**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**TRIAL DIVISION-CIVIL**

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| BENSALEM RACING ASSOCIATION, INC. And KEYSTONE TURF CLUB, INC., | : | February Term 2016 |
| Plaintiff, | : | No. 4858 |
| v. | : | |
| ACE PROPERTY AND CASUALTY INSURANCE COMPANY, | : | Commerce Program |
| Defendant. | : | Control Nos. 16061758/16101436 |

**ORDER**

**AND NOW**, this 20th day of January 2017, upon consideration of Plaintiffs' Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment, all responses in opposition and in accord with the attached Memorandum Opinion, it hereby is **ORDERED** as follows:

1. Plaintiffs' Motion for Summary Judgment to Count I (breach of contract) is **Denied**.
2. Defendant's Motion for Summary Judgment to Count I (breach of contract) is **Granted**.
3. The stay as to Count II (bad faith) is vacated and the count is dismissed.

**BY THE COURT,**

**RAMY I. DJERASSI, J.**

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| BENSALEM RACING ASSOCIATION, INC. And KEYSTONE TURF CLUB, INC., Plaintiff, | : | February Term 2016 |
| | : | No. 4858 |
| v. | : | |
| ACE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant. | : | Commerce Program |
| | : | Control Nos. 16061758/16101436 |

**MEMORANDUM OPINION**

This is an action for breach of an insurance contract and bad faith for failing to pay punitive damages awarded by a jury against Parx Racing in *Calderon v. Philadelphia Park Casino and Racetrack, et. al.*, 1205-2939 ("underlying action"). Bensalem Racing Association, Inc. and Keystone Turf Club, Inc. (hereinafter "Parx") are the plaintiffs and Ace Property and Casualty Insurance Company (hereinafter "Ace") is the defendant.

## I. The Ace Policy

Parx owns and operates Parx Racetrack in Bensalem, Pennsylvania. Ace issued an insurance policy relevant to this case for the period April 1, 2010 to April 11, 2011. The Ace policy is a commercial umbrella liability policy with a limit of $25,000,000 for each occurrence and in the aggregate. The policy's general liability insurance coverage is not implicated unless and until the $1,000,000 aggregate limit of an underlying primary-layer commercial general liability insurance policy was exhausted. The umbrella policy provides in relevant part that defendant "will pay on behalf of the 'insured' those sums in excess of the 'retained limit' that the 'insured' becomes legally obligated to pay as damages because of 'bodily injury' …to which this insurance applies." The retained limit for the policy is $10,000. The policy defines "bodily injury" to include "bodily injury, sickness or disease sustained by a person, including death

resulting from any of these at any time." The policy also provides that defendant "will have the right and duty to defend the insured against any suit seeking damages for bodily injury" which exposes the insured to liability beyond primary coverage. The Ace umbrella policy also gives the insurance company, "the right but not the duty to associate in the investigation of any claim and the defense of any suit which may, in defendant's opinion result in damages to which this insurance applies." Finally, the umbrella policy does not contain a written exclusion for punitive damages.

## II. The Underlying Action

On May 30, 2010, Mario Ramiro Calderon was injured in an accident that took place while he exercised a race horse at the Parx Racetrack in Bensalem, Pa. The accident was allegedly caused when a chicken on the racetrack spooked the horse on which Calderon was riding causing Calderon to fall, suffer injury and die. On May 24, 2012, Calderon's estate filed a wrongful death and survival action against Parx and its related entities for negligence in allowing chickens to roam freely on the racetrack premises and the racetrack itself. No Parx employees were identified as defendants. The Estate was granted leave of court to file a second amended complaint to add a claim for punitive damages alleging that Parx knew that the presence of chickens on or near the racetrack posed a serious danger to horse riders and no steps were taken by Parx to ban the chickens from the track and premises. Ace exercised its right under the policy to associate in the defense of the Calderon action. On March 6, 2014, Ace issued a reservation of rights letter wherein Ace reserved its right to disclaim coverage under the policy for any punitive damages that might be awarded at the Calderon trial.

A jury trial was held before the late Honorable Albert John Snite, Jr. from March 31, 2014 to April 9, 2014. At no time during the trial was the specific phrase "vicarious liability" used and

vicarious liability was not charged to the jury. On April 9, 2014, the jury returned a verdict in favor of the underlying plaintiff and against Parx and awarded a total of $7,764,429; $2,264,429 was attributable to the Wrongful Death Act, $500,000 was attributable to the Survival Act and $5,000,000 was attributable to punitive damages. Ace declined to indemnify Parx for the punitive damage award.

Parx filed post-trial motions which the trial court denied. An appeal was filed with the Superior Court. In November 2015, prior to the appeal being decided, Parx finalized a settlement with the Calderon plaintiff for $5,500,000; $2,746,429 was attributable to compensatory damages, $88,196.64 to delay damages and $2,647,374.36 to punitive damages. Ace did not object to the settlement. Ace tendered payment of $1,820,874.85, representing its share of the compensatory and delay damages portion of the settlement of the *Calderon* Action. Ace did not make any payments toward the punitive damage component of the settlement. Parx paid the punitive damages directly to the Calderon plaintiff. In February 2016, Parx filed the instant action for breach of contract and bad faith to recover the punitive damages component of the settlement paid to the Calderon plaintiff. Presently before the court are the parties' cross motions for summary judgment.

**DISCUSSION**

In the case *sub judice,* the only issue before this court is whether Ace is responsible to reimburse Parx the punitive damage component of the *Calderon* settlement. It is undisputed that the Ace policy does not contain an exclusion for punitive damages. Ace relies upon a violation of Pennsylvania law and its public policy to exclude coverage for punitive damages.[1] It is Pennsylvania's longstanding rule that a claim for punitive damages against a tortfeasor who is

[1] *See, United States Auto Ass'n. v. Elitzky*, 358 Pa. Super. 362, 369, 517 A.2d 982, 986 (1986).

personally guilty of outrageous and wanton misconduct is excluded from insurance coverage as a matter of law. "Public policy does not permit a tortfeasor ... to shift the burden of punitive damages to his insurer." *Esmond v. Liscio.*[2] This rule is based on the view that punitive damages are not intended as compensation but rather are a penalty, imposed to punish the defendant and to deter him and others from similar 'outrageous' conduct." As stated in *Esmond*, "To permit insurance against the sanction of punitive damages would be to permit such offenders to purchase a freedom of misconduct altogether inconsistent with the theory of civil punishment which such damages represent." [3]

An exception to this no punitive damages rule exists where an insured's liability stems *solely* from vicariously liability:

> The Court stated: "In this situation where there was no direct or indirect violation on the part of the master in the commission of the act, no public policy is violated by protecting him from the unauthorized and unnatural act of his servant. In general, allowing one who is only vicariously liable for punitive damages to shift the burden of satisfying the judgment to his insurer does not conflict with the rule of policy which we announce today.[4]

This limited exception for vicarious liability does not apply to Parx here. The focus of the underlying trial was on Parx's liability as a landowner, its knowledge that chickens regularly walked on the racetrack and premises and knew that this posed a serious risk of injury or death to the decedent and what actions, if any, were taken by Parx to prevent harm. Based on the evidence presented, Judge Snite instructed the jury in the underlying *Calderon* case as follows:

> I'm going to refer to Parx as the owner of land because there are certain rules concerning owners of land and built into this is the rule of law for a racetrack.

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[2] *Esmond v. Liscio*, 209 Pa.Super. 200, 224 A.2d 793, 799 (1966).

[3] *Id.*

[4] *Id.*

> An owner of land is required to use reasonable care in the maintenance and use of the land and to protect people that it invites on to its property from foreseeable harm, protect people from foreseeable harm by using reasonable care in the maintenance and use of the land. An owner of land is also required to inspect the premises and to discover dangerous conditions.
> An owner of land is liable for harm caused to people it invites upon its property by a condition that exists on the land if—and these are the three rules here—the owner knows or by using reasonable care would discover the dangerous condition and should realize that it involves an unreasonable risk of harm; and the owner should expect either that the people coming upon the property will fail to protect themselves against it; and the owner fails to take every reasonable precaution to make their premises safe as to protect the people it invites upon its land against a danger.
> An owner of land is liable to people it allows on its property for any harm that the owner should have anticipated regardless of whether the danger is known or obvious. That is the duty.[5]

The jury also was provided with the following instructions regarding the verdict sheet:

> The verdict sheet says, Number 1: "Do you find that defendant Parx was negligent?" It's a "Yes" or "No."
> If you answer is "Yes", then you have found that the plaintiff has proven Parx did not comply with the duty they had to people who came upon their land. If you say "No" then you say Parx wasn't negligent and the case is over. [6]

Parx directs this court's attention to the testimony of an employee to support its position that the *Calderon* jury's award for punitive damage was based on vicarious liability. However, Parx's reliance upon this testimony does not establish that the punitive award was based *solely* on vicarious liability as required by *Esmonde* and its progeny. On the contrary, the record is filled with evidence of Parx's own direct negligence based on its knowledge of the chickens' presence and the company's failure to address the problem. For instance: (1) In January 2010, Parx's chief of security Lance Morell was informed about chickens spooking horses on the

[5] Exhibit "10" to Plaintiffs' Motion for Summary Judgment pp. 28-29.

[6] Id. at p. 32.

racetrack and responded there was nothing they could do to prevent them;[7] (2) Victor Molina, vice president of the jockey association, testified that he spoke about the presence of chickens on the racetrack with Morell prior to the accident[8]; (3) Salvatore Sinatra, a race director at the track testified that it was not his job to remove the chickens from the track. He said Parx set no prohibitions against the presence of chickens on the track but conceded that he knew that allowing chickens on the track presented serious risk of injury or death to the riders[9]; (4) Roy Smith, also a race director, testified that he also regularly saw chickens on the racetrack but no one at Parx was assigned responsibility to round up the chickens and keep them off the track and premises[10]; (5) David Ziegler, director of facilities and construction, testified that he had not been concerned with the chickens as part of his job, and he did not know anyone at Parx who was assigned to keep the track and premises free of them;[11] and (5) Joseph Wilson, operating officer for Parx, testified that he knew of a prior injury resulting from chickens on a race track and agreed that he could have banned the chickens from the racetrack, but did not. He said he thought Sinatra and Morell were responsible for rounding up chickens on the premises, but he did not provide any corroboration besides his belief.[12].

This evidence, along with the court's jury instruction on the duties of a land owner and the court's explanation of the verdict sheet, is persuasive that the jury's punitive damages award

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[7] Exhibit "H" to Defendant's Response to Plaintiffs Motion for Summary Judgment citing N.T. 3/31/14, 8-17.

[8] Id. citing, N.T. 3/31/14, p. 33.

[9] Id. citing, N.T. 4/1/14 pp. 37-38 and N.T. 4/2/14- pp. 18-29.

[10] Id. citing N.T. 4/3/14 pp. 56, 62-63.

[11] Id. citing N.T. 4/03/14 p. 83.

[12] Id. citing N.T. 4/07/14 p. 33.

was against Parx for its own direct negligence. The company had failed to maintain a safe racetrack, even as it was aware of the risks. Parx could have taken action, but did not. Landowners like Parx have a duty to protect an invitee not only against known dangers, but also against dangers that might be discovered with reasonable care.[13] The fact that Parx's corporate responsibility stems from actions of its employees does not preclude its own direct liability. If a jury finds that a corporation has committed an outrageous dereliction of duty, punitive damages are appropriate.[14]

In support of its position that punitive damages are recoverable, Parx relies upon *Butterfield v. Giuntoli* but this reliance is misplaced.[15] In *Butterfield,* plaintiff sued individual doctors and sought damages from them as individual persons. The *Butterfield* jury found these doctors were negligent and apportioned damages among them. In our case here, no individual Parx employee was sued, let alone found liable. Also, the *Butterfield* Court examined punitive damages in the context of liability based *solely* on vicarious liability, whereas in the underlying case vicarious liability was not the sole negligence theory against Parx.[16] The *Calderon* jury found that Bensalem Racing Association, Inc. and Keystone Turf Club, Inc. ("Parx") was a landowner that

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[13] *Funari v. Valentino*, 435 Pa. 363, 257 A.2d 259 (Pa. 1969).

[14] *See, Pennbank v. St. Paul Fire and Marine Ins. Co.*, 669 F. Supp. 122 (1987).

[15] *Butterfield v. Giuntoli*, 448 Pa.Super. 1, 670 A.2d 646 (1996), *appeal denied* 546 Pa. 635, 683 A.2d 875 (1996).

[16] While *Butterfield* affirms and applies the *Esmonde* holding that Pennsylvania public policy allows recovery of punitive damages where the insured is *only* vicariously liable for the damages, the Court goes on to make a statement that the insurance carrier has the burden to show that the jury "assessed the punitive damages *solely* on the basis of direct liability." This court notes that prior holdings of other courts discussing the same issue and cited within the *Butterfield* opinion do not stand for the later proposition and only hold that Pennsylvania does not preclude recovery of punitive damages from an insurer where the insured is *only* vicariously liable for such damages. See, *Pennbank v. St. Paul Fire and Marine Insurance Co.* 669 F.Supp. 122 (1987) and *Esmond,,supra*, at 800 . However, the policy articulated in *Butterfield* is well-settled. Where there is direct liability, punitive damages are not insurable because the responsible party for outrageous conduct should be punished and not have an insurance company pay and effectively mitigate the penalty to the wrongdoer.

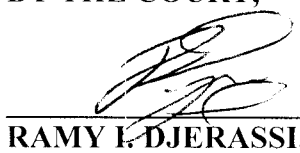
engaged in direct negligence. Going further, the jury found that Parx knew, or should have known, of the serious risks of bodily injury and death to horse riders caused by chickens on its racetrack and premises, and then did nothing.

Consistent with Pennsylvania law and public policy, punitive damages based on Parx's direct liability may not be insured and are therefore not recoverable from Ace.

## CONCLUSION

Based on the foregoing, Plaintiffs' Motion for Summary Judgment to Count I (breach of contract) is **Denied**; Defendant's Motion for Summary Judgment to Count I (breach of contract) is **Granted** and the stay as to Count II (bad faith) is vacated and the count is dismissed.[17]

**BY THE COURT,**



**RAMY I. DJERASSI, J.**

[17] Since this court finds that there is no coverage for punitive damages, there can be no bad faith. As such, Count II is dismissed. *See Scopel v. Donegal Mut. Ins. Co.*, 698 A.2d 602, 605 (Pa.Super.1997) (observing that if there is no duty to defend, there can be no duty to indemnify); *Johnson v. Progressive Ins. Co.*, 987 A.2d 781, 784 (Pa.Super.2009) (observing that bad faith is present if there was no reasonable basis for denying benefits).