IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 929 MDA 2001

RALPH MARTIN COLYER t/d/b/a COLYER DRY KILN, as Assignee/Subrogee of EBAC SYSTEMS, INC., EBAC, INC. and EBAC, LTD.,

Plaintiff/Appellee,

v.

NATIONAL GRANGE MUTUAL INSURANCE COMPANY, ALPINE INSURANCE COMPANY successor in interest to TRANSCO SYNDICATE #1, LTD., and ALLIANCE GENERAL INSURANCE COMPANY,

Defendants.

Appeal of: NATIONAL GRANGE MUTUAL INSURANCE COMPANY.

BRIEF FOR APPELLEE

Appeal from the Judgment of the Court of Common Pleas of
Centre County, Pennsylvania, Civil Action-Law No. 2000-0527

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I. COUNTER-STATEMENT OF JURISDICTION

This Court lacks appellate jurisdiction over the appeal of defendant/appellant National Grange Mutual Insurance Company. Therefore, this Court should dismiss this appeal without addressing the merits of the issues that National Grange has raised. Appellate jurisdiction is lacking because National Grange filed its notice of appeal before the entry of a final, appealable judgment in this matter. Reproduced Record (R.) 4a. National Grange then failed to file a notice of appeal within thirty days after the entry of final judgment in the trial court. *Id.*

National Grange asserts that its premature notice of appeal ripened into a proper notice of appeal from a final judgment once the trial court entered final judgment in favor of plaintiff Ralph Martin Colyer, but no applicable precedent dictates that result. Moreover, federal appellate courts, applying materially identical principles of federal appellate jurisdiction, have rejected National Grange's argument that appellate jurisdiction exists under these circumstances.

A complete explanation of why this Court should dismiss National Grange's appeal for lack of appellate jurisdiction is set forth below in the first part of the "Argument" section of this brief.

II. COUNTER-STATEMENT OF THE STANDARDS OF REVIEW

This Court exercises de novo review over whether appellate jurisdiction exists. *See Thatcher's Drug Store of West Goshen, Inc.* v. *Consolidated Supermarkets, Inc.*, 535 Pa. 469, 477, 636 A.2d 156, 160 (1994); *O'Neal* v. *Department of the Army*, 742 A.2d 1095, 1101 (Pa. Super. Ct. 1999).

The trial court found that National Grange forfeited its objection to the application of Pennsylvania law to decide Colyer's claim under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371, and this Court exercises deferential review over that finding. *See*

Commonwealth v. *Baylor*, 279 Pa. Super. 304, 310, 420 A.2d 1346, 1349 (1980) (trial court's waiver determination treated as finding of fact); *see also Thatcher's Drug Store*, 535 Pa. at 477, 636 A.2d at 160 (holding that a trial court's factual findings generally bind an appellate court). Moreover, an appellant may not raise for the first time on appeal an argument not preserved at the appropriate time in the trial court. *See* Pa. R. App. P. 302(a); *Commonwealth* v. *Piper*, 458 Pa. 307, 309-11, 328 A.2d 845, 847 (1974).

Although National Grange correctly notes that the Supreme Court of the United States recently held that appellate courts should exercise de novo review over a trial court's ruling on whether a *jury's* award of punitive damages is unconstitutionally excessive, that precedent is not on point. Here, the trial court, sitting as the finder of fact, awarded punitive damages, and under these circumstances the appropriate appellate standard of review remains abuse of discretion. *See Pierce* v. *Penman*, 357 Pa. Super. 225, 237, 515 A.2d 948, 954 (1986), *appeal denied*, 515 Pa. 608, 529 A.2d 1082 (1987); *see also SHV Coal, Inc.* v. *Continental Grain Co.*, 526 Pa. 489, 496, 587 A.2d 702, 705 (1991) (holding that trial court's decision in non-jury matter to award punitive damages is reviewed only for abuse of discretion).

The plain language of 42 Pa. Cons. Stat. Ann. § 8371 provides trial courts with discretion to award punitive damages and interest under Pennsylvania's insurance bad faith statute, and thus the trial court's decisions to award punitive damages and interest are reviewed only for abuse of that discretion. As the Supreme Court of Pennsylvania has explained, "an abuse of discretion may not be found merely because the appellate court might have reached a different conclusion, but requires a showing of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support as to be clearly erroneous." *Paden* v. *Baker Concrete Constr., Inc.*, 540 Pa. 409, 412, 658 A.2d 341, 343 (1995).

III. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should National Grange's appeal be dismissed for lack of appellate jurisdiction, because National Grange admittedly appealed from an interlocutory order and then failed to appeal within thirty days after entry of the final judgment entered at its behest in this matter?

2. Has National Grange forfeited its ability to challenge the trial court's application of Pennsylvania law in adjudicating Colyer's claim under Pennsylvania's insurance bad faith statute, because: (a) National Grange suffered a default judgment, which National Grange never sought to strike or open, on that statutory claim arising under Pennsylvania law; (b) National Grange's counsel at the assessment of damages trial affirmatively agreed that Pennsylvania law applied; and (c) National Grange waited until it filed its post-trial motions to contend that Virginia law applied?

3. If National Grange's challenges are not waived, did the trial court err in applying Pennsylvania law to Colyer's insurance bad faith claim?

4. Was the trial court's award of punitive damages unconstitutionally excessive?

5. Did the trial court abuse its discretion when it awarded to Colyer pre-judgment interest compounded annually pursuant to Pennsylvania's insurance bad faith statute?

IV. COUNTER-STATEMENT OF THE CASE

A. Relevant Procedural History

Three procedural facts are crucial to this appeal, and therefore Colyer sets them forth at the outset before reviewing the case's entire relevant procedural history.

First, the trial court entered a default judgment against National Grange on Colyer's claim under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371. R.2a,

125a, 347a. National Grange never sought to strike or open that default judgment in the trial court.

Second, although National Grange appeared through counsel to defend itself at the assessment of damages hearing held in the trial court, National Grange did not assert that Virginia law rather than Pennsylvania law should govern Colyer's claim under Pennsylvania's insurance bad faith statute. R.438a. On the contrary, National Grange's counsel at the assessment of damages hearing affirmatively manifested his agreement that Pennsylvania law governed that claim. R.132a-33a.

Third, National Grange admits that it neglected to appeal from the final judgment in this matter. *See* Brief for Appellant at 1. Instead, it appealed from the trial court's interlocutory order resolving only the claims asserted against National Grange. R.4a. When National Grange filed its notice of appeal, Colyer's claims against National Grange's co-defendants remained pending, unresolved, in the trial court. *Id.*

* * * * *

In 1995, Colyer brought suit on behalf of his sole proprietorship against several related companies that were insured by National Grange. R.100a. Colyer's suit asserted claims sounding in tort and contract and sought compensatory and punitive damages. R.100a-14a. National Grange received timely notice of Colyer's suit from its insureds. R.245a, 348a.

Nevertheless, in a course of conduct that National Grange's own high-ranking employee described as the most unprofessional claim handling practices he had ever seen, R.218a-19a, National Grange failed to: (1) advise its insureds that coverage existed; (2) advise its insureds that coverage did not exist; (3) defend its insureds under a reservation of rights; or (4) initiate a declaratory judgment action to determine whether coverage or a duty to defend existed. R.348a-50a. Instead, National Grange chose to do nothing and simply abandoned its insureds. R.351a.

On the eve of trial, National Grange's insureds settled Colyer's claims against them. R.9a. As an integral part of this settlement, the insureds assigned to Colyer the right to pursue their claims against National Grange under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371, and for breach of contract. R.9a, 96a-99a. This Court has ruled that bad faith claims under § 8371 are assignable in this manner. *See Brown* v. *Candelora*, 708 A.2d 104, 112 (Pa. Super. Ct. 1998) ("Under Pennsylvania law . . . , an insured's claim against his or her insurer . . . under Section 8371 of the Judicial Code for punitive damages, counsel fees and interest are assignable."), *appeal granted on other grounds*, 555 Pa. 478, 725 A.2d 176 (1999).

In March 2000, following that assignment, Colyer brought suit against National Grange in the Court of Common Pleas of Centre County, Pennsylvania. R.1a. Colyer's suit asserted a claim against National Grange under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371, and sought compensatory and punitive damages plus interest and attorneys' fees. R.11a-13a. Colyer also joined two other insurers as National Grange's co-defendants in the suit. R.7a-21a.

It is undisputed that Colyer properly served process on National Grange, that the trial court possessed personal jurisdiction over National Grange, and that National Grange never responded to Colyer's complaint. Accordingly, on May 1, 2000, the trial court entered a default judgment against National Grange and in favor of Colyer on the claims that Colyer had asserted against National Grange in his complaint. R.2a. One of those claims was, of course, Colyer's claim under Pennsylvania's insurance bad faith statute. National Grange never asked the trial court to strike or open the default judgment entered against it.

On June 5, 2000, Colyer asked the trial court to schedule an assessment of damages hearing. R.2a. In advance of that hearing, Colyer served a notice on National Grange's treasurer directing him to attend the assessment of damages hearing to testify about National Grange's

financial condition. In advance of the assessment of damages hearing, trial counsel for National Grange entered an appearance in this matter. *Id.* National Grange agreed in its proposed findings of fact and conclusions of law, and in the brief accompanying them, that Pennsylvania law governed Colyer's claim under 42 Pa. Cons. Stat. Ann. § 8371. R.325a, 331a-35a, 343a.

At the assessment of damages hearing, one of National Grange's own high-ranking employees candidly admitted that the insurer's practices at issue in the case represented the worst example of claims mishandling that he had ever seen in his long career. R.218a-19a, 353a. Based on the egregious nature of National Grange's conduct, Colyer asked the trial court, both at the hearing and in his proposed findings of fact and conclusions of law filed shortly thereafter, to award punitive damages against National Grange on his claim under Pennsylvania's insurance bad faith statute. R.195a-96a, 312a.

After both Colyer and National Grange filed their proposed findings of fact and conclusions of law and post-trial briefs, the trial court entered its findings of fact and conclusions of law and returned a damages verdict on Colyer's claim under Pennsylvania's insurance bad faith statute. R.347a-59a. The trial court ruled that Colyer was entitled to recover $130,000, representing the cash component of the settlement that Colyer struck with National Grange's insured. R.358a. The trial court also ruled that Colyer was entitled to recover $62,245 in attorneys' fees incurred by National Grange's insured in the underlying suit. *Id.* The trial court awarded to Colyer interest totaling $142,763, representing pre-judgment interest at the rate specified in 42 Pa. Cons. Stat. Ann. § 8371 compounded annually. *Id.* Finally, the trial court awarded to Colyer $3,350,000 in punitive damages. *Id.*

After the trial court issued its verdict, National Grange retained new counsel to represent it in the trial court. R.3a. While the appearance of new counsel might not be noteworthy in the typical case, it is worthy of note here because the arrival of new counsel coincided with National

Grange's effort to adopt an entirely new litigation strategy by seeking to raise and argue issues that it had long ago waived or abandoned.

Most notably, in its post-verdict motions and brief, National Grange argued for the very first time that the trial court should have applied the substantive law of Virginia, rather than Pennsylvania law, in adjudicating Colyer's claim under Pennsylvania's insurance bad faith statute. R.368a-69a, 438a.

On May 4, 2001, the trial court entered an order denying National Grange's post-verdict motions in their entirety. R.444a. In an opinion in support of that ruling, the trial court explained that National Grange had waived any ability to challenge the application of Pennsylvania law to Colyer's claim under Pennsylvania's insurance bad faith statute. R.439a. The trial court found that not only had National Grange's trial counsel affirmatively taken the position that Pennsylvania law applied, but also that National Grange's post-verdict change of position substantially prejudiced Colyer, who had no reason to make a record at trial to support the finding that Pennsylvania law governed his bad faith claim. R.438a-39a. The trial court also ruled that punitive damages were properly awarded in light of National Grange's egregiously reprehensible conduct toward its insured. R.439a-40a. Next, the trial court rejected National Grange's argument that the amount of punitive damages awarded was unconstitutionally excessive. R.440a-42a. Finally, the trial court rejected National Grange's challenge to the award of compound interest. R.442a.

National Grange appealed on June 1, 2001 from the trial court's rulings on its post-trial motions, even though Colyer's claims against National Grange's two co-defendants remained to be adjudicated when that notice of appeal was filed. R.4a, 450a. National Grange did not ask the trial court to certify its order as appealable pursuant to Pennsylvania Rule of Appellate

Procedure 341(c) although that order resolved fewer than all claims against fewer than all parties.

Approximately one week after National Grange filed its notice of appeal, Colyer voluntarily discontinued his claims against National Grange's two co-defendants. R.4a. Thereafter, National Grange praeciped for the entry of final judgment against it, and the trial court entered a final judgment in Colyer's favor against National Grange on July 20, 2001. R.4a, 448a. For reasons that defy understanding, National Grange did not file a notice of appeal within thirty days after the trial court's entry of final judgment. Rather, the only notice of appeal that National Grange ever filed was its notice of appeal from the trial court's plainly interlocutory order, which National Grange filed at a time when Colyer's claims against National Grange's two co-defendants remained pending. R.4a.

B. Relevant Factual History

1. Colyer's original lawsuit against National Grange's insureds

In 1995, Colyer, on behalf of his sole proprietorship, Colyer Dry Kiln, brought suit against defendants Ebac Systems, Inc. and Ebac, Ltd. asserting various claims sounding in breach of contract and tort. R.100a-14a. Later, Colyer added Ebac, Inc. as a defendant. R.96a. This brief refers to these defendants collectively as "Ebac." Colyer's suit against Ebac sought both compensatory and punitive damages. R.110a-11a.

Colyer Dry Kiln at all relevant times was in the business of drying hardwoods for large lumber companies. In late February 1990, Colyer received from Ebac three dehumidification units that he had ordered the previous year. R.101a. Colyer incorporated the dehumidification units into his kilns, but the units were defective and did not become fully operational until May 1990. *Id.* By March 4, 1991, eleven of the twelve copper evaporator coils contained in the

dehumidification units purchased from Ebac had failed, resulting in the shutdown of Colyer's kilns for a total of thirty-three days. R.101a-02a.

In late April 1991, Colyer received from Ebac, and installed at his own expense, replacement copper coils. R.102a. The replacement coils themselves began to fail after just five months. *Id.* Ebac again promised to resolve the problems that Colyer was experiencing with Ebac's dehumidification units. *Id.* The defective coils caused much of Colyer's lumber to be ruined, which caused Colyer to sustain greatly increased costs while, at the same time, significantly reducing the amount of lumber that Colyer was able to dry. R.103a.

In December 1993, Ebac finally admitted to Colyer that Ebac should not have used copper coils in the dehumidifiers supplied to Colyer. *Id.* Ebac advised that it should have instead used stainless steel coils, which Ebac promised to supply promptly to Colyer. *Id.* It was not until October 1994, however, that Ebac supplied some replacement stainless steel coils, and Ebac did not replace all of the copper coils with stainless steel coils until February or March 1995. R.104a. In the interim, between December 1993 and March 1995, Colyer continued to sustain substantial damages because the dehumidification units kept failing and malfunctioning, causing increased operational costs and increased shutdowns of the kilns. *Id.*

From December 22, 1991 through December 22, 1992, Ebac was insured under a commercial general liability insurance policy issued by National Grange. R.23a. The insurance policy provided Ebac with aggregate coverage of $2 million and had a per-occurrence limit of $1 million. *Id.*

National Grange received notice of Colyer's lawsuit against Ebac in two ways. Ebac gave timely notice of the suit to National Grange, R.245a, and Colyer had added National Grange as a defendant in that suit and served a copy of his suit papers directly on the insurance company, R.255a.

2. National Grange's mishandling of Colyer's claims against Ebac

National Grange's district claim manager Duane Regan, who has worked in the insurance industry for more than thirty years, testified at the assessment of damages hearing that he had never seen an insurance company's claim file that was more poorly handled than the file involving Colyer's claim against Ebac. R.218a-19a. To understand the basis for Regan's refreshingly candid admission, which National Grange's opening brief on appeal fails even to mention, it is necessary to review in close detail how National Grange handled Ebac's claim. Because National Grange does not challenge as clearly erroneous any of the facts found by the trial court, almost all of the facts discussed below are taken directly from the trial court's findings of fact. It quickly becomes clear that National Grange, in its opening brief on appeal, has simply ignored the most damaging facts established against it in the trial court.

National Grange received notice of Colyer's claims against Ebac on June 12, 1995. R.348a. On June 14, 1995, an adjuster, supervisor and claim manager for National Grange collectively agreed that the insurer needed to obtain an opinion from outside counsel as to whether the insurance policy issued to Ebac provided coverage for Colyer's claims. *Id.* National Grange thus retained attorney William H. Black, Jr. of the Philadelphia law firm of Hecker Brown Sherry and Johnson to provide a coverage opinion. *Id.*

Attorney Black advised National Grange approximately one month later that his initial impression was that the insurer would have to provide insurance coverage and a defense to Ebac on Colyer's claims. *Id.* In August 1995, Colyer filed a writ of summons against Ebac. *Id.* National Grange did not retain counsel to defend Ebac, nor did it rule Colyer to file a complaint. *Id.*

In October 1995, attorney Black again advised a district claim manager for National Grange that, in Black's opinion, insurance coverage appeared to exist for Colyer's claims against

Ebac. *Id.* Then, on November 28, 1995, attorney Black told the same district claim manager that National Grange was probably "on the hook" for Colyer's claims against Ebac and that National Grange should defend Ebac under a reservation of rights. *Id.*

National Grange received a copy of Colyer's complaint in late October 1996. *Id.* Although National Grange asked counsel for Colyer for two extensions of time to respond to the complaint on Ebac's behalf, National Grange never retained counsel to defend Ebac against Colyer's suit. R.348a, 350a. In December 1996, Tracey Robinson, the National Grange litigation specialist assigned to Ebac's file, directed attorney Black to await further instructions before preparing a formal coverage opinion letter. R.349a. Several days later, Robinson advised Ebac, contrary to the advice and opinions she had received from attorney Black, that she did not think that insurance coverage existed for Colyer's claims but that she would seek an independent coverage opinion from outside counsel. *Id.*

In January of 1997, National Grange supposedly decided to get a coverage opinion from an attorney other than Black but then failed to do so. *Id.* In December of 1997, National Grange instructed attorney Black to close his file without issuing a coverage opinion. *Id.* National Grange never paid attorney Black for the work he performed in researching and analyzing whether the insurer should defend and/or cover Colyer's claims against Ebac. *Id.*

The trial court found as a fact that National Grange: (1) "never received a written coverage opinion from any attorney"; (2) "violated its own internal guidelines by never explaining its coverage position to Ebac"; (3) "never hired counsel to defend Ebac under a reservation of rights"; and (4) "never instituted any formal legal proceedings to determine its obligations and responsibilities under the policy to Ebac." R.350a. The trial court also recognized that National Grange has admitted that Colyer's complaint against Ebac "triggered [National Grange's] duty to defend Ebac under a reservation of rights." *Id.*

The trial court further found that although National Grange was aware of Colyer's suit against Ebac, no one in a supervisory position at the insurer conducted any substantive review of that file for nearly three years. R.351a. The trial court also found that National Grange decided to close the claim file on December 17, 1999, at a time when National Grange had not incurred a single dollar of expense on the file. *Id.*

Tracey Robinson was the National Grange litigation specialist assigned to handle Ebac's claim for insurance coverage arising from Colyer's lawsuit. R.349a. The trial court found that National Grange put incentives in place that foreseeably led to the egregious bad faith conduct that National Grange manifested toward Ebac. R.354a. In National Grange's May 1997 review of Robinson's performance, the insurer praised her for significantly decreasing the company's legal expenses in an amount that exceeded the company's goal. R.352a. As a result, Robinson received a 7.12% salary increase from National Grange. *Id.* In 1998, the insurer's review of Robinson's performance again praised her for "an excellent job in controlling legal expenses," which contributed to an economic turn-around of her office's performance in 1997. *Id.* Robinson received a $1,800 salary increase immediately thereafter. *Id.*

In National Grange's 1999 review of Robinson's performance, the insurer criticized her for not placing enough emphasis on litigation expense control, and she did not receive any raise or bonus in 1999. R.352a-53a. Of course, in 1997 and 1998, when Robinson was being praised and economically rewarded for controlling expenses, she had failed to engage outside counsel to prepare a formal analysis of coverage and defense obligations in Colyer's suit against Ebac. And, in 1999, when the insurer was withholding raises and bonuses due to an increase in outside expenditures by Robinson, National Grange closed its file on Colyer's claims against Ebac.

As the trial court's findings of fact explain, National Grange's "District (presently Regional) Claim Manager Regan stated during the August 14, 2000 hearing that this was the

worst file handling he had ever seen" in his more than thirty years as an employee in the insurance industry. R.353a.

As a direct result of National Grange's having placed its own interests ahead of the interests of its insured, to whom the insurer owed an indisputable fiduciary duty, Ebac was forced to hire its own attorneys to defend against Colyer's claims. R.350a. Following jury selection, Colyer and Ebac reached a settlement of the lawsuit between them. *Id.* The trial court found that at the time of settlement Colyer was seeking compensatory damages of $235,000 plus punitive damages against Ebac. *Id.* Had Colyer obtained the recovery he sought in his suit against Ebac, the judgment would have caused Ebac to experience severe financial consequences, including the possibility of bankruptcy.

Colyer, in his settlement with Ebac, obtained two things of economic value in exchange for releasing his claims for compensatory and punitive damages. First, Colyer received $130,000 in cash from Ebac. *Id.* Second, Colyer received the even more valuable assignment of Ebac's claim under Pennsylvania's insurance bad faith statute against National Grange. R.96a-99a. While National Grange's opening brief insinuates that Ebac never exhibited confidence in the merits of its claim for bad faith against National Grange, *see* Brief for Appellant at 10, that insinuation is belied by the fact that the assignment itself requires Colyer to pay a portion of his recovery to Ebac to reimburse Ebac for the expenditures it made on counsel fees after National Grange failed to defend Colyer's suit against Ebac. R.98a-99a.

3. Colyer's claim, as Ebac's assignee, against National Grange under Pennsylvania's insurance bad faith statute

On March 8, 2000, Colyer as Ebac's assignee brought suit in the Court of Common Pleas of Centre County, Pennsylvania against National Grange and two other insurance companies. Colyer asserted two claims against National Grange, one for breach of contract and the other

under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371. R.10a-13a. Colyer's complaint specifically referenced that statutory provision of Pennsylvania law, making it unmistakably clear that Colyer was asserting against National Grange not a generic, common law claim for bad faith insurance practices (which, of course, Pennsylvania courts have consistently refused to recognize) but instead was asserting a statutory claim for insurance bad faith provided under Pennsylvania law in 42 Pa. Cons. Stat. Ann. § 8371. R.11a-13a. Colyer's complaint averred that he had received an assignment from Ebac of Ebac's claim against National Grange under 42 Pa. Cons. Stat. Ann. § 8371, R.9a, and Colyer attached to the complaint a copy of the written assignment between Colyer and Ebac effectuating the assignment of that claim, R.96a-99a.

National Grange received service of Colyer's complaint by certified mail, return receipt requested, on March 16, 2000 at its corporate headquarters in Keene, New Hampshire. National Grange failed to respond to the complaint, and therefore on April 6, 2000 Colyer sent to National Grange by certified mail, return receipt requested, a ten-day default notice. National Grange received the ten-day default notice on April 10, 2000 but continued to ignore Colyer's suit.

On May 1, 2000, the trial court entered default judgment against National Grange on Colyer's claims against the insurer for breach of contract and under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371. R.2a. The trial court's docket entries disclose that the trial court sent notice of the entry of default judgment to National Grange at its headquarters in Keene, New Hampshire and also to the insurer's branch office in Virginia. *Id.* On June 1, 2000, Colyer filed a praecipe in the trial court asking that court to hold an assessment of damages hearing. *Id.* Colyer served that praecipe on National Grange both at its corporate headquarters in New Hampshire and at its branch office in Virginia.

On July 5, 2000, Colyer served on National Grange's treasurer a notice to attend the assessment of damages hearing scheduled for August 14, 2000 in the trial court. The notice informed National Grange's treasurer that his testimony concerning the company's net worth was required and that he should bring with him documents evidencing the company's financial condition. The notice to attend appears to have finally caused National Grange to be interested in Colyer's suit against it, because on August 1, 2000 counsel for National Grange entered an appearance in the trial court. *Id.*

National Grange never asked the trial court to strike or open the default judgment entered against National Grange, and in favor of Colyer, on Colyer's claim under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371. National Grange has never challenged the trial court's exercise of personal jurisdiction over National Grange, and it is undisputed that National Grange conducts a substantial amount of business within Pennsylvania.

The assessment of damages hearing proceeded as scheduled on August 14, 2000. R.122a. Counsel for Colyer and for National Grange agreed at the start of the hearing that the sole purpose of the hearing was to assess damages, because default judgment had been entered against National Grange on Colyer's claim under 42 Pa. Cons. Stat. Ann. § 8371. R.125a; *see also id.* 347a (trial court's opinion of 11/15/00) ("As a default judgment was previously entered, the sole purpose of the August 14, 2000 hearing was for the assessment of damages . . . .").

At the hearing, Colyer introduced the evidence described above to demonstrate that National Grange's treatment of Ebac's claim was one of the most egregious examples of claim mishandling ever seen in the insurance industry. The default judgment entered against National Grange also established as admitted all factual averments in Colyer's complaint. The complaint averred that National Grange engaged in "wanton and/or willful misconduct[,] acted without regard to the rights of its insured," and acted "for the purpose of causing harm to its insured."

R.12a. The complaint further alleged that "[t]he conduct of National Grange was outrageous, oppressive and recklessly indifferent to the rights of its insured." *Id.* Moreover, the complaint alleged that National Grange had "abandoned" its insured. R.11a. The trial court found as a fact that National Grange put its own financial interests ahead of the fiduciary duty it owed to the insured. R.353a. The trial court further found that National Grange's behavior "was outrageous and recklessly indifferent toward its insured." R.354a. Finally, the trial court found that National Grange lied to its insured and also "breached its duty of good faith and fair dealing to its insured." R.353a-54a.

With respect to National Grange's financial position, the trial court found that National Grange had total assets of almost $526 million as of December 31, 1999, of which approximately $320 million were liquid assets. R.353a. The trial court further found that National Grange earned investment income of more than $17 million in 1999 and that the insurer's policyholder surplus in 1999 was almost $266 million. *Id.* Because National Grange stipulated to this evidence of its financial position, the testimony of its treasurer proved unnecessary.

Based on its findings that National Grange's conduct toward Ebac was outrageous and recklessly indifferent toward the insured, and that National Grange placed its own financial interest ahead of its insured's, the trial court concluded that an award of punitive damages against National Grange was appropriate. R.353a-54a, 357a. The trial court determined that the amount of punitive damages necessary to punish National Grange, and to deter it and other insurers doing business in Pennsylvania from engaging in bad faith conduct toward insureds that was similarly reprehensible, was $3.35 million dollars. R.357a-58a, 444a. This amount of punitive damages, the trial court found, represented just over two months' worth of investment income to National Grange. R.441.

V. SUMMARY OF THE ARGUMENT

This Court lacks appellate jurisdiction over National Grange's appeal. National Grange appealed from the trial court's interlocutory order that decided only Colyer's claims against National Grange. When National Grange filed its premature notice of appeal, Colyer's claims against National Grange's co-defendants remained pending. Inexplicably, National Grange failed to file a notice of appeal after the trial court entered its final judgment in this matter. No decision from this Court or from the Supreme Court of Pennsylvania, and no sensible construction of the Pennsylvania Rules of Appellate Procedure, provides for the exercise of appellate jurisdiction under the circumstances of this case. National Grange's appeal should therefore be dismissed for lack of appellate jurisdiction.

National Grange devotes the vast bulk of its opening brief on appeal to arguing that the trial court should have applied Virginia law, rather than Pennsylvania law, when adjudicating Colyer's claim under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371. Because National Grange is precluded from challenging the trial court's application of Pennsylvania law, National Grange's choice of law arguments are entirely without merit. *First*, the default judgment entered against National Grange on Colyer's claim under 42 Pa. Cons. Stat. Ann. § 8371 — a default judgment that National Grange has never sought to strike or open — precludes National Grange from challenging the trial court's application of Pennsylvania law. *Second*, National Grange's trial counsel affirmatively manifested his agreement that Pennsylvania law governed Colyer's claim under 42 Pa. Cons. Stat. Ann. § 8371, and the trial court relied on that agreement. National Grange has therefore waived any challenge to, and is judicially estopped from challenging, the trial court's application of Pennsylvania law. *Third*, National Grange's arguments that choice of law issues cannot be waived, or that a choice of law objection can properly be raised for the first time on post-trial motions by a party that previously

concurred in the trial court's application of the forum state's law, are specious. For these reasons, this Court should reject National Grange's argument that the trial court should have applied Virginia law to adjudicate Colyer's claim under 42 Pa. Cons. Stat. Ann. § 8371.

National Grange's challenge to the trial court's award of punitive damages on Colyer's claim under Pennsylvania's insurance bad faith statute is similarly without merit. The trial court properly found, on a record that permitted no other conclusion, that National Grange's bad faith conduct towards its insureds was egregiously reprehensible. National Grange's own regional claims manager conceded that National Grange's behavior constituted the worst example of claims mishandling he had ever seen in his long career in the insurance business. The insurer's intentional misconduct threatened to inflict severe financial consequences on its insureds, including the possibility of forcing them into bankruptcy. Given the extraordinarily reprehensible nature of National Grange's conduct, the trial court properly exercised its discretion when it awarded punitive damages of $3.35 million to Colyer. That amount, which represented only slightly more than two months' worth of National Grange's investment income, and which did not come close to threatening National Grange's ability to fulfill its obligations to its other insureds, was finely calibrated to ensure that National Grange would never repeat the wrongs at issue in this case. The punitive damages award at issue in this case is far smaller, both in actual and relative size, than the punitive damages awards that other state and federal appellate courts have upheld against excessiveness challenges in bad faith cases against insurers. This Court should therefore reject National Grange's argument that the trial court's award of punitive damages in Colyer's favor was unconstitutionally excessive.

Finally, National Grange challenges the trial court's calculation of pre-judgment interest. Specifically, National Grange asserts that the trial court abused its discretion in awarding compound pre-judgment interest because 42 Pa. Cons. Stat. Ann. § 8371 is silent regarding

whether interest should be simple or compound. National Grange cites no authority in support of its assertion that statutory silence mandates simple interest, and therefore this Court should hold that National Grange's argument is waived. Moreover, the trial court's decision to award compound interest did not constitute an abuse of discretion. The trial court's ruling was consistent both with the legislative judgment reflected in § 8371 that a bad faith claimant should be made whole and with the Supreme Court of Pennsylvania's ruling in 1989 that wrongfully withheld funds should be subject to interest at the market rate. Accordingly, this Court should reject National Grange's challenge to the trial court's award of pre-judgment interest.

VI. ARGUMENT

A. This Court Should Dismiss National Grange's Appeal For Lack Of Appellate Jurisdiction

This Court lacks appellate jurisdiction over National Grange's appeal. When National Grange filed its notice of appeal, no final, appealable judgment existed because Colyer's claims against National Grange's two co-defendants remained pending in the trial court. R.4a. Recognizing that the existence of appellate jurisdiction is in serious doubt, National Grange argues in its opening brief that this Court's ruling in *Johnston the Florist, Inc.* v. *Tedco Constr. Corp.*, 441 Pa. Super. 281, 286-89, 657 A.2d 511, 513-15 (1995), establishes the propriety of exercising appellate jurisdiction over the insurer's premature appeal. National Grange's jurisdictional argument is without merit, however, and the Court should therefore dismiss this appeal.

In *Johnston the Florist*, when the appellant filed its notice of appeal the trial court had adjudicated all claims as to all parties, and had decided the appellant's post-trial motions, but no final judgment had been entered memorializing those rulings. Recognizing that "appellate courts may regard as done that which ought to have been done," *id.* at 288, 657 A.2d at 514-15, this

Court ruled that an appeal filed after the trial court had decided all claims as to all parties, but before the ministerial task of entering a formal judgment had occurred, could proceed so long as judgment had been entered in the interim.

Here, by contrast, when National Grange filed its notice of appeal the trial court had not yet decided all claims as to all parties. Colyer's claims against National Grange's two co-defendants remained undecided, and, unlike in *Johnston the Florist*, National Grange could have asked the trial court to allow an immediate appeal pursuant to Pennsylvania Rule of Appellate Procedure 341(c).

About one week after National Grange filed its indisputably premature notice of appeal, Colyer voluntarily dismissed his claims against National Grange's co-defendants. R.4a. Over one month later, National Grange praeciped the trial court to enter a final judgment in Colyer's favor, which the trial court entered on July 20, 2001. *Id.* For reasons that defy understanding, however, National Grange failed to file a notice of appeal within thirty days of the trial court's entry of final judgment. Rather, the only notice of appeal that National Grange ever filed was the plainly interlocutory notice of appeal filed while Colyer's claims against National Grange's co-defendants remained outstanding. *Id.*

Pennsylvania Rule of Appellate Procedure 902 compels the dismissal of National Grange's untimely appeal. It provides:

> An appeal permitted by law as of right from a lower court to an appellate court shall be taken by filing a notice of appeal with the clerk of the lower court within the time allowed by Rule 903 (time for appeal). *Failure of the appellant to take any other step other than the timely filing of a notice of appeal does not affect the validity of the appeal . . . .*

Pa. R. App. P. 902 (emphasis added). The italicized portion of Rule 902 clearly provides that the failure to file a timely notice of appeal is of jurisdictional significance and requires the dismissal of an untimely appeal.

This Court has recently reaffirmed that "[t]he Superior Court is without jurisdiction to excuse failure to file a timely notice of appeal, as [the] 30-day period for appeal must be strictly construed; untimely appeal divests the Superior Court of jurisdiction." *State Farm Fire & Cas. Co.* v. *Craley*, 2001 PA Super 280, ¶4 n.5 (Sept. 26, 2001) (en banc); *see also Korn* v. *DeSimone Reporting Group, Inc.*, 454 Pa. Super. 273, 275, 685 A.2d 183, 185 (1996) ("This Court's jurisdiction is established by statute and in the absence of proper authority, we are barred from accepting jurisdiction."). This Court has also recognized that a party appeals prematurely when it appeals from an order disposing of fewer than all claims or fewer than all parties. *See Kirby Elec., Inc.* v. *Jet Contracting Corp.*, 447 Pa. Super. 1, 3, 665 A.2d 1293, 1294 (1995).

National Grange argues that its admittedly premature appeal ripened into a proper appeal after Colyer voluntarily withdrew his claims against National Grange's co-defendants and the trial court entered a final judgment, but several federal appellate rulings mandate the rejection of National Grange's argument. The Federal Rules of Appellate Procedure are in all relevant respects indistinguishable from the Pennsylvania Rules of Appellate Procedure. *Compare* Fed. R. App. P. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry."), *with* Pa. R. App. P. 905(a) ("A notice of appeal filed after the announcement of a determination but before the entry of an appealable order shall be treated as filed after such entry and on the day thereof.").

In *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, 498 U.S. 269, 276 (1991), the Supreme Court of the United States held that "[i]n our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from a final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment." As the Fifth Circuit has explained, "*FirsTier* allows premature appeals only

where there has been a final decision, rendered without a formal judgment." *United States* v. *Cooper*, 135 F.3d 960, 963 (5th Cir. 1998). The decision from which National Grange appealed was not immediately appealable upon its announcement because Colyer's claims against National Grange's co-defendants remained pending.

In *United States* v. *Hansen*, 795 F.2d 35, 38 (7th Cir. 1986) (Posner, J.), the Seventh Circuit rejected the very same argument that National Grange makes here: "Hence the issue is whether the defendants can appeal from a subsequent final judgment, without having filed a notice of appeal from that judgment, merely because they filed an earlier notice of appeal from a nonfinal, nonappealable order. We think not."

The Fifth Circuit reached the same conclusion in a case whose jurisdictional posture was nearly on all fours with the present appeal. In *United States* v. *Taylor*, 632 F.2d 530 (5th Cir. 1980) (per curiam), the government sued defendants to recover the unpaid balance on a promissory note. The defendants filed a counterclaim, which the trial court dismissed. On February 5, 1980, the defendants appealed from the dismissal of their counterclaim, even though the government's claim against them remained pending. On February 19, 1980, the government moved to dismiss its remaining claim, and the trial court granted that motion on that very same day. The Fifth Circuit ruled that the defendants had forfeited their ability to have the dismissal of their counterclaim reviewed on appeal, because they had appealed only from an interlocutory, nonfinal order and had failed to appeal within the time provided from the final judgment of February 19, 1980. *See id.* at 531. (Although *Taylor* was subjected to criticism in some later Fifth Circuit rulings, *see, e.g., Alcom Elec. Exch., Inc.* v. *Burgess*, 849 F.2d 964, 966-69 (5th Cir. 1988), in *Cooper*, 135 F.3d at 963, the Fifth Circuit abrogated these critical rulings, rendering *Taylor* once again good law.)

In sum, National Grange's original appeal was without effect because it was premature, having been filed at a time when claims remained pending against other defendants, thus distinguishing this case from *Johnston the Florist*. And, although National Grange could have and should have appealed within thirty days after the trial court's entry of final judgment on July 20, 2001, National Grange failed to do so. This Court should therefore hold, in accordance with the persuasive federal appellate decisions discussed herein, that National Grange has no right to appellate review in this matter.

If this Court were to adopt National Grange's argument that a defendant's appeal filed while claims are pending against the defendant's co-defendants is miraculously transformed into an appeal from a final judgment once the rest of the case is resolved, appeals will be held dormant on this Court's docket for months and years. As the Seventh Circuit observed in *Hansen* in refusing to give effect to a premature appeal, parties anticipating defeat "might as well have filed the notice of appeal simultaneously with the filing of their counterclaims or their answer to the . . . complaint." *Hansen*, 795 F.2d at 38. No ruling of this Court or of the Supreme Court of Pennsylvania authorizes the result that National Grange seeks here.

For these reasons, this Court should dismiss National Grange's appeal for lack of appellate jurisdiction, thus bringing a final and fitting end to this matter.

B. National Grange Has Forfeited Its Argument That The Trial Court Should Have Applied Virginia Law, Instead Of Pennsylvania Law, In Adjudicating Colyer's Claim Under Pennsylvania's Insurance Bad Faith Statute

Colyer sued National Grange under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. Ann. § 8371, and National Grange suffered the entry of default judgment against it on that claim. R.2a, 11a. National Grange never sought to strike or open that default judgment. When counsel for National Grange finally appeared in the trial court to defend at the assessment

of damages hearing, National Grange's counsel manifested his agreement that Pennsylvania law governed Colyer's bad faith claim. R.325a, 331a-35a, 343a, 438a.

After the trial court returned its verdict and National Grange retained new counsel to handle post-judgment motions and any appeal, National Grange argued for the very first time that the trial court erred in applying Pennsylvania law to adjudicate Colyer's claim under Pennsylvania's insurance bad faith statute, § 42 Pa. Cons. Stat. Ann. § 8371. R.438a. Instead, according to National Grange in its post-trial motions and now in its opening brief on appeal, the trial court should have applied Virginia law to adjudicate Colyer's claim under Pennsylvania's insurance bad faith statute.

According to National Grange, which has made the "choice of law" argument the centerpiece of its appeal to this Court, neither the entry of a default judgment against a defendant nor a defendant's concession that the forum's law applies suffices to bar a defendant from arguing for the first time in its post-verdict motions that a foreign state's law should have instead been applied. The absurdity of National Grange's main argument on appeal is readily apparent, and Colyer now turns to demonstrate that governing law requires the rejection of National Grange's choice of law argument.

1. The default judgment entered against National Grange on Colyer's claim under 42 Pa. Cons. Stat. Ann. § 8371 precludes National Grange from challenging the trial court's application of Pennsylvania law in deciding that claim

Two decisions of this Court compel the holding that the entry of a default judgment against National Grange on Colyer's claim under Pennsylvania's insurance bad faith statute precludes National Grange from arguing that the trial court should have applied Virginia law in deciding that claim.

In *Thomas* v. *Duquesne Light Co.*, 376 Pa. Super. 1, 13, 545 A.2d 289, 295 (1988), *aff'd*, 528 Pa. 113, 595 A.2d 56 (1991), this Court ruled that a default judgment entered against one of several defendants "was conclusive of his liability to the plaintiffs" on the claim asserted against him. As this Court's opinion explains:

> As a result of his default, [defendant] Watson's liability had been determined finally by the judgment entered against him. As to him, therefore, the issues were limited to the amount of the plaintiffs' damages. Defenses which go to the right of recovery are not available to a defaulting defendant. The doctrine of comparative negligence, even though it goes in part to the assessment of damages, is primarily a substantive defense going to plaintiffs' right to recover and, therefore, is not available as a defense to a defendant against whom a default judgment has been entered. Any other result would weaken the efficacy of default judgments.

Id. at 13-14, 545 A.2d at 295 (citations omitted).

Similarly, in *Luszczynski* v. *Bradley*, 729 A.2d 83, 88-89 (Pa. Super. Ct.), *appeal withdrawn*, 559 Pa. 692, 739 A.2d 1058 (1999), this Court ruled that the only way for a defendant to preserve legal arguments that would defeat the plaintiff's claims is to raise the arguments before default judgment is entered against the defendant. In *Luszczynski*, this Court ruled that the entry of default judgment against the insurance company in that case "precluded our review" of whether the insured in that case had properly assigned its claim for bad faith to the plaintiff. *Id.* at 89; *see also American Mfg. Co.* v. *S. Morgan Smith Co.*, 25 Pa. Super. 176 (1904) (holding that default judgment entered against defendant precluded that party from challenging the trial court's venue).

As this Court ruled in *Thomas*, the entry of default judgment against a defendant is "conclusive of [the defendant's] liability to the plaintiff[]." 376 Pa. Super. at 13, 545 A.2d at 295. Colyer's complaint against National Grange expressly asserted a claim for "bad faith pursuant to 42 Pa.C.S.A. § 8371." R.11a. Thus, as this Court explained in *Thomas*, given the

entry of default judgment, National Grange could no longer contest its liability under § 8371 but instead was limited to contesting the amount of damages that should be awarded to Colyer.

In *Thomas*, this Court ruled that the defaulting defendant could not assert in mitigation of damages the doctrine of comparative negligence, because, while that doctrine related in part to damages, it also was "a substantive defense going to a plaintiffs' right to recover." 376 Pa. Super. at 13, 545 A.2d at 295. Similarly, National Grange's argument that Virginia law should be applied to Colyer's bad faith claim under 42 Pa. Cons. Stat. Ann. § 8371 represents a substantive defense going to Colyer's right to recover. This is because Virginia law does not recognize the statutory bad faith claim on which Colyer has prevailed by obtaining the entry of default judgment against National Grange.

Virginia law today treats bad faith claims against insurers the same way that Pennsylvania law used to regard such claims before Pennsylvania's Legislature enacted 42 Pa. Cons. Stat. Ann. § 8371. *Compare D'Ambrosio* v. *Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 494 Pa. 501, 507-08, 431 A.2d 966, 970 (1981) (refusing to recognize common law cause of action for insurance bad faith some nine years before Legislature enacted § 8371), *with A & E Supply Co.* v. *Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 676-78 (4th Cir. 1986) (Virginia law does not recognize extra-contractual bad faith claim for failure to honor first-party insurance claim), *cert. denied*, 479 U.S. 1091 (1987), *and Bettius & Sanderson, P.C.* v. *National Union Fire Ins. Co.*, 839 F.2d 1009, 1015-17 (4th Cir. 1988) (Virginia does not recognize extra-contractual bad faith claim for failure to honor third-party insurance claim).

National Grange asserts in its appellate brief that Va. Code Ann. § 38.2-209 represents Virginia's insurance bad faith statute, *see* Brief for Appellant at 26, but that assertion is incorrect. Section 38.2-209 provides that an insurer that breaches its contract can be held liable for the insured's attorneys' fees if the breach of contract was in bad faith, but the statute simply shifts

attorneys' fees and does not create a free-standing cause of action as 42 Pa. Cons. Stat. Ann. § 8371 does. *Compare Brown*, 708 A.2d at 110 ("Section 8371 of the Judicial Code did and was intended to create an independent cause of action separate and distinct from the underlying contractual insurance claim arising from the express terms of the contract of insurance"), *with Coker* v. *State Farm Fire & Cas. Co.*, 1998 WL 972219, at *6 (Va. Cir. Ct. June 4, 1998) ("the Virginia General Assembly has had the opportunity to recognize a general cause of action for bad faith but has on each occasion declined to do so").

In sum, National Grange's "choice of law" argument does not ask which state's law should be applied to govern a claim recognized in both Pennsylvania and Virginia. Instead, the argument seeks to replace the law of a state that statutorily recognizes the claim on which Colyer has obtained default judgment against National Grange with the law of a foreign state that does not appear to recognize such a claim. This Court ruled in *Thomas* that the entry of default judgment against a defendant is "conclusive of [the defendant's] liability to the plaintiff[]" and that arguments that would defeat both liability and damages are "not available as a defense to a defendant against whom a default judgment has been entered." 376 Pa. Super. at 13, 545 A.2d at 295. This Court further observed in *Thomas* that "[a]ny other result would weaken the efficacy of default judgments." *Id.* at 13-14, 545 A.2d at 295. National Grange's choice of law argument plainly seeks to defeat liability on Colyer's claim under Pennsylvania's insurance bad faith statute. The default judgment that Colyer obtained against National Grange on his claim under 42 Pa. Cons. Stat. Ann. § 8371 therefore mandates rejection of National Grange's "choice of law" argument.

2. National Grange has waived its "choice of law" argument and is judicially estopped from contesting the application of Pennsylvania law to Colyer's claim under 42 Pa. Cons. Stat. Ann. § 8371

National Grange asks this Court to rule that a party need not raise any objection to the trial court's choice of law until post-judgment motions, or possibly even until a case goes on appeal, because the choice of law determination implicates non-waivable concerns of a constitutional dimension. National Grange's argument is demonstrably wrong in every conceivable respect, and therefore this Court should reject it out of hand.

As Colyer now turns to establish, objections pertaining to choice of law are waivable and were waived by National Grange in this case, as the trial court expressly found. Moreover, National Grange is judicially estopped from objecting to application of Pennsylvania law to decide Colyer's claim under 42 Pa. Cons. Stat. Ann. § 8371, because National Grange's trial counsel affirmatively agreed that Pennsylvania law applied. Finally, even if choice of law can sometimes implicate constitutional concerns, parties remain free to waive this or even more important constitutional rights, and the assertion that choice of law is an unwaivable constitutional matter is frivolous.

a. The U.S. Court of Appeals for the Third Circuit ruled in its en banc decision in *Neely* v. *Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 180 (3d Cir. 1995) (en banc), that "choice of law issues may be waived." The Third Circuit's en banc ruling that "choice of law issues may be waived," *id.*, takes precedence over the fifty-seven-year-old ruling of a three-judge Third Circuit panel in *United States* v. *Certain Parcels of Land*, 144 F.2d 626 (3d Cir. 1944), on which National Grange relies for the contrary proposition. *See* Brief for Appellant at 16.

The Seventh Circuit has ruled that where, as here, both parties initially acquiesce in the application of a given state's law, a party cannot be heard later to object that another state's law should have been applied, which is what National Grange attempted to argue for the very first

time after the trial court returned its damages verdict. *See Muslin* v. *Frelinghuysen Livestock Managers, Inc.*, 777 F.2d 1230, 1231 n.1 (7th Cir. 1985). The Fourth Circuit, which presides over federal district courts located in Virginia, has similarly concluded that the parties' pre-verdict failure to object to the application of Virginia law precluded any such objection thereafter. *See Bilancia* v. *General Motors Corp.*, 538 F.2d 621, 623 (4th Cir. 1976) (per curiam).

As the Seventh Circuit has explained: "A Wisconsin (or any) state court trying a case in which, as here, the parties did not explicitly indicate which law they thought governed would naturally apply the law of its own state." *Central Soya Co.* v. *Epstein Fisheries, Inc.*, 676 F.2d 939, 941 (7th Cir. 1982) (Posner, J.). This is precisely what happened here. Colyer asserted a claim under 42 Pa. Cons. Stat. Ann. § 8371 against National Grange. Even National Grange's counsel, at the assessment of damages hearing and in National Grange's proposed findings of fact and conclusions of law filed before the trial court returned its verdict, manifested his agreement that Pennsylvania law governed Colyer's claim under this Pennsylvania statute. R.132a-34a, 325a, 331a-35a, 343a, 438a.

The trial court expressly found that National Grange, by concurring in the trial court's application of Pennsylvania law before and during the assessment of damages hearing, had waived the choice of law issue. As the trial court's opinion explains:

> NGM, by failing to put this Court and the Plaintiff on notice of the instant issue, deprived Plaintiff of the opportunity to conduct appropriate discovery and present relevant evidence, and deprived this Court of the opportunity to address the issue. Instead, NGM allowed default judgment to be entered against it, whereby the allegations set forth in Plaintiff's Complaint were deemed admitted by default, and now improperly attempts to raise issues like a Monday morning quarterback after the game has been decided. Consequently, this Court determines NGM, by failing to raise the issue of choice of law determination prior to Post-Trial Motions, has waived said issue.

R.439a.

The Supreme Court of Pennsylvania has repeatedly and consistently ruled that objections that are available to a party before or during a trial must be raised at those junctures to preserve such objections for appellate review, and that waiting to raise such objections in a post-trial motion fails to preserve the issues for appellate review. *See Takes* v. *Metropolitan Edison Co.*, 548 Pa. 92, 97-100, 695 A.2d 397, 399-401 (1997) ("The waiver rule prevents the trial from becoming a mere dress rehearsal and ensures trial counsel is prepared to litigate the case and create an adequate record for appellate review."); *McMillen* v. *84 Lumber, Inc.* 538 Pa. 567, 571-72, 649 A.2d 932, 934 (1994) ("Aside from capital cases in the domain of criminal law — where a human life is at stake, no fact situations have been presented to us, and none readily comes to mind, where this narrow public interest exception would justify departure from the waiver rule."); *Reilly* v. *SEPTA*, 507 Pa. 204, 214-15, 489 A.2d 1291, 1296 (1985) ("In order to preserve an issue for appeal, a litigant must make a timely, specific objection at trial *and* must raise the issue on post-trial motions.") (emphasis added).

Similarly, Pennsylvania Rule of Civil Procedure 227.1(b)(1) provides that "Post-Trial relief may not be granted unless the grounds therefor, if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial." Pa. R. Civ. P. 227.1(b)(1). The official explanatory note accompanying that rule explains that "[i]f no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief." Pa. R. Civ. P. 227.1(b)(1) (note).

Here, it is undisputed that National Grange never objected to the trial court's application of Pennsylvania law until it filed its post-trial motions. Under the governing Supreme Court of Pennsylvania precedents cited immediately above, and under Rule 227.1(b)(1), National Grange

waived its choice of law argument by failing to raise the argument before the trial court returned its verdict.

National Grange relies on the Second Circuit's ruling in *Booking* v. *General Star Mgmt. Co.*, 254 F.3d 414 (2d Cir. 2001), in arguing that it has not waived the choice of law argument, but that case is distinguishable. In *Booking*, the choice of law argument was first raised in the trial court in a reply brief that the plaintiff filed before the trial court announced its ruling. *See id.* at 417. The choice of law issue was then briefed further by both parties before the trial court entered summary judgment in favor of the defendant. *See id. Booking* does not hold that a party can wait until after the entry of default judgment, after the occurrence of a non-jury trial, and after the entry of a verdict before raising for the very first time the choice of law issue.

b. The law of judicial estoppel similarly compels affirmance. As the trial court's opinion denying National Grange's post-trial motions observes, this is not simply a case in which National Grange waited until its post-trial motions to raise the choice of law issue for the first time. Even worse, as the trial court found, National Grange had previously manifested its agreement that Pennsylvania law governed Colyer's claim under Pennsylvania's insurance bad faith statute. R.438a. The Commonwealth Court has persuasively explained that "[a] party may be prevented from 'playing fast and loose' with the Court by the doctrine of judicial estoppel, which is designed to uphold the dignity of the Court by preventing litigants from abusing the judicial process by changing positions as the moment requires." *Koschak* v. *Redevelopment Auth.*, 758 A.2d 291, 293 (Pa. Commw. Ct. 2000) (citing *Trowbridge* v. *Scranton Artificial Limb Co.*, 560 Pa. 640, 747 A.2d 862 (2000)).

Based on judicial estoppel, the Commonwealth Court ruled in *Koschak* that the plaintiff was not allowed to argue on appeal that the Redevelopment Authority had taken his property because the plaintiff had argued in the trial court that he had no property interest in the real estate

in question. As in *Koschak*, here judicial estoppel precludes National Grange from agreeing that Pennsylvania law governs Colyer's bad faith claim — an agreement on which the trial court relied in awarding the various forms of damages that 42 Pa. Cons. Stat. Ann. § 8371 expressly allows — only to contend post-verdict that Virginia law should instead have been applied.

c. National Grange's appeal also asserts the preposterous contention that its choice of law argument is not waivable because the argument has constitutional dimensions. As we have already demonstrated above, numerous courts have expressly held that a party's failure to assert choice of law arguments in a timely manner *does* constitute a waiver. Moreover, the choice of law question would still be subject to waiver even if it did raise issues of constitutional dimension. As this Court explained in *Tyler* v. *King*, 344 Pa. Super. 78, 93, 496 A.2d 16, 24 (1985), "a party may waive constitutional rights designed for his benefit." The Supreme Court of the United States reached a similar conclusion in *Yakus* v. *United States*, 321 U.S. 414, 444 (1944), where the Court explained that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

The Pennsylvania Supreme Court's ruling in *McMillen* makes clear that the only category of cases in which a waiver of the sort that National Grange has committed will be excused are death penalty cases, "where human life is at stake." *McMillen*, 538 Pa. at 571, 649 A.2d at 934. The trial court did not abuse its discretion in holding that National Grange had waived its choice of law argument, and the trial court's ruling on that point should therefore be affirmed.

d. Notwithstanding the trial court's well-grounded finding of waiver, National Grange audaciously asks this Court to address the "merits" of the choice of law argument on a trial court record that, as the trial court itself found, R.439a, lacks much of the evidence necessary to perform the balancing that Pennsylvania's interest test requires. *See Levin* v. *Desert*

Palace Inc., 318 Pa. Super. 606, 610, 465 A.2d 1019, 1021 (1983) ("we look to the law of the state having the greater interest in the application of its law"). On a proper record, a trial court's choice of law determination would present a mixed question of law and fact that this Court would review under an abuse of discretion standard. *See Mars Area Sch. Dist.* v. *United Presbyterian Women's Ass'n of N. Am.*, 554 Pa. 324, 326, 721 A.2d 360, 361 (1998).

National Grange is itself headquartered in New Hampshire, R.283a, so presumably its affinity for Virginia law stems from the fact that the type of insurance bad faith claim on which default judgment was entered against it under Pennsylvania law does not exist under Virginia law. National Grange contends that Virginia law should apply because its insured, Ebac, had its headquarters in Virginia. However, Ebac conducted business in Pennsylvania, as does National Grange. R.8a, 295a. Even more importantly, National Grange's bad faith conduct caused Ebac to sustain injury in Pennsylvania, which is where Colyer sued Ebac in the lawsuit that National Grange failed in bad faith to defend or otherwise address. Ebac clearly could have sued National Grange in Pennsylvania under 42 Pa. Cons. Stat. Ann. § 8371 for the injuries that Ebac sustained, and it is noteworthy that National Grange has never contested the trial court's exercise of personal jurisdiction over it. *See Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 313-20, 325-26 (1981) (U.S. Constitution did not prevent Minnesota state court from applying Minnesota law to adjudicate claim against insurer on insurance policy issued in Wisconsin to Wisconsin resident).

Finally, the statute at issue, 42 Pa. Cons. Stat. Ann. § 8371, represents a very important legislative policy that insurers conducting business in Pennsylvania should not engage in bad faith with respect to claims arising in Pennsylvania. Ebac's claim, stemming from a lawsuit filed in Pennsylvania, arose in Pennsylvania. No similar legislative policy has been enacted into law in Virginia, and thus National Grange is left to argue that Virginia has adopted the opposite policy — that insurers conducting business in Virginia should be able to engage in bad faith

conduct toward their insureds with impunity — due to Virginia's lack of bad faith legislation. The inference that National Grange would have this Court draw from the absence of comparable Virginia legislation is tenuous at best. *See Williams Crane & Rigging, Inc.* v. *Northbrook Property & Cas. Ins. Co.*, 1996 WL 134800, at *4 (E.D. Pa. Mar. 26, 1996) (after engaging in choice of law analysis, trial court applies 42 Pa. Cons. Stat. Ann. § 8371 to adjudicate bad faith claim involving insurance policy entered into in Virginia by Virginia-based insured).

While this Court cannot and should not address the "merits" of National Grange's choice of law argument for the numerous reasons previously explained herein, it is clear that the trial court would have been well within its discretion to rule that Pennsylvania law applied had National Grange properly raised the issue in the trial court. Because National Grange failed to raise its choice of law arguments in the trial court at the appropriate juncture, and because National Grange is judicially estopped from objecting to the trial court's application of Pennsylvania law to Colyer's claim under 42 Pa. Cons. Stat. Ann. § 8371, this Court should affirm the trial court's judgment.

C. National Grange's Challenges To The Trial Court's Award Of Punitive Damages Are Without Merit

1. The trial court did not abuse its discretion in deciding that an award of punitive damages against National Grange was appropriate

Before turning to demonstrate that the trial court's award of punitive damages was not unconstitutionally excessive, Colyer will quickly refute National Grange's argument on appeal that the trial court abused its discretion by awarding any punitive damages.

Pennsylvania's insurance bad faith statute provides:

> 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 costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371.

In stating that the trial court *may* award punitive damages against the insurer if the court finds that the insurer has acted in bad faith, the statute expressly gives a trial court discretion to award punitive damages. This Court has recently reiterated that "[p]unitive damages must be based on conduct which is malicious, wanton, reckless, willful, or oppressive." *Paves* v. *Corson*, 765 A.2d 1128, 1137 (Pa. Super. Ct. 2000), *appeal granted on other grounds*, 779 A.2d 1142 (Pa. 2001). Colyer's complaint, the factual averments of which are deemed admitted due to the default judgment entered against National Grange, *see* Pa. R. Civ. P. 1029(b) ("[a]verments in a pleading to which a responsive pleading is required are admitted when not denied"), averred that National Grange acted "recklessly, wantonly and willfully . . . for the purpose of causing harm to its insured." R.12a. The complaint further alleged that "[t]he conduct of National Grange was outrageous, oppressive and recklessly indifferent to the rights of its insured." *Id.* Where the defendant has suffered a default judgment, the trial court may rely on allegations contained in the plaintiff's complaint in deciding to award punitive damages. *See* Pa. R. Civ. P. 1029(b); *see also Hill* v. *Johnson*, 437 S.E.2d 801, 802-03 (Ga. Ct. App. 1993) (trial court properly relied on complaint's averments in deciding to award punitive damages after entry of default judgment).

The trial court, which heard evidence at the assessment of damages hearing that included the admission of National Grange's own representative that his employer's handling of Ebac's claim was the worst instance of claim handling that he had ever seen in his long career in the

insurance industry, found as a fact that "NGM's behavior was outrageous and recklessly indifferent toward its insured." R.354a.

These findings and admissions establish that the trial court properly exercised its discretion to award punitive damages in favor of Colyer on his claim arising under 42 Pa. Cons. Stat. Ann. § 8371. Accordingly, this Court should reject National Grange's argument that the trial court abused its discretion in awarding any punitive damages. *See SHV Coal, Inc.*, 526 Pa. at 495, 587 A.2d at 705 ("The determination of whether a person's actions arise to outrageous conduct lies within the sound discretion of the fact-finder and will not be disturbed by an appellate court so long as that discretion has not been abused.").

2. The trial court's award of punitive damages was not unconstitutionally excessive

National Grange begins its argument that the trial court's award of punitive damages was unconstitutionally excessive by contending that the U.S. Supreme Court's recent ruling in *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001), mandates de novo appellate review.

What National Grange overlooks, however, is that *Cooper Indus.* merely held that de novo appellate review is appropriate when a trial court has decided on post-trial motions whether *a jury's* award of punitive damages is excessive. *Cooper Indus.* did not hold that appellate courts must exercise de novo review when analyzing whether a *trial court's* punitive damage award, rendered following a non-jury trial, is unconstitutionally excessive.

Until either the U.S. Supreme Court or the Supreme Court of Pennsylvania rules that appellate courts must exercise de novo review of a *trial court's* award of punitive damages following a non-jury trial, this Court remains bound to follow existing precedent holding that abuse of discretion review is to be applied. *See Pierce* v. *Penman*, 357 Pa. Super. 225, 237, 515

A.2d 948, 954 (1986) (on review of trial court's award of punitive damages following non-jury trial, this Court holds that "[t]he finder of fact should be given broad discretion in assessing the amount of punitive damages which will be sufficient to punish the defendant and to set an example which may deter the defendant and others from similar conduct."), *appeal denied*, 515 Pa. 608, 529 A.2d 1082 (1987); *see also SHV Coal, Inc.*, 526 Pa. at 496, 587 A.2d at 705 (holding that trial court's decision in non-jury matter to award punitive damages is reviewed only for abuse of discretion); *Boyd & Mahoney* v. *Chevron U.S.A.*, 419 Pa. Super. 24, 35, 614 A.2d 1191, 1197 (1992) (holding that trial court's award of compensatory damages in non-jury case will be reviewed only for abuse of discretion), *appeal denied*, 535 Pa. 629, 631 A.2d 1003 (1993).

As the Supreme Court acknowledged in *Cooper Indus.*, applying abuse of discretion review instead of de novo review will "affect the result of the . . . analysis in only a relatively small number of cases." *Cooper Indus.*, 121 S. Ct. at 1688. The odds that the applicable standard of review will affect the outcome here are exceedingly small, given how obvious it is that the trial court's award of punitive damages in this case is *not* unconstitutionally excessive.

In *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574-75 (1996), the Supreme Court explained that an appellate court reviewing an award of punitive damages for alleged unconstitutional excessiveness should consider three things: (1) the degree of reprehensibility of the conduct for which the defendant is being punished; (2) the ratio between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the sanctions imposed across the nation to address instances of comparable misconduct. National Grange's trial counsel, in his proposed findings of fact and conclusions of law and in an accompanying brief filed before the trial court returned its verdict, failed to cite even once to the *BMW* decision.

Nevertheless, a review of these three *BMW* factors demonstrates that the trial court's award of punitive damages is not unconstitutionally excessive.

***Degree of reprehensibility*:** The trial court found as a fact that National Grange put its own interests ahead of the interests of its insured, Ebac, to whom National Grange owed a fiduciary duty to do no harm. R.353a-54a. The trial court further found that National Grange acted in bad faith. R.353a-55a. The trial court also found that National Grange committed these acts intentionally, willfully and wantonly and with reckless disregard for the obligations it owed to Ebac. R.353a-54a, 357a. Moreover, National Grange's own senior employee testified at trial that this was the worst example of claim mishandling that he had ever seen. R.353a.

As the trial court explained in its opinion, National Grange (referred to in the opinion as "NGM"):

> breached its duty of good faith and fair dealing, elevated its own financial interests above its duties to its insured, consciously disregarded the advice from counsel it hired to render a coverage opinion, and provided incentives for bad faith behavior from NGM's handlers. Put simply, NGM "shopped" for a favorable coverage opinion, lied to the insured about the coverage, abandoned the insured without so much as a denial of coverage, and ignored the file for several years.

R.439a.

Based on these facts, the trial court observed that "[t]he degree of conduct exhibited by NGM is *exactly* the type of reprehensible conduct contemplated by Pennsylvania's Bad Faith Statute." R.439a-40a. The trial court, which had a first-hand view of the testimony and other evidence, concluded that this "was a case of an insurance company consciously neglecting to follow its own internal policies and leaving its insured 'hanging out to dry.'" R.440a. Significantly, National Grange chose to engage in this egregious bad faith conduct when its insureds were facing claims that threatened severe financial consequences, including the possibility of bankruptcy. These facts, taken together, establish a very high degree of

reprehensibility justifying a very large punitive damages award. *See BMW*, 517 U.S. at 579 (acts of affirmative misconduct warrant larger punitive damages award).

In *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 460-62 (1993), the Supreme Court affirmed a punitive damages award of $10 million in a case between two corporate parties in which the defendant's actions, taken in bad faith, threatened to cause significant financial harm to the plaintiff. In *TXO*, the compensatory damages awarded in favor of the plaintiff was a mere $19,000. *Id.* at 446. In *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 2001 WL 1246676, at *36 (Utah Oct. 19, 2001), the Supreme Court of Utah reinstated a $145 million punitive damages award on a bad faith claim. In *Allsup's Convenience Stores, Inc.* v. *North River Ins. Co.*, 976 P.2d 1, 17-20 (N.M. 1998), the Supreme Court of New Mexico reinstated a jury's award of $4.5 million on a bad faith claim against an insurer. In *Life Ins. Co.* v. *Johnson*, 701 So. 2d 524, 534 (Ala. 1997), the Supreme Court of Alabama four years ago allowed a $3 million punitive damages award to stand against an insurer that had defrauded a policyholder. And, in *Walston* v. *Monumental Life Ins. Co.*, 923 P.2d 456, 467 (Idaho 1996), the Supreme Court of Idaho five years ago allowed a $3.2 million punitive damages award on a bad faith claim.

These cases from other state and federal courts demonstrate that an insurer's bad faith conduct toward its insured merits a sizeable punitive damages award. Here, the defendant's bad faith conduct threatened to cause significant harm to Ebac, because Colyer's claims against Ebac, if successfully litigated to a judgment by Colyer, could well have forced Ebac into bankruptcy.

Given the trial court's findings that National Grange intentionally caused its insured to sustain actual and substantial harm, in bad faith, in breach of the insurer's fiduciary duties, it is clear that the degree of reprehensibility of National Grange's conduct was very high and a large award of punitive damages is therefore permissible.

***Ratio of compensatory to punitive damages*:** National Grange argues that comparing the $130,000 in compensatory damages that Ebac agreed to pay to Colyer to the trial court's award of $3,350,000 in punitive damages produces an unconstitutionally high ratio. National Grange's argument overlooks, however, that this Court has recently reaffirmed that "the award [of punitive damages] need not bear a proportional relationship to the amount of compensatory damages awarded." *Paves*, 765 A.2d at 1137 (citing *Kirkbride* v. *Lisbon Contractors, Inc.*, 521 Pa. 97, 102-03, 555 A.2d 800, 803 (1989)).

National Grange's proportionality argument is also waived. Before the trial court returned its verdict, National Grange's trial counsel affirmatively argued that "there is absolutely no case law which mandates that punitive damages be in any certain ratio to compensatory damages . . . ." R.341a. This Court should not allow National Grange to argue on appeal that the trial court awarded too high a proportion of punitive damages after arguing to the trial court that no requirement of proportionality exists.

Moreover, the premise of National Grange's proportionality argument is false. Colyer did not agree to settle his lawsuit against Ebac for a mere $130,000. Rather, Colyer obtained in settlement from Ebac, in addition to $130,000, the right to pursue Ebac's claim against National Grange for breach of contract and violation of Pennsylvania's insurance bad faith statute. In the bad faith action, Colyer obtained a compensatory damages award of $335,008 against National Grange. Thus, Ebac in fact paid to Colyer compensatory damages of $465,008 to settle Colyer's lawsuit, and that was the absolute minimum amount of actual compensatory damages that should be compared to the $3.35 million punitive damages award that the trial court returned. That comparison produces a ratio of approximately seven to one. And, of course, that ratio would become even smaller if one examines the severe financial consequences that National Grange's bad faith actions threatened to inflict on Ebac, including the possibility of bankruptcy, had

Colyer recovered the full amount of his claim plus the punitive damages he was seeking in his original suit.

In *TXO*, the Supreme Court upheld a punitive damages award on a bad faith claim of $10 million accompanied by a compensatory damages award of just $19,000, while recognizing that the potential harm to the plaintiff in that case was approximately $1 million. *TXO Prod. Corp.*, 509 U.S. at 446, 462. A ten to one ratio of punitive damages to threatened actual damages is not unconstitutionally excessive, the Supreme Court ruled. *See BMW*, 517 U.S. at 581 (discussing *TXO* ruling).

In the years since the Supreme Court issued its rulings in *TXO* and *BMW*, state and federal appellate courts have upheld the constitutionality of punitive damages awards whose ratio to compensatory damages far exceeds the ten to one ratio approved in *TXO*. *See Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 2001 WL 1246676 (Utah Oct. 19, 2001) (reinstating $145 million punitive damages award on compensatory damages award of $2.6 million, a fifty-five to one ratio); *American Income Life Ins. Co.* v. *Hollins*, 2001 WL 695516 (Miss. June 21, 2001) (affirming $100,000 punitive damages award accompanying $400 compensatory damages award, a twenty-five to one ratio); *State Farm Mut. Auto. Ins. Co.* v. *Grimes*, 722 So. 2d 637 (Miss. 1998) (affirming $1,250,000 punitive damages award accompanied by a $1,900 compensatory damages award, a greater than 650 to one ratio); *Life Ins. Co.* v. *Johnson*, 701 So. 2d at 534 (upholding $3 million punitive damages award on compensatory award of $250,000, a twelve to one ratio); *Wilson* v. *IBP, Inc.*, 558 N.W.2d 132 (Iowa 1996) (upholding $2 million punitive damages award accompanied by a $4,000 compensatory damages award, a 500 to one ratio), *cert. denied*, 522 U.S. 810 (1997); *Continental Trend Res., Inc.* v. *OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996) (upholding $6 million punitive damages award on award of $269,000 in compensatory damages, a twenty-two to one ratio), *cert. denied*, 520 U.S. 1241 (1997); *Walston*,

923 P.2d at 468 (upholding punitive damages award of $3.2 million on compensatory damages award of $124,000, a twenty-five to one ratio).

As the Supreme Court of Idaho insightfully observed in *Walston*, "the U.S. Supreme Court in *BMW* made clear that it was not prescribing a mathematical formula to be followed" in determining whether a given ratio of compensatory to punitive damages established unconstitutional excessiveness. *Walston*, 923 P.2d at 468.

The foregoing discussion of ratios demonstrates that the ratio of punitive to compensatory damages at issue in this case, which is smaller than ten to one, easily passes constitutional muster. Moreover, National Grange's assertion that a ten to one ratio represents the border between the lawful and the unconstitutionally excessive is without merit. Finally, it is important to remember that National Grange promised to provide Ebac with an aggregate amount of $2 million in insurance coverage. R.23a. The combined compensatory and punitive award in this case was less than twice the amount of National Grange's total potential liability under the insurance policy at issue.

***Sanctions for comparable misconduct*:** On appeal, National Grange argues that *BMW* requires that the trial court's award of punitive damages be compared to the regulatory sanctions available for comparable misconduct under Pennsylvania law. The proposed findings of fact and conclusions of law and accompanying brief that National Grange filed before the trial court returned its verdict did not once draw the trial court's attention to these regulatory sanctions. Accordingly, this Court should hold that National Grange has waived this argument.

Although National Grange understandably prefers to focus on the relatively low sanctions available to Pennsylvania's Department of Insurance to punish insurers who engage in unfair practices, in so restricting its focus National Grange has committed three significant oversights. First, National Grange has overlooked that Pennsylvania's Legislature has expressly authorized

punitive damages where insurers act in bad faith. *See* 42 Pa. Cons. Stat. Ann. § 8371. The penalty at issue in this case is a legislatively authorized civil penalty, and thus it presumptively qualifies as lawful under the third and final prong of the *BMW* inquiry.

Second, Pennsylvania's Insurance Department could disqualify National Grange from conducting business in Pennsylvania as a result of the actions at issue in this case. *See* Pa. Stat. Ann. tit. 40, § 1171.9. This form of corporate death penalty would be substantially more costly to National Grange than the other relatively light regulatory penalties to which National Grange refers.

Finally, National Grange overlooks that in *BMW* the Supreme Court refused to restrict its focus on comparable sanctions to the state whose award of punitive damages was at issue. Rather, in *BMW* the Supreme Court reviewed the sanctions available throughout the nation to punish the conduct in which *BMW* had engaged. *See BMW*, 517 U.S. at 583-84 & nn. 39-40. As the appellate decisions from other states discussed above demonstrate, the $3.35 million punitive damage award imposed against National Grange in this case comes nowhere close to being the largest punitive damage award in amount or in ratio imposed against an insurer that acted intentionally and in bad faith to harm its insureds.

The trial court found as a fact that the punitive damage award returned against National Grange in this case would have no significant impact on National Grange's financial strength and represents just slightly more than two months' worth of investment income to National Grange. R.441a. The trial court also found that the amount of punitive damages that it awarded was necessary to deter National Grange from engaging in this type of conduct. R.442a. Unlike in *BMW*, where the auto-maker's actions were lawful in many states and were not undertaken in bad faith, National Grange has cited no state in which insurers are permitted to harm their customers intentionally and in bad faith. And, unlike in *BMW*, the trial court here did not decide

what amount of punitive damages to award based on other instances of National Grange's bad faith conduct that exclusively affected states other than Pennsylvania. Rather, the trial court focused solely on National Grange's egregious conduct in the matter giving rise to this case. National Grange's conduct was appropriately subject to punishment in Pennsylvania because the lawsuit that National Grange refused in bad faith to cover or defend against was pending in a Pennsylvania state court, causing its insureds to sustain damage in Pennsylvania.

The need for a sizeable award of punitive damages in this matter cannot be understated. In the insurance industry, competing insurers attempt to distinguish themselves by boasting about their relative financial strength. Insurers that are allowed to sign-up policyholders and then deny covered claims will gain a competitive advantage over insurers that faithfully live up to their contractual obligations to their customers. If one insurer is allowed to get away scot-free with bad faith conduct, the pressure will mount for rival insurers to attempt to do the same. This would quickly devolve into an intolerable situation. The trial court's award of punitive damages in this matter was finely calibrated to punish National Grange for its intentional bad faith conduct that threatened to drive its insureds out of business, while guaranteeing that National Grange retained more than sufficient financial strength to respond properly to the claims of its other policyholders.

For all of these reasons, this Court should reject National Grange's argument that the trial court's award of punitive damages was unconstitutionally excessive.

D. The Trial Court Reasonably Exercised Its Discretion In Ordering Interest Compounded Annually Under 42 Pa. Cons. Stat. Ann. § 8371 And In Selecting The Date On Which Interest Began To Accrue

The final issue that National Grange seeks to raise on appeal challenges the trial court's award of interest in Colyer's favor. Because Pennsylvania's insurance bad faith statute expressly authorizes an award of interest in the plaintiff's favor, an analysis of National Grange's argument must begin with a review of that statute. It provides:

> 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 . . . [a]ward 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%.

42 Pa. Cons. Stat. Ann. § 8371.

Without citing any authority whatsoever, National Grange asserts that interest is not available under § 8371 where the "claim" made by the insured was a claim for insurance coverage and a defense arising from a lawsuit against the insured. National Grange's argument that § 8371 does not apply to third-party claims is foreclosed by this Court's decision in *Birth Center* v. *St. Paul Cos.*, 727 A.2d 1144 (Pa. Super. Ct. 1999), *appeal granted on other grounds*, 560 Pa. 633, 747 A.2d 858 (2000), which held that an insurer could be held liable under the bad faith statute for its bad faith handling of a lawsuit against its insured.

Because the bad faith statute's interest provision appropriately applies under the circumstances of this case, it is necessary to determine the date on which Ebac "made" its claim for insurance coverage. The trial court found as a fact that the date on which Ebac made its claim for insurance coverage and a defense was June 12, 1995. Although National Grange portrays June 12, 1995 as a date that the trial court plucked from thin air, in fact on that date National Grange received notice from Ebac of Colyer's claim. R.348a. June 12, 1995 was "the date the claim was made by the insured," Ebac, and § 8371 expressly requires that interest be awarded from that date forward until the entry of judgment in the plaintiff's favor.

National Grange's argument that some other, non-statutorily authorized start date for interest should be used lacks any support in the text of Pennsylvania's insurance bad faith statute. If the legislature had wished to provide that interest would begin to run under that statute as of the date on which the insured made expenditures for which the insurer should have assumed responsibility, certainly the legislature could have so provided. But the legislature did not so provide; instead, it selected "the date the claim was made by the insured" as the date on which interest should begin to accrue. Ironically, the legislatively-selected start date that National Grange asks this Court to ignore will in fact work to the advantage of insurance companies in cases where an insured has provided late notice of a suit or a claim to its insurer after the insured has paid attorneys' fees or even a judgment or settlement.

Next, National Grange argues that the trial court erred in awarding compound interest. National Grange admits that 42 Pa. Cons. Stat. Ann. § 8371 is silent concerning whether the interest available under that statute is simple or compound. National Grange cites absolutely no authority in support of its argument that statutory silence mandates simple interest. This Court should therefore hold that the argument is waived. *See Collins* v. *Cooper*, 746 A.2d 615, 619 (Pa. Super. Ct. 2000) ("Where an appellant has failed to cite any authority in support of a contention, the claim is waived.").

In *Polselli* v. *Nationwide Mut. Fire Ins. Co.*, 126 F.3d 524, 532 (3d Cir. 1997), the Third Circuit construed 42 Pa. Cons. Stat. Ann. § 8371 in light of Pennsylvania's general rule of statutory construction that "provisions of a statute shall be liberally construed to effect their objects and to promote justice." *See* 1 Pa. Cons. Stat. Ann. § 1928(c). In particular, the Third Circuit concluded that it was important to construe and apply Pennsylvania's bad faith statute so as to make the injured claimant "completely whole." *Polselli*, 126 F.3d at 531-32.

While 42 Pa. Cons. Stat. Ann § 8371 does not expressly resolve whether the interest awarded thereunder should be simple or compound, that statute similarly does not address the question the Third Circuit resolved in *Polselli* of whether the insurer should be liable for the insured's attorneys' fees in pursuing a bad faith action filed after the insured defeated the insurer in an earlier breach of contract suit seeking insurance coverage. The attorneys' fees the insured incurred in the first suit at issue in *Polselli* were clearly recoverable, but the statute did not speak to whether the fees incurred in the second action, alleging bad faith, were also recoverable. Based on the purpose of the statute, the Third Circuit ruled that those fees were recoverable. *See Polselli,* 126 F.3d at 529-30. This Court, in *Birth Center*, agreed with the Third Circuit's resolution of this issue, *see Birth Center,* 727 A.2d at 1160 & n.11, and held that the award of fees would be reviewed under the abuse of discretion standard because the statute gives the trial court discretion whether to award such fees, *id.* at 1161. Of course, the statute likewise gives the trial court discretion to decide whether to award interest.

Application of the abuse of discretion standard here, informed by the "make whole" policy that guided this Court's decision in *Birth Center* and the Third Circuit's ruling in *Polselli,* should lead this Court to affirm the trial court's award of interest compounded annually. The purpose of interest is to reimburse a claimant to whom money is due and owing for the lost time value of money. *See Pollice* v. *National Tax Funding, L.P.*, 225 F.3d 379, 396 (3d Cir. 2000) ("prejudgment interest and damages for delay . . . are awarded by a court to compensate a prevailing party for the lost time-value of money running from the date of the opposing party's breach of contract or breach of duty"); *see also Milwaukee* v. *Cement Div., National Gypsum Co.*, 515 U.S. 189, 195 (1995) ("The essential rationale for awarding prejudgment interest is to ensure than an injured party is fully compensated for its loss."). The trial court's decision to

impose compound interest appropriately prohibited National Grange from having cost-free use of the substantial amount of interest that it owed to Colyer, as Ebac's assignee. R. 442a.

In *Rizzo* v. *Haines*, 520 Pa. 484, 509, 555 A.2d 58, 70 (1989), the Supreme Court of Pennsylvania ruled that "where funds are wrongfully and intentionally procured or withheld from one who seeks their restoration, the court should calculate interest on these monies at the market rate." The Supreme Court's ruling in *Rizzo* provides additional support for the trial court's decision to compound interest annually, because the market typically provides compound interest, rather than simple interest, to depositors and lenders of money. *See Gorenstein Enters., Inc.* v. *Quality Care-USA, Inc.*, 874 F.2d 431, 437 (7th Cir. 1989) (Posner, J.) (losing party's "dilatory tactics denied [prevailing party] the use of its money, including the opportunity to obtain interest on interest"); *see also In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1332 (7th Cir. 1992) (per curiam) ("compound prejudgment interest is the norm in federal litigation").

In the unlikely event that this Court concludes that the trial court should have awarded simple interest rather than interest compounded annually (and National Grange's opening brief on appeal suggests that the difference between compound and simple interest is just $30,000, *compare* Brief for Appellant at 44 (applying simple interest produces interest calculation of $112,516), *with* R.358a (trial court's decision granting $142,763 in compound interest)), National Grange argues that the trial court's award of punitive damages must be remanded as well because the trial court intended to award punitive damages of ten times the amount of compensatory damages.

Once again, National Grange advances an argument that lacks a solid foundation. While the trial court's award of punitive damages was approximately (but not exactly) ten times its award of compensatory damages, the trial court nowhere expressed an intent that the punitive damages award would require alteration if the compensatory damages award changed. Indeed,

in the trial court's ruling on National Grange's post-trial motions, the trial court expressly disclaimed any intent to link the two awards by a ratio of ten to one and independently justified the punitive damages award by reference to both the unusually egregious nature of National Grange's wrongful acts and National Grange's annual investment income and overall financial position. R.441a-42a, 444a.

The minor alteration in the trial court's award of interest that National Grange seeks would in no way undermine any of the considerations on which the trial court relied in deciding that a punitive damages award of $3.35 million was justified in this case. Accordingly, in the unlikely event that this Court were to remand for a recalculation of interest, this Court should nevertheless affirm the trial court's award of punitive damage. Anything less would serve to guarantee the relitigation of this entire appeal in the very near future.

In sum, this Court should hold that the trial court did not abuse its discretion under the circumstances of this case, which disclose that National Grange intentionally engaged in egregious bad faith conduct to the substantial detriment of its insured, when the trial court decided to award interest compounded annually in order to make the bad faith claimant whole.

VII. CONCLUSION

For all of the foregoing reasons, this Court either should dismiss National Grange's appeal for lack of appellate jurisdiction or should affirm the final judgment in full.

Respectfully submitted,

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