ORIGINAL

IN THE SUPREME COURT OF OHIO

SST BEARING CORPORATION, Plaintiff-Appellee, **-vs-** **TWIN CITY FAN COMPANIES, LTD.,** Defendant-Appellant.	**Case Nos. 12-1197 & 12-1221** **On Appeal from the Court of Appeals** **First Appellate Judicial District** **Hamilton County, Ohio** **Appeal No. C1100611**

PLAINTIFF-APPELLEE SST BEARING CORPORATION'S MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

Seeking a second bite at the apple, Appellant Twin City Fan Companies, Ltd. ("TCF") has filed a motion for reconsideration of this Court's entry dismissing TCF's Notice of Certified Conflict (Case No. 2012-1197), as well as its entry declining discretionary review (Case No. 2012-1221). TCF's Motion, however, is improper, as an entry dismissing an appeal for want of conflict following the filing of a Notice of Certified Conflict cannot be reconsidered under Rule 11.2. Additionally, the Motion constitutes impermissible reargument under Rule 11.2, as it reasserts the same arguments made in its Notice of Certified Conflict and Memorandum in Support of Jurisdiction, again claiming there is somehow a conflict among Ohio courts on the issue of whether attorneys' fees are awardable for bad faith in a contract action. More fundamentally, the purported "conflict" TCF cites is no conflict at all. Ohio courts have consistently held that litigants, such as Appellee SST Bearing Corporation ("SST"), can obtain attorneys' fees for the bad faith of the other party, including in contract actions.[1] Accordingly, TCF's Motion should be denied.

II. ARGUMENT

A. TCF's Motion for Reconsideration Is Procedurally Improper.

As a threshold matter, TCF's Motion for Reconsideration is not permitted under the Supreme Court Rules of Practice. Though TCF couches its Motion as seeking a reconsideration

[1] TCF makes no effort to challenge the trial court's finding that it engaged in bad faith -- for good reason, as its conduct was egregious. The trial court found that TCF's proffered "good cause" for cancelling its contract with SST – that the goods at issue were purportedly defective – was false. (T.d. 108, p. 2.) TCF retained an expert to support its false position, who formed his conclusions before even examining the bearings and admitted that he wanted to "displace SST and get the business for" his own company. (*Id.*) The court noted that "TCF had no loyalty to the contract with SST" and tried to take SST's prices to try and leverage competitors to give TCF a better price. (*Id.*) TCF further admitted that it was attempting to get trade secret information from SST for which it had no need, which the court found to be evidence of fraud. (*Id.*, p. 3.)

of both this Court's entry declining jurisdiction and the entry dismissing TCF's appeal for want of conflict, in reality, TCF's brief focuses almost exclusively on this Court's dismissal entry. Supreme Court Rule of Practice 11.2(B) provides, in pertinent part:

> (B) A motion for reconsideration shall not constitute a reargument of the case and may be filed only with respect to the following:
>
> (1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal or the dismissal of a claimed appeal of right as not involving a substantial constitutional question;
> (2) The sua sponte dismissal of a case;
> (3) The granting of a motion to dismiss;
> (4) A decision on the merits of a case.

S.Ct.Prac.R. 11.2(B) (effective 6-1-94). The entry dismissing TCF's appeal based on a Notice of Certified Conflict meets none of the criteria of Rule 11.2(B), as it is not an Order refusing to grant jurisdiction to hear a discretionary appeal or a claimed appeal of right, the granting of a motion to dismiss, or a decision on the merits. Moreover, the entry is not a *sua sponte* dismissal of the case. This Court did not act on its own in dismissing the action, but instead acted in response to TCF's filing of the Notice of Certified Conflict and in accordance with the provisions of Rule 4.2, which provides that, upon receiving such notice, "[i]f the Supreme Court determines that a conflict does not exist, it will issue an order dismissing the case." S.Ct.Prac.R. 4.2; *compare id.* at R. 12.2 (noting that once the Court finds a conflict in response to a notice filed pursuant to Rule 4.2, it may later find there is no conflict and "***sua sponte dismiss*** the case as having been improvidently certified") (emphasis added). Consistent with this, the dismissal entry does not indicate that it is a *sua sponte* dismissal. This Court should therefore dismiss TCF's Motion for Reconsideration.

TCF's Motion is also an improper effort to reargue its Notice of Certified Conflict and Memorandum in Support of Jurisdiction. The Supreme Court Rules of Practice expressly

provide that a motion for reconsideration "shall not constitute a reargument of the case." S.Ct.Prac.R. 11.2(B). Throughout its brief, TCF simply repeats the same arguments it previously made to this Court as to the existence of a purported conflict among Ohio's courts, apparently hoping this Court will change its mind. Indeed, the only additional rationale TCF presents is its suggestion that this Court should take a "second look" at the issue. Such reargument, however, is inappropriate and TCF's Motion should be denied.

B. This Case Does Not Involve a Conflict or a Question of Public or Great General Interest.

TCF's Motion should also be denied because there is no conflict as to whether attorneys' fees are properly awardable for a party's bad faith in a contract action, and this case consequently does not involve a question of public or great general interest. Though TCF derides this Court's prior decisions as being "imprecise," there is no mistaking that this Court (as ultimately conceded by TCF) has long recognized a bad faith exception to the American Rule. In *Sharp v. Norfolk & Western Railway*, this Court noted that "[i]t is well-settled law that where there is no statutory provision for attorney fees, the prevailing party is not entitled to an award of attorney fees unless the party against whom the fees are taxed was found to have acted in bad faith." 72 Ohio St.3d 307, 314, 649 N.E.2d 1219 (1995) (citing *Sorin v. Board of Ed. of Warrensville Hts. School Dist.*, 46 Ohio St.2d 177, 347 N.E.2d 527 (1976)). This Court recognized this exception again in *State ex rel. Waiters v. Szabo*, 129 Ohio St.3d 122, 2011-Ohio-3088, 950 N.E.2d 546, ¶ 15.

Consistent with this Court's decisions, Ohio's appellate courts have uniformly applied the bad faith exception to the American Rule in contract cases, and these courts are decidedly not in conflict on this issue. As pointed out in SST's Memorandum in Opposition to Jurisdiction, the majority of the cases cited by TCF fail to even address the bad faith exception, and *all* of the

cases have since been superseded by decisions affirming the existence of a bad faith exception to the American Rule in contract cases. For instance, TCF relies, as it did in its Memorandum in Support of Jurisdiction, upon the Second Appellate District's 1981 decision in *Argrov Box Co. v. Illini Four Co.*, 2nd Dist. No. CA6947, 1981 Ohio App. LEXIS 13598 (June 15, 1981) as allegedly demonstrating a conflict. Yet the Second District recently and plainly accepted the existence of the bad faith exception in a breach of contract action and has also applied the exception in other contexts. *Thomason v. Hamilton*, No. 07-CA-60, 2008-Ohio-3492, 2008 Ohio App. LEXIS 2941, ¶¶ 9-10 (2nd Dist.) (noting the existence of bad faith doctrine in a contract case, but declining to apply it because bad faith had not been pled or proven); *see also Bd. of Trs. of Sinclair Cmty. College Dist. v. Farra*, 186 Ohio App.3d 662, 665, 929 N.E.2d 1105 (2nd Dist. 2010) (applying bad faith exception).

Similarly, the Eighth Appellate District's 1989 decision, in *Sims v. Cleveland Builders Corp.*, 8th Dist. No. 55153, 1989 Ohio App. LEXIS 1003 (March 23, 1989), has since been superseded by authority recognizing the existence of the bad faith doctrine in contract and other actions. *Weisman v. Blauschild*, No. 93928, 2010-Ohio-3199, 2010 Ohio App. LEXIS 2675 (8th Dist.) (recognizing the bad faith doctrine in a contract case, but declining to apply it because breach of contract had not been proven); *see also Calloway v. Wasik*, No. 92304, 2009-Ohio-6215, 2009 Ohio App. LEXIS 5209, ¶ 25 (8th Dist.) (recognizing attorneys' fees can be awarded if it is demonstrated that a party acted in bad faith). Indeed, decisions in *all* twelve appellate districts have recognized the bad faith exception in actions involving contract claims.[2]

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[2] *See, e.g.*, *SST Bearing Corp. v. Twin City Fan Companies, Ltd.*, No. C-110611, 2012-Ohio-2490, ¶¶ 29-30 (1st Dist.); *Thomason*, 2008 Ohio App. LEXIS 2941 at ¶¶ 9-10 (2nd Dist.); *Am. Premier Underwriters v. Marathon Ashland Pipeline*, No. 10-03-12, 2004-Ohio-2222, 2004 Ohio App. LEXIS 1967, ¶¶ 23-25 (3rd Dist.) (noting that bad faith was an available exception in a breach of contract action, but finding insufficient evidence of bad faith); *Watershed*

The Eighth District's decision in *Williams v. Crawford*, 8th Dist. No. 72936, 1998 Ohio App. LEXIS 5085 (October 29, 1998) and the Twelfth District's decision in *Padgett v. Sanders*, 130 Ohio App. 3d 117, 719 N.E.2d 636, 639 (12th Dist. 1998) are not inconsistent. TCF construes these cases as standing for the sweeping proposition that attorneys' fees are somehow only awardable following an award of punitive damages, regardless of whether a tort, contract, or other theory of relief is pursued. Yet this contention conflicts with TCF's earlier acknowledgement in its Motion that "this Court has repeatedly acknowledged a bad faith exception to the American Rule." (*See* TCF Motion to Reconsider, p. 3.) A punitive damages award is just one pathway that a prevailing party can utilize to obtain an award of attorneys' fees. *See, e.g.*, *Dodson*, 2012 Ohio App. LEXIS 2247, ¶ 39. *Williams* and *Padgett* accordingly only address a request for attorneys' fees under the "punitive damages" exception to the American Rule and do not address the bad faith exception. Further, as with the other authority cited by TCF, the Second and Twelfth Districts later issued decisions recognizing a bad faith exception to

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Management LLC v. Neff, No. 10CA42, 2012-Ohio-1020, 2012 Ohio App. LEXIS 888, ¶¶ 49-54 (4th Dist.) (finding that material issues of fact remained as to whether defendant acted in bad faith in withholding payment required under contract); *Stambaugh v. T.C. Wood Realty, Inc.*, No. 09 CA 00008, 2010-Ohio-3763, 2010 Ohio App. LEXIS 3205, ¶¶ 23-25 (5th Dist.) (affirming award of attorneys' fees in breach of contract action where bad faith was shown); *Dodson v. Maines*, No. S-11-012, 2012-Ohio-2548, 2012 Ohio App. LEXIS 2247, ¶¶ 39-43 (6th Dist.) (awarding attorneys' fees under bad faith exception for defendant's "vengeful" actions); *Martin v. Lake Mohak Property Owners* Association, No. 06-CA-841, 2007-Ohio-6432, 2007 Ohio App. LEXIS 5618, ¶¶ 70-75 (7th Dist.) (affirming denial of attorneys' fees in contract and tort action, as bad faith was not demonstrated); *Weisman*, 2010 Ohio App. LEXIS 2675 at ¶ 10 (8th Dist.); *Tech Constr. Specialties, Inc. v. New Era Builders, Inc.*, No. 25776, 2012-Ohio-1328, 2012 Ohio App. LEXIS 1161, ¶ 26 (9th Dist.) (noting that "bad faith" is an exception to the American Rule in contract actions); *Medical Equipment Co. v. Watters*, 13 Ohio App.3d 149, 153, 468 N.E.2d 343 (10th Dist. 1983) (affirming award of attorneys' fees in contract case where "defendant acted in bad faith in her dealings with plaintiff"); *Clem v. Steiner*, No. 2002-P-00506, 2003-Ohio-4865, 2003 Ohio App. LEXIS 4383, ¶ 28 (11th Dist.) (affirming attorneys' fee award based on bad faith breach of contract); *Fowler v. Smith*, No. CA2003-02-042, 2003-Ohio-6257, 2003 Ohio App. LEXIS 5607, ¶ 25 (12th Dist.) (finding that bad faith could form a basis for an attorneys' fee award in connection with enforcement of a settlement agreement, but remanding for a determination of whether defendants acted in bad faith).

the American Rule in contract cases. *See, e.g.*, *Weisman*, 2010 Ohio App. LEXIS 2675 at ¶ 10; *Fowler*, 2003 Ohio App. LEXIS 5607 at ¶ 25.

Confronted with the consistent decisions of Ohio's appellate districts on this issue, TCF attempts to explain away the lack of a conflict, claiming that "most" of the cases cited by SST in its Memorandum in Opposition to Jurisdiction applied the bad faith exception to litigation conduct, not a bad faith breach of contract. But this is simply not true. None of the Ohio appellate cases cited by SST make any mention of litigation misconduct.[3] In applying the bad faith exception in other contexts, this Court has never restricted the rule to litigation conduct and has instead repeatedly considered whether pre-litigation conduct was in bad faith so as to justify an award of attorneys' fees. *See, e.g.*, *Oberlin Manor, Ltd. v. Lorain Cty. Bd of Revision*, 69 Ohio St.3d 1, 3, 629 N.E.2d 1361 (1994) (noting that attorneys' fees would be awardable if the County Board of Revision and Auditor acted in bad faith in its assessment of taxes on apartment owner, but finding that conduct did not rise to level of bad faith); *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Revision*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, ¶¶ 55-56 (noting there was no evidence that board of elections acted in bad faith in upholding protest against an initiative); *State ex rel. Dellick, Judge v. Sherlock*, 100 Ohio St.3d 77, 2003-Ohio-5058, 796 N.E.2d 897, ¶¶ 55-57 (denying attorneys' fees because commissioners did not act in bad faith in rejecting judges' budget requests).

The United States Supreme Court's decision in *Chambers* is not inconsistent. *See Chambers v. Nasco, Inc.*, 501 U.S. 31, 11 S.Ct. 2123 (1991). Though the Court ostensibly

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[3] The Twelfth Appellate District's decision in *Fowler* concerned the enforcement of a settlement agreement entered into while litigation was still pending between the parties. However, the focus of the parties' dispute was on the appellants' bad faith refusal to honor the settlement, and not any misconduct during the litigation, which is akin to a claim of a bad faith breach of contract. *See Fowler*, 2003 Ohio App. LEXIS 5607 at ¶¶ 12-15.

indicated its decision addressed only the award of attorneys' fees for litigation misconduct, the dissents in that case made clear that the trial court, in fact, was awarding sanctions for bad faith occurring prior to the litigation and for the petitioner's bad faith breach of contract and that the Court was implicitly upholding the award. *Id.* at 60 (Scalia, J., dissenting); *id.* at 73 (Kennedy, J., dissenting). In any event, the U.S. Supreme Court has on other occasions -- and consistent with this Court's previous holdings -- held that prelitigation conduct can be the subject of sanctions for bad faith. In *Roadway Express, Inc. v. Piper*, the Court noted that "[b]ad faith may be found, not only ***in the actions that led to the lawsuit***, but also in the conduct of the litigation." 447 U.S. 752, 766, 100 S. Ct. 2455 (1980) (quoting *Hall v. Cole*, 412 U.S. 1, 15, 93 S. Ct. 1943 (1973)) (emphasis added); *see also Vaughan v. Atkinson*, 369 U.S. 527, 530-31, 82 S. Ct. 997 (1962) (upholding award of attorneys' fees under inherent power of court for shipping company's refusal to provide benefits to seaman, which forced him "to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old").

Even if the bad faith exception could be restricted to litigation conduct, the trial court made numerous findings of TCF's bad faith during the litigation to independently support an award of attorneys' fees. As noted in SST's Memorandum in Opposition of Jurisdiction, TCF continued to pursue an utterly meritless defense and counterclaim based on facts it knew to be false. TCF also relied upon dishonest witnesses to support its spurious claims. In the trial court's decision, the trial judge noted that TCF's expert witness was incredible and that "never in over 14 years as a judge or in 14 years before that as a trial lawyer [have I] seen a witness like him." (T.d. 108, p. 2.) The court noted that the witness committed to his opinion before ever examining the parts at issue and that TCF had full knowledge of this. (*Id.*) TCF's "expert" also admitted that he was seeking to displace SST as a supplier for his own personal gain. (*Id.*)

Ohio courts are not in conflict about whether the bad faith exception to the American Rule applies in contract cases. There is accordingly no need for this Court to upset a rule of law that has been uniformly applied throughout Ohio and is consistent with this Court's precedent recognizing a bad faith exception to the American Rule.

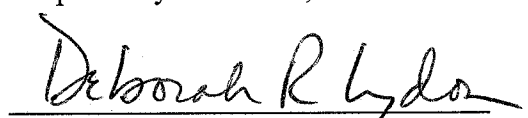
The bad faith exception is also not in conflict with this Court's holding in *Ketcham v. Miller*, 103 Ohio St. 372, syllabus ¶ 2 (1922) that punitive damages are not recoverable in a contract action. Nowhere does the *Ketcham* decision address the bad faith doctrine allowing an award of attorneys' fees. Moreover, this Court has recently recognized that attorneys' fees are separate and distinct from an award of punitive damages. *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829, 928 N.E.2d 421, ¶ 14. An attorneys' fee award on a finding of bad faith is not tantamount to an award of punitive damages and is in no way inconsistent with the unavailability of punitive damages in a contract action. And for this reason, allowing the award of attorneys' fees for bad faith does not raise an issue of whether "tort-like" remedies, such as emotional distress damages, non-consequential damages, and punitive damages, are available in a breach of contract action. Unlike tort remedies, attorneys' fees for bad faith are available to *both* plaintiffs and defendants and simply serve to discourage frivolous conduct.

Finally, this case does not implicate a question of public or great general interest. As demonstrated above, Ohio's courts have uniformly cited and applied the bad faith exception to the American Rule in contract cases, and there is no "conflict" or "confusion" among the courts on this issue that is in need of superintendence by this Court. While TCF claims the bad faith exception will somehow change the way breach of contract cases are litigated in Ohio, its statement is belied by the fact that all twelve appellate districts have recognized the bad faith exception in contract cases with no adverse consequences to the public.

III. CONCLUSION

Despite TCF's efforts to reargue the merits of its Notice of Certified Conflict and Memorandum in Support of Jurisdiction, TCF cannot avoid the fact that there is simply no "conflict" or "confusion" among Ohio's courts as to the applicability of the bad faith exception to the American Rule to contract cases. Ohio's courts have uniformly applied the exception for years, with no adverse effect. Accordingly, TCF's Motion for Reconsideration should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email and U.S. Mail, this 31st day of October, 2012, upon the following:

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