[J-139-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

THE BIRTH CENTER,	:	Nos. 25 - 28 M.D. Appeal Docket 2000
	:	
	:	Appeal from Order of Superior Court
	:	entered March 9, 1999 at Nos. 2379 PHL
THE ST. PAUL COMPANIES, INC.,	:	1997, 2380 PHL 1997, 2659 PHL 1997,
SHARON DAWSON-COATES AND AL	:	2670 PHL 1997, reversing the trial court's
AFONSO	:	order which granted J.N.O.V. in favor of
	:	Birth Center and remanded with
APPEAL OF: THE ST. PAUL	:	instructions to the Court of Common Pleas
COMPANIES, INC.	:	of Delaware County, Civil Division, at No.
	:	94-06492
	:	
	:	727 A.2d 1146 (Pa. Super.1999),
	:	
	:	ARGUED: October 17, 2000

OPINION

MADAME JUSTICE NEWMAN **DECIDED: December 31, 2001**

The St. Paul Companies, Inc. ("St. Paul") appeals from an Order of the Superior Court that reversed the Order of the Court of Common Pleas of Delaware County ("trial court"), which granted St. Paul's motion for judgment notwithstanding the verdict. The jury found, by clear and convincing evidence, that St. Paul acted in bad faith when it refused to settle a civil action[1] against The Birth Center ("Birth Center"), and that St. Paul's bad faith conduct was a substantial factor in causing The Birth Center to incur compensatory damages in the amount of $700,000.00.

[1] Norris v. Birth Center, (Del. Co. Ct of Common Pleas Docket No. 86-16841) ("Norris").

We affirm the decision of the Superior Court. Where an insurer refuses to settle a claim that could have been resolved within policy limits without "a bona fide belief . . . that it has a good possibility of winning," it breaches its contractual duty to act in good faith and its fiduciary duty to its insured. Cowden v. Aetna Casualty and Surety Company, 134 A.2d 223, 229 (Pa. 1957). Therefore, the insurer is liable for the known and/or foreseeable compensatory damages of its insured that reasonably flow from the bad faith conduct of the insurer. The fact that the insurer's intransigent failure to engage in settlement negotiations forced it to pay damages far in excess of the policy limits so as to avoid a punitive damages award, does not insulate the insurer from liability for its insured's compensatory damages where the insured can prove that the insurer's bad faith conduct caused the damages.[2]

FACTUAL AND PROCEDURAL HISTORY

The Underlying Action - Norris v. The Birth Center

This claim arose out of St. Paul's bad faith refusal to engage in settlement negotiations in the underlying action, Norris. In that case, Gerald and Denise Norris ("Parents") filed suit on November 16, 1986 against Birth Center[3] alleging that its

[2] St. Paul could have easily avoided liability by engaging in good faith settlement negotiations. Instead, St. Paul patently disregarded the interests of its insured by refusing to negotiate. For example, after the trial began but before the jury announced its $4,500,000.00 verdict, St. Paul refused to offer any money.

For an insurer to refuse to offer any money and to state that it tries "all of these bad baby cases" (N.T. 5/6/96 at 16) regardless of the impact that decision might have on its insured invites a bad faith case.

[3] The Parents also sued two doctors (who Birth Center employed) and the attending midwife.

negligence during the birth of their daughter Lindsey, caused her to suffer severe physical injury and permanent brain damage. After service of the complaint, The Birth Center turned to St. Paul, its professional liability insurance carrier, for its legal defense.[4] St. Paul hired counsel to defend The Birth Center and undertook an investigation of the Parents' claim.

On August 2, 1991, the Parents proposed, on behalf of Lindsey, to settle the case within the limits of The Birth Center's professional liability insurance policy with St. Paul. The Birth Center notified St. Paul that it was making a firm demand to settle the case within its policy limits. On August 7, 1991, St. Paul refused to settle or to even make an offer of settlement.

During the course of an August 8, 1991 pre-trial conference, the presiding judge recommended settlement of Norris within the limits of The Birth Center's insurance policy. Again, St. Paul refused. At a second pre-trial conference, a second judge assigned to the case also recommended settlement within Birth Center's policy limits. The Birth Center demanded settlement in accordance with the judge's recommendation; but St. Paul refused to negotiate or offer any money.

In January of 1992, St. Paul requested the defense attorneys for The Birth Center and one of the doctors involved in Lindsey's delivery to prepare pre-trial reports

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[4]St. Paul insured Birth Center under a professional liability policy with a $1,000,000.00 policy limit.

for St. Paul's consideration. In her report to St. Paul, defense counsel for The Birth Center stated that The Birth Center had, at best, a fifty-percent chance of successfully defending the lawsuit at trial. Furthermore, she advised that the jury verdict could range from $1,250,000.00 to $1,500,000.00. The doctor's defense counsel advised St. Paul that he believed that The Birth Center had a thirty-five percent chance of winning at trial and predicted a jury verdict of $5,000,000.00 to $6,000,000.00.

On January 27, 1992, the executive director of The Birth Center put St. Paul on written notice of the potential for compensatory damages and expressed her deep concerns regarding the possibility of a verdict in excess of Birth Center's policy limits. She explained that such a verdict would have devastating effects upon The Birth Center and could risk its continued existence. When expressing the same concerns to the St. Paul claims representative assigned to the case, the claims representative informed her that St. Paul tries "all of these bad baby cases, and we're going to trial." (N.T. 5/6/96 at 16) (emphasis added).

Before the commencement of the Norris trial, a third judge, who ultimately presided over that trial, held another conference and recommended settlement within The Birth Center's policy limits.[5] St. Paul refused to make any offer whatsoever. Then, on February 12, 1993, the Parents made a high/low offer of settlement, in which St. Paul would pay a non-refundable $300,000.00 amount regardless of the verdict. If, however,

[5] Kenneth A. Clouse, Judge of the Court of Common Pleas Delaware Co., presided over the trial of the underlying action, Norris v. The Birth Center.

the jury returned a verdict in excess of Birth Center's policy limits, the Parents agreed to accept the policy limits as total satisfaction of the verdict. Finally, the settlement offer provided that if the jury returned a verdict lower than The Birth Center's maximum coverage, but higher than the low figure of $300,000.00, then the Parents would accept such verdict as full satisfaction of The Birth Center's liability. St. Paul refused this offer of settlement and made no counter-offer.

On February 16, 1993, the day of trial, a final pre-trial conference took place in the robing room of the trial judge. At this time, the Parents reasserted their high/low offer of settlement. The Birth Center expressed its desire that St. Paul agree to the Parents' proposal; but, a representative of St. Paul, present during the discussion in the robing room, rejected the high/low offer of settlement on the record. Following St. Paul's rejection, the judge stated that he believed that St. Paul's actions were in bad faith and that it was putting its interests ahead of those of its insured. (N.T., 2/16/93, at 15-19).

The Norris trial ensued. After the start of the trial, but before the jury returned a verdict, the trial judge instructed defense counsel for The Birth Center to contact St. Paul to see if it intended to make any offer of settlement. When counsel returned from her telephone conversation with St. Paul, she stated to those present in the robing room: "They must be crazy. They're not offering a dime. They won't give me authority to offer any money in this case, you know I can't believe it." (N.T., 5/3/96, at 69).

On March 4, 1993, the jury returned a verdict in favor of the Parents for $4,500,000.00, with The Birth Center liable for sixty percent of that amount. The final verdict was molded to include delay damages and interest and totaled $7,196,238. The Birth Center's ultimate liability amounted to $4,317,743.00. St. Paul agreed to indemnify The Birth Center for the entire verdict and the parties settled the case for $5,000,000. Before St. Paul paid the excess verdict, it requested that The Birth Center sign a release in exchange for the payment, but The Birth Center refused to sign the release. St. Paul paid on September 20, 1993.

The Birth Center v. St. Paul - The Bad Faith Action

On June 3, 1994, The Birth Center sued St. Paul, alleging that St. Paul breached its fiduciary duty to The Birth Center, its implied covenant of good faith, and its contract. The Birth Center also claimed that St. Paul's failure to settle Norris within its policy limits constituted negligence, reckless disregard for the rights of Birth Center, willful and wanton behavior and bad faith pursuant to the Bad Faith Statute, 42 Pa.C.S.A. § 8371.

On May 3, 1996, the trial began. The Birth Center claimed that St. Paul's refusal to engage in reasonable settlement negotiations damaged "its business, reputation and credit." Appellee's Br. at. 11. After the trial, the jury found, by clear and convincing evidence, that St. Paul acted in bad faith and that its actions were a substantial factor in bringing about harm to The Birth Center totaling, $700,000.00 in compensatory damages. The jury did not award punitive damages.

St. Paul moved for judgment notwithstanding the verdict. On February 7, 1997, the trial court[6] granted St. Paul's motion. The trial court concluded that St. Paul's payment of the excess verdict nullified Birth Center's bad faith claim, that compensatory damages are not available pursuant to 42 Pa. C.S.A. §8371, and that, because it believed that it had not charged the jury on the breach of contract claim, that The Birth Center could not recover compensatory damages based on that theory. See The Birth Center v. St. Paul Companies, Inc., No. 94-6492, slip op. at 9 (C.P. Delaware County Aug 11, 1997). The trial court denied The Birth Center's motion for reconsideration. On June 10, 1997, the trial court entered judgment in favor of St. Paul.

On appeal, the Superior Court determined that the payment of the excess verdict did not preclude the award of compensatory damages and that the trial court had charged the jury on breach of contract. Therefore, it reversed the decision of the trial court, reinstated the jury award, and remanded the case for a determination of The Birth Center's entitlement to interest, attorney's fees and costs pursuant to 42 Pa.C.S.A. § 8371.[7]

St. Paul appealed the Superior Court's decision to this Court.

DISCUSSION

St. Paul's Arguments in Opposition to the Award of Compensatory Damages

St. Paul sets forth four reasons why it is not liable for Birth Center's compensatory

[6] Judge George Koudelis, Judge of the Court of Common Pleas Delaware Co., presided over the trial of the Birth Center's bad faith action against St. Paul.

[7] The Birth Center v. St. Paul Companies Inc., 727 A.2d 1144 (Superior Ct. 1999).

damages. First, it asserts that its payment of the excess verdict barred Birth Center's bad faith claim. St. Paul argues that allowing bad faith claims despite an insurer's "voluntary" excess payment would discourage insurance companies from satisfying future excess verdicts. Second, St. Paul contends that D'Ambrosio v. Pennsylvania National Mut. Ins., 431 A.2d 966 (Pa. 1981) bars The Birth Center's claim. Third, St. Paul points to 42 Pa.C.S.A. § 8371, which authorizes the award of punitive damages, attorneys fees and costs when an insurer is found to have acted in bad faith, and asserts that because the statute does not mention compensatory damages, none are available. Fourth, St. Paul argues that the trial court did not charge the jury on The Birth Center's breach of contract claim and that, as a result, The Birth Center may not recover compensatory damages based on that claim. In turn, we address and reject St. Paul's arguments.

The Trial Court Charged the Jury on Breach of Contract

Although this is St. Paul's final argument, we address it first because if the trial court did not charge the jury on breach of contract, The Birth Center could only recover compensatory damages from St. Paul if some other theory provided a basis for recovery. As we discuss in this opinion, neither 42 Pa. C.S.A. § 8371 nor any other relevant cause of action provide a basis for recovery. Thus, Birth Center's compensatory damage award depends on whether The Birth Center asserted a contract cause of action and whether the trial court charged the jury regarding that claim.

The Superior Court properly determined that The Birth Center asserted a breach of contract claim. Birth Center's Complaint requests compensatory damages based upon its

insurance contract with St. Paul. Complaint ¶¶ 76-77. The Complaint provides:

> 76. By failing to settle the Norris claim within the limits of the insurance policy of The Birth Center, the Defendants herein breached their contractual obligations to The Birth Center under said policy of insurance, by failing to protect The Birth Center and their [sic] assets.
>
> 77. The Defendants herein, in the performance of the said contract, owed to The Birth Center, a fiduciary duty to act in good faith, and to use due care in representing The Birth Center's interests.
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> * * *
>
> **WHEREFORE**, Plaintiff The Birth Center demands judgment against Defendants in an amount in excess of . . . $50,000, plus additional compensatory and/or consequential damages allowed by law, together with interest thereon, Court costs, attorney's fees and such other relief as the Court deems just and proper.

Id. Therefore, it is clear that The Birth Center alleged a claim sounding in contract.

Additionally, the trial court charged the jury with regard to The Birth Center's contract cause of action. The court charged the jurors, inter alia, that if they found that St. Paul breached its contract with The Birth Center, that they were to award compensatory damages if the breach caused the damages, and the damages were reasonably foreseeable at the time the parties entered into the contract and at the time of the breach. Specifically, the trial judge charged, among other things, that:

> where one party to a contract breaches that contract, the other party may recover for those injuries which have been proved to you with reasonable certainty.
>
> * * *
>
> If you find that defendant St. Paul breached its contract with the Birth Center, you must then decide based on all of the evidence presented what amount of money will compensate the Plaintiff for those injuries, which were a direct and foreseeable result of the breach by St. Paul which the parties could reasonably foresee at the time they made that contract and at the time of the Defendant's breach of the contract.

(N.T., 5/10/96, at 246-247 emphasis added).[8] The jury returned a verdict finding that St. Paul acted in bad faith in its handling of the underlying Norris case, and that the bad faith conduct was a substantial factor in bringing about harm to The Birth Center in the amount of $700,000. The jury verdict sufficiently established that the jury considered the breach of contract claim. The jury found that St. Paul acted in bad faith; St. Paul had a contractual duty to act in good faith; therefore, St. Paul breached its contract.

In reviewing the propriety of an order granting or denying judgment notwithstanding the verdict, we must determine whether there was sufficient competent evidence to sustain the verdict. Wenrick v. Schloemann-Siemag Aktengesellschaft, 564 A.2d 1244, 1246 (Pa. 1988). We view the evidence in the light most favorable to the verdict winner and give him or her the benefit of every reasonable inference arising there from while rejecting all unfavorable testimony and inferences. Moure v. Raeuchle, 604 A.2d 1003, 1007 (Pa. 1992). Moreover, "[a] judgment n.o.v. should only be entered in a clear case and any doubts must be resolved in favor of the verdict winner." Id.; see, Atkins v. Urban Redevelopment Authority of Pittsburgh, 414 A.2d 100 (Pa. 1980). Finally, "a judge's appraisement of evidence is not to be based on how he would have voted had he been a member of the jury . . ." Moure, 640 A.2d at 1007 quoting Brown v. Shirks Motor Express, 143 A.2d 374 (Pa. 1958).

[8] Accordingly, the charge, in Birth Center's bad faith action against St. Paul, specifically authorized the jury to award compensatory damages based upon the breach of contract claim. If the judge did not want to charge the jury with regard to the possibility for a breach of contract recovery, he should have limited his charge to 42 Pa.C.S.A. § 8371. See p. 16 infra.

A court may not vacate a jury's finding unless "the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant." Moure, 640 A.2d at 1007 quoting Cummings v. Nazareth Borough, 233 A.2d 874 (Pa. 1967). While we respect Judge Koudelis' opinion that St. Paul's refusal to engage in settlement negotiations was not in bad faith, the jury was the finder of fact. It found that based upon all of the evidence that The Birth Center proved "by clear and convincing evidence that [St. Paul] acted in bad faith in handling the underlying case of Norris v. The Birth Center." We also note that Judge Clouse, who tried the underlying case, stated, the day of trial, that he believed that St. Paul's settlement posture was in bad faith and inconsistent with its fiduciary duty to the Birth Center. Specifically, Judge Clouse expressed his opinion that:

> [t]here is a clear indication of bad faith here. I think the insurance company is not proceeding in a responsible manner and is not discharging its fiduciary obligation to its insureds in this case . . . I think this insurance company has operated in a highly irresponsible manner. I want it clear that they have turned this high/low offer of $300,000.00 down in which [sic] I think is a breach of their fiduciary responsibility to their insureds. And I want that clear on this record.

(N.T., 2/16/93, at 15-19, emphasis added). While Judge Clouse's opinion is arguably irrelevant to the jury's determination that St. Paul acted in bad faith, it is a compelling indication of how a reasonable jury could have come to a similar conclusion that St. Paul acted in bad faith.

While a judge may disagree with a verdict, he or she may not grant a motion for J.N.O.V. simply because he or she would have come to a different conclusion. Indeed, the verdict must stand unless there is no legal basis for it. Without agreeing or

disagreeing with Judge Koudelis or Judge Clouse, we view the evidence in the light most favorable to Birth Center, the verdict winner, and give it the benefit of every reasonable inference arising therefrom while rejecting all unfavorable testimony and inferences. From that perspective, we are unable to conclude that no reasonable jury could have found that St. Paul acted in bad faith. Therefore, although, like Judge Koudelis, we may not have reached the same verdict as the jury, there was sufficient evidence to sustain the verdict and a reasonable basis for the jurors to have found, from the evidence that St. Paul acted in bad faith. Consequently, the trial court should not have granted the motion for a directed verdict based on St. Paul's argument that it did not act in bad faith.

Payment of the Excess Verdict

Next, we address St. Paul's arguments that the trial court properly granted its motion for a judgment notwithstanding the verdict because of its contentions that: (1) an insurer's payment of an excess verdict precludes all bad faith claims, and (2) allowing The Birth Center to recover additional compensatory damages would discourage insurance companies from satisfying excess verdicts. St. Paul states:

> The effect of the Superior Court's holding is to discourage insurance companies from satisfying excess verdicts unless they are required to do so. If an insurance company can still be exposed to a bad faith suit even after voluntarily satisfying an excess verdict, the company has no incentive to pay the excess.
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> * * *
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> If it remains exposed to the bad faith claim and punitive damages anyway, the obvious course for the insurance company is to stand its ground, defend the bad faith claim, and leave its insured to its own devices.

Appellant's Br. at 15.

While St. Paul's argument has facial appeal, it does not stand up to closer examination. St. Paul did not pay the excess verdict out of the goodness of its heart. It had reason to believe that The Birth Center was going to sue for bad faith[9] and it knew that if it were found to have acted in bad faith, it would be liable for punitive damages as well as the amount of the excess verdict. 42 Pa. C.S.A. § 8371. It, therefore, appears that St. Paul paid the excess in an attempt[10] to avoid a punitive damages award.

The purpose of damages in contract actions is to return the parties to the position they would have been in but for the breach. Gedeon, 188 A.2d at 322 n. 5. The relationship and dispute between The Birth Center and St. Paul flow from their contract. Gray, 223 A.2d at 12. "Breach of . . . [the] obligation [to act in good faith] constitutes a breach of the insurance contract for which an action in assumpsit will lie." Id. Therefore, where an insurer acts in bad faith, the insured is entitled to recover such damages sufficient to return it to the position it would have been in but for the breach. St. Paul's payment of the excess verdict does not bar The Birth Center's claim for compensatory damages because The Birth Center was able to prove that St. Paul's bad faith conduct was a substantial factor in The Birth Center suffering damages in addition to the excess verdict.

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[9] St. Paul does not appear to dispute the contention of The Birth Center that its private attorney sent St. Paul "dozens" of written threats stating that if St. Paul did not pay the excess verdict, Birth Center would sue St. Paul for its bad faith conduct. Appellee's Br. at 10.

[10] It was a successful one. The jury did not award punitive damages.

Furthermore, there is no reason to limit damages to the amount of the verdict where the insured can show that the insurer's bad faith conduct caused it additional damages. The insurer's conduct is not the subject of the underlying court action against the insured and, except for the amount of the excess verdict, damages stemming from the insurer's bad faith conduct are not resolved by the action against the insured. Where, as here, the insured can prove that it sustained damages in excess of the verdict, the insurer's payment of the excess has little to do with the insured's damages. Accordingly, the insurer's payment of the excess should not free it from other known or foreseeable damages it has caused its insured to incur.

D'Ambrosio Does Not Bar The Birth Center's Claim

Next, St. Paul contends that D'Ambrosio, 431 A.2d 966, bars Birth Center's claim for compensatory damages. We disagree. Our holding in D'Ambrosio was a narrow one. D'Ambrosio involved a claim by an insured that his insurer acted in bad faith by failing to explain why it was declining to pay a property damages claim. The insured asserted that the insurer was implicitly stating that the claim was fraudulent. We described the insured's bad faith claim as "dubious." Id. at 971. We held that where the allegations in the complaint failed to show how the insurer acted in bad faith, we would not allow the insured to recover punitive damages or damages for emotional distress on his trespass cause of action. The contractual cause of action was never before the Court.[11] In fact, we expressly stated that, in an appropriate case, an insured could recover compensatory

[11] We observed with respect to the assumpsit claim that: "[t]his count is not now before us. The trial court has directed appellee to file its answer". 431 A.2d at 967.

damages based on a contract cause of action, because of an insurer's bad faith conduct. We explained:

> The possibility cannot be ruled out that emotional distress damages may be recoverable on a contract where, for example, the breach is of such a kind that serious emotional disturbance was a particularly likely result . . .. The present record falls far short of establishing such conduct.

431 A.2d at 970 (internal citations, quotations omitted and emphasis added). Similarly, in Chief Justice Nix's concurring opinion, he stated:

> In addition to the deterrent provisions of the Unfair Insurance Practices Act . . . appellant was also in a position to seek relief under a theory of breach of contract, or by pursuing the common law tort of deceit . . .. I do not accept the dissent's implicit premise that these existent remedies are inadequate to make appellant whole.

Id. at 973-974 (internal citations omitted emphasis added). Because nothing in D'Ambrosio bars a party bringing a bad faith action sounding in contract from recovering damages that are otherwise available to parties in contract actions, we reject St. Paul's argument that D'Ambrosio bars Birth Center's claim.[12]

42 Pa.C.S.A. § 8371 Does Not Prohibit the Award of Compensatory Damages

In St. Paul's third argument, it incorrectly asserts that compensatory damages may not be awarded when an insurer's bad faith conduct causes the insured to incur actual damages, because the damages are not mentioned in 42 Pa. C.S.A. § 8371.[13] While The Birth Center

[12] Justice Cappy, in his concurring opinion in Johnson v. Beane, 664 A.2d 96 at 101-102 (Pa. 1995), correctly examined this issue and observed that at least since this Court's 1957 decision in Cowden, 134 A.2d 223 common law contract rights permit an insured to recover compensatory damages in bad faith actions.

[13] Section 8371 is in Article 42 subchapter G. The legislature entitled Subchapter G "Special Damages". The use of the adjective "special" to modify the word damages implies that not all

may not recover compensatory damages based on Section 8371, that Section does not alter The Birth Center's common law contract rights. We begin with the words of the statute. Section 8371 provides:

> § 8371. Actions on insurance policies
>
> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S.A. § 8371.

The statute does not prohibit the award of compensatory damages. It merely provides an additional remedy and authorizes the award of additional damages.[14] Specifically, the statute authorizes courts, which find that an insurer has acted in bad faith toward its insured, to award punitive damages, atttorneys' fees, interest and costs. Id. The statute does not reference the common law, does not explicitly reject it, and the application of the statute is not inconsistent with the common law. Consequently, the common law remedy survives. Metropolitan Property and Liability Insurance Co. v. Insurance Commissioner of Pennsylvania, 580 A.2d 300 (Pa. 1990). In Metropolitan Property, we rejected an insured's argument that the Unfair Insurance Practices Act abrogated the insurer's contractual,

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types of damages that are available are discussed within the provisions within the subchapter.

[14] This case does not require that we resolve the question of whether Section 8371 creates an independent cause of action or an additional remedy. We make no comment on that issue here because the issue is not squarely before us.

common law right of rescission. Id. at 302-303. We explained that because the statute did not refer to the common law remedy of rescission and its concurrent application was not inconsistent with the statute that the legislature did not intend to preclude the remedy. Id. We determined that:

> Under the . . . [Statutory Construction Act. 1 Pa. C.S. § 1921 et seq] an implication alone cannot be interpreted as abrogating existing law. The legislature must affirmatively repeal existing law or specifically preempt accepted common law for prior law to be disregarded.
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> * * *
>
> [Because 40 Pa.C.S. § 1171.5 (the provision at issue in Metropolitan Property] makes no reference to the common law right to rescission . . . [s]uch an omission cannot be interpreted as an intention to foreclose such a long-standing right.

Id. at 311.

Similarly, in Rahn v. Hess, 106 A.2d 461 (Pa. 1954), we stated: "statutes are never presumed to make any innovation in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions." Id. at 886. Indeed, in the context of determining whether 42 Pa. C.S.A. 8371 altered the burden of proof, the Third Circuit applied Pennsylvania law and explained that because the legislature did not expressly alter prior law, it did not intend to change it. Polselli v. Nationwide Mutual Fire Insurance Co., 23 F.3d 747, 752 (3d Cir. 1994). There, the court observed that:

> In enacting a statute, the legislature is presumed to have been familiar with the law, as it then existed and the judicial decisions construing it. See Raymond v. School Dist., 186 Pa. Super 352, 142 A.2d 749 (1958). Had the legislature intended to make changes in the law with respect to the burden of persuasion necessary to prove bad faith, it could have done so expressly. See Harka v. Nabati, 337 Pa.Super 617, 487 A.2d 432, 435 (1985). By failing to articulate any changes, the legislature implicitly acknowledged that the existing standards remain applicable.

23 F.3d at 751. The same reasoning applies where, as here, the legislature did not expressly prohibit the continued award of compensatory damages when an insurer's bad faith conduct causes them.

Therefore, contrary to St. Paul's contention, Section 8371 does not prohibit courts from awarding compensatory damages that are otherwise available.[15] In Section 8371, the legislature granted the court additional authority to award punitive damages, interest,

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[15] Before the enactment of Section 8371, courts could award compensatory damages in contract cases when the damages were known or foreseeable and subject to calculation. R.I. Lampus Co. v. Neville Cement Products Corp., 378 A.2d 288 (Pa. 1977); Cowden, 134 A.2d 223 . In R.I. Lampus, we quoted Professor Corbin for the following proposition of law:

> All that is necessary, in order to charge the defendant with the particular loss, is that it is one that ordinarily follows the breach of such a contract in the usual course of events, or that reasonable men in the position of the parties would have foreseen as a probable result of breach.

378 A.2d at 291, quoting 5 A. Corbin, Corbin on Contracts § 1010 at 79 (1964). The same year the legislature enacted Section 8371 we were not breaking new ground when we stated, "in addition to allowing compensatory damages under [the Uniform Commercial C]ode, Pennsylvania allows compensatory damages in the form of lost profits to be recovered." AM/PM Franchise Association v. Atlantic Richfield Co., 584 A.2d 915, 920 (Pa. 1990). Indeed, by the time that the legislature enacted Section 8371, it had long been axiomatic that compensatory damages were available in contract actions where the damages were the foreseeable result of the breach. Delahanty v. First Pennsylvania Bank N.A., 464 A.2d 1243 (Pa. Super. 1983). The Delahanty court observed that:

> It is well settled law in Pennsylvania that loss of profits are recoverable upon proper proof in contract . . . The general rule of law applicable for loss of profits in both contract and tort actions allows such damages where (1) there is evidence to establish them with reasonable certainty, (2) there is evidence to show that they were the proximate consequence of the wrong; and, in the contract actions, that they were reasonably foreseeable.

Id. at 1258. Because compensatory damages were available at the time the legislature enacted Section 8371, and that Section does not provide that the court may no longer award compensatory damages, those damages remain available.

costs and attorneys' fees. The fact that the statute authorized courts to award these damages does not prohibit them from granting other remedies that they theretofore had the power to award without the grant of additional authority.

Finally, St. Paul's argument that damages not mentioned by Section 8371 are not available is inconsistent with St. Paul's admission that other damages, not listed in Section 8371, remain viable. Appellant's Reply Br. at 3. Notwithstanding that Section 8371 does not provide that courts may require an insurer to pay an excess verdict when it refuses, in bad faith, to settle a case, St. Paul admits, as it must,[16] that such an award is permissible. St. Paul states:

> it has long been held in this Commonwealth that when an insurance company fails to settle a third-party claim against its insured, the insurer can be liable for the full amount of any excess verdict, if the decision not to settle was made in bad faith. [St. Paul also admits that] this right has been held to be contractual in nature; it can be enforced by an action in assumpsit; and it is assignable to the injured third party.

Appellant's Reply Br. at 3. St. Paul, thereby, concedes that an insurer who acts in bad faith may be subject to damages other than those set forth in Section 8371. Accordingly, just as courts may require an insurer to pay an excess verdict even though Section 8371

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[16] An insurer, who acts in bad faith by unreasonably refusing to settle a case, may be liable for the full amount of a verdict notwithstanding that the verdict exceeds the insured's policy limits. Cowden, 134 A.2d 223. In Cowden, we stated that an insurer:

> may be liable for the entire amount of a judgment secured by a third party against the insured, regardless of any limitation in the policy, if the insurer's handling of the claim, including a failure to accept a proffered settlement, was done in such a manner as to evidence bad faith on the part of the insurer in the discharge of its contractual duty.

Id. at 224. See also Gray v.Nationwide Insurance Co., 223 A.2d 8 (Pa. 1966).

does not mention excess verdict liability, the absence of compensatory damages from Section 8371 does not alter the authority of courts to award compensatory damages.

Requiring insurers, who act in bad faith, to pay excess verdicts protects insured from liability that, absent the insurer's bad faith conduct, the insured would not have incurred.[17] The insured's liability for an excess verdict is a type of compensatory damage

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[17] The rationale for requiring an insurer to pay an excess verdict derives from the insurer's right to control the defense of an action. Cowden, 134 A.2d at 228. Where the insurance company takes control of the decision to settle or litigate actions brought by third parties, the insurance company owes its policyholder a fiduciary duty, among other things, to engage in good faith settlement negotiations. Gedeon v. State Farm Mutual Automobile Insurance Company, 188 A.2d 320 (Pa. 1963). In Gedeon, we stated that:

> by asserting in the policy the right to handle all claims against the insured, including the right to make a binding settlement, the insurer assumes a fiduciary position towards the insured and becomes obligated to act in good faith and with due care in representing the interests of the insured.

Id. at 322. Because of the insurer's controlling role in the litigation, the insurer enters a fiduciary relationship with its insured and accepts the responsibility to protect the interests of its insured. Gray v. Nationwide Mutual Insurance Company, 223 A.2d 8 (Pa. 1966) (holding that an insured's right to recover an award in excess of his policy limits from his insurer, when the insurer refuses to settle a claim against the inured in bad faith, was assignable).

Notwithstanding the insurer's contractual duty to its insured, the interests of insurers and their insureds are not always consistent and are frequently in conflict with one another. Indeed, an insured's interests are particularly at risk when a plaintiff expresses a willingness to settle for the policy limits. When it becomes clear that an insurer could settle a third-party claim against its insured for the limits of the policy, and thereby release its insured from any worry about an excess verdict, the insurer must be vigilant to ensure that it has a reasonable basis to try the case and that it is not breaching its fiduciary duty to its insured, based upon a small chance of a defense verdict. Cowden, 134 A.2d at 228.

An insured's interests are particularly in jeopardy under the forgoing facts because whether the insurer settles for the policy limits or looses at trial, its risk is the same; in both instances, and absent bad faith, all it would have to pay would be the policy limits.

for which this court has allowed recovery. Therefore, when an insurer breaches its insurance contract by a bad faith refusal to settle a case, it is appropriate to require it to pay other damages that it knew or should have known the insured would incur because of the bad faith conduct.

The dissent would hold that an insurer's bad faith refusal to settle a claim against its insured does not give rise to a contract cause of action. For the reasons set forth in this opinion, we respectfully disagree. However, we respond to point out that the characterization of the claim by the dissent has no bearing on the outcome of this particular case. Whether Birth Center's cause of action sounds in contract or in tort, the jury found by clear and convincing evidence that St. Paul acted in bad faith and that its actions were a substantial factor in bringing about harm to the Birth Center totaling $700,000.00 in compensatory damages. In appropriate circumstances, compensatory damages are available in both contract and tort causes of action. Indeed, generally, compensatory damages are easier to recover in tort actions than in contract actions. Consequently, in this case, which does not involve a statute of limitations issue, the dissent's assertion that the claim should sound in tort instead of contract is irrelevant.

The only applicable issue raised by the dissent is whether the Bad Faith Statute, 42 Pa.C.S.A. § 8371, bars the recovery of compensatory damages. For the reasons we have discussed, we are not persuaded by the dissent. To the contrary, the provision

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Id. In such a situation, a faithless insurer would have nothing to loose by trying the case; it might as well take the risk and hope for a defense verdict. At the same time, the insured would have no reason to risk a trial. Cowen, 134 A.2d at 223.

does not prohibit the award of compensatory damages; it merely provides a basis to award additional damages. The statute does not reference the common law, does not explicitly reject it, and the application of the statute is not inconsistent with the common law. Accordingly, the remedy survives. To hold otherwise as the dissent does would read a statute - - that authorizes additional damages - - to prohibit the award of compensatory damages, which were already within the power of the courts to award. We cannot countenance such a result because it directly conflicts with the one the legislature intended.

CONCLUSION

Today, we hold that where an insurer acts in bad faith, by unreasonably refusing to settle a claim, it breaches its contractual duty to act in good faith and its fiduciary duty to its insured. Therefore, the insurer is liable for the known and/or foreseeable compensatory damages of its insured that reasonably flow from the insurer's bad faith conduct. Accordingly, we affirm the decision of the Superior Court, reinstate the jury's verdict and remand this case to the trial court for a determination of The Birth Center's entitlement to interest, reasonable attorneys' fees and costs pursuant to 42 Pa.C.S.A. § 8371.

Mr. Justice Nigro files a concurring opinion.

Mr. Justice Zappala files a dissenting opinion in which Mr. Justice Castille joins.