No. 2022-0595

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
Eighth Appellate District
Cuyahoga County, Ohio
Case No. CA 21 110428

THE SCOTT FETZER COMPANY,

Plaintiff-Appellee,

v.

TRAVELERS CASUALTY AND SURETY COMPANY
f/k/a AENTA CASUALTY AND SURETY COMPANY,

Defendant-Appellant.

MERIT BRIEF OF APPELLEE THE SCOTT FETZER COMPANY

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case of first impression in Ohio in which this Court is asked to decide whether Restatement (Second) of Conflict of Laws § 145 (which relates to tort claims) or § 193 (which relates to contract claims) should apply to determine the law applicable to The Scott Fetzer Company's ("Scott Fetzer") bad faith claim against Travelers Casualty and Surety Company ("Travelers") for (i) failure to properly and timely investigate Scott Fetzer's claim, (ii) failure to provide a coverage determination for over thirty-six years, and (iii) failure to timely pay the claim, all without reasonable justification therefor. By its express terms, § 193 relates to contract claims—specifically the "validity" of insurance contracts and the "rights created thereby." Conversely, by its express terms, § 145 applies to tort claims. The bad faith claim asserted by Scott Fetzer herein is classified as an independent tort that arises from breaches of duties imposed upon Travelers by law, not by contract. Thus, § 145 should be utilized to determine the applicable law.

Although the precise issue before this Court—the application of § 145 versus § 193—is one of first impression, the fundamental legal principles that govern its resolution were long ago decided by this Court and have been applied by lower courts without controversy for decades. Under Ohio law, it is undisputed that a bad faith claim in the insurance context is one sounding in tort that exists independently from the insurance policy or the parties' respective rights and responsibilities under the policy. Further, this Court has adopted the choice of law analysis found in Restatement § 145 that applies to torts. It logically follows, then, that § 145 is applicable to the tort of bad faith here.

Restatement § 193, in contrast, applies to contract disputes, and no Ohio court has ever applied § 193 to a bad faith tort claim (or to any other form of tort claim). In fact, Travelers' merit

brief fails to cite any case law that would support its conclusion and misstates the holdings in several of the cases it relies upon to imply that § 193 is regularly applied to the tort of bad faith. Not so. Instead, the majority of cases apply either § 145 to bad faith claims or apply a similar approach to the choice of law analysis to reach the same result as the lower courts did here.

Notably, Travelers has not challenged the Eighth District's holding that consideration of the § 145 factors compels application of Ohio law, nor has it challenged the Eighth District's holding that Ohio law requires production of the documents in dispute. Thus, if this Court finds that § 145 applies, the Eighth District's decision should be affirmed.

Moreover, it bears noting that, even if Restatement § 193 could be considered in determining the state law applicable to Scott Fetzer's bad faith claim, it would not compel a different conclusion. Rather, § 193 is the beginning, not the end, of a choice of law analysis—a point made clear by the second portion of § 193 that is largely ignored in Travelers' merit brief. Specifically, § 193 does not apply when, "***with respect to the particular issue***, some other state has a more significant relationship under the principles stated in Restatement (Second) of Conflict of Laws § 6 to the transaction and the parties, in which event the local law of the other state will be applied." (Emphasis added). With respect to "the particular issues" involved in a bad faith tort, the large majority of decisions that have considered the question under the § 6 factors have found that the state where the bad faith conduct was directed, where the pecuniary damage was inflicted, and whose state's public policy was violated, has the most significant relationship to the issues involved in a claim of bad faith. Here, the state with the most significant relationship to those issues is Ohio.

Finally, there is yet another basis upon which Scott Fetzer is entitled to the bad faith discovery ordered to be produced by the trial court. Pursuant Restatement (Second) of Conflict of

Laws § 139(2), Ohio privilege law would apply to the discrete question of whether the documents at issue are privileged and compel Travelers to produce them. Under Restatement § 139(2), the local privilege law of the forum state (Ohio) concerning matters of privilege must be applied if the forum state would admit the contested documents ***even if*** the laws of the state with the most significant relationship to them would not. Thus, applying § 139(2) results in the contested documents being produced to Scott Fetzer, albeit via a different route than the one taken by the lower courts.

II. STATEMENT OF FACTS

A. Scott Fetzer has demanded insurance coverage relating to the underlying environmental matters since 1986.

This is an environmental coverage case in which Scott Fetzer seeks insurance coverage from Travelers and another insurer for substantial defense expenses and remediation costs incurred by Scott Fetzer dating back to 1986. (*See generally* Dkt. No. 1, Complaint.) The environmental site at issue—known as the North Bronson Industrial Area ("NBIA")—is comprised of several individual "operating units." Scott Fetzer is involved in the NBIA cleanup actions because Kingston Products—a company Scott Fetzer acquired via merger in 1968—operated a manufacturing facility on a portion of the NBIA site. (*Id.* at ¶¶ 1, 39–45.) In the underlying environmental matters, Scott Fetzer has been the subject of both governmental enforcement actions and private lawsuits. (*Id.* at ¶¶ 37–72.) Since 1986, Scott Fetzer has demanded insurance coverage from its own insurers and the insurers that issued policies to Kingston Products. (*Id.* at ¶¶ 2–3, 20, 80–137.) Travelers is one of the insurers that issued policies to Kingston Products. (*Id.* at ¶¶ 16–23; *see also* Dkt. No. 79, Aug. 4, 2020 Motion to Compel at 16 n. 2, 22 n.4).

After receiving no assistance from Travelers (or any other insurer), Scott Fetzer commenced an action in the Cuyahoga Court of Common Pleas against Travelers and several other

insurers. In that action, Scott Fetzer asserts claims for declaratory judgment and breach of contract. (*Id.* at ¶¶ 147–174.) Scott Fetzer also asserts bad faith claims against two insurers, including Travelers. (*Id.* at ¶¶ 175–181.) The bad faith claim arises from Travelers' (1) failure to investigate the insurance claim in a timely manner; (2) failure to convey a coverage position within a reasonable time (now going on thirty-six years); and (3) failing to pay sums due under the policy without reasonable justification. (*Id.*) Further, Travelers has attempted to capitalize on Scott Fetzer's inability to locate physical copies of the decades-old Kingston Products policies by denying their existence despite overwhelming evidence that they were issued. (*Id.* at Exhibit 2.) It is a discovery dispute related to this bad faith claim, including Travelers' failure to conduct a reasonable search for the lost Kingston Products policies, that brings the parties before this Court.

B. In an order that was affirmed by the Eighth District Court of Appeals, the trial court, over Travelers' privilege objections, ordered Travelers to produce communications that are probative of Scott Fetzer's bad faith claim.

Scott Fetzer served written discovery upon Travelers in 2019. Travelers initially moved the trial court to bifurcate Scott Fetzer's bad faith claim from the underlying coverage claims and to stay discovery on the bad faith claim. (Dkt. No. 49, Insurers' Mtn. to Bifurcate and Stay Plaintiff's Bad Faith Case of Action.) The trial court agreed to the bifurcation request but denied the motion to stay bad faith discovery. (Dkt. No. 69, Apr. 28, 2020 Order.) Neither of these rulings is before this Court on appeal.

Upon Scott Fetzer's review of the documents produced by Travelers in connection with a review of Travelers' privilege log, it became apparent that Travelers had withheld probative evidence that would support Scott Fetzer's bad faith claim. Scott Fetzer therefore moved the trial court to compel Travelers to produce these documents, arguing that Ohio law, and this Court's decision in *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 214, 744 N.E.2d 154 (2001), obligated

Travelers to produce the documents over its privilege objections. (Dkt. No. 79, Aug. 4, 2020 Motion to Compel.) Travelers argued, *inter alia*, that Ohio law did not apply to Scott Fetzer's bad faith claims and therefore *Boone* had no application. (Dkt. No. 91, Travelers' Br. in Opposition.)

On October 5, 2020, the trial court found in Scott Fetzer's favor and ordered Travelers to produce the challenged documents and a privilege log for an *in camera* review consistent with *Boone* and Ohio Revised Code § 2317.02(A)(2). (Dkt. No. 99, Oct. 5, 2020 Order.) The *in camera* review was conducted by Administrative Judge Sheehan. In an Opinion and Judgement Entry entered March 25, 2001, Judge Sheehan ordered Travelers to produce several of the challenged documents because they were "probative of Travelers' efforts to investigate the current claims and/or locate the alleged [lost] policies." (Dkt. No. 127, Mar. 25, 2021 Order at p. 5.)

After obtaining a stay of Judge Sheehan's order (Dkt. No. 143, May 5, 2021 Order), Travelers appealed the trial court's discovery orders to the Eighth District Court of Appeals. Travelers' appeal raised three issues: (1) the trial court erred by refusing to stay discovery on Scott Fetzer's bad faith claim; (2) Ohio law did not apply to Scott Fetzer's bad faith claim; and (3) even if Ohio law applied, the trial court erred in ordering Travelers to produce the disputed documents. The Eighth District dismissed Travelers' appeal relating to the stay of bad faith discovery, finding that it lacked jurisdiction to consider the appeal. (8th Dist. Dkt. No. 20, July 22, 2021 Order.) Travelers has not appealed that dismissal.

As to the remaining two issues, the Eighth District first recognized that Scott Fetzer's bad faith claim was a tort pursuant to this Court's decisions in *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (1983) and *Dombrowski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, ¶ 8. As such, the Eighth District applied Restatement § 145, in conjunction with § 6, when analyzing which state's law applied to Scott Fetzer's bad faith claim.

Scott Fetzer Co. v. Am. Home Assur. Co. et al., 8th Dist. Cuyahoga No. 110428, 2022-Ohio-1062, ¶ 11.

In conducting this analysis, the court noted that the pecuniary injury happened at Scott Fetzer's Ohio headquarters, that certain conduct in furtherance of Travelers' bad faith occurred in Ohio, that only Ohio or Connecticut had ties to the parties involved, and that the relationship between the parties was centered in either Connecticut or Ohio. *Id.* at ¶¶ 12–16. The court determined that the four § 145 factors, applied "against the backdrop of Section 6," compelled application of Ohio law because "Ohio has the most significant relationship to the occurrence—the alleged failure to make a timely coverage determination—as well as the parties." Therefore, the Eighth District affirmed the trial court's application of Ohio law to Scott Fetzer's bad faith claim. *Id.* at ¶ 17. In a footnote, the court stated that it need not consider Scott Fetzer's separate argument that Restatement § 139(2) provided an independent basis for the application of Ohio privilege law. The court noted that its application of Ohio law to the bad faith claim itself disposed of the issue before it without the need to apply § 139(2). Thus, the Eighth District did not analyze this additional basis for affirming the trial court's order.

Finally, turning to the question of whether, under Ohio law, the trial court correctly ordered Travelers to produce the challenged documents, the Eighth District also affirmed the trial court's decision. *Id.* at ¶ 30. The court noted that Travelers failed to identify which specific documents the trial court incorrectly ordered to be disclosed. *Id.* at ¶ 27.

C. Travelers initiated this appeal, asserting that Ohio law does not apply but effectively conceding that if Ohio law does apply, the contested documents must be produced.

In this appeal, Travelers has limited its argument to a single proposition of law: Restatement (Second) of Conflict of Laws § 193 applies not only to insurance contract claims, but also to the tort of bad faith because bad faith claims "arise out of" insurance contracts. According

to Travelers, § 193 mandates that the "principal location of the insured risk during the term of the policy" is the determinative factor in deciding which state's law applies to Scott Fetzer's bad faith claim. Travelers asserts that this "principal location" is not in Ohio but does not take a definitive position on what other state it would be. Notably, however, Travelers has not appealed to this Court the lower courts' findings that the challenged documents are probative of Scott Fetzer's bad faith claim and that, if Ohio law applies, Travelers must produce those documents. Thus, the lower courts' orders compelling the documents should be affirmed if the Court determines *either* (1) that Restatement § 193 either does not apply to Scott Fetzer's bad faith claim or, if it did, would not mandate a different result here; *or* (2) that, regardless, Restatement § 139(2) would compel application of Ohio privilege law to this dispute.

Finally, Traveler's arguments below, and those it advances in this appeal, do not take a position on which state's law must be applied if it is not Ohio's. Thus, even if Travelers' arguments were adopted and the lower courts are reversed, the case would need to be remanded for a determination as to the correct law to be applied consistent with this Court's opinion. However, as explained below, the lower courts' orders are entirely consistent with well-established Ohio law and should be affirmed.

III. LAW AND ARGUMENT

<u>Scott Fetzer's Proposed Proposition of Law</u>: Restatement § 145 applies to choice of law questions relating to bad faith claims because, under established Ohio law, bad faith is a tort that exists independently of the insurance policy and arises by operation of law. Restatement § 193, which applies only to the "validity" of insurance contracts or "rights conferred thereby" does not apply to the tort of bad faith.

A. Under well-settled Ohio law, Scott Fetzer's bad faith claim is a tort and the law applicable to that claim must be determined with regard to choice of law principles applicable to torts. Here, those choice of law principles are reflected in Restatement (Second) of Conflict of Laws § 145, and § 193 is inapplicable.

In *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 2001-Ohio-100, 747 N.E.2d 206, this Court conducted an analysis of the choice of law principles applicable to tort and contract claims. In so doing, the Court started its analysis by noting that "[t]he Restatement's choice-of-law rules depend on the 'classification of a given factual situation under the appropriate legal categories and specific rules of law.'" *Id.* at 208 (*quoting* 1 Restatement of the Law 2d, Conflict of Laws (1971) 18, Section 7, Comment b). Thus, the first step in any choice of law analysis is determining the nature of the claim asserted so that it may be classified in relation to the appropriate Restatement section.

1. As Travelers admits, bad faith is classified as an independent tort under established Ohio law, thus invoking § 145's choice of law analysis.

Here, there is no debate regarding the "classification" of Scott Fetzer's bad faith claim. This Court has repeatedly held that Scott Fetzer's bad faith claim must be classified as a tort. In *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (1983), this Court held:

> The liability of the insurer in such cases does not arise from its mere omission to perform a contract obligation, for it is well established in Ohio that it is no tort to breach a contract, regardless of motive. *See, e.g.*, *Ketcham v. Miller* (1922), 104 Ohio St. 372, 136 N.E. 145. Rather, the liability arises from the breach of the positive legal duty imposed by law due to the relationships of the parties. See *Battista*, *supra*, at 117–118. *See, also*, *Saberton v. Greenwald* (1946), 146 Ohio St. 414, 66 N.E.2d 224 [32 O.O. 454]. ***This legal duty is the duty imposed upon the insurer to act in good faith and its bad faith refusal to settle a claim is a breach of that duty and imposes liability sounding in tort.***

(Emphasis added). Subsequent decisions from this Court have reinforced that a bad faith claim is properly categorized as a tort action, not one sounding in contract. *See Dombrowski v. WellPoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538, ¶ 8 (holding that bad faith is an "actionable tort"); *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 210 n. 1, 744 N.E.2d 154, 155 (2001) (insurer's bad faith conduct "gives rise to a cause of action in tort against the insurer."); *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 554, 644 N.E.2d 397, 399 (1994) (referring to

the "tort of bad faith" and clarifying that the claim does not require proof of intent). There has been no confusion on this issue among the lower courts—bad faith claims sound in tort. *Beever v. Cincinnati Life Ins. Co.*, 2003-Ohio-2942, 2003 WL 21321428, ¶ 50 (10th Dist.) (tort of bad faith is independent of insurance contract and tort statute of limitations applies thereto); *Eastham v. Nationwide Mut. Ins. Co.*, 66 Ohio App.3d 843, 849, 586 N.E.2d 1131 (1st Dist. 1990); *Stevenson v. First Am. Title Ins. Co.*, 5th Dist. Fairfield No. 05-CA-39, 2005-Ohio-6461, ¶ 26. Travelers, for its part, does not contest the Eighth District's classification of bad faith as a tort.

Based upon well-established choice of law principles, the law applicable to Scott Fetzer's tort claim must be decided under the factors set forth in § 145. *See Am. Interstate Ins. Co. v. G & H Serv. Ctr., Inc.*, 112 Ohio St.3d 521, 523, 2007-Ohio-608, 861 N.E.2d 524, 527, ¶ 8 ("Section 145 addresses conflicts in tort actions generally and lists several factors for the court to consider when deciding which state law applies to a case."). Both Ohio's courts and the highest courts of other states have so held. *In re Commercial Money Ctr., Inc., Equip. Lease Litigation*, 603 F. Supp.2d 1095, 1107 (N.D. Ohio 2009) (applying § 145 to bad faith claims against financial surety defendants and noting that "Ohio courts have consistently treated bad faith claims as claims arising in tort—even when the bad faith claims relate to obligations arising from a contract (as is typical in insurance bad faith situations)." (citations omitted)); *Martin v. Gray*, 2016 OK 114, 385 P.3d 64, 66 (Okla. 2016) (applying tort choice of law factors, analogous to § 145, to bad faith claims and noting that bad faith is an independent tort that arises by operation of law); *Bates v. Superior Court of State of Ariz., In and For Maricopa County*, 156 Ariz. 46, 749 P.2d 1367, 1370–72 (Ariz. 1988) (applying § 145 to bad faith claims).

Likewise, several federal appellate courts have applied Restatement § 145 to bad faith claims. *Williams v. Liberty Mut. Ins. Co.*, 741 F.3d 617, 625 (5th Cir. 2014) (reversing trial court's

application of §§ 188 and 193 to claim for bad faith which, under applicable law, is an independent tort subject to § 145); *American Guar. and Liability Ins. Co. v. U.S. Fidelity & Guar. Co.*, 668 F.3d 991, 996–1001 (8th Cir. 2012) (applying § 145 to bad faith tort claim brought by excess insurer against primary insurer); *Lange v. Penn Mut. Life Ins. Co.*, 843 F.2d 1175, 1179–81 (9th Cir. 1988) (holding choice of law for bad faith claim governed by § 145 and noting that the insured's tort claim arises "from breach of a good faith covenant implied in law[,]" not in contract); *TPLC, Inc. v. United Nat. Ins. Co.*, 44 F.3d 1484, 1490–91, 1495–1496 (10th Cir. 1995) (applying Restatement's contract provisions §§ 6 and 188 to breach of insurance contract claim but applying § 145 to bad faith claim).

Other state appellate and federal district court cases are in accord. *See, e.g., SnyderGeneral v. Great American Insurance Co.*, 928 F. Supp. 674 (N.D. Tex. 1996) (holding § 145 is applicable to claims of bad faith); *Barten v. State Farm Mut. Auto Ins. Co.*, 28 F. Supp.3d 978, 983, 986 (D. Ariz. 2014) (holding § 145 applies to bad faith claim, rejecting insurer's argument that Michigan law applies, and noting that Arizona has a paramount interest in ensuring its citizens are made whole for injuries caused in Arizona); *York v. Globe Life and Acc. Ins. Co.*, 734 F. Supp. 340, 341 (C.D. Ill. 1990) (noting that contract choice of law rules are "not particularly helpful" to claims asserting bad faith and applying tort choice of law rules to claim); *Ranger v. Fortune Ins. Co.*, 881 P.2d 394, 395–96 (Colo. App. 1994) (rejecting insurer's attempt to apply § 193 to bad faith claim, holding that § 145 applies, and noting that "the state where the injury occurred, which is often where the plaintiff resides, may have the greater interest in the controversy."); *Allstate Fire and Cas. Ins. Co. v. Stratman*, 620 S.W.3d 228, 233–35 (Mo. App. 2020) (rejecting insurer's attempt to apply §§ 188 and 193 to bad faith claims which are extra-contractual tort claims to which § 145 applies); *Altschuler v. Chubb Nat. Ins. Co.*, 2021 WL 4263696 at *5–6 (D. Ariz. 2021) (applying

§ 193 to claims for breach of insurance contract and § 145 to claim for tort of bad faith); *World Plan Exec. Council-U.S. v. Zurich Ins. Co.*, 810 F. Supp. 1042, 1047 (S.D. Iowa 1992) (applying § 145 to determine law applicable to bad faith claim despite contractual choice of law clause in policy).

Here, applying § 145, the Eighth District found that Ohio law must be applied to Scott Fetzer's bad faith claim. Travelers has not assigned as error the Eight District's analysis of the § 145 factors to the underlying facts or its holding that, if § 145 is applicable, Ohio law applies to Scott Fetzer's bad faith claim.

2. Ohio courts have consistently held that bad faith claims are not predicated upon rights created by the insurance policy.

Ohio courts' handling of bad faith claims in similar contexts underscores the distinction between Scott Fetzer's bad faith claim (which arises by operation of law) and Scott Fetzer's breach of contract claims (which arise under the policies). In recognition of its classification as an independent tort, Ohio courts routinely distinguish the rules that apply to insurer bad faith claims from those that apply to breach of contract claims arising from the parties' obligations under the insurance policy. The following are examples of Ohio courts' analysis of bad faith claims as separate and distinct tort claims arising independently of the insured's claim for coverage under an insurance policy.

a. Courts apply the tort statute of limitations to bad faith claims even where the insurance policy contains a contractual limitations period.

Because a bad faith claim is independent of the insurance policy, Ohio courts consistently apply Ohio's four-year statute of limitations for torts to bad faith claims instead of contractual limitations periods found in the insurance policy. *See, e.g. Ransom v. Erie Ins. Co.*, 7th Dist. Harrison No. 21 HA 0011, 2022-Ohio-3528, ¶ 43 (noting that "numerous Ohio courts have held

that a contract limitation in the policy does not govern the time to file a bad faith claim because *Hoskins* made it clear an insurer's breach of the duty to act in good faith is a tort and consequently governed by the statute of limitations for torts.") (citing multiple cases relying upon *Hoskins*); *United Dept. Stores Co. No. 1 v. Continental Cas. Co.*, 41 Ohio App.3d 72, 73, 534 N.E.2d 878 (1st Dist. 1987) (rejecting trial court's application of contractual limitation because the "tort claim is independent of the contract of insurance."); *Plant v. Illinois Employers Ins. of Wausau*, 20 Ohio App.3d 236, 485 N.E.2d 773 (9th Dist. 1984), syllabus at 3 (rejecting application of contractual limitations period based upon treatment of bad faith as an independent tort).

b. Punitive damages are recoverable for the tort of bad faith but not for ordinary breach of contract claims.

This Court has recognized that punitive damages are recoverable for the tort of bad faith, but not for breach of an insurance contract. *Hoskins*, 6 Ohio St.3d at 276–277 (punitive damages recoverable for bad faith), citing *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E.145 (1922) (punitive damages are not recoverable for breach of contract). The Court's recognition that punitive damages are recoverable in a bad faith claim underscores the distinction between the tort of bad faith and a claim for breach of the insurance policy. It also underscores Ohio's public policy of protecting insureds against unscrupulous conduct and deterring insurers that have been granted the privilege of conducting business in Ohio from engaging in such conduct toward Ohio insureds.

c. Certain statutes applicable to insurance policies are inapplicable to bad faith claims.

Ohio courts have rejected the application of Ohio Revised Code § 3911.06 to a bad faith claim. *Beever v. Cincinnati Life Ins. Co.*, 10th Dist. Franklin Nos. 02AP-543, 02AP-544, 2003-Ohio-2942, ¶ 51. This section, which applies to an insured's action to recover *under an insurance*

policy, was found inapplicable to a bad faith claim which the court found was "independent of the contract of insurance." *Id.* at ¶¶ 46–51.

d. Ohio courts regularly find that the success of a bad faith claim is not dictated by the fate of the insured's coverage claim.

The First District Court of Appeals' decision in *Eastham* exemplifies the extent to which Ohio law treats bad faith claims as separate and independent from the underlying coverage claim. Travelers cites *Eastham* for the proposition that a bad faith claim "derives from and exists solely because of" the insurance contract, and argues this language from *Eastman* is "nothing less than a rephrasing" of § 193's "created thereby" language. (Trav. Br. at 11, citing *Eastham*, 66 Ohio App.3d at 846). However, as discussed below, *Eastham* is one of the many instances in which Travelers has misstated the holding of a case in an attempt to manufacture a colorable debate regarding the applicability of § 193. The language quoted by Travelers was in relation to an analysis of who has *standing* to assert a bad faith claim—not to a choice of law analysis applicable to the claim itself.

Travelers's discussion of *Eastham* omits the court's instructive analysis pertaining to the merits of the bad faith claim. In *Eastham*, the insurer argued that an insured's execution of a release in exchange for the payment of benefits under an insurance policy also extinguished the insured's bad faith claim against the insurer arising from its handling of the released claim. *Id.* at 849. The appellate court rejected this argument, finding that the bad faith claim arose independently of the insurance coverage provided by the policy—i.e., the rights "created by" the policy—and therefore was not extinguished by the release, noting that a bad faith "tort claim does not result from the accident . . . but instead results from Nationwide's bad faith in dealing with its insured. The instant claim sounding in tort is independent of the insurance policy and, therefore, is not barred by the release and trust agreement signed by Ed Eastham." *Id.* at 849.

Moreover, courts frequently permit bad faith claims to proceed even where the insured's coverage claim is barred by the applicable statute of limitations. *See e.g.*, *Bullet Trucking, Inc. v. Glen Falls Ins. Co.*, 84 Ohio App.3d 327, 333 (Ohio App. 1992) (finding that a bad faith claim could proceed despite the underlying coverage claim being barred by the contractual limitations period, noting that "a cause of action for the tort of bad faith may exist irrespective of any liability arising from a breach of contract and may, in certain circumstances, be brought as a separate cause of action."); *Plant*, 20 Ohio App.3d at 237–38 (affirming dismissal of contract claim based upon expiration of contractual limitations period but reversing dismissal of bad faith claim).

As the foregoing cases make clear, for decades Ohio's courts have uniformly followed *Hoskins* and applied tort law and tort principles to bad faith claims, rejecting attempts to apply concepts unique to the law of contracts, such as contractual limitations periods, to such claims. The choice of law analysis applicable to bad faith claims should be no different. The same logic that prevents a contractual limitation provision or a release resolving a coverage dispute from controlling an independent bad faith claim applies to the issue currently on appeal. It is axiomatic that Scott Fetzer's bad faith claim does not involve "rights created by" an insurance contract because the bad faith claim is (i) "independent of the insurance contract," (ii) arises from an obligation imposed by law based upon the special relationship of the parties rather than the insurance contract itself; and (iii) is not subject to insurance policy terms relating to the parties' rights and obligations under the policy. Each of these fundamental aspects of Ohio law, uniformly applied by this Court and lower courts for decades, counsels in favor of applying § 145 to Scott Fetzer's bad faith claim.

3. Restatement § 193, by its terms, is inapplicable to the tort of bad faith because the claim is created by operation of law, not by the insurance policy.

Rather than challenge the Eighth District's analysis under § 145, Travelers contends that § 145 should not have been applied in the first instance. However, § 193 is found in Restatement Chapter 8, which is applicable to contract claims, not torts. Further, § 193 is not applicable pursuant to its express terms. Rather, § 193 provides:

> The ***validity of a contract of fire, surety or casualty insurance and the rights created thereby*** are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, ***unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.***

(Emphasis added). As § 193 makes clear, it applies only to claims relating to the validity of an insurance contract or a party's contractual rights under an insurance contract. A bad faith claim invokes neither of these issues.

In order to avoid Restatement § 193's plain language, Travelers contends that Scott Fetzer's bad faith claims "arise out of" the insurance contract or can only exist in the "context of" an insurance contract. (Trav. Br. at 8, 10, 13). These are the fallacies upon which Travelers' entire argument rests. In reality, and as admitted by Travelers in its merit brief, Ohio law is clear that a bad faith claim is independent of the insurance contract (*Id.* at 12); thus, a bad faith claim is not predicated on a "right" expressly provided by the contract. Rather, it is a right conferred at law. *See e.g.*, *Hoskins*, 6 Ohio St.3d at 276 (liability of insurer for bad faith does not arise from "mere omission to perform a contract obligation" but rather "from the breach of ***a positive legal duty imposed by law***") (emphasis added); *Staff Builders, Inc. v. Armstrong,* 37 Ohio St.3d 298, 302, 525 N.E.2d 783, 788 (1988) (abrogated on other grounds) (holding "that an insurer has a duty to act in good faith in the processing and payment of the claims of its insured. A breach of this duty

will give rise to a cause of action in tort irrespective of any liability arising from breach of contract."); *Eastham v. Nationwide Mut. Ins. Co.*, 66 Ohio App.3d 843, 849, 586 N.E.2d 1131 (1st Dist. 1990) (bad faith is a tort claim that is independent of insurance contract); *Stevenson v. First Am. Title Ins. Co.*, 5th Dist. Fairfield No. 05-CA-39, 2005-Ohio-6461, ¶ 26 (stating that "the tort of bad faith exists independent of the insurance contract") (citation omitted); *Hoeper v. Progressive Cas. Ins. Co.*, 12th Dist. Clermont, No. CA90-06-063, 1991 WL 149554, at *3–4 (Aug. 5, 1991) ("[t]hus, it is not the insurance contract itself which imposes a good faith duty on the insured, but the relationship between the parties."); *In re Commercial Money Center, Inc. Equipment Lease Litigation*, 603 F. Supp.2d 1095, 1107 (N.D. Ohio 2009) (holding that it is "clear under Ohio law that a claim for breach of the covenant of good faith and fair dealing sounds in tort . . . even when the bad faith claims relate to obligations arising from a contract" and applying § 145 to determine which state's law to apply).

As this Court recognized in *Hoskins*, "[t]he liability of the insurer in [bad faith] cases does not arise from its mere omission to perform a contract obligation, for it is well established in Ohio that it is no tort to breach a contract, regardless of motive." *Hoskins*, 6 Ohio St.3d at 276. Because Scott Fetzer's bad faith claims do not "arise from [Travelers'] mere omission to perform a contract obligation," they necessarily do not concern "[t]he validity of a contract of fire, surety or casualty insurance and the rights created thereby," which is all that is governed by Restatement § 193.

Because § 193, by its plain terms, does not apply to tort claims arising by operation of law, Travelers attempts to distort § 193's language by arguing that it applies to any claims "involving a contract" or claims that in any way relate to a contract. However, that is not what § 193 says, and Travelers fails to cite any authority in the Restatement or elsewhere supporting its overly-broad reading of the section. As discussed above, courts addressing bad faith claims under Ohio

law, and elsewhere, have concluded that an insured's bad faith claim is not dictated by the insurance policy's terms and conditions, underscoring the fact that Scott Fetzer's bad faith claim is not a "right created" by the policy.

4. As this Court recognized in *Ohayon*, a tortfeasor has no justifiable expectations to protect when deciding the law applicable to its conduct.

In *Ohayon*, this Court explained the rationale for applying a different choice of law analysis depending upon whether a claim sounds in contract or tort:

> We apply different choice-of-law principles to actions sounding in contract than to actions sounding in tort for several reasons. For one, the parties to a contract are largely free to negotiate the law to be applied to disputes arising thereunder. See 1 Restatement of Conflicts at 15, Section 6, Comment g; see, also, id. at Section 187. In the absence of such a choice, the Restatement's contractual choice-of-law rules seek to protect the justified expectations of the contracting parties. See id. at 576, Section 188, Comment b.
>
> ***Unlike a contracting party, on the other hand, a negligent tortfeasor acts without a conscious regard for the legal consequences of his or her conduct—let alone the particular law to be applied to that conduct—and the parties contesting liability and/or the appropriate measure of damages for the conduct thus "have no justified expectations to protect."*** Restatement at 15, Section 6, Comment g. Accordingly, the Restatement and courts emphasize different factors when resolving choice-of-law issues in these contextually distinct legal fields.

Ohayon, 91 Ohio St.3d at 476–77 (emphasis added). *See also*, Restatement (2d) of Conflicts § 6, Comment g ("There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied. In such situations, the parties have no justified expectations to protect, and this factor can play no part in the decision of a choice-of-law question.").

This principle is exemplified in *SnyderGeneral v. Great American Insurance Co.*, 928 F. Supp. 674 (N.D. Tex. 1996), a case addressing issues analogous to those presented here. In *SnyderGeneral*, the court was confronted with a choice of law analysis relating to a claim for coverage under a policy of insurance purchased in Minnesota by McQuay, Inc. After purchasing

the policies, McQuay merged with SnyderGeneral, which was located in Texas. *Id.* at 676. After the merger, SnyderGeneral, as the surviving corporation, was subject to environmental claims arising from McQuay's operations in California. *Id.* After submitting claims to both its own insurers and to McQuay's, SnyderGeneral filed suit alleging claims for declaratory relief, breach of contract, and bad faith. *Id.*

In analyzing the claims relating to the McQuay policies, the court found that the contract claims against McQuay's historical insurer were governed by Minnesota law because that was the state in which the contracting parties' relationship was centered when the policies were purchased. *Id.* at 678. However, the court conducted a different analysis of the bad faith claims against McQuay's insurer:

> The resolution of this issue is different for the bad faith claims. ***This cause of action did not accrue until Great American failed to respond to the demand for coverage and refused to tender a defense in the underlying environmental actions. At that time, SnyderGeneral was the policyholder.*** SnyderGeneral communicated with the insurance company from its principal place of business in Texas. The damages resulting from any unfair claims settlement practices occurred there. Great American is authorized to transact business in the state. Texas has a significant interest in matters related to violations of its insurance laws. [] The Court therefore concludes that the bad faith claims against Great American are governed by Texas law.

Id. (internal citations omitted).

Thus, the court in *SnyderGeneral* recognized that the parties, when contracting, may have justifiably expected that Minnesota law would apply to their respective rights under the insurance contract since that was the corporate location of the insured. However, with respect to bad faith, the justifiable expectation analysis is different. A tortfeasor, acting in bad faith, is not entitled to the presumption of justifiable expectations created by contracts entered into decades earlier. Rather, the insured, as the victim of tortious conduct, is justified in expecting that the law of the state in which it is located will govern its rights and remedies arising from tort.

Similarly, in *Bates v. Superior Court of State of Ariz., In and For Maricopa County*, 156 Ariz. 46, 749 P.2d 1367 (Ariz. 1988), a Michigan resident purchased a policy in Michigan and was later injured in an accident in Illinois. The insured received benefits under the policy in Michigan for a number of years and the claim was adjusted by the insurer out of its Michigan office. *Id.* at 1368–69. The insured later moved to Arizona and the office adjusting the claim switched to Ohio. *Id.* After the insurer terminated the insured's benefits, the insured filed a bad faith claim in Arizona and argued that Arizona law applied to her claim. *Id.* at 1369.

After classifying the bad faith claim as a tort, the Arizona Supreme Court applied § 145 and determined that Arizona law applied. In so holding, the Court rejected the insurer's argument that Michigan law should apply because that was where the policy was purchased and where the parties' relationship was centered. The court reasoned that "identifying the historical genesis of the underlying contract does not end the inquiry. The claim in question does not arise from breach of some express covenant inserted by Nationwide as a matter unique to its Michigan business. Its claim arises, rather, from breach of a good faith covenant implied in law." *Id.* at 1371. The court further observed:

> In addition, the nature of the insurance business is such that even at the genesis of the contract, Nationwide would have known that its Michigan insureds might relocate or possibly be involved in accidents in other states and that claims would be adjusted in states other than Michigan. ***In short, because it provided coverage on a national basis, Nationwide necessarily knew that it might be required to perform its obligations as an insurer in any state in the union. It could not justifiably expect that every aspect of its conduct would be governed by the law of the state in which the contract originally was made.*** We reject the argument that the law of the state where the insurance contract was made must be applied to a bad faith claim arising from an accident in a different state, especially where the alleged bad faith conduct and resultant injury also occurred in different states and the insurer does business in those states.

Id. at 1372 (emphasis added).

In an attempt to avoid application of Ohio law, Travelers' brief cites to *Kilmer v. Connecticut Indemn. Co.*, 189 F. Supp.2d 237 (M.D. Pa. 2002) for the proposition that § 193 has been applied to a bad faith claim "based on its connection to the insurance contract." (Trav. Br. at 17). *Kilmer*, however, supports, rather than undermines, Scott Fetzer's argument. Travelers fails to note that the court in *Kilmer* found that § 193's focus on the location of the insured risk "is not controlling in all circumstances," particularly in cases where another state has a more significant relationship to the issue, and therefore declined to apply § 193 to the insured's bad faith claim. *Id.* at 245. In the context of a bad faith claim, the court found that it "would not be unfair to require [the insurer] to abide by Pennsylvania requirements when administering insurance policies to Pennsylvania residents, regardless of where the [insured] property is located . . . ." *Id.*

Aside from omitting the *Kilmer* decision's complete choice of law discussion, Travelers' brief also omits the *Kilmer* opinion's reliance upon *Thiel v. Northern Mut. Ins. Co.*, 36 F. Supp.2d 852 (E.D. Wis. 1999), which held:

> ***[A]n insurance company that conducts business with residents of various states should expect to be subject to the tort laws of that state if the insurer engages in bad faith with respect to the insurance policy.*** Of course, if a company's operation is national in scope, it may be subject to the tort laws of many states, but it is "predictable" that if a tort is committed against a Wisconsin policyholder, for example, Wisconsin tort law will apply.

Id. at 855 (emphasis added). *See also*, *Allstate Fire and Casualty Insurance Company v. Stratman*, 620 S.W.3d 228, 234 (Mo. App. 2020) (rejecting insurer's argument that §§ 188 and 193 should apply to a bad faith claim and holding that § 145 must apply because bad faith is an extra-contractual claim sounding in tort).

These public policy reasons are further acknowledged in various Official Comments to Restatement § 145. Official Comment (e) to § 145 notes that the place of injury is particularly relevant to the analysis applicable to tort claims: "This contact likewise plays an important role in

the selection of the state of the applicable law in the case of other kinds of torts, provided that the injury occurred in a single, clearly ascertainable, state. This is so for the reason among others that ***persons who cause injury in a state should not ordinarily escape liabilities imposed by the local law of that state on account of the injury***." (Emphasis added). Official Comment (b) to § 145 further underscores the distinction between justified expectations in tort and contract cases:

> The factors listed in Subsection (2) of the rule of § 6 vary somewhat in importance from field to field. ***Thus, the protection of the justified expectations of the parties, which is of extreme importance in such fields as contracts, property, wills and trusts, is of lesser importance in the field of torts.*** This is because persons who cause injury on nonprivileged occasions, particularly when the injury is unintentionally caused, usually act without giving thought to the law that may be applied to determine the legal consequences of this conduct. Such persons have few, if any, justified expectations in the area of choice of law to protect, and as to them the protection of justified expectations can play little or no part in the decision of a choice of law question. Likewise, the values of certainty, predictability and uniformity of result are of lesser importance in torts than in areas where the parties and their lawyers are likely to give thought to the problem of the applicable law in planning their transactions. ***Finally, a number of policies, such as the deterrence of tortious conduct and the provision of compensation for the injured victim, underlie the tort field.*** These policies are likely to point in different directions in situations where the important elements of an occurrence are divided among two or more states.

(Emphasis added).

Thus, the principles underlying the *Ohayon* Court's distinction between "justified expectations" in the contract versus tort contexts has been followed by courts in other jurisdictions when refusing to apply the "principal location of the risk" analysis advanced by Travelers here. This distinction recognized in *Ohayon*, *SnyderGeneral*, *Kilmer*, and *Thiel* is particularly relevant with regard to the tort of bad faith in the insurance context. Scott Fetzer's bad faith claim arises by operation of law and it is not created by, nor does it arise from, the insurance policy. A party that commits bad faith is acting in derogation of the law, not in reliance upon it, and therefore has no justified expectations to protect.

To the contrary, Scott Fetzer justifiably expected that, as a company located in Ohio, it would be afforded the protection of Ohio law in the handling and resolution of its insurance claim. *See Lewis v. Horace Mann Insurance Co.*, 410 F. Supp.2d 640, 655 (N.D. Ohio 2005) ("Further, Lewis, a resident of Ohio, injured in Ohio, and seeking redress in an Ohio court, should justifiably be able to expect that Ohio's laws will apply."); *In re Commercial Money Ctr.*, 603 F. Supp.2d at 1107 (injury resulting from bad faith of insurer occurred at company's Ohio headquarters); Restatement § 145 Official Comment (f) (where damage "is pecuniary in nature, [it] will normally be felt most severely at the plaintiff's headquarters or principal place of business"). The *Ohayon* Court's recognition of these important distinctions between the choice of law analysis applicable to contract and tort claims further supports the application of § 145, rather than § 193, to the tort of bad faith.

5. The law of different states may properly apply to different issues in the same case.

While the trial court may ultimately need to apply the Restatement's choice of law principles applicable to contracts prior to deciding Scott Fetzer's declaratory judgment and breach of contract claims, the law applicable to Scott Fetzer's bad faith claims must be determined independently. Indeed, the Restatement, as applied by Ohio courts, has long recognized that different choice of law analyses may (and often should) be applied to separate claims in the same case. *See Am. Interstate Ins. Co. v. G&H Service Center, Inc.*, 112 Ohio St.3d 521, 2007-Ohio-608, 861 N.E.2d 524, ¶ 12 (2007) (noting Restatement § 185 applied to choice of law analysis on subrogation claim but that § 145 applied to determine which state's law applied to the issue of tort liability); *Est. of Sample through Cornish v. Xenos Christian Fellowship, Inc.*, 2019-Ohio-5439, 139 N.E.3d 978, 986, ¶ 25 (10th Dist.) (noting that the Restatement "adopts a selective, issue-oriented approach to determining choice of law" and "different states' laws can apply to different

issues in the same case, an outcome the authors of the Restatement acknowledged and found consistent with longstanding law.").

B. Travelers misreads Ohio law and may have attempted to mislead this Court as to the adoption of its position by other courts.

Travelers misleadingly asserts that two Ohio cases—*Misseldine v. Progressive Cas. Ins. Co.*, 8th Dist. Cuyahoga No. 81770, 2003-Ohio-1359 and *Mayfield v. Chubb Ins. Co.*, 5th Dist. Stark No. 2001CA00244, 2002-Ohio-767—applied § 193 to cases "involving bad faith." (Trav. Br. at 10). However, neither case applied § 193 to a choice of law analysis involving a bad faith claim. *Misseldine* applied § 193, in conjunction with § 188, to determine the parties' rights and duties "with respect to an issue in contract" and held that Ohio law did not apply to the interpretation of UM/UIM coverage for an automobile located in Hawaii. *Misseldine* at ¶ 51. Similarly, *Mayfield* applied § 193 to a "declaratory judgment action for UM/UIM coverage . . . sounding in contract, not tort." *Mayfield*, 2002-Ohio-767, *2. The court did not reach the issue of which state's law applied to bad faith. *Id.*

The other Ohio cases relied upon by Travelers are equally unhelpful to Travelers' argument. *See Gillette v. Estate of Gillette*, 163 Ohio App.3d 426, 431, 2005-Ohio-5247, 837 N.E.2d 1283 (10th Dist.) (noting that the insurance policy informs *who* may bring a bad faith claim, but the claim itself "does not arise from breach of the terms of the insurance policy, but from the 'breach of the positive legal duty imposed by law due to the relationship between the policies.'" (*Id.* quoting *Hoskins*, 6 Ohio St.3d at 276)); *Gen. Accident Ins. Co. v. Ins. Co. of N. Am.*, 69 Ohio App.3d 52, 58, 590 N.E.2d 33 (8th Dist. 1990) (mentioning § 193 only in passing but applying § 188 to contract interpretation). Thus, contrary to what its merit brief implies, Travelers has failed to cite a single Ohio case applying § 193 to a bad faith tort claim.

The non-Ohio cases cited by Travelers are either inapplicable or, in many instances, actually supportive of Scott Fetzer's position. As discussed above, Travelers' brief does not contain a fulsome discussion of the *Kilmer* decision and omits the court's actual holding in that case because it undermines Travelers' arguments. The remaining non-Ohio cases cited by Travelers are also unhelpful, as they either contain no analysis of the issue before this Court or arise under the laws of states that treat bad faith claims as akin to contract claims. *See Cecilia Schwarber Trust Two v. Hartford Acc. & Indemn. Co.*, 437 F. Supp.2d 485, 488–89 (D. Md. 2006) (holding that the state where policyholder resided had greater interest in the claim and rejecting attempt to apply law of state where insurer was located);[1] *Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 152–53 (2nd Cir. 2008) (noting it is not uncommon to apply different states' laws to breach of contract and bad faith claims and holding that applying California law to bad faith claims "based on an insurer's conduct that took place chiefly in New York [] would offend New York's policy choice."); *Celebre v. Windsor-Mount Joy Mut. Ins. Co.*, E.D. Pa. No. CIV. A. 93-5212, 1994 WL 13840, **1–2 (Jan. 14, 1994) (noting that Pennsylvania's courts apply the "most significant relationship" test regardless of whether a claim sounds in contract or in tort); *Malbco Holdings, LLC v. AMCO Ins. Co.*, D. Oreg. No. CV–08–585–ST, 2008 WL 5205202, *5 (Dec. 11, 2008) (noting that Oregon law "considers the type of breach of duty of good faith and fair dealing alleged here to be a contractual claim, not a tort claim."); *Pen Coal Corp. v. William H. McGee and Co., Inc.*, 903 F. Supp. 980, 983 (S.D. W.Va. 1995) (noting that West Virginia law, unlike

[1] Travelers' discussion of *Cecelia Schwarber Tr. Two* on page 17 of its brief is somewhat misleading. Travelers notes that the court declined to apply the bad faith law of a particular state simply because "the claim handling operations took place in that state." *Id.* at 488. In that case, the insured argued that the law of the state where the *insurer's claims handling personnel* were located should govern the claim. That argument was rejected by the court. Here, Scott Fetzer is not arguing that the law of Connecticut—where Travelers claims department was located—should govern. Thus, *Cecelia Schwarber Tr. Two* is inapposite.

Ohio, characterizes a bad faith claim as sounding in contract); *KNS Companies, Inc. v. Federal Ins. Co.*, 866 F. Supp. 1121 (N.D. Ill. 1994) (addressing choice of law applicable to a demand for punitive damages arising from alleged bad faith breach of insurance contract where it appears no separate tort claim for bad faith was alleged).

In sum, Travelers has failed to cite any case holding that § 193 must be applied to a bad faith tort claim, particularly under the facts presented here. Rather, most of the case law it relies upon supports Scott Fetzer's argument that the law of the state where the bad faith conduct is directed has the most significant relationship to the claim and it is that state that has the greatest interest in providing a remedy to compensate for any loss resulting from the insurer's conduct. Here, that state is Ohio, and the lower courts correctly applied Ohio law to Scott Fetzer's bad faith claim.

C. Even if Section 193 applies, it does not mandate application of another state's law to Scott Fetzer's bad faith claim.

Even if Travelers could successfully argue that § 193 should be considered when deciding a choice of law question in regard to a tort claim, § 193 itself does not, standing alone, mandate which state's law should apply. Rather, it provides that the location of the principal risk should apply unless § 6 of the Restatement dictates that another state's law has a more significant relationship to the parties or transaction. *See also*, *Kilmer*, 189 F. Supp.2d at 245 (noting that § 193's focus on the location of the insured risk "is not controlling in all circumstances"). Thus, even if § 193 were arguably applicable, it provides only an initial consideration with respect to choice of law. This point is reinforced through § 193's ultimate deference to the considerations set forth in Restatement § 6. Section 6 provides that the following factors should be considered when deciding which state's law to apply:

> (a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Restatement (Second) § 6.

In the present case, the § 6 factors strongly favor application of Ohio law. The needs of interstate and international systems are best served by protecting the justified expectations of insureds in the handling of insurance claims under the law of the state where they are located, even if that location changes after the insurance policy is issued. Even in such circumstances, the insurer knows, or should know, where the insured is located and can comport its conduct accordingly.

With regard to § 6(b), Ohio public policy favors the protection of insureds located in Ohio from bad faith claims practices. *See e.g.*, *Hoskins*, 6 Ohio St.3d at 277 (since "insurance companies are clearly affected with a public interest, there is wisdom in a rule which deters refusals on the part of insurers to pay valid claims where the refusals are both unjustified and in bad faith."). In this regard, Ohio has a well-established body of bad faith law. The deterrence of bad faith was of such significance to Ohioans that the state legislature codified an exception to Ohio's privilege law so that communications in furtherance of bad faith would not be shielded from disclosure by invalid claims of privilege. R.C. § 2317.02(A)(2). Further, Ohio has enacted statutes and regulations prohibiting conduct deemed to be unfair and deceptive to policyholders located in Ohio. *See e.g.* R.C. § 3901.20; R.C. § 3901.21; O.A.C. §§ 3901-1-07. *See also*, *Barge v. Jaber*,

831 F. Supp. 593, 596 (S.D. Ohio 1993), *aff'd* 39 F.3d 1181 (6th Cir. 1994) ("[U]nder the 'interest analysis' approach, the Plaintiffs in this case are not only Ohio residents, but the injuries occurred in Ohio. The State of Ohio, therefore, would logically have a substantial interest in the application of its own laws, to its own citizens, who were injured within its borders.")

In contrast, while Ohio has significant public policy reasons favoring application of its law to this case, with regard to § 6(c), Indiana and Michigan have no such interests. Neither Scott Fetzer nor Travelers are located there, and Travelers has not identified any claims activity related to Scott Fetzer's bad faith claim that occurred in either state.

With regard to § 6(d)–(g), each factor weighs in favor of Ohio law. As discussed above, Scott Fetzer should rightfully expect that its claim would be considered under Ohio law, whereas Travelers had no expectation that another state's law would govern its tortious conduct directed to an insurance claimant located in Ohio. Further, the public policies underlying bad faith law—deterring insurers' bad faith conduct in handling insurance claims—would be protected by applying Ohio law. Finally, Ohio's established bad faith law would provide for predictability, uniformity, and ease of administration in regard to claims asserted by Ohio policyholders arising from conduct directed to them in Ohio.

Therefore, even if § 193's focus on the "principal location of the risk" were a consideration in the choice of law analysis applicable to Scott Fetzer's bad faith claim, the § 6 factors would override that presumption in favor of applying Ohio law.

D. In the event Travelers successfully compels application of another state's law to the bad faith claim itself, Restatement § 139(2) requires the application of Ohio privilege law to the underlying discovery dispute.

Although Travelers has filed this appeal to force the application of another state's law to Scott Fetzer's bad faith claim, its victory on that issue would ultimately make no difference to the

outcome of the discovery dispute that forms the basis of this appeal. Put another way, even if the lower courts had agreed with Travelers and held that § 193 compelled application of Indiana or Michigan law to Scott Fetzer's bad faith claim, such a holding would simply have triggered a separate analysis of Restatement § 139(2) to resolve the question of which state's privilege law would apply to the specific documents at issue. In such circumstances, § 139(2) would dictate application of Ohio privilege law to the disputed documents.

Section 139(2) of the Restatement supplies the framework for deciding a choice of law dispute relating to question of privilege. That section provides:

> (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
>
> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication ***but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect***.

(Emphasis added).

Subsection (1) offers Travelers no protection, because regardless of which state has "the most significant relationship with the communication," Ohio unquestionably is the forum, and Ohio makes these communications admissible. Subsection (2), similarly, offers Travelers no protection because it makes clear that communications such as the ones at issue here are admissible if they would be admissible under the law of the forum—again, here, Ohio. The law of Ohio, which is "the local law of the forum," is clear on these points and does not protect communications that are created in furtherance of bad faith. *See* R.C. § 2317.02(A)(2); *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 214, 744 N.E.2d 154 (2001). Additionally, Travelers has not sought appellate review of the lower courts' decisions holding that the documents at issue are not privileged under

Ohio law and must be produced. Thus, this issue is finally determined—the documents are subject to disclosure unless another state's privilege law applies to protect them.

Although Travelers' opening brief does not address § 139(2), it will likely argue on reply that a "special reason" precludes the application of Ohio law. However, in the proceedings below, Travelers never identified any such "special reason" and there is no basis to find that one exists. Comment (d) to § 139 provides four considerations for when a "special reason" might prevent application of the forum state's privilege law: (1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved, and (4) fairness to the parties. None of these factors weighs in favor of applying another state's privilege law.

1. Ohio has the most significant relationship with the communications at issue.

It is undisputed that in 1968, Kingston (at the time an Indiana corporation) merged with Scott Fetzer. At that time, Kingston Products' policies applied to Scott Fetzer by operation of law. Since 1968, then, the rights under those policies have resided with Scott Fetzer, whose principal place of business is in Ohio.

Further, the underlying claims at issue herein were submitted to the insurers, including Travelers, beginning in 1986—well after the rights to the Travelers policies applied to Scott Fetzer by virtue of the merger. As such, during the entire time these claims were being investigated and adjusted, the policies belonged to a company located in Ohio. During that time, all communications between Travelers and Scott Fetzer relating to the underlying claims have been directed to, or emanated from, Scott Fetzer or its agents in Ohio. Ohio (the forum state) has the most significant relationship to both the bad faith claim itself, and the communications at issue.

2. The disputed documents are material to Scott Fetzer's bad faith claim.

There can be no dispute that the documents sought are material and probative of Scott Fetzer's bad faith claim. Indeed, as the Eight District's decision noted, the documents Travelers has been ordered to produce are directly probative of "Travelers' investigation of into the existence of the policies" that Travelers now claims do not exist. *Scott Fetzer*, 2022-Ohio-1062 at ¶ 4. The documents are also "probative of Travelers' efforts to investigate the current claims and/or locate the alleged policies." *Id.* (quoting lower court decision). The materiality of these documents is underscored by this Court's decision in *Boone* and the legislature's amendment to R.C. § 2317.02(A)(2), both of which recognize that the disputed communications are material to Scott Fetzer's bad faith claim and thus "unworthy of protection." *Boone*, 91 Ohio St.3d at 213.

3. The attorney-client privilege plays a vital role in our judicial system but is subject to judicially-created limitations and legislative directives.

The third consideration—the type of privilege involved—does not mandate application of the "special reason exception." This Court in *Boone* acknowledged the important role the attorney-client privilege plays in our judicial system. *Boone*, 91 Ohio St.3d at 210, n. 2. However, while recognizing the importance of protecting attorney-client communications, the Court and the Ohio legislature both have determined that communications between insurance companies and their attorneys in furtherance of bad faith conduct are unworthy of protection.

4. It would not be unfair to apply Ohio privilege law to the communications at issue because Travelers directed all of its claims activity to Scott Fetzer in Ohio.

The same reasons that support application of Ohio law to the bad faith claim generally also demonstrate that it would not be unfair to apply Ohio privilege law to the documents at issue. As is clear from the record herein, Travelers at all times was fully aware that it was adjusting a claim submitted by a company that was headquartered in Ohio, and that all communications to and from

Scott Fetzer in connection with this claim were connected to Ohio. Moreover, Travelers has availed itself of the privilege of conducting business in Ohio through licensure with the Ohio Department of Insurance—further evidence of the fact that Travelers could fully anticipate being subject to Ohio law, including R.C. § 2317.02. Finally, *Boone* was decided in 2001 and R.C. § 2317.02 was amended shortly thereafter to make it clear that communications in furtherance of bad faith are not privileged. Thus, Travelers knew, or should have known, that Ohio law would not offer protection for any communications authored in furtherance of its bad faith scheme.

As explained above, Travelers' argument that § 193 mandates the application of Indiana or Michigan law to Scott Fetzer's bad faith claim is wrong. However, even if Travelers was right, § 139(2) would be triggered, thus requiring application of Ohio privilege law when resolving the underlying question of whether the documents at issue are privileged. *See C.B. Fleet Co. v. Colony Specialty Ins. Co.*, N.D. Ohio No. 1:11-CV-0375, 2012 WL 9514721, at *4 (Dec. 21, 2012) ("In summary, the four factors discussed above weigh in favor of applying Ohio privilege law; the factors do not suggest 'there is some special reason why [Ohio law] should not be given effect.' Restatement § 139(2). Accordingly, documents that are not privileged under Ohio law must be produced."); *Gibson v. Chubb Natl. Ins. Co.*, 20-CV-1069, 2021 WL 4401434, **3-4 (N.D. Ill. 2021) (applying Restatement § 139(2) and holding that the law of the forum controlled application of the attorney-client privileged to documents withheld in coverage dispute based, in part, on policy of forum state favoring disclosure under the applicable facts).

In either event, the lower court's decisions holding that Travelers must produce the disputed document must be upheld—either because Ohio law applies to the bad faith claim in its entirety, or because, regardless, Section 139(2) mandates the application of Ohio privilege law where there is a conflict among competing states' laws.

IV. CONCLUSION

Restatement § 145, which relates to tort claims, rather than § 193, which applies to contract claims, determines the law applicable to a bad faith tort claim and compels application of Ohio law to Scott Fetzer's claim here. This result is consistent both with previous decisions from this Court holding that a bad faith claim sounds in tort and with the Court's adoption of Restatement § 145's framework to tort claims. Applying § 145 to Scott Fetzer's bad faith claim promotes Ohio public policy to protect its insureds from unreasonable and injurious conduct by insurers. It is also a rational approach as applied to insurers that have availed themselves of the privilege of conducting business in Ohio and have directed communications in furtherance of bad faith conduct to insureds located here. Scott Fetzer's bad faith claim arises from conduct directed to Scott Fetzer in Ohio and pecuniary loss suffered in Ohio. Travelers' merit brief fails to make a colorable argument that any state other than Ohio has a legitimate interest in addressing the issues giving rise to Scott Fetzer's bad faith claims. Finally, even if another state's law applies to the bad faith claim itself, Restatement § 139(2) compels application of Ohio privilege law to the underlying discovery dispute. Accordingly, because Ohio law will apply in any event, and it is undisputed that Ohio law mandates production of the disputed documents, the Eighth District's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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