THE FRICK LAW FIRM, PLLC

5521 Murray Avenue
Suite 100
Memphis, TN 38119
Telephone: 901.260.4515
Facsimile: 901.260.4516
Web: www.fricklawfirm.net

Scott A. Frick, Esq.*
Attorney at Law
Email: sfrick@fricklawfirm.net
*Rule 31 Listed General Civil Mediator

December 16, 2020

VIA FEDERAL EXPRESS
And Email

Ms. Ceesha Lofton
Legal Project Assistant
Tennessee Supreme Court
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, TN 37219

RE: Matter: ***Application for Nomination to Judicial Office***
Chancery Court, Part 1, Thirtieth Judicial District
FLF No: 0022•000

Dear Ms. Lofton:

Enclosed, please find the original of my ***Application for Nomination to Judicial Office*** for the vacancy that has arisen for Chancery Court, Part 1, for the Thirtieth Judicial District. The digital version is being transmitted to you via electronic mail.

Your attention on this matter is appreciated. Please contact me if you have any questions.

Sincerely,

Scott A. Frick

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Encl.
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Tennessee Trial Court Vacancy Commission

Application for Nomination to Judicial Office

9/8/20

Name: Scott A. Frick

Office Address: (including county) 5521 Murray Avenue, Suite 100
Memphis, Shelby Co., TN 38119

Office Phone: 901-260-4515 Facsimile: 901-260-4516

Email Address: [redacted]

Home Address: (including county) [redacted]
Collierville, Shelby Co., TN 38017

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

Tennessee Code Annotated section 17-4-301 et seq. charges the Trial Court Vacancy Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Commission requests that applicants obtain the Microsoft Word form and respond directly on the form. Respond in the box provided below each question. (The box will expand as you type in the document.) **Review the separate instruction sheet prior to completing this document. Submit by the noon deadline date an original (unbound) completed application (with ink signature) to the Administrative Office of the Courts.** In addition, submit a digital copy with electronic or scanned signature via email to ceesha.lofton@tncourts.gov, or via another digital storage device such as a flash drive. See section 1(g) of the application instructions for additional information related to hand-delivery of application packages.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Frick Law Firm & Mediation Solutions, PLLC

5521 Murray Avenue, Suite 100

Memphis, TN 38119

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1988; BOPR #012972

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Although I am licensed to practice law only in the State of Tennessee, I am admitted to practice before the United States District Court for the Eastern District of Arkansas, United States District Court for the Western District of Arkansas, the United States Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the Eighth Circuit.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Frick Law Firm & Mediation Solutions, PLLC (f/k/a The Frick Law Firm, PLLC) – Memphis, Tennessee

Founding Member – January 2010 to Present

Evans Petree, PC/Stokes Bartholomew Evans & Petree, PA – Memphis, Tennessee

Shareholder – January 1999 to December 2009

Less, Getz & Lipman, PLLC – Memphis, Tennessee

Partner – January 1995 to December 1998

Associate – December 1987 to December 1994

6. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Construction law – 80%

General commercial law – 15%

Collections work – 5%

7. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters.

My practice experience spans over thirty-two (32) years of providing legal services and representation to clients primarily associated with the commercial construction industry. My practice has included a variety of areas including construction law, general commercial litigation, creditor representation in bankruptcy, personal injury/property damage insurance defense and architect/engineer liability. I regularly review and draft contracts for large commercial construction projects. My litigation experience includes bench trials, jury trials, mediations and arbitrations that predominantly consist of commercial disputes including cases where multimillion dollar claims were in controversy. I have appeared before the Tennessee State Building Commission, many different Circuit and Chancery Courts throughout the West, Middle and East Grand Divisions of Tennessee, the Tennessee Court of Appeals, Tennessee Supreme Court, the United States District Courts for the Western, Middle and Eastern Districts of Tennessee, the United States District Court for the Eastern District of Arkansas, the United States District Court for the Eastern District of Michigan, the United States District Court for the Western District of Louisiana, the United States Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the Eighth Circuit.

I have represented clients in several arbitration proceedings administered primarily by the American Arbitration Association involving single and multiple member arbitration panels. One such arbitration I commenced on behalf of a client involved a claim in excess of $1 million against an Italian company, and was administered by the International Centre for Dispute Resolution section of the American Arbitration Association. This arbitration was conducted in

New York City before a three-member arbitration panel consisting of arbitrators from Washington D.C, Texas and Italy.

I have represented clients in a number of mediations over the last twenty (20) years, many involving multiple parties asserting multiple claims and crossclaims. With that experience as a backdrop, I became a Tennessee Supreme Court Rule 31 Listed General Civil Mediator in February 2020.

8. Describe any matters of special note involving your practice in trial courts, appellate courts, and administrative bodies.

Koch v. Construction Technology Inc. et al., 924 S.W.2d 68 (Tenn. 1996)

Lead counsel at trial through appeal on landmark case decided by the Tennessee Supreme Court establishing Tennessee's interpretation of "paid when paid" clauses in construction contracts and proper legal construction of statutory bonds for state/county/municipal government construction projects.

Commercial Painting Company, Inc. v. The Weitz Company, LLC et al. – Shelby County, Tennessee Chancery Court No. CH-06-1573-3; Tennessee Court of Appeals No. W2013-01989-COA-R3-CV; Tennessee Supreme Court No. W2013-01989-SC-R11-CV; Tennessee Court of Appeals No. W2019-02089-COA-R3-CV

Sole attorney conducting a three-week long jury trial in 2018 representing a subcontractor suing a top 100 U.S. general contractor for compensatory and punitive damages resulting in an $8.3 million verdict in favor of the subcontractor client which included $3.9 million in punitive damages. Case is currently on appeal to the Tennessee Court of Appeals, Western Section.

9. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

Co-Founder/Director of Associate/Mentor Program – Evans Petree, PC/Stokes Bartholomew Evans & Petree, PA (2000 – 2008)

Co-developed and administered program for working with firm associates that paired partner/mentors with firm associates and monitored associate caseloads and mentoring performed by partners assigned to associates.

Litigation Practice Group Manager – Evans Petree, PC/Stokes Bartholomew Evans & Petree, PA (2000 – 2005)

Tennessee Bar Association Ad Hoc Committee on Tennessee's Mechanics' and Materialmen's Lien Statutes (2006 – 2007)

One of three construction lawyers from West Tennessee selected by the President of the Tennessee Bar Association to serve on the Ad Hoc Committee tasked to redraft and revise Tennessee's Mechanics' and Materialmen's Lien statutes. The Committee's work led to the statutes that were passed by the Tennessee Legislature and became law in 2007.

Continuing Legal Education Presenter – 1997 to 2017

Presenter at approximately twenty continuing legal education seminars for attorneys conducted by various seminar providers including Tennessee Association of Construction Counsel, National Business Institute and HalfMoon Education. Seminars were primarily on construction law topics and legal ethics. I have authored numerous written seminar materials on construction industry topics and legal ethics for those seminars.

Co-author of Chapter 4, "Fiduciary Bonds and Appeal/Supercedeas Bonds," Handling Fidelity, Surety and Financial Risk Claims, Wiley Law Publications, Second Edition (1990).

10. List and describe all prior occasions on which you have submitted an application for any state or federal judicial position.

None.

EDUCATION

11. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Mississippi School of Law – Oxford, Mississippi (August 1985 – December 1987)

Awarded Juris Doctor – December 1987

Vanderbilt University, College of Arts and Science – Nashville, Tennessee (August 1983 – May 1985)

Awarded Bachelor of Arts (History and Political Science) – May 1985

Oglethorpe University – Atlanta, Georgia (August 1981 – May 1983); Transferred to Vanderbilt University after my Sophomore year to complete my undergraduate degree.

PERSONAL INFORMATION

12. State your date of birth.

[redacted] 1962

13. How long have you lived continuously in the State of Tennessee?

Since 1967 with the exception of two (2) years for college and two and one-half (2½) years for law school.

14. How long have you lived continuously in the county where you are now living?

Since December 1987.

15. State the county in which you are registered to vote.

Shelby County

16. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Tennessee State Guard (2019 to present), Current Rank: Second Lieutenant (2LT; O-1); Current assignment: Battalion S3 Officer for 3rd Military Police Battalion, 1st Regiment; Awards: Tennessee Defense Service Ribbon.

Georgia Air National Guard/United States Air Force Reserve (1982 – 1984); Active Duty: May 1982 through August 1982; Senior Airman (SRA; E-4) at separation; Honorable Discharge; Awards: Air Force Outstanding Unit Award Ribbon, Basic Military Training Honor Graduate Ribbon, Air Force Training Ribbon.

17. Have you ever pled guilty or been convicted or are now on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

18. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

19. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint. You may wish to request a report from the appropriate supervisory authority (or authorities) for a complete history.

Three former disgruntled employees of a small closely held corporation filed a shareholder's derivative action against a long-term client who was the majority shareholder. The client retained me to represent him in that lawsuit. The employment of one of the former employees was terminated after my client was informed that this particular former employee had been indicted in Texas for multiple counts of violating one or more federal felony statutes related to computer hacking. That individual eventually pled guilty to one of the felony counts and served time in federal prison. Approximately one year after the shareholder's derivative action was filed, I filed a Motion for Summary Judgment seeking dismissal of two of the three Plaintiffs from the case for lack of standing. In March 2012, the Motion was granted as to one of Plaintiffs. A few days later, all three of the former employees simultaneously filed three separate complaints with the Tennessee Board of Professional Responsibility claiming that I had a conflict of interest representing the majority shareholder. Although the former employees were represented by counsel, no motion was ever filed by their counsel challenging my representation of the client, nor for that matter, was an issue even raised by opposing counsel about any alleged conflict of interest. On August 22, 2013, the Board of Professional Responsibility transmitted three letters informing me that the Board's investigation found no merit to the three complaints and that the complaints were dismissed. Other than this one incident, no formal complaints have ever been filed against me with any supervisory agency or board.

20. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

21. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

22. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

My wife and I were Plaintiffs in a lawsuit styled Frick, et al v. Citibank (SD), N.A., et al; Case No. 2:03-cv-02045-JDB, filed in the United States District Court for the Western District of Tennessee on January 22, 2003. My wife's wallet was stolen and several fraudulent charges were made on a joint account credit card even though the theft of the card was reported to the credit card company within minutes of the theft. Despite the credit card issuer being notified that the charges were fraudulent, the credit card issuer reported to the major Credit Reporting Agencies that we were delinquent on the account for nonpayment of the unauthorized charges. After transmitting several letters on my firm's letterhead demanding the removal of the negative reporting, the credit card issuer ignored my demands and continued the negative reporting. As a result, the only recourse I had remaining was to commence litigation against the credit card issuer for violations of the Fair Credit Reporting Act. The matter was amicably settled and the case was dismissed on June 13, 2003.

23. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

Hope Presbyterian Church – Memphis, Tennessee

Faith Presbyterian Church – Germantown, Tennessee

National Rifle Association

Tennessee Firearms Association

24. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

25. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Tennessee Bar Association – 1998 to present. I served on the Ad Hoc Committee on Tennessee's Mechanics' and Materialmen's Lien Statutes (2006 – 2007).

National Native American Bar Association – 2018 to present. My Choctaw tribal lineage was certified by the U.S. Department of the Interior, Bureau of Indian Affairs in 2003, and I became a member of the Choctaw Nation of Oklahoma with full voting rights in 2003.

Memphis Bar Association – 1998 to present.

The Federalist Society – 2018 to present.

26. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

Tennessee Supreme Court Rule 31 Listed General Civil Mediator.

AV Preeminent Peer Review Rating from Martindale-Hubbell.

27. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

None.

ESSAYS/PERSONAL STATEMENTS

28. What are your reasons for seeking this position? ***(150 words or less)***

Our judicial system is only as strong as the lawyers who represent the litigants and the judges who hear the evidence, make the decisions and apply the law. I have been blessed to have worked with very fine lawyers on the other side of counsel table, and very pragmatic, thoughtful hard-working judges on the other side of the bench. I have also been very fortunate to work on very challenging cases involving complex facts, legal issues and claims with some of those cases

involving many fact and expert witnesses and thousands of pages of documentation, all of which must be reviewed, analyzed and ultimately synthesized in a cogent and concise fashion for presentation to a judge, jury or arbitration panel. I have reached a point in my career where I am ready to take that experience and put it to use in service of the citizens of Shelby County. Given the important role that the Chancery Court fulfills in adjudicating complex business disputes and challenges to county and city ordinances, I believe that my thirty-two (32) years of experience has prepared me well to assume the awesome responsibility of this position if I am selected.

29. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

Chancery Court of Tennessee for the 30th Judicial District, Part 1. The Chancery Court for the Thirtieth Judicial District has three (3) Chancellors, and serves Shelby County, Tennessee. Chancery Court is my preferred venue for the filing of virtually all of commercial litigation matters I have handled during my practice because that Court typically handles more business oriented cases. With the vast majority of my practice and experience involving complex issues in commercial matters, I believe that my experience would facilitate the fair, efficient and effective administration of justice and the Chancery Court's docket. In addition, thoroughly researched and well drafted rulings from trial courts potentially make those rulings less likely to be appealed and if appealed, more likely to be affirmed on appeal. In order for the Commission to have some insight into my research and writing skills, I have attached a Brief I recently filed in the Court of Appeals that is my sole work product both in terms of authorship and research.

30. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. It is absolutely essential that trial court judges uphold the law even where they personally disagree with the substance of the law. Otherwise, it unnecessarily increases the cost and time required for litigation to be brought to a conclusion. While I have no disagreement with RPC 3.3 and personally believe that Rule is exceedingly important, the closest example I can think of from my private practice that is analogous to this concept is that part of RPC 3.3 that states lawyers cannot knowingly "...fail to disclose to the tribunal legal authority in the controlling jurisdiction known by the lawyer to be directly adverse the position of the client and not disclosed by opposing counsel."

In 2015, I was defending a client in the United States District Court for the Western District of Tennessee in a case where my client had been sued for intentional interference with contract/procurement of breach concerning an employee hired by the client who was subject to a noncompete agreement. Part of the damages being sought were the attorney's fees incurred by the Plaintiff to enforce the noncompete agreement. The Kentucky law firm that represented the Plaintiff drafted a Motion for Summary Judgment, but failed in their Memorandum to cite to the landmark case of ***Pullman Standard, Inc. v. Abex Corp.***, 693 S.W.2d 336 (Tenn. 1985) which

was directly on point concerning the damages which could be recovered and was adverse to my client's position. In my Memorandum, I made reference to my obligations under the Rules of Professional Conduct and disclosed the existence the ***Pullman*** case to the Court.

It is not a pleasant thing to have to explain to a client why you have pointed out controlling case authority that helps the opposing party. However, the integrity of the judicial system depends upon lawyers who fulfill their ethical obligations to the court system, and judges that enforce rules, statutes or controlling case precedent, including those with which they personally disagree.

REFERENCES

31. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. Hon. Janice M. Holder, Tennessee Supreme Court (Retired); [redacted] Memphis, TN, 38103; [redacted]

B. Michael C. Patton, Esq., Shareholder; Baker, Donelson, Bearman, Caldwell & Berkowitz, PC; First Horizon Building, [redacted] Memphis, TN 38103; Direct Phone No.: [redacted]

C. Linda Mathis, Esq., Partner, Golden & Mathis; [redacted] Memphis, TN 38120; Phone No.: [redacted]

D. Winston S. Gipson, President, Gipson Mechanical Contractors, Inc. [redacted] Rd., Memphis, TN 38134; Cell No.: [redacted]

E. Mark Koch, President, Commercial Painting Company, Inc.; [redacted] Memphis, TN 38112; Cell No.: [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Chancellor of the Chancery Court, Part 1, for the 30th Judicial District of Tennessee at Memphis, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the

Governor for the judicial vacancy in question.

Dated: December 16, 2020.

Signature

When completed, return this questionnaire to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE TRIAL COURT VACANCY COMMISSION
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Trial Court Vacancy Commission to request and receive any such information and distribute it to the membership of the Commission and to the Office of the Governor.

Scott A. Frick
Print Name


Signature

December 16, 2020
Date

012972
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE COURT OF APPEALS FOR THE STATE OF TENNESEE
WESTERN SECTION AT JACKSON

COMMERCIAL PAINTING COMPANY, INC., and **LIBERTY MUTUAL INSURANCE COMPANY,** Plaintiff/Counter-Defendants/ Appellees, v. **THE WEITZ COMPANY, LLC, FEDERAL INSURANCE COMPANY,** and **ST. PAUL FIRE & MARINE INSURANCE CO.,** Defendants/Appellants.	Court of Appeals No. W2019-02089-COA-R3-CV Shelby Chancery No. CH-06-1573-3

BRIEF OF APPELLEES COMMERCIAL PAINTING COMPANY, INC. AND LIBERTY MUTUAL INSURANCE COMPANY

Scott A. Frick (#12972)
Frick Law Firm & Mediation Solutions, PLLC
5521 Murray Avenue, Suite 100
Memphis, TN 38119
(901) 260-4515 *ph.* (901) 260-4516 *fax*

ORAL ARGUMENT REQUESTED

IN THE COURT OF APPEALS FOR THE STATE OF TENNESEE
WESTERN SECTION AT JACKSON

COMMERCIAL PAINTING COMPANY, INC., and **LIBERTY MUTUAL INSURANCE COMPANY,**	)	Court of Appeals No. W2019-02089-COA-R3-CV
Plaintiff/Counter-Defendants/ Appellees,	)	Shelby Chancery No. CH-06-1573-3
v.	)	
THE WEITZ COMPANY, LLC, FEDERAL INSURANCE COMPANY, and **ST. PAUL FIRE & MARINE INSURANCE CO.,**	)	
Defendants/Appellants.	)	

BRIEF OF APPELLEES COMMERCIAL PAINTING COMPANY, INC. AND LIBERTY MUTUAL INSURANCE COMPANY

Scott A. Frick (#12972)
Frick Law Firm & Mediation Solutions, PLLC
5521 Murray Avenue, Suite 100
Memphis, TN 38119
(901) 260-4515 *ph.* (901) 260-4516 *fax*

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES PRESENTED FOR REVIEW BY APPELLEE COMMERCIAL PAINTING COMPANY, INC.

I. **WHETHER THIS COURT SHOULD AWARD APPELLEE COMMERCIAL PAINTING COMPANY, INC. ITS ADDITIONAL ATTORNEY'S FEES AND EXPENSES INCURRED SUBSEQUENT TO THE TRIAL COURT'S INITIAL AWARD OF ATTORNEY'S FEES AND EXPENSES.**

STATEMENT OF THE CASE[1]

Appellee, Commercial Painting Company, Inc. ("Commercial Painting") commenced the instant litigation on August 11, 2006 in the Chancery Court of Shelby County for the Thirtieth Judicial District at Memphis asserting its various causes of action against Appellants The Weitz Company, LLC, St. Paul Fire & Marine Insurance Company, Federal Insurance Company, and other Defendants who are no longer involved in this litigation and are not parties to this appeal (R. Vol. 1, p. 1). Appellant, The Weitz Company, LLC ("Weitz") filed its Answer and Counterclaim on January 24, 2007 (R. Vol. 1, p. 126). On August 15, 2008, an Order was entered by former Chancellor Arnold Goldin transferring the instant case to Part 2 of Shelby County Chancery Court from Part 3 of Chancery Court where the case had been initially presided over up until that time by former Chancellor Kenny Armstrong (R. Vol. 1, p. 144). On December 1, 2008, a second order was entered by former Chancellor Goldin consolidating the instant case and two other cases involving different subcontractors on the same construction project for discovery purposes and setting certain scheduling deadlines (R. Vol. 22, p. 1). The parties began the discovery process including both written discovery and conducting depositions of various fact witnesses. On August 20, 2009, former Chancellor Goldin entered an Order transferring this case back to Shelby County Chancery Court Part 3 where it was again presided over by former Chancellor Armstrong (R. Vol. 22, p. 6).

On November 25, 2009, Appellee Commercial Painting filed its Amended Complaint asserting additional causes of action in tort (intentional/negligent misrepresentation, fraud and recession) and also asserted a claim for punitive damages based upon information obtained during discovery (R. Vol. 2, p. 146). On March 22, 2010, Appellant Weitz filed its Answer (R. Vol. 3, p. 330). On October 19, 2010, Appellant Weitz filed its Motion for Partial Summary seeking

[1] In order to abbreviate the Record in this case, only a limited number of filings made prior to the 2016 remand of this case are included in the Technical Record. However, several filings that were not included in the Technical Record are referenced in Appellees' Statement of the Case in order to present a complete Statement of the Case.

summary dismissal of Appellant's tort claims and punitive damages claims. On July 15, 2011, the Trial Court conducted a hearing on the Motion for Partial Summary Judgment pertaining to the tort and punitive damages claims and granted the Motion dismissing Appellee Commercial Painting's tort and punitive damages claims. An Order memorializing that ruling was entered on July 29, 2011. On July 28, 2011, Appellee Commercial Painting filed a Motion to Reconsider requesting that the Trial Court reconsider its ruling. On August 28, 2011, the Trial Court entered an Order denying Appellant Weitz's original Motion for Partial Summary Judgment pertaining to Appellee Commercial Painting's contract claims filed February 10, 2009. On August 11, 2011, the Trial Court entered an Order denying Appellee's Motion the Reconsider.

On January 9, 2012, the first trial of this matter commenced and was conducted over thirteen (13) trial days ending on January 26, 2012. On March 6, 2013, the Trial Court entered its Memorandum Opinion (R. Vol. 4, p. 485) setting forth its ruling regarding all of the claims between the parties. On August 1, 2013, the Trial Court entered an Order reflecting its ruling on competing Motions to Alter Amend.

On August 23, 2013, Appellee Commercial Painting filed its Notice of Appeal. On August 29, 2013, Appellant Weitz filed a separate Notice of Appeal. Pursuant to the Order entered by this Court on November 26, 2013, the Trial Court entered its Order Clarifying Memorandum Opinion Entered March 6, 2013 on December 5, 2013.

The first appeal of this case initially resulted in this Court issuing an Opinion on November 18, 2014 vacating the Order Granting Weitz's Motion for Partial Summary Judgment. On December 1, 2014, Appellant Weitz filed a Petition for Rehearing, and on December 11, 2014, this Court entered an Order denying the Petition for Rehearing. On February 10, 2015, Appellant Weitz filed an application for permission to appeal to the Tennessee Supreme Court. On November 25,

2015, the Tennessee Supreme Court entered an Order granting Appellant Weitz's Application, and summarily remanded the case back to this Court solely for a reanalysis of its November 18, 2014 Opinion under the new summary judgment standard announced in ***Rye v. Women's Care Center of Memphis, MPLLC***, 477 S.W.3d 235 (Tenn. 2015) now applicable to all motions for summary judgment regardless as to the date the underlying lawsuit was filed. After submission of additional briefing, this Court issued its second Opinion on June 20, 2016 (R. Vol. 22, p. 8) and determined that there were genuine issues of material fact that precluded the granting of Appellant Weitz's Motion for Partial Summary Judgment, reversed the Order granting that Motion, vacated the judgment rendered as a result of the trial conducted in January, 2012, and remanded the case back to the Trial Court. The Mandate was issued on September 7, 2016. (R. Vol. 22, p. 28).

After obtaining leave of court, Appellee Commercial Painting filed its Second Amended Complaint on June 16, 2017. (R. Vol. 5, p. 657) Appellants filed their Answer, which included Appellant Weitz's Counterclaim, on July 17, 2017. (R. Vol. 863). Appellee Commercial Painting filed a Jury Demand (R. Vol. 7, p. 927) and its Answer to Appellant Weitz's Counterclaim on July 20, 2017. (R. Vol. 7, p. 918). On July 31, 2017, Appellant Weitz filed its Motion to Strike Jury Demand. (R. Vol. 7, p. 929). On August 2, 2017, Appellee Commercial Painting filed its Response to Appellant Weitz's Motion to Strike Jury Demand and Motion for Trial by Jury of All Issues. (R. Vol. 7, p. 939). On October 19, 2017, the Trial Court entered its Order Denying Appellant Weitz's Motion to Strike Jury Demand and Renewed Jury Demand and Order Granting Appellee Commercial Painting's Motion for Trial by Jury of All Issues. (R. Vol. 11, p. 1520).

On September 17, 2018, the second trial of this case commenced and a jury was impaneled. On October 5, 2018, the Trial Court entered its Order Denying Defendant, the Weitz Company, LLC's Motion for Directed Verdict on Plaintiff's Claims. (R. Vol. 13, p. 1838). The trial concluded

on October 8, 2018. The Jury awarded Appellee Commercial Painting $1,729,122.46 in compensatory damages against the Appellants, plus prejudgment interest. In addition, the Jury found that the Appellant Weitz liable for punitive damages (R. Vol. 13, p. 1842), and after a second bifurcated hearing concerning the amount of punitive damages to be awarded, the Jury awarded Appellee Commercial Painting $3.9 million in punitive damages against Appellant Weitz. (R. Vol. 13, p. 1841).

On October 11, 2018, the Trial Court entered its Order Granting Motions to Amend Pleadings to Conform to the Evidence. (R. Vol. 13, p. 1849). On October 11, 2018, the Appellee Commercial Painting and Appellant Weitz filed a stipulation regarding an extrajudicial payment made by Appellant Weitz to Appellee Commercial Painting on June 25, 2013 after the conclusion of the first trial, and the application of that extrajudicial payment as a credit against the compensatory damages award made by the Jury. (R. Vol. 13, p. 1853). On October 12, 2018, the Trial Court entered its Order Approving Jury Verdict (R. Vol. 13, p. 1914) which approved the Jury's verdict concerning compensatory damages subject to a reduction for the extrajudicial payment made by Appellant Weitz on June 25, 2013, and further acknowledged that as it pertained to the punitive damages award, the Trial Court would perform the necessary review mandated by ***Hodges v. S.C. Toof & Co.***, 833 S.W.2d 896 (Tenn. 1992) with a final judgment to be entered at a future date. The Trial Court requested that the parties to prepare and submit proposed findings of fact and conclusions of law regarding the punitive damages award. On October 15, 2018, the Trial Court entered its Order Denying Defendant, The Weitz Company, LLC's Motion for Directed Verdict made at Close of All Proof. (R. Vol. 13, p. 1919).

On October 29, 2018 Appellee Commercial Painting filed its Motion to Determine Amount of Prejudgment Interest and Determination of Post-Judgment Interest Rate. (R. Vol. 14, p. 2080). In

support of its Motion, Appellee Commercial Painting filed the Affidavit of Jeff Stallings, CPA on October 30, 2018 (R. Vol. 15, p. 2115) and the Affidavit of Scott A. Frick, Esq. on October 30, 2018. (R. Vol. 14, p. 2087).

On November 16, 2018, Appellee Commercial Painting filed its Amended Motion to Determine Amount of Prejudgment Interest and Determination of Post-Judgment Interest Rate. (R. Vol. 15, p. 2212). On November 19, 2018, Appellee Commercial Painting filed its Motion for Award of Attorney's Fees, Expenses and Costs and For Entry of Final Judgment. (R. Vol. 15, p. 2219). On November 20, 2018, Appellee Commercial Painting filed the Affidavit of Scott A. Frick, Esq. in Support of Motion for Award of Attorney's Fees, Expenses and Costs and associated exhibits (R. Vol. 15, p. 2226), Affidavit of David Pearson and associated exhibits (R. Vol. 17, p. 2416) and Affidavit of Mark Koch. (R. Vol. 17, p. 2512). On December 3, 2018, Appellee Commercial Painting filed the Supplemental Affidavit of Scott A. Frick, Esq. in Support of Motion for Award of Attorney's Fees, Expenses and Costs. (R. Vol. 17, p. 2515)

On December 12, 2018, the Trial Court entered its Order Adopting Findings of Fact and Conclusions of Law Supporting Punitive Damages Award, Granting Motion to Determine Amount of Prejudgment Interest To Be Added to Final Judgment and Determination of Post-Judgment Interest Rate, Granting Motion for Award of Attorney's Fees, Expenses and Costs and for Entry of Final Judgment and Order of Final Judgment. (R. Vol. 18, p. 2541). Also on December 12, 2018 the Trial Court entered its Order Granting Commercial Painting Company, Inc.'s Motion to Allocate Second Application of Special Master for Compensation Against Defendant, The Weitz Company, LLC (R. Vol. 17, p. 2538) and Order Approving Second Application of Special Master for Compensation and Expenses. (R. Vol. 17, p. 2535).

On January 11, 2019, Appellant Weitz filed its Motion for New Trial, Motion for Judgment

Notwithstanding the Verdict (R. 18, Vol. p. 2626) and Motion to Alter or Amend the Order Approving Second Application of Special Master for Compensation and Expenses. (R. Vol. 18, p. 2594). On January 11, 2019, Appellee Commercial Painting filed its Motion to Alter or Amend Judgment to Include Revocation of Defendant, The Weitz Company, LLC's Tennessee Contractor's License. (R. Vol. 18, p. 2584)

On February 13, 2019, the Trial Court conducted hearings on the post-trial Motions filed by Appellant Weitz and Appellee Commercial Painting. (R. Vol. 55). On October 31, 2019, the Trial Court entered its Order Denying Defendant, The Weitz Company, LLC's Motion for New Trial (R. Vol. 20, p. 2966), Order Denying The Weitz Company, LLC's Motion for Judgment Notwithstanding the Verdict (R. Vol. 21, p. 2989), Order Denying The Weitz Company, LLC's Motion to Alter or Amend the Order Approving Second Application of Special Master for Compensation and Expenses (R. Vol. 20, p. 2986) and Order Denying Commercial Painting's Motion to Alter or Amend Judgment to Include Revocation of Weitz's Tennessee Contractor's License (R. Vol. 20, p. 2963).

On November 8, 2019, Appellant Weitz filed its Motion and Memorandum of Law to Set Bond for Stay on Appeal. (R. Vol. 21, p. 2993). On November 20, 2019, the Trial Court entered its Order on Motion to Set Bond on Appeal, Setting Amount of Bond on Appeal and Other Conditions for Stay of Execution on Appeal. (R. Vol. 21, p. 3034). On November 26, 2019, Appellants filed their Notice of Appeal with this Court.

STATEMENT OF THE FACTS[2]

Material Evidence Regarding Intentional Misrepresentations And Withholding Of Material Information By Weitz During Subcontract Negotiations.

1. Appellant, Commercial Painting Company, Inc. (hereinafter "Commercial Painting") has been in business in since 1980, and its President, Mark Koch has been in the painting, drywall and construction business since 1974. Commercial Painting is also a licensed general contractor in the state of Tennessee as well as Arkansas and Mississippi. (R. Vol. 12, p. 1695, ¶ 74).

2. Appellant, The Weitz Company, LLC doing business as The Weitz Company-National (hereinafter "Weitz"), entered into an agreement with The Village at Germantown, Inc. (hereinafter "VAG") entitled Prime Contract (R. Vol. 15, p. 2090), which provides for the furnishing of labor, materials, equipment and services in connection with the construction of a multi-building facility known as The Village of Germantown (hereinafter referred to as "Project"). (R. Vol. 12, p. 1695, ¶ 75).

3. In connection with said contract, Weitz as principal and Federal Insurance Company and St. Paul Fire & Marine Insurance Company as sureties, executed a Payment Bond designed Federal Insurance Company A1932523 and St. Paul Fire & Marine Insurance Company Bond No. 400 SY 3917. (R. Vol. 12, p. 1695, ¶ 76; R. Vol. 61, Trial Exhibit 349).

4. Commercial Painting responded to an invitation to bid received from Weitz for certain scopes of work to be performed on the Project. Commercial Painting received a Bidding Manual (R. Vol. 58, Trial Exhibit 215) and began the process of preparing its bid for its scope of

[2] Appellees' Statement of the Facts is not intended to be an exhaustive listing of all material evidence that supports the Jury's verdict and the Trial Court's December 12, 2018 Findings of Fact and Conclusions of Law and Order of Final Judgment. Instead, this Statement of the Facts catalogs only a portion of the material evidence presented at trial that supports the verdict and judgment.

work on the Project as evidenced in its bid file (R. Vol. 58, Trial Exhibit 214; R. Vol. 12, p. 1696, ¶ 77).

5. In connection with its bid, Commercial Painting provided a qualification statement listing qualifications and a listing of jobs that were ongoing and that had been recently completed. (R. Vol. 12, p. 1696, ¶ 78); R. Vol. 56, Trial Exhibit 100).

6. In late 2003 prior to submission of Appellee Commercial Painting's bid on the Project, representatives of Weitz met with representatives of Commercial Painting at another construction project in Memphis, Tennessee called the Grizzlies House which was similar to the Project in order to examine the type work that Commercial Painting was capable of performing. (R. Vol. 12, p. 1696, ¶ 79).

7. The work performed by Commercial Painting on the Grizzlies House project involved the installation of drywall with schedule durations for hanging and finishing that were similar to that required on the Project. In addition, schematic plans demonstrate that the amount of drywall installed on a typical floor of the Grizzlies House project was similar to a typical floor at the VAG Project, and are the same type construction projects. (R. Vol. 12, p. 1696, ¶ 80).

8. Commercial Painting submitted its bid for this work for the first time in 2003. In preparing its bid, Commercial Painting performed a quantity analysis to determine the materials needed based upon digitized plans. Quantities for specific work were generated in Condition Summaries, all of which were utilized to formulate Appellee's Commercial Painting's bid. (R. Vol. 12, p. 1696, ¶ 81; R. Vol. 56, Trial Exhibit 96).

9. On December 10, 2003, Commercial Painting made an inquiry concerning the status of the bid award process. (R. Vol. 12, p. 1697, ¶ 82; R. Vol. 58, Trial Exhibit 270).

10. On June 15, 2004 representatives of Weitz requested a meeting to confirm pricing. Representatives of Commercial Painting had meetings with representatives of Weitz in the late summer of 2004 to finalize the bid. (R. Vol. 12, p. 1697, ¶ 83; R. Vol. 58, Trial Exhibit 271).

11. On July 27, 2004, representatives of Weitz advised Commercial Painting that it was the second lowest bidder for the scope of work and advised Commercial Painting concerning the difference in bids between it and the lowest bidder. (R. Vol. 12, p. 1695, ¶ 84; R. Vol. 58, Trial Exhibit 272). However, a document authored by the Weitz Project team after the Project was finished entitled "CONSTRUCTION POST MORTEM REVIEW" and dated July 19, 2006 actually reflects that Commercial Painting "...was 25% lower than the other bidders. We know signing them up would be trouble, but we could not take the $1 million hit [underbid by Weitz for the drywall portion in its contract with the Owner] right away and thought our project team could manage the sub." (R. Vol. 59, Trial Exhibit 302 at page 9).

12. By September, 2004, Weitz had determined that it was going to award the subcontract to Commercial Painting and issued a "notice to proceed" to Commercial Painting to commence its work on the Project on September 17, 2004 (R. Vol. 56, Trial Exhibit 97). Although the notice to proceed had been issued, no contract agreement had been executed by Weitz and Commercial Painting. Weitz requested confirmation of unit pricing on September 27, 2004 which was incorporated into the subcontract agreement being prepared by Appellant Weitz. (R. Vol. 58, Trial Exhibit 273; R. Vol. 12, p. 1697, ¶ 85).

13. On or about September 28, 2004, representatives of Weitz prepared the subcontract agreement for the installation of exterior ceiling insulation, exterior wall metal framing, exterior wall installation, light gauge metal partitions, gypsum board walls, ceilings and

soffits, suspended ceilings and related materials. The Subcontract between Weitz and Commercial Painting was executed by Mr. Mark Koch, President of Commercial Painting, on behalf of Commercial Painting on November 1, 2004, and was executed by Mr. Greg Schulte of Weitz on December 7, 2004. (R. Vol. 56, Trial Exhibit 94). The Subcontract was based upon drawings which were only eight-five percent (85%) complete and the bid on which the Subcontract was based excluded engineering (R. Vol. 12, p. 1697, ¶ 86).

14. Prior to Commercial Painting entering into the Subcontract with Weitz, Weitz was already behind schedule for the completion of the Project. More specifically, the contract between Weitz and VAG allowed for the completion of the Project within twenty months after the issuance of a Notice to Proceed. The Notice to Proceed established a commencement date of January 21, 2004. As work on the Project proceeded over the next several months, the Project became further and further behind. As of August, 2004, the Project was already at least six months behind schedule due to rainfall and wet soil conditions. (R. Vol. 57, Trial Exhibit 179/185)[3].

15. Prior to the execution of the Subcontract with Commercial Painting, Weitz began negotiating with the Project owner concerning an extension to the contract time for the completion of the Project. More specifically, between the summer of 2004 through November and December 2004, correspondence was exchanged between VAG and Weitz regarding a six month extension to the contract time (R. Vol. 57, Trial Exhibits 179, 180, 181 and 182).

16. On November 17, 2004, Ed Cronan, Weitz's Senior Project Manager for the Project, transmitted a letter to Carl Smith of Freeman White, the Project Architect, outlining delays that Weitz contended were due to abnormal inclement weather and bad soil conditions

[3] The November 17, 2004 letter was marked twice during depositions as Exhibits 179 and 185. Original deposition exhibit numbers were retained for use at trial.

encountered on the Project. In that letter, Mr. Cronan advised Mr. Smith that even though the parties had agreed that the Project had been delayed by six months, the actual delay was more on the order of eight and a half months. In his letter, Mr. Cronan stated that one month of the additional delay could be recovered by shortening the preparation time for the interior drawings and delivery of materials. Concerning the other one and a half months' worth of delay, Mr. Cronan stated that "the other one and one half months will have to come from TWC (The Weitz Company) compressing the construction schedule." In addition, Mr. Cronan stated in his letter that in order to make up for some of the delay, it would be necessary to "[s]upplement trim, paint, **drywall**, carpet and tile crews among others." (emphasis added). In addition, the November 17, 2004 letter contained a revised construction schedule with a run date of November 18, 2004 which incorporated an additional six month extension on the contract schedule. Also attached to the letter after the schedule were documents prepared by Patrick Brannon of Oxley & Brannon, Weitz's scheduling consultant, reflecting delays and substantiating Mr. Cronan's statement that the delay to the Project was on the order of eight and a half months (R. Vol. 57, Trial Exhibit 179). Although the letter was from Mr. Cronan, Mr. Patrick Brannon of Oxley & Brannon (Weitz's scheduling consultant), took an active role in authoring the November 17, 2004 letter (R. Vol. 43, p. 1814, l. 15 though p. 1815, l. 9). Weitz had been a client of Oxley & Brannon since 1992 (R. Vol. 44, p. 1890, ll. 20-24).

17. Mr. Cronan did not share the contents of the November 17, 2004 letter including the fact that Appellant Weitz was considering compressing the project schedule and supplementing the drywall work in order to make up delays that were not caused by Commercial Painting with Commercial Painting prior to the Subcontract being executed (R. Vol. 44, p. 1999, l. 19 though page 2001, l. 6). In addition, DJ VanEtten, the Weitz Project Engineer who was

negotiating with Commercial Painting concerning the Subcontract, was aware of the contents of the November 17, 2004 letter at the time the letter was sent to Mr. Smith, but prior to Commercial Painting's Subcontract being executed. That letter also contains her initials indicating that she had reviewed the letter and was aware of its contents at or about the time Mr. Cronan transmitted the letter to the Project Architect. (R. Vol. 39, p. 1513 l. 23 through p. 1516, l. 12). Although Ms. VanEtten was aware of the contents of the letter, she did not communicate any of the contents of that letter to Commercial Painting, including the fact that Appellant Weitz was considering compressing the project schedule and supplementing the drywall work in order to make up delays that were not caused by Commercial Painting. (R. Vol. 39, p. 1516, l. 13 through p. 1517, l. 14).

18. Greg Schulte, who was a Weitz Vice President and Project Manager for the Project, signed the Subcontract on behalf of Weitz on December 7, 2004, never communicated to Commercial Painting prior to execution of the Subcontract, that Weitz was considering compressing the construction schedule and supplementing the drywall scope of work in order to make up delays on the Project that were not the responsibility of Commercial Painting. (R. Vol. 40, pp. 1633-1636).

19. Less than seven (7) days after Mr. Cronan sent the November 17, 2004 letter to the Project Architect, Ms. Van Etten transmitted an email on November 23, 2004 (R. Vol. 66 Trial Exhibit 488) asking that Commercial Painting expedite delivery of Commercial Painting's payment and performance bond that was required under the terms of the Subcontract even though the Subcontract was not fully executed. That email stated in part "[i]t is imperative that the bond is turned in. Time is of the essence. Please advise at once, [as] to the status of your bond." This was critical because once the payment and performance bond was issued and

delivered to Weitz, leaving the Project was simply not an option for Commercial Painting no matter how difficult Weitz became to work with, or what Weitz demanded in terms of Commercial Painting's work on the Project. Commercial Painting had no choice but to finish the Project no matter what was demanded by Weitz because of indemnity obligations which both Commercial Painting and Mr. Koch, individually, contractually owed to Liberty Mutual Insurance Company, Commercial Painting's bonding company, in the event that there was a claim on that bond. (R. Vol. 39, pp. 1521 through 1523; R. Vol. 47, p. 2284, l. 19 through p. 2285, l. 16; R. Vol. 29, pp. 777-778).

20. Both Weitz and the Project Owner compromised on the six-month delay extension but it was Weitz's responsibility to bring the Project in on time and at no additional cost to the Project Owner. Both parties knew the delay was longer than six months. (R. Vol. 32, pp. 1095-1096. At the time of the November 17, 2004 letter (R. Vol. 57, Trial Exhibit 179/185), the Architect knew the Project was in "serious trouble" due to the delays. (R. Vol. 32, p. 1103).

21. On December 7, 2004, the Mr. Smith wrote a response letter to Mr. Cronan criticizing and questioning the validity of the revised Project schedule attached to Mr. Cronan's November 17, 2004 letter. In addition, Mr. Smith expressed specific concerns about the validity of the schedule stating that ". . . it is impossible to determine the time the buildings would be closed in, when drywall finishing would start, and how many buildings would be in the condition to start drywall finishing during the two months of the proposed winter heating." (R. Vol. 57, Trial Exhibit 180). On December 16, 2004, Mr. Smith transmitted another letter to Weitz expressing concerns over the validity of the proposed schedule submitted by Defendant Weitz. (R. Vol. 57, Trial Exhibit 181).

22. The Subcontract between Commercial Painting and Weitz had attached to it a schedule that was incorporated as Exhibit E to the Subcontract and had a run date of March 16, 2004 (R. Vol. 56, Trial Exhibit 94). On December 7, 2004, the date that Weitz executed the Subcontract between Commercial Painting and Weitz, Weitz executed the Subcontract knowing that the schedule attached as Exhibit E was outdated by a period of approximately eight months. (R. Vol. 56, Trial Exhibit 94 and R. Vol. 57, Trial Exhibit 179). Moreover, despite having a revised Project schedule that was updated almost three weeks before the execution of the Subcontract, Weitz nevertheless executed the Subcontract with the out-of-date schedule issued in March, 2004 (R. Vol. 56, Trial Exhibit 94). In addition, Weitz knew on December 7, 2004 when it executed the Subcontract that the six month contract extension being negotiated with the Project owner was insufficient to cover the actual Project delay that Mr. Cronan had estimated was on the order of eight and a half months. Further, Weitz knew and had stated to the Project owner that some of the delay experienced in the Project would be made up by "compressing the construction schedule" and would also be made up by supplementing various subcontractor trades including drywall work to be performed by Commercial Painting. (R. Vol. 33, pages 1095-1096).

23. No representative of Weitz advised Commercial Painting prior to execution of the Subcontract that Weitz was considering compressing the construction schedule and supplementing the drywall scope of work. In addition, representatives of Weitz never advised Commercial Painting that Commercial Painting's bid was 25% lower than the next lowest bidder (R. Vol. 62, Trial Exhibit 370) or that Weitz had underbid the drywall scope of work to the Project Owner by $1 million resulting in a $1 million "bid bust" for Weitz (R. Vol. 59, Trial Exhibit 302, page 9; R. Vol. 28, pp. 644-646).

24. Had Weitz made Commercial Painting aware prior to execution of the Subcontract that Weitz was considering compressing the construction schedule to make up delays for which Commercial Painting was not responsible, Commercial Painting would not have signed the Subcontract (R. Vol. 28, pp. 644-646).

25. Had Weitz made Commercial Painting aware prior to execution of the Subcontract that Weitz was contemplating supplementing the drywall scope of work to make up for schedule delays for which Commercial Painting was not responsible, Mr. Koch would have signed the Subcontract (R. Vol. 28, pages 644-646).

Material Evidence Establishing Weitz Demanded A Higher Quality of Drywall Finish That Was Not Required By The Subcontract And Fraudulently Claimed That Commercial Painting Was Behind Schedule In Order To Obtain Increased Productivity From Commercial Painting.

26. Concerning the drywall installation, Commercial Painting was to first perform "pre-rock" and metal framing. After electrical and mechanical subcontractors completed their work in the walls, Commercial Painting would then insulate, hang the remaining drywall, and lastly tape and finish the drywall. These five activities performed by Commercial Painting were to be completed within durations on the construction schedule of five (5) days for each activity (R. Vol. 26, pp. 387-390).

27. There are five levels of drywall finish recognized in the construction industry. During the 2018 trial, the Jury was shown a demonstrative exhibit prepared by Commercial Painting that demonstrated the five levels of drywall finish (R. Vol. 27, pp. 466-492).

28. A Level 3 finish is not an appropriate finish when the drywall is to be painted with any grade finish of paint. Instead, a Level 3 finish is specified where vinyl or other wall coverings are specified. Carl Smith of Freeman White acknowledged that the Level 3 drywall finish was incompatible paint specified for the Project (R. Vol. 32, pages 1163-1165).

29. By the first or second week of May, 2005, the Project had progressed to the point that Commercial Painting could begin performing the majority of the tape and finish work. When Commercial Painting began performing the vast majority of the drywall finish, Weitz representatives, Don Brusseau and Bill Mueller examined the Level 3 drywall finish, and rejected it even though the Level 3 finish performed was actually better than the Level 3 finish required by the specifications for the Project. From that point forward, representatives of Weitz refused to accept any Level 3 finish on any drywall requiring a Level 3 finish and instead demanded that all drywall finish work that went well beyond a Level 3 finish (R. Vol. 34, pp. 1067-1071).

30. Although a Level 5 is the highest level of finish recognized in the drywall industry, Weitz required Commercial Painting and others performing drywall finish to continually apply joint compound over the entire surface of a wall until all imperfections, no matter how small, were no longer visible (R. Vol. 30, Tab A, pp. 1513-1518; R. Vol. 46, pp. 2183-2193).

31. John Wirsen, the Weitz Project Superintendent that oversaw Commercial Painting's work in Buildings A, G and H, testified that Commercial Painting installed a Level 4 finish in the areas he was responsible for supervising (R. Vol. 42, Tab C, pp. 1023, 1039).

32. Starting on December 16, 2004, Commercial Painting began identifying delays that it was experiencing in the performance of its work due to the activities or lack of progress by other subcontractors working on the Project. Commercial Painting's field superintendent noted delays caused by other subcontractors until his last report dated September 28, 2005 (R. Vol. 34, Trial Exhibit 356; R. Vol. 34, pp. 1084-1092). Poor quality framing performed by 84 Lumber made drywall installation and finish abnormally difficult (R. Vol. 34, pp. 1071-1073). In an

effort to alleviate problems caused by out of plumb framing and misaligned wall panels, on December 29, 2004, Commercial Painting requested that it be allowed to install the drywall horizontally as opposed to the vertical installation required by the Project specifications. This request was passed on to Carl Smith of Freeman White architects on December 30, 2004. The architect rejected this request and suggested that a pre-installation meeting be held with Commercial Painting on January 12 or 13, 2005 (R. Vol. 57, Trial Exhibit 162). On January 4, 2005, Weitz notified Commercial Painting that the requested horizontal installation of the drywall was rejected by the architect. However, Weitz did not advise Commercial Painting that the architect had suggested that a pre-installation meeting take place on January 12 or 13, 2005. (R. Vol. 57, Trial Exhibit 163).

33. Additional delays were encountered by Commercial Painting in the performance of its work until the end of the Project in February, 2006, but Commercial Painting did not complete Daily Reports after September 28, 2005. Between December 16, 2004 and September 28, 2005, Commercial Painting noted many instances in its Daily Reports where it was delayed in the performance of its work by lack of inspections by code enforcement officials or other subcontractors who had not completed preceding work that needed to be completed before Commercial Painting could complete its required work in a given area (R. Vol. 61, Trial Exhibit 356; R. Vol. 34, pp. 1084-1092).

34. Scott Russell and Steve Foree, on-site field representatives of both the electrical subcontractor (AC Electric) and door and hardware installation subcontractor (Hutzel Construction), testified at trial regarding numerous instances of Weitz improperly sequencing work of the various subcontractor trades resulting in the destruction of installed drywall which required extensive cutting and patching of drywall to repair. As a result of the manner and

method that Weitz used to sequence work on the Project, Commercial Painting was forced to install drywall and cover-up other work without building inspections in and throughout the job. Mr. Foree also testified how very poor framing adversely affected the quality of the drywall finish and further resulted in destruction of Commercial Painting's previously installed drywall in order to correct framing problems (R. Vol. 31, pp. 802-825; 862-889)

35. Weitz left itself little recourse against 84 Lumber for the myriad of delay and construction issues caused on the Project by 84 Lumber due to the fact that the subcontract between Weitz and 84 Lumber eliminated any liquidated damages from being assessed against 84 Lumber. As a result, any liquidated damages resulting from 84 Lumber's poor workmanship and defective framing would have to be absorbed by Weitz. An email dated July 6, 2005 from Weitz, Senior Project Manager, Ed Cronan, to Brett Kelly of 84 Lumber confirmed ongoing delays that were the responsibility of 84 Lumber and the fact that liquidated damages had been removed from 84 Lumber's subcontract (R. Vol. 66, Trial Exhibit 491).

36. Commercial Painting's scheduling expert, David Pearson, testified regarding delays created by 84 Lumber and other factors beyond Commercial Painting's control and the impact of those delays on Commercial Painting's work (R. Vol. 33, pp. 1039-1044). The extent of the problems created by 84 Lumber are documented in the exhibits to Mr. Pearson's report (R. Vol. 60, Exhibits 8, 9, 10 and 11 of Trial Exhibit 303).

37. Weitz utilized the services of Mr. Patrick Brannon and his firm, Oxley & Brannon, for scheduling work on the Project from the beginning (R. Vol. 44, page 1890). This was the same scheduling consultant was used by Weitz to testify at trial as Weitz's expert. In March, 2005, Phil Sorenson of Oxley & Brannon and Mr. Wirsen of Weitz actively revised the full construction schedule. Mr. Sorenson wrote an e-mail to Mr. Wirsen on March 23, 2005

expressing concerns about the number of added and deleted relationships in Mr. Wirsen's most recent "0320" schedule and advised Mr. Wirsen that the schedule needed to be revised so that the logic and durations for the remaining work were accurate and realistic even if not achievable in the field. (R. Vol. 58, Trial Exhibit 207). Mr. Pearson testified that the basis and logic of the "0320" schedule was eventually incorporated into a later schedule known as the "0502" schedule (R. Vol. 33, pp. 1007-1019).

38. Starting in May, 2005, Weitz began complaining that Commercial Painting was behind schedule and demanded that Commercial Painting increase its manpower on the Project and demanded faster completion of drywall work. Weitz Project Engineer, DJ VanEtten drafted notes concerning various types of meetings that were conducted by Weitz on the Project including subcontractor and staff meetings. In her May 3, 2005 staff meeting notes, Ms. VanEtten noted that Commercial Painting was expected by Weitz to increase the level of drywall finish from the Level 3 specified by the Subcontract to a Level 4 finish in Building A (R. Vol. 66, Trial Exhibit 380, p. 3). In addition, these notes reflect that Weitz was demanding that Commercial Painting was to increase its manpower and had been placed on notice the previous day that it needed to increase its manpower. This coincides with Weitz creation of the "0502" schedule to manage the Project even though that schedule had not been formally published to the subcontractors, and according to David Pearson, Commercial Painting's scheduling expert, was even more compressed than the June 17, 2005 schedule that was eventually published to the subcontractors (R. Vol. 33, pp. 1007-1011). According to Weitz scheduling consultant's schedule log (R. Vol. 62, Trial Exhibit 407), the "0502" schedule showed a completion date of December 19, 2005.

39. On May 17, 2005, Weitz transmitted a letter to Commercial Painting demanding increased performance and increase manpower of Commercial Painting on the Project. Weitz further threatened that supplementation forces would be brought to the Project to perform a portion of Commercial Painting's scope of work with the costs deducted from Commercial Painting's contract. Commercial Painting responded stating that it would increase manpower on the Project (R. Vol. 57, Trial Exhibit 120).

Material Evidence Establishing Weitz Manipulated Construction Schedules In Order To Capture An Early Completion Bonus Misrepresenting To Commercial Painting And Other Subcontractors The Amount Of Time To Complete The Project.

40. John Wirsen, Weitz superintendent, testified that until his departure from the Project in October 2005, all of the full construction schedules were prepared by Weitz Superintendent John Wirsen and Weitz's scheduling consultant, Oxley & Brannon (R. Vol. 30, Tab C, page 1029).

41. Mr. Wirsen testified that when he developed the full construction schedules, Mr. Wirsen scheduled the Project completion for the required completion date established in the contract between the Project Owner and Weitz as provided to him by Weitz Project Manager, Ed Cronan, as opposed to actual progress on the Project (R. Vol. 30, Tab C, pp. 1031, 1036). As full construction schedules were updated, Mr. Wirsen would not update the full construction schedules to reflect actual job progress (R. Vol. 30, Tab C, pp. 1032, 1037).

42. On June 2, 2005, Weitz and the Project Owner entered into Amendment No. 2 to the contract between the Project Owner and Weitz that extended various dates for the completion of the Project. Among other deadlines, this amendment extended the completion date for Wings B and C of the Project to January 6, 2006 and the Healthcare Building to March 6, 2006. In addition, this Amendment provided for an early completion bonus to Weitz in the amount of

$8,597.00 for each day the Project was completed early with a total maximum potential early bonus of $386,865.00. (R. Vol. 58, Trial Exhibit 202).

43. Shortly after execution of Amendment No. 2 to the contract between the Project Owner and Weitz, Weitz issued a revised construction schedule which was distributed to all subcontractors on June 28, 2005 with a cover letter drafted by Weitz Senior Project Manager, Ed Cronan (R. Vol. 57, Trial Exhibit 156). The June 28, 2005 schedule produced by Weitz was drafted with completion dates designed to allow Weitz to obtain the completion bonus provided for in Amendment No. 2 between Project Owner and Weitz. This is also confirmed in the Oxley & Brannon schedule (R. Vol. 62, Trial Exhibit 407) which shows the completion date for the project as January 20, 2006, instead of the March 6, 2006 completion date reflected in Amendment No. 2 (R. Vol. 58, Trial Exhibit 202).

44. In his June 28, 2005 transmittal letter, Mr. Cronan did not disclose to the subcontractors that the June 17, 2005 schedule did not include the full six month extension agreed to between the Project Owner and Weitz, but instead provided for only 4 1/2 months of the six-month extension. Mr. Cronan failed to disclose the existence of the six-month extension despite the fact that Section 5.6 of the Subcontract obligated Weitz to extend Commercial Painting's and the other subcontractors' subcontract time to the extent any extensions were granted by the Project Owner (R. Vol. 57, Trial Exhibit 156).

45. On July 19, 2005, Carl Smith of Freeman White transmitted a letter to Mr. Cronan of Weitz criticizing the June 17, 2005 schedule produced by Weitz and advised Mr. Cronan that the schedule was missing critical information (R. Vol. 57, Trial Exhibit 183). The next day on July 20, 2005, Carl Smith of Freeman White Architects transmitted another letter to Mr. Cronan of Weitz indicating that a review of the construction schedule had been performed by Mr. Smith

and a representative of the Project Owner, and compared the schedule to the status of the construction in place (R. Vol. 57, Trial Exhibit 184). In that letter, Mr. Smith stated that ". . . [b]ased on our experience and what we saw during our walk around, we have no confidence in the sequences and durations you have established in the schedule and TWC's ability to complete the work according to the schedule. We see incompatible tasks scheduled one on top of one another in various areas, missing tasks, and the schedule lacks a true logic line or critical path. It appears that the date of September 6th was not scheduled to but simply backed into in an attempt to capture the forty-five bonus days available to TWC in Amendment No. 2." Mr. Smith concluded the letter by stating "[w]e encourage you to take a serious look at your construction schedule and make an effort to schedule the work to an appropriate finish, rather than backing into an arbitrary date. **Trying to accomplish the most difficult and quality sensitive work of the Project in the shortest time possible, is not in the best interest of the Project.**" (R. Vol. 57, Trial Exhibit 184, emphasis added).

46. David Pearson, scheduling expert for Commercial Painting, testified based upon a full and complete as-built scheduling analysis going back to the start of construction activities, that in the July, 2005 timeframe, the Project was on the order of eleven (11) months behind schedule, none of which was the fault of Commercial Painting. Mr. Pearson further testified that Commercial Painting was never behind schedule in the completion of its scope of work even though Weitz falsely claimed that Commercial Painting was behind schedule. In fact, Commercial Painting was completing its work faster than required by the Subcontract. Mr. Pearson further testified that if there were any instances when Commercial Painting did not complete an individual item of work within a required duration, it was the fault of other subcontractors not timely completing predecessor work. Although Commercial Painting was not

responsible for these delays, Mr. Pearson testified that Weitz falsely claimed that Commercial Painting was responsible for these delays, and then not only used these false claims as an excuse to supplement Commercial Painting, but further used it as an excuse to assess liquidated damages against Commercial Painting for which Commercial Painting was not responsible. Mr. Pearson testified that Commercial Painting's work was compressed by 39%. (R. Vol. 33, pp. 957-1044; R. Vol. 60, Exhibits 26, 33, 34, 35 and 36 of Trial Exhibit 303).

47. Weitz continued to schedule and sequence the work in an effort to capture the early completion bonus until December 2005 when it became apparent that it could not achieve the early completion bonus. At that time, Weitz issued its December 2, 2005 schedule which moved the completion date from January 20, 2006 to March 8, 2006 (R. Vol. 57, Trial Exhibit 140; R. Vol. 62, Trial Exhibit 407). In the December 2, 2006 cover letter transmitting the December 2, 2006 schedule, Weitz, for the first time, issued a construction schedule that incorporated the six-month extension for Project completion granted by Amendment No. 2 to Commercial Painting and the other subcontractors. However, Weitz had withheld this information from Commercial Painting and the other subcontractors for a period of approximately six months between the time it issued the June 17, 2005 schedule (R. Vol. 57, Trial Exhibit 156) and the issuance of the December 2, 2006 schedule (R. Vol. 57, Trial Exhibit 140).

48. During this time period which occurred after Weitz had already formally secured the six-month extension of time granted by Amendment No. 2 and which Weitz refused to incorporate into its schedules, Weitz began to issue notices to comply and notices to supplement to Commercial Painting asserting that the finish being performed by Commercial Painting was not acceptable even though Commercial Painting was only required to install a Level 3 finish,

and further stating that Commercial Painting's forces would be supplemented falsely claiming that Commercial Painting was behind schedule based on the June 17, 2005 schedule that did not include the full six month time extension granted in Amendment No. 2, when in fact, Commercial Painting was not responsible for any delays according to the testimony of Commercial Painting's scheduling expert David Pearson. During this time, Weitz stated that Commercial Painting would be supplemented with another drywall subcontractor falsely claiming that Commercial Painting was behind schedule. On July 15, 2005, Commercial Painting disputed in writing the Notice to Comply concerning the drywall finish in the Wing F of the Project and stated that Commercial Painting was already providing more than a Level 3 finish (R. Vol. 61, 323). On July 20, 2005, Commercial Painting responded to a notice to comply concerning the finish around certain doors stating that the problem was due to change in the door specifications to another product that did not have interior trim (R. Vol. 61, Trial Exhibit 324).

49. On July 20, 2005, Commercial Painting sent five separate letters objecting to notices from Weitz that it intended to supplement Commercial Painting in various areas of the Project. In addition, Commercial Painting stated that it was performing work within the durations required under the Subcontract (R. Vol. 61, Trial Exhibits 325, 326, 327, 328 and 329). On July 21, 2005, Commercial Painting transmitted another letter objecting to the July 19, 2005 supplementation letter and requested that the disputes between Commercial Painting and Weitz be submitted for resolution in compliance with Paragraph 10.1 of the Subcontract (R. Vol. 61, Trial Exhibit 330). Mr. Koch testified that Weitz ignored this request for resolution of the disputes through the claim resolution mechanisms in the Subcontract (R. Vol. 28, pp. 553- 555).

Material Evidence Establishing Weitz Submitted A Request For Information To The Project Architect Seeking Clarification Regarding The Level of Finish Required For The Drywall, Failed To Disclose The Architect's Response To Commercial Painting And Continued To Demand A Higher Level Of Drywall Finish From Commercial Painting After The Project Architect Confirmed That Weitz Had Been Demanding A Higher Level Of Finish Of Commercial Painting Than What Was Required By The Subcontract.

50. After Mr. Koch raised the issue that Commercial Painting was providing a better level of finish than that required by the specifications for the Project, Weitz Project Superintendent John Wirsen transmitted an email on July 20, 2005 to DJ VanEtten stating that Commercial Painting "...is responsible for the most stringent of specs, i.e. level 4..." even though the specifications for the Project required only a Level 3 finish (R. Vol. 66, Trial Exhibit 487).

51. On July 26, 2005, Weitz submitted a Request for Information ("RFI") to the Project Architect requesting clarification of the level of drywall finish required for the Project even though the vast majority of Commercial Painting's drywall finish had begun almost three (3) months earlier in May 2005 when Weitz Superintendents Bill Mueller and Don Bruseau met with Mr. Bringle and refused to accept a Level 3 finish. In addition, Commercial Painting had performed work in the buildings supervised by Mr. Wirsen and Mr. Wirsen testified this work had been finished to Level 4. The Project Architect responded and confirmed that the level of drywall finish required by the specifications was a Level 3 finish. While Weitz claimed that this RFI (RFI #346) was transmitted to Commercial Painting, both Mr. Koch and Mr. Bringle testified that they had never seen RFI #346 until the trial. Moreover, RFI #346 (R. Vol. 66, Trial Exhibit 485) does not contain a facsimile transmission confirmation sheet that confirms that RFI #346 was ever transmitted either to Commercial Painting or Performance Contracting, Inc., the two subcontractors to whom the RFI indicates the RFI applied. In addition, RFI Nos. 330 through 360 (R. Vol. 66, Trial Exhibit 486) contain fax transmission confirmation sheets

identifying the individual subcontractors to whom those RFI's were sent. The only RFI that does not have a fax transmission confirmation sheet is RFI #346. Weitz was unable to produce any proof at trial that RFI #346 was ever transmitted to Commercial Painting, and Ms. VanEtten's only explanation was speculative testimony that the facsimile transmission sheets must have been "lost." (R. Vol. 39, pp. 1497-1502).

52. Although Weitz held a meeting with Performance Contracting, Inc. to confirm the level of finish required by the specification as confirmed by RFI #346, Weitz did not include Commercial Painting in this meeting even though Weitz had previously directed Commercial Painting to perform a higher level of finish than that required by the specifications (R. Vol. 66, Trial Exhibit 485). Mr. Bringle was never told that Commercial Painting no longer needed to install a Level 4 finish on the Project after Weitz received RFI #346 (R. Vol. 34, pages 1097-1098). On cross examination, Ms. VanEtten admitted that neither she nor any other representative of Weitz ever sent an email or other communication telling Commercial Painting that it no longer needed to install a Level 4 finish on the Project after Weitz received RFI #346 (R. Vol. 39, pp. 1497-1502).

Material Evidence To Establish That Weitz Fraudulently Supplemented Commercial Painting And Withheld Monies from Commercial Painting Based Upon Intentional Misrepresentations That Commercial Painting Was Behind Schedule Even Though Commercial Painting Was Meeting Or Exceeding Its Schedule Obligations, And Continued To Not Respond to Commercial Painting's Multiple Requests To Invoke The Claims Resolution Process Contained In The Subcontract.

53. On November 22, 2005, Weitz transmitted a letter indicating that it intended to supplement Commercial Painting in Building C West (R. Vol. 63, Trial Exhibit 414). On November 29, 2005, Commercial Painting transmitted a letter objecting to the November 22, 2005 supplementation letter, as well as another supplementation notice dated November 15, 2005. Further, Commercial Painting again requested that Weitz begin the claim dispute

resolution process contained in Paragraph 10.1 of the Subcontract (R. Vol. 61, Trial Exhibit 333). Mr. Koch testified that Weitz also ignored this request for resolution of the disputes through the claim resolution mechanisms in the Subcontract (R. Vol. 28, pp. 557-559).

54. On December 15, 2005, Commercial Painting notified Weitz that it disputed all back charges identified in Change Orders 6 and 7 and again requested that Weitz begin the claim dispute resolution process contained in Paragraph 10.1 of the Subcontract (R. Vol. 61, Trial Exhibit 334). On February 16, 2006, Commercial Painting notified Weitz that the disputed all back charges identified in Change Order 8 (R. Vol. 61, Trial Exhibit 338). However, according to Mr. Koch's testimony, Weitz never responded to Commercial Painting's request to implement the claims resolution process contained in the Subcontract (R. Vol. 28, pp. 559-561).

55. One of the supplementing subcontractors retained by Weitz VS & Sons Construction. In performing the finish work it performed, VS & Sons Construction performed finish work that was above a Level 3 finish. The level of finish actually installed removed all imperfections in the drywall finish when viewed with a 500 watt light (R. Vol. 42, Tab A, pp. 1501-1518. VS & Sons Construction did not attempt to document the work it was performing on square footage basis, but only tracked man-hours spent on the Project (R. Vol. 42, Tab A, p. 1526). Weitz utilized the charges from VS & Sons to back charge Commercial Painting and withhold monies from Commercial Painting (R. Vol. 59, Trial Exhibit 364).

56. Similarly, Performance Contracting Inc. was retained by Weitz to construct expansion joints in the buildings of the Project, but was later retained by Weitz to perform touchup work on the drywall (R. Vol. 42, Tab B, p. 1910). When performing the touch up work, Performance Contracting, Inc. corrected any imperfections that were observed in the walls regardless as to cause. Weitz did not advise Performance Contracting, Inc. to what level of

drywall finish the touch up work was to be performed. In addition, Performance Contracting, Inc. corrected drywall problems due to incorrect framing (R. Vol. 42, Tab B, pp. 1923-1924). Weitz utilized the charges from Performance Contracting Inc. to back charge Commercial Painting and withhold monies from Commercial Painting (R. Vol. 59, Trial Exhibits 363 and 364).

57. Robert Davis was employed by Commercial Painting as a foreman for the touch up crew that performed punch list work requested by Weitz. While running the touch up crew, Mr. Davis and his crew were required to return and repeatedly touch up work all over the Project because Weitz employees would accept nothing less than walls that were perfect and free from any imperfections in the finish. He further testified that the work of the supplementing contractors did not involve correcting any alleged deficient drywall work performed by Commercial Painting, but instead were refinishing walls that had already been painted long after Commercial Painting had performed its original installation and finish work. (R. Vol. 46, pp. 2183-2193) Mr. Davis documented with photographs the extensive amount of cutting and patching of the drywall and other defects and problems caused by improper sequencing throughout the Project (R. Vol. 61, Trial Exhibit 322). The locations of the photographs taken by Robert Davis are reflected in his notes (R. Vol. 56, Trial Exhibits 4 through 46 and R. Vol. 58, 222 through 268).

58. Hutzel Construction performed drywall installation on the Project, but was originally retained by Weitz to install doors and finish hardware. Hutzel Construction was repeatedly asked to refinish drywall to a Level 5 or better finish because they would accept nothing less than perfection. Hutzel Construction encountered substantial difficulties in performing drywall work as well as door installation due to framing problems. Hutzel

Construction was asked to refinish Commercial Painting drywall finish when no corrective work was needed because Weitz would accept nothing less than perfection (R. Vol. 31, pp. 862-889).

Material Evidence To Establish Commercial Painting's Claims For Extra Work Demanded By Weitz And Weitz Withholding Substantial Sums of Monies Due Commercial Painting Based Upon Fraudulent Backcharges And Fraudulent Liquidated Damages.

59. During the course of the construction of the Project, Commercial Painting was required to perform extra and additional work by Weitz. This additional work included adding and constructing draft stops that were not shown on the plans and specifications for the Project, raised window headers, construction of scaffold for elevator hoist beam, repair framing due to truss failure, change low wall partitions, correction of dry wall at bath vanities, modifications to various rooms including the gift shop, adding of acoustical ceiling tile in lieu of the ceiling called for in the plans and specifications, lowering of ceiling grid, change in ceiling tile specifications, upgrade in tile specifications from those originally called for in the plans and specifications, added a utility closet, repairs to walls and ceilings due to added electrical panel, additional drywall work, cut and patch inspection access for inspection of sprinkler system, additional painting, cleanup of areas due to sloppy workmanship by other subcontractor trades, extra drywall to complete elevator frames that were improperly constructed by other subcontractor trades, repair of work damaged by other subcontractor trades, correction of doorways and pass-throughs due to defective construction by other subcontractor trades, adding missing wood framing that was to be installed by other subcontractor trades, correction of out-of-plumb doorframes, correction of tub-openings, patching of elevator walls cut for inspections, patching of walls and/or ceilings for additional sprinklers, increase in level of finish due to improper framing construction by other subcontractors, as well as additional work requested by Weitz that

was outside the scope of the work to be performed pursuant to the Subcontract (R. Vol. 28, pp. 566-640; R. Vol. 56, Trial Exhibits 47-92).

60. By the end of the Project, Weitz withheld $564,731.76 of Commercial Painting's monies for supplementation charges and liquidated damages charges that were not the responsibility of Commercial Painting and that were disputed by Commercial Painting for work that was predominantly performed to repair damage to Commercial Painting's finished work (R. Vol. 61. Trial Exhibit 350). Mr. Koch testified that he thoroughly reviewed all back charges claimed by Weitz and of those charges, only $7,519.18 were legitimate, and the portion of Commercial Painting's actual hang and finish scope of work that was not performed by Commercial Painting and performed by the supplementing contractors only amounted to $86,834.00 (R. Vol. 28, pp. 636-640; R. Vol. 61, Trial Exhibit 350).

61. On February 8, 2006, Commercial Painting gave notice of its claims to Weitz, VAG, Federal and St. Paul (R. Vol. 61, Trial Exhibit 344). On March 15, 2006, Commercial Painting gave notice of its claims to Weitz, VAG, Federal Insurance and St. Paul and continued to perform the work required of it under the terms of its Subcontract, as well as additional work directed by Weitz (R. Vol. 61, Trial Exhibit 345).

62. On March 31, 2006, Commercial Painting gave notice of its claim of a mechanics' and materialmen's lien for all outstanding amounts due for work, labor and materials incorporated into the Project through February 25, 2006 (R. Vol. 61, Trial Exhibit 346). On May 11, 2006, Commercial Painting Company transmitted its Second Revised Notice of Non-Payment to Weitz, VAG, Federal Insurance and St. Paul for all labor and materials incorporated into the Project through March 25, 2006 (R. Vol. 61, Trial Exhibit 347). On May 18, 2006,

Commercial Painting transmitted an Amended Notice of Lien Claim giving notice of its claim of a Mechanics' and Materialmen's Lien on the Project (R. Vol. 61, Trial Exhibit 348).

Material Evidence To Establish That Weitz Intended To Inflict Substantial Damage Upon Commercial Painting.

63. In July, 2006 after the conclusion of the Project, members of the Weitz supervisory staff working on the Project drafted and circulated a document entitled "Post Mortem" which outlined various concerns and observations concerning the Project (R. Vol. 59, Trial Exhibit 302). This document reflects that Weitz had a $1 million "bid bust" pertaining to the drywall portion of the Project that Weitz thought it could lessen by "managing" Commercial Painting (R. Vol. 59, Trial Exhibit 302, page 9). This document states that Commercial Painting "should be out of business by now." (R. Vol. 59, Trial Exhibit 302, p. 6). This document also reflects that scheduling for the Project was inaccurate and that correct durations were not properly assigned to specific construction activities and that Weitz incurred losses of almost $2.9 million on the Project (R. Vol. 59, Trial Exhibit 302, page 9).

64. Frankie Bringle testified that DJ VanEtten of Weitz had stated to him on a Saturday during a lunch break in the summer of 2005 that Weitz had put another drywall company out of business (R. Vol. 34, pp. 1098-1099).

65. Although Ms. VanEtten claims that she never read the Post Mortem document, her transmittal email nevertheless praises the author's work compiling the contents of that document and suggested that it was so good, it needed to be used on future projects. In addition, despite her claim to have never read the Post Mortem document, the email shows that she requested the recipients of the email to return any comments by the following day, and her transmittal email clearly states that she transferred the contents of the Post Mortem document into a spreadsheet (R. Vol. 40, pp. 1153-1565).

ARGUMENT

I. INTRODUCTION

Appellants begin their Brief with an introductory statement attempting to persuade this Court regarding the significance of this case and the issues on appeal, and does so by propagating a false narrative that Appellants have been victimized by the judicial system – first by a jury which the Appellants falsely claim was misinformed of the law and out of control, and then by the Trial Court which the Appellants claim with equal falseness, completely abrogated its judicial responsibilities both in the conduct of the trial and in the discharge of its judicial responsibilities regarding the Jury's verdict following the trial. Appellants would further have this Court believe that if the Jury's verdict and the Trial Court's judgment are not overturned, the construction industry in Tennessee, and even the entire United States, would be shaken to its core, implying that if the judgment of the Trial Court is not reversed, the construction industry would collapse because fundamental principles of contract law and Tennessee jurisprudence would be "upended" essentially rendering all contracts, and legal precedent regarding contracts, meaningless and moot.

There is one primary overriding flaw with the Appellants' far-fetched apocalyptic, doomsday vision of this case – Appellants' vision of this case has nothing to do with the facts of this case, and most significantly, fails to recognize that Appellant Weitz is not the blameless victim it represents itself to be to this Court. Instead, Appellant Weitz was guilty of multiple acts of fraud which it committed in secret against Appellee Commercial Painting, both before and after it entered into the Subcontract at issue in this litigation, and simply got caught doing what Appellant Weitz stated numerous times was "...permitted under the contract and consistent with industry norms." *See*, Weitz Memorandum filed November 8, 2018 at page 7 (R. Vol. 15 at p. 2130). What is astonishing about that statement is that Appellant Weitz continues to express this belief despite the

opposite conclusions reached by the Trial Court and the Jury about Appellant Weitz's conduct, and equally, if not more significantly the conclusion this Court reached about such conduct based only on the 2011 summary judgment record as reflected on page 17 of the June 20, 2016 Opinion:

> With regard to its supplementation of Commercial Painting's work, Weitz contends the subcontract permitted it to do this.
>
> ...
>
> Although Weitz is correct that it is entitled to supplement Commercial Painting's work if Commercial Painting is in default of its obligations, the subcontract does not entitle Weitz to cause Commercial Painting to be in default by misrepresenting a material fact and then sanctioning Commercial Painting for being in default.

Despite this Court telling Appellant Weitz a full two years before the second trial that it could not cause Appellee Commercial Painting to be in default by misrepresenting a material fact, and correctly forecasted that such conduct might subject Appellant Weitz to punitive damages after a full hearing of all the evidence at a new trial, Appellant Weitz has never budged from its position that its conduct was "...permitted under the contract and consistent with industry norms."

Appellant Weitz was not the victim of a runaway jury or a disinterested, unengaged Trial Court that had allegedly shirked its judicial duties and responsibilities. In fact, counsel for Weitz commented on more than occasion during the trial what an outstanding job the Jury was doing paying attention to the proof. Here is one such example:

> MR. TEMPLER: This has been a difficult case, both factually and in determining the amount of time we have spent. And I know you folks have been paying specific attention to all this. You've giving us excellent questions every couple of days, and that tells us that you're listening to us, that you're paying attention. And you have great questions that help us present the case in what we're trying to do.
>
> R. Vol. 24, Page 2454, line 22 through page 2455, line 5.

Appellant Weitz was not a victim of anything. Instead, Appellant Weitz is nothing more than a bad actor that got caught and was held accountable for its actions by the judicial system.

That result is precisely what the judicial system is designed to do – shine a bright light on the conduct of bad actors and hold them accountable.

While Appellants are correct that a subcontract should not be viewed as a "lottery ticket" by subcontractors, by the same token, general contractors such as Appellant Weitz should not be able to use a subcontract of its own authorship as an impervious shield of absolute immunity from the consequences of fraudulent and intentional conduct designed to, at minimum, deprive a subcontractor of its earned compensation, and at worst, put a subcontractor out of business, all of which Appellant Weitz describes as "...permitted under the contract and consistent with industry norms." Even worse, Appellants' "lottery ticket" statement makes a mockery of the judicial system, the careful hard work that the Jury and Trial Court performed in discharging their respective duties, and belittles the substantial amount of time and resources Appellee Commercial Painting expended to uncover the truth about Appellant Weitz's fraudulent conduct which was hidden and unknown going back as far as the negotiation stage of the Subcontract, and would have remained undiscovered had it not been for Appellee Commercial Painting commencing this litigation.

If we take Appellant Weitz at its word that its conduct towards Appellee Commercial Painting was "...permitted under the contract and consistent with industry norms," then the outcome of this appeal will not be significant because it "upends" long-standing principles of Tennessee jurisprudence regarding contracts as Appellants exaggeratedly claim, but instead, will be significant because general contractors like Appellant Weitz will have to think twice before they, 1) fraudulently manipulate construction schedules through misrepresentations of fact regarding a subcontractor's performance in order to obtain increased work output without payment, 2) fraudulently supplement a subcontractor's work forces and then backcharge the costs of the supplementation to the subcontractor in order to make up for schedule delays caused by others or to

earn an early completion bonus, 3) fraudulently assess liquidated damages to a subcontractor for delays caused by other subcontractors, or worse, the general contractor itself, and 4) demand subcontractors to perform extra work without payment. Deterring Appellant Weitz and other general contractors from engaging in this type behavior in the future fulfils the one of the two roles punitive damages are designed to perform.

It is also appropriate to comment in this Introduction that Appellants throughout their Brief bring this Court's attention to the fact that this case was at one time presided over at the trial court level by Judge Armstrong prior to his elevation to the Western Section Court of Appeals, and that Judge Armstrong reached a different result than what was reached by the Jury and the Trial Court in the 2018 trial. This is an obvious attempt to undermine the legitimacy of the ruling of the Trial Court. This is not the first time that Appellant Weitz has pursued this tactic. Following the remand of this case in 2016, Appellant Weitz took numerous opportunities to attempt to influence the Trial Court's view of the case by mentioning the now vacated judgment rendered by then Chancellor Armstrong in 2013 while presiding over the first trial of this case. Appellee Commercial Painting submits that this Court made it abundantly clear in the June 20, 2016 Opinion that the prior judgment rendered in this case was reversed, vacated and remanded. This Court's instructions could not have been more clear and specifically stated that the judgment and award of damages emanating from the 2012 trial were vacated. It is axiomatic that when a lower court judgment has been vacated, it has no further relevance to the case, and the parties stand in the same position they occupied before the judgment was entered. *See*, ***Freeman Indus. LLC v. Eastman Chem. Co.***, 227 S.W.3d 561, 567 (Tenn. Ct. App. 2006). Yet, Appellant Weitz, has refused to accept that fact, and has spent the last four (4) years attempting to resurrect the vacated 2013 judgment and astonishingly, still does so today when it states on page 93 of its Brief that this Court "...should

reinstate Chancellor Armstrong's March 6, 2013 Memorandum Opinion as the Final Judgment in this case, and dismiss this case since that judgment was fully satisfied in 2013." There is simply no basis in the law for such an outlandish and preposterous request. That nonsense aside, it should be noted that the 2018 trial was conducted with all of Appellee Commercial Painting's claims at issue for adjudication, and the evidentiary record presented at the 2018 trial was substantially different than what existed at the summary judgment stage in 2011.

Finally, it must be noted that the Appellants' Brief further obfuscates the issues to be examined on appeal by bringing to the gates of this Court, a Trojan Horse that contains within in it, something other than the correct standard of review for virtually all of the issues identified by Appellants, particularly where the issue involves some analysis of the facts supporting the Jury's verdict. Appellants claim that essentially every issue to be decided by this Court comes to this Court for a de novo review with no presumption of correctness, but then argue that certain facts are "undisputed." By so doing, Appellants attempt an end-run around the much higher material evidence standard where Appellants are required to demonstrate that there is no material evidence to support the verdict. As stated by the Tennessee Supreme Court in the case of ***Barnes v. Goodyear Tire & Rubber Co.***, 48 S.W.3d 698 (Tenn. 2000):

> When addressing whether there is material evidence to support a verdict, an appellate court shall: (1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all [countervailing] evidence. *Crabtree Masonry Co. v. C & R Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn.1978); *Black v. Quinn*, 646 S.W.2d 437, 439-40 (Tenn. App.1982). Appellate courts shall neither reweigh the evidence nor decide where the preponderance of the evidence lies. If the record contains "any material evidence to support the verdict, [the jury's findings] must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury." *Crabtree Masonry Co.*, 575 S.W.2d at 5.
>
> ***Barnes*** at pages 704-705

The failure by Appellants to articulate the correct standard of review is then further compounded by the failure of the Appellants to address how that particular issue was handled by the Trial Court. Instead, Appellants throughout their entire Brief, largely opt to speak in vague generalities that do little to assist this Court in resolving the issues on appeal.

Appellee Commercial Painting responds to Appellants' argument as follows:

II. THE VERDICT AND JUDGMENT WERE NOT ERRONEOUS SIMPLY BECAUSE THE APPELLEE PROCEEDED TO TRIAL ON ALTERNATIVE THEORIES OF RECOVERY, PRESENTED ONE DAMAGE CALCULATION FOR ALL THEORIES AND THE JURY AWARDED THE SAME AMOUNT UNDER ALL THEORIES.

Standard of Review: Whether there is material evidence in the record to support the verdict.

A. The Jury's Verdict And The Trial Court's Judgment Emanating From That Verdict Are Not Internally Consistent Nor Irreconcilable With Tennessee Law, And Appellants' Assignments of Error Were Waived By Appellants.

Appellants first argument erroneously claims that the verdict and judgment are inconsistent and irreconcilable under Tennessee law, and Appellants' characterization of this issue is nothing more than a Trojan Horse attempting to interject a lesser and incorrect standard of review into this appeal in order for Appellants' to escape their obligation to demonstrate to this Court's satisfaction that there is no material evidence to support the verdict. Appellants' basis for this argument is that the Jury made findings consistent with the breach of contract claim as well as the unjust enrichment claim, and that the damage calculation presented to the Jury by Appellee Commercial Painting was the same. Appellants further argue that Appellee Commercial Painting was required to make an election of remedies. However, all of these arguments fail because, while there is a prohibition under Tennessee law against a plaintiff making a double recovery by presenting two competing theories of recovery, there is nothing that prevents a plaintiff from proceeding under two alternative causes of action, and then making

an election of remedies depending upon which theory of recovery yields the greater recovery for the plaintiff as this Court explained in its June 20, 2016 opinion. In addition, there is no requirement that a plaintiff present all damages it incurred and could potentially recover. For instance, it is well-established that in a tort claim, a plaintiff may recover consequential damages, but in a contract claim, a party cannot recover consequential damages unless consequential damages were in contemplation of the parties. ***Western Union Tel. Co. v. Green***, 153 Tenn. 522, 528 (1921). Moreover, Appellants cite this Court to no authorities that hold a plaintiff is prohibited from presenting the same damage calculation for more than one theory of recovery so long as each element of those damages is permitted to be recovered under each alternative theory of recovery. Other than its arguments regarding the appropriateness of an award of punitive damages in a contract case, Appellants made no such arguments to the Trial Court or to this Court.

Concerning the Appellants' argument that proceeding to trial on both contract and *quantum meruit*/unjust enrichment theories at trial was inconsistent, this Court stated very plainly in the June 20, 2016 Opinion that Appellee Commercial Painting was free to pursue its various causes of action so long as it did not result in a double recovery. More specifically, this Court stated the following on page 18 of the June 20, 2016 Opinion:

> 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.

Despite the fact that this Court made it clear that Appellee Commercial Painting could pursue overlapping alternative theories of recovery so long as only one recovery was made, Appellants ignore this Court's ruling. Further, in making their arguments, Appellants failed to take into account that while there was a contract between Appellant Weitz and Appellee

Commercial Painting as it pertained to installing the drywall and providing only a Level 3 drywall finish, there was no contract between those parties to perform the higher level of drywall finish that was demanded by Appellant Weitz under threat of supplementation and declaring Appellee Commercial Painting in default of the Subcontract. The same is true for the other extra work demanded by Appellant Weitz, performed by Appellee Commercial Painting, and then not paid for by Appellant Weitz. In fact, Appellant Weitz actually went to great lengths during the trial to prove that there was no agreement or contract between the parties to perform the extra work that made up the bulk of the extra work claims that Appellee Commercial Painting presented at trial. In addition, Appellants failed to recognize that the totality of Appellee Commercial Painting's claim consisted of more than just the extra work claims which fell outside the scope of the Subcontract. A review of Trial Exhibit 350[4] (R. Vol. 61) clearly shows that $564,731.76 of Appellee's damage claim was for progress payments and retainage due under the Subcontract for work that fell within the scope of the Subcontract. The extra work claims, which fell outside of the scope of the Subcontract and which Appellant Weitz argued there was no obligation to pay for under the terms of the Subcontract, amounted to $1,364,696.98.

Also, it is important to note that the Jury did not award all of the damages claimed by Appellee Commercial Painting. As Exhibit 350 reflects (R. Vol. 61), Appellee Commercial Painting was seeking $564,731.76 of unpaid progress payments and retainage due under the Subcontract, and $1,364,696.98 in extra work claims, less total credits for work not performed by Appellee, Commercial Painting of $94,353.18 for a total of $1,835,075.56. However, the Jury awarded a lesser amount of $1,729,122.46 which amounts to a reduction of $105,953.10 and

[4] It should be noted that what is shown in Appellants' Brief on page 43 as Exhibit 350 is erroneous. That was an earlier draft of Exhibit 350 which did not include the $94,353.18 of credits due Appellant Weitz for work that was not performed by Appellee Commercial Painting.

presumably came out of the extra work claims. It is impossible to know what this deduction represents, nor is knowing that important for purposes of this appeal. However, it is important to the extent it evidences the fact that the Jury carefully examined the proof regarding the damages and awarded $105,953.10 less in damages than what Appellee Commercial Painting was claiming. The fact that they looked closely at the evidence supporting the extra work claims is borne out by the fact that the Jury specifically asked for the identity of the exhibits which substantiated the extra work claims (R. Vol. 49 at pp. 2524-2527).

Accordingly, there was nothing inconsistent about the Jury's verdict and determination of the damages. If there was no contract between Appellant Weitz and Appellee Commercial Painting for the $1,364,696.98 claimed for the extra work performed, the only theories other than contract by which Appellee Commercial Painting could recover those damages was under *quantum meruit*/unjust enrichment or intentional misrepresentation. There was extensive proof offered into evidence both through testimony and documentary exhibits as to the nature of those damages and how they were calculated (*see* No. 59 of Statement of the Facts at pages 30-31). If it was important to the Appellants that the Jury segregate the damages due under the Subcontract from the damages for the extra work that fell outside of the Subcontract, Appellants should have requested that the Trial Court include such an instruction on the Jury Verdict Form. However, Appellants never raised this issue at trial, nor in their Motion for New Trial. In fact, and as will be explained later, Appellants agreed that the Jury could put the same damage figure in each of the blanks on the Jury Verdict Form when this very question was raised by the Jury during their deliberations. Regardless, the argument has no merit because had the Jury segregated the amounts due under the Subcontract for in scope work from the amount for extra work claims that fell outside of the scope of the Subcontract, the amount of damages awarded would have been

exactly the same – $1,729,122.46.

Moreover, once proof of those damages was admitted into evidence, the burden of proof shifted to the Appellants to offer some countervailing proof if the Appellee's calculation of those damages was disputed. "With respect to the burden of proof in such cases, the general rule is that the defendant has the onus of establishing matters asserted by him in mitigation or reduction of the amount of plaintiff's damages." ***International Correspondence School, Inc. v. Crabtree***, 162 Tenn. 70, 78 (1931). However, Appellants offered little evidence to rebut Appellee Commercial Painting's proof regarding the amount and calculation of its damages, and instead, relied exclusively on a forensic accounting expert to offer countervailing proof, and that proof consisted, in part, that there were no signed change orders (a situation caused exclusively by Appellant Weitz's refusal to issue change orders) as the sole basis for why a particular damage calculation should not be awarded, while offering little countervailing proof as to an alternative value for a particular line item of extra work. Accordingly, there was nothing at all inconsistent about the Jury's finding that there was a recovery under both contract and under *quantum meruit*/unjust enrichment. Moreover, there is material evidence to support a finding by the Jury that as it pertained to the extra work claims: (1) that no legally enforceable contract existed between the parties for the goods or services provided; (2) the plaintiff provided valuable goods or services; (3) the defendant received the goods or services; (4) under the circumstances, the parties reasonably understood that the plaintiff expected to be paid; and (5) it would be unjust for the defendant to retain the goods or services without paying for them. The damages to be awarded are the reasonable value of services provided and should be judged by the customs and practices prevailing in that kind of business. *See*, ***Doe v. HCA Health Serv. of Tenn., Inc.***, 46 S.W.3d 191, 197-98 (Tenn. 2001) (citing ***Swafford v. Harris***, 967 S.W.2d 319, 324 (Tenn.

1998)) and ***Chisholm v. W. Reserves Oil Co.***, 655 F.2d 94, 96 (6th Cir. 1981).

Weitz has repeatedly taken the position that there was no agreement for any of the extra work claims asserted in this litigation, including an agreement for Appellee Commercial Painting to perform repairs on its finished work damaged by other subcontractors. There is no other way to interpret Appellants' position other than there was no legally enforceable contract between the parties for those goods or services provided Appellee Commercial Painting that constituted the constituted the extra claims. Had Appellee Commercial Painting refused to provide that extra work, Appellant Weitz would have contracted someone else to do that extra work, and in fact partially did so when Appellant Weitz supplemented Appellee Commercial Painting to perform some of the repairs to the drywall damaged by other subcontractors. It is the quintessential definition of unjust enrichment for Appellant Weitz to be required to pay a third party to do that work, but not pay Appellee Commercial Painting. Accordingly, there is no doubt that Appellant Weitz was enriched by Appellee Commercial Painting's work, and it would be unjust for Appellant Weitz to have the retained benefit of that work without paying for it.

In any event, Appellants argument on this issue is nothing more than a disguised attempt to attack the Jury's verdict concerning the damages awarded without addressing the material evidence review standard. As is highlighted in Appellee Commercial Painting's recitation of the facts, there is ample material evidence in the record that supports the Jury's verdict concerning Appellee Commercial Painting's damages.

B. Appellants' Complaints Regarding The Final Jury Instructions And Jury Verdict Form Were Waived At Trial And On Appeal.

It is also important to point out that the Appellants' argument that the verdict and judgment are inconsistent and irreconcilable under Tennessee law as a result of supposedly improper instructions and jury verdict form fails for another more fundamental reason. If

Appellants had an issue with how the Trial Court instructed the Jury, or that the Jury Verdict Form created the potential for the same damages calculation to be placed in each of the separate blanks for the total damages, then Appellants had two separate and distinct opportunities to address that issue at trial. The first was during the Charge Conference when the Jury Verdict Form was discussed in detail and the opportunity provided to object to the contents of the Jury Verdict Form. In fact, the potential that the Jury could put the same amount in the blanks for the damages for the various causes of action was raised by counsel for Appellee Commercial Painting, and counsel for Weitz expressed no concerns and raised no objections (R. Vol. 22, p. 2317). The entire Charge Conference if found at R. Vol. 47, p. 2306 through R. Vol. 48, p. 2372. Even more significantly fatal to the Appellants' argument is the fact that there was yet a second opportunity for Appellants to suggest revisions to the Jury Verdict Form when the Jury sent back a question raising the precise issue of whether or not the same figure could be put in the different damage columns or whether different amounts had to be listed. The discussion which took place on that issue can be found at R. Vol. 24, p. 2529, l. 23 through p. 2530, l. 22 in which the following discussion took place:

> THE COURT: Can all the blanks be the same amount?
> MR. FRICK: If that's -- yes.
> THE COURT: They could be.
> MR. FRICK: They could be.
> THE COURT: How would they do it like that, I don't know.
> MR. SMITH: Could be zeros across the board.
> THE COURT: Huh?
> MR. SMITH: It could be zeros across the board.
> THE COURT: I can't hear you.
> MR. SMITH: It could be zeros across the board.
> THE COURT: Could be that. Okay. All right, let's see. Okay. The answer to the first question is St. Paul Fire and Marine Insurance Company is required to stand for the payment of damages in the event The Weitz Company, LLC does not pay. Then No. 2, the first part is no. And then, the second part is yes. All agreed?
> MR. FRICK: Agreed.
> MR. SMITH: Yes, Your Honor.

Appellants agreed that the Jury could list the same damage amount in all of the blanks on the Jury Verdict Form that required a listing of the amount of damages awarded. If Appellants had an issue with that, they were first required to raise that issue during the charge conference pertaining to the Jury Verdict Form. However, that issue was not raised by Appellants at that time even though counsel for Appellee Commercial Painting raised the possibility of that very event occurring. If it was not raised then by Appellants, it most certainly should have been raised when the Jury actually asked a question about whether or not different amounts had to be asserted in the various columns for damages. If that issue had been raised then, it would have permitted the Trial Court and the parties to have addressed that issue then. Instead of raising an objection to the possibility of the Jury listing the same damage amount in each column, counsel for Appellants stated not once, but three times that "[i]t could be zeros across the board." And assuming that Appellants had raised an objection regarding this issue at that time regarding the Jury Verdict Form or the manner in which the Trial Court handled the Jury's question, and had that objection been overruled, Appellants would have then been obligated to raise these issues in their Motion for New Trial (R. Vol. 15, page 2626) in order to raise that issue now on appeal.

Rule 3(e) of the Tennessee Rules of Appellate Procedure states very clearly as follows:

> Provided, however, that in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

Appellants did not raise this issue at any of the three times it was required to do so, and the failure to raise the issue at trial, and then the failure to raise this issue in its Motion for New Trial constitutes a waiver by the Appellants of that issue on appeal.

Moreover, Rule 36(a) of the Tennessee Rules of Appellate Procedure likewise strikes a

fatal blow to Appellants' arguments. Rule 36(a) states as follows:

> Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.

The Advisory Commission Comments to this Rule further amply the inability of a party to obtain relief on appeal when the party caused or could have prevented the error of which it complains:

> The last sentence of this rule is a statement of the accepted principle that a party is not entitled to relief if the party invited error, waived an error, or failed to take whatever steps were reasonably available to cure an error.

See, ***Levine v. March***, 266 S.W.3d 426, 440 (Tenn. Ct. App. 2007) ("Parties cannot obtain relief on appeal from an alleged error they could have prevented."); ***Sanders v. Breath of Life Christian Church, Inc.***, No. W2010-01801-COA-R3-CV, 2012 Tenn. App. LEXIS 27, 52-53 (Tenn. Ct. App. 2012).

Lastly, yet a third fatal blow to the Appellants' argument arises out of the Appellants' failure to comply with Court of Appeals Rule 6 which states as follows:

> **Rule 6. Briefs. —**
>
> (a) Written argument in regard to each issue on appeal shall contain:
>
> > (1) A statement by the appellant of the alleged erroneous action of the trial court which raises the issue and a statement by the appellee of any action of the trial court which is relied upon to correct the alleged error, with citation to the record where the erroneous or corrective action is recorded.
> >
> > (2) A statement showing how such alleged error was seasonably called to the attention of the trial judge with citation to that part of the record where appellant's challenge of the alleged error is recorded.
> >
> > (3) A statement reciting wherein appellant was prejudiced by such alleged error, with citations to the record showing where the resultant prejudice is recorded.
> >
> > (4) A statement of each determinative fact relied upon with citation to the

record where evidence of each such fact may be found.

> (b) No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

Appellants' failure to raise its objections at trial, failure to comply with T.R.App.P. 3(e), failure to comply with T.R.App.P. 36(a) and failure to comply with Court of Appeals Rule 6 strike three (3) independent fatal blows to Appellants on these issues, and while that alone renders further argument on these issues moot, there is yet another glaring deficiency in the Appellants' argument, and that concerns the complete absence of any substantive discussion whatsoever in Appellants' Brief regarding Appellee Commercial Painting's independent cause of action for intentional misrepresentation, and in particular, fraudulent inducement. Appellants make the self-serving statement that "[t]his case is fundamentally a breach of contract claim." See, Appellants' Brief at p. 10. However, that statement is simply not true.

C. Appellants Fail To Recognize That Appellee Commercial Painting's Cause Of Action For Fraudulent Inducement Is Not Grounded In Contract, But In Tort.

As stated previously, Appellee Commercial Painting had a unique opportunity as a result of this Court's June 20, 2016 Opinion to file an amended complaint which, among other things, allowed Appellee Commercial Painting to recraft and restate the causes of action contained in the Second Amended Complaint to mirror those causes of action as framed by this Court in the June 20, 2016 Opinion. Appellee Commercial Painting asserted the following restated cause of action in the Second Amended Complaint filed June 16, 2017 (R. Vol. 5, p. 657):

COUNT VII
INTENTIONAL MISREPRESENTATION AS TO DEFENDANT WEITZ

> 134. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 103 of this Complaint.

135. As more particularly described in other paragraphs of this Second Amended Complaint, Weitz made one or more representations of a present or past fact or produced one or more false impressions regarding the length of time Commercial Painting would have to perform its work and 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.

136. The representation(s) or impression(s) was/were false when made.

137. The representation(s) or impression(s) concerned a material fact, the Subcontract at issue.

138. Weitz either knew that the representation(s) and/or impression(s) were false or did not believe they were true.

139. 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).

140. Commercial Painting sustained damages as a result of the representation because, inter alia, it was not able to recover the fees it reasonably anticipated when the Subcontract became effective.

141. As a result, Commercial Painting has suffered damages that in no event are less than $1,929,428.74 less the $456,170.00 payment made by Weitz on June 25, 2013, plus consequential damages in an amount to be proven at trial and pre-judgment interest.

Moreover, the following factual allegations were made at ¶¶ 42 through 44 of the Second Amended Complaint and were incorporated by reference:

42. During the initial meetings between Weitz and Commercial Painting, which took place prior to the execution of the Subcontract, representatives of Weitz did not disclose to Commercial Painting that Weitz had already decided to supplement Commercial Painting's forces and have a portion of the work which would ultimately become a part of Commercial Painting's scope of work performed by another contractor with the cost of that supplementation deducted from Commercial Painting's bargained for compensation. In addition, no representative of Weitz during any of these meetings disclosed to Commercial Painting that Weitz did not intend to pass down all time extensions received from the Project Owner as it was required to do pursuant to Section 5.6 of the Subcontract that was ultimately executed between Weitz and Commercial Painting, nor did Weitz disclose to representatives of Commercial Painting during these meetings that Weitz intended to compress the overall schedule performance

requirements set forth in the original schedule that was attached to the Subcontract.

43. Prior to the execution of the Subcontract, Weitz never advised Commercial Painting that Weitz intended to supplement Commercial Painting's work on the drywall portion of the Project.

44. Prior to the execution of the Subcontract, Weitz also did not disclose to Commercial Painting that it intended to revise the construction schedule after the execution of the Subcontract in such a manner so as to make the work required of Commercial Painting to be more expensive and difficult to perform than what is reasonably expected including problems with Commercial Painting's completed work being damaged by other subcontractors, work being sequenced in such a manner as to require an unusual amount of mobilizations and demobilizations, and overall poor management of the construction of the Project to such an extent that the conduct of Weitz materially interfered with the construction of the Project on a daily basis.

Fraudulent inducement is well-recognized to be a form of fraud, and more specifically, a variation of the tort of intentional misrepresentation. ***Medical Educ. Assistance Corp. v. Mehta***, 19 S.W.3d 803, 817 (Tenn. Ct. App. 1999). What the Appellants have either failed to recognize, or simply choose to ignore, is that fraudulent inducement does not sound in contract, but instead sounds in tort. Moreover, the law in Tennessee is clear that when a party has been induced by fraud to enter into a contract, the defrauded party may elect between two remedies. The defrauded party may either treat the contract as voidable and seek to have the contract rescinded, or the defrauded party may treat the contract as existing taking the benefits of the contract and suing for damages.

As it pertains to the gravamen of the cause of action of fraudulent inducement and the remedies available to the defrauded party, this precise issue was addressed by the Tennessee Supreme Court in the case of ***Vance v. Schulder***, 547 S.W.2d 927 (Tenn. 1977). In that case, the Tennessee Supreme Court stated the following:

> An individual induced by fraud to enter into a contract may elect between two remedies. He 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." The latter is grounded in tort.

> "Thus, a person who has been injured by the fraud of another or others, by either a party or parties to a transaction or a third party or third parties committing fraudulent acts involving or bringing about the negotiation of a transaction, such transaction usually but not necessarily involving business or commercial dealings, may maintain an action at law in tort or recover damages for the injury received from the fraud and deceit perpetrated by such other or others. The foundation of the action is not contract, but tort." *37 Am.Jur.2d Fraud and Deceit § 332* at 439.

Vance at page 931.

See, ***Media General, Inc. v. Tanner***, 625 F. Supp. 237, 248 (M.D. Tenn. 1985); ***American Fidelity Fire Ins. Co. v. Tucker***, 671 S.W.2d 837, 841 (Tenn. Ct. App. 1983) ("We can see no real difference in the basic allegations in the *Vance* case and the allegations in the present case. Both are premised upon alleged misrepresentations by the defendants causing or inducing the plaintiff to act to his detriment. Since the causes of action of Tucker sound in tort and following the rationale of *Vance, supra*, we hold that the appropriate statute of limitations is Tenn. Code Ann. § 28-3-105, a period of three years.")

The failure of the Appellants to recognize that under Tennessee law, Appellee's intentional misrepresentation claims sound in tort and not in contract is completely fatal to substantially all, if not all of the issues Appellants have raised on appeal. Every other argument made by the Appellants concerning the Economic Loss Rule, the Independent Duty Rule and the red herring issue regarding damages allegedly arising only from breach of contract fail because Appellee Commercial Painting did precisely what Tennessee law provides which is to give a party who was fraudulently induced to enter into a contract the remedy to treat the contract as existing and sue for damages at law under what was referred to as the old common law theory of "deceit." In this case, there actually was no election between two remedies available to Appellee

Commercial Painting that are normally available in a fraudulent inducement case for the simple reason that the alternative remedy of rescission was not available to Appellee Commercial Painting because an essential requirement of recession is that the parties be placed in the position they occupied prior to the transaction. For example, where a party is fraudulently induced to enter into a contract for the purchase of real property, the property has to be returned to the seller inducing the fraud, and the consideration paid by the defrauded buyer returned by the seller to the buyer. As this Court stated in ***Lloyd v. Turner***, 602 S.W.2d 503 (Tenn. Ct. App. 1980):

> Generally, a party seeking rescission of a contract must return or offer to return that which he has received under it, and thus return the other party as nearly as is possible to his status before the contract. *Moore v. Howard Pontiac-American, Inc.*, 492 S.W.2d 227 (Tenn.1973). See also Kenner v. City Nat. Bank, 164 Tenn. 119, 46 S.W.2d 46 (1932).
>
> ***Lloyd*** at page 510.

A similar expression of the law was made by the Eastern Section Court of Appeals in the case of ***Moore v. Howard Pontiac-American, Inc.***, 492 S.W.2d 227 (Tenn. App. 1972). In that case, the following was stated:

> It is a generally recognized principle of law that a party seeking rescission of a contract must return, or offer to return, what he has received under it, and thus put the other party as nearly as is possible in his situation before the contract. 55 Am.Jur., Vendor and Purchaser, Sections 636 and 639; 3 Williston on Sales, Sections 649, 649(a), at pages 498-502.
>
> ***Moore*** at page 230.

The equitable remedy of rescission was simply not available to Appellee Commercial Painting as a remedy for Appellant Weitz's fraudulent inducement to enter into the Subcontract, so it is perplexing why Appellants are apparently critical of Appellee Commercial Painting Company for abandoning the recession claim when that remedy was clearly not available. For a rescission to have taken place, Appellee Commercial Painting would have been required to have

returned all payments made by Appellant Weitz, and Appellant Weitz would have been required to return the used raw materials and labor expended that were utilized on the Project. That obviously is an impossibility. The Appellants' argument that the Appellee Commercial Painting pursued its damages under the Subcontract clearly makes no sense because pursuing its damages at law was the only remedy available to Appellee Commercial Painting pursuant to Tennessee law, and its calculation for the work performed but unpaid for by Appellant Weitz is going to be the same regardless of what theory of recovery was pursued.

As a result, Appellants' arguments that the verdict and judgment are somehow inconsistent under Tennessee law are completely meritless. First, this Court made it clear in the June 20, 2016 opinion that Appellee Commercial Painting was completely free to pursue its various alternative theories of recovery so long as Appellee Commercial Painting did not receive a double recovery. That clearly did not happen, nor was that even argued by the Appellants in their Brief. Moreover, Appellants failed to cite this Court to any authority whatsoever that there is a blanket prohibition from the damage calculation being the same under alternative theories of recovery or that a plaintiff is required to pursue all potential damages available to it under a particular theory of recovery. The fact that Appellee Commercial Painting did not, for instance, pursue claims for consequential damages available under tort theory does not undermine the viability of the damages calculations presented at trial. Second, Tennessee law is clear that in a fraudulent inducement cause of action, a plaintiff such as Appellee Commercial Painting is free to either pursue the equitable rescission of remedy, or take the benefits of the contract it was fraudulently induced to enter, and pursue its damages available under the contract. Since rescission was not available, Appellee Commercial Painting pursued its money damages as Tennessee law permits, and for Appellants to argue now that pursuing those damages was

somehow inappropriate would leave Appellee Commercial Painting in the untenable position of having suffered an actionable wrong with no remedy to address that wrong. Equally significant, Appellants failed to recognize, much less address in their Brief, the fact that when a plaintiff has been wrongfully induced to enter into a contract, the gravamen of the cause of action sounds in tort, not contract, and that critical distinction undermines the viability of the legal arguments advanced by the Appellants in support of their issues raised on appeal concerning the verdict and judgment.

Appellants' reliance upon ***Shahrdar v. Global Housing, Inc.***, 983 S.W.2d 230 (Tenn. Ct. App. 1998) is misplaced. That case dealt with promissory fraud, not fraudulent inducement, and while promissory fraud and fraudulent inducement are not distinct causes of action, "...it is more correct to think of intentional misrepresentation as a necessary element of a fraud claim, while promissory fraud is a type of fraud perpetrated by means of a false promise of future action." ***Shahrdar*** at page 237. That case does not stand for the proposition, as the Appellants claim, that the failure to show additional damages in tort versus a breach of contract precludes recovery under one theory or the other, but simply states that a plaintiff can have only one recovery, which is exactly what this Court, citing to ***Shahrdar***, stated on page 18 of the June 20, 2016 Opinion. The erroneous characterization of the holding as expressed by the Appellants is proven by the very citation to which the Appellants direct this Court, and includes a portion of the language which this Court included on page 18 of the June 20, 2016 Opinion:

> Plaintiff is entitled, however, to recover damages incurred during the period of his employment as a result of promissory fraud if he can show that he incurred damages beyond those awarded for breach of contract. The injured party should be compensated for the actual injuries sustained by placing him in the same position he would have occupied had the wrongdoer performed and the fraud not occurred. *Blasingame v. American Materials, Inc.*, 654 S.W.2d 659, 665 (Tenn. 1983). Whether the theory of recovery is breach of contract, intentional misrepresentation, or promissory fraud, if the damages claimed under each theory

> overlap, the Plaintiff is only entitled to one recovery. *Allied Sound, Inc. v. Neely*, 909 S.W.2d 815, 821 (Tenn.App. 1995).
>
> Plaintiff has neither pled nor proven damages different in kind or amount sufficient to justify an award of damages beyond what he was awarded for breach of contract. Therefore, we must vacate the trial court's award of $65,000 in damages (after remittitur) on the claim of misrepresentation and promissory fraud.
>
> ***Shahrdar*** at p. 238.

Vance, on the other hand, deals specifically with fraudulent inducement, and states:

> An individual induced by fraud to enter into a contract may elect between two remedies. He 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." The latter is grounded in tort.
>
> ***Vance,*** cited *supra* at page 931.

What is instructive about the ***Shahrdar*** that directly applies to this Court's analysis of this case is the following statement found on page 237 of that opinion which states the following:

> The amount of damages to be awarded rests in the sound discretion of the jury, and if approved by the trial court, will not be disturbed on appeal absent an abuse of discretion. *Ellis v. White Freightliner Corp.*, 603 S.W.2d 125 (Tenn. 1980); *Sholodge Franchise Sys. v. McKibbon Brothers, Inc.*, 919 S.W.2d 36, 42 (Tenn. App. 1995).

As a result, the holding in ***Vance*** completely vitiates the arguments advanced by the Appellants. As will be addressed next, the Economic Loss Doctrine and the Independent Duty Rule are not pertinent to the issues on appeal and have no application.

III. THE ECONOMIC LOSS RULE AND THE INDEPENDENT DUTY RULE HAVE NO APPLICATION TO INTENTIONAL TORT CLAIMS AND THEREFORE DO NOT BAR RECOVERY OF PUNITIVE DAMAGES IN THIS CASE.

Standard of Review: Questions of law are reviewed de novo with no presumption of correctness. However, to the extent this issue requires an analysis of factual contentions pertaining to the verdict, there only need to be some material evidence in the record to support the verdict.

A. The Economic Loss Doctrine Is Not Applicable To This Case.

Appellants starting at page 57 of their Brief devote a substantial amount of argument to the supposed application of the Economic Loss Doctrine and the Independent Duty Rule to this case arguing that those doctrines prevent an award of punitive damages. Appellant Weitz proceeded to trial never making this argument previously only raising it for the first time in its Motion for New Trial, and in the case of the Independent Duty Rule, raised it for the first time on appeal. However, what makes this issue on appeal completely pointless is that it proceeds on the dogged refusal by the Appellants to recognize that this case is first and foremost a cause of action for intentional misrepresentation, and neither the Economic Loss Doctrine, or its close relative, the Independent Duty Rule, have any application to intentional tort actions, and specifically, fraudulent inducement, and as such, the gravamen of the cause of action is based in tort, not contract. It is interesting that the Appellants hardly mentioned, much less substantively address, the extensive findings by both the Jury and the Trial Court that Appellant Weitz had engaged in intentional misrepresentations, and that the fact that this conduct was proven by clear and convincing evidence. Moreover, there was a finding that the conduct was sufficiently egregious in nature that the award of punitive damages was appropriate.

Appellants chose to ignore any discussion in their Brief about the case law concerning intentional misrepresentation likely because had Appellants done so, it would have completely undermined and completely vitiated the primary arguments and case authorities upon which they rely to make the groundless claim that the Economic Loss Doctrine and the Independent Duty Rule prevent an award of punitive damages in this case. One of the cases cited by the Appellants in their Brief is the case of ***Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.***, 293 S.W.3d 487 (Tenn. 2009). What makes that case as well as the other cases relied upon by the Appellants

concerning the Economic Loss Doctrine inapplicable to any analysis to be performed by this Court concerning the issues on appeal is that the ***Lincoln Gen. Ins. Co.*** case is a products liability case, and the distinction in that case that the Economic Loss Doctrine is applicable to negligence actions, not intentional torts. The inapplicability of the Economic Loss Doctrine here is best demonstrated by the following found at pages 488 and 489 of that opinion which states as follows:

> This certified question presupposes that Tennessee recognizes the economic loss doctrine, a judicially created principle that reflects an attempt to maintain separation between contract law and tort law by barring recovery in tort for purely economic loss. See generally, Vincent R. Johnson, The Boundary-Line Function of the Economic Loss Rule, 66 Wash. & Lee L. Rev. 523 (2009). Although this Court has never expressly adopted the economic loss doctrine, we expressed agreement with the policies underlying the doctrine in *Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128 (Tenn. 1995). In *Ritter*, this Court stated that "Tennessee has joined those jurisdictions which hold that **product liability claims resulting in pure economic loss can be better resolved on theories other than negligence**. . . . In Tennessee, the consumer does not have an action in tort for economic damages under strict liability." 3 Id. at 133 (footnote omitted); see also *First Nat'l Bank of Louisville v. Brooks Farms*, 821 S.W.2d 925, 930-31 (Tenn. 1991) (finding that actions under the Tennessee Products Liability Act are limited to those brought on account of personal injury, death, or property damage and do not include actions brought for pecuniary loss).
>
> ***Lincoln Gen. Ins. Co.*** at pp. 488-489 (emphasis added).

The holding in ***John Martin Co. v. Morse/Diesel, Inc.***, 819 S.W.2d 428 (Tenn. 1991) likewise is of no help to Appellants in their argument that the Economic Loss Doctrine applies to this case. The Tennessee Supreme Court noted that the case before them was not a products liability case, and the claim asserted was under negligence theory, and stated the following:

> This is not a products liability case. In this instance, the theory of recovery is that the defendant **negligently** supplied information intended for the guidance of others; the plaintiff relied upon the misrepresentation in the performance of his contracted service and experienced business losses as a result. Many of those cases relied upon by the defendant involve claims of product liability in respect to design defects; the losses suffered were caused by defective products, not misguidance or misdirection in the performance of services. See, e.g.,

> *MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).* The question here is not one of harm to person or property, but of economic loss.
>
> ***John Martin Co.*** at page 431. (emphasis added.)

There are no Tennessee cases that stand for the proposition that the Economic Loss Doctrine has application in fraud or intentional misrepresentation claims. In fact, the United States District Court for the Middle District of Tennessee addressed the specific issue of whether the Economic Loss Doctrine applies in claims involving fraud. The case of ***Exprezit Convenience Stores, LLC v. Transaction Tracking Techs., Inc.***, 2007 U.S. Dist. LEXIS 7130 (West. Dist. Of Tenn. 2007), the defendant brought a motion for partial summary judgment arguing that the plaintiff's tort claims were barred by the Economic Loss Doctrine, including the plaintiff's claims for fraud. Addressing the applicability of the Economic Loss Doctrine to the plaintiff's tort claims, the Middle District Court stated the following:

> The parties have cited and the Court has found no Tennessee cases which hold that the economic loss doctrine bars a fraud in the inducement claim. Other courts have repeatedly held that fraud in the inducement is an exception to the economic loss doctrine. See, *Alternative Aviation Serv. Inc. v. Meggit (UK) Ltd.*,207 Fed. Appx. 506, 2006 U.S. App. LEXIS 31497, 2006 WL 3794329 at *6 (6th Cir. 2006)(applying Michigan law); *Marvin Lumber and Cedar Co. v. PPG Indus. Inc.*, 223 F.3d 873, 885 (8th Cir. 2000)(Minnesota law); *Kaloti Enterprises, Inc. v. Kellog Sales Co.*, 699 N.W.2d 205, 2062005 WI 111, 283 Wis. 2d 555, 699 N.W.2d 205 (Wis. 2006)(Wisconsin law); *D & M Jupiter, Inc. v. Friedopfer*, 853 So.2d 485, 487 (Fl. App. 2003)(Florida law); *Cocchiola Paving v. Peterbilt of S. Conn.*, 2003 Conn. Super. LEXIS 589, 2003 WL 1227557 at *5 (Conn. Super. 2003)(Connecticut law). Given that a fraud in the inducement claim presents a special situation where parties to a contract appear to negotiate freely -- which normally would constitute grounds for invoking the economic loss doctrine -- but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior, the Court concludes that the economic loss doctrine would not bar Exprezit's misrepresentation claim.
>
> ***Exprezit*** at pp. 30-31.

In its attempt to somehow make the Economic Loss Doctrine applicable to this case, Appellants make reference to Appellee Commercial Painting asserting a negligent misrepresentation claim. The problem with this argument is that negligent misrepresentation was pled as an alternative to Appellee Commercial Painting's intentional misrepresentation claim. In fact, the Jury Verdict Form specifically instructed the Jury to not answer Questions 6 and 7 pertaining to negligent misrepresentation if the questions pertaining to intentional misrepresentation were answered in the affirmative. The Jury found, and the Trial Court concurred in, the Jury's determination that Appellant Weitz was guilty of intentional misrepresentation. As a result, the Economic Loss Doctrine not only has no application because this case does not involve a products liability claim, but the theory upon which Appellant Weitz was found liable in tort was based on the intentional tort of fraud and intentional misrepresentation, not negligence. Accordingly, the Economic Loss Doctrine has no application here, and Appellants attempt to make a square peg fit into a round hole cannot make that Doctrine apply where it clearly does not.

Appellants' reliance upon the holding in the case of ***Milan Supply Chain Solutions, Inc. v. Navistar, Inc.***, W2018-00084-SC-R11-CV (Tenn. Ct. App. 2019) likewise does not aid the Appellants in their claim that the Economic Loss Doctrine bars the recovery of punitive damages in this case. First, it should be noted that the Appellants' statement on Page 59 of their Brief that the ***Milan*** case involved a claim where "... Navistar had fraudulently induced Milan to enter into multiple contracts to purchase trucks Navistar knew to be defective" is not established anywhere in the opinion. There is no discussion in the case history contained in the opinion or anywhere else in the opinion that backs up that statement. The opinion only states that ***Milan*** asserted claims of intentional misrepresentation. From a factual perspective, it is not known whether the

alleged misrepresentations took place before or after the parties had entered into the contracts. In fact, the only mention that is made in the opinion concerning fraudulent inducement actually concerned the discussions pertaining to fraudulent inducement being an exception to the Economic Loss Doctrine as determined by courts in other jurisdictions. Again, as Appellants have done so many times during the course of this litigation, and now in their Brief, the essential holding of the ***Milan*** case is not dispositive of the issues on appeal in this case nor does that opinion have the broad reaching impact that the Appellants claim.

The most essential distinguishable aspect of the ***Milan*** case that differs from the instant case is that the ***Milan*** case involved the sale of goods with extensive contract documentation concerning warranties and service contracts that pertained to the trucks that were purchased. The fact is comparing the ***Milan*** case to the instant case is like comparing apples and oranges, and that is reflected by the fact that Appellants ignored, and failed to directly quote to this Court, any of the analysis made in the ***Milan*** opinion concerning fraud and the application of the Economic Loss Doctrine, and most importantly, the actual holding made in the ***Milan*** opinion which is of absolutely no help to the Appellants in their argument that the Economic Loss Doctrine applies to this case.

For instance, page 9 of the ***Milan*** opinion contains the following discussion:

> In fact, as alluded to previously, the specific controversy here concerns the economic loss doctrine's *scope*, namely whether it serves as a bar to fraud claims. To some degree, this dispute has been emboldened by virtue of the fact that various courts have taken different approaches to this precise question. Indeed, despite the widespread acceptance of the economic loss doctrine across the country, some courts have created exceptions for allegations of fraud. It appears that three approaches to fraud claims have emerged: (1) there is no exception to the economic loss doctrine; (2) there is a general exception for all fraud in the inducement claims; or (3) a narrow exception exists where the fraud "is not interwoven with the quality or character of the goods for which the parties contracted or otherwise involved performance of the contract." *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205, 217 (Wis. 2005).

(emphasis in original)

In their discussion of the ***Milan*** case, Appellants ignored this important part of the opinion, and for good reason. As was discussed above in connection with the ***Exprezit*** case, it is recognized by the vast majority of jurisdictions that the Economic Loss Doctrine has no application in a fraudulent inducement case.

In addition, Appellants in their discussion of the ***Milan*** case did not discuss this important portion of the ***Milan*** opinion found on page 10:

> The Wisconsin Supreme Court's decision in *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 699 N.W.2d 205 (Wis. 2005), is another notable instance where such an analytical approach was adopted. In that case, the Wisconsin Supreme Court centered its focus, in part, on whether the alleged fraud "concerns matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted," explaining that misrepresentations that relate to the "quality or character of the goods sold" are either "(1) expressly dealt with in the contract's terms, or (2) if they are not dealt with explicitly in the contract's terms, they go to reasonable expectations of the parties to the risk of loss in the event the goods purchased did not meet the purchaser's expectations." *Id.* at 219. According to the *Kaloti* court, a fraud in the inducement claim would not be barred by the economic loss doctrine if the fraud was extraneous to the contract, rather than interwoven with it. *Id.*

Discussion of this portion of the opinion in the ***Milan*** case is critical because it forms the basis of what was stated next in the opinion and constitutes the ruling in that case as it pertains to the application of the Economic Loss Doctrine, and that holding differs materially from what Appellants claim in their Brief. The very next paragraph of the opinion in the ***Milan*** case states as follows:

> While no Tennessee appellate court has found that an exception to the economic loss doctrine exists for extraneous fraud that is unrelated to the quality and character of the goods sold, we need not address it here because the claimed misrepresentations in this case clearly relate to the quality of the trucks purchased by Milan. Yet, like *Huron Tool*, *Kaloti*, and other decisions that have adopted such a narrow exception, we hold that where the alleged fraud, as in this case, relates to the quality of goods sold, the economic loss doctrine is a bar and any

remedies must be pursued in contract/warranty law.

And the opinion in the ***Milan*** case concludes the discussion of the holding as it pertains to the application of the Economic Loss Doctrine as follows on page 12 of the opinion:

> To conclude with regard to this first issue, we are in general agreement with the arguments set forth by Navistar. Because only "economic loss" is at issue here and Milan's fraud claims concern the quality of the trucks sold to it, we hold that those claims are barred by the economic loss doctrine. Those claims are hereby dismissed.

Appellants paint with an overly broad brush as it pertains to the holding of the ***Milan*** case concerning the application of the Economic Loss Doctrine to fraud claims. The case itself dealt with the sale of goods, and in that particular case, trucks. More significantly, the discussion concerning the application of the Economic Loss Doctrine specifically hinged on the fact that the remedies to address potential defective conditions of the trucks sold were encompassed by the warranty and extended service provisions of the contract documents, and the parties were free to negotiate how defects in the trucks being purchased could be addressed in the warranty and service provisions of the contract documents. This simply has no application to the instant case because first, this case has nothing to do with the sale of goods, how risks of potential defects within those goods would be allocated between the parties and to what extent defects in the goods sold would be warranted by the seller. Second, and most importantly, Appellants failed to recognize, much less substantively address in their Brief, how fraudulent inducement claims are universally recognized as being an exception to the Economic Loss Doctrine. The Appellants also fail to address in their Brief that, according to Tennessee law as previously cited in this Brief, fraudulent inducement as a species of intentional misrepresentation is grounded in tort theory, not in contract theory, and the only role the contract plays in the cause of action is that the party fraudulently induced to enter into the contract can elect to treat the contract as existing

and proceed to recover the benefits of the contract, or pursue the equitable remedy of rescission, which as discussed previously, was not an available to Appellee Commercial Painting as a remedy. However most significantly, Appellants have not and cannot address the fact that the primary reason why the Economic Loss Doctrine has no application in a fraudulent inducement cause of action is because "...a fraud in the inducement claim presents a special situation where parties to a contract appear to negotiate freely -- which normally would constitute grounds for invoking the economic loss doctrine -- but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior...." the Economic Loss Doctrine has no application. ***Exprezit***, *cited infra* at pp. 30-31.

B. The Independent Duty Rule Is Not Applicable To This Case.

Similarly, Appellants argument regarding the Independent Duty Rule likewise has no application. First, it should be noted that Appellants raise the Independent Duty Rule now for the first time on appeal. A review of the Motion for New Trial (R. Vol. 18, p. 2626) indicates that while the Appellants raise the Economic Loss Doctrine for the first time after the trial, there is no mention made of the Independent Duty Rule. As discussed extensively at pages 43 through 47 of this Brief, issues not raised in the trial court and raised for the first time on appeal are deemed waived.

This issue aside, all of the cases cited by the Appellants concerning the Independent Duty Rule have no application because as has already been discussed extensively, it is well settled in Tennessee that an intentional misrepresentation claim, and in particular, a fraudulent inducement claim, is based in tort and not in contract. *See,* ***Vance v. Schulder***, 547 S.W.2d 927, 931 (Tenn. 1977); ***Media General, Inc. v. Tanner***, 625 F. Supp. 237, 248 (M.D. Tenn. 1985) and ***American Fidelity Fire Ins. Co. v. Tucker***, 671 S.W.2d 837, 841 (Tenn. Ct. App. 1983). What Appellants

failed to realize, or don't want to admit, is that if this Court were to apply their interpretation of the law to a fraudulent inducement claim, it would have the effect of essentially eliminating intentional misrepresentation and fraudulent inducement as a cause of action simply because of the mere existence of a contract between the parties. The implications of such an interpretation would be to create a shield for fraudulent conduct in connection with any situation involving a contract because it would allow the party committing the fraud to simply claim the existence of the fraudulently induced contract and the Economic Loss Doctrine as a bar to any recovery under tort law. Such a result is not only abhorrent, it makes no sense. It would provide an absolute immunity to a party to fraudulently induce another party to enter into a contract and then argue to a court that there can be no recovery of damages pertaining to that fraudulent conduct except for what the contract provides simply because a contract is involved despite the fact that the contract was obtained through fraudulent means.

Appellants' arguments pertaining to the Independent Duty Rule, including the citations to other cases from jurisdictions outside of Tennessee and therefore not controlling in this case, all center upon a singular concept that the duties between the parties arise by virtue of the contract alone, and have nothing to do with fraudulent inducement claims. Fraudulent inducement is a tort claim and there is an independent duty that arises separate from the contract, and that duty is don't make false representations of material fact with the intent to have the other party rely to their detriment upon those false representations. As stated previously, the ends of justice are not served by permitting a party to fraudulently induce another party to enter into a contract, and then when sued for fraud and intentional misrepresentation, the party committing the fraud then gets to use the fruits of its ill-gotten gains as a shield to protect it from liability for its fraudulent conduct. More significantly, those cases are at odds with established Tennessee law previously

discussed herein that establishes that the gravamen of a fraudulent inducement action lies in tort and not in contract.

IV. EVEN ABSENT APPELLEE'S FRAUDULENT INDUCEMENT CLAIM, PUNITIVE DAMAGES CAN BE AWARDED IN A CONTRACT CASE.

Standard of Review: Questions of law are reviewed de novo with no presumption of correctness. However, to the extent this issue requires an analysis of factual contentions pertaining to the verdict, there only need to be some material evidence in the record to support the verdict.

A. Punitive Damages Are Recoverable In A Contract Case Under Tennessee Law.

Appellants' next argument concerning the alleged prohibition of punitive damages in a breach of contract action likewise fails for the same reasons as its Economic Loss Doctrine and Independent Duty Rule Arguments. Moreover, this Court in the June 20, 2016 Opinion clearly stated that Appellee Commercial Painting had demonstrated a factual basis for an intentional misrepresentation claim, and that if successful, Appellee Commercial Painting would be entitled to pursue a claim for punitive damages. As this Court stated on page 17 of the June 20, 2016 Opinion:

> With regard to its supplementation of Commercial Painting's work, Weitz contends the subcontract permitted it to do this. Weitz points to section 11.1 of the parties' subcontract, which is titled — Subcontractor's Default and provides, in part:
>
> > If the Subcontractor fails or neglects to carry out the Subcontractor's Work in strict compliance with the Subcontract Documents or is otherwise in default of any of its obligations under the Subcontract Documents, and fails to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, after 48 hours following delivery to the Subcontractor of written notice thereof and without prejudice to any other remedy the Contractor may have, (i) supplement the Subcontractor's performance with additional material, supplies, equipment, or labor, pay for same and deduct the amount so paid from any money then or thereafter due Subcontractor . . . .
>
> Although Weitz is correct that it is entitled to supplement Commercial Painting's work if Commercial Painting is in default of its obligations, the subcontract does not entitle Weitz to cause Commercial Painting to be in default by

misrepresenting a material fact and then sanctioning Commercial Painting for being in default.

Putting this deficiency of their Brief aside, Appellants again paint with an overly broad brush incorrectly claiming that there is some sort of blanket prohibition against an award of punitive damages in a contract case. Appellants failed to recognize that under Tennessee law, punitive damages can be awarded in a contract case where the breaching party engaged in intentional or fraudulent conduct. *See*, ***Riad v. Erie Ins. Exch.***, 436 S.W.3d 256, 276 (Tenn. Ct. App. 2013); ***Rogers v. Louisville Land Co.***, 367 S.W.3d 196, 211 n.2 (Tenn. 2012) (citations omitted); ***Next Generation, Inc. v. Wal-Mart, Inc.***, 49 S.W.3d 860, 866 (Tenn. Ct. App. 2000) and ***Dog House Invs., LLC v. Teal Props.***, 448 S.W.3d 905, 915-916 (Tenn. Ct. App. 2014). It is important to note that all of these authorities cited here are all post-***Hodges*** cases.

The Jury and the Trial Court specifically found that there was intentional and fraudulent conduct engaged in by Appellant Weitz, that this conduct was proved by clear and convincing evidence, and that this conduct committed was sufficiently egregious that it warranted the imposition of punitive damages. More specifically, Question 10 of the Jury Verdict Form specifically asked the Jury the following question:

> 10. Do you find that the Plaintiff, Commercial Painting Company, Inc., has shown by clear and convincing evidence that the Defendant, the Weitz Company, LLC has acted either intentionally, recklessly, maliciously, or fraudulently, and that such conduct was so egregious that punitive damages should be assessed?

The Jury answered this question in the affirmative, and the Trial Court subsequently issued findings of facts and conclusions of law concurring with the Jury's verdict on this issue, and did so in its role as the Thirteenth Juror confirming that this finding had been established by clear and convincing evidence. This Court reviews those findings under a substantially less strict standard of whether or not there is material evidence in the record to support that verdict. As the

factual background portion of this Brief establishes, there is ample material evidence in the Record to support this finding.

Accordingly, irrespective of whether or not Appellee Commercial Painting prevailed on its fraud claims separate and apart from the contract claims, punitive damages were appropriate to be awarded in this case even under a contract cause of action.

B. Appellants Cannot Rely Upon Any Supposed Contractual Limitations Of Damages When The Appellee Was Fraudulently Induced To Enter Into The Subcontract.

Appellants next argue that the award of punitive damages was barred by the express terms of the Subcontract. Appellants also incredulously state that the Subcontract contains a waiver of punitive damages, and makes reference to Item 5.6 and Item 11.6 of the Standard Terms Conditions found in Trial Exhibit 94 (R. Vol. 56). However, this is just another example of Appellants trying to make a square peg fit into a round hole. Item 5.6 of the Standard Terms & Conditions is entitled "Adjustments To Subcontract Time." There is no waiver of punitive damages contained within that provision. Likewise, Item 11.6 of the Standard Terms & Conditions has even less application because Article 11 of the Standard Terms & Conditions concerns termination rights, and what compensation a subcontractor is entitled to in the event the Subcontract is terminated. Those provisions are completely irrelevant to any issue in this appeal because there is absolutely not one shred of evidence that Appellant Weitz exercised the termination provisions found at Article 11 of the Subcontract.

However, the greatest fallacy in Appellants' argument is that they again fail to recognize, much less address in their Brief, the fact that Appellee Commercial Painting's cause of action was based on the tort of fraudulent inducement. A party simply does not have an expectation of defrauding another party into entering into a contract, and then being able to use the terms of that

contract against the defrauded party, or as a shield to protect the party committing the fraud from its own conduct.

In the case of ***Nashville Ford Tractor, Inc. v. Great American Insurance Company***, 194 S.W.2d 415 (Tenn. Ct. App. 2005), the Middle Section Court of Appeals stated the following on transactions tainted by fraud and the enforcement of legal rights by the parties committing the fraud:

> It has long been the policy of this state that fraud will vitiate any type of transaction. *New York Life Ins. Co. v. Nashville Trust Co.*, 200 Tenn. 513, 523, 292 S.W.2d 749, 754 (1956); *Stubblefield v. Patterson*, 4 Tenn. (3 Hawy.) 128, 129 (1816); *Anderson v. Mezvinsky*, 2001 Tenn. App. LEXIS 645, No. E1998-00795-COA-R3-CV, 2001 WL 984908, at * 7 (Tenn. Ct. App. Aug. 28, 2001), perm. app. denied (Tenn. Dec. 27, 2001); *Fox v. Fox*, 1993 Tenn. App. LEXIS 567, No. 85-275, 1993 WL 328789, at *5 (Tenn. Ct. App. Aug. 25, 1993), perm. app. denied (Tenn. Feb. 7, 1994).
>
> The courts will not aid individuals in enforcing their legal rights where those rights arise from a transaction that is tainted by fraud. Thus, in the analogous context of mechanic's and material supplier's liens, both the Tennessee Supreme Court and this court have squarely held that falsifying accounts will preclude a party from enforcing a construction lien. *Hayes Pipe Supply, Inc. v. McKendree Manor, Inc.*, 695 S.W.2d 174, 178 (Tenn. 1985); *Alside Supply Ctr. v. Vinson*, 802 S.W.2d 632, 633, 634 (Tenn. Ct. App. 1990). We have concluded that the same rule should apply where, as here, a supplier of labor or materials submits altered documents in an attempt to collect on the payment bond for the project. C.C. Marvel, Annotation, False Receipts or the Like as Estopping Materialmen or Laborers from Recovering on Public Work Bond, 39 A.L.R.2D 1104, 1104-05 (1955); 17 AM. JUR. 2D Contractors' Bonds § 128, at 848 (1990).
>
> ***Nashville Ford Tractor, Inc.*** at page 428.

It defies logic and the law that a party committing fraud can take advantage of its own wrongdoing which is precisely what Appellants attempt to do here by arguing that a contract that was the result of fraudulent inducement can be relied upon as a shield to protect it from its own wrongdoing by the party guilty of the fraud. "When a man has been misled by the untruth propounded by another, and acted to his detriment in reliance upon the misrepresentation, the

misleading party will be estopped to show that the true facts are contrary to those he first propounded." ***Duke v. Hopper***, 486 S.W.2d 744, 748 (Tenn. Ct. App. 1972).

V. THE TRIAL COURT PROPERLY IMPANELED A JURY TO TRY ALL ISSUES IN THE CASE.

Standard of Review: Abuse of discretion.

Appellants next resurrect their argument regarding whether or not this case was properly tried before a jury. Appellant Weitz first made this argument when it filed its Motions to Strike Appellee Commercial Painting's jury demands (R. Vol. 7, p. 929 and R. Vol. 9, p. 1273), incorrectly arguing that Appellee Commercial Painting did not make a timely demand for a jury pursuant to Rule 38.02 of the Tennessee Rules of Civil Procedure. However, in making this argument, Appellants failed to recognize new factual allegations made in the Second Amended Complaint, ignored new factual allegations Appellant Weitz itself made in its own Answer and Counterclaim, and most glaringly ignored the fact that Appellant Weitz asserted two new causes of action against Appellee Commercial Painting in its Counterclaim.

On July 17, 2017, Appellant Weitz filed its Answer and Counterclaim (R. Vol. 6, page 863). In its Answer and Counterclaim, Appellant Weitz denied the majority of the new factual allegations asserted in the Second Amended Complaint thus creating triable issues of fact and the opportunity for the issues in this case to be tried by jury. While that alone made the jury demand timely, Appellant Weitz chose to not merely deny those new factual allegations, but raised several new affirmative defenses that were not contained in its original Answer to the first Amended Complaint filed in this case. More specifically, Appellant Weitz's Ninth, Twelfth, Thirteenth, Fourteenth, Seventeenth, Twentieth, Twenty-First, Twenty-Second, Twenty-Third, Twenty-Fourth, Twenty-Fifth and Twenty-Sixth affirmative defenses were entirely new affirmative defenses that were not included in its original Answer filed March 22, 2010 to the

first Amended Complaint (R. Vol. 3, page 330). In addition, Appellant Weitz's Third and Seventh affirmative defenses, while asserted in its original Answer filed March 22, 2010 to the first Amended Complaint, were greatly expanded and include specific factual allegations that were not included in the original Answer and Counterclaim filed March 22, 2010. In addition, it should be noted that Appellant Weitz likewise asserted a plethora of new factual allegations throughout its responses to specific paragraphs of the Second Amended Complaint that Weitz had not previously raised.

More significantly, in its Answer and Counterclaim filed on July 17, 2017, Appellant Weitz asserted two entirely new causes of action against Appellee Commercial Painting. The first new cause of action asserted by Appellant Weitz in its Counterclaim filed July 17, 2017 (R. Vol. 6, p. 863) is entitled "Exaggeration of Lien" and contains new factual allegations not previously asserted in its Counterclaim, and in addition to this cause of action, Appellant Weitz asserted a claim for restitution against Appellee Commercial Painting that was not previously asserted by Appellant Weitz against Appellee Commercial Painting. Lastly, it should be noted that in the prayer for relief, Appellant Weitz sought the original $500,000.00 amount sought in its Counterclaim filed March 22, 2010, and in addition to that amount sought an additional award in an unspecified amount for damages Appellant Weitz claims it incurred to bond off Appellee Commercial Painting's lien and for indemnifying the project owner from expenses associated with the assertion of the lien claim by Appellee Commercial Painting. In addition to these amounts Appellant Weitz sought an additional award of $456,170.00 plus interest on that amount from June 25, 2013. Appellant Weitz further sought an award of attorney's fees pursuant to Tenn. Code Ann. § 66-11-139 which was not previously pled.

As mentioned previously, Appellant Weitz served its Answer and Counterclaim asserting

these new affirmative defenses, new factual allegations and new causes of action on July 17, 2017. On July 20, 2017, only three (3) days after Appellant Weitz filed its Answer and Counterclaim, Appellee Commercial Painting filed its Answer to Appellant Weitz's Answer and Counterclaim (R. Vol. 7, p. 918), and made demand in that pleading for a jury as well as filing a separate Jury Demand on that same day (R. Vol. 7, p. 927). A Renewed Jury Demand was filed on September 7, 2017 (R. Vol. 7, p. 974) after two additional Defendants filed their Answers. Clearly, Appellee Commercial Painting timely made its jury demand within the fifteen (15) day time period established by Rule 38.02 of the Tennessee Rules of Civil Procedure. Amendments to any complaint and counterclaim, or answer to any of those pleadings asserting new issues of fact opens a new window for the demanding of a jury to try all issues in the case. This issue was specifically addressed in the case of ***Trimble v. Sonitrol of Memphis, Inc.***, 723 S.W.2d 633 (Tenn. App. 1986). In that case, this Court, quoting from 5 Moore's Federal Practice, § 38.41, p. 38-366, stated on page 640 that "[i]t is now well settled that where the amendment creates new jury issues, a party upon timely demand therefore is entitled to a jury trial, if the amended pleading sets forth new factual issues and not merely a different legal theory."

Even if Appellee Commercial Painting had not timely asserted a jury demand, the Trial Court expressly ordered a jury trial at Appellee Commercial Painting's request. More specifically, Rule 39.02 of the Tennessee Rules of Civil Procedure gives a court the discretion upon request of one of the parties to order a jury trial even where a timely demand for a jury has not been made. More specifically, Rule 39.02 of the Tennessee Rules of Civil Procedure states as follows:

> Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury as to any issue with respect to which demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

While Appellee Commercial Painting respectfully submits that a new window for making a jury demand was created by the filing of the Second Amended Complaint and the Answer and Counterclaim filed in response, Appellee Commercial Painting moved the Trial Court for the alternative relief of ordering a jury trial pursuant to Rule 39.02 in its Response to Appellant Weitz's Motion Strike Commercial Painting Company, Inc.'s Jury Demand and Renewed Jury Demand filed on August 2, 2017. The Order entered by the Trial Court on October 19, 2017 denied Weitz's Motion to Strike Commercial Painting Company, Inc.'s Jury Demand and Renewed Jury Demand and granted Commercial Painting's Motion for Trial by Jury of All Issues.

In ***Silcox v. Smith County***, 487 S.W.2d 652 (Tenn. Ct. App. 1972), the Middle Section Court of Appeals stated following on this issue:

> The plain words of 39.02 give the Trial Judge discretionary power to allow a trial by jury regardless of previous default in demand. This provision does not give a party *the right* to a jury trial after his failure to make timely demand. It does deny the opposite party the right to a non-jury trial if the Trial Judge exercises his discretion under Rule 39.02 and allows a jury trial. The waiver provided by 38.05 may terminate the right to trial by jury, but it does not confer upon the opposite party any right to a trial without a jury.
>
> ***Silcox*** at page 658.

Accordingly, the Trial Court appropriately impaneled a jury to try this case. In reviewing all of its arguments concerning the issue of a supposed error impaneling a jury, Appellants make absolutely no mention of this Order, but instead expended a substantial effort arguing about the timing of the jury demand and whether or not new factual issues were raised subsequent to the filing of the Second Amended Complaint that opened a new window for a jury to be demanded. The simple fact remains that when the Trial Court entered an order granting Appellee's request to impanel a jury to try all issues pursuant to rule 39.02 of the Tennessee Rules of Civil

Procedure, it rendered moot the entirety of the argument of whether or not a jury demand had been timely or properly made.

The decisions of trial court to grant or deny a jury trial will only be aside for an abuse of discretion. ***Caudill v. Mrs. Grissom's Salads, Inc.***, 541 S.W.2d 101, 105 (Tenn. 1976). An abuse of discretion occurs if a trial court causes an injustice to a party by "(1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." ***Lee Med., Inc. v. Beecher***, 312 S.W.3d 515, 524 (Tenn. 2010). "The abuse of discretion standard of review envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal." Id. (citing ***Beard v. Bd. of Prof'l Responsibility***, 288 S.W.3d 838, 860 (Tenn. 2009); ***State ex rel. Jones v. Looper***, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000)). This standard of review "does not, however, immunize a lower court's decision from any meaningful appellate scrutiny." ***Lee Med.***, 312 S.W.3d at 524 (citing ***Boyd v. Comdata Network, Inc.***, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002)).

Appellant Weitz's Motion for New Trial presented many of the same arguments that Appellants argue in their Brief regarding a jury trial being conducted in this case. In its Order entered October 31, 2019, the Trial Court addressed those arguments as follows on page 12 of the Order:

> Tenn. R. Civ. P. 39.02 provides that "notwithstanding the failure of a party to demand a jury as to any issue with respect to which demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues." Clearly, the trial court is seized with the discretion to order a "trial by jury of any or all issues" in cases where there is a failure to demand a jury provided a demand for a jury could have been made. Tenn. R. Civ. P. 39.02; *and see Silcox v. Smith Cty.*, 487 S.W.2d 652, 658 (Tenn. Ct. App. 1972). In the case at bar, this Cause was remanded by the Court of Appeals, which vacated the prior holding of the trial court and placed the parties virtually at the beginning of their lawsuit. *See McIntyre v. Traughber,* 884 S.W.2d 134, 138 (Tenn. Ct. App.

> 1994) ("Vacating the trial court's judgment removes its precedential value"). Therefore, neither party is bound by any prior ruling of the Court before action by the Court of Appeals.
>
> The law of the case became that which was declared by the Court of Appeals. *See Memphis Pub.* Co. *v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). In preparing for a new trial, the parties were also free to request a determination of the matter by jury, which the Plaintiff did over the Defendant's objection. The Court opined then, as it does now, that the request for a jury was timely and caused no prejudice to the Defendant. Waiver of a jury trial in the first trial does not extinguish the right to a jury in the second trial. *See Stepp v. Stepp*, 11 Tenn. App. 578 (Tenn. Ct. App. 1930); *Harding v. Harding*, 485 S.W.2d 297, 299 (Tex. Civ. App. 1972).
>
> Defendant does not clearly articulate any harm that occasioned it by the grant of a jury, other than the potential for a different outcome. Since a different Chancellor was presiding, together with the Court of Appeals ruling, there was a good probability that the outcome would be different whether or not a jury was empaneled. In light of the analysis provided above, the Defendant's argument that the jury demand was not in the interests of justice and caused significant harm to Weitz, is without merit.

Since the Appellants did not even casually mention the fact that the Trial Court ordered that a jury be impaneled to try this case, it certainly did not present even one sentence of argument that the Trial Court abused its discretion in ordering that this case be conducted with the jury, and as such, has waived that issue on appeal. "In order for an issue to be considered on appeal, a party must, in his brief, develop the theories or contain authority to support the averred position." ***Hawkins v. Hart***, 86 S.W.3d 522, 531 (Tenn. Ct. App. 2001); ***Bunch v. Bunch***, 281 S.W.3d 406, 409 (Tenn. Ct. App. 2008). "Where a party makes no legal argument and cites no authority in support of a position, such issue is deemed to be waived and will not be considered on appeal." ***Branum v. Akins***, 978 S.W.2d 554, 557 n.2 (Tenn. Ct. App. 1998), ***Hawkins***, 86 S.W.3d at 531. As such, it is difficult for the Appellee Commercial Painting to argue that the Trial Court did not abuse its discretion in ordering a jury trial when Appellants failed to even make that allegation. That said, when the abuse of discretion standard is applied to the actions of

the Trial Court as articulated in its October 31, 2019 Order, there clearly was no abuse of discretion.

VI. THE TRIAL COURT PROPERLY CHARGED THE JURY AND APPELLANTS FAILED TO LODGE OBJECTIONS TO THE JURY INSTRUCTIONS AND JURY VERDICT FORM.

Standard of Review: Questions of law are reviewed de novo. However, to the extent this issue requires an analysis of factual contentions pertaining to the verdict, there only need to be some material evidence in the record to support the verdict.

As discussed previously, Appellants claim in very vague generalities that the Trial Court failed to properly instruct the Jury, and provided a defective Jury Verdict Form to the Jury. While the Appellants make these accusations, they fail to identify with any specificity what portion of the Jury Instructions were supposedly defective, or what supposed errors exist in the Jury Verdict Form. Since the Appellants failed to identify what specific instructions were objectionable, or what specific instructions should have been given to the Jury. The same holds true for Jury Verdict Form. While Appellant Weitz did identify specific complaints in its Motion for New Trial about special jury instructions that the Trial Court ruled would not be given to the Jury because the special instructions requested by Appellant Weitz were already covered in other Tennessee Pattern Jury Instructions that were given to the Jury, the Appellants apparently decided to not pursue that issue in this appeal. Accordingly, Appellants' failure to raise its objections at trial, failure to comply with T.R.App.P. 3(e), failure to comply with T.R.App.P. 36(a) and failure to comply with Court of Appeals Rule 6 is dispositive of all complaints regarding the Jury Instructions and Jury Verdict Form.

VII. THE TRIAL COURT PROPERLY CARRIED OUT ITS DUTIES AS THE THIRTEENTH JURIOR.

Standard of Review: Questions of law are reviewed de novo. However, to the extent this issue requires an analysis of factual contentions pertaining to the verdict, there only need to be some material evidence in the record to support the verdict.

In a jury trial, a trial court sits as a thirteenth juror and, if employing its independent judgment, the trial court is dissatisfied with the verdict, then the trial court is required to order a new trial. For almost 100 years, the "thirteenth juror rule" has been integral part of the fabric of Tennessee's jurisprudence system. The Tennessee Supreme Court reaffirmed the trial court's role in a jury case as the thirteenth juror in the case of ***Davidson v. Lindsey***, 104 S.W.3d 483 (Tenn. 2003). In that case, the Supreme Court stated as follows:

> The reasons given for the rule are, in substance, that the circuit judge hears the testimony, just as the jury does, sees the witnesses, and observes their demeanor upon the witness stand; that, by his training and experience in the weighing of testimony, and the application of legal rules thereto, he is especially qualified for the correction of any errors into which the jury by inexperience may have fallen, whereby they have failed, in their verdict, to reach the justice and right of the case, under the testimony and the charge of the court; that, in our system, this is one of the functions the circuit judge possesses and should exercise -- as it were, that of a thirteenth juror. So it is said that he must be satisfied, as well as the jury; that it is his duty to weigh the evidence; and, if he is dissatisfied with the verdict of the jury, he should set it aside.
>
> ***Davidson*** at p. 488.

Exercising its role as the thirteenth juror, the trial court then has the duty to independently weigh the evidence and determine whether or not the evidence preponderates for or against the verdict. *See*, ***Woods v. Walldorf & Co., Inc.***, 26 S.W.3d 868, 873 (Tenn. Ct. App. 1999); ***Shivers v. Ramsey***, 937 S.W.2d 945, 947 (Tenn. Ct. App. 1996); ***Witter v. Nesbit***, 878 S.W.2d 116, 121 (Tenn. Ct. App. 1993).

Appellant Weitz advanced these same arguments in its Motion for New Trial. In addressing those arguments, the Trial Court stated as follows on pages 5 – 7 of the October 31, 2019 Order (R. Vol. 20, p. 2966):

> The Court considered the entire case again upon entry of the Order Approving Jury Verdict. The Court was satisfied that "the Jury was properly charged with the law applicable to the claims and defenses at issue in this case...." The Court also acknowledged that the Jury imposed punitive damages against the Defendant

based upon "clear and convincing evidence, and that the imposition of punitive damages against the Defendant, The Weitz Company, LLC, was appropriate based on the evidence. The Plaintiff put on additional proof regarding the *Hodges* factors and the jury was properly charged with the law applicable to the determination of the amount of punitive damages...."

The Court reviewed the verdict forms, allowed the polling of jurors and concluded "... that the verdict of the Jury as reflected in the Jury Verdict Forms duly filed in this cause are in all respects proper, the Court finds in favor of the Plaintiff...." The Court also recognized at that time that it "... must conduct a further review of same punitive damage award to determine the appropriateness of the award of punitive damages...." On each of these occasions, the Court had the opportunity to consider the evidence and the Defendant's arguments and the Court was not persuaded that the Defendant should prevail on the motion advanced.

The Court next considered the evidence in the case when determining the appropriateness of the jury's award of punitive damages. After due consideration of the evidence, exhibits, the trial notes, prior submissions from the Special Master, the proposed findings of the parties, the Court approved the jury's punitive damages award and provided detailed findings and conclusions thereto. This process began in October, not in December as suggested by Defendant.

Moreover, both the Plaintiff's and the Defendant's positions as to punitive damages had been made known to the Court by prior arguments to the Special Master and to the Court. Defendant did not present anything new or compelling to the Court in any of its post-trial submissions. With respect to the Defendant's citations to *Smith v UHS of Lakeside, Inc.*, 439 S.W.3d 303 (Tenn. 2014), other than a pronouncement of the law and ruling contained therein, *Smith* has little application to the case at bar. First, *Smith* involved a trial court's ruling on a motion for summary judgment, as opposed to a trial court's ruling as thirteenth juror following a jury trial. Second, the trial court in Smith specifically stated that it had not provided the basis for the decision and delegated the task to defense counsel. This Court did not delegate that task but sought the assistance from counsel in creating the necessary findings and conclusions. Third, the instant case involves the decision of the case by a jury, while *Smith* involved a lone judge making a decision without making detailed factual and legal determinations to support the decision. In contrast, this Court's duty in the premises was to act as the thirteenth juror after sitting through the trial and hearing the evidence, seized with the Court's own personal notes, the exhibits provided to the Court, the various orders entered on the contested issues of the case, the parties' proposed findings, conclusions, and the entire file. This Court decided the facts based upon the evidence submitted and is satisfied that the jury performed within the instructions given to it. Moreover, the Court believes there was more than ample material evidence to support the jury verdict, not just a mere preponderance.

As this portion of the October 31, 2019 Order graphically demonstrates, the Trial Court took its judicial duties and responsibilities with tremendous seriousness and care, and for Appellants to imply that the Trial Court did nothing more than "... simply play a 'Pontius Pilate role' by washing his ...hands of the case and deferring to the jury to decide the case as they see fit..." is as offensive as it is inaccurate. There is simply nothing in the Record that establishes such an outlandish claim, and in fact, the Record is replete with evidence that the Trial Court performed its judicial duties in the conduct of the trial in a completely exemplary and competent manner.

Similarly, there is absolutely nothing in the Record that substantiates the claim by Appellants that the Trial Court did not follow the instructions issued by this Court in the June 20, 2016 Opinion. As stated previously, the instructions given by this Court in the June 20, 2016 Opinion was more than a remand of this case for "... further proceedings consistent with this opinion" as claimed by the Appellants on page 80 of their Brief. Instead, as stated previously, this Court's full instructions found on page 18 of the June 20, 2016 Opinion which the Appellants conveniently eliminated in its discussion were as follows:

> For the reasons stated above, we reverse the trial court's award of partial summary judgment to Weitz, vacate the trial court's judgment and award of damages following the trial, and remand the case for further proceedings consistent with this opinion.

There was nothing in those instructions that prohibited a jury trial from being conducted nor mandated that a bench trial had to be conducted. Appellants have cited this Court to nothing in the record that even hints that the Trial Court failed to conduct further proceedings consistent with the June 20, 2016 Opinion.

VIII. THE TRIAL COURT PROPERLY RELIED UPON PARTY PREPARED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Standard of Review: Questions of law are reviewed de novo. However, to the extent this issue requires an analysis of factual contentions pertaining to the verdict, there only need to be some material evidence in the record to support the verdict.

Appellants renew in this appeal their unfounded accusation that the Trial Court did not exercise independent judgment when it adopted the proposed findings of facts and conclusions of law submitted by Appellee Commercial Painting. Moreover, Appellants make this argument after the Trial Court addressed this argument in the October 31, 2019 Order concerning this issue as shown in the quoted portions of the October 31, 2019 Order contained in the previous section of this Brief which demonstrates the Trial Court went to great lengths in that Order to explain in detail the process the Trial Court went through in its evaluation of the evidence and how the proposed findings of fact and conclusions of law that were adopted by the Trial Court represented its independent decision concerning the case after the Trial Court independently reviewed the evidence. Appellants conveniently disregarded this explanation in their Brief.

Again quoting from the October 31, 2019 Order, the Trial Court stated the following on page 2 of that Order regarding the use of the findings of facts and conclusions of law prepared by the parties at the Trial Court's request:

> The Court considered the proposed findings of fact and conclusions of law of both parties. Defendant's proposed findings and conclusions were diametrically opposed to the verdict without sufficient support or corroboration to convince the Court that its position should be accepted. On the other hand, Plaintiff's proposed findings and conclusions mirrored much, if not all, of the credible testimony presented at trial, while discounting the less credible evidence offered by the Defendant. The Court considered the submissions and concluded that Plaintiff's proposal actually represented both the jury's verdict and the opinion of the Court as to the decision that should be reached in this cause.

In addition to this statement, the Trial Court included a footnote on page 2 of the Order that stated the following:

> Few, if any, of the proposed findings submitted by the Defendant reflect the testimony adduced at trial as observed by the Court, nor did they take into account the credibility or lack thereof, of the witnesses. On the other hand, Plaintiffs proposed findings track closely to the testimony of the witnesses, the Court's trial notes and the verdict the jury returned.

The Trial Court also stated the following on page 4 of the October 31, 2019 Order:

> The Defendant charges that this Court erred in its production of Findings of Fact and Conclusions of Law. As stated above, in many areas, the Plaintiff's proposals tracked the Court's memory of the proof and the jury's verdict. The Findings of Fact and Conclusions of Law entered in this Cause accurately reflect this Court's opinion of the case and its confirmative decision after reviewing and chronicling the evidence with the aid of the proposed findings and conclusions submitted by the parties. *See Smith v U& S Lakeside, 439 S.W.3d, 315-316* (Tenn. 2014).
>
> The trial record, as reviewed by this Court, does not create any doubt that the Court's decisions in crafting and adopting its final findings and conclusions were arrived at through the Court's own private deliberations and decisions.
>
> As pointed out above, when the Court considered the Defendant's proposals in light of the lack of credibility of some of its key witnesses, the Court could not adopt many of its proposed findings and the conclusions thereto.

It is plainly ludicrous for the Appellants to claim that the Trial Court carried out its duties like "Pontius Pilate" who washed "...his...hands of the case and deferring to the jury to decide the case as they [saw] fit" in view of all the statements made by the Trial Court in the October 31, 2019 Order regarding the steps taken after the Jury had rendered its verdict, and the careful thought that went into the crafting of all the post-trial Orders in this case.

Appellants reliance on ***Smith v. UHS Lakeside***, 439 S.W.2d 303 (Tenn. 2014) is misplaced as the Trial Court explained on page 2 and pages 5 through 6 of the October 31, 2019 Order as quoted in this Brief. It is ironic that Appellants would cite this Court to this case because this was precisely the case relied upon by this Court in its first opinion when the this Court reversed the prior ruling granting partial summary judgment in favor of Appellant Weitz dismissing Appellee Commercial Painting's tort and punitive damages claims. More

significantly, the key point in that case was that the order on the motion for summary judgment at issue in the ***Smith*** case did not contain the required findings of facts and conclusions of law mandated by T.R.Civ.P. 56.04, and that the appellate court was not required to do an "archaeological dig" of the record to determine the basis for the trial court's holding in the absence of findings of fact and conclusions of law. ***Smith*** simply has no application here because we are not dealing with a ruling on a motion for summary judgment or a bench trial.

Second, the entire holding of the ***Smith*** case was based upon the fact that the trial court's order completely lacked findings of facts and conclusions of law which would have allowed this Court and ultimately the Supreme Court to discern the factual and legal grounds relied upon by the trial court in reaching its ruling. That set of facts has no application here. The Trial Court's December 12, 2018 Findings of Fact and Conclusions of Law and Order of Final Judgment (R. Vol. 18, p. 2541) exceeds forty (40) pages in length, and is replete with factual findings and legal conclusions that support the Jury's verdict and the Judgment entered by the Trial Court.

Appellants' reliance upon ***Deberry v. Cumberland Electric Membership Corp.***, 2018 Tenn. App. LEXIS 605 (Tenn. Ct. App. Oct. 15, 2018) is likewise not applicable to this case. What Appellants fail to inform the Court about this case is far more dispositive of the issues in a manner adverse to Appellants compared with that portion of the authority Appellants disclosed in their argument. The ***Deberry*** case dealt with a retaliatory discharge claim, and the case was tried as a bench trial, not as a jury trial. That alone makes the ***Deberry*** case not applicable to the issues to be decided here. More significantly, other portions of that case demonstrate that there is absolutely nothing wrong with the Trial Court having adopted Appellee Commercial Painting's proposed findings of facts and conclusions of law, especially in the context here where the findings of fact and conclusions of law support a unanimous verdict rendered by a jury of twelve

persons. A review of the ***Deberry*** opinion yields at least one quote worthy of mention that completely contradicts Appellants' arguments concerning the issue of the Trial Court's adoption of Appellee Commercial Painting's proposed findings of facts and conclusions of law. More specifically, the ***Deberry*** Court stated the following at pages 4-5 of the opinion:

> A trial court's decisions "must be, and must appear to be, the result of the exercise of the trial court's own judgment." *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 312 (Tenn. 2014).[1] The requirement that a trial court exercise its independent judgment does not mean that a trial court may not adopt party-prepared findings of fact and conclusions of law. *SecurAmerica Bus. Credit*, 2018 Tenn. App. LEXIS 109, 2018 WL 1100958, at *6.

Deberry clearly demonstrates that the exercise of independent judgment does not prevent the adoption of party-prepared findings of facts and conclusions of law so long as the record does not create doubt that the decision represents the trial court's own deliberations and decision. In the ***Deberry*** case, the case was tried as a bench trial, and there was no indication that the decision was the result of independent deliberations because there was no oral ruling in the record to reflect that such deliberations had taken place.

It should also be noted that the issue of party-prepared proposed findings was thoroughly addressed in reported opinions by this Court. One such case is ***Airline Constr. Inc. v. Barr***, 807 S.W.2d 247 (Tenn.Ct.App.1990). In that case, the Appellant, Airline Construction, Inc. argued on appeal that the preparation of party-prepared findings and conclusions was erroneous. This Court, at page 254, held "...we conclude that the adoption of the party-prepared findings is neither reversible error nor justification for disregarding the prescribed 'presumption of correctness.'"

The issue of party prepared findings was again addressed by this Court in 2009 in the case of ***Madden Phillips Constr. v. GGAT Dev. Corp.***, 315 S.W.3d 800 (Tenn. Ct. App. 2009). This Court provided an extensive history of Tennessee jurisprudence concerning a trial court's

use of party-prepared findings of fact and conclusions of law on pages 809-811 of the opinion, and after providing that extensive history, this Court stated the following at p. 811:

> GGAT has equally failed to show that the trial court's findings of fact and conclusions of law did not represent the chancellor's views of this case. It is clear from the record that, although the chancellor reproduced verbatim a majority of Madden Phillips' proposed findings, he also excluded some findings. The trial court excluded findings of fact related to Madden Phillips' preparations to soil cement on the day of termination. Additionally, the trial court omitted findings that pertained to disputed charges for completion costs. The chancellor's modifications to Madden Phillips' proposed findings, at a minimum, **surpassed the word-for-word reproduction we approved in *Barr.*** (emphasis added)
>
> We conclude that the trial court did not err in relying on party-prepared findings of fact and do not find sufficient reason to abandon the ordinary presumption of correctness given to those factual findings. There is no indication that the trial judge did not carefully review the party-prepared findings to ensure the findings reliably reflected his opinion based on his observation of the witnesses and evidence produced at trial. There is likewise no indication that the trial court did not review the party-prepared findings to ensure they disposed of all relevant issues before the court. We once again note that party who disagrees with a trial court's findings of fact may file a motion to alter or amend pursuant to Tennessee Rules of Civil Procedure 52.02. GGAT filed no such motion. We conclude that the chancellor's findings are entitled to the ordinary presumption of correctness and will proceed accordingly.
>
> ***Madden Phillips Constr.*** at p. 811.

Appellants failed to disclose in their Brief the true state of the law in Tennessee regarding a trial court's use of party-prepared findings of fact and conclusions of law. And to compound this failure, Appellants failed to recognize the two critical distinguishing factors that make this issue a red herring. The first distinguishing factor is that ***UTS Lakeside*** and ***Deberry*** cited by Appellants concerned a bench trial or a motion for summary judgment. The second distinguishing factor is that those cases concerned rulings by trial courts that either completely lacked any indication in the record regarding the basis for the trial court's ruling, or the record raised some doubt or lacked an affirmative indication that the findings of fact and conclusions of

law were the result of the trial court's independent deliberations. As is graphically demonstrated by the portions of the October 31, 2019 Order quoted in this Brief, this is not the case here.

In addition, it should be noted that the Trial Court also addressed the issue of not conducting any type of oral arguments concerning the proposed findings of facts and conclusions of law which Appellants complain. On that issue, the Trial Court stated the following on page 2 of the October 31, 2019 Order:

> Defendant makes much out of the fact that the Court did not conduct a hearing upon the proposed findings and conclusions submitted by the parties. The Court did not require such a hearing, having sat through a three (3) week-long trial with the parties, and having reviewed the proof and notes to determine the appropriateness of the award of punitive damages. The Court was quite familiar with the proof and the legal arguments of the parties. Quite simply, the Court saw no basis in fact or law to disagree with the jury's verdict.

It should be pointed out that Appellants had no right to a hearing concerning the proposed findings of facts and conclusions of law submitted by the parties. Rule 16(a) of the Rules of Chancery Court of Shelby County, Tennessee allowed the Trial Court, in its discretion, to "...limit or direct argument and, in non-jury cases, may choose not to hear closing argument."

But even more significantly, the Trial Court transmitted an email to all counsel on December 10, 2018 asking whether or not any of the parties had any objection to rulings being made without further oral argument (R. Vol. 21, p. 3039). On December 10, 2018, Appellants' counsel transmitted emails to the Chancellor's office stating that Appellants had no objection to the Trial Court not conducting any further oral argument (R. Vol. 21, p. 3042). Accordingly, Appellants voluntarily waived any oral argument regarding the Findings of Fact and Conclusions of Law.

The Appellants' claim that the Trial Court failed to properly carry out its judicial duties and responsibilities before and after the trial simply have no merit. The Record clearly

establishes that the Trial Court carried out all of its judicial duties thoroughly and competently.

IX. THE TRIAL COURT PROPERLY AWARDED PREJUDGMENT INTEREST AND UTILIZED THE CORRECT RATE OF INTEREST.

Standard of Review: Questions of law are reviewed de novo. However, to the extent this issue requires an analysis of factual contentions pertaining to the verdict, there only need to be some material evidence in the record to support the verdict.

The Jury rendered its verdict in this case, and after determining the amount of damages to be awarded, the Jury also determined that Appellee Commercial Painting should be awarded prejudgment interest on the amount of its compensatory damages.

Parties who are wrongfully deprived of money are damaged in two ways. First, they did not receive the money to which they were entitled. Second, they were deprived of the use of that money from the time that they should have received it until the date of judgment. Courts are therefore empowered to award prejudgment interest to address that second type of damage to compensate the aggrieved party for being forced to forego the use of its money over time. *See*, ***Scholz v. S.B. Intern., Inc.***, 40 S.W.3d 78, 82 (Tenn. Ct. App. 2000). Prejudgment interest is calculated using the simple interest method. ***Otis v. Cambridge Mut. Fire Ins. Co.***, 850 S.W.2d 439, 447 (Tenn. 1992). Calculating the amount of interest due under this method required the Trial Court to ascertain (1) the principal amount owed, (2) the applicable interest rate, and (3) the relevant time period.

Concerning the principal amount to be used in the calculation and the relevant time period, the Trial Court properly found that Commercial Painting's Second Notice of Nonpayment (R. Vol. 61, Trial Exhibit 347) was the first formal demand letter making demand for the full amount sought as damages in this case, and that May 11, 2006 was the appropriate starting point for the calculation of prejudgment interest. Since prejudgment interest is awarded to compensate a party for the time that it is wrongfully deprived of money to which it is entitled,

May 11, 2006 was the appropriate date to begin the accrual of prejudgment interest. *See* ***Scholz***, 40 S.W.3d at 82. The Jury determined that Appellee Commercial Painting was owed $1,729,122.46 prior to the application of the extrajudicial payment that Appellant Weitz made on June 25, 2013. Accordingly, the Trial Court properly found that interest should be calculated on the principal amount of $1,729,122.46 from May 11, 2006 through June 25, 2013 when the extrajudicial payment was made by Appellant Weitz. Concerning the end date for the calculation of prejudgment interest, Tenn. Code Ann. § 47-14-122 states as follows:

> Interest shall be computed on every judgment from the day on which the jury or the court, sitting without a jury, returned the verdict without regard to a motion for a new trial.

Accordingly, the Trial Court properly found that the principal amount for the determination of prejudgment interest after June 26, 2013 is $1,272,952.40 calculated through October 8, 2018, the date of the Jury's verdict.

Concerning the interest rate, the Trial Court properly found that Sections 1.2 and 1.8 of the Subcontract (R. Vol. 56, Trial Exhibit 94) incorporated the Prime Contract (R. Vol. 14, p. 2090) between Appellant Weitz and the Project Owner. Section 1.2 of the Subcontract entitled "Prime Contract Rights and Responsibilities" states as follows:

> To the extent that provisions of the Prime Contract apply to the Subcontractor's Work, (i) the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under the Prime Contract, assumes toward the Owner, the Architect, or others, including (by way of example) Subcontractor's proportionate share of any liquidated damages which Contractor may be liable to owner, and (ii) **the Subcontractor shall be entitled to the same benefits and rights which the Contractor, under the Prime Contract, is granted against the Owner**. The Contractor shall have the benefit of all rights, remedies and redress against the Subcontractor that the Owner, under the Prime Contract, has against the Contractor. The provisions of the Subcontract Documents shall be in addition to and not in substitution of any of the provisions of the Prime Contract. The Prime Contract is available for review by the Subcontractor at the Contractor's office. (Emphasis added.)

Section 1.8 of the Subcontract entitled "Subcontract Documents" states in pertinent part as follows:

> The "Subcontract Documents" consist of (i) Exhibit F, any modifications to the Standard Form Subcontract Agreement Between Contractor and Subcontractor ("Agreement") entered into after the date of the Agreement; (ii) Exhibit A; (iii) the Agreement; (iv) Exhibit C; (v) Exhibit D; (vi) Exhibit B; (vii) any other Exhibits to the Agreement in letter order; (viii) the Sub-contractor's payment bond and its performance bond, if required; and (ix) **the Prime Contract**. The Subcontract Documents together form the contract between the parties thereto, and are as fully a part of the Agreement as is attached thereto or repeated therein. (Emphasis added.)

Section 11.7 of the Prime Contract states as follows:

> 11.7 Any amounts payable hereunder which are not paid when due shall thereafter accrue interest at Wall Street Journal "New Your Prime" plus three percent (3%) per annum or the highest rate allowed under the law of the state where the Project is located, whichever is less.

As the Subcontract is silent on the rate of interest to be applied to payments due under the terms of the Subcontract, the rate of interest to be applied is established by the Prime Contract which is made applicable to the dispute between Appellee Commercial Painting and Appellant Weitz by virtue of Section 1.2, and incorporation of the Prime Contract into the Subcontract by virtue of Section 1.8. The Trial Court properly relied upon the Affidavit of Appellee Commercial Painting's accountant, Jeff Stallings, CPA (R. Vol. 15, p. 2115), who researched the interest rates established at the time payment was due to Appellee Commercial Painting, and the New York Prime Rate in effect on May 11, 2006 was 7.930%. Accordingly, interest rate to be applied under the terms of the Prime Contract is 10.930%.

Tennessee Code Annotated § 47-14-123, permits the parties to a contract to establish the rate for interest. More specifically, Tenn. Code Ann. § 47-14-123 states that "[i]n addition, contracts may expressly provide for the imposition of the same or a different rate of interest to be paid after breach or default within the limits set by § 47-14-103. Tennessee Code Annotated §

47-14-103 states in pertinent part that:

> (2) For all written contracts, including obligations issued by or on behalf of the state of Tennessee, any county, municipality, or district in the state, or any agency, authority, branch, bureau, commission, corporation, department, or instrumentality thereof, signed by the party to be charged, and not subject to subdivision (1), the applicable formula rate;...

The next important consideration is to determine what is meant by "applicable formula rate." The definition of "applicable formula rate" is found in the definition section at Tenn. Code Ann. § 47-14-102 entitled "Definitions." More specifically, Tenn. Code Ann. § 47-14-102(3) states as follows:

> (3) "Applicable formula rate at any given time is the greater of:
> (A) The formula rate in effect at such time; or
> (B) The formula rate last published in the Tennessee Administrative Register prior to such time, pursuant to § 47-14-105;

A review of the historical formula rates published in the Tennessee Administrative Register reflects that the "formula rate" on April 11, 2006 was 11.57% and for May 23, 2006 was 11.75%. Accordingly, pursuant to Section 11.7 of the Prime Contract, the interest rate to be charged was the lesser of the "New York Prime" plus three percent (3%) or the highest rate permitted in the state where the Project was located. The "New York Prime" rate plus three percent is 10.93%, and the highest "formula rate" in effect on April 11, 2006 and May 23, 2006 was 11.57% and 11.75% respectively[5]. Accordingly, the 10.93% interest rate that the Trial Court ruled was the applicable rate to be charged as the prejudgment interest rate does not exceed the statutory cap set forth at Tennessee Code Annotated § 47-14-103(2) as Appellants erroneously argue.

In addition, the Trial Court properly included a provision in the Final Judgment establishing the post-judgment interest rate to be applied until the judgment is paid. Since the

[5] Source: https://www.tn.gov/content/tn/tdfi/tdfi-how-do-i/info/formula-rate/formula-rate-history.html

interest rate is established by contract, the post-judgment interest rate remains unchanged. More specifically, Tenn. Code Ann. § 47-14-121 states in pertinent part as follows:

> (c) Notwithstanding subsection (a) or (b), where a judgment is based on a statute, note, contract, or other writing that fixes a rate of interest within the limits provided in § 47-14-103 for particular categories of creditors, lenders or transactions, the judgment shall bear interest at the rate so fixed.

Since Tenn. Code Ann. § 47-14-121(c) permits post judgment interest to be determined by contract, the Trial Court properly found that the post-judgment interest rate to be applied is the same interest rate used to calculate prejudgment interest which is 10.93% per annum. It should also be pointed out that Appellant Weitz filed no countervailing affidavits to dispute Appellee Commercial Painting's prejudgment interest calculation and post-judgment interest calculation.

The Trial Court properly determined the amount of Commercial Painting's prejudgment interest, and correctly determined that the contract rate continues on the post-judgment interest, and accordingly, the Trial Court's determination should be affirmed.

X. THE TRIAL COURT PROPERLY AWARDED APPELLEE ITS ATTORNEY'S FEES AND OTHER LITIGATION EXPENSES.

Standard of Review: Abuse of Discretion.

Appellants' arguments against the award of attorney's fees and costs likewise has no merit. An award of attorney's fees and costs was proper under either the Subcontract or the Prompt Pay Act codified at Tenn. Code Ann. § 66-34-602. Section 12.1 of the Subcontract contains the following provision:

> 12.1 Attorney's Fees
> 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.

Similarly, Tenn. Code Ann. § 66-34-602(d) states that "[r]easonable attorney's fees may be awarded against the nonprevailing party; provided, that such nonprevailing party has acted in bad faith." The Jury found, and the Trial Court concurred, that Appellant Weitz had acted in bad faith when it failed to pay Commercial Painting.

As the Trial Court noted on pages 19 and 20 of the October 31, 2019 Order, the Appellee Commercial Painting's application for attorney's fees and costs was fully supported by affidavits (R. Vol. 15, p. 2226; R. Vol. 17, p. 2416; R. Vol. 17, p. 2512; R. Vol. 17, p. 2515) and in all respects proper. In its Brief, Appellants apparently do not take issue with the amount of the award, but only suggest that the attorney's fees and litigation costs award should be vacated if the Trial Court's Judgment is reversed. The Trial Court properly awarded Appellee Commercial Painting its attorney's fees and costs as the prevailing party in this case, and that portion of the Judgment along with the remainder of the Judgment should be affirmed.

XI. THERE WAS SUFFICIENT PROOF OF LIABILTY FOR AND THE AMOUNT OF PUNITIVE DAMAGES.

Standard of Review: There must be some material evidence in the record to support the verdict.

At this stage in the long procedural history of this case, Appellant Weitz has now been told by the Court of Appeals, the Jury and the Trial Court that its behavior towards Appellee Commercial Painting was not "...permitted under the contract and consistent with industry norms." as Appellee Weitz has repeatedly claimed in its various filings. As stated previously, this Court forewarned the Appellants that Appellant Weitz's conduct towards the Appellee Commercial Painting was not permitted under the Subcontract and might subject it to an award of compensatory and punitive damages on page 17 of the June 20, 2016 Opinion.

As the Findings of Fact and Conclusions of Law entered by the Trial Court as part of the Judgment (R. Vol. 18, p. 2541) entered in this case on December 12, 2018 demonstrate, there were ample factual findings made by the Jury to establish that Appellant Weitz engaged in fraudulent and intentional conduct that established liability for punitive damages, as well as the amount of punitive damages actually awarded by the Jury (R. Vol. 49, pp. 2538-2560; R. Vol. 66, Trial Exhibits 493, 494 and 495[6]). Moreover, the Trial Court fulfilled its duties under ***Hodges*** by conducting a review of the evidence in its capacity as the Thirteenth Juror, and conducted that review under the more stringent clear and convincing evidence standard, as opposed to the material evidence standard that applies to this Court's review of the verdict. Appellee Commercial Painting will not canvass the copious amounts of material evidence that support the Jury's findings regarding Appellant Weitz's liability for the imposition of punitive damages, and the amount of punitive damages awarded by the Jury as confirmed by the Trial Court. Appellee Commercial Painting respectfully submits that the best recitation of that evidence is the Findings of Facts and Conclusions of Law contained in the Trial Court's December 12, 2018 Order. A review of those findings and conclusions along with the Statement of the Facts contained in this Brief with citations to the Record catalog the ample evidence to support the punitive damages award, including the amount awarded by the Jury.

Appellants, again speaking in vague generalities in this portion of their Brief do nothing more than argue that there is insufficient evidence to support a punitive damages award without discussing the evidence itself, and essentially ask this Court to disregard the material evidence standard applicable to this Court's review, and to re-weigh the evidence which is strictly prohibited according to ***Barnes v. Goodyear Tire & Rubber Co.***, cited *supra.*

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[6] The Exhibits referred to here are the second set of Trial Exhibits marked as 493, 494 and 495 consisting of Appellant Weitz's 12/31/2016 balance sheet, 2015/2016 consolidated financial statements and website printouts.

Appellee Commercial Painting respectfully submits that when this materiality review is performed, the Jury's verdict as confirmed by the Trial Court was, in all respects, proper both in terms of the imposition and amount of punitive damages.

XII. THIS COURT SHOULD AWARD APPELLEE COMMERCIAL PAINTING COMPANY, INC. ITS ADDITIONAL ATTORNEY'S FEES AND COSTS INCURRED SUBSEQUENT TO THE TRIAL COURT'S INITIAL AWARD OF ATTORNEY'S FEES AND COSTS.

Standard of Review: Not Applicable.

The only relief requested by Appellee Commercial Painting is that assuming that this Court affirms the Jury's verdict and the Trial Court's judgment, Appellee Commercial Painting will be entitled to recover its attorney's fees and expenses incurred subsequent to the initial attorney's fee award contained in the December 12, 2018 Order. As discussed in the section of this Brief concerning the Trial Court's award of attorney's fees and litigation costs, Section 12.1 of the Subcontract provides that a prevailing party "...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." Although redundant, Appellee Commercial Painting also sought recovery of its attorney's fees and expenses pursuant to Tenn. Code Ann. § 66-34-602(d), and the Jury found, and the Trial Court concurred, that Appellant Weitz had acted in bad faith when it failed to pay Appellee Commercial Painting. Accordingly, assuming this Court affirms the Jury's verdict and Trial Court's judgment, Appellee Commercial Painting requests that this Court remand this case back to the Trial Court with instructions to conduct further proceedings on the sole issue of an award to Appellee Commercial Painting additional fees and expenses.

XIII. THE TRIAL COURT PROPERLY DISMISSED ALL CLAIMS AGAINST APPELLEE LIBERTY MUTUAL INSURANCE COMPANY.

Standard of Review: Questions of law are reviewed de novo. However, to the extent this issue requires an analysis of factual contentions pertaining to the verdict, there only need to be some material evidence in the record to support the verdict.

As previously mentioned, Appellee Liberty Mutual Insurance Company issued a performance bond that guaranteed Appellee Commercial Painting would complete its work under the Subcontract. As a result, Appellant Weitz asserted a claim in its Answer and Counterclaim against Appellee Liberty Mutual Insurance Company. Since the Jury found against Appellant Weitz on its Counterclaim, Appellant Weitz's claims against Appellee Liberty Mutual Insurance Company were dismissed. While Appellants raise no issues on appeal against Appellee Liberty Mutual Insurance Company, it has nevertheless been made a party to this appeal. Appellee Liberty Mutual Insurance Company therefore joins in all arguments advanced by Appellee Commercial Painting in this Brief.

Under Tennessee law, a surety stands in the shoes of its principal and its liability is the same as that of the principal. See ***In re Darwin's Estate***, 503 S.W.2d 511 (Tenn. 1973); ***Exchange Mut. Ins. Co. v. Olsen***, 667 S.W.2d 62 (Tenn. 1984); ***City of Nashville v. Singer & Johnson Fertilizer Co.***, 127 Tenn. 107, 153 S.W. 838 (1913) and ***Lexington Hous. Auth. v. Continental Cas. Co.***, 210 F. Supp. 732 (W.D. Tenn. 1962). Under these well settled tenets of surety law, the surety is considered a privy of its principal.

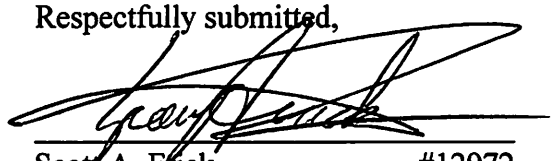
Since Appellee Liberty Mutual Insurance Company can only be held liable to Appellant Weitz to the extent Appellee Commercial Painting Company is liable to Weitz, the Jury appropriately found in favor of Appellee Liberty Mutual Insurance Company, and the claims against Appellee Liberty Mutual Insurance Company were properly dismissed by the Trial

Court. Accordingly, Appellee Liberty Mutual Insurance Company respectfully submits that the Jury's verdict and the Trial Court's Order of Final Judgment should be affirmed in all respects.

CONCLUSION

Based on the foregoing, Appellees Commercial Painting Company, Inc. and Liberty Mutual Insurance Company respectfully request that this Court affirm the Trial Court's judgment in all respects. In addition, Appellee Commercial Painting, Inc. respectfully requests this Court to award Appellee Commercial Painting Company, Inc. its attorney's fees and expenses incurred subsequent to the Trial Court's initial award of attorney's fees and expenses including attorney's fees and expenses incurred for this appeal, by remanding this case back to the Trial Court with instructions to the Trial Court to conduct further proceedings to determine the amount of a supplemental award of attorney's fees and expenses.

Respectfully submitted,



Scott A. Frick #12972
Frick Law Firm & Mediation Solutions, PLLC
5521 Murray Avenue, Suite 100
Memphis, TN 38119
(901) 260-4515 *ph.* (901) 260-4516 *fax*

CERTIFICATE OF SERVICE

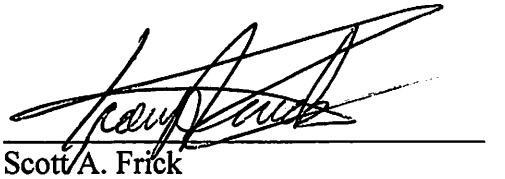
I, Scott A. Frick certify that a true and exact copy of the foregoing **BRIEF OF APPELLEES COMMERCIAL PAINTING COMPANY, INC. AND LIBERTY MUTUAL INSURANCE COMPANY**, has been forwarded via U.S. Mail this 30th day of November, 2020, to:

John A. Templer, Jr.
Whitfield & Eddy Law
699 Walnut Street, Suite 2000
Des Moines, IA 50309

Jeffrey C. Smith
Waller Lansden Dortch & Davis
1661 International Drive, Suite 400
Memphis, TN 38120

Robert Flynn
HF Law Group, PLLC
P.O. Box 38269
Germantown, TN 38183

Philip E. Beck
Smith, Currie & Hancock LLP
2700 Marquis One Tower
245 Peachtree Center Avenue, N.E.
Atlanta, GA 30303-1227



Scott A. Frick