—chose to take the vehicle to Lindgren (a repair shop they had used in the past), the *Bergs* specifically authorized the repairs performed by Lindgren, and the vehicle was directly returned by Lindgren to the *Bergs*. R.1382a; R.1383a-84a; R.1421a; R.1446a-47a. While Nationwide guaranteed Lindgren's repairs, Nationwide did not itself undertake the repairs. As such, these

treatises do not even apply to Nationwide, let alone stand for the proposition that Nationwide had a duty to verify repairs that had been performed by the Bergs' chosen repair shop. R.1446a-47a.

Nor can the Bergs find support in Pennsylvania law. The Bergs claim that "this Court defined" an insurer's duty to inspect the quality of repairs done by others in 1885 in *Fire Association of Philadelphia v. Rosenthal*. Pet. at 22. *Rosenthal*, however, establishes only that when an insurer elects to perform repairs *itself*, the insurance contract converts to a contract to repair. *Fire Ass'n of Philadelphia v. Rosenthal*, 1 A. 303, 305 (Pa. 1885). It hardly establishes a duty for Nationwide (and all other insurers) to hire a veritable army of mechanics to visit repair shops to double check every completed repair performed by the repair shop's own mechanics. The cost to do so would be staggering.

The Bergs also point to *Keystone Paper Mills Co. v. Pa. Fire Ins. Co.*, 139 A. 627 (Pa. 1927). In *Keystone*, the insurer never repaired the damaged property or even contracted with any repairmen to repair the insured's property. The *Keystone* Court held that the insurer was "bound to put the property in substantially the same state or as good as it was before [the damage]." *Id.* at 629. But the case announces no duty to inspect or verify repairs performed on insured property by others.

The Superior Court's opinion does not "conflict[] with this Court's holdings" in *Rosenthal* and *Keystone*. Pet. at 11. Nor did the Superior Court "absolve[] Nationwide" of the "well-established duty" to inspect and determine whether a repaired vehicle is crashworthy, because no such duty exists. Pet. at 24. Accordingly, the Petition should be denied.

B. The Bergs Cite No Bad Faith Law

The Bergs' argument also fails because they do not cite a single case holding that an insurer acts in bad faith by not itself re-inspecting repairs. The cited portions of their treatises do not discuss bad faith, much less statutory bad faith under Pennsylvania law. *Rosenthal* and *Keystone*, both breach of contract cases, have never been cited in a bad faith case under Pennsylvania law. And the Bergs cite no Pennsylvania bad faith precedent holding that an insurer must verify the quality of repairs performed by others. Therefore, there is simply no support for any claim that a violation of Bergs' unsupported duty somehow demonstrates bad faith under Pennsylvania law.

Further, even if Nationwide somehow had a duty to verify the repairs to the Bergs' Jeep, its failure to do so would demonstrate, at most, negligence, not bad faith. *Rancosky*, 170 A.3d at 378 (Saylor, C.J., concurring) ("[A] finding of bad faith requires more than mere negligence."); *see also Bodnar v. Nationwide Mut. Ins. Co.*, 2015 WL 5517922, at *14 n.8 (M.D. Pa. Sept. 15, 2015) (explaining that,

even if insurer "should have done a deeper factual investigation," bad faith claim fails).

IV. THE SUPERIOR COURT DID NOT COMMIT ERROR IN ASSIGNING JUDGE STABILE TO PARTICIPATE IN THE SECOND PANEL FOR THIS APPEAL

In their fourth question presented for this Court's review, the Bergs ask this Court to decide whether the Superior Court violated its Internal Operating Procedures when, after the first panel deadlocked, the court reassigned the case to a panel that included a judge from the deadlocked panel. Pet. at 4. Not only does this question present no "special and important reasons" warranting this Court's review, it also has no merit. Pa. R.A.P. 1114(a).

On May 1, 2017, the original panel (which included Judge Stabile) issued an order stating that it was unable to reach a majority decision in the case and that the case would be reassigned to another panel.[9] The composition of the second panel was announced on August 31, 2017. It included Judge Stabile. On September 11, 2017, the Bergs filed an Application for Reassignment of the Appeal to a panel that either did not include Judge Stabile, or included both Judge Stabile and Justice

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[9] Judge Panella recused himself after oral argument. Pet. App'x D. There was no explanation of what the point or points of disagreement were between the two remaining panel members. *Id.* Justice Fitzgerald, the other original panel member, has since retired from the bench.

Fitzgerald. The Bergs made many of the same arguments then that they make again now, *i.e.*, that the inclusion of Judge Stabile in the second panel did not comply with the Superior Court's internal operating procedures and gave rise to an appearance of impropriety. The Court denied the Bergs' Application on September 19, 2017.

Now, the Bergs *once again* argue that the assignment of Judge Stabile to the second panel: (1) was contrary to Superior Court Internal Operating Procedure 65.5F; and (2) showed a "bias or uneven-handedness" in favoring Nationwide over the Bergs. Pet. at 40-42. The Bergs are wrong.

Nothing in the Court's internal operating procedures prevented Judge Stabile's participation in the new panel. I.O.P. 65.5F states that the President Judge may, at the request of a deadlocked panel, reassign the appeal for re-argument "before another panel." Pa. Super. Ct. I.O.P. § 65.5F. Nowhere does it say that "another panel" cannot include a judge from a previous panel. As judges routinely rotate through different panel compositions, it is not surprising that a member of an original panel may occasionally appear on a second panel. If the Court wished to keep that from happening, the I.O.P. would provide that the assignment should be but to an "entirely new" panel. Contrary to the Bergs' argument, the dictionary definition of "another" as "not the same" or "different"

does not establish that Judge Stabile's inclusion on the second panel violated I.O.P. 65.5F. A panel is obviously not the same if even one member is different.

The Bergs argue that "the record establishes that two [Superior Court] judges supported reversal while two clearly did not." Pet. at 42. This statement assumes Justice Fitzgerald's position regarding the merits of the appeal, when the order establishes only that the first panel was "unable to reach a majority decision." Pet. App'x D. The Bergs also assume that Judge Stabile had firmly made up his mind in favor of reversal after the first oral argument. Pet. at 41. Though Judge Stabile authored the Majority opinion here, there is no indication that he did not come into the second argument with an open mind.[10] The Bergs' assumptions about the views of the judges from the first panel are unsupported and their argument borders on assailing the integrity of the court's assignment process.

Matters of scheduling and avoiding the appearance of impropriety should be left to the sound discretion of the Court. In the absence of *any* evidence to the contrary, the Superior Court and its Honorable Judges should be presumed to have

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[10] Neither party submitted any additional briefing between the first argument and the second argument. The record before the court was identical. To the extent Judge Stabile made up his mind to overturn the Trial Court's decision after the first argument—and there is no evidence that this is the case—this would have been properly based off the record and briefing before both panels.

acted properly and without bias. This Court's supervisory authority is not warranted to review such a matter of judicial administration.

CONCLUSION

The Majority's exhaustive opinion was legally sound and supported by the evidence of record. The Petitioner has presented no questions warranting this Court's discretionary review. Accordingly, and for the reasons stated herein, Nationwide respectfully requests that this Court deny the Bergs' Petition for Allowance of Appeal.

Dated: September 28, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant has complied with the 9,000 word limit set forth in Pa. R.A.P. 1116(c). According to the Word Count feature in Microsoft Office Word 2013, Appellant's Answer contains 8,880 words, excluding the parts exempted by Pa. R.A.P. 1116(d).

Dated: September 28, 2018

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PROOF OF SERVICE

Pursuant to Rule 121(d) of the Pennsylvania Rules of Appellate Procedure, the undersigned hereby certifies that on this date, a true and correct copy of the foregoing document was served upon the following parties via PACFile:

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The undersigned hereby certifies that no confidential information is included in this filed document and the filing complies with the Public Access Policy of the Unified Judicial System of Pennsylvania.

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