

[J-161-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

EDWARD MISHOE,	:	Nos.87 & 88 MAP 2001
	:	
Appellant,	:	Appeal from the order of the Superior
	:	Court entered October 31, 2000 at No.
v.	:	1578 HBG 1998 and No. 1988 PGH 1998,
	:	affirming the order of the Court of
ERIE INSURANCE COMPANY,	:	Common Pleas of Lebanon County
	:	entered August 20, 1998 at No. 95-00118,
Appellee,	:	and affirming the order of the Court of
	:	Common Pleas of Blair County entered
and	:	July 30, 1998 at No. 93 CP 1345
	:	
NANCY L. HAMER,	:	
	:	762 A.2d 369 (Pa. Super. 2000)
Appellant,	:	
	:	
v.	:	ARGUED: November 14, 2001
	:	
FEDERAL KEMPER INSURANCE CO.,	:	
	:	
Appellee.	:	

OPINION OF THE COURT

MR. JUSTICE NIGRO

Decided: May 30, 2003

The question presented in this case is whether there is a right to a jury trial in a bad faith action pursuant to 42 Pa.C.S. § 8371. We hold that there is not.

In the first of these consolidated cases, Appellant Edward Mishoe suffered permanent injuries in an automobile collision in Lebanon County, Pennsylvania. Mishoe recovered the maximum amount of coverage available to him under the other driver's insurance policy, and then requested \$600,000.00 in underinsured motorist benefits from his own insurer, Appellee Erie Insurance Company ("Erie"). Erie first offered to settle the matter for \$75,000.00 and later increased its offer to \$125,000.00. Dissatisfied with both of

these offers, Mishoe invoked the arbitration provision in the insurance policy. The arbitrators awarded Mishoe \$1,185,000.00, or about nine times the amount of Erie's highest offer. Consequently, Mishoe sued Erie in the Court of Common Pleas of Lebanon County, claiming that Erie had acted in bad faith pursuant to 42 Pa.C.S. § 8371. Mishoe demanded a jury trial, but the trial court struck the jury demand.

In the second case, Appellant Nancy L. Hamer was injured in an automobile collision in Blair County, Pennsylvania. After receiving the maximum amount of coverage to which she was entitled under the other driver's insurance policy, Hamer sought underinsurance benefits from her own insurer, Appellee Federal Kemper Insurance Company ("Kemper"). Kemper offered to settle the matter for \$5,000.00, but Hamer rejected this offer and chose to proceed to arbitration. The arbitrators awarded Hamer \$66,000.00, or about thirteen times the amount of Kemper's offer. As a result, Hamer filed suit against Kemper in the Court of Common Pleas of Blair County, claiming that Kemper had acted in bad faith under 42 Pa.C.S. § 8371. Hamer demanded a jury trial, but the trial court refused the jury demand.

On appeal, the Superior Court consolidated the two cases, reversed the trial court orders refusing the jury demands, and remanded the cases for jury trials. Erie and Kemper filed a petition for allowance of appeal and, in a per curiam order, we remanded the matter to the Superior Court for reconsideration in light of our decision in Wertz v. Chapman Township, 741 A.2d 1272 (Pa. 1999). 752 A.2d 401 (Pa. 2000). On remand, the Superior Court applied Wertz and affirmed the trial court orders, holding that neither section 8371 nor the Pennsylvania Constitution provide for the right to a jury trial for claims arising under section 8371. 762 A.2d 369 (Pa. Super. 2000). We granted Mishoe's and Hamer's petitions for allowance of appeal, 782 A.2d 547 (Pa. 2001), and now affirm.

Section 8371 of the Judicial Code provides as follows:

§ 8371. Actions on insurance policies

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
- (2) Award punitive damages against the insurer.
- (3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S. § 8371. Mishoe and Hamer advance two claims in support of their conclusion that the right to a jury trial applies in cases arising under this section: that the section itself provides for the right to a jury trial, and that the Pennsylvania Constitution guarantees a jury trial for claims under section 8371.

With respect to Mishoe and Hamer's statutory argument, we note that our role in statutory interpretation matters is to give effect to the intent of the General Assembly.¹ See 1 Pa.C.S. § 1921; Pantuso Motors, Inc. v. CoreStates Bank, N.A., 798 A.2d 1277, 1281-82 (Pa. 2002). Thus, if possible, statutes must be construed so that every word is given effect. See 1 Pa.C.S. § 1921(a); Pantuso Motors, 798 A.2d at 1282. In giving effect to the words of the legislature, "we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear." O'Rourke v. Department of Corr., 778 A.2d 1194, 1201 (Pa. 2001). Moreover, the words and phrases used in each statute are ordinarily to be construed according to their common usage. See 1 Pa.C.S. § 1903(a); Bowser v. Blom, 807 A.2d 830, 835 (Pa. 2002); Pantuso Motors, 798 A.2d at 1282. Where terms have acquired a specialized meaning, however, we must apply those terms according to such connotations. See 1 Pa.C.S. § 1903(a); Pantuso Motors, 798 A.2d at 1282. If, after applying the foregoing principles, we find that a statute is unclear, we may

¹ We also note that, in general, we will not reach a constitutional issue where it is possible to decide the matter on a non-constitutional basis. See P.J.S. v. Pennsylvania State Ethics Comm'n, 723 A.2d 174, 176 (Pa. 1999).

ascertain the General Assembly's intent by considering a variety of other statutory construction factors. See 1 Pa.C.S. § 1921(c); O'Rourke, 778 A.2d at 1201-05. On the other hand, if a statute is "clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b); see also Bowser, 807 A.2d at 835; Ramich v. Worker's Comp. Appeal Bd. (Schatz Elec., Inc.), 770 A.2d 318, 322 (Pa. 2001).

In Wertz, which prompted our remand to the Superior Court in the instant case, this Court was asked to determine whether the Pennsylvania Human Relations Act ("PHRA") provides for the right to a jury trial. See Wertz, 741 A.2d at 1273. Specifically, the following PHRA provision was at issue:

If the court finds the respondent has engaged in such discriminatory practices charged in the complaint, the court shall enjoin the respondent from engaging in such unlawful discriminatory practice and order affirmative action which may include, but is not limited to, reinstatement or hiring of employees, granting of back pay, or any other legal or equitable relief as the court deems appropriate. . . .

Id. at 1274 (quoting 43 P.S. § 962(c)(3)). In arriving at our conclusion that the foregoing language does not provide for the right to a jury trial, we relied on three criteria. First, we put substantial emphasis on the fact that the PHRA was silent regarding the right to a jury trial. See id. As we explained, "the General Assembly is well aware of its ability to grant a jury trial in its legislative pronouncements," and therefore, "we can presume that the General Assembly's express granting of trial by jury in some enactments means that it did not intend to permit for a jury trial under the PHRA." Id.; cf. Hoy v. Angelone, 720 A.2d 745, 748 (Pa. 1998) (the General Assembly's use of specific language to permit punitive damages in numerous statutes reflects intention to allow such damages only when expressly provided). Second, we focused on the General Assembly's use of the term "court" in the PHRA, which we stated was "strong evidence that under the PHRA, it is a tribunal, rather than a jury, that is to make findings and provide relief." Wertz, 741 A.2d at

1274. Finally, we considered it important to our statutory analysis that there was nothing in the legislative history of the PHRA to support the notion that the General Assembly intended for the PHRA to contain a right to a jury trial. See id. at 1274-75.

Significantly, in section 8371, as in the PHRA, the General Assembly is silent regarding the right to a jury trial. See id. at 1274. In addition, the legislature chose to use the term "court" in section 8371, rather than "jury." See id. Finally, there is no legislative history supporting the position that a section 8371 plaintiff is entitled to a jury trial. See id. at 1274-75. Accordingly, the very factors that led us to conclude that there was no right to a jury trial in Wertz are also present in this case. Thus, applying our analysis in Wertz, we conclude that section 8371, like the PHRA, does not provide for the right to a jury trial.² Accord Younis Bros. & Co. v. Cigna Worldwide Ins. Co., 882 F. Supp. 1468, 1474 (E.D. Pa. 1994); Thomson v. Prudential Prop. & Cas. Ins. Co., No. 91-4073, 1992 U.S. Dist. LEXIS 12627, at *7-*8 (E.D. Pa. Aug. 24, 1992); Godak v. Nationwide Ins. Co., 35 Pa. D. & C. 4th 481, 484 (Com. Pl. Allegheny 1997); see also Fahy v. Nationwide Mut. Fire Ins. Co., 885 F. Supp. 678, 680-81 (M.D. Pa. 1995) (expressing agreement with reasoning of Younis Bros. and Thomson).³

Mishoe and Hamer argue, however, that this case is different from Wertz because, unlike the PHRA, section 8371 is subject to the Judicial Code's definitions section, which

² As the statute is clear, we will not resort to the other statutory construction factors delineated by the General Assembly in 1 Pa.C.S. § 1921(c). See 1 Pa.C.S. § 1921(b) (if a statute is "clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit").

³ We note our disapproval of certain dicta contained in a footnote in the Superior Court's decision in The Birth Center v. The St. Paul Companies, 727 A.2d 1144, 1160 n.10 (Pa. Super. 1999), aff'd on other grounds, 787 A.2d 376 (Pa. 2001), where the court stated that section 8371 does provide for the right to a jury trial. Likewise, we note our disapproval of Kehrer v. Nationwide Ins. Co., 25 Pa. D. & C. 4th 1 (Com. Pl. Lancaster 1995), which reaches the same conclusion.

states that "court" "[i]ncludes any one or more of the judges of the court who are authorized by general rule or rule of court, or by law or usage, to exercise the powers of the court in the name of the court." 42 Pa.C.S. § 102 (emphasis added). According to Mishoe and Hamer, this inclusive definition is broad enough to include juries because the word "includes" is open-ended, suggesting that meanings other than those specified are also valid. Additionally, they contend that it is illogical to read "court" to mean only "judge" because the Judicial Code separately defines "court" and "judge" and thus assigns independent significance to each term.⁴ See 1 Pa.C.S. § 1921(a) (statutes must be construed such that every word is given effect). We disagree.

Although Mishoe and Hamer correctly note that the definition of "court" does not specifically exclude other meanings of that term, their conclusion that the definition therefore necessarily includes "jury" is flawed. As an initial matter, Mishoe and Hamer fail to recognize that the word "includes" can signal the beginning of a complete list. See AMERICAN HERITAGE DICTIONARY 665 (1969) (explaining that "includes," like "comprise," can imply that all of the components are stated). Moreover, the fact that the definition of "court" is dedicated to a discussion of the power of judges strongly suggests that "court" is a concept that is meant to be limited to judges. See Ken R. ex rel. C.R. v. Arthur Z., 682 A.2d 1267, 1270 (Pa. 1996) ("the inclusion of a specific matter in a statute implies the exclusion of other matters"); see also Younis Bros., 882 F. Supp. at 1473 (the Judicial Code's definitional section "does not refer to the jury in its definition of 'court'"); Godak, 35 Pa. D. & C. 4th at 483-84 (definition of "court" shows that it means "judge" for section 8371 purposes). Indeed, the definition plainly states that "court" means "judges . . . who are

⁴ For purposes of the Judicial Code, "judge" "[i]ncludes a justice of the Supreme Court. Except with respect to the power to select a president or administrative judge, to appoint and remove the administrative staff of the court and to adopt rules of court and other similar matters, the term includes a senior judge." 42 Pa.C.S. § 102.

authorized . . . to exercise the powers of the court in the name of the court," 42 Pa.C.S. § 102 (emphases added), indicating that when a judge acts "in the name of the court," she is the "court" for purposes of the Judicial Code. Furthermore, it is difficult to find merit in Mishoe and Hamer's assertion that "court" includes "jury" when numerous other statutes within the Judicial Code plainly treat the two concepts as independent from one another.⁵ See Younis Bros., 882 F. Supp. at 1474 (citing statutes distinguishing "court" from "jury" and concluding that "the [Pennsylvania] legislature specifically includes the term 'jury' in a statute when it wants the jury to serve as a decision maker").⁶ Finally, we see nothing

⁵ See, e.g., 42 Pa.C.S. § 5327(c) ("The court, not jury, shall determine the law of any governmental unit outside this Commonwealth."); 42 Pa.C.S. § 6107(c) ("The construction of such ordinances shall be made by the court and not by the jury and shall be reviewable."); 42 Pa.C.S. § 6111(c) ("It shall be competent for experts in formulating their opinions to the court and jury to place the genuine and disputed signatures or writing in juxtaposition . . ."); 42 Pa.C.S. § 7302(d)(2) ("a court in reviewing an arbitration award . . . shall . . . modify or correct the award where the award is contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict."); 42 Pa.C.S. § 7502(c) ("In any action where the affiant is found by the court to have knowingly filed a false affidavit, such conduct shall constitute just cause for the court to instruct the jury that it may award exemplary damages in relation to such conduct."); 42 Pa.C.S. § 8342 ("In all civil actions for libel, the plea of justification shall be accepted . . . when it is pleaded, and proved to the satisfaction of the jury, under the direction of the court as in other cases . . ."); 42 Pa.C.S. § 9711(a)(1) ("After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment."). It is also worth noting that other definitions within the definitions section of the Judicial Code show that "court" means "judge" for purposes of the Code. See, e.g., 42 Pa.C.S. § 102 ("tribunal" defined as "[a] court, district justice or other judicial officer vested with the power to enter an order" (emphasis added)).

⁶ Interestingly, the rationale employed in Younis Bros. was explicitly adopted by the Commonwealth Court in its decision in Wertz, which this Court later affirmed. See Wertz v. Chapman Township, 709 A.2d 428, 432 (Pa. Commw. 1998), aff'd, 741 A.2d 1272 (Pa. 1999). In Younis Bros., the court interpreted section 8371--the very section at issue here--as not providing for a jury trial. See Younis Bros., 882 F. Supp. at 1474. Mishoe and (continued...)

wrong with construing "court" and "judge" as essentially synonymous for purposes of section 8371, particularly when statutes throughout the Judicial Code use them as equivalents, with the only variation being the context in which each term is used.⁷ Therefore, we reject Mishoe and Hamer's claim that the term "court" in section 8371 encompasses juries in addition to judges and tribunals.

Mishoe and Hamer also contend that section 8371 affords the right to a jury trial because it permits an award of punitive damages, which is traditionally within the domain of the jury. We disagree. Although juries have traditionally awarded punitive damages, we cannot rest the right to a jury trial on tradition alone where the General Assembly has not referenced that tradition in section 8371 and the section's legislative history in no way signals an intent to adhere to such tradition.⁸ See Wertz, 741 A.2d at 1274. As we

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Hamer fail to explain how the reasoning in Younis Bros. provided a sufficient basis for the Commonwealth Court in Wertz to hold that no right to a jury trial exists under the PHRA, yet somehow fails to provide a sufficient basis to hold that no right to a jury trial exists under section 8371 itself.

⁷ The term "court" is generally used in the Code on occasions where it would be inappropriate for the General Assembly to use the term "judge," as in such instances the judicial action contemplated is only possible "in the name of the court." 42 Pa.C.S. § 102; see examples cited supra note 5. On the other hand, the term "judge" is typically used in references to judges in an individual sense. See, e.g., 42 Pa.C.S. § 325 (providing for seniority of "judges"); 42 Pa.C.S. § 911 (providing for the number of "judges" to be allotted to each judicial district). Thus, it is rather obvious that separate terminology is necessary, as it would be impossible for the legislature to accurately use the term "court" in reference to a judge in the latter scenario.

⁸ We also note that if we were to accept Mishoe and Hamer's "tradition" argument, we would be compelled to construe section 8371 as requiring some remedies to be awarded by a judge and others by a jury. This is because the first and third remedies provided by the statute, interest and costs and fees, see 42 Pa.C.S. § 8371(1) and (3), are traditionally awarded by a judge, while the second remedy, punitive damages, see 42 Pa.C.S. § 8371(2), is traditionally awarded by a jury. Thus, Mishoe and Hamer's approach would create two simultaneous meanings for the term "court" within section 8371. Specifically, (continued...)

explained in Wertz, if the General Assembly wanted to provide jury trials for section 8371 claims, it could have simply said so in that section. See id. (citing statutes conferring right to jury trial); Younis Bros., 882 F. Supp. at 1474 ("the [Pennsylvania] legislature specifically includes the term 'jury' in a statute when it wants the jury to serve as a decision maker"). As the legislature did not in any way indicate its intent to provide for the right, we will not engage in speculation as to its conceivable intentions. See 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). Furthermore, it is important to note that although juries have traditionally awarded punitive damages, the remedy is not within the exclusive province of the jury, as judges regularly award punitive damages where the right to a jury trial has been waived in favor of a bench trial. See, e.g., SHV Coal, Inc. v. Continental Grain Co., 587 A.2d 702, 703-05 (Pa. 1991) (bench trial with award of punitive damages); Trotman v. Mecchella, 618 A.2d 982, 983-85 (Pa. Super. 1992) (same). Additionally, even where juries award punitive damages, we sanction judicial control over such awards by way of remittitur. See G.J.D. v. Johnson, 713 A.2d 1127, 1131 (Pa. 1998). Therefore, the traditional role juries play in awarding punitive damages is not sufficient to

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"court" would mean "judge" regarding the first and third remedies, but "court" would mean "jury" with regard to the second remedy. There is nothing in the text or history of section 8371, however, that supports the notion that the legislature intended to use "court" as some sort of verbal chameleon. Cf. Younis Bros., 882 F. Supp. at 1473 n.12 ("were I to adopt [the argument that section 8371 contains a right to a jury trial], I would in fact have to conclude that section 8371 does not reserve to the judge any role under the statute as it fails to specifically define the role of the judge as distinguished from that of the jury."). In addition, Mishoe and Hamer's approach ignores the overall context of section 8371, which presupposes a single meaning for the term "court." See O'Rourke, 778 A.2d at 1201 ("we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear").

overcome the presumption that, absent specific conferral, the right to a jury trial does not exist.⁹ See Wertz, 741 A.2d at 1274.

Having concluded that Mishoe and Hamer have no statutory right to a jury trial under section 8371, we must address their alternative argument that the Pennsylvania Constitution guarantees a jury trial for claims arising under section 8371. The applicable constitutional provision provides, in relevant part, that "[t]rial by jury shall be as heretofore, and the right thereof remain inviolate."¹⁰ Pa. Const. art. 1, § 6. In construing this section,

⁹ We summarily dismiss Mishoe and Hamer's claim that we should construe section 8371 as providing for the right to a jury trial to maintain consistency between state and federal forums, see, e.g., Fahy, 885 F. Supp. at 680-81 (Seventh Amendment to the United States Constitution guarantees jury trial in section 8371 cases), as we rejected the same argument in Wertz because forum variation is simply a result of "the peculiarities of our system of federalism." Wertz, 741 A.2d at 1279 n.5. Furthermore, we reject Mishoe and Hamer's argument that we should recognize section 8371 as containing an implicit jury trial right similar to that implied in Pennsylvania's wrongful death and survival statutes, see 42 Pa.C.S. §§ 8301 to 8302, as those statutes simply preserve a deceased person's underlying cause of action for the benefit of the person's estate. See In re Pozzuolo's Estate, 249 A.2d 540, 544 (Pa. 1969) (survival action is "an action which [the] decedent himself could have instituted had he survived"). Finally, we dismiss Mishoe and Hamer's assertion that the public interest is best served by affording the right to a jury trial in section 8371 cases, see 1 Pa.C.S. § 1922(5), as Mishoe and Hamer simply emphasize the importance of jury trials without explaining how trial judges are incapable of serving the public interest in redressing bad faith. See Wertz, 741 A.2d at 1279 ("While we are aware of the great value placed on a trial by a jury of one's peers in our Commonwealth, we are confident that the judges of our Commonwealth are equally as capable as jurors to justly resolve claims of discrimination brought under the PHRA.").

¹⁰ This provision has remained essentially unchanged since the Constitution of 1790 was adopted. See Wertz, 741 A.2d at 1275-76. The Constitution of 1776 generally provided that, in civil suits, "the parties have a right to trial by jury, which ought to be held sacred," Pa. Const. (1776) ch. 1, cl. 11, and that "[t]rials shall be by jury as heretofore," id., ch. 2, § 25. The Constitution of 1790 provided "[t]hat trial by jury shall be as heretofore, and the right thereof remain inviolate." Pa. Const. (1790) art. 9, § 6. The wording of this provision has not changed since 1790, although in 1874 it was moved to a different section within the Constitution. See Pa. Const. (1838) art. 9, § 6; Pa. Const. (1874) art. 1, § 6; Pa. Const. (1968) art. 1, § 6.

this Court has consistently held that the right to a jury trial as preserved by our Constitution extends to all causes of action that existed at the time the Constitution was adopted. See Wertz, 741 A.2d at 1275-76; Commonwealth v. One (1) 1984 Z-28 Camaro Coupe, 610 A.2d 36, 41 (Pa. 1992) (right to jury trial for in rem forfeiture cases preserved by Pennsylvania Constitution where such cases heard by juries at time of adoption of Constitution); William Goldman Theatres, Inc. v. Dana, 173 A.2d 59, 64-65 (Pa. 1961) (right to jury trial for obscenity charge preserved by Pennsylvania Constitution where such cases heard by juries at time of adoption of Constitution); Appeal of Watson, 105 A.2d 576, 577-78 (Pa. 1954) (no right to jury trial on issue of tenure for teacher fired for "mental derangement" where such cases not heard by juries at time of adoption of Constitution); Premier Cereal & Beverage Co. v. Pennsylvania Alcohol Permit Bd., 140 A. 858, 859-60 (Pa. 1928) (no right to jury trial on issue of revocation of liquor license where such cases not heard by juries at time of adoption of Constitution). As this Court explained in 1866:

The great purpose of the constitution in providing that "trial by jury shall be as heretofore, and the right[] thereof remain inviolate," was not to contract the power to furnish modes of civil procedure in courts of justice, but to secure the right of trial by jury in its accustomed form before rights of person or property shall be finally decided. Hence the right of trial as it then existed was secured, and the trial itself protected from innovations which might destroy its utility and its security as a palladium of the liberties of the citizen. But beyond this point there is no limitation upon legislative power in constructing modes of redress for civil wrongs, and regulating their provisions.

Haines v. Levin, 51 Pa. 412, 414 (Pa. 1866). Accordingly, our inquiry is whether the bad faith cause of action today residing in section 8371 existed at the time the Pennsylvania Constitution was adopted.

In 1981, this Court considered whether there was a common law tort cause of action for bad faith on the part of an insurer and concluded that there was not. See generally D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 431 A.2d 966 (Pa. 1981). In what has been described as a "delayed response" to that decision, see Polselli v. Nationwide Mut.

Fire Ins. Co., 126 F.3d 524, 529 (3d Cir. 1997), the Pennsylvania legislature in 1990 enacted section 8371. See Nelson v. State Farm Mut. Auto. Ins. Co., 988 F. Supp. 527, 531-32 (E.D. Pa. 1997) (section 8371 prompted by outcome in D'Ambrosio). As such, it is clear that the bad faith cause of action that is codified in section 8371 did not exist prior to the enactment of that statute and certainly did not exist at the time the Pennsylvania Constitution was adopted. Accordingly, the Pennsylvania Constitution does not provide for the right to a jury trial for bad faith claims arising under section 8371. Cf. Wertz, 741 A.2d at 1277; Premier Cereal & Beverage, 140 A. at 859-60.

Mishoe and Hamer argue to the contrary that section 8371 merely codified the common law right of an insured to enforce an insurer's contractual obligations and that the section simply adds remedies for an insurer's breach of the contractual duty of good faith. We disagree. Even assuming arguendo that at least some aspect of section 8371 claims sound in contract,¹¹ common law bad faith contract claims against insurers are of a relatively recent vintage and thus did not exist at the time the Constitution was adopted. See Cowden v. Aetna Casualty & Surety Co., 134 A.2d 223, 227 (Pa. 1957) (whether common law rule exists regarding bad faith "has never before been passed upon by this [C]ourt"); see also Birth Ctr. v. St. Paul Cos., 787 A.2d 376, 390 (Pa. 2001) (Nigro, J., concurring) (citing Perkoski v. Wilson, 92 A.2d 189 (Pa. 1952), as genesis of contract action

¹¹ Proper characterization of section 8371 claims is a matter that is unsettled. See Birth Ctr. v. St. Paul Cos., 787 A.2d 376, 389 (Pa. 2001) (noting that characterization of claim is irrelevant to outcome of case); Birth Ctr., 787 A.2d at 390-91 (Nigro, J., concurring) (claims under section 8371 are tort claims; separate bad faith cause of action exists at common law that is rooted in contract); Birth Ctr., 787 A.2d at 391-94 (Zappala, J., dissenting) (bad faith claims are based in tort rather than contract); see also Woody v. State Farm Fire & Cas. Co., 965 F. Supp. 691, 695 (E.D. Pa. 1997) (claims arising under section 8371 can be characterized as either tort or contract claims); Nelson, 988 F. Supp. at 534 (rejecting Woody; claims arising under section 8371 sound in tort rather than contract). As this question is neither raised in this appeal nor essential to its disposition, we do not address it.

for bad faith); Johnson v. Beane, 664 A.2d 96, 101 (Pa. 1995) (Cappy, J., concurring) ("for almost four decades, we have recognized a common law action for bad faith sounding in contract"). Indeed, the authorities offered by Mishoe and Hamer that date to 1790 do not support the notion that bad faith claims were recognized at that time. Rather, they merely stand for the general proposition that juries were empanelled in trials regarding insurance policies in 1790. See, e.g., Richette v. Stewart, 1 Dall. 317 (Pa. 1788) (insurance dispute tried before jury; no reference to bad faith in Court's opinion). We will not, however, analogize such generic insurance contract cases to section 8371 cases for purposes of establishing historic precedent for the constitutional right to a jury trial. See Wertz, 741 A.2d at 1278-79 (rejecting "analogy" of PHRA discrimination claim to more general personal injury claim).

In conclusion, we hold that neither 42 Pa.C.S. § 8371 itself nor the Pennsylvania Constitution provides for the right to a jury trial for bad faith claims brought under section 8371. Accordingly, the Superior Court was correct in affirming the orders of the Lebanon County and Blair County trial courts rejecting the jury demands of Appellants Edward Mishoe and Nancy L. Hamer.

The order of the Superior Court is affirmed.

Former Chief Justice Flaherty and former Chief Justice Zappala did not participate in the decision of this case.

Mr. Justice Castille files a concurring opinion.

Mr. Chief Justice Cappy files a dissenting opinion in which Madame Justice Newman joins.