No. 23-0411

SUPREME COURT OF OHIO

RICE DRILLING D LLC et al.
Appellants

v.

TERA LLC
Appellee

On Appeal from the Court of Appeals
for the Seventh Appellate District

BRIEF OF AMICI CURIAE OHIO CHAMBER OF COMMERCE & AMERICAN GAS ASSOCIATION IN SUPPORT OF APPELLANTS

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BACKGROUND

Businesses depend on contracts to accomplish their purposes. Those businesses recognize that an occasional disagreement about a contract's meaning is common when doing business. They also understand that being mistaken about a contract interpretation may have financial consequences, but those are usually somewhat predictable because they come from the contract at issue. The *Tera* decision, however, defenestrates predictability and precedent by allowing ordinary quarrels over contract interpretation to result in extraordinary liability, including attorney fees and punitive damages. Businesses and individuals should be able to argue about the meaning of their agreements without the fear of being automatically labeled as acting in bad faith and, resultantly, held responsible for excessive, uncontemplated damages that could put them out of business.

STATEMENT OF INTEREST

Ohio Chamber of Commerce. Since its founding in 1893, the Chamber has been an advocate and resource for Buckeye State businesses. It serves a variety of members from individually owned and operated businesses serving rural communities to publicly traded companies operating on a

global scale. Those business rely on the stability of Ohio's legal system when making business decisions, and the Chamber supports them by filing amicus briefs in cases that are important to those businesses.

American Gas Association. Since its founding in 1918, the Association has represented more than 200 local energy companies that deliver clean natural gas across the United States. Those companies collectively serve 95% of the 77 million residential, commercial, and industrial natural gas consumers across the country. The Association advocates for predictable and fair laws and regulations to ensure its members can provide safe, reliable, and efficient energy services to their customers.

STATEMENT OF FACTS

The Chamber and the Association defer to and incorporate the statements of facts included in the opening brief of Appellants Rice Drilling D LLC and Gulfport Energy Corporation.

STANDARD OF REVIEW

Because this appeal concerns summary judgment decisions, this Court reviews the decisions de novo. *Smathers v. Glass*, 2022-Ohio-4595, ¶ 30.

DISCUSSION

Proposition of Law No. 2: "Bad faith" trespass in energy cases—as in other cases—turns on subjective intent.

A party must be permitted to defend against allegations of bad faith, even when bad faith is presumed.

A factfinder's "bad faith" determination can come with costly consequences. In mineral trespass cases, those consequences may come in the form of enhanced damages. In other cases, they may be attorney fees, and in others, punitive damages. Those costly consequences are not now the norm, but the *Tera* decision sets the stage for them to become all but inevitable. This Court is poised to reverse that decision and to preserve a legal system that does not impose exemplary punishments for a simple disagreement of contract interpretation.

1. The *Tera* decision ignores the subjective nature of the "bad faith" inquiry, undermines the jury's factfinding duty, and prevents parties from defending themselves.

Historically, after being presented with evidence of a party's subjective beliefs, a jury is tasked with deciding whether that party acted in bad faith or not. The *Tera* decision takes that task from the jury and gives it to the court, and then the *Tera* decision permits the court to decide the

matter without considering evidence of a party's subjective beliefs. In doing so, the *Tera* decision also deprives the accused party of an opportunity to defend itself against allegations of bad faith.

a. Whether a party acted in bad faith depends on evidence of that party's subjective belief.

Bad faith centers on subjective belief. Indeed, the meaning of "bad faith" is "[d]ishonesty of belief, purpose, or motive." *Bad faith*, Black's Law Dictionary (11th ed. 2019). This Court has consistently held that bad faith is based on a party's belief. *See, e.g., Slater v. Motorists Mut. Ins. Co.*, 174 Ohio St. 148, 151 (1962), *overruled on other grounds* ("'Bad faith' is . . . a dishonest purpose or some moral obliquity."); *State ex rel. Grumbles v. Delaware Cnty. Bd. of Elections*, 2021-Ohio-3132, ¶ 20 ("The phrase ['bad faith'] connotes a dishonest purpose, moral obliquity, conscious wrongdoing, or some ulterior motive or ill will."). Even the lower court recognized this reality in its opinion. *Tera LLC v. Rice Drilling D LLC*, 2023-Ohio-273, ¶¶ 55, 57 (noting that bad faith depends on a party's "bona fide belief of right").

Because of its basis in subjective belief, a party claiming bad faith must prove that the accused party committed an unlawful act with a "such

a reprehensible and intolerable nature as to constitute bad faith." *Slater*, 174 Ohio St. at 151. This requires evidence demonstrating "more than negligence or bad judgment." *Grumbles*, 2021-Ohio-3132 at ¶ 20; *see also Slater*, 174 Ohio St. at 151 ("'Bad faith' is . . . not simply bad judgment. It is not merely negligence."). Even in rare cases in which bad faith is presumed, this Court has historically required that the accused party be given an opportunity to rebut that presumption. *Charles A. Burton Inc. v. Durkee*, 162 Ohio St. 433, 442–43 (1954) (allowing party accused of bad faith to "produce evidence sufficient to balance the state of proof"); *Corwin v. Suydam*, 24 Ohio St. 209, 217 (1873) (providing that party may "fully rebut[] any presumption of fraud or bad faith" by showing it acted with "caution or prudence").

The *Tera* decision failed to consider any subjective evidence before declaring that Rice had acted in bad faith. In fact, the decision did not evaluate any evidence at all, imposing "bad faith" liability as a matter of law regardless of Rice's belief, purpose, or motive. *See Tera*, 2023-Ohio-273 at ¶¶ 56–58. The *Tera* decision came to that conclusion despite first acknowledging that Ohio law requires evidence of "bona fide belief" to be evaluated before bad faith can be decided. *See id.* at ¶ 57. But if bad faith can

be decided without considering subjective belief or "faith"—which the *Tera* decision approved—then the "bad faith" inquiry becomes meaningless.

b. Whether a party acted in bad faith is a factual decision for the jury.

Perhaps because of its subjective nature, this Court has long viewed bad faith as "a jury question." *Fabrey v. McDonald Vill. Police Dep't*, 70 Ohio St. 3d 351, 356 (1994); *see, e.g., Apel v. Katz*, 83 Ohio St. 3d 11, 22 (1998) (affirming submission of bad faith question to jury); *Katz v. Am. Fin. Co.*, 112 Ohio St. 24, 27 (1925) (finding bad faith is "question of fact"). Even the *Tera* decision stated this rule, despite its contrary holding. *See Tera*, 2023-Ohio-273, ¶ 55 ("The question of good faith is an issue of ultimate fact as to whether or not there was bona fide belief of right in the action taken and complained of, to be arrived at by the trier of the facts from all the relevant material evidence adduced in the case."). Put simply, the issue of bad faith must go to the jury.

Following this Court's precedent, lower Ohio courts have consistently upheld the jury's role in determining bad faith. *See, e.g., O'Farrell v. Harlem Twp. Bd. of Trs.*, 2019-Ohio-1675, ¶¶ 52, 54 (5th Dist.) (holding that "issues regarding malice, bad faith, and wanton or reckless

behavior are questions presented to the jury"); *Third Fed. S. & L. Assn. of Cleveland v. Formanik*, 2016-Ohio-7478, ¶ 45 (8th Dist.) (reviewing Ohio cases and concluding that "bad faith is a question of fact"); *Watershed Mgmt. LLC v. Neff*, 2012-Ohio-1020, ¶ 49 (4th Dist.) (holding that "bad faith is a factual determination"); *Littlejohn v. Parrish*, 2005-Ohio-4850, ¶¶ 24–28, 31–32 (1st Dist.) (finding that the issue of whether party acted in bad faith "was an unresolved question of fact that made the grant of summary judgment inappropriate" for that issue).

The *Tera* decision usurps the jury's factfinding role by deciding a genuinely disputed claim of bad faith before trial. *See Tera*, 2023-Ohio-273 at ¶ 2. And it does so despite acknowledging—as this Court has explained—that bad faith must be determined "by the trier of the facts from all the relevant material evidence adduced in the case." *See id.* at ¶ 55. The jury should have considered the disputed question of fact regarding whether Rice had trespassed in bad faith based on the evidence in the case. Yet the *Tera* decision invades the province of the jury by deciding a disputed question of fact before trial and basing that decision on a previous question of law about contract ambiguity and not on any evidence about bad faith

trespass. *See id.* at ¶¶ 53–58. This practice is impermissible under Ohio precedent regarding claims of bad faith.

c. Whether a party acted in "bad faith" is a rebuttable accusation.

Regardless of how the factfinder decides whether a party acted in bad faith, that party must have the chance to rebut the accusation. It is a fundamental principle of law that parties hauled into court are entitled to defend against the accusations brought against them. This Court has found that accusations of bad faith, in particular, can be exceptionally damaging and can lead to "an unfair and wrong result" if not carefully assessed. *Slater,* 174 Ohio St. at 152. At the very least, determinations of bad faith warrant more than a pretrial review of contract language for ambiguity. *Contra Tera,* 2023-Ohio-273, ¶¶ 57–58 (finding bad faith trespass on summary judgment because relevant "contract language is only susceptible to one reasonable interpretation").

Bad faith must be carefully evaluated and tried because it can result in a party paying damages far beyond any damages actually caused. For example, a party may have to pay attorney fees for itself and a prevailing

party if the prevailing party can demonstrate that the losing party acted in bad faith. *See, e.g., Wilborn v. Bank One Corp.*, 2009-Ohio-306, ¶ 7; *Grumbles*, 2021-Ohio-3132, ¶ 20. As another example, a party may have to pay punitive damages on top of any actual damages if the prevailing party can show that the losing party "breache[d] his duty of good faith." *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272, 277–78 (1983). Those increased damages can be devastating to parties. As a result, due caution is required before a party can be punished beyond any damages it caused.

Due caution is disregarded when a court finds bad faith solely based on whether a contract is ambiguous, as the *Tera* decision did. *See Tera*, 2023-Ohio-273, ¶¶ 57–58 (finding bad faith because subject "contract language is only susceptible to one reasonable interpretation"). If the *Tera* decision stands, a party who chooses to enter into a contract under Ohio law could be faced with unpredictable punishment based on a court's interpretation of that contract. Each and every term in a contract could become a trigger for debilitating bad faith damages. *See, e.g., Krasny-Kaplan Corp. v. Flo-Tork Inc.*, 66 Ohio St. 3d 75, 78 (1993) (holding distributor did not act in bad faith and thus was not required to pay attorney fees and costs); *Dardinger v.*

Anthem Blue Cross & Blue Shield, 2002-Ohio-7113, ¶ 174 (noting insurer acting in bad faith "can be liable in compensatory and punitive damages").

Businesses cannot thrive in an environment littered with unforeseen legal landmines in contracts. And businesses need those contracts to provide their goods and services and, thus, to survive. The Court should protect the rights of Ohio businesses to contract freely without fear of irrebuttable bad faith accusations by reversing the decision below.

2. The *Tera* decision compounds its errors by also increasing the financial exposure of parties that simply have a mistaken understanding of an agreement.

"Bad faith" is not a concept unique to the mineral trespass at issue in the *Tera* decision. For example, a prevailing party can recover attorney fees when the other party acted in bad faith. For another, the "bad faith" inquiry is similar to the inquiry preceding punitive damages. Consequently, the *Tera* decision threatens to permit attorney fees and punitive damages under circumstances when neither would have been permitted before.

a. Are attorney fees appropriate when a court merely agrees with a party's interpretation of a contract?

When it comes to attorney fees, Ohio follows the American rule, meaning "a prevailing party in a civil action may not recover attorney fees

as part of the costs of litigation." *Wilborn*, 2009-Ohio-306 at ¶ 7. That rule is not without its exceptions, and one permits an award of attorney fees "when the prevailing party demonstrates bad faith on the part of the unsuccessful litigant." *Id.* Whether that exception applies is typically a question of fact left to the jury. *See, e.g., Watershed*, 2012-Ohio-1020 at ¶¶ 49–50 (agreeing that "bad faith is a factual determination").

But affirming the *Tera* decision will permit that exception to swallow the rule in contract cases and perhaps others. Per that decision, it is impossible to rebut a claim of bad faith relating to contract interpretation if a court decides that the relevant "contract language is only susceptible to one reasonable interpretation." *See Tera*, 2023-Ohio-273 at ¶ 57. Put plainly, under *Tera*, a party has acted in bad faith if a court later rejects that party's interpretation of a contract.

Now consider that in the context of a hypothetical contract case. Party A and Party B disagree about how to interpret contract language concerning Party B's compensation. That dispute finds its way into a courtroom, and eventually, the court decides that Party A's interpretation was right. Because Party B's interpretation was wrong, regardless of

whether he believed it was wrong, he acted in bad faith under the *Tera* decision. Consequently, Party A could get his attorney fees from Party B. The same can go for nearly every party prevailing in a dispute involving contract interpretation, and thus *Tera* allows the "bad faith" exception to swallow the American rule limiting the availability of attorney fees.

Even more, the *Tera* decision precludes "bad faith" determinations from going to the jury in the contract context, placing the decision further at odds with the law as it is. Contract interpretation is largely reserved to the courts. *See, e.g.*, 18 Ohio Jur. 3d *Contracts* § 110, Westlaw (updated June 2023). Yet bad faith determinations are largely reserved to jurors. *See, e.g.*, *Watershed*, 2012-Ohio-1020 at ¶¶ 49–50. By mandating a finding of bad faith as a matter of law if a party's interpretation conflicts with a court's interpretation, the *Tera* decision renders the jury unnecessary in this context. This Court should not approve of a judicial practice that so casually usurps the role of the jury.

Countless contract disputes involve a disagreement about what the parties' agreement means. The American rule provided predictability, assuring that absent exceptional circumstances, each party would have to

foot its own bills to resolve the dispute. The *Tera* decision takes a different route. Under that decision, a party must be prepared not only for the possibility that the court may disagree with her position, but also for the possibility that she'll have to cover the other side's legal bills if she is wrong. No longer can parties plan for the cost of litigation, and thus the *Tera* decision trades predictability for chaos.

b. Are punitive damages justified when a tort is the result of an accidental contract misinterpretation?

Because of the similarity between enhanced mineral trespass damages and punitive damages, the *Tera* decision allows enhanced damages to become more commonplace. Consider first the two types of damages available for mineral trespass. Typically, a mineral trespasser "is liable in damages only for the minerals removed" based on "their value in situ." *Brady v. Stafford*, 115 Ohio St. 67, 79 (1926). But when that trespass was committed "willfully, intentionally, wrongfully, and knowingly"—that is, in bad faith—"the measure of damages is the market value of the coal mined, at the time of removal, without any deduction whatsoever." *Id.* This so-called harsh rule augments liability, in part, "to deter other

wrongdoers." *Tera*, 2023-Ohio-273 at ¶ 54; *see also* 21 A.L.R. 2d 380 *Wilful trespass; "harsh" rule* § 5, Westlaw (updated weekly).

Punitive damages share similar means and ends. The harsh rule applies when a party acts in bad faith, which "imports a dishonest purpose or some moral obliquity" and "implies conscious doing of wrong." *Victor v. Big Sky Energy Inc.*, 2018-Ohio-4666, ¶ 85 (11th Dist.). Similarly, punitive damages are available "when a party's actions demonstrate malice or aggravated or egregious fraud" and "a positive element of conscious wrongdoing is always required." *WWSD LLC v. Woods*, 2022-Ohio-952, ¶¶ 69, 71 (10th Dist.). And both serve the same end—deterring others. *Compare Dardinger*, 2002-Ohio-7113 at ¶ 178 ("The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct."), *with Tera*, 2023-Ohio-273 at ¶ 54 ("The deliberate trespasser is prevented from reaping any advantage from his wrongdoing, not strictly as a matter of right to the property owner, but also to deter other wrongdoers.").

Those similarities invite the use of the *Tera* decision to justify punitive damages in tort cases when the parties also have a contractual relationship. Consider a hypothetical. Company A and Company B have an

agreement whereby Company B has the right to use certain Company A equipment. After Company B uses and damages a piece of equipment, Company A sues, alleging a conversion claim because, in its view, Company B did not have permission to use that equipment. Company B argues that it used the equipment under the agreement, but the court ultimately disagrees and decides Company B is liable for conversion. Because the court rejected Company B's interpretation of the agreement, the *Tera* decision allows the conclusion that Company B therefore acted in bad faith, entitling Company A to punitive damages as a matter of course, not because of exceptional circumstances.

Punitive damages are exemplary damages. But the *Tera* decision stands to make them ordinary. Under that decision, an error of contract interpretation under honest belief is not just "bad judgment," it becomes "bad faith" and exposes a mistaken party to punishment beyond any damages that party caused. *See Victor*, 2018-Ohio-4666 at ¶ 85 ("Bad faith is not simply bad judgment. It imports a dishonest purpose or some more obliquity. It implies conscious doing of wrong." (cleaned up)). This Court should correct this error and explain that parties can have their own honest

interpretations of an agreement. And each can do so without fear of enhanced liability if a court happens to disagree with its interpretation.

CONCLUSION

Because the *Tera* decision disregards the precedents of this Court and destabilizes the longstanding jurisprudence that Ohio businesses depend on, this Court should reverse the *Tera* decision.

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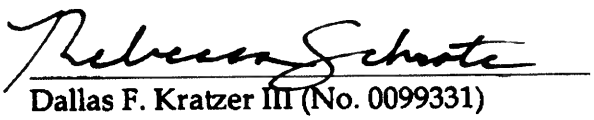

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CERTIFICATE OF SERVICE

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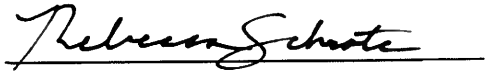

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