

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
October 2, 2025 Session

FILED

10/28/2026

Clerk of the
Appellate Courts

**COMMERCIAL PAINTING COMPANY INC. v. THE WEITZ COMPANY
LLC ET AL.**

**Appeal from the Chancery Court for Shelby County
No. CH-06-1573 JoeDae L. Jenkins, Chancellor**

No. W2019-02089-COA-R3-CV

The Tennessee Supreme Court remanded this case, directing this court to determine whether the parties' contractual waiver applied to punitive damages that were awarded in connection with a tort claim for intentional misrepresentation. We conclude that the contractual waiver in this case is not a bar to the punitive damages awarded for intentional misrepresentation. The trial court's judgment on this matter is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

JEFFREY USMAN, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and CARMA DENNIS MCGEE, J., joined.

Philip E. Beck, Atlanta, Georgia; Jeffrey C. Smith, Memphis, Tennessee; and John A. Templer, Jr., Des Moines, Iowa, for the appellants, The Weitz Company, LLC, Federal Insurance Company (NJ), and St. Paul Fire & Marine Insurance Company.

Scott A. Frick, Memphis, Tennessee, for the appellees, Commercial Painting Company, Inc., and Liberty Mutual Insurance Company (MA).

OPINION

I.

Like a relentless vine growing over the course of more than two decades of litigation, this case has become ever more tangled — the present appeal being the fifth iteration of this case before the Tennessee Court of Appeals. The Tennessee Supreme Court sketched out a significant portion of the tortuous journey in the following manner:

This case stems from a contract dispute between a general contractor, The Weitz Company, LLC, and its drywall subcontractor, Commercial Painting Company, Inc. Weitz was the general contractor on a multi-building retirement community in Shelby County. In December 2004, the parties entered into a contract for Commercial Painting to perform drywall work on the project.¹ The contract included a schedule detailing the phases and timing of construction. Weitz agreed to pay Commercial Painting \$3,222,400 for its work. Change orders later increased the amount to \$3,315,189. The parties had various disputes as the project progressed.

By the end of the contract, Weitz had paid Commercial Painting twelve of its seventeen pay applications. Weitz refused to pay the remaining five applications, claiming they were submitted untimely and contained improper change order requests.

In August 2006, Commercial Painting sued Weitz² and its sureties, Federal Insurance Company and St. Paul Fire & Marine Insurance Company, and The Village at Germantown in the Shelby County Chancery Court seeking \$1,929,428.74 in damages for breach of contract, including attorney's fees.³ Commercial Painting alleged that Weitz failed to properly sequence, coordinate, monitor, and inspect the work of the various subcontractors on the project, which caused Commercial Painting extra work and forced it to work in a more inefficient and costly manner. The complaint also included claims for payment under the performance bond issued by Weitz's sureties, interest on retainage under section 66-11-144 of the

¹ The work included installation of exterior ceiling insulation; exterior wall metal framing; exterior wall insulation; light gauge metal partitions; gypsum board walls, ceilings, and soffits; and suspended ceilings. The contract, with an effective date of September 28, 2004, was signed by the president of Commercial Painting on November 1, 2004, and by Weitz's representative on December 7, 2004.

² The defendant named in the complaint's caption was The Weitz Company, Inc., but the first paragraph of the complaint referenced the defendant as The Weitz Company-National. These entities are referred to herein collectively as "Weitz."

³ Section 12.1 of the contract provides:

In the event it shall become necessary for either party to institute legal proceedings against the other party for recovery of any amounts due and owing under the Agreement, it is expressly agreed that the prevailing party in any such action shall be entitled to recover from the non-prevailing party all costs, including reasonable attorney's fees, of pre-suit collection attempts, suit, and post judgment or settlement collection including those incurred on appeal.

Tennessee Code,⁴ unjust enrichment, enforcement of Commercial Painting's mechanic's and materialman's lien, and interest and attorney's fees under the Prompt Pay Act of 1991.⁵

Weitz answered and counterclaimed against Commercial Painting and its surety for "no event less than" \$500,000 in damages for costs allegedly incurred on the project due to Commercial Painting's delay and defective workmanship.

In a later amendment to its complaint, Commercial Painting asserted additional claims for fraud, intentional and negligent misrepresentation, rescission/reformation of the contract, and \$10,000,000 in punitive damages. Commercial Painting alleged Weitz negotiated a six-month extension with the project owner before executing the contract with Commercial Painting, but the construction schedule attached to the contract did not reflect the extension. Commercial Painting also claimed Weitz signed the contract knowing the schedule was outdated by about eight months and that the actual length of the delay was eight to twelve months. Commercial Painting alleged that Weitz knew when it executed the contract that to make up for the delay, it would have to compress the construction schedule and hire extra workers to supplement the work of various subcontractors, including Commercial Painting's drywall work. Commercial Painting also asserted that after negotiating the six-month extension with the project owner, Weitz issued an amended construction schedule that was "fraudulent and unrealistic" in order to earn an early completion bonus.⁶ According to Commercial Painting, Weitz continued to issue construction schedules that were unrealistic, and required the subcontractors to adhere to those schedules, never revealing the actual length of the extension until near the end of the project when it became clear that Weitz could not complete construction in time to earn the early completion bonus. Commercial Painting contended that Weitz improperly supplemented Commercial Painting's work by falsely claiming Commercial Painting was not completing its work according to a schedule that Weitz knew contained false information about the project completion date and that Weitz fraudulently charged Commercial Painting for the cost of the supplemental drywall work. Weitz generally denied the allegations in the amended complaint and reiterated the allegations in its counterclaim that

⁴ Transferred to section 66-34-104 of the Tennessee Code by 2008 Public Acts, chapter 804, section 2, effective July 1, 2008.

⁵ Tenn. Code Ann. §§ 66-34-101 to -704.

⁶ The extension agreement negotiated by Weitz and the project owner included a bonus to Weitz of \$8,597 for each day, up to forty-five days, that the project was completed early.

Commercial Painting was in breach of the subcontract and did not perform its contractual duties in a timely and workmanlike manner.

The trial court granted partial summary judgment in favor of Weitz on Commercial Painting's claims for intentional/negligent misrepresentation and fraud, rescission/reformation of the contract, and punitive damages. After a bench trial, the trial court awarded Commercial Painting \$450,464.26 for breach of contract, finding that Commercial Painting was entitled to \$600,464.26 less a \$150,000 offset to Weitz for having to supplement Commercial Painting's work.

The Court of Appeals vacated the trial court's award of partial summary judgment to Weitz, concluding that Commercial Painting established a genuine issue of material fact regarding the intentional and negligent misrepresentation claims. *Com. Painting Co. v. Weitz Co., LLC* [(“*Com. Painting I*”), No. W2013-01989-COA-R3-CV, 2016 WL 3519015, at *2 (Tenn. Ct. App. June 20, 2016)].

Com. Painting Co. Inc. v. Weitz Co. (“*Com. Painting B*”),⁷ 676 S.W.3d 527, 529-31 (Tenn. 2023).

The case was appealed, and the Tennessee Supreme Court remanded to this Court for reconsideration in light of the changes to the summary judgment standard set forth in *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235 (Tenn. 2015). *Com. Painting Co., Inc. v. Weitz Co.* (“*Com. Painting A*”), No. W2013-01989-SC-R11-CV (Tenn. Nov. 25, 2015) (Order). On remand, this Court concluded that, applying the new summary judgment standard, the trial court had erred in granting summary judgment on the claims for intentional or negligent misrepresentation; accordingly, this court reversed the grant of summary judgment, vacated the judgment and damages from the bench trial, and remanded for further proceedings. *Com. Painting Co., Inc. v. The Weitz Co.* (“*Com. Painting II*”), No. W2013-01989-COA-R3-CV, 2016 WL 3519015, at *1 (Tenn. Ct. App. June 20, 2016). In doing so, this court held, “Commercial Painting is entitled to just one recovery to the extent damages from more than one cause of action overlap, but it should not be precluded from proceeding on multiple theories of liability if it is able to make out a *prima facie* case under more than one cause of action.” *Id.* at *12. This court noted that Commercial Painting was “not required to choose between various causes of action” and that it may be entitled to recover punitive damages. *Id.*

After the remand, Commercial Painting amended its complaint; it sought a jury trial

⁷ In order to distinguish the various appellate opinions generated by this litigation, and to maintain consistency with the naming used by prior opinions in this case, we designate this court's four prior opinions with Roman numerals, and we designate the Supreme Court's prior opinions and orders with capital letters.

on claims for negligent and intentional misrepresentation, breach of contract, unjust enrichment, and damages pursuant to a payment bond. *Com. Painting Co. Inc. v. Weitz Co.* (“*Com. Painting III*”), No. W2019-02089-COA-R3-CV, 2022 WL 737468, at *4 (Tenn. Ct. App. Mar. 11, 2022), *rev’d and remanded*, 676 S.W.3d 527 (Tenn. 2023). At the 2018 jury trial, Commercial Painting presented proof that it was misled by Weitz regarding the bids from other subcontractors, the delays in the project, and the extension for completion. *Id.*

In October 2018, the jury returned a verdict for Commercial Painting under four theories: breach of contract, unjust enrichment/quantum meruit, intentional misrepresentation, and under the payment bond. *Com. Painting III*, 2022 WL 737468, at *5. It awarded \$8,359,863.83, which included \$1,272,952.46 in compensatory damages,⁸ \$2,083,362.16 in pre-judgment interest, \$1,103,549.00 in attorney’s fees, and \$3,900,000 in punitive damages, plus post-judgment interest. *Id.* at *5-6.

In affirming the punitive damages, the trial court noted the jury’s finding that the elements of fraud were met, that Weitz acted in bad faith, and that Weitz acted intentionally, recklessly, maliciously, or fraudulently such that the conduct was egregious. The trial court made findings of fact in support of upholding the jury’s punitive damages award. It found that, prior to the execution of the subcontract, Weitz was aware that it was behind schedule by eight months. Weitz planned to recover the delay by compressing the construction schedule and by supplementing the drywall work which had not yet been assigned through a subcontract. Although the subcontract had not been executed, Weitz told Commercial Painting that it was “imperative” that Commercial Painting’s payment and performance bond be issued. Commercial Painting provided evidence that, once this bond was issued, Commercial Painting was essentially bound to the project due to indemnity obligations, no matter how difficult Weitz became to work with or what Weitz demanded. Moreover, Weitz was made aware that the revised project schedule was unrealistic and in particular that the drywall finishing would be impacted by the existing delays. The signed subcontract had a schedule that Weitz knew was outdated by three months. Weitz was in possession of an updated schedule and knew the schedule it provided to Commercial Painting was outdated. Weitz, however, did not inform Commercial Painting that it was behind schedule by eight months, that it intended to compress the schedule, or that it intended to supplement the drywall work. Commercial Painting’s President testified that he would not have signed the Subcontract had he been aware that Weitz intended to compress the schedule or supplement the drywall. Furthermore, Weitz misrepresented the length of an extension it eventually obtained from the project owner, although it was obligated under the subcontract to grant Commercial Painting the benefit of any extensions Weitz itself received. Weitz was put on notice by the project architects that the schedule it was attempting to impose on Commercial Painting included

⁸ The award of compensatory damages was \$1,729,122.46, but a stipulation in connection with a \$456,170 payment reduced the amount actually owed to \$1,272,952.46.

incompatible tasks scheduled on top of one another and appeared to be driven by Weitz's desire to capture a bonus rather than a logical evaluation of required tasks. Weitz also insisted on a higher level of finish than called for in the contract and failed to inform Commercial Painting that the project owner had confirmed that the contract only required a lower level of finish.

Additionally, Weitz "back charged" Commercial Painting for work performed by other subcontractors that was not necessitated by Commercial Painting's failure to perform but by Weitz's actions or by those of other subcontractors. For instance, Weitz charged Commercial Painting for work necessitated by incorrect framing done by another subcontractor and for repairs to damage caused by other subcontractors. It also charged Commercial Painting for a level of finish above that required by contract. Weitz wrongfully withheld over half a million dollars from Commercial Painting based on the supplemental work. A "Post Mortem" document circulated by Weitz revealed that the lowest bid for the drywall, from Commercial Painting, still resulted in a \$1 million loss for Weitz, which Weitz attempted to lessen by "managing" Commercial Painting. After the completion of the project, Weitz employees joked that Commercial Painting "[s]hould be out of business by now." Weitz project engineer DJ VanEtten, who had claimed at trial never to have seen the "Post Mortem" document despite the fact that she had both forwarded it with effusive praise and had requested feedback on it, told another Weitz employee that Weitz had put "another" drywall company out of business.

Ultimately, the trial court found that the fraudulent conduct by Weitz was in fact egregious, proven by clear and convincing evidence, and justified punitive damages. The trial court found that Weitz intended to put Commercial Painting out of business through its malicious conduct. In evaluating the award, the trial court noted Weitz's large size and annual revenues in excess of \$1.5 billion, the hardship imposed by the wrongful withholding of the payments from the comparatively small company Commercial Painting, and the ill intent to compress the schedule and supplement the work which was conceived prior to execution of the contract. The trial court further found that, during litigation, Weitz attempted to conceal its fraudulent conduct, requiring Commercial Painting to hire additional experts, and it found that Weitz's conduct protracted the litigation, as Weitz had "never taken its potential liability seriously." The court noted Weitz's lowball 2017 settlement offer, which did not even offer the full amount of the funds which Weitz had wrongfully withheld from its payments and which constituted only 9% of the final compensatory award. The court awarded prejudgment interest based on both the contract and the Prompt Pay Act. The trial court also awarded attorney's fees based on the contract and the Prompt Pay Act.

Weitz appealed. The Tennessee Supreme Court described this court's ruling in *Commercial Painting III*, which addressed the appeal of the 2018 trial, as follows:

Weitz appealed, and the Court of Appeals held that the economic loss

doctrine applied outside the products liability context when the contract was negotiated between sophisticated commercial entities. The intermediate appellate court affirmed the trial court's judgment for compensatory damages for breach of contract; dismissed the tort claim for intentional misrepresentation and reversed the punitive damages award based on the economic loss doctrine; reversed the trial court's award of pre- and post-judgment interest after finding that interest was not an available remedy under the parties' contract; and vacated the trial court's award of attorney's fees in part after determining that Commercial Painting was entitled only to attorney's fees incurred in obtaining the compensatory damages award. *Com. Painting Co. v. Weitz Co., LLC*, No. W2019-02089-COA-R3-CV, 2022 WL 737468, at *1 (Tenn. Ct. App. Mar. 11, 2022). The Court of Appeals analyzed and attempted to apply the principles stated in *Milan Supply Chain Sols., Inc. v. Navistar, Inc.*, 627 S.W.3d 125 (Tenn. 2021), concluding that "the reasoning employed by" *Milan* "hews most closely to the reasoning of those jurisdictions that have extended the economic loss rule beyond its origination." *Com. Painting [III]*, 2022 WL 737468, at *21.

Com. Painting B, 676 S.W.3d at 532.

As noted above, the Tennessee Court of Appeals in *Commercial Painting III* concluded that Commercial Painting's fraud or misrepresentation claim was barred by the economic loss doctrine, which we applied to non-products liability contracts between sophisticated commercial entities. *Com. Painting III*, 2022 WL 737468, at *23-24. This court then proceeded to address Commercial Painting's argument that, even if the economic loss doctrine barred any tort recovery, Commercial Painting was entitled to punitive damages under a contract theory. *Id.* at *24. Noting that punitive damages may be awarded under a contract theory only in the most egregious cases, this court concluded that, because the economic loss rule applied, the parties were bound by the contract provisions regarding damages. *Id.* at *24-25. This court specifically noted, however, that a party may maintain alternative theories of recovery through trial "or even following [a] verdict," so long as the party does not receive a double recovery. *Id.* at *8 (quoting *Dallas v. Shelby Cty. Bd. of Educ.*, 603 S.W.3d 32, 46-47 (Tenn. Ct. App. 2019)).

Regarding the contract, this court held as follows:

In this case, item 11.6 of the Subcontract contains a rather broad limitation on damages that precludes recovery of anticipatory profit or indirect, special, or consequential damages. Even further, this section provides that Commercial Painting "specifically agrees that it shall not be entitled to assert, and it hereby waives, any Claims in quantum meruit, interest on late payments, or any other measure of damages other than as specifically provided in items 11.4 and 11.5 above." Items 11.4 and 11.5, however,

authorize Commercial Painting generally only to receive the agreed upon Subcontract Sum. Finally, item 5.6 of the Subcontract provides that Commercial Painting is not entitled to any delay damages attributable to breach of contract, tort, or conduct not contemplated by the parties.

Id. at *26.⁹

In relation to a contract-based recovery, this court concluded that “the award of punitive damages is barred by the plain language of the parties’ agreement.” *Id.* at *26. Addressing Commercial Painting’s argument that such a limitation on liability should not be upheld in the presence of fraud, this court reasoned: “The problem, of course, with this argument is that under the economic loss rule and the limited fraud exception adopted by the Tennessee Supreme Court, Commercial Painting cannot utilize a claim of fraud to avoid the consequences of its own contractual agreements.” *Id.* at *28. We concluded that “[a]ll remaining issues related to the punitive damages award are therefore pretermitted.” *Id.* We proceeded to affirm the compensatory award under the contract but reverse the award of punitive damages and contractual interest. In reversing the interest and punitive damages awards, this court concluded that the contract language clearly waived any such claims. *Id.* at *30. The award of attorney’s fees was vacated for the trial court to determine which portion was attributable to securing the compensatory award, and we denied appellate attorney’s fees to Commercial Painting.¹⁰ *Id.* at *31.

The Tennessee Supreme Court granted review on two issues: whether this court erred in expanding the application of the economic loss doctrine beyond the context of products liability and whether this court erred in vacating the attorney’s fees award below and denying fees on appeal.¹¹ A majority of the Tennessee Supreme Court reversed this

⁹ Specifically, the contract provides:

11.6 Contract Terms Control

In no event shall the Contractor be obligated to pay Subcontractor any anticipatory profit or indirect, special or consequential damages, however caused, and Subcontractor hereby waives all such Claims. Without limiting the generality of the foregoing, the Subcontractor specifically agrees that it shall not be entitled to assert, and it hereby waives, any Claims in quantum meruit, interest on late payments, or any other measure of damages other than as specifically provided in item, 11.4 and 11.5 above.

¹⁰ Weitz did not request fees on appeal.

¹¹ The Court stated the issues as:

1. Whether the Court of Appeals erred in applying this Court’s holding in *Milan Supply Chain Solutions, Inc. v. Navistar, Inc.*, 627 S.W.3d 125 (Tenn. 2021), and expanding the application of the economic loss doctrine to the circumstances of this case.

2. Whether the Court of Appeals erred in vacating the trial court’s award of attorney’s fees and in limiting the scope of recoverable fees on remand, and whether the Court of Appeals

court's judgment on the economic loss doctrine, concluding that it discerned no reason to extend the economic loss doctrine to contracts for services, instead confining it to the realm of products liability. *Com. Painting B*, 676 S.W.3d at 538. Noting that even sophisticated commercial parties should not be charged with anticipating fraud, the Court determined that the general application of the doctrine would threaten to engulf tort law. *Id.* at 539-40. The Tennessee Supreme Court concluded:

Thus, the economic loss doctrine does not bar Commercial Painting's recovery of compensatory and punitive damages based on its tort claim of intentional misrepresentation against Weitz. The Court of Appeals reversed the punitive damages award based largely on its holding that the economic loss doctrine precluded Commercial Painting's tort claims and pretermitted all remaining issues related to the punitive damages award. *Com. Painting*, 2022 WL 737468, at *28. We granted review on the narrow issue of the applicability of the economic loss doctrine. Thus, we remand to the Court of Appeals to review any pretermitted issues regarding the jury's award of punitive damages consistent with this opinion.

Com. Painting B, 676 S.W.3d at 540-41.

The majority opinion twice more reiterated that the case was remanded “to review any pretermitted issues regarding the jury’s award of punitive damages consistent with this opinion” and “for review of any pretermitted punitive damage issues consistent with this opinion.” *Id.* at 542. Noting that its decision made Commercial Painting the only prevailing party, the majority decided that “the second issue raised in this appeal about attorney’s fees is pretermitted.” *Id.* The Court quoted *Commercial Painting II*’s language that multiple theories of recovery could be pursued and that Commercial Painting was “not required to choose between various causes of action just because the damages available may overlap,” so long as the plaintiff was limited to one recovery. *Id.* at 541. The dissent would have affirmed the application of the economic loss doctrine. *Id.* at 542 (Campbell and Bivens, JJ., dissenting). The dissent noted that it “would hold that the economic-loss doctrine applies here and precludes the subcontractor from recovering punitive damages and pre-judgment interest.” *Id.*

On remand, the parties disputed which issues had been pretermitted and accordingly fell within the scope of this court’s review. *Com. Painting Co. Inc. v. Weitz Co.* (“*Com. Painting IV*”), No. W2019-02089-COA-R3-CV, 2024 WL 4360219, at *3 (Tenn. Ct. App. Oct. 1, 2024), *perm. app. granted in part, decision vacated in part*, No. W2019-02089-SC-R11-CV, 2025 WL 1588451 (Tenn. June 5, 2025). This court identified four issues related

erred in denying Commercial Painting Company an award of costs and fees on appeal.

Com. Painting B, 676 S.W.3d at 532.

to punitive damages that had been pretermitted in *Commercial Painting III*: “(1) whether punitive damages were appropriate under *Hodges* [*v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992)], (2) whether the punitive damages award was constitutionally excessive in violation of due process protections, (3) whether the trial court failed to perform its role of thirteenth juror, and (4) whether the trial court erred in adopting Commercial Painting’s proposed finding of facts and conclusions of law” under *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303 (Tenn. 2014). *Com. Painting IV*, 2024 WL 4360219, at *6. This court determined in *Commercial Painting IV* that Weitz had waived the *Hodges* issue and due process argument by presenting only a skeletal argument. *Id.* at *7. This court also determined that the trial court adequately performed its role as thirteenth juror and that Weitz was not entitled to relief on the *Lakeside* issue. *Id.* at *9.

This court concluded that two issues — “whether this case falls within the narrow circumstances where Tennessee law allows for punitive damages in a breach of contract action and, relatedly, whether the actual terms of the parties’ contractual agreements prohibit the award of punitive damages” — had not actually been pretermitted and were accordingly not within the scope of remand. *Id.* at *5. Noting a distinction between remands to reconsider an issue in light of a ruling from a higher court and remands to consider a pretermitted issue, we noted that “[o]ver the course of multiple pages of the opinion, this court in *Commercial Painting III* extensively discussed the contract issues” and that we had determined “that Commercial Painting could not use fraud as an exception that would allow for recovery of punitive damages and was, accordingly, bound by the contract terms that precluded recovery of punitive damages, with the economic loss doctrine being critical to these conclusions.” *Id.* at *5.

Weitz appealed, and the Tennessee Supreme Court vacated “that portion of the Court of Appeals’ judgment and opinion declining to consider whether Commercial Painting contractually waived entitlement to punitive damages on its claim for intentional misrepresentation.” *Com. Painting Co. v. Weitz Co.* (“*Com. Painting C*”), No. W2019-02089-SC-R11-CV, 2025 WL 1588451, at *1 (Tenn. June 5, 2025) (Order). The Tennessee Supreme Court clarified that, while this court had decided the issue that any punitive damages tied to Commercial Painting’s contract claim had been contractually waived, “[b]ecause the Court of Appeals held that the economic loss rule barred Commercial Painting’s misrepresentation claim, it did not expressly consider whether the contractual waiver also barred the punitive damages award to the extent it is premised on Weitz’s intentional misrepresentations.” *Id.*

The Tennessee Supreme Court concluded that this court pretermitted the issue because our holding erroneously barred the misrepresentation claim — and the attached punitive damages — based on the economic loss doctrine and accordingly did not address whether the contract also barred punitive damages based on misrepresentation. The Tennessee Supreme Court vacated the portion of our opinion concluding we had not pretermitted the issue of punitive damages based on tort, and it remanded for this court to

consider “whether Commercial Painting contractually waived entitlement to punitive damages on its misrepresentation claim.” *Id.* The Tennessee Supreme Court noted that its prior opinion “essentially revived the punitive damages award to the extent it is based on Weitz’s tortious conduct.” *Id.* at *2.

The sole issue remaining before us is whether the contractual provision executed by Commercial Painting, which contained “a rather broad limitation on damages that precludes recovery of anticipatory profit or indirect, special, or consequential damages,” *Com. Painting III*, 2022 WL 737468, at *26, also operates to nullify the jury’s award of punitive damages in connection with its tort claim.

II.

In its principal brief filed in 2020, Weitz argued generally against punitive damages. In doing so, it asserted that the case “should properly be viewed as a breach of contract case” and it combined its analysis of punitive damages based on contract with punitive damages based on tort. As a separate issue, Weitz engaged with the effect of the written contract on “non-contractual and punitive damages.” Stated in its entirety, Weitz’s argument on this issue reads as follows:

4. The award of non-contractual and punitive damages in this case is expressly barred by the undisputed terms of the written Subcontract which governed and which established the parties’ relationships, rights, and responsibilities.

The Record in this case is devoid of any evidence to support an award of punitive damages. But this Court need not read the entire Record in order to conclude there is no “clear and convincing evidence” for an award of punitive damages under Tennessee law. Rather, the Court need only look at the Subcontract governing the parties’ rights and responsibilities. *See Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tenn., Inc.*, 566 S.W.3d 671 (Tenn. 2019) (holding that extrinsic evidence cannot be used or considered to vary, contradict, or supplement the terms of a fully-integrated written contract).

As discussed in [the facts section] above, Section 11 of the Subcontract’s Standard Terms and Conditions, in Item 11.6, precludes recovery of any damages other than direct job costs (labor, materials, equipment, machinery, and tools). *See* Item 5.6 of the Subcontract’s Standard Terms and Conditions. Under the Subcontract’s express language, Commercial Painting waived the right to pursue any claims for non-contractual or exemplary damages.

The Tennessee Supreme Court's remand has plainly instructed us to address whether Commercial Painting contractually waived punitive damages in connection with its intentional misrepresentation tort claim. To address this matter, this court requested and received supplemental briefing after the remand in *Commercial Painting C*.

Reflecting upon the parties' briefing, we begin by delineating what is not at issue in this narrow remand. Commercial Painting argues that we should revisit the determination that the contractual language excluded punitive damages. In *Commercial Painting III*, we noted that item 11.6 excluded anticipatory profit, or indirect, special, or consequential damages and that Commercial Painting waived any other measure of damages other than as specifically provided in the contract. *Com. Painting III*, 2022 WL 737468, at *26. This court observed that items 11.4, 11.5, and 11.6 "constitute a broad and unqualified waiver of damages that are not among those permitted under the Subcontract." *Id.* We ultimately concluded, "Because the Subcontract clearly provides that the damages that are permitted are compensatory in nature and 'any' other measure of damages was waived by Commercial Painting, we must conclude that the award of punitive damages is barred by the plain language of the parties' agreement." *Id.*

Commercial Painting asserts there are limited circumstances which allow revisiting a previously decided issue, including that the analysis was clearly erroneous and would result in manifest injustice if allowed to stand. *See Memphis Pub. Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). Commercial Painting contends that the Tennessee Supreme Court has the ability to reset the case to "square one" and did so in this case.

Commercial Painting is correct that the Tennessee Supreme Court certainly could have vacated this court's holding that the contract prohibited punitive damages sought pursuant to a breach of contract theory. *Com. Painting III*, 2022 WL 737468, at *26. However, it is equally clear that it did not do so. Instead, the Tennessee Supreme Court held that this court had erred in concluding that Commercial Painting's tort claims were precluded under the economic loss doctrine. *Com. Painting B*, 676 S.W.3d at 540 ("Thus, the economic loss doctrine does not bar Commercial Painting's recovery of compensatory and punitive damages based on its tort claim of intentional misrepresentation against Weitz."). The Tennessee Supreme Court did not revisit this court's holdings on the contract interpretation issues. *Id.* at 541 ("We granted review on the narrow issue of the applicability of the economic loss doctrine."). The Tennessee Supreme Court's initial remand was already narrow in scope, instructing this court to review only "any pretermitted issues regarding the jury's award of punitive damages consistent with this opinion." *Id.* The current remand is not broader. The Tennessee Supreme Court, in considering our opinion in *Commercial Painting IV*, vacated only "that portion of the Court of Appeals' judgment and opinion declining to consider whether Commercial Painting contractually waived entitlement to punitive damages on its claim for intentional misrepresentation." *Com. Painting C*, 2025 WL 1588451, at *1. Having concluded that this court "erroneously

failed to consider whether Commercial Painting contractually waived entitlement to punitive damages on its misrepresentation claim,” the Tennessee Supreme Court remanded for “further consideration consistent with this Order.” *Id.* at *2. Accordingly, the only portion of this court’s opinion that was vacated was the portion which opined that the contractual waiver of punitive damages for misrepresentation had not been pretermitted. The remaining prior appellate determinations constitute the law of the case.

Generally, “[w]hen a remanded cause has been re-entered on the docket, it stands exactly as it did when the appeal was granted, except insofar as changed by the appellate courts.” *Bank of New York Mellon v. Chamberlain*, No. M2021-00684-COA-R3-CV, 2022 WL 3026908, at *7 (Tenn. Ct. App. Aug. 1, 2022) (quoting *Hawkins v. Hart*, 86 S.W.3d 522, 532 (Tenn. Ct. App. 2001)). “[B]y remanding a case with limiting instructions when error exists only as to certain issues[,] the courts maintain the integrity of rulings previously made.” *In re A.J.*, No. M2014-02287-COA-R3-JV, 2015 WL 6438671, at *3 (Tenn. Ct. App. Oct. 22, 2015) (quoting *Melton v. Melton*, No. M2003-04120-COA-R10-CV, 2004 WL 63437, at *5 (Tenn. Ct. App. Jan. 13, 2004)). This court has previously observed that the inferior court — that being this court in this appeal — must operate within the scope of remand:

“The appellate court directs actions and dictates results through its orders, judgments, and mandates” and may limit the scope of a remand. *State v. Williams*, 52 S.W.3d 109, 123 (Tenn. Crim. App. 2001); *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995); *Cook v. McCullough*, 735 S.W.2d 464, 470 (Tenn. App. 1977). Such orders and mandates are controlling, and the lower court does not have “the authority to expand the directive or purpose of [the higher] court imposed upon remand.” *State v. Weston*, 60 S.W.3d 57, 59 (Tenn. 2001); *Cook*, 735 S.W.2d at 470. Otherwise, “[t]here would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decision.” *Irick*, 906 S.W.2d at 443, (quoting *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976)).

Raleigh Commons, Inc. v. SWH, LLC, 580 S.W.3d 121, 129-30 (Tenn. Ct. App. 2018) (quoting *Silvey v. Silvey*, No. E2003-00586-COA-R3-CV, 2004 WL 508481, at *3 (Tenn. Ct. App. Mar. 16, 2004)). “[T]he decision of the appellate court establishes the law of the case which generally must be followed upon remand,” and the Tennessee Supreme Court’s declining review “does not lessen the application of the law of the case doctrine with respect to issues which were explicitly or implicitly resolved by the intermediate appellate court decision.” *Memphis Pub. Co.*, 975 S.W.2d at 306, 307. In our prior decision in this case, we observed that, “[s]imply stated, ‘inferior courts must abide by the orders, decrees, and precedents of higher courts.’” *Com. Painting IV*, 2024 WL 4360219, at *3 (quoting *Weston v. State*, 60 S.W.3d 57, 59 (Tenn. 2001)).

Accordingly, an intermediate court may not expand the scope of remand after

appeal. *Id.*; *Hutchison v. State*, 118 S.W.3d 720, 735 (Tenn. Crim. App. 2003); *see Seaton v. Wise Props.-TN, LLC*, No. E2013-01360-COA-R3-CV, 2014 WL 1715068, at *7 (Tenn. Ct. App. Apr. 30, 2014) (trial court exceeded its authority by considering on remand an issue the party had waived by failing to raise it on appeal). Indeed, “[a]ny proceedings on remand which are contrary to the directions contained in the mandate from the appellate court may be considered null and void.” *Raleigh Commons*, 580 S.W.3d at 129 (quoting *Silvey*, 2004 WL 508481, at *3).

In the case at bar, this court held in *Commercial Painting III* that the language of the contract barred any punitive damages arising out of breach of the contract claim, and the Tennessee Supreme Court did not grant review as to the contract interpretation issue. *Com. Painting B*, 676 S.W.3d at 532; *Com. Painting III*, 2022 WL 737468, at *26. Furthermore, had it intended to vacate our holding interpreting the contractual language to exclude punitive damages with regard to the contract claim, the Tennessee Supreme presumably would have remanded for reconsideration of damages under the contract. Accordingly, our prior determination regarding the contractual language — that it bars punitive damages based on breach of contract — stands.

These same principles concerning finality also apply to Weitz’s arguments insofar as they seek to revisit the jury’s finding of intentional misrepresentation itself. In its supplemental briefing, Weitz argues that Commercial Painting condoned, and essentially purged, any fraud. But this position cannot be reconciled with the jury’s verdict, which is now the law of the case. The jury found that Weitz

(1) made a representation or representations of a present or past fact or produced a false impression regarding the length of time Commercial Painting would have to perform its work or regarding the amount of work Commercial Painting would be able to perform in order to mislead Commercial Painting to obtain an undue advantage over it; (2) the representation(s) or impression(s) was/were false when made; (3) the representation or impression concerned a material fact, i.e. the subcontract at issue; (4) Weitz either knew that the representation(s) and/or impression(s) were false or did not believe they were true; (5) Commercial Painting did not know that the representation(s) or impression(s) were false when Weitz made or created them and was justified in relying on the truth of Weitz’s representation(s) or impression(s); and (6) Commercial Painting sustained damages as a result of the representation or impression.

Weitz’s argument that Commercial Painting knew about the fraud and continued to perform is essentially a rejection of the jury’s finding that Commercial Painting reasonably relied on Weitz’s misrepresentations. The argument necessarily encompasses a challenge to the jury’s verdict that Weitz is liable for compensatory damages resulting from fraud because Commercial Painting justifiably relied on the misrepresentations. Additionally,

the trial court here found that Weitz intentionally acted to defraud Commercial Painting over a lengthy period of time extending through “the end of the Project in the Spring of 2006,” that the discovery of the misrepresentations led to the filing of the complaint in June 2006, and that Weitz “actively sought to conceal its fraudulent and intentional conduct[,] expecting that its behavior would never be discovered because . . . Commercial Painting [would] be put out of business.” The court found Commercial Painting was forced to incur significant expenses to prove the intentional misrepresentation. Accordingly, Weitz’s theory that Commercial Painting condoned the intentional misrepresentation by continuing to act on the contract rather than rescinding runs contrary to the factual findings made below. Weitz also acknowledges that there could be no rescission after the contract was fully performed, and the trial court found that Weitz’s fraudulent actions continued through the completion of the project.

The findings below regarding intentional misrepresentation have now become the law of the case. The Tennessee Supreme Court in *Commercial Painting B* determined: “The amici assert there is no proof in the record of justifiable reliance on a misrepresentation or damages resulting proximately from such a misrepresentation. We disagree. There is proof in the record from which the jury found both.” *Com. Painting B*, 676 S.W.3d at 540. Furthermore, in *Commercial Painting C*, the Court observed that “the Court’s judgment essentially revived the punitive damages award to the extent it is based on Weitz’s tortious conduct.” *Com. Painting C*, 2025 WL 1588451, at *2. As noted above, when superior courts issue a remand overturning only limited rulings, “the courts maintain the integrity of rulings previously made.” *In re A.J.*, 2015 WL 6438671, at *3 (quoting *Melton*, 2004 WL 63437, at *5). The integrity of the jury’s finding as to intentional misrepresentation has not been impugned, falls outside the scope of remand, and remains standing. Accordingly, it is the law of the case that Weitz is liable for its intentional misrepresentations and that the punitive tort damages have been “revived,” unless they are barred by the contractual waiver extending to the tort misrepresentation claim. *Com. Painting C*, 2025 WL 1588451, at *2.

Furthermore, ratification is an affirmative defense. *Kelly v. Stewart*, No. M2024-00296-COA-R3-CV, 2025 WL 1156914, at *3 n.7 (Tenn. Ct. App. Apr. 21, 2025). While Weitz focuses upon this issue in its supplemental briefing, it was not pled as an affirmative defense in the present case, and Weitz did not set forth ratification as an issue or subissue in its initial briefing in its appeal. While Weitz’s initial briefing was extremely extensive, running ninety-five pages, the words “ratify,” “ratification,” “purged,” or “condoned” do not appear even once, much less a developed ratification-based argument for elimination of punitive damages award in connection with Commercial Painting’s tort claim. Because Weitz did not present any argument related to ratification in its 2020 briefing challenging the intentional misrepresentation verdict in *Commercial Painting III*, the argument is waived.

Having concluded that these arguments fall outside the scope of our review and have

been waived regardless, we examine the singular issue at hand.

III.

The sole issue before us in this appeal is whether contractual waiver bars the recovery of punitive damages in connection with Commercial Painting's tort claim. While compensatory damages exist to compensate an injured plaintiff for injuries, "punitive damages are intended to 'punish a defendant, to deter him from committing acts of a similar nature, and to make a public example of him.'" *Goff v. Elmo Greer & Sons Const. Co., Inc.*, 297 S.W.3d 175, 187 (Tenn. 2009) (quoting *Huckeby v. Spangler*, 563 S.W.2d 555, 558-59 (Tenn. 1978)). Punitive damages must be established by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly. *Id.*

Generally, tort claims can be intertwined with contract claims, and recovery may be available under either theory. *Isaacs v. Bokor*, 566 S.W.2d 532, 537-38 (Tenn. 1978). A victim of misrepresentation "is afforded by courts both of law and equity with a number of alternate remedies, including actions for rescission and restitution, actions for breach of contract and actions in tort for misrepresentation." *Dunn v. Vukodinovich*, 700 S.W.3d 64, 101 (Tenn. Ct. App. 2023) (quoting *Isaacs*, 566 S.W.2d at 537-38) (observing that a person cannot both repudiate a contract and claim its benefits); see *Justice v. Anderson Cnty.*, 955 S.W.2d 613, 616 (Tenn. Ct. App. 1997) (a party "may treat the contract as voidable and sue for the equitable remedy of rescission or he may treat the contract as existing and sue for damages at law under the theory of deceit in the ordinary case. The former is a contract action, while the latter is grounded in tort."); *Vance v. Schulder*, 547 S.W.2d 927, 931 (Tenn. 1977) (holding that when a plaintiff is fraudulently induced to contract, the plaintiff may seek rescission or "may treat the contract as existing and sue for damages at law under the theory of 'deceit.' The latter is grounded in tort.").

Tennessee courts have allowed parties to proceed with multiple, alternative theories of recovery. In *Dog House Investments, LLC v. Teal Props., Inc.*, the defendant landlord was responsible for remediating flood damage and encouraged the tenant to conduct the actual remediation, promising reimbursement that never came, even though the landlord received insurance reimbursement. 448 S.W.3d 905, 911 (Tenn. Ct. App. 2014). After concluding that the breach of contract was insufficiently egregious to support punitive damages, the court considered whether punitive damages could accompany a collateral claim of promissory fraud, and it affirmed the punitive damages award based on the fraud claim. *Id.* at 916-17. Likewise, in *Goff*, the defendant contracted with the plaintiffs to allow it to place dirt and rock from nearby blasting on their land, and the plaintiffs subsequently sued for breach of contract for failure to pay the agreed-upon compensation and also for nuisance, after the plaintiffs discovered that the defendant buried debris on their property. 297 S.W.3d at 180-81. This court upheld an award of punitive damages. *Id.* at 187.

In this case, in particular, it is the law of the case that Commercial Painting may pursue multiple, alternative theories of relief, so long as it does not obtain more than one recovery. *See Com. Painting B*, 676 S.W.3d at 541 (Commercial Painting “should not be precluded from proceeding on multiple theories of liability”); *Com. Painting III*, 2022 WL 737468, at *8 (concluding alternative theories could be maintained even after the verdict); *Com. Painting II*, 2016 WL 3519015, at *12 (“Commercial Painting is entitled to just one recovery to the extent damages from more than one cause of action overlap, but it should not be precluded from proceeding on multiple theories of liability if it is able to make out a prima facie case under more than one cause of action.”); *see also Petty v. Darin*, 675 S.W.2d 714, 716-17 (Tenn. Ct. App. 1984) (plaintiffs could have prosecuted both breach of contract and rescission in the alternative, but they pursued rescission to a judgment on the merits and were afterwards bound by this election of remedies). The recovery at issue on this remand concerns only the punitive damages attached to the tort.

As to the issue before us, Weitz argues that Tennessee courts have upheld contractual waivers of claims of fraud, citing to *Burd v. Richey*, No. M2023-00252-COA-R3-CV, 2025 WL 1766645 (Tenn. Ct. App. June 26, 2024). In that case, as part of the sale of a business, a partner received compensation to sign a very broad release of all claims at law or equity. He brought suit after subsequently discovering that the sale price was higher than represented by the other partners and that the other partners would continue to have an ownership interest, contrary to their representations to him. *Id.* at *2. This court affirmed dismissal, concluding that the language in that case covered waiver of the alleged malfeasance. *Id.* at *6-7.

A separate line of Tennessee cases, however, has rejected contractual waivers of misrepresentation. This court has, in fact, declared that “[i]t is well settled in Tennessee that the courts of our State will not be utilized to enforce a contract which is the product of fraud; indeed, fraud vitiates all that it touches.” *Shelby Elec. Co., Inc. v. Forbes*, 205 S.W.3d 448, 455 (Tenn. Ct. App. 2005). In *Shelby Electric*, the court addressed “whether a defense of fraud or fraudulent inducement can be waived under the general waiver of ‘any defenses’ in a guaranty.” *Id.* at 454. In that case, the defendants had signed a promissory note in which they explicitly waived “any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness.” *Id.* at 452. The waivers did not specifically waive fraud or fraud in the inducement as defenses, and this court concluded that the fraud defense was not waived, particularly in the absence of a specific waiver. *Id.* at 456. In so holding, the court noted that fraud was “as odious and as fatal” at law as in equity and that it “poisons alike the contract of the citizen, the treaty of the diplomat, and the solemn judgment of the court.” *Id.* at 455 (quoting *New York Life Ins. Co. v. Nashville Tr. Co.*, 292 S.W.2d 749, 754 (1956)).

Likewise, this court recently observed that “Tennessee law has ‘long recognized’ that claims for fraudulent misrepresentation in inducement of a contract may be filed regardless of whether the plaintiff has signed a release agreement in a contract, particularly

in the absence of a specific waiver of fraud or fraudulent inducement.” *Phillips v. Nat’l Aggregates, LLC*, No. E2024-01492-COA-R3-CV, 2026 WL 852265, at *6 (Tenn. Ct. App. Mar. 27, 2026), *perm. app. denied* (Tenn. July 22, 2026). In *Phillips*, the plaintiffs had filed tort claims, including fraud, related to a settlement they entered into, and the defendants asserted as a counterclaim that the plaintiffs had breached a very broad general release in the settlement contract. *Id.* This court held that the plaintiffs, who had ultimately not succeeded in establishing fraud, were nevertheless entitled to file the claims without breaching the contract because fraud vitiates all it touches. *Id.* Likewise, in *Holliday v. Patton*, a broad release of “any and all claims, liabilities, and causes of action” was held not to waive a fraud claim because the language did “not specifically address claims of fraud” under *Shelby Electric*. No. W2013-00545-COA-R3-CV, 2014 WL 1281558, at *4 (Tenn. Ct. App. Mar. 31, 2014).¹²

A prominent treatise has noted a split in authority nationwide. When a defendant asserts a contractual bar to misrepresentation, “the traditional approach more or less flatly rejects exculpatory mechanisms, often in very broad and absolute terms, frequently saying that fraud vitiates everything it touches, or that enforcing contract clauses that would protect fraud is against public policy.” Dan B. Dobbs, et al., *The Law of Torts* § 683 (2d ed.) (footnotes omitted). Even where the contractual language specifically addresses misrepresentation, courts have concluded that “contract clauses aimed at defeating a potential fraud claim, having been brought to life by the fraud they seek to protect, come under the broad traditional principle.” *Id.* Accordingly, “[a] whisper of fraud can topple the pillars of even the most impregnable contract, for to base a contract upon fraud is to build it upon sand.” *Bowman v. Presley*, 212 P.3d 1210, 1220 (Okla. 2009). However, a contrary view gives force to specific contractual clauses disclaiming reliance on misrepresentations. Dobbs, *The Law of Torts* §§ 684, 685. The enforceability of such clauses varies. *Cf. Whelan v. Abell*, 48 F.3d 1247, 1258 (D.C. Cir. 1995) (rejecting an approach sanctioning general disclaimers, noting that it “would leave swindlers free to extinguish their victims’ remedies simply by sticking in a bit of boilerplate”); *Pike Co., Inc. v. Jersen Const. Grp., LLC*, 147 A.D.3d 1553, 1555, 47 N.Y.S.3d 579, 581 (4th Dept. 2017) (stating that “[g]enerally, ‘[a] claim for fraud is barred by the existence of a specific disclaimer and failure to exercise reasonable diligence’ . . . and a disclaimer clause will preclude a fraud claim only where the clause ‘specifically disclaims representations concerning the very matter to which the fraud claim relates’”); *Slack v. James*, 614 S.E.2d 636, 641 (S.C. 2005) (noting that “even if the sentence could be considered to be a non-reliance clause, we find the result would be the same because as a non-reliance clause it lacks the required specificity”); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997) (providing that to negate a fraudulent inducement claim, the parties’ intent

¹² In general, exculpatory provisions are evaluated by examining: “(1) relative bargaining power of the parties; (2) clarity of the exculpatory language, which should be clear, unambiguous, and unmistakable about what the party who signs the agreement is giving up; and (3) public policy and public interest implications.” *Copeland v. Healthsouth/Methodist Rehab. Hosp., LP*, 565 S.W.3d 260, 274 (Tenn. 2018).

as set forth in the disclaimer must be “clear and specific”). Professor Dobbs suggests that these contrary views can be reconciled by regarding such exculpatory clauses as evidence of a lack of justifiable reliance necessary for a tort recovery. *See* Dobbs, *The Law of Torts* § 685.

In this case, the contractual clause limiting liability is general and does not specifically exculpate Weitz from tort damages arising out of its fraudulent conduct. The provision lacks such specificity. Section 11.6 provides:

11.6 Contract Terms Control

In no event shall the Contractor be obligated to pay Subcontractor any anticipatory profit or indirect, special or consequential damages, however caused, and Subcontractor hereby waives all such Claims. Without limiting the generality of the foregoing, the Subcontractor specifically agrees that it shall not be entitled to assert, and it hereby waives, any Claims in quantum meruit, interest on late payments, or any other measure of damages other than as specifically provided in item, 11.4 and 11.5 above.

Simply stated, the limitation in the present case does not appear to set forth an explicit, specific waiver of damages for claims of fraud or misrepresentation or address the specific misrepresentations. *See Phillips*, 2026 WL 852265, at *6; *Holliday*, 2014 WL 1281558, at *4; *Shelby Elec.*, 205 S.W.3d at 452; *see also dOTERRA Int’l, LLC v. Kruger*, 491 P.3d 939, 945 (Utah 2021) (waiver of punitive damages was insufficiently clear and unambiguous to exculpate company for personal injuries).

In support of a contractual bar on tort recovery, Weitz expresses concern about interference with the ability of parties to contract in such a manner so as to avoid tort liability for misrepresentation. Assuming for purposes of argument that Weitz’s concerns are valid, the non-traditional approach described above does not actually prevent parties from contracting so as to limit damages for claims of fraud or misrepresentation. It instead requires specificity in contracting to do so — specificity that is not present in this case. Accordingly, it does not appear that waiver was established under either a traditional approach rejecting the possibility of waiver of fraud or under an approach requiring an explicit clear and specific waiver.

Foundationally, the Tennessee Supreme Court in *Commercial Painting B* observed the following:

One party need not have to consider another party’s fraud among the potential risks and costs when negotiating a contract in good faith. Parties to a contract—even sophisticated commercial parties—“cannot, and should not, be expected to anticipate fraud and dishonesty in every transaction.” To hold otherwise would increase the risk of fostering a legal system tending to

place the risk of fraudulent behavior on the defrauded party rather than the perpetrator. Contracting parties in Tennessee, including those in the construction industry, should not have to factor into their decision to enter a contract the potential for fraud or another party's dishonesty.

Com. Painting B, 676 S.W.3d at 539 (citations omitted). The Tennessee Supreme Court expressly concluded that "Commercial Painting could not be expected to factor into its decision to enter the contract the possibility that Weitz was making false misrepresentations." *Id.* at 540.

As to the findings before us, the jury in this case found that the elements of fraud were met, that Weitz acted in bad faith, and that Weitz acted intentionally, recklessly, maliciously, or fraudulently such that the conduct was egregious. As addressed above, the trial court made findings of fact in support of the jury's punitive damages award, including as to intentional misrepresentations by Weitz prior to the execution of the contract, continuing throughout the duration of the performance of the contract, and extending to concealment during the litigation.

The contractual waiver in the present case does not specifically exculpate fraudulent conduct or misrepresentations, and it appears to address remedies related to contract rather than tort.¹³ Whether viewed under the traditional approach or an approach that would permit such provisions to be enforced so long as the provisions are specific and clear, we conclude that the contractual waiver in this case does not operate to bar punitive damages awarded pursuant to the misrepresentation claim.

Ultimately, we conclude that, under the facts and circumstances of the present case, the contractual waiver does not bar the punitive damages awarded pursuant to misrepresentation in this case.

IV.

For the foregoing reasons, we affirm the judgment of the trial court regarding the punitive damages accompanying the misrepresentation claim. Costs of this appeal are taxed to the appellant, The Weitz Company LLC, for which execution may issue if necessary. The case is remanded for such further proceedings as may be necessary and

¹³ The waiver release in *Burd* was much broader:

from any and all claims, actions, causes of action, suits, damages, judgments, expenses, demands and other obligations or Liabilities of any kind or nature whatsoever, known or unknown, fixed or contingent, past, present or future, in law or in equity, relating to, arising out of, or in connection with any claims that [Mr. Burd] may now have or may in the future have against the Company or their respective subsidiaries

Burd, 2025 WL 1766645, at *4.

consistent with the appellate decisions in this case.

s/ Jeffrey Usman
JEFFREY USMAN, JUDGE