IN THE SUPREME COURT OF THE STATE OF DELAWARE

NATIONWIDE INSURANCE COMPANY Plaintiff/Appellant, v. ANGEL IRIZARRY Defendant/Appellee	) No.: 99,2020C)) Court Below-Superior Court) of the State of Delaware)) C.A. No.: N18C-02-167 PRW)))

REPLY BRIEF OF APPELLANT NATIONWIDE INSURANCE COMPANY

REGER RIZZO & DARNALL LLP

Louis J. Rizzo, Jr., Esquire (#3374)
1521 Concord Pike, Suite 305
Brandywine Plaza West
Wilmington, DE 19803
(302) 477-7100
Attorney for Appellant
Nationwide Insurance Company

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ARGUMENT

Nationwide Insurance Company issued a standard motor vehicle insurance policy providing $15,000 in liability benefits and $15,000 in underinsured motorist benefits. The liability benefits were procured to protect innocent victims from the negligence of its insured. The underinsured benefits were procured to protect the insured from the negligence of unknown drivers. The policy, the statute, and common sense all point to the conclusion that the underinsured motorist would be insured under a liability policy separate from the policy providing underinsured motorist benefits.

Appellee attempts to alter this basic premise and compel insurance carriers to pay double benefits to passengers in their insured's vehicles. This obligation imposed on optional insurance coverage would have the effect of raising premiums, thus discouraging drivers from obtaining coverage. Nationwide paid its contractual and statutory obligations to Irizarry, a third party beneficiary to the policy, when it paid the liability policy limits and first party medical benefits. No further payments are required.

I. The Proper Application of the Rules of Statutory Construction Reveal that Under Delaware's Motor Vehicle Insurance Law the Insured Vehicle and the Underinsured Vehicle are Different Vehicles Insured Under Different Policies.

The Answering Brief focuses solely on one paragraph of Del. Code Ann. tit. 18, § 3902 in support of the argument that the statute now requires an insurance company to pay out both liability benefits and underinsured motorist benefits to a passenger in the insured vehicle in a single accident. The Answering Brief also contends that the fact that there was no Legislative history showing this intent is irrelevant to the question of statutory interpretation.

Appellee's argument ignores all of the rules of statutory construction. First, Statutory interpretation requires review of the entire statute, not just a single paragraph or clause amended by statute. In order to determine the legislative intent of a statute, it is important "to give effect to the whole statute, and leave no part superfluous." *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc., 36* A.3d 336, 343-44 (Del. 2012). Read as a whole, Del. Code Ann. tit. 18, § 3902 provides that one should not be able to recover twice under the same policy for the same injury. Del. Code Ann. tit. 18, § 3902(b) limits the amount of underinsured coverage to the amount of liability benefits an insured chooses to provide for victims of their own negligence and Del. Code Ann. tit. 18, § 3902(c) bars stacking of benefits on one policy.

"Legislative history and preliminary statements, such as the preamble, can often aid in statutory construction. See 2A *N. Singer, Sutherland Statutory Construction* § 47.04 (4th ed. 1984)." *State v. Lillard*, 531 A.2d 613, 617 (Del. 1987). The Answering Brief did not challenge the argument that the purpose of the amendment of the statute was to solve the anomalistic language in the prior statute which had elements of both "gap" and "excess" coverage schemes. Nor did the Answering Brief challenge that the preamble to the statute made a clear indication that the intent was to allow the insureds to buy more protection for themselves against injuries caused by other drivers. The actions and statements of the Legislature are consistent with the principle that underinsured motorist coverage involves payments being made from two insurance policies.

Later in the Answering Brief, the argument is made that inaction by the legislature following a Superior Court ruling should be taken as an indication that the Legislature supports the ruling. That has never been a rule of statutory construction. Such a rule would usurp the Supreme Court's obligation to review decisions of the Superior Court and interpret State Law. The only analogous rule of construction is that if the legislature reenacts a statute and is aware of a judiciary or administrative ruling, that it is presumed to have adopted that ruling. *Allen v. Prime Comput., Inc.*, 540 A.2d 417, 420 (Del. 1988). That has not occurred. What the Legislature would have been aware of when it amended the statute were

prior decisions of the Supreme Court. These clearly indicated that underinsured coverage is meant to protect the insured from the negligence of someone other than the insured, as noted in *Frank v. Horizon Assurance Co.*, 553 A.2d 1199 (Del. 1989): "The public policy underlying section 3902 is to permit an insured to protect ***himself*** from an irresponsible driver causing injury or death. *See Home Ins. Co. v. Maldonado*, 515 A.2d 690 (Del. 1986)." *Frank*, 553 A.2d at 1205. In the context of the *Frank* decision, the insured seeking the additional protection from unknown drivers was Luis Velez. The prior decisions describing underinsured motorist coverage must be taken into account when interpreting Section 3902. Since these define underinsured motorist coverage as offering protection against unknown drivers and the driver of the insured vehicle is known, the statute does not permit one to collect liability and underinsured motorist benefits from the same policy.

The Answering Brief attempts to isolate one paragraph in a statute to double the benefits paid out under one policy. The interpretation of the statute ignores the common sense principle that underinsured motorist coverage is to protect the insured from the negligence of other unknown drivers. The legislature already mandated that the owners of motor vehicle buy liability insurance. Appellee's interpretation ignores other provisions of the statute, the preamble, the purpose of the amendment and the prior judicial rulings which all support the notion that the

plain meaning of underinsured motorist coverage is to provide protection from someone other than the insured. Nationwide satisfied the goals of Delaware's Motor Vehicle insurance regulations when Irizarry received $15,000 in liability payments. The decisions of the Superior Court should be reversed.

II. When the Legislature Amended the UIM Statute, it Used Language Which Other Courts had Unanimously Concluded Barred an Insured from Recovering both Liability Benefits and Underinsured Motorist Benefits From the Same Policy.

When attempting to distinguish the decisions from twelve other jurisdictions that had determined that an insured cannot collect both liability and underinsured motorist benefits from another policy, Appellee was able to identify only one jurisdiction, South Carolina, that supported his interpretation of the law. The Answering Brief, though, failed to note that the language contained in the South Carolina law is substantially different than the law of Delaware. The South Carolina statute in effect in 1987 contained the following definition of when underinsured motorist benefits are available:

> Section 56-9-831 requires automobile liability insurance carriers to provide coverage for damages sustained in excess of the liability limits carried by an ***at fault insured*** or underinsured motorist.
>
> *Bratcher v. Nat'l Grange Mut. Ins. Co.*, 292 S.C. 330, 332, 356 S.E.2d 151, 152 (1987) (emphasis added)[1]

[1] South Carolina would later rewrite its motor vehicle insurance laws and abandoned many of the "no fault" provisions. The new law does keep the same definition for underinsured motorist benefits: "Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to

Several other states, all of which have found that the insured cannot recover both liability and UIM benefits under the same policy for the same injury, have definitions substantially similar to Delaware's definition of an underinsured motor vehicle. Appellee did not distinguish the decisions of any of these states:

Minnesota:

> Subd. 17. Underinsured motor vehicle. — "Underinsured motor vehicle" means a motor vehicle or motorcycle to which a bodily injury liability policy applies at the time of the accident but its limit for bodily injury liability is less than the amount needed to compensate the insured for actual damages.

Minn. Stat. § 65B.43

Pennsylvania:

> "Underinsured motor vehicle." —A motor vehicle for which the limits of available liability insurance and self-insurance are insufficient to pay losses and damages.

75 Pa. Cons. Stat. § 1702

Rhode Island:

> For the purposes of this section "uninsured motorist" shall include an underinsured motorist. An "underinsured motorist" is the owner or operator of a motor vehicle who carries automobile liability insurance with coverage in an amount less than the limits or damages that persons insured pursuant to this section are legally entitled to recover because of bodily injury, sickness, or disease, including death, resulting from that injury, sickness or disease.

R.I. Gen. Laws § 27-7-2.1

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provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute."
S.C. Code Ann. § 38-77-160

Washington:

> An underinsured vehicle is defined by the statute as a vehicle with respect to which the sum of liability limits "applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover." Wash. Rev. Code § 48.22.030(1).

As set forth below, prior to the amendment to Delaware's law, the highest court of each of these states determined that the definition of an underinsured motor vehicle meant there were two insurance policies involved. These states did not permit someone to recover both liability and underinsured motorist benefits from the same policy for the same injury. The Delaware Legislature chose to use the same definition rather than the definition of underinsured motorist in the South Carolina statute, which specifically added claims involving an at fault insured as a separate category of claims for which coverage would apply. The Delaware legislature chose to use language that had been interpreted to disallow duplicate liability/UIM recovery, while electing not to adopt the clear language of the South Carolina statute which allows such duplicate recovery. This should be taken into consideration when interpreting Delaware Law, as an indication of the legislature's intent.

The Answering Brief suggested that details on the rational behind the decisions of other jurisdictions were lacking. A review of the other decisions indicates that they followed the same basic legal principles of Delaware Law:

Rhode Island:

We agree with Amica's contention that the exclusion in the policy does not deny the Streickers any of the protections that are embodied in R.I. Gen. Laws § 27-7-2.1. The exclusion simply removes from the definition of "uninsured motor vehicle" those vehicles that are covered by the liability insurance under the same policy. Thus Amica intended to limit its total liability to an insured to $ 300,000, either under the liability coverage or under the uninsured/underinsured-motorist coverage. Although it is an unfortunate consequence that the Streickers are not fully compensated for their losses, this court is still obligated to respect the express terms and conditions of an insurance contract that are not in violation of public policy. *McGowan v. Conn. Gen. Life Ins. Co.*, 110 R.I. 17, 19, 289 A.2d 428, 429 (1972). As a matter of contract law, this exclusion represents Amica's legitimate attempt to protect itself against claims for double recovery.

Amica Mut. Ins. Co. v. Streicker, 583 A.2d 550, 553-54 (R.I. 1990)

Minnesota:

The purpose of liability insurance is to protect "passengers in [the at-fault] vehicle from negligent driving of the owner or another driving the vehicle," while UIM coverage is designed to protect against a different type of risk, the risk that a negligent driver of another vehicle will have failed to purchase adequate liability insurance; that is, it is intended "to protect the named insured and other additional insureds from suffering an inadequately compensated injury caused by an accident with an inadequately insured automobile."

Meyer v. Ill. Farmers Ins. Grp., 371 N.W.2d 535, 537 (Minn. 1985) (quoting *Myers v. State Farm Mut. Auto. Ins. Co.*, 336 N.W.2d 288, 291 (Minn. 1983)). When a liability claim is made on one policy and a UIM claim is made on a second policy, both of which list the tortfeasor as an insured, allowing the UIM claim would result in the payment of additional benefits for injuries caused by the negligence of the insured tortfeasor, which is, as we stated in *Lynch*, the "essence of liability coverage." *Lynch v. Am. Family Mut. Ins. Co.*, 626 N.W.2d 182, 188 (Minn. 2001).

Kelly v. State Farm Mut. Auto. Ins. Co., 666 N.W.2d 328, 331 (Minn. 2003)

Pennsylvania:

The policy as written guarantees up to $ 100,000 of coverage from whatever source to an insured injured in an accident regardless of the identity or number of negligent parties. If the Myers had desired $ 200,000 of total coverage, they could have purchased that amount of bodily injury liability coverage and the commensurate amount of underinsured motorist coverage for a higher premium. They did not, however, and we will not rewrite the policy. Instead, we will enforce the setoff provision as written consistently with the policy of the MVFRL to allow individuals to balance the benefits of added coverage against the resulting increases in premiums, absent any contrary statutory provision. Accordingly, we reverse the decision of the Superior Court and reinstate the trial court's grant of summary judgment to Appellant Penn National and the denial of summary judgment to Appellees.

Pa. Nat'l Mut. Cas. Co. v. Black, 591 Pa. 221, 242-43, 916 A.2d 569, 582 (2007)

Hawaii:

In the present case, acceptance of Kang's argument would allow Kang to recover for Kim's negligence under both the liability and underinsurance provisions of the State Farm policy, which would in effect transform underinsured motorist coverage into liability coverage and thus create a duplication of liability benefits. We do not believe that such a result is consistent with the legislative intent. The Hawaii legislature recognized the distinction in coverages when it mandated bodily injury liability coverage for each motor vehicle pursuant to Haw. Rev. Stat. § 294-10(a) and left the purchase of uninsured and underinsured coverages as optional under Haw. Rev. Stat. § 431-448(c). This court has also recognized the distinction among liability, uninsured, and underinsured motorist coverages. *See Nat'l Union Fire Ins. Co. v. Ferreira*, 71 Haw. 341, 790 P.2d 910 (1990).

Kang v. State Farm Mut. Auto. Ins. Co., 72 Haw. 251, 256, 815 P.2d 1020, 1022-23 (1991)

Washington:

Our conclusion is also dictated by common sense and the consuming public's general understanding of coverage under these circumstances. The owner of a

> vehicle purchases liability insurance to, among other things, protect passengers in the vehicle from his, or another driver's, negligent driving. He purchases underinsured motorist coverage to protect himself and others from damages caused by another vehicle which is underinsured. An insured wishing to avoid personal liability, and protect his passengers, may simply increase the liability insurance. The result of dual recovery in the instant case would transform *underinsured* motorist coverage into liability insurance. This result would cause insurance companies to charge substantially more for underinsured motorist coverage in order to match the cost of that coverage with the presently more expensive liability coverage. This increase in cost would discourage consumers from purchasing underinsured coverage, an important protection presently available for a minimal cost.
>
> *Millers Cas. Ins. Co. v. Briggs*, 100 Wash. 2d 1, 8, 665 P.2d 891, 895 (1983)

The Answering Brief cited dicta in *Frank*, 553 A.2d 1199, noting that common conditions and exclusions were not included as specifically permissible by the legislature as to uninsured motorist coverage in §3902. The Supreme Court chose not to base its decision on that premise and instead focused on the public policy implications of an insured not obtaining any benefits from a policy purchased to protect himself from the negligence of others. *Id.* at 1204.

Irizarry's status as a third party beneficiary prevents him from objecting to conditions on coverage that are customary in the industry. Section 3902 does not identify the scope of individuals entitled to underinsured motorist protection. Frank Irizarry is entitled to benefits as a passenger only because he is deemed to be an insured under Del. Code Ann. tit. 18, § 3902(b), pursuant to Del. Code Ann. tit. 12, § 2118(a)(2)(c): "The coverage required by this paragraph shall be applicable to each person occupying such motor vehicle and to any other person injured in an

accident involving such motor vehicle, other than an occupant of another motor vehicle." Because the definition of who is an insured is set by Section 2118 (a)(2), Irizarry's right to benefits is also governed by Section 2118 (f) which states:

> (f) The coverage described in paragraphs (a)(1)-(4) of this section may be subject to conditions and exclusions customary to the field of liability, casualty and property insurance and not inconsistent with the requirements of this section, except there shall be no exclusion to any person who sustains bodily injury or death to the extent that benefits therefore are in whole or in part either payable or required to be provided under any workers' compensation law.

Appellee is merely a third party beneficiary to a policy which has been determined to be personal to the named insured. His standing to bring this lawsuit is predicated upon being bound by the provisions of Section 2118(f). Any contrary ruling would bar him from even attempting to claim underinsured motorist benefits.

Appellant identified twelve other jurisdictions which had held that a passenger cannot collect both liability and underinsured motorist benefits from the same policy. Appellee has not disputed the fact that it is the custom and practice of motor vehicle financial responsibility laws nationwide to prohibit this type of double recovery. The conclusion is not defeated by contending that some states expressed this policy in clearer terms than others. The clauses at issue in this case are not highly technical policy exclusions. The policy clauses simply enforce the customary practice and understanding that liability coverage provides benefits to

others for your negligence and underinsured motorist coverage provides benefits to the insured against the negligence of others. A stranger to the policy, who paid no premium and had no expectation of any coverage, has no right to complain that he did not also obtain underinsured motorist benefits from the policy of the tortfeasor. Nationwide's interpretation of the statute is consistent with the plain meaning of the distinction between liability coverage and underinsured coverage adopted across the country. The decisions of the Superior Court should be reversed.

III. The Provisions of the Policy Which Limit an Insured to Recovering the Stated Limits in the Policy are Permitted by the Optional Nature of Underinsured Motorist Coverage

Appellant contends that further support for restricting insureds from recovering both liability and underinsured benefits can be found in the unique nature of underinsured motorist coverage. Liability coverage is mandatory; underinsured coverage is not. Uninsured coverage requires a written waiver, underinsured coverage does not. Del. Code Ann. tit. 18, § 3902. As noted in the original brief, the more recent decisions in *State Farm Mut. Auto. Ins. Co. v. Kelty*, 126 A.3d 631 (Del. 2015), and *Stoms v. Federated Serv. Ins. Co.*, 125 A.3d 1102, 1106 (Del. 2014), have made this distinction legally significant.

The Answering Brief attempted to distinguish *Kelty* on the basis that it involved first party medical benefits. As noted earlier, Irizarry's claim is predicated on his

being defined as in insured under Section 2118. Because of the interplay between Sections 2118 and 3902, the reasoning used by the Court in *Kelty* is applicable to this matter. As noted by the Supreme Court in *Kelty*, since the Nationwide policy has already provided the minimum benefits required by the act by the payment of liability coverage, the Named Insured was permitted to purchase insurance which did not provide greater benefits. The Supreme Court in *Kelty* established that the Courts are not to require insureds to purchase benefits beyond the statutory minimums as that raises the cost of optional coverage resulting in less coverage being purchased. *State Farm Mut. Auto. Ins. Co.*, 126 A.3d at 636.

The Answering Brief tries to distinguish *Stoms* on the basis that the fact pattern indicated that an uninsured motorist coverage waiver had been signed. By focusing on the waiver, Appellee avoided addressing the significance of the Court's decision. When making decisions on optional coverage beyond the statutory minimum, the Supreme Court in *Kelty* stated that the court must take into consideration the fact that decisions which require greater benefits for optional coverage result in higher premiums and less people obtaining greater protection. *Stoms*, 125 A.3d at 1106. The Appellant also failed to recognize that uninsured motorist coverage requires a specific written waiver, while underinsured coverage **does not**. Requiring an insured to pay a higher premium for underinsured motorist coverage for guest passengers injured by the insured's negligence would deter

insureds from buying protection for themselves from the negligence of other drivers.

Underinsured Motorist Coverage is entirely optional. No waiver for such coverage is required, should the insured choose not to purchase same. When purchasing coverage, the insured is deciding how much protection they want if they are hit by another vehicle. The coverage is personal to the insured and applies if they are in their own vehicle, in another vehicle or a pedestrian. *Frank*, 553 A.2d 1199. As noted in both *Stoms* and *Kelty*, the insured is not obligated to buy greater underinsured protection for others than he has purchased for himself, where all mandatory coverages have been purchased. Since these clauses do not limit the amount of benefits available to the named insured when injured by an unknown driver, they can be included within the initial offer of underinsured motorist coverage. Any ruling that requires greater coverage to third parties has the effect of raising premiums, discouraging the purchase of any coverage, and should be avoided. *State Farm Mut. Auto. Ins. Co. v. Kelty* 126 A.3d 631, *Stoms*, 125 A.3d 1102. The decision of the Superior Court should be reversed.

IV. The Delaware Supreme Court has Already Determined as a Matter of Law that Greater Benefits Require Greater Premiums and That Liability Coverage is Rated Differently than Underinsured Motorist Coverage.

The Answering Brief asserts that in the absence of an actuarial study there is no "proof" that requiring greater benefits will result in higher premiums. While the exact premium increase is not on the record, the Supreme Court has repeatedly recognized that, by definition, greater benefits require greater premiums. *Stoms, supra.; see also Bermel v. Liberty Mut. Fire Ins. Co.*, 56 A.3d 1062, 1070 (Del. 2012) (Adding employee to policy as another named insured would have resulted in higher premium charge). The fact that rates have not already increased is immaterial. It would have been inappropriate for the insurance carriers to submit a request for new rates prior to the Supreme Court's ruling on this issue. Appellee's suggestion that this is free coverage reflects a naive view of the insurance industry.

The Supreme Court has routinely cited to the process by which insurance premiums are calculated when making rulings. For example, in *State Farm Mut. Auto. Ins. Co. v. Washington*, 641 A.2d 449, 452 (Del. 1994) the Supreme Court had to decide whether an excluded driver who was operating the vehicle without the benefit of liability coverage could recover UIM benefits when struck by an unknown negligent driver. The Supreme Court held that underinsured motorist benefits should be provided based on how insurance premiums are calculated:

> An auto insurer assumes two very different risks in terms of liability and uninsured/underinsured motorist coverages. In the first instance, the experience,

> driving record and negligence of the insured driver defines the risk to the insurer. In the latter, the risk is defined by the negligence of the public at large. Uninsured/underinsured motorist coverage protects those injured by negligent, financially irresponsible drivers. Del. Code Ann. tit. 18, § 3902. It thus follows that State Farm assumes the same risk of the Son being hit by an uninsured/underinsured motorist whether or not he is a passenger in an automobile, a pedestrian or a driver. Hence, denying the Son underinsured motorist protection does not further the same purpose of excluding him from the Father's liability coverage.
>
> *State Farm Mut. Auto. Ins. Co.*, 641 A.2d at 452

The decision of the Supreme Court in Washington highlights the difficult situation that Appellee's dual recovery requirements would have on premiums. Drivers whose record makes them "high risk" pay a higher premium for liability coverage. When calculating premiums for high risk drivers, if the Superior Court decision is upheld, carriers will have to calculate the risk of not just a liability payment but also a double payment if the insured requests underinsured motorist coverage to provide additional liability coverage for passengers in the car. The calculation for the premium will be contrary to the principles set forth in *Washington*.

The Supreme Court in *Washington* was adamant that the potential liability of the insured purchasing the policy is not a factor in calculating the UIM premium. For that conclusion to be accurate, the uninsured motorist must be insured on a different policy. The prior decisions of the Supreme Court not only recognized that greater benefits require higher premiums but also that uninsured motorist

coverage premiums do not take into account the peculiar risks of the insured driver. Every case decided by the Supreme Court which stated the purpose of underinsured motorist coverage is to protect the insured from unknown drivers reinforces the fact that the proper interpretation of the statute is that an insured vehicle and uninsured vehicle are, by their very nature, named on different policies, The decisions of the Superior Court which held that the uninsured vehicle and insured vehicle can be the same automobile should be reversed.

CONCLUSION

The rules of statutory construction do not allow portions of a statute to be read in isolation, nor do they allow for interpretations of words and phrases that run contrary to common sense and industry customs. The insured was given the option to elect additional coverage to protect himself from the negligence of others. The policy issued by Nationwide provided the amount of benefits the insured knew he had purchased to protect others from his own negligence. Neither the policy nor the law requires more. The decision of the Superior Court should be reversed.

REGER RIZZO & DARNALL LLP

/s/ Louis J. Rizzo, Jr., Esquire

Louis J. Rizzo, Jr., Esquire (#3374)
1521 Concord Pike, Suite 305
Brandywine Plaza West
Wilmington, DE 19803
(302) 477-7100
Attorney for Plaintiff
Nationwide Insurance Company
Word Count 4,680

Dated: June 3, 2020

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Defendant/Appellee	)

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This reply brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4,680 words, which were counted by the word-count function in Microsoft Word 2010.

REGER RIZZO & DARNALL LLP

/s/ Louis J. Rizzo, Jr., Esquire
Louis J. Rizzo, Jr., Esquire (#3374)
1521 Concord Pike, Suite 305
Brandywine Plaza West
Wilmington, DE 19803
(302) 477-7100
Attorney for Appellant
Nationwide Insurance Company

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ANGEL IRIZARRY	)
Defendant/Appellee	)

CERTIFICATE OF SERVICE

I, Louis J. Rizzo, Jr., Esquire, hereby certify on this 3rd day of June, 2020, that a true and correct copy of the Reply Brief of Appellant Nationwide Insurance Company was served via File & Serve Xpress Electronic Filing upon the following:

Scott E. Chambers
Gary E. Junge, Esquire
Schmittinger & Rodriguez
414 South State Street
P.O. Box 497
Dover, DE 19903

REGER RIZZO & DARNALL LLP

/s/ Louis J. Rizzo, Jr., Esquire
Louis J. Rizzo, Jr., Esquire (#3374)
1521 Concord Pike, Suite 305
Brandywine Plaza West
Wilmington, DE 19803
(302) 477-7100
Attorney for Appellant
Nationwide Insurance Company

Dated: June 3, 2020