[J-107-2019] [OISR - Wecht, J.]
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,	:	No. 33 MAP 2019
Appellant	:	Appeal from the Superior Court at No. 713 MDA 2015, dated 6/5/18, reconsideration denied 8/8/18, vacating the 4/21/15 judgment entered of the Berks County Court of Common Pleas, Civil Division, at No. 98-813 and remanding
v.	:	
NATIONWIDE MUTUAL INSURANCE COMPANY, INC.,	:	
Appellee	:	ARGUED: November 21, 2019

OPINION IN SUPPORT OF AFFIRMANCE

CHIEF JUSTICE SAYLOR **DECIDED: August 25, 2020**

As a threshold matter, the Justices supporting reversal observe that, "[b]efore we proceed, we must address the degree of deference that we owe to [the trial judge's] factual findings and credibility determinations." Opinion in Support of Reversal ("OISR"), *slip op.* at 12. The Justices then conclude that great deference should be accorded to those findings. *See id.* at 12-15, 59 (referring to the trial court as "the sole arbiter of credibility").

There is, however, an outstanding claim of judicial bias on the part of the trial judge that hasn't yet been addressed in the appellate review process. *See Berg v. Nationwide Mut. Ins. Co.*, 189 A.3d 1030, 1060 (Pa. Super. 2018) ("Given our

conclusion that the record does not support the trial court's necessary findings of fact to establish bad faith, *we need not further address this issue*," *i.e.*, Appellee's argument that "the trial court's disposition of this case was motivated by partiality, prejudice, bias, or ill will"). Accordingly, to the extent that the trial court's credibility judgments are material, as the Justices in a reverse posture find to be the case, *see* OISR at 58-59, I fail to see how the deference issue can be appropriately resolved at this juncture. Instead, I conclude that, at minimum, the case should be remanded to the Superior Court to resolve this challenge before unlimited deference would be conferred, even to supported findings. *See* OISR, *slip op.* at 12-16.[1]

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

> The consumer buys insurance on good faith, hope, trust and expectation that at critical times the company will set itself apart from other companies on service, legal representation, and prompt consideration of losses. *We* trust that the company will be on *our* side and go to bat for *us*, that they will be there just like a good neighbor or family member . . ..
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> *We* just had an accident. *We* are scared. *We* need a company "Driven to be the best." *We* may have hurt someone or worse. . . . *We* are sick about it. *We* want a company that will keep its promises and step up in *our* time

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

> of need. *We* need help and *we* need it now. "It's at times like this that [company] sets itself apart." *We* can trust them; after all they advertise that "they insure over 40,000,000 people worldwide." . . .

Id. at 28 (emphasis added).

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

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

[3] One might say the judge's empathy with consumers is understandable in one sense, since we are all insurance consumers by necessity. But this issue must be viewed from the perspective of the insurance company as a party to the litigation haled into court by individual consumers and entitled to a neutral decision-maker. Along these lines, judges who unavoidably have personal interests overlapping with the subject matter of litigation are required to assiduously put these aside in the performance of their judicial duties. Notably, there would be little doubt that an appearance of impropriety would arise if a judge presiding over bad-faith litigation, who was a former insurance lawyer, engaged in lengthy discussion of just how committed such companies are to exceeding their obligations to insureds. It seems to me that the trial judge's approach of allying with consumer interests here should be of similar concern.

(continued…)

I have other differences with the OISR's approach to deference. First, the Justices supporting reversal recognize that, ordinarily, when (as here) factual assessments by a trial judge are made on a cold record, these findings are subject to less deferential review by Pennsylvania appellate courts, since these courts are able to review the evidence on the same terms as the trial judge. *See* OISR, *slip op.* at 12 (citing *Commonwealth v. $6,425 Seized From Esquilin*, 583 Pa. 544, 558 n.7, 880 A.2d 523, 531 n.7 (2005)). According to the OISR, however, Appellee waived the entitlement to this less-deferential review, since Appellee agreed that the trial judge could review the cold record from the previous trial in the first instance. *See id.* at 12-15.

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

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The problem with the trial judge's poor judgment is magnified, given that the predecessor judge had found, on much the same record as concerns the pre-litigation circumstances, that the Bergs were not denied any benefits under their insurance policy with Appellee. *See Berg v. Nationwide Ins. Co.*, No. 98-813, *slip op.* at 16, 18 (C.P. Berks June 3, 2011) (Stallone, J.). By contrast, on remand, the substitute judge issued a series of findings of reprehensible conduct on Appellee's part, giving rise to the OISR's conclusion that Appellant elected and breached the repair option under its insurance policy with the Bergs. *See* OISR, *slip op.* at 44.

alternative of requiring the mutual exchange of some sort of cautionary warnings amongst opposing attorneys in civil litigation would seem to me to be both impractical and imprudent.[4]

Further, the Justices supporting reversal find that, because additional evidence, including some live testimony, was submitted to the fact-finder upon the retrial, "there is no basis to lessen the level of deference we afford to the trial court's findings." OISR, *slip op.* at 16. In this regard, those Justices credit the trial court's assertion that the original trial record contained "only the tip of the iceberg" of the bad faith evidence. *Id.* at 15 (quoting *Berg*, *v. Nationwide Mut. Ins. Co.*, No. 98-813, *slip op.* at 39 (July 22, 2015)). Most of the live testimony and exhibits presented on retrial, however, concerned *post*-litigation conduct and damages. *See* OISR, *slip op.* at 8. Thus, I fail to

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

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

According to the Justices in a reverse posture, the concern with the trial judge's neutrality isn't presently before this Court. *See* OISR, *slip op.* at 16 n.9. But Appellee has specifically raised the matter in its brief in its arguments about the amount of deference to be allocated to the trial court's findings. *See, e.g.*, Brief for Appellee at 18-19, 24 (asserting that the trial judge's "factual findings warranted careful scrutiny because of his demonstrated animus toward insurance companies including Nationwide").

see why the ordinary standard of deference pertaining to cold-record factual determinations should not pertain relative to the crucial *pre*-litigation conduct in issue. Moreover, I hold a different view than the Justices in a reverse posture -- as expressed later in this opinion -- concerning the appropriate treatment of post-litigation-conduct evidence in insurance bad-faith litigation.

Again, the Justices supporting reversal acknowledge that the deference issue is central to their own treatment of this appeal. *See, e.g.*, OISR, *slip op.* at 58-59 (highlighting the critical role of the fact-finding function to the proper outcome). For my part, however, I agree with the Superior Court's assessment of the evidence in many respects, particularly to the degree its opinion reveals the lopsidedness of the trial court's findings relative to the actual record. In this regard, I view some of the key findings as being clearly erroneous and the weight of the evidence concerning others as clearly favoring Appellee.

By way of an example that I believe is central to a better understanding of the case, I regard the trial court's material finding that the Bergs' Jeep was not repairable as being wholly unsustainable. Significantly, this finding was based, in large part, on the court's determination that two body shops -- Lindgren and K.C. Auto Body Shop -- were unable to straighten the twisted frame of the Berg's Jeep. *See Berg*, No. 98-813, *slip op.* 6 (July 22, 2015); *see also id.* at 10 (depicting K.C. Auto Body Shop as "[t]he facility that did the structural repair"); OISR, *slip op.* at 27 (explaining that the trial court relied on "the fact that two different repair facilities had tried and failed to repair the Jeep," in support of its conclusion that the vehicle couldn't be repaired).

According to the only specific evidence on the point, however, K.C. Auto Body's Shop's assignment was only a preliminary one, in that the shop was subcontracted -- and paid only $330 by Lindgren -- to "pre-pull" the Jeep's frame to "relieve stress from

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

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

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

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

As such -- and as the manager of K.C. Auto Body Shop testified without contradiction -- pre-pulling is only a preliminary step in the attempt to return a damaged vehicle frame to manufacturer specifications. *See* N.T., Dec. 15, 2004, at 574.

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

Moreover, the only record evidence concerning the matter affirmed that this rough-repair procedure applied to the Bergs' vehicle was successful. *See id.* at 575; *see also id.* at 685 (reflecting the opinion of Lindgren's manager, Douglas Joffred, that the Jeep was repairable when it was returned from K.C. Auto Body Shop). Accordingly, the trial court's assertion that K.C. Auto Body Shop attempted -- and failed -- to straighten the frame is entirely unfounded.

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

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

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

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

Implicit in Wenrich's testimony, as well, is that no further corrective manipulation of the frame occurred at Lindgren's facility after the vehicle was returned from K.C. Auto Body Shop.[6] Instead, it appears that Lindgren discerned, based on inapt measuring

[6] Again, contrary to implications that can be drawn from Joffred's testimony, *see supra* note 5, Wert testified that Lindgren didn't possess a frame alignment machine in relevant time period. *See* N.T., Dec. 15, 2004, at 542. At one point in its opinion, however, the trial court accepted that Lindgren had all the equipment necessary for "holding, pulling, and measuring most vehicles . . . including plaintiffs' Jeep." *Berg*, No. 98-813, *slip op.* at 8 (July 22, 2015). *But see Berg,* No. 98-813, *slip op.* at 10 (June 24, 2015) ("It is . . . clear that this Jeep could not have its frame straightened by any mechanic utilizing all the equipment at Lindgren, and, therefore, it was sent to K.C. Auto (continued…)

techniques, that the $330 rough pull performed by K.C. Auto Body Shop had somehow restored the frame to perfect alignment. *See* N.T., Dec. 15, 2004, at 702 (reflecting Joffred's extraordinary claim that "when [the Jeep] came back [after the rough pull at K.C Auto Body Shop] everything was in alignment."). In other words, the record strongly suggests that Lindgren didn't implement precision alignment techniques and associated measuring necessary to restore the vehicle to its original dimensions.

Thus, in my view, far from demonstrating that the Bergs' Jeep was unrepairable, as the trial court found and the OISR credits, the evidence concerning the repair efforts

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Body[.]"). The trial court grounded its assumption that Lindgren had the necessary equipment upon testimony from Appellee's collision damages consultant, William Anderton. *See* N.T., Dec. 16, 2004, at 894-895 (reflecting Anderton's testimony that Lindgren had a "car aligner universal bench system" in its shop at the time of the repairs). However, the basis for Anderton's assessment about what equipment Lindgren had at the time of the repairs is unclear.

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

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

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

instead strongly suggests only that those efforts never stood a chance of succeeding on their own account.[7]

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

What is relatively clear on the present record, however, is that Lindgren's efforts to repair the frame were utterly substandard, and accordingly, the trial court's reliance on those efforts as support for its conclusion that the Bergs' Jeep was unrepairable is deeply flawed.[9] Moreover, as the Superior Court explained, most of the affirmative

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[7] Notwithstanding this conclusion, the Bergs' post-repair problems with the vehicle should be kept in perspective. For example, whereas the OISR indicates that they repeatedly returned it to Lindgren "to remedy structural issues," OISR, *slip op.* at 3, Mr. Berg described two repair visits, one to address a failure of the headlights and the other for drifting, noise, and tire wear. *See* N.T., Dec. Dec. 15, 2004, at 727-28, 753-54. However, after the tires were replaced and wheel alignment was performed, Mr. Berg related, the vehicle "was driving fine," and he and Mrs. Berg "drove it a lot," *i.e.*, nearly 20,000 miles. *See* N.T., Dec. 14, 2004, at 407 (testimony of Mrs. Berg). Notably, as well, as of the time the Bergs were contacted by former Lindgren employee David Wert with information about irregularities in the repair efforts, "there was no knowledge that there was anything wrong with the vehicle." N.T., Dec. 15, 2004, at 754 (testimony of Mr. Berg).

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

[9] Furthermore, as Appellee observes, the notion that a failure to repair equates to non-repairability is also a non sequitur in the first instance. *See* Brief for Appellee at 35 (continued…)

evidence presented at trial on the point -- including testimony from witnesses presented by both sides of the litigation -- explicitly supports the contrary conclusion, *i.e.*, that the Jeep was repairable. *See Berg*, 189 A.3d at 1044-45.

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

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("[T]he mere fact that a repair shop *did not* repair the Jeep properly is a far cry from clear and convincing evidence that it *could not* be repaired[.]") (emphasis in original).

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

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

(continued…)

None of the above is meant to say that pre-litigation conduct attributable to Appellee was not unprofessional or otherwise wrongful. Along these lines, I agree with the trial court and the Justices supporting reversal that Witmer did what he said he did, in that he "instructed [Lindgren] to initiate repairs." N.T., Dec. 14, 2004, at 302. This decision was, of course, not Witmer's or Appellee's prerogative at all; rather, the decision belonged to the Bergs. Accordingly, at the very least, when Joffred communicated his initial opinion that the Jeep was a total loss, Appellee's representatives should have personally apprised the Bergs that the company was taking a contrary position and of their options, particularly after Witmer undertook to involve Appellee in the opinion of an individual who was supposed to serve as a neutral appraiser.[11] Additionally, given the complexity involved in repairing a twisted unibody

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

[11] I agree nonetheless with the Superior Court that the weight of the evidence strongly supports Joffred's pervasive testimony that, upon his discussion with Witmer, Joffred agreed that the repair plan was feasible. *See Berg*, 189 A.3d at 1038-43. In this regard, the Justices supporting reversal dismiss the bulk of Joffred's testimony based on his proclivity at trial to agree with those with which he was speaking. *See* OISR, *slip op.* at 25. Such trait, however, would seem to lend additional support to the extensive evidence that Joffred also agreed with Witmer.

Moreover, to the extent that the Justices in a reverse posture and the trial court have determined and/or implied that Joffred submitted a *written* total-loss appraisal or assessment to Nationwide on September 10, 1996, *see* OISR, *slip op.* at 20-26, I find no record support for this assertion. Although Joffred repeatedly responded that he submitted an appraisal, he never said that the assessment was in writing. The term "appraisal," although a term of art in the insurance, is ambiguous in that its colloquial meaning would encompass oral statements. Moreover, the explanation that the written repair estimate that Joffred said he had locked into the computer on September 10, (continued…)

frame, Lindgren's lack of the necessary equipment to perform an essential task should have been taken as a telltale sign that it wasn't the right facility to accomplish the repairs. Thus, the Bergs should have at least been advised that a second appraisal could be secured from a repair facility that was equipped to address the relevant frame damage, if it was repairable.

All of this being said, it is clear that the Bergs were otherwise made aware by Joffred of his initial total-loss assessment and that Mr. Berg actually made the decision to proceed with the repairs. *See* N.T., Dec. 15, 2004, at 725-726 (testimony of Mr. Berg). It also appears that Mr. Berg was contemporaneously aware of Witmer's role in the abandonment of Joffred's initial total-loss assessment, and Mr. Berg did speak with Witmer about the prospective repairs, *see id.*, although the details of the conversation remain too vague to support a conclusion that Witmer withheld material information that should have been disclosed by Appellee. And with the above knowledge in hand, Mr. Berg chose to maintain his authorization of repairs by Lindgren. *See id.* at 808

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

Indeed, as Appellee highlights, a September 10, 1996, entry on the claims log evidences that "they [*i.e.*, Lindgren] have an estimate," N.T., Dec. 14, 2004, Ex. 8 at 69, and a September 12, 1996, entry designates the amount of the estimate as "12K." *Id.* at 67. Accordingly, any suggestion that the $12,326 repair estimate was first prepared on September 20, 1996, *see* OISR, *slip op.* at 27, lacks evidentiary support and is refuted by the actual evidence.

In this line of discussion, with reference to the OISR's assertion that "the Bergs were never provided with a copy of the September 10, 1996 appraisal[,]" OISR, *slip op.* at 23, in fact, Joffred testified that the Bergs would have been provided his estimate on September 10, 1996. *See* N.T., Dec. 15, 2004, at 692. Accordingly, at the very least, the evidence is ambiguous and/or inconsistent on the point.

(reflecting Mr. Berg's testimony that, "I commented that I can't believe they are fixing that vehicle, but there is no one here that is going to stand up to Nationwide so I dropped it at that point.").[12]

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

As such, and otherwise, I respectfully differ with the position of the OISR that Appellee assumed the duty to repair that otherwise fell to the repair facility per its contractual agreement with the Bergs. *See, e.g.*, OISR, *slip op.* at 44.[14] And I certainly

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

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

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

[14] In this vein, the OISR broadly asserts that "it was Nationwide, not Lindgren, controlling and directing the repair process." OISR, *slip op.* at 29 (citing *Berg*, No. 98-813, *slip op.* at 15 (June 14, 2014)). I respectfully disagree, not the least since there is no evidence that Appellee had anything to do with directing the grossly deficient manner in which Lindgren undertook the frame repairs after the Jeep was returned from K.C. Auto Body Shop. *See supra.* At most, it seems to me that the record supports an (continued…)

wouldn't find that such duty arises from mere maintenance of a blue-ribbon-type program, which can inure to the benefit not only insurance companies but also repair facilities and consumers. *See, e.g.*, *Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025, 1027 (9th Cir. 2009)).[15]

(…continued)
inference that Appellee negligently facilitated repairs at a shop that lacked the equipment, and inferentially the expertise, to effectuate them. Negligence, of course, falls short of bad faith. *See Rancosky v. Washington Nat'l Ins. Co.*, 642 Pa. 153, 174-75, 170 A.3d 364, 376 (2017). *See generally Berg*, 189 A.3d at 1050 (concluding that "the evidence here does not rise above negligence, much less support a finding of bad faith by clear and convincing evidence").

Parenthetically, the OISR pronounces that "Nationwide misled the trial court in 2007 by arguing that the BRRP was somehow different from and therefore not part of the Bergs' insurance policy." OISR, *slip op.* at 56. The "somehow" relates to the fact that the blue-ribbon agreement isn't part of the physical policy which is, by law, filed with the Insurance Department. *See* N.T., June 8, 2007, at 626-627 (testimony of Constance Foster, Esquire). And this Court has not passed on the Superior Court's previous determination that the blue-ribbon commitment is part of the policy for purposes of bad-faith litigation, which, I believe, would require an analysis by this Court of the relevant legislative intent.

[15] To the degree the Justices supporting reversal treat random inspections conducted by insurance claims representatives at independent repair facilities as tantamount to actual or constructive knowledge of deficient repairs, *see* OISR, *slip op.* at 32-33, 47-51, I also disagree. Notably -- as Appellee and its *amici* highlight -- to the extent that the insurance industry responds by implementing self-protective measures, this will require close post-repair inspections by insurer representatives, which will increase expenses and potentially premiums, as well as extend the time that insureds must await the return of their vehicles.

On the subject of post-repair inspections, I also note another errant finding by the trial court, as follows: "[E]very subsequent inspection of the Jeep confirmed visible repair failures." OISR, *slip op.* at 29 (citing *Berg*, No. 98-813, *slip op.* at 16, 18 (June 24, 2014)). This ignores the uncontroverted evidence that the Jeep passed Pennsylvania state inspection, apparently several times. *See* N.T., Dec. 15, 2004, at 732, N.T., Dec. 16, 2004, at 813. *See generally* 67 Pa. Code §175.80(e)(5) (prescribing the annual (continued…)

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

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

(…continued)
inspection procedure encompassing a "beneath the vehicle inspection," encompassing the requirement to assess the vehicle frame for visible defects).

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

To the extent that an unduly aggressive claims handling strategy is being attributed to Appellee, *see* OISR, *slip op.* at 36-41, 52-55, I emphasize that this analysis doesn't relate to the pre-litigation conduct. Indeed, the Bergs' counsel was "willing to stipulate that the Best Claims Practices and litigation strategy was not utilized by Doug Witmer in this case." N.T., June 5, 2007, at 129.

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

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

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

OISR, *slip op.* at 56. According to this recitation -- other than the post-litigation conduct -- the case would be about the four business days that passed between Potosnak's inspection of the Jeep and the filing of the Bergs' complaint.

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

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

> Appellant claims that, after Potosnak inspected the Jeep on April 28, 1998, Nationwide "did not promptly honor the claim by finally conceding the Jeep was a total loss" and instead,

(continued…)

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

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

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

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

These circumstances seem to me to illustrate a very good reason for implementing a rule -- which appears to be the majority approach in other jurisdictions --

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(…continued)

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

Brief for Appellee at 44 (emphasis in original).

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

[18] Evidence pertaining to settlement negotiations would need to be handled carefully, particularly in instances in which insurance bad-faith proceedings might be conducted before a jury, in light of the general prohibition against the admission of such evidence. (continued…)

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

To the degree that the trial court and the Justices supporting reversal have otherwise attributed great fault to Appellee relative to the length of the litigation, I find that the Superior Court has offered a more accurate portrait, *see Berg*, 189 A.3d at

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(…continued)
See Pa.R.E. 408(a). Nevertheless, in a bad-faith action in which there is a colorable proffer to demonstrate that a bad-faith refusal to settle an *underlying* claim continued into the litigation, I would hold that the evidence should be admitted.

[19] In various passages, the OISR and the trial court have referred to an original claim, by the Bergs, of $25,000. *See, e.g.*, OISR, *slip op.* at 55 ("Although the original claim was for only $25,000, Nationwide spent nineteen years fighting this case rather than settle[.]"). It should be borne in mind, however, that from the outset of the litigation the Bergs were seeking, *inter alia*, "punitive damages in excess of 50,000" on multiple counts in their complaint. *See, e.g.*, Complaint dated May 4, 1998, in *Berg v. Nationwide Mut. Ins. Co.*, No. 98-813, at 45-46.

Given that the attribution to Appellee of an unduly aggressive claims handling strategy relates only to the company's *post*-litigation conduct, *see supra* -- which occurred at a time during which Appellee was being charged with bad-faith conduct relative to its insureds and the stakes had been raised much higher -- the reference to an "original claim [that] was for only $25,000," in association with the criticized strategy, seems particularly inapt. OISR, *slip op.* at 55.

1051-57, and I would allocate fault to both sides of the litigation. Along these lines, I believe that Appellee's argument, as follows -- incorporating material findings by the judges presiding over discovery and the first trial -- should be given greater account:

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

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

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

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

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

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

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

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[20] To the extent the Justices supporting reversal suggest that Appellee's answer to the Berg's complaint falsely denied knowledge about repair issues, *see* OISR, *slip op.* at 6, 36, I note that Appellee presents a detailed recitation of the relevant passages of the complaint and answer and concludes, in my view properly, that:

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

Brief for Appellee at 50-51.

Justice Baer joins this Opinion in Support of Affirmance.