

IN THE SUPREME COURT OF OHIO

SST BEARING CORPORATION,)
)
 Plaintiff-Appellee)
)
 v.)
)
TWIN CITY FAN COMPANIES, LTD.,)
)
 Defendant-Appellant.)

Case Nos. 2012-1197
 2012-1221

On Appeal from the Hamilton
 County Court of Appeals
 First Appellate District

Court of Appeals
 Case No. C-110611

**APPELLANT TWIN CITY FAN COMPANIES, LTD.
 MOTION FOR RECONSIDERATION**

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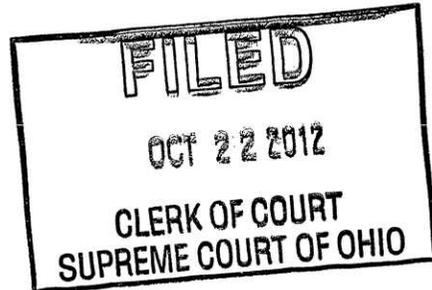
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Defendant-Appellant Twin City Fan Companies, Ltd. respectfully requests reconsideration by this Court of its recent decisions on the First District Court of Appeal's order certifying a conflict in this case (No. 2012-1197) and on Twin City's separate request for discretionary review in the same matter (No. 2012-1221). Both cases were resolved by this Court by narrow four to three margins. Twin City Fan believes that the importance of the issues at stake—and the existence of a conflict among the court of appeals on whether plaintiffs can recover attorneys' fees in a breach of contract action absent contractual agreement by the parties—warrant a second look by this Court. The implications are far reaching, beyond the bounds of this case, and Twin City Fan files this short memorandum in both cases in support of its request.

This is a breach of contract case. The questions for this Court surround whether the trial court appropriately awarded attorneys' fees to SST upon a finding of "bad faith"—not in the conduct of the litigation or as a sanction for litigation conduct—but for "bad faith" breach of contract. There was no separate award of punitive damages here and indeed there was no tort cause of action or finding of any bad faith litigation conduct to support a fee award. To the contrary, in its decision, the trial court expressly thanked counsel for both parties for a well-tryed case.

The First District certified that there indeed exists a conflict as to whether "bad faith" breach of contract is recognized in Ohio as an exception to the "American Rule" absent a basis to award punitive damages. Absent resolution of this conflict, plaintiffs with breach of contract claims will have an incentive to file within the First District, and to avoid the Eighth and Twelfth Districts, in order to have a claim for attorneys' fees in the absence of any contractual provision for them.

A broader question, upon which an even more fundamental conflict exists that warrants and needs this Court's clarity, is whether "bad faith" in the performance of a contract, not in the conduct of the litigation, can carry with it the consequence of an award of attorneys' fees. And although this Court has repeatedly acknowledged a bad faith exception to the American Rule, it has never permitted a recovery for attorneys' fees for bad faith in the performance or non-performance of a contract, as opposed to bad faith litigation conduct. To the contrary, and contrary to what SST has asserted, this Court's longstanding decision in *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922), held precisely the opposite: that punitive damages are not recoverable in breach of contract cases. And if there is no such thing as a breach of contract that is sufficiently in "bad faith" to justify punitive damages, there is also no such thing as a breach sufficiently in "bad faith" to justify an award of attorneys' fees. Allowing an award of attorneys' fees in such cases will change the way that breach of contract cases are pled and litigated in Ohio. This Court has never recognized the existence of these expansive types of remedies for breach of contract actions.

The conflict that the First District certified is straightforward: whether an attorneys' fees award can be permitted without an award of punitive damages. Here, there was no punitive damages award and the trial court expressly found there was no basis to support such an award.¹ In *Williams v. Crawford*, 8th Dist. No. 72936, 1998 WL 767617 (Oct. 29, 1998), the court stated that in "Ohio, punitive damages are a prerequisite to an award of attorney fees." And in *Padgett v. Sanders*, 130 Ohio App.3d 117, 122, 719 N.E.2d 636, 639 (12th Dist. 1998), the court stated the same thing. That

¹ And, of course, consistent with *Ketcham, supra*, there could not legally have been a punitive damages award.

court also suggested that an attorneys' fees award can be justified if "the legal standard for punitive damages could have been met." Here, there was no finding on that point and no tort at issue, so that is immaterial.

To be sure, both cases were tort cases and not breach of contract cases, but the holdings regarding punitive damages as a prerequisite for an attorneys' fees award are clear and in direct conflict with the First District's decision here. *Padgett* also recognizes that a fee award could be justified if there is a basis for sanctions for litigation conduct under Rule 11. 130 Ohio App.3d at 122. But again, that was not the basis for the trial court's award here. The "breach by [Twin City] was in bad faith," not its conduct in the litigation. *SST Bearing Corp. v. Twin City Fan Cos.*, 2012-Ohio-2490, ¶27. So the question here is whether attorneys' fees for bad faith breach can be awarded where there was no punitive damages award and no sanctionable conduct or enforceable fee-shifting provision.

Importantly, this case also raises what is a more fundamental question about remedies in breach of contract cases generally. *Twin City Fan* will not repeat every case citation that it laid out previously, but this more fundamental issue is illustrated by *Argrov Box Co. v. Illini Four Co.*, 2d Dist No. CA6947, 1981 WL 2827 (June 15, 1981). In that case, the court specifically rejected an award of attorneys' fees after concluding that the case sounded in contract and not in tort. *Id.* at *4, 6. Because that case was "ex contractu," just like here, the court held that neither attorneys' fees nor punitive damages were available. The court specifically contrasted cases involving "an ordinary contract between businessmen," from insurance cases where some courts had "allowed a tort recovery for a malicious refusal to perform a contractual obligation." *Id.* at *4. The

present case plainly falls into the former category. In its opposition to Twin City Fan's memorandum in support of jurisdiction, SST says that the case does not mention "bad faith." (See Mem. in Opp. 2.) But that is not true, the court discusses and contrasts the "malicious refusal" to perform a contract, which is tantamount to the bad faith that the trial court found here. *Id.* at *4. Again, the difference between *Argrov Box* and this case is at a fundamental level. In *Argrov Box*, the court concluded that attorneys' fees were not available as a legal matter once it found that the matter sounded in contract and was not an insurance case—whether bad faith was present or not was not relevant. *Accord*, e.g., *Sims v. Cleveland Builders Corp.*, 8th Dist. No. 55153, 1989 WL 27760 (Mar. 23, 1989) (in breach of contract case, punitive damages and attorneys' fees are not recoverable). That is the complete opposite of what happened here.

Even more broadly, this case conflicts with any contract case that has refused to allow tort remedies for ordinary breach of contract. The "general rule in Ohio is that irrespective of the motive on the part of the defendant and no matter how willful the breach, punitive damages are not recoverable in an action for breach of contract." *Kruse v. Vollmar*, 83 Ohio App.3d 378, 386, 614 N.E.2d 1136, 1141 (6th Dist. 1992); *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922). Indeed, the broader question raised by this conflict implicates the motivation behind a breach of contract, and raises a host of questions under Ohio law, like whether other tort-like remedies such as emotional distress damages, non-consequential damages, and punitive damages, ought to be available in a breach of contract case with no tort cause of action. See, e.g., *Sorensen v. Wise Mgmt. Servs.*, 8th Dist. No. 81627, 2003 WL 361286 (Feb. 20, 2003) ("the law

generally does not distinguish between good and bad motives for breaching a contract”) (internal quotation omitted).

What is clear is that most of the cases that SST has cited for its arguments that the award here is consistent with a “bad faith doctrine” or bad faith exception to the American Rule involve bad faith litigation conduct, which is not at issue here. Those cases do not involve bad faith breaches of contract *i.e.*, prelitigation bad faith in performing or not performing the contract. Those cases involve bad faith or vexatious litigation conduct. Indeed, SST highlights *Chambers v. NASCO*, 501 U.S. 32 (1991) to illustrate its argument. (Mem. in Opp. 1.) But that case, on its face, involved “sanctions [] imposed for conduct during the litigation.” 501 U.S. at 54. And it was clear that the trial court “did not attempt to sanction petitioner for breach of contract, but rather imposed sanctions for the fraud he perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of the litigation.”² *Id.*; accord, e.g., *Metz v. Unizan Bank*, 655 F.3d 485, 489 (6th Cir. 2011) (case involved “imposition of sanctions under the bad faith standard”).³ A clear reading of *Chambers*

² On the first page of SST’s opposition to Twin City Fan’s memorandum in support of jurisdiction, in discussing *Chambers*, SST asserts that the award in *Chambers* was based on the defendant’s bad faith breach of the contract mirroring the trial court’s decision here. In support, SST cites a *dissent* from *Chambers* without indicating that it was a dissent. Indeed, the dissenting and majority opinions did spar over the question of whether the fee award was a sanction for a breach of contract because the dissents *agreed* that the fee award would have been inappropriate in that circumstance. See 501 U.S. at 60 (Scalia, J., dissenting); 501 U.S. at 74 (Kennedy, J., dissenting). That’s why the majority opinion in *Chambers* specifically holds that the sanction was for bad faith litigation conduct, not pre-litigation conduct.

³ See *Association of Flight Attendants, AFL-CIO v. Horizon Air Indus. Inc.*, 976 F.2d 541, 550 (9th Cir. 1992) (“No federal appellate authority in or out of the Ninth Circuit has clearly approved an order shifting attorney’s fees based solely upon a finding of bad faith as an element of the cause of action presented in the underlying suit.”)

confirms that it does not support SST's position that the trial court's decision is consistent with recognized "bad faith" doctrine.

This Court's decision in *Sorin v. Board of Educ. of Warrensville Hts. School Dist.*, 46 Ohio St.2d 177, 347 N.E.2d 527 (1976) is no different. In *Sorin*, the Court recognizes that bad faith in a tort case can result in attorneys' fees or punitive damages but otherwise shifts its focus to whether "*proceedings were instituted . . . in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons*" for cases not sounding in tort. SST cites what it deems "bad faith" cases from this Court but make no mistake: There is no case from this Court that permits the recovery of attorneys' fees in an ordinary breach of contract case for "bad faith" breach of contract. SST has certainly not cited any.

To be sure, while the above statements are without question true, there is some imprecision in the language in some of this Court's cases that SST has latched onto. In *State ex rel. Waiters v. Szabo*, 129 Ohio St.3d 122, 2011-Ohio-3088, 950 N.E.2d 546, ¶ 15, for example, this Court noted, in passing, that a "bad faith" exception to the American Rule exists without specifically stating that such "bad faith" is in the conduct or institution of litigation—though again, *Szabo* did not permit a fee award on its facts in a breach of contract case. Similarly, in *Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, 906 N.E.2d 396, ¶ 7, which involved a fee award based on a contract provision, the court, in reciting the exceptions to the American Rule, simply noted one for "bad faith on the part of the unsuccessful litigant," without any qualification or application. And *Sharp v. Norfolk & Western Ry. Co.*, 72 Ohio St.3d 307, 649 N.E.2d 1219 (1995) repeats the same "bad faith" language but was actually a tort case where the

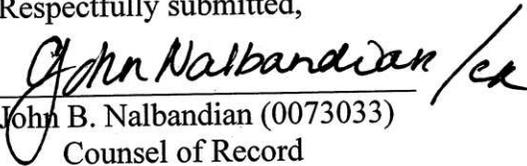
plaintiff had simply failed to prove his case for either attorneys' fees or punitive damages.⁴

It is true that there are lower court cases in Ohio that appear consistent with what the First District did here and illustrate the depth of the conflict in the lower courts on this issue. What appears to have happened is that these lower courts, like the First District here and the Sixth District in another recent case, *Dodson v. Maines*, 6th Dist. No. S-11-012, 2012 WL 2061608 (June 8, 2012), have taken this Court's general "bad faith" language (intended to cover litigation conduct or sanctions) and expanded it to permit attorneys' fees recoveries in actions that involved bad faith in the underlying performance of a contract. *See also Columbus Medical Equipment Co. v. Watters*, 13 Ohio App.3d 149, 153, 468 N.E.2d 343, 348 (10th Dist. 1983) (approving attorneys' fees award where defendant "acted in bad faith in her dealings with plaintiff"). But this type of expansion in what the recoverable remedies can be in a breach of contract case should only be done by this Court or the legislature.

What is plainly apparent is that without a clear statement from this Court, either way, a conflict and confusion will persist in Ohio on these issues in the courts of appeals. The First District recognized this problem and certified a conflict to obtain that clarity. As such, Twin City Fan respectfully requests reconsideration of this Court's decisions on the First District's certification of a conflict and on Twin City Fan's memorandum in support of jurisdiction that this case is of great general interest.

⁴ *Sharp* itself cited *State ex rel. Kabatek v. Stackhouse*, 6 Ohio St.3d 55, 55-56, 451 N.E.2d 248, 249 (1983) in support of its bad faith language. In *Kabatek*, this Court rejected a bad faith argument that there was "dilatatory conduct designed to prolong litigation" on the part of the party against whom fees were sought. 6 Ohio St.3d at 56.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of October, 2012, I served a copy of the foregoing via electronic mail and U.S. First Class Mail, postage prepaid, upon:

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