

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED

06/05/2025

Clerk of the
Appellate Courts

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

**Chancery Court for Shelby County
No. CH-06-1573**

No. W2019-02089-SC-R11-CV

ORDER

The Weitz Company and its sureties have filed an application for permission to appeal from the Court of Appeals' judgment on remand from this Court's opinion in *Commercial Painting Co. v. Weitz Co.*, 676 S.W.3d 527 (Tenn. 2023). Upon consideration of the application, Commercial Painting Company's response, and the record before us, we conclude that the Court of Appeals has misinterpreted the scope of our remand in this case. Accordingly, we grant the application in part and vacate that portion of the Court of Appeals' judgment and opinion declining to consider whether Commercial Painting contractually waived entitlement to punitive damages on its claim for intentional misrepresentation. We deny review of the other issues raised in the Rule 11 application and remand for further consideration consistent with this Order.

Commercial Painting brought this action alleging that Weitz breached the parties' subcontract agreement and engaged in other tortious conduct relating to the agreement's formation and performance. A jury awarded Commercial Painting \$1,729,122.46 in compensatory damages on each of its claims, including claims for breach of contract and intentional misrepresentation. The jury also awarded Commercial Painting \$3,900,000 in punitive damages. The Chancery Court awarded interest and fees and entered judgment for Commercial Painting in the total amount of \$8,359,863.83.

Weitz and its sureties appealed the Chancery Court's judgment. As relevant here, Weitz and its sureties argued that the economic loss doctrine barred the misrepresentation claim as a matter of law. They also challenged the jury's award of compensatory damages on the contract claim. Finally, they argued that Commercial Painting contractually waived any entitlement to punitive damages based on language in the agreement providing that the

parties were not liable for damages beyond the compensatory damages specified in the agreement.

The Court of Appeals reversed in part, affirmed in part, and vacated in part. *See Com. Painting Co. v. Weitz Co.*, No. W2019-02089-COA-R3-CV, 2022 WL 737468, at *1 (Tenn. Ct. App. Feb. 16, 2021), *rev'd in part*, 676 S.W.3d 527 (Tenn. 2023). As relevant here, the court held that the economic loss rule barred Commercial Painting's misrepresentation claim as a matter of law. *Id.* at *24. As a result, the court did not address any of the other issues on appeal concerning the misrepresentation claim. Moreover, although the Court of Appeals upheld the jury's award of compensatory damages on the contract claim, it held that Commercial Painting contractually waived any entitlement to punitive damages on that claim. *Id.* at *26. Because the Court of Appeals held that the economic loss rule barred Commercial Painting's misrepresentation claim, it did not expressly consider whether the contractual waiver also barred the punitive damages award to the extent it is premised on Weitz's intentional misrepresentations.

Commercial Painting filed an application for permission to appeal to this Court pursuant to Tennessee Rule of Appellate Procedure 11. We granted review on two issues: (1) whether the economic loss doctrine barred Commercial Painting's misrepresentation claim; and (2) whether the Court of Appeals erroneously vacated aspects of the fee award.

Ultimately, our Court reversed the Court of Appeals' application of the economic loss doctrine to bar Commercial Painting's misrepresentation claim. *Com. Painting Co.*, 676 S.W.3d at 540–41. Specifically, the Court held that the economic loss doctrine only applies in product liability cases and thus did not foreclose Commercial Painting's recovery of compensatory and punitive damages on its misrepresentation claim. *Id.* Because the Court's judgment essentially revived the punitive damages award to the extent it is based on Weitz's tortious conduct, the Court remanded for the Court of Appeals to consider "any pretermitted issues regarding the jury's award of punitive damages consistent with this opinion." *Id.* at 541. Our Court did not consider the second issue relating to fees because, after the Court's judgment, Commercial Painting was the only prevailing party. *Id.* at 542.

On remand, the parties vigorously disputed what issues were properly before the Court of Appeals. As relevant here, the Court of Appeals held that it could not consider whether Commercial Painting contractually waived any right to recover punitive damages based on its misrepresentation claim because that issue was outside the scope of this Court's remand. Specifically, the Court of Appeals concluded that it would be improper to consider the issue on remand because its prior opinion "extensively discussed" the contractual waiver and did not expressly pretermite the issue. *Com. Painting*, 2024 WL 4360219, at *5.

Weitz and its sureties seek this Court's review, arguing in relevant part that the

Court of Appeals misinterpreted the scope of our remand and, as a result, erroneously failed to consider whether Commercial Painting contractually waived entitlement to punitive damages on its misrepresentation claim. We agree.

This Court’s previous opinion remanded this case for the Court of Appeals to consider “any pretermitted issues regarding the jury’s award of punitive damages consistent with this opinion.” In this context, a “pretermitted” issue is one that a court purposely disregards because it can resolve the case on other grounds. *See, e.g., Pretermitt*, Black’s Law Dictionary (12th ed. 2024) (defining “pretermitt” to mean “[t]o ignore or disregard purposely,” as in “the court pretermitted the constitutional question by deciding the case on procedural grounds”). Consequently, when the Court of Appeals held that the economic loss doctrine barred Commercial Painting’s misrepresentation claim, it pretermitted Weitz’s argument that Commercial Painting contractually waived any entitlement to punitive damages based on that claim. Accordingly, our remand to consider “any pretermitted issues regarding the jury’s award of punitive damages” necessarily included Weitz’s pretermitted contractual waiver argument.

For these reasons, we conclude that the Court of Appeals misinterpreted this Court’s remand as barring consideration of whether Commercial Painting waived entitlement to punitive damages on its misrepresentation claim. We grant the application in part, vacate this aspect of the Court of Appeals’ opinion and judgment, and remand the case to the Court of Appeals for further consideration consistent with this Order. We express no opinion on the merits of the parties’ underlying arguments and deny review of the other issues presented in the Rule 11 application. The costs of this appeal are taxed to Commercial Painting, for which execution may issue if necessary.

This Order is designated for publication pursuant to Tennessee Supreme Court Rule 4.

PER CURIAM