

2016 WL 3908965

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Supreme Court of Pennsylvania.

A. SCOTT ENTERPRISES, INC., Appellee

v.

CITY OF ALLENTOWN, Appellant

A. Scott Enterprises, Inc., Appellee

v.

City of Allentown, Appellant.

Argued Nov. 18, 2015.

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Resubmitted Jan. 20, 2016.

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Decided July 19, 2016.

Synopsis

Background: General contractor sued city for breach of contract seeking to recover its losses caused by city's suspension of public highway project. Following a jury trial, the Court of Common Pleas, Lehigh County, Civil Division, No. 2011-C-2818, Varricchio, J., entered judgment for contractor. Both parties appealed. The Commonwealth Court, Nos. 2163 C.D. 2013, 2289 C.D. 2013, 379 C.D. 2014, 102 A.3d 1060, affirmed in part and reversed in part. City appealed.

[Holding:] The Supreme Court, Nos. 55 MAP 2015, 56 MAP 2015, Dougherty, J., held that jury finding of bad faith does not require trial court to impose a statutory penalty and award attorney fees under prompt payment provisions of Procurement Code; disapproving *Dep't of Gen. Servs. v. Pittsburgh Bldg. Co.*, 920 A.2d 973, *A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ.*, 898 A.2d 1145, and *Pietrini Corp. v. Agate Construction Co.*, 901 A.2d 1050.

Reversed and remanded.

Wecht, J., concurred and filed opinion.

Donohue, J., dissented and filed opinion.

West Headnotes (6)

[1] **Appeal and Error**

⇒ Amount of recovery or extent of relief

Appeal and Error

⇒ Fees

By objecting to the submission of issue of bad faith to the jury, as related to an award of statutory penalty and attorney fees under prompt payment provisions of Commonwealth's Procurement Code, and challenging viability of general contractor's breach of contract damages at trial, city properly preserved that issue and other questions relating to bad faith for review. 62 Pa.C.S.A. § 3935.

Cases that cite this headnote

[2] **Appeal and Error**

⇒ Review Dependent on Whether Questions Are of Law or of Fact

Appeal and Error

⇒ Cases Triable in Appellate Court

Because issue of statutory construction is a pure question of law, the Supreme Court's standard of review is de novo and its scope of review is plenary.

Cases that cite this headnote

[3] **Statutes**

⇒ Plain Language; Plain, Ordinary, or Common Meaning

Often, the best indicator of legislative intent is the plain language of the statute; therefore, the Supreme Court gives particular weight to the express language of the statute.

Cases that cite this headnote

[4] **Statutes**

⇒ Mandatory or directory statutes

Although the word "may" can mean the same as "shall" where a statute directs the doing of

a thing for the sake of justice, it ordinarily is employed in the permissive sense.

Cases that cite this headnote

[5] **Public Contracts**

☞ Withholding payments

Public Contracts

☞ Damages and Amount of Recovery

Prompt payment provisions of Procurement Code, providing that the court may award a penalty equal to 1% per month of the amount that was withheld in bad faith, allows, but does not require, the court to order an award of a statutory penalty and attorney fees when payments have been withheld in bad faith, and the court's determinations in this regard are subject to review for an abuse of discretion; disapproving *Dep't of Gen. Servs. v. Pittsburgh Bldg. Co.*, 920 A.2d 973, *A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ.*, 898 A.2d 1145, and *Pietrini Corp. v. Agate Construction Co.*, 901 A.2d 1050, 62 Pa.C.S.A. § 3935.

Cases that cite this headnote

[6] **Municipal Corporations**

☞ Rights and remedies of contractor and sureties

Public Contracts

☞ Verdicts and findings

Trial court's explanation in its opinion in support of order, that an award of a penalty and attorney fees under prompt payment provisions of Commonwealth's Procurement Code was unwarranted because general contractor's testimony, respecting damages relating to city's suspension of public road project, was "conflicting," without more, was insufficient to support its outright denial of an award following jury's finding of bad faith in general contractor's breach of contract action, warranting remand. 62 Pa.C.S.A. § 3935; Rules App.Proc., Rule 1925(a), 42 Pa.C.S.A.

Cases that cite this headnote

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, JJ.

OPINION

Justice DOUGHERTY.

*1 In this discretionary appeal, we consider whether an award of a statutory penalty and attorney fees under the prompt payment provisions of the Commonwealth's Procurement Code, *see* 62 Pa.C.S. § 3935, is mandatory upon a finding of bad faith, irrespective of the statute's permissive phrasing. We hold such an award is not mandatory, and therefore reverse the order of the Commonwealth Court and remand the case to the trial court for proceedings consistent with this Opinion.

Appellant City of Allentown (City) contracted with appellee A. Scott Enterprises, Inc. (ASE), to construct a new public road.¹ After arsenic-contaminated soil was discovered at the worksite, the City suspended work on the project. Following testing, it was determined construction could resume if precautions were taken. Accordingly, the City instructed ASE to obtain revised permits and proceed with the project. However, the existing contract did not include terms regarding the potential for contaminated soil, despite the fact the City was aware there might be contamination prior to entering into the contract, and ASE declined to proceed, explaining it would incur substantial additional costs due to the contaminated soil. The parties made several attempts to reach an agreement in which ASE would continue the construction, but to no avail. Consequently, ASE sued the City to recover its losses on the project, alleged breach of contract, and sought compensation under theories of *quantum meruit* and unjust enrichment, as well as interest and a statutory penalty and fee award for violations of the prompt pay provisions of the Procurement Code.

After a trial, a jury found the City breached its contract with ASE and also withheld payments in bad faith. Trial Court Opinion at 28 & n. 5.² Both parties filed post-trial motions. The City requested the trial court to enter judgment in its favor or grant a new trial with respect to ASE's breach of contract claims, as well as enter judgment in its favor or grant a new trial with respect to ASE's Procurement Code claim. The City argued there was

insufficient evidence of bad faith to pose that issue to the jury, while ASE's motion sought a statutory penalty and attorney fees for bad faith pursuant to Section 3935 of the Procurement Code. Section 3935 provides, in relevant part:

(a) **Penalty.**—If arbitration or a claim with the Board of Claims or a court of competent jurisdiction is commenced to recover payment due under this subchapter and it is determined that the government agency ... has failed to comply with the payment terms of this subchapter, ... the arbitrator, the Board of Claims or the court **may** award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious ...[.]

(b) **Attorney fees.**—Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter **may** be awarded a reasonable attorney fee in an amount to be determined by the Board of Claims, court, or arbitrator, together with expenses, if it is determined that the government agency ... acted in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious.

*2 62 Pa.C.S. § 3935 (emphases added).³ The court did not rule on the post-trial motions within 120 days and, on praecipe filed by ASE on November 22, 2013, judgment was entered on the jury's verdict of \$927,299.00. See Pa.R.C.P. 227.4(1)(b) (prothonotary shall, upon praecipe of party, enter judgment upon jury verdict if post-trial motions are filed and court does not dispose of all motions within 120 days of first motion; judgment entered is final).⁴ Both parties appealed to the Commonwealth Court.

In its Pa.R.A.P.1925(a) opinion, as relevant to this appeal, the trial court stated although there was sufficient evidence of bad faith to submit that question to the jury, the court nevertheless retained discretion to deny an award. The court explained its decision on both points as follows:

[T]he City admitted that it would not release or terminate the Contract

with ASE until ASE came up with the right price. The City refused force accounts.⁵ The City did not direct ASE to demobilize or to resume work unconditionally on forced account. There was never a writing authorizing the additional work and compensation as required by the City's Contract. Furthermore, the City knew or should have known that the recommended soil testing was not performed. The City's Engineer, ... and Lehigh County Conservationist recommended the soil testing due to the likelihood of contaminated soil. Moreover, PennDOT agreed to do the test. Nevertheless, no one tested or verified testing prior to contracting with ASE. Furthermore, the City failed to include terms or conditions providing for contaminants in their contract. Additionally, the City never disclosed to ASE that soil testing was recommended, but never completed. [The suspension of work on the Contract] could have been avoided if the City had followed through with PennDOT, and accepted the recommendations of [the Engineer and Conservationist]. There was sufficient evidence to send the question of bad faith to the jury. At the same time, it is within the discretion of this [c]ourt to award penalty, attorneys' fees and interest. Given the conflicting testimony as to damages presented by ASE, the request for such award is denied.

Trial Court Opinion, 2/28/14, at 32–33.⁶

In the Commonwealth Court, each party raised multiple issues. As relevant here, the City claimed the trial court erred in submitting the Procurement Code bad faith issue to the jury because ASE failed to prove the claim. ASE disputed that assertion and, in its cross-appeal, claimed the trial court erred in failing to award a statutory penalty and attorney fees premised upon the jury finding of

bad faith. Specifically, in ASE's view, such an award under Section 3935 is mandatory where a jury finds a government agency acted in bad faith. ASE argued the trial court improperly set the jury's finding of bad faith aside and substituted its own judgment; while acknowledging the amount of a Section 3935 award is discretionary, ASE asserted the trial court could not deny outright a penalty and attorney fees where bad faith was established.

*3 The City responded by noting ASE's complaint about the denial of a Section 3935 award arose in an unusual procedural posture because the taking of judgment precluded the trial court from deciding the claim prior to appeal. The City then disputed ASE's view of the statute, stressing the discretionary nature of the statutory language. The City asserted ASE's issue, properly framed, was whether the trial court abused its discretion in failing to award a penalty and fees. In the City's view, ASE's contrary reading ignored the right to a Section 3935 award is created and controlled by the statute, and the statute does not vest a jury with the ultimate power to issue an award. The City also argued the trial court did not abuse its discretion in denying an award because the amount sought by ASE was, by ASE's own admission, incorrect; the City claimed it was within the court's discretion to conclude the non-payment of those amounts was neither arbitrary nor vexatious.

In a published decision, the Commonwealth Court agreed with ASE's reading of the statute, notably opining:

The purpose of the Procurement Code is to "level the playing field" between government agencies and contractors. It advances this goal by requiring a government agency that has acted in bad faith to pay the contractor's legal costs, as well as an interest penalty. Otherwise, the finding of bad faith is a meaningless exercise with no consequence for the government agency found to have acted in bad faith.

A. Scott Enterprises, Inc. v. City of Allentown, 102 A.3d 1060, 1070 (Pa.Cmwlth.2014) (internal citation omitted). Relying in part on Missouri case law, the court concluded Section 3935 "requires the imposition of attorney's fees and the statutory penalty upon a jury's finding of bad

faith," reversed the trial court's "refusal to consider" an award, and remanded to the trial court for a hearing to determine, within its discretion, the amount of the penalty and attorney fees to be awarded. *Id.*, citing *City of Independence v. Kerr Construction Paving Co.*, 957 S.W.2d 315 (Mo.Ct.App.1997).⁷ The City's application for reargument *en banc* was denied.

Upon petition by the City, this Court granted allowance of appeal to address whether "a jury finding of bad faith require[s] the trial court to impose a statutory penalty and award attorney fees under" Section 3935, while denying review of other issues raised in the City's petition for allowance of appeal. *A. Scott Enterprises, Inc. v. City of Allentown*, 117 A.3d 1277, 1277-78 (Pa.2015) (*per curiam*).

The City argues that, when construed according to its common and approved usage, the word "may" as used in Section 3935 is properly interpreted as permissive, not mandatory. The City acknowledges there are instances when courts have deliberately interpreted permissive language like "may" to mean "shall," but it claims such limited circumstances are not present here. The City also notes the text of the Contractor and Subcontractor Payment Act (CASPA), 73 P.S. §§ 501-516, a prompt payment statute applicable to non-governmental parties, provides for a penalty and attorney fees similar to the Procurement Code, but explicitly states penalties and attorney fees "shall" be awarded where payment is "wrongfully withheld," the amount of which is then determined by the court or arbitrator. 73 P.S. § 512(a)-(b).⁸ The City contends CASPA's use of "shall," as opposed to "may," is significant as it demonstrates the General Assembly was cognizant of the distinction between mandatory and discretionary bad faith penalty awards; had the Legislature intended to make the Procurement Code awards mandatory as well, it would not have used permissive language. Moreover, the City argues the Commonwealth Court improperly rested its decision on a Missouri case involving a distinguishable statute, and the perceived broad legislative intent underlying the Procurement Code as a whole, rather than applying the rules of statutory construction and acknowledging the narrow circumstances in which Pennsylvania courts have interpreted "may" to mean "shall."

*4 The City further notes Section 3935 makes no mention of a jury, and the Legislature therefore could not have intended the trial court to be bound to award a penalty and attorney fees whenever a jury makes a finding of bad faith; such an interpretation would contravene the statute's express provision that the arbitrator, the Board of Claims, or the court makes the award. *See* 62 Pa.C.S. § 3935(a)–(b). Finally, the City claims, if the Commonwealth Court's decision is not reversed, the result is an award essentially directed by jurors who were not comprehensively instructed on the meaning of “arbitrary or vexatious,” or told their finding of bad faith would result in a 1% penalty and counsel fees paid from public funds. The jury was not instructed in this regard, argues the City, because the trial court believed, properly so, it had discretion to decide the ultimate question of whether a statutory award was warranted.

In response, ASE first argues the City did not contend, either at trial or in its post-trial motions, that the trial court retained discretion to decline to award a penalty and attorney fees; rather, ASE maintains the City's sole challenge was to the quantum of proof submitted by ASE to establish bad faith. Consequently, ASE alleges, the City failed to preserve the issue of whether the jury's finding of bad faith mandates an award under Section 3935, and its appeal should be dismissed.

On the merits, ASE tracks the Commonwealth Court's reasoning below, asserting the legislative purpose underlying the Procurement Code—*i.e.*, providing contractors with a remedy against governmental entities that withhold payment in bad faith—cannot be achieved without a mandatory award of a penalty and attorney fees where bad faith is found. “ ‘Otherwise, the finding of bad faith is a meaningless exercise with no consequence for the government agency found to have acted in bad faith.’ ” ASE's Brief at 19, *quoting A. Scott Enterprises*, 102 A.3d at 1070. ASE further notes there is no language in Section 3935 suggesting once a contractor has proven bad faith additional factors must be established before the arbitrary or vexatious conduct is deemed sufficiently egregious to warrant a penalty and attorney fees award. Thus, ASE contends it is unclear what burden a contractor would bear, if “may” is read as permissive. In ASE's view, such an interpretation would subject the availability of the statutory remedies to the “individual whim of each trial court judge.” *Id.* Again agreeing with the Commonwealth Court, ASE posits the trial court judge,

while having discretion regarding the amount of awards, has no discretion to refuse them altogether.

Moreover, ASE submits Pennsylvania courts, as well as courts of other states, have interpreted “may” as mandatory when a statute directs the doing of a thing for the sake of justice or when necessary to effectuate a statute's underlying purposes. *See, e.g., Hotel Casey Co. v. Ross*, 343 Pa. 573, 23 A.2d 737, 740–41 (1942) (where Commonwealth was not rightfully entitled to taxes paid, statute authorizing refund or credit to taxpayer should be interpreted as mandatory). ASE also posits Pennsylvania's intermediate appellate courts have held a finding of bad faith under Section 3935 mandates an award of a penalty and attorney fees. *See, e.g., A.G. Cullen Constr. Inc. v. State Sys. of Higher Educ.*, 898 A.2d 1145, 1164–66 (Pa.Cmwlt.2006); *Pietrini Corp. v. Agate Construction Co.*, 901 A.2d 1050, 1053 (Pa.Super.2006).

*5 ASE acknowledges that, while both CASPA and the Procurement Code were designed to authorize awards of penalties and attorney fees under specified conditions, the key difference between the two statutes is the Procurement Code requires a threshold finding of the government agency's bad faith. Accordingly, there is an additional burden of proof under the Procurement Code, requiring a heightened showing of wrongful conduct before an award can be made where public funds are at issue. Thus, ASE contends, the Legislature's intent was to “bring about parity with the remedies in CASPA once bad faith is found[.]” ASE's Brief at 28, and thus, the award should be automatic upon that finding.

In the alternative, ASE develops an argument that, to the extent the trial court maintained discretion to decline an award despite a finding of bad faith, it abused its discretion here. ASE argues that, at a minimum, a jury finding of bad faith should create a strong presumption of entitlement to a penalty and attorney fees, and the government should bear the burden to prove why no award should issue. In this case, ASE notes, the trial court's single-sentence explanation for its denial of the award did not specify any standard used or factors considered, and the “passing reference to conflicting testimony” regarding damages is an insufficient basis to decline to issue any award. ASE argues such evidentiary conflicts are relevant only to the proper calculation of the award. Citing a multi-factor test employed in other areas involving awards of attorney fees, ASE argues

consideration of such “traditional factors” weighs heavily in its favor. See ASE’s Brief at 31, citing, e.g., *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir.1983) (where award of attorney fees under ERISA⁹ is discretionary, courts have considered: 1) offending party’s culpability or bad faith; 2) ability of offending party to satisfy fee award; 3) deterrent effect of award; 4) benefit conferred by award; 5) relative merits of parties’ position). ASE concludes by requesting that, if this Court determines the award of a penalty and attorney fees is discretionary, we should remand to the trial court with instructions respecting the factors to be employed in deciding the issue.

The City responds to ASE’s alternative argument by first asserting the question whether the trial court abused its discretion is not within the scope of the issue accepted for decision. On the merits, the City posits the decision was not an abuse of discretion given the “gross inconsistencies” in the invoices ASE submitted for payment and ASE’s failure to supply the City with “accurate” claims of amounts due for payment. In the City’s view, the trial court cannot have abused its discretion where ASE was unable to specify “what amounts for what work ... were not properly paid.”

[1] We begin by addressing ASE’s waiver argument. Given the timing of the trial court’s determination—after ASE praeciped for judgment (as was its right, given the delay) and the cross-appeals were filed—the City was in no position to “preserve” its issue when the matter was still before the trial court. Moreover, since the trial court ultimately awarded ASE no statutory penalty or attorney fees despite the jury’s finding of bad faith, the City was not aggrieved by the trial court’s decision. Indeed, the City’s present claim did not mature until the Commonwealth Court issued its opinion reversing the trial court and holding an award was mandatory. See, e.g., *Lebanon Valley Farmers Bank v. Commonwealth*, 623 Pa. 455, 83 A.3d 107, 113 (2013) (successful litigant need not file protective cross-appeal on pain of waiver); *Basile v. H & R Block, Inc.*, 601 Pa. 392, 973 A.2d 417, 422 (2009) (appellee should not be required to file protective cross-appeal if judgment granted relief appellee sought). Furthermore, the City objected to the submission of the bad faith claim to the jury. N.T. 1/22/13–1/31/13, 879, 883, 1302–13. As the Commonwealth Court noted in rejecting ASE’s waiver argument, by “object[ing] to the submission of the issue of bad faith to the jury and challeng[ing] the viability of [ASE’s] breach of contract damages at trial[.]” the City

properly preserved this and other questions relating to bad faith for review. *A. Scott Enterprises*, 102 A.3d at 1066 (citations omitted). As we find the issue was not waived, we next turn to the merits.

*6 [2] [3] The issue is one of statutory construction, which is a pure question of law; therefore, our standard of review is *de novo* and our scope of review is plenary. *Lynnebrook & Woodbrook Assocs. v. Borough of Millersville*, 600 Pa. 108, 963 A.2d 1261, 1268 n. 2 (2008). Our objective “is to ascertain and effectuate the intention of the General Assembly.” 1 Pa.C.S. § 1921(a). Often, “the best indicator of legislative intent is the plain language of the statute.” See *Freedom Med. Supply v. State Farm Fire and Cas. Co.*, — Pa. —, 131 A.3d 977, 983 (2016), citing *Commonwealth, Office of Governor v. Donahue*, 626 Pa. 437, 98 A.3d 1223, 1237 (2014). Therefore, we give particular weight to the express language of the statute.

In reading a statute, we construe the words in accordance with the rules of grammar and their common and approved usage or, when proper, according to their “peculiar and appropriate” or statutorily provided meanings. 1 Pa.C.S. § 1903(a); see also *Treaster v. Union Twp.*, 430 Pa. 223, 242 A.2d 252, 255 (1968) (“Words used in a statute are not lightly to be given a meaning other than their normal one.”); *Commonwealth v. Rieck Inv. Corp.*, 419 Pa. 52, 213 A.2d 277, 282 (1965) (Legislature must be presumed to mean what it has plainly expressed). “When the words ... are [unambiguous], the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa.C.S. § 1921(b). Generally, it is only where the words are not explicit, creating ambiguity within the statute, that this Court will resort to other considerations to discern the Legislature’s intent. 1 Pa.C.S. § 1921(c).

Preliminarily, we note that while this case presents in a facially clean fashion—is the statutory language of permissive or mandatory effect?—in fact it is not so simple. For example, the statute speaks of awards rendered by an arbitrator, Board of Claims, or court—not awards by a jury; and, as the City notes, arbitrators, Boards of Claims, and courts are more aware than juries of the precise monetary effect of a Section 3935 award premised upon bad faith. Such awareness no doubt can play into the determination of bad faith itself in the non-jury scenario. In addition, the trial court did not issue its determination of the penalty and attorney fees question until after judgment was entered—the ensuing appellate

dispute has thus proceeded without benefit of argument before, or developed reasoning from, the trial court. Instead, we have a single-sentence explanation in the trial court's opinion. Finally, we are aware the City's primary Procurement Code complaint throughout the litigation focused upon the more elemental question of whether a case of bad faith was established: the proper consequence of a sustained finding of Procurement Code bad faith came into focus only after the related foundational issues were resolved.

[4] With these complexities in mind, we turn to the statutory text. Our reading aligns with that posed by the City. The statute's plain language is unambiguous and permissive in nature: "the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith," and "the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee [.]" 62 Pa.C.S. § 3935 (emphases added). "Although 'may' can mean the same as 'shall' where a statute directs the doing of a thing for the sake of justice, it ordinarily is employed in the permissive sense." *Commonwealth v. Garland*, 393 Pa. 45, 142 A.2d 14, 17 n. 5 (1958) (internal citations omitted); *Commonwealth v. A.M. Byers Co.*, 346 Pa. 555, 31 A.2d 530, 532 (1943) ("The word 'may' clearly implies discretionary power. The language is permissive, rather than mandatory."). See also *Bowser v. Blom*, 569 Pa. 609, 807 A.2d 830, 835 (2002) (where court "may" award costs and fees in child support proceeding, prevailing party is not automatically entitled to award); *Treaster, supra* (statute stating township "may revise its budget" during fiscal year should not be construed to mean township was required to do so); Pa.R.A.P. 2744 (appellate court "may award as further costs damages as may be just" if appeal is frivolous). Cf. *In re Farnese*, 609 Pa. 543, 17 A.3d 357, 370–71 (2011) (Election Code provision stating court "shall" award costs "as it shall deem just" does not entitle prevailing party to automatic award; language "contemplates a more nuanced, calibrated decision, perhaps difficult, but not at all a strange matter for courts of justice").

*7 Additionally, although this Court has occasionally interpreted the word "may" in a statute as mandatory, we have done so "usually where the ends of justice or constitutional requirements so dictate." *Treaster*, 242 A.2d at 255. In *Hotel Casey*, for example, the Court held, notwithstanding permissive language regarding the award

of a refund of taxes paid in error, "if an application is made for a refund under § 503 of the Fiscal Code within the period of limitations fixed thereby and it appears there was a tax paid to the Commonwealth to which the Commonwealth was not equitably or rightfully entitled, the provision for a refund or credit is mandatory." 23 A.2d at 741.¹⁰ The Court acknowledged it would be "both illogical and unreasonable to assume that, when the legislature attempted to correct a rigor of the law that caused an injustice and in so acting made it the duty of one of its fiscal agents to determine whether a tax had been collected to which the state was not rightfully or equitably entitled and made specific provision for a refund or credit in the event of such a finding, it intended only such illusory relief as would leave the granting of the refund to the unlimited discretion of the agency." *Id.* at 740. The Court continued that, "[w]hile such words as 'authorized' and 'empowered' are usually words of permission merely and generally have that sense when used in contracts and private affairs, when they are used in statutes they are frequently mandatory and imperative. Consequently, where a statute directs the doing of a thing for the sake of justice the word 'may' means the same thing as the word 'shall.'" *Id.* Notably, in concluding the government agency must refund the taxes, the *Hotel Casey* Court sought to give the statute, "if possible, an interpretation which will prevent any conflict with the Constitution." *Id.*; see also *In re Philadelphia Parking Authority*, 410 Pa. 270, 189 A.2d 746, 749 (1963) ("may," as used in statute providing for bond to secure compensation for condemned real estate pursuant to constitutional mandate, "must be construed as 'shall,' as mandatory rather than permissive"). Unless there are similarly compelling reasons for interpreting "may" as "shall" here, the plain, permissive language in Section 3935 leaves the decision to issue an award to the sound discretion of the tribunal.

[5] We are not persuaded "the ends of justice or constitutional requirements ... dictate" we interpret the permissive language in Section 3935 as mandatory. See *Treaster*, 242 A.2d at 255. ASE has proffered no constitutional argument counseling a construction of the language as mandatory, and we are not convinced by the position of ASE and the Commonwealth Court that such a reading is necessary in order to "level the playing field" between government agencies and contractors engaged in public construction projects. In this statute creating and framing the cause of action and the remedy, the playing

field has been established by the General Assembly, and it employed language vesting discretion in the tribunal when payment is withheld in bad faith.

*8 Our determination that the statute intends to confer discretionary authority is buttressed by the fact the General Assembly has used the term “shall” in a similar statute like CASPA. CASPA is effectively the prompt payment statute for private parties, while the Procurement Code provides prompt payment rules for government projects. See generally *Clipper Pipe & Service Inc. v. Ohio Cas. Ins. Co.*, — Pa. —, 115 A.3d 1278, 1283–84 (2015) (CASPA does not apply in context of public works projects, where owner of construction project is government agency). With regard to penalties, Section 512(a) of CASPA states, if “an owner or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court shall award, in addition to all other damages due, a penalty equal to [1%] of the amount that was wrongfully withheld.” 73 P.S. § 512(a) (emphasis added). The General Assembly’s use of the word “shall” in provisions in CASPA which are otherwise functionally equivalent to the terms of the Procurement Code suggests a deliberate intention that awards of penalties and attorney fees under the Procurement Code are within the discretion of the tribunal. Notably, a different payment provision within the Procurement Code itself employs mandatory language respecting a penalty for late payments, further corroborating the General Assembly meant Section 3935 to be permissive. See 62 Pa.C.S. § 3932(c) (if progress payments are not timely made, government agency shall pay to contractor or design professional, in addition to amount due, interest on amount due).

Turning to whether the “ends of justice” dictate a non-literal reading of the text, we remain unconvinced by the notion Section 3935 must be construed as mandatory. Although we would not overstate the argument, there is some force in the City’s point the jury’s finding of bad faith here was rendered without appreciation of the potential ramifications of its finding; the trial court, of course, knows what the statute authorizes. There is also some force in the argument it is rational to vest discretion in the Procurement Code scenario, as contrasted with CASPA, since Procurement Code awards implicate the public treasury. Resolution of the question before us does not require inquiry into the wisdom or fairness of such a distinction and scheme; it is enough the scheme is not

such as to make it apparent the permissive term must be construed as mandatory in order to avoid a manifestly unjust result. Cf. generally *Freedom Medical Supply*, 131 A.3d at 984, citing 1 Pa.C.S. §§ 1922(1), (4), and (5) (“[W]e presume to be erroneous any interpretation that leads to an absurd or unreasonable result, or which renders the statute ineffective or uncertain, or which favors private interests over the public interest[.]”).

Furthermore, it is not apparent an abuse of discretion standard in such matters is inappropriate or unworkable. See, e.g., *Lucchino v. Commonwealth*, 570 Pa. 277, 809 A.2d 264, 269–70 (2002) (statute stating Environmental Hearing Board “may, in its discretion” order payment of costs and attorney fees “clearly vests broad discretion” in that body; where record supports tribunal’s finding conduct of party was dilatory, obdurate, vexatious, or in bad faith, award of fees will not be disturbed in absence of abuse of discretion). Accord *Farnese*, 17 A.3d at 370–71 (standard directing that court “shall” award costs “as it shall deem just” “contemplates a more nuanced, calibrated decision, perhaps difficult, but not at all a strange matter for courts of justice”).

*9 Prior to the Commonwealth Court’s decision in this case, both intermediate appellate courts acknowledged a Section 3935 award is discretionary but, we recognize, the panels nonetheless remanded for entry of an award where the trial court or Board of Claims declined to issue one in the first instance. For example, in *Dep’t of Gen. Servs. v. Pittsburgh Bldg. Co.*, 920 A.2d 973 (Pa. Cmwlth.), appeal denied, 595 Pa. 712, 939 A.2d 890 (2007) (“DGS”), and *A.G. Cullen, supra*, the Board of Claims found the failure to comply with prompt pay requirements did not rise to the level of arbitrary and vexatious conduct, and no statutory penalty or fees were awarded. On appeal in both cases, however, the Commonwealth Court ruled, essentially as a matter of law, the government agency’s conduct did constitute bad faith under Section 3935, and then remanded for an award. *DGS*, 920 A.2d at 991 (remand for “proper determination of penalty interest and attorney fees”); *A.G. Cullen*, 898 A.2d at 1166 (remand for award of attorney fees on claim arising out of vexatious conduct). The Commonwealth Court’s directive in each case followed its preliminary statement such an award is discretionary with the trial court. *DGS*, 920 A.2d at 990 (“The Board’s denial of a party’s request under Section 3935 is within its sound discretion, and we will only reverse upon a clear abuse of discretion.”); *A.G. Cullen*, 898 A.2d

at 1164 (“Tribunals possess great latitude and discretion in awarding attorney’s fees when authorized by a statute.”).

Similarly, in *Pietrini*, the Superior Court remanded for entry of a Section 3935 award in a case where it overturned the trial court’s holding an award was not warranted, after finding the defendant’s conduct was vexatious. The panel noted, “even in the presence of an undisputed factual record such as this, the award of penalties and attorney’s fees under the [P]rocurement [C]ode is an issue that under common circumstances requires reference to existing norms of conduct. As such, the decision remains committed to the sound discretion of the trial court, which we will reverse only [for] a palpable abuse of discretion.” 901 A.2d at 1053. The *Pietrini* panel then found the trial court abused its discretion by concluding the defendant’s conduct was not vexatious but, rather than remand for a determination whether a penalty and attorney fees were warranted, the panel remanded for “an assessment of penalties” and attorney fees, thus apparently, interpreting the statute as mandating an award when bad faith is found. *Id.* at 1055.

It appears the specific question now before this Court was not squarely presented in *DGS*, *A. G. Cullen*, and *Pietrini*. In each of those cases, after explaining its disagreement with the lower tribunal’s finding on the bad faith question, the panel remanded for entry of an award, rather than remanding for the tribunal to exercise its discretion in light of the bad faith conduct. To the extent those decisions can be read as being in tension with our holding, they necessarily are disapproved.

*10 We stress our holding that Section 3935 does not mandate an award in every case where bad faith has been established does not mean a tribunal can arbitrarily decline to issue an award; its determination is subject to review for abuse of discretion, and the soundness of the decision no doubt will depend upon the persuasiveness of the explication of the reasons for denial. Furthermore, given the extreme conduct necessary to support a finding of bad faith, the instances where a finding of bad faith is deemed not to require a Section 3935 award at all presumably will be rare.¹¹

Contrary to the City’s suggestion, our holding that the Commonwealth Court erred in determining an award of a penalty and attorney fees is mandatory under Section 3935 does not end the matter. ASE, which prevailed in

the Commonwealth Court, has forwarded an alternative argument that, under the abuse of discretion standard advocated by the City, the matter at a minimum should be remanded to the trial court. We agree.¹²

[6] The trial court’s explanation in its Rule 1925(a) opinion that an award of a penalty and attorney fees was unwarranted because ASE’s testimony respecting damages was “conflicting,” without more, is insufficient to support its outright denial of an award following the jury’s finding of bad faith. The fact of the matter is that the jury returned a finding of bad faith based on that same “conflicting” evidence of damages and the bad faith finding has been sustained. ASE having anticipatorily posed a contingent argument respecting whether the court abused its discretion, the parties have engaged in a fact-intensive dispute about the accuracy of the court’s bald assessment, as well as the appropriate consequence if in fact there was conflicting evidence on damages. Given the unusual procedural posture of the case, these arguments have not been assessed in the courts below, much less have they been assessed with the sharp focus necessary to properly frame an issue for this Court. The proper course, in these circumstances, is for the arguments to be made in the first instance to the trial judge upon remand.

Finally, ASE notes, accurately enough, the trial court did not identify any standard used or specific factors considered in refusing the request for an award of a statutory penalty and attorney fees. Consequently, ASE asks that we provide a standard to govern the remand. This too, however, is an issue best posed to the trial court in the first instance.

Accordingly, we hold Section 3935 of the Procurement Code allows—but does not require—the court to order an award of a statutory penalty and attorney fees when payments have been withheld in bad faith. The court’s determinations in this regard are subject to review for an abuse of discretion. Therefore, we reverse the Commonwealth Court and remand to the trial court for proceedings consistent with this Opinion. In addition, the trial court on remand is directed to determine the amount of pre- and post-judgment interest to be awarded in accordance with the Commonwealth Court’s unaffected additional rulings.

*11 Reversed and remanded. Jurisdiction relinquished.

Chief Justice SAYLOR and Justices BAER, TODD and WECHT join the Opinion.

Justice WECHT files a Concurring Opinion.

Justice DONOHUE files a Dissenting Opinion.

Justice WECHT, concurring.

I join the learned Majority's opinion in full, writing only to emphasize that we granted *allocatur* on one issue: whether a jury finding of bad faith requires the trial court to impose a statutory penalty and award attorney fees under 62 Pa.C.S. § 3935. We denied *allocatur* as to all other issues, including the issue raised by the dissent. Consequently, whether the bad faith question should be submitted to the jury or, in the alternative, decided by the judge, is not before the Court. The parties have not fully briefed the issue, nor has it been preserved for our review. Accordingly, I do not read the majority to endorse or disapprove of the submission of the bad faith question to the jury in this specific instance or in future cases.

Justice DONOHUE, dissenting.

*11 I must respectfully dissent. I disagree with the esteemed Majority's statutory analysis, as section 3935 of the Procurement Code does not vest a trial court with the discretion to deny an award of interest penalties and attorneys' fees even where it is proven that the government agency acted in bad faith. More fundamentally, I am of the view that this case presents an issue arising only because the trial court erred in submitting the question of bad faith to the jury. Whether the City of Allentown (the "City") acted in bad faith was a finding that should have been made by the trial court, not the jury. Under section 3935, the trial court, in the exercise of its discretion based upon its review of the evidentiary record, must determine whether the City acted in bad faith and, if reaching such a finding, award interest penalties and attorneys' fees.

Chapter 39 of the Procurement Code governs contracts for public works. It applies to "contracts entered into by a government agency through competitive sealed bidding or competitive sealed proposals[.]" and its purpose is "to establish a uniform and mandatory system governing public contracts[.]" 62 Pa.C.S.A. § 3901. The section at issue in this appeal provides as follows:

(a) **Penalty.**—If arbitration or a claim with the Board of Claims or a court of competent jurisdiction is commenced to recover payment due under this subchapter and it is determined that the government agency, contractor or subcontractor has failed to comply with the payment terms of this subchapter, the arbitrator, the Board of Claims or the court may award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was withheld in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious. An amount shall not be deemed to have been withheld in bad faith to the extent it was withheld pursuant to section 3934 (relating to withholding of payment for good faith claims).

*12 (b) **Attorney fees.**—Notwithstanding any agreement to the contrary, the prevailing party in any proceeding to recover any payment under this subchapter may be awarded a reasonable attorney fee in an amount to be determined by the Board of Claims, court or arbitrator, together with expenses, if it is determined that the government agency, contractor or subcontractor acted in bad faith. An amount shall be deemed to have been withheld in bad faith to the extent that the withholding was arbitrary or vexatious.

62 Pa.C.S.A. § 3935.

The Majority acknowledges that the issue presented is one of statutory interpretation, and that our objective in this regard is to ascertain the intent of the General Assembly. Majority Op. at ———. To this end, the Majority also acknowledges that our task is "not so simple" as a superficial review of the specific words used, as this Court has, on some occasions, interpreted permissive language as imposing a mandatory directive. *Id.* at ———. As we explained in *Hotel Casey Co. v. Ross*, 343 Pa. 573, 23 A.2d 737 (1942):

While such words as 'authorized' and 'empowered' are usually words of permission merely and generally have that sense when used in contracts and private affairs, when they are used in statutes they are frequently mandatory and imperative. Consequently, where a statute directs the doing of a thing for the sake of justice the word 'may' means the same thing as the word 'shall'. The principle is thus stated in *Supervisors, Rock Island Co. v. United States*, 71 U.S. 435, 446 [4

Wall. 435] 18 L.Ed. 419: 'The conclusion to be deduced from the authorities is, that where power is given to public officers in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'

Id. at 740.

As this passage in *Hotel Casey* indicates, ascertaining legislative intent requires an examination of the primary purpose of the statute at issue. 1 Pa.C.S.A. § 1921(c) (4); *In re Carroll*, 586 Pa. 624, 896 A.2d 566, 573 (2006); *Vitac Corp. v. Workers' Compensation Appeal Board (Rozanc)*, 578 Pa. 574, 854 A.2d 481, 485 (2004). Indeed, in a subsequent case interpreting and applying the principles in *Hotel Casey*, this Court held that where the basic purpose of the statute requires it, "the word 'may' must be construed as 'shall', as mandatory rather than permissive." *In re Philadelphia Parking Auth.*, 410 Pa. 270, 189 A.2d 746, 749 (1963) (emphasis added).

*13 Unfortunately, the Majority does not attempt to ascertain the legislature's purpose for section 3935, and instead relies exclusively on the General Assembly's use of the word "may" rather than "shall." The purpose of section 3935 is easily identified upon review of the surrounding provisions in the Procurement Code. For example, section 3932(a) provides that "[t]he government agency shall pay the contractor or design professional strictly in accordance with the contract." 62 Pa.C.S.A. § 3932(a). If the contract does not contain a term governing the time for payment, section 3932(b) provides that the contractor or design professional are entitled to progress payments, which the government agency must make within forty-five calendar days of the application for payment is received (less any retainage). 62 Pa.C.S.A. § 3932(b). Section 3934 requires government agencies to timely pay contractors for all work that has been satisfactorily completed, and permits the withholding of payments due under the contract only for deficiency items

upon notice of the good faith basis for doing so within fifteen days of receipt of the application for payment.¹ 62 Pa.C.S.A. § 3934.

These provisions of the Procurement Code plainly demonstrate that the legislature's intent and purpose in enacting section 3935 is to supply an enforcement mechanism to ensure compliance with the strict payment requirements imposed in the preceding provisions.² In the absence of the specter of having to pay attorneys' fees and interest penalties, the multiple requirements under the Procurement Code demanding that government agencies pay on time and in accordance with contractual obligations would have no "teeth," and could fairly be ignored if useful to achieve other purposes. *See, e.g., Pietrini Corp. v. Agate Const. Co.*, 901 A.2d 1050, 1054 (Pa.Super.2006) (contractor's withholding of payments from subcontractor "constituted coercion, not negotiation," requiring the imposition of attorneys' fees and interest penalties under section 3935).

As both the Superior Court and the Commonwealth Court have correctly recognized, the purpose of the Procurement Code is to "level the playing field" between government agencies and contractors. *Id.*; *A. Scott Enterprises, Inc. v. City of Allentown*, 102 A.3d 1060, 1070 (Pa.Comm.2014). At the same time, by setting a high evidentiary bar for such remedies (bad faith), the statute also strikes an appropriate balance between discouraging arbitrary or vexatious behavior by government agencies and not penalizing them for mere mistakes or good faith disputes. Accordingly, giving the trial court (or an arbitrator or the Board of Claims, as the case may be) the discretion to refuse to impose attorneys' fees and interest penalties under section 3935, even when payments have been withheld in bad faith, clearly impedes, rather than advances, the purpose of the General Assembly, as it results in a statutory scheme of strict payment requirements but no effective enforcement mechanism for noncompliance.

*14 In this regard, we must be mindful of the general command that we presume that the legislature did not intend a result that is unreasonable or absurd. 1 Pa.C.S.A. § 1922(1); *Koken v. Reliance Ins. Co.*, 586 Pa. 269, 893 A.2d 70, 81 (2006); *Street Road Bar & Grille, Inc. v. Pennsylvania Liquor Control Bd.*, 583 Pa. 72, 876 A.2d 346, 353 (2005). The text of section 3935 authorizes awards of interest penalties and attorneys'

fees if the government agency withholds payments in bad faith, and to that end, describes in detail what bad faith is (withholding arbitrarily or vexatiously) and what it is not (withholding pursuant to the good faith provisions of section 3934). The text mentions no other factor to be considered in connection with such awards. Yet this Court today interprets this text to permit a trial court (or an arbitrator or the Board of Claims) to deny an award of interest penalties and attorneys' fees under section 3935 even if it has been proven that the government agency withheld payments in bad faith, apparently based upon consideration of any other factor or factors it considers relevant, including matters entirely dehors the evidentiary record. Under this statutory interpretation, section 3935 instructs that the tribunal must first decide whether the government agency acted in bad faith, but then permits this finding to be ignored entirely based upon any other factors deemed to be more significant under the circumstances presented—none of which are either mentioned in the statutory text or identified in the Majority's opinion.³ The determination of whether the government agency acted in bad faith becomes, as the Commonwealth Court correctly recognized, “a meaningless exercise with no consequence for the government agency.” *A. Scott Enterprises, Inc.*, 102 A.3d at 1070. In my view, this result is unreasonable and bordering on the absurd.

I find this Court's decision in *In re Farnese*, 609 Pa. 543, 17 A.3d 357, 370 (2011), to be instructive in interpreting the legislative intent regarding the mandatory nature of the remedies in section 3935. In that case, we held that where a statute authorizes a trial court to award costs to a prevailing party “as it deems just,” such awards are not automatic and the trial court may exercise discretion in assessing whether an award is warranted. *Id.* In *Farnese*, the absence of an evidentiary standard that must be met for a statutory award led to our conclusion that the award was discretionary. *Id.* In contrast, section 3935 establishes a threshold evidentiary requirement for statutory awards, namely a showing of bad faith. As such, the logic of *Farnese* compels a conclusion that section 3935 awards are mandatory upon satisfactory proof of bad faith.

Finally, in my view, the issue of statutory construction currently before the Court arises only because of a clear error by the trial court, namely, its submission to the jury the question of whether the City acted in bad faith. Section 3935 delineates the entities tasked with

determining whether a plaintiff has established bad faith, and those entities are an arbitrator, the Board of Claims, or “the court.” See 62 Pa.C.S.A. § 3935. No language in section 3935 states, or even suggests, that juries can or should play any role in this process. This Court has ruled that when used in statutes, the word “court” is synonymous with “judge” and cannot be broadly construed to include “jury.” *Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 824 A.2d 1153, 1157–58 (2003); see also *Wertz v. Chapman Township*, 559 Pa. 630, 741 A.2d 1272, 1274 (1999) (“[T]he General Assembly's use of the term ‘court’ in the statute is significant.... This is strong evidence ... that the tribunal, rather than a jury, ... is to make findings and provide relief.”).

*15 Moreover, the awards under section 3935 are available only by statute, not at common law, and thus no right to a jury trial exists to secure their recovery. See *Mishoe*, 824 A.2d at 1160 (stating that the right to trial by jury extends only to the causes of actions that existed at common law the time of the Pennsylvania Constitution's adoption). Analogous parallels in this regard to section 3935 are sections 2503(7) and 2503(9) of the Judicial Code, which empower courts to award attorneys' fees if a party's conduct during the pendency of a case is vexatious, obdurate or dilatory, 42 Pa.C.S.A. § 2503(7), or if a party's conduct in commencing an action is “arbitrary, vexatious, or in bad faith,” 42 Pa.C.S.A. § 2503(9). In *Township of South Strabane v. Piecknick*, 546 Pa. 551, 686 A.2d 1297 (1996), this Court determined that the decision to award attorneys' fees under section 2503(7) requires a finding by the trial court of vexatious, obdurate or dilatory conduct. *Id.* at 1301. Similarly, in *Slappo v. Development Associates, Inc.*, 791 A.2d 409 (Pa.Super.2002), the Superior Court concluded that the trial court erred in submitting the issue of an award of attorneys' fees under section 2503(9) to the jury for its consideration. *Id.* at 416.

Absent the clear error by the trial court in this case, over the City's repeated objections,⁴ of submitting the issue of bad faith to the jury, the current dilemma over whether the trial court had the discretion to refuse to impose interest penalties and attorneys' fees never arises. Indeed, I do not read the trial court's opinion to relate that it decided not to award statutory remedies even though the City had acted in bad faith. Instead, the trial court declined to impose interest penalties and attorneys' fees because it disagreed with the jury's finding of bad faith, as it did not consider the conflicting evidence to establish that the City had in

fact acted arbitrarily or vexatiously. Trial Court Opinion, 2/28/2014, at 33. Section 3935 plainly confers discretion on the trial court, but the discretion conferred is to decide, based upon its review of the evidentiary record, whether the government agency acted in bad faith in withholding payments due and owing. If and when the trial court determines that the government agency acted in bad faith, it must then award interest penalties and attorneys' fees as

specified in section 3935, as the statute identifies no other factors to be considered before doing so.

For these reasons, I respectfully dissent.

All Citations

--- A.3d ----, 2016 WL 3908965

Footnotes

- 1 The Commonwealth's Procurement Code, and more specifically, its provisions relating to prompt payment for public works contracts entered into by a government agency, apply to the project. See, e.g., 62 Pa.C.S. §§ 3931–3939 (prompt payment schedules).
- 2 The jury verdict slip included Question 4: "Do you find by a preponderance of the evidence that the City of Allentown withheld payments due A. Scott Enterprises in bad faith?" N.T. 1/22/13–1/31/13 at 1413. The court instructed the jury on bad faith as follows: "An amount shall be deemed to have been withheld, in bad faith, to the extent that the withholding was arbitrary or vexatious. An amount shall not be deemed to have been withheld in bad faith, to the extent that it was withheld pursuant to withholding of payment for deficiency items according to the contract." *Id.* at 1418. The court did not further define "arbitrary or vexatious."
- 3 Although the statute provides for "expenses" as well as a penalty and attorney fees, the parties argue largely only in terms of penalty and attorney fees. The imprecision is of no moment to our decision, and we will follow the parties' preferred expression.
- 4 The City's post-trial motion was filed on February 6, 2013, and ASE's was filed two days later. The court heard argument on July 12, 2013. The parties do not raise any challenge deriving from the manner of entry of judgment on the verdict.
- 5 "Force account work is work that goes beyond that set forth in the contract and is generally paid on a time and material basis." *A. Scott Enterprises, Inc. v. City of Allentown*, 102 A.3d 1060, 1063 n. 1 (Pa.Cmwlth.2014), citing *Green Construction Co. v. Dep't of Transp.*, 164 Pa.Cmwlth. 566, 643 A.2d 1129, 1131 n. 1 (1994).
- 6 The court filed two opinions, in response to duplicate appeals filed by ASE. The second opinion, filed on May 29, 2014, incorporated the February 28, 2014 opinion in its entirety. *A. Scott Enterprises*, 102 A.3d at 1064 n. 3; ASE's Brief at 8.
- 7 The Commonwealth Court also confirmed ASE is entitled to some statutory interest on the verdict amount, and directed the trial court on remand to mold the verdict to include certain items of pre- and post-judgment interest. *A. Scott Enterprises*, 102 A.3d at 1072–73. The issue of judgment-related interest is not before us in this appeal.
- 8 Section 512 provides:
 - (a) Penalty for failure to comply with act.—If arbitration or litigation is commenced to recover payment due under this act and it is determined that an owner, contractor or subcontractor has failed to comply with the payment terms of this act, the arbitrator or court **shall** award, in addition to all other damages due, a penalty equal to 1% per month of the amount that was wrongfully withheld. An amount shall not be deemed to have been wrongfully withheld to the extent it bears a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor against whom the contractor or subcontractor is seeking to recover payment.
 - (b) Award of attorney fee and expenses.—Notwithstanding any agreement to the contrary, the substantially prevailing party in any proceeding to recover any payment under this act **shall** be awarded a reasonable attorney fee in an amount to be determined by the court or arbitrator, together with expenses.73 P.S. § 512 (emphases added).
- 9 Employment Retirement Income Security Act of 1974, 29 U.S.C. Ch. 18, § 1001 *et seq.*
- 10 The statute provided, "The Board of Finance and Revenue shall have the power, and its duty shall be, (a) To hear and determine any petition for the refund of taxes, license fees, penalties, fines, bonus, or other moneys paid to the Commonwealth and to which the Commonwealth is not rightfully or equitably entitled, and, upon the allowance of any such petition, to refund such taxes, license fees, penalties, fines, bonus, or other moneys, out of any appropriation or appropriations made for the purpose, or to credit the account of the person, association, corporation, body politic, or public officer entitled to the refund." 23 A.2d at 739 (quoting 72 P.S. § 503). The statute also provided the Board's decision

"shall be final," and the lower court took this language to mean there could be no appeal; this Court reversed that holding and allowed mandamus relief. *Id.* at 743.

11 We need not posit a hypothetical situation where an outright denial of an award would be a sustainable exercise of discretion.

12 We are unpersuaded by the City's argument that any question of the propriety of the trial court's exercise of discretion is not subsumed within our grant of review. Indeed, under what the City itself has realized are unusual procedural circumstances here, we believe ASE is in a similar issue-preservation posture respecting its alternative argument as the City was respecting the Commonwealth Court holding an award is mandatory. The competing issues—is an award mandatory or not and, if not mandatory, was there an abuse of discretion or not—should have developed with greater specificity in the trial court, but did not for the reasons we have described in text. Our mandate allows both parties the opportunity to develop their positions before the trial court, including the interposition of objection premised upon waiver, at the trial level. "The edifice of justice stands, its symmetry, to many, greater than before." *Palko v. State of Connecticut*, 302 U.S. 319, 328, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (Cardozo, J.), *overruled by Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

1 Note that pursuant to section 3935(a), where notice is provided pursuant to section 3934, such amounts are deemed not to have been withheld in bad faith. 62 Pa.C.S.A. § 3935(a).

2 On the other hand, given the potential severity of awards under section 3935, the General Assembly also established a high evidentiary burden (proof of bad faith) for their imposition. Under section 3935, a finding of bad faith requires proof that the withholding of payment was either done arbitrarily or vexatiously. 62 Pa.C.S.A. § 3935. This Court has held that arbitrary conduct must be shown to be "based on random or convenient selection or choice rather than on reason or nature[.]" and vexatious conduct has "the sole purpose of causing annoyance." *Thunberg v. Strause*, 545 Pa. 607, 682 A.2d 295, 299 (1996).

For this reason, I reject the Majority's assertion that the language of section 512(a) of the Contractor and Subcontractor Payment Act ("CASPA") provides an apt parallel to section 3935 of the Procurement Code. The relevant portion of section 512(a) provides that where a party has failed to comply with CASPA's payment terms, an arbitrator or court shall award an interest penalty on the amount that was "wrongfully withheld." 73 P.S. § 512(a). Section 512(a) further provides that an amount will not be considered to have been wrongly withheld if it "bears a reasonable relation to the value of any claim held in good faith by the owner, contractor or subcontractor...." *Id.* This is a lower evidentiary obligation than is proof of bad faith under section 3935. In addition, under CASPA, attorneys' fees are awarded to the substantially prevailing party as of right, without the need for any showing of misconduct. 73 P.S. § 512(b).

3 The Majority does observe that awards under the Procurement Code "implicate the public treasury," but does not explain why this should be a relevant factor for consideration under section 3935. Majority Op. at ——. While it is of course true that the Procurement Code, of necessity, implicates the public treasury, no provision in the Procurement Code authorizes, or even implies, a government agency may ever ignore its payment obligations to private parties merely because such payments are made from the public treasury. To the contrary, as indicated hereinabove, the Procurement Code plainly states, in no uncertain terms, that "[t]he government agency shall pay the contractor or design professional strictly in accordance with the contract." 62 Pa.C.S.A. § 3932(a). Where a government agency fails to do so, and that failure is proven to have been in bad faith, section 3935 must result in the imposition of attorneys' fees and interest penalties. The fact that public funds are at issue is taken into account by the higher evidentiary standard of proof of bad faith to support the award of interest penalties and attorneys' fees.

4 See, e.g., N.T., 1/22/2013, 879, 883, 1302–13; City's Reply Brief at 2–3.