IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

COMMERCIAL PAINTING COMPANY, INC.,	)	Supreme Court No. W2019-02089-SC-R11-CV
Plaintiff/Appellant,	)	Court of Appeals No. W2019-02089-COA-R3-CV
v.	)	Shelby County Chancery Court No. CH-06-1573-3
THE WEITZ COMPANY, LLC; FEDERAL INSURANCE COMPANY; and ST. PAUL FIRE & MARINE INSURANCE CO.,	)	
Defendants/Appellees.	)	

BRIEF OF *AMICI CURIAE* ASSOCIATED GENERAL CONTRACTORS OF AMERICA AND ASSOCIATED GENERAL CONTRACTORS OF TENNESSEE, INC.

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I. IDENTITY AND STATEMENT OF INTEREST

AGC is a nationwide construction trade association headquartered in Arlington, Virginia. AGC was founded in 1918, primarily for the purpose of improving communication with and among the construction firms that would be, and today remain, critical to the country's economic growth and development. AGC is widely regarded as the voice of the United States construction industry.

AGC is comprised of 89 chapters, located in all 50 states plus Puerto Rico. Despite its name, AGC's membership is not limited to general contractors. AGC's membership includes approximately 27,000 members, of which approximately 7,000 are general contractors (like Weitz) or construction managers; approximately 9,000 are specialty contractors (which typically operate as subcontractors, as Commercial Painting did here); and approximately 11,500 are service providers (e.g., law firms, accounting firms, insurance and bonding companies, and brokers) or suppliers that provide services, equipment, materials, and products to the construction industry.

AGC's members construct both public and private buildings, such as courthouses, schools, offices, apartments and senior living

communities, hospitals, laboratories, shopping centers, factories, and warehouses. They also construct infrastructure and public works projects, including highways, bridges, tunnels, dams, airports, industrial plants, pipelines, power lines, and both clean and wastewater facilities.

AGC-TN is one of AGC's 89 chapters and is proud to serve the great State of Tennessee. The chapter's members include general contractors, joint ventures, specialty contractors, emerging contractors, and associate firms dedicated to skill, integrity, and responsibility in the construction industry and the construction process. AGC-TN is the leading statewide professional trade association representing the commercial construction industry in Tennessee.

AGC-TN provides a full range of services to address the needs and concerns of its members, and the industry, thereby improving the quality of construction and protecting the public interest. AGC-TN is headquartered in Nashville, but also has four branch offices located in West Tennessee, Middle Tennessee, Knoxville, and the Tri-Cities. AGC-TN supports initiatives – such as the filing of this *Amicus Curiae* Brief – that attempt to provide clarity, predictability, and sound policies for the construction contracting community in Tennessee.

II. STATEMENT OF THE ISSUE ADDRESSED

This Court agreed to review the Tennessee Court of Appeals' March 11, 2022 decision in this case solely with respect to two issues. This Brief will address the first of those: whether the Court of Appeals erred in applying this Court's holding in *Milan Supply Chain Solutions, Inc. v. Navistar, Inc.,* 627 S.W. 3d 125 (Tenn. 2021) ("***Milan***"), and expanding the application of the Economic Loss Doctrine to the circumstances of this case.

Amici Curiae **respectfully submit that the Court of Appeals' decision properly applied *Milan* and existing Tennessee law to the facts of this case and that to hold otherwise would be contrary to Tennessee law and would establish a harmful legal precedent and bad public policy.**

III. SUMMARY

This is a case of great significance to the construction industry in Tennessee and across the United States because it threatens to erode the very foundation upon which construction contracting is based: enforceable contract terms and conditions. If the Court of Appeals' decision is overturned and the Trial Court's decision is reinstated by this Court and adopted as the new law of Tennessee, a radical change in the

law will occur. A new and different legal precedent will determine whether construction contractors (and subcontractors of every tier) – and the suppliers, insurers, sureties, lenders, and other service providers who support and participate in the construction process – can trust and rely upon the contracts they must use to define the participants' rights and responsibilities and to allocate risks among the parties.

A broad range of risks is inherent in the construction of large, complex construction projects. Such projects typically require several dozen companies, including subcontractors at several tiers and each of their suppliers and service providers.

Many of the risks construction contractors must successfully evaluate and manage in order to survive – such as the risks of delay, defective materials, defective work, differing site conditions, and declines in productivity – are purely construction risks. Other risks fall into financial, environmental, legal, regulatory and other categories.

The fair and efficient allocation of these risks among the many participants in any one project – and the certainty and predictability that all participants require to price, plan, and perform their work – are critically dependent on a complex web of contractual arrangements

among, and interconnecting, the various project participants. These arrangements typically begin with a prime contract between the owner and the general contractor and then cascade down to subcontractors, at all tiers. The roles and responsibilities of the peripheral participants in the construction process – such as material and equipment suppliers, lenders, insurers, sureties, and other service providers – are also defined by contracts rather than being left to chance or to an *ad hoc*, after-the-fact determination.

The gravamen of the complaint in this case is, and has always been, a subcontractor's claim that a general contractor breached the terms of a detailed, written contractual arrangement between the

parties: the subcontract.[1] All of the obligations the general contractor in this case allegedly failed to satisfy are rooted in and are the product of that contractual arrangement, and have no independent source. But for the existence of that subcontract, those obligations would not exist. It follows that, stripped of its many trappings, this is a contract case.

In order to determine: (1) whether the general contractor fulfilled its legal obligations to the subcontractor, and (2) what remedies are available and appropriate if the general contractor failed to do so, a court should look to the subcontract between the parties, and should decline the Appellant's invitation to rummage through a Pandora's Box of non-

[1] Courts in Tennessee are often called upon to determine "the gravamen of a plaintiff's complaint (or individual claims within a complaint)" to, for example, determine which statute of limitations applies. *See, e.g., Benz-Elliott v. Barrett Enterprises, LP*, 456 S.W. 3d 140 (2015). This determination is made based, in part, on the nature of the relief sought. In this case, Commercial Painting sought purely economic damages, without any allegation of any personal injury or property damage. In fact, in its original Complaint, filed on August 11, 2006, Commercial Painting asserted only a breach of contract claim, without any tort claim or punitive damages claim. Commercial Painting first alleged tort claims, a claim for rescission of the subcontract, and a claim for punitive damages – based upon the same alleged facts "known" and asserted more than three years earlier in the original Complaint – when it amended its complaint for the first time on November 25, 2009. If and to the extent "the gravamen of Commercial Painting's complaint" is not a breach of contract claim, the three-year statute of limitations contained in Tenn. Code § 28-3-105 presumably would apply.

contractual claims, theories of recovery, and remedies, potentially converting commercial litigation to a high-stakes game of chance. Experienced contractors, such as the contractors who are parties to this case, recognize the risks inherent in commercial construction and address those risks in their contracts. Assuming those contracts are enforceable – which the parties here do not dispute – it is incumbent upon the courts to enforce those contracts.

Both general contractors and subcontractors require confidence in the contracts customarily used in the industry to define rights and responsibilities to set expectations and to allocate risks. Fortunately, existing Tennessee law recognizes and protects the sanctity and reliability of contracts. Existing Tennessee law also establishes and preserves the boundaries separating contract law and tort law through the Economic Loss Doctrine and the closely-related Independent Duty Rule.

The Trial Court allowed Commercial Painting to commingle and confuse separate and distinct legal theories of recovery, resulting in a judgment that was patently inconsistent on its face and clearly contrary to Tennessee law. Armed with the ability to carefully study and consider

this Court's *Milan* decision and the reasoning behind it before rendering its decision in this case, the Court of Appeals properly overturned the Trial Court's decision.

At the very heart of this case lie two ***alternative and inconsistent*** legal propositions:

1. That there ***was a binding contract*** between the parties which governs the parties' rights, responsibilities, and risks, as well as the remedies available; ***or***

2. That there ***was no binding contract*** between the parties, requiring and allowing the courts to look outside contract law for available legal theories of recovery and remedies.

An obvious problem with the jury's verdict and the Trial Court's decision in this case is that the jury and the Chancellor found ***both of these propositions to be true*** – an error which cannot be reconciled, justified, or ignored. The Trial Court entered a judgment in favor of Commercial Painting based upon multiple, intertwined, and ***inconsistent*** legal theories of recovery and remedies. The Court of Appeals properly corrected that.

Another troubling aspect of the Trial Court's decision in this breach of contract case – and another reason this Court should not reinstate it – is that it opened a portal for Commercial Painting to enter (in "Alice in Wonderland" fashion) the world of tort law, to obtain non-contractual and punitive damages barred by the subcontract, for alleged misrepresentations of the project schedule. Project schedules are an essential tool used by experienced general contractors to plan and manage complex commercial construction projects in order to perform projects as quickly, efficiently, and economically as possible, for the benefit of *all* parties, in accordance with the Contract Documents and without sacrificing quality. To the extent project schedules reflect work already performed ("As-Built Schedule Data"), they cannot, however, mislead active project participants, as the status of the existing work is plain for them to see for themselves. And, to the extent project schedules set forth a plan for going forward ("As-Planned Schedule Data"), they are, by definition, forward-looking, aspirational documents. Thus, project schedules cannot provide an essential element of the tort of misrepresentation: the misrepresentation of a ***prior or existing fact.*** *Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 311 (Tenn.

2008); *McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127, 130 (Tenn. Ct. App. 1982).

In addition, it appears to the *Amici* that the Record in this case provides no proof of at least two additional essential elements of intentional or negligent misrepresentation under Tennessee law: (1) justifiable reliance upon a misrepresentation and (2) damages that proximately resulted therefrom. *Id.* In fact, it appears that: (1) Commercial Painting's principal testified at trial that he had no use for the project schedules Weitz issued and *did not read or rely upon them*; and (2) Commercial Painting tendered no proof of any damages other than the purely economic losses it allegedly suffered as a result of Weitz's alleged breach of contract. Indeed, it appears that the only evidence of compensatory damages offered at all was this evidence of economic losses/contract damages, which the jury and the Chancellor awarded on every Count. Therefore, it seems irrefutable, in this case, that the Trial Court simply allowed Commercial Painting to circumvent the parties' subcontract by tacking on special tort remedies without any evidence that a tort had occurred.

AGC does not support or condone fraud or deceptive business practices. In fact, AGC is dedicated to promoting its core principles of skill, integrity, and responsibility in the construction industry, as AGC's logo reflects. But, it does not appear to the *Amici* that any fraud occurred here, and the *Amici* strongly disagree that affirming the Court of Appeals' decision would "promote fraud," as Commercial Painting contends in Section III.B.5 of its Reply Brief. Rather, this case bears all the hallmarks of a simple contract dispute, much like the majority of disputes that, unfortunately, arise from time to time in the construction process, despite the best intentions of the parties.

If this Court reverses the Court of Appeals' decision in this case, the resulting precedent will deprive contracting parties and other participants in the construction process of the confidence and certainty they require in their contractual arrangements and will materially change Tennessee law. The unintended consequences could well include great harm to AGC's and AGC-TN's members, to the construction industry they serve, to commerce in this state, and to the State of Tennessee as a whole.

It is well-known that Tennessee is currently experiencing robust construction activity, with a number of massive, important construction projects currently planned or underway across the state. And, significant federal funding is also now available under the federal Bipartisan Infrastructure Act to make much-needed infrastructure improvements on a rapidly accelerated basis. It is no exaggeration to say that a bad decision in this case could adversely affect that construction activity by making it economically unfeasible, or, at a minimum, more expensive, resulting in fewer improvements being accomplished for more dollars.

Reinstating the Trial Court's decision would also leave contractors wondering what they can and should do to manage their risks, if they elect to continue to pursue and perform work in Tennessee at all. At a minimum, it is reasonable to assume that such a legal precedent would increase construction, financing, and bonding costs in Tennessee and make it more difficult for small subcontractors to obtain work in the future. So, by helping one subcontractor achieve a windfall jackpot, this Court would cause serious harm to subcontractors as a whole.

Finally, the issue now before this Court begs the question: is there any legal, logical, or public policy reason why construction contractors

should not be afforded the same protections and safeguards as other commercial entities? No prior decision by this Court has held that the Economic Loss Doctrine does not apply in a construction setting. And there is no logical reason it should not. In fact, the courts of many states have specifically addressed this issue and have ruled that it does. *See, e.g., LAN/STV v. Martin K. Eby Construction Co., Inc.*, 435 S.W.3d 234, 248 (see especially the lengthy quote at 435. S.W. 3d 248, quoted in part at p. 47 of Appellees' Brief, discussing why construction disputes are especially appropriate for the application of the Economic Loss Doctrine). (Tex. 2014); *Flagstaff Affordable Hous. Ltd. P'ship v. Design Alloy,* 233 p. 3d 664 (Ariz. 2010).

In *Milan,* this Court held that a seller of commercial trucks, alleged to have fraudulently induced a commercial trucking company to enter into multiple contracts to purchase trucks the defendant knew to be defective, was not liable for punitive damages based upon the Economic Loss Doctrine. To hold that the Court of Appeals erred in applying the holding in *Milan* and the Economic Loss Doctrine to this case would, in effect, tell commercial contractors that they cannot rely upon their contracts governing the furnishing of labor, materials, equipment, and

services, and are not entitled to the same safeguards, or treated with as much dignity and respect, in this state as sellers of trucks, or, by logical extension, the proverbial "used car salesman". **How could such a holding *not* cause a contractor to think twice about performing work in this state?**

In an effort to deprive Weitz of the protections agreed to by the parties in the subcontract and afforded by the Economic Loss Doctrine, Commercial Painting states emphatically, on page 10 of its Reply Brief, that "the subcontract in this case ***is a contract for services***" (emphasis in original), suggesting that is dispositive of this case and precludes the application of *Milan*. Why should the Economic Loss Doctrine apply to a sale of products, but not to a sale of services? There seems to be no logical reason for such a distinction.

Furthermore, even if such a distinction is to be made, that still would not preclude the application of the Economic Loss Doctrine to this case. In reality, most commercial construction subcontracts require the subcontractor to provide labor, materials (i.e., products), equipment, ***and*** services. And, that was clearly the case here. See Trial Exhibit 94 (which states, in Exhibit A, that Commercial Painting's scope of work included providing materials and equipment); and Commercial Painting's Job

Cost History, Trial Exhibit 218 (which indicates, on p. 22, that more than $1.4 million of its $2.5 million in total job costs – i.e., more than half – was for providing materials incorporated into its work).

IV. AUTHORITIES AND ARGUMENT

A. Contracts Must Govern Contracting Parties' Rights And Responsibilities In Order To Preserve The Sanctity And Reliability Of Contracts And Protect Contracting Parties' Expectation Interests

As noted in Appellees' Brief, construction contractors are called "contractors" for a reason – their roles, relationships, rights, and responsibilities on a construction project are defined by their contracts. Construction contracts are also used as vehicles for allocating the risks inherent in the construction process among the various project participants. Construction is a risky business, and contractors operate on relatively small profit margins. Surveys indicate that commercial and industrial general contractors average approximately 3% net profit before taxes, while specialty contractors average a little higher (but still single digit). *See, e.g.,* CFMA's 2019 Construction Financial Bench Marker Online Questionnaire Results, CFMA.org. Tennessee courts have recognized that construction contracting is, by its very nature, a risky business. *Purcell Enterprises v. State,* 631 S.W.2d 401 (Tenn. Ct.

App. 1981). Under Tennessee law, contracting parties are free to allocate those risks between themselves as they see fit. *Brown Bros. Inc. v. Metro Gov't of Nashville & Davidson Cty.*, 877 S.W.2d 745, 749 (Tenn. Ct. App. 1993). The litigants here did that.

It is, imperative that contractors be able to identify, assess, quantify, price, and manage their risks in order to survive. Contractors rely upon the sanctity and predictability of contracts to: (1) establish, communicate, and memorialize the parties' expectations; (2) anticipate and allocate risks; (3) decide whether to take on a particular project, to do business with a particular company, or to pursue work in a particular jurisdiction; and (4) price their work.

The Tennessee Legislature and Tennessee Courts have long recognized the importance of parties' freedom of contract, the need to ensure that contracting parties can rely upon the terms of the contracts they negotiate and execute, and the critical role contracts play in commerce in this state.

For example, Tenn. Code Ann. § 47-50-112(a) provides as follows: "All contracts . . . shall be prima facie evidence that the contract contains the true intention of the parties, and shall be enforced as written;

provided, that nothing herein shall limit the right of any party to contest the agreement on the basis it was procured by fraud or limit the right of any party to assert any other rights or defense provided by common law or statutory law in regard to contracts." As ultimately presented to the jury, there was no allegation in this case that the Subcontract was unenforceable because either party fraudulently induced the other to enter into it or on any other grounds. Rather, the parties stipulated that a binding subcontract existed, and relied upon it in formulating their claims and defenses. Therefore, the Subcontract should be enforced – not used as a launching pad for other, non-contractual claims.

Contracts are especially critical in the context of a complex, multi-party commercial construction project, where contracts are the conduit that interconnects the various project participants. *See, e.g.,* Carl J. Circo, *Placing The Commercial And Economic Loss Problem In The Construction Industry Context*, 41 J. Marshall L. Rev. 39 (2007); Carl J. Circo, *Contract Theory and Contract Practice: Allocating Design Responsibility in the Construction Industry*, 58 Fla. L. Rev. 561 (2006). The earlier of these two law review articles written by Professor Circo

addresses the importance of contract law in the construction setting, particularly for purposes of risk allocation. The author notes:

> A construction project provides an especially apt forum for a comprehensive contractual approach to risk allocation. Design professionals, general contractors, trade contractors, suppliers, manufacturers, insurers, sureties, and others in the construction industry all assume specific risks for fees. Short-term profit on any specific construction project, and often long-term success in the industry, depends on the participant's ability to predict the costs of performance, which in turn requires a comprehensive and objective inventory of contractual activities, responsibilities, and risks.

Id. at 619.

Tennessee Courts also have long recognized that contracts are presumed to represent the intent of the parties and, therefore, should be enforced as written, even if that may lead to a harsh result. *Petty v. Sloan*, 277 S.W.2d 355, 359 (Tenn. 1955) (stating: "It is the function of a court to interpret and enforce contracts as they are written, notwithstanding the possibility that they may contain terms which may be thought harsh and unjust. A court is not at liberty to make a new contract for parties who have spoken for themselves." (citing *Smithart v. John Hancock Mutual Life Ins. Co.*, 71 S.W.2d 1059, 1063 (Tenn. 1934))); *Kafozi v. Windward Cove, LLC*, 184 S.W.3d 693, 700 (Tenn. Ct. App.

2005) (stating: "In the absence of fraud or mistake, a contract must be interpreted and enforced as written even though it contains terms which may be thought to be harsh or unjust . . . While this may not be the result this Court would prefer, it is the result mandated by the law and the evidence." (citing *Tenpenny v. Tenpenny*, No. 01A01-9406-CV-00296, 1995 WL 70571, at *6 (Tenn. Ct. App. Feb. 22, 1995))).

When parties to a lawsuit are in contractual privity, courts must look to contract law to determine their obligations to one another, as well as their available rights and the remedies. *Williams v. SunTrust Mortg., Inc.*, No. 3:12-CV-477, 2013 WL 1209623, at *4 (E.D. Tenn. Mar. 25, 2013) (stating: "[W]hen two parties enter into a contractual agreement, their obligations to each other arise out of the contract itself, so that a violation of the contractual duty supports an action in contract rather than in tort."); *Grona v. CitiMortgage, Inc.*, No. 3-12-0039, 2012 WL 1108117, at *3 (M.D. Tenn. Apr. 2, 2012) (stating: "Where two parties enter into a contractual arrangement, their obligations to each other generally arise only out of the contract itself . . . If the only source of duty between a particular plaintiff and defendant is their contract with each other, then

a breach of duty, without more, ordinarily will not support a negligence claim.").

Even the goals of the remedies available under contract law and tort law are different. *See* Tenn. Prac. Contract Law and Practice § 1:4 (2020). As this article states:

> From a policy perspective, moreover, tort law and contract law have fundamental differences. Tort duties protect individuals from the risk of harm to their persons or property. These duties stem from the reasonable expectations of parties and of society; the need to guard against the possible proliferation of claims and the likelihood of unlimited defendants' liability; concerns over disproportionate defendant risk; reparations allocation; and public policy, all without regard to an agreement or bargain between the parties. Contract obligations, by comparison, arise from promises or agreements between parties. Contract law protects expectancy interests (or related ones such as interests in restitution or reliance) created by the parties' commitments, so that the parties may allocate risks and costs while bargaining. In forming their contract, rational economic actors, who transact their business (usually) at arm's length, can address the potential for a party's nonperformance.

Id.

It appears to the *Amici* that the contractors in this case actively negotiated a comprehensive, integrated subcontract, which anticipated and addressed the potential circumstances, contingencies, and risks that

ultimately came to pass on this Project. This is typical of the prime contracts and subcontracts commonly used and relied upon in the commercial construction industry. Those provisions include provisions governing any changes to the scope of the subcontractor's work; provisions relating to the project schedule and change thereto; and provisions by which the parties agree to limit the recoverable damages.

The Trial Court in this case erred by failing to recognize that Commercial Painting's rights and remedies against Weitz both began and ended with the Subcontract. The Court of Appeals rectified that oversight by enforcing the Subcontract. If this Court reverses the Court of Appeals, it will erode the very foundation upon which construction contracting is built and upon which contractors must rely: the parties' contracts.

B. The Trial Court Erred By Allowing Commercial Painting To Recover Damages Based Upon Commingling And Contaminating Alternative And Inconsistent Theories of Recovery And Remedies, Requiring Reversal By The Court of Appeals

Somehow, Commercial Painting, in this case, persuaded the jury ***and*** Chancellor Jenkins to award it damages which: (1) were based upon ***both*** the premise that a binding contract existed between the parties and

the premise that no binding contract existed; and (2) included ***both*** damages recoverable only if there was a binding contract and damages that would be recoverable only if there was not. It is difficult to imagine a jury verdict and final judgment which are any more clearly flawed than the jury verdict and final judgment rendered in this case.

Ultimately, Chancellor Jenkins should have required Commercial Painting to choose between: (1) a breach of contract claim, entitling Commercial Painting to any damages recoverable under the subcontract for a breach thereof, but no non-contractual damages (as such are precluded by both the terms of the subcontract and the Economic Loss Doctrine), ***or*** (2) rescission of the subcontract and recovery under a theory of unjust enrichment/*quantum meruit* or in tort (assuming all of the requisite elements, including justifiable reliance and resulting damages, were proven).

Instead, Commercial Painting elected ***not*** to submit its claim for rescission to the jury and presented only its contractual damages – the exact same damages presented in the initial (bench) trial. But, Commercial Painting also asserted claims for unjust enrichment/*quantum meruit* and misrepresentation, seeking the exact

same contract damages, ***plus*** non-contractual and punitive damages as well.

By rendering a verdict in favor of Commercial Painting on ***all*** of these theories of recovery and granting ***all*** forms of relief sought, the jury, in effect, held that both of the fundamental propositions at the heart of the case, although mutually exclusive, were true: i.e., there both was a binding contract between the parties and there was not. By signing the proposed Final Order of Judgment written and presented by Commercial Painting's counsel, Chancellor Jenkins not only failed to correct this obvious error by the jury, but approved and compounded it. And, in so doing, the Trial Court violated both the Economic Loss Doctrine and other well-settled Tennessee legal principles as well.

As it turns out, Chancellor Kenny Armstrong, who presided over the initial (bench) trial in this case, was absolutely correct in predicting that Commercial Painting would be unable to prove that it had: (1) justifiably relied on any misrepresentations by Weitz with regard to the Project schedule, or (2) suffered any damages as a proximate result of any alleged misrepresentation that were different than or in addition to the economic losses allegedly incurred due to the alleged breach of the

subcontract. While the appellate courts, in their rulings following the initial trial in this case, determined that Commercial Painting was "entitled to its day in court" on its non-contractual claims, it was incumbent upon Commercial Painting, when given its "second bite at the apple", to prove its case. Commercial Painting only proved a breach of contract case. **This case vividly demonstrates why the Economic Loss Doctrine is needed.**

C. The Court of Appeals Correctly Applied The Economic Loss Doctrine To This Case

The Economic Loss Doctrine is a well-established legal principle of Tennessee law, designed to preserve the boundaries between contract and tort law and to prevent contract law from drowning in a sea of torts. *Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc.*, 131 S.W.3d 457, 465 (Tenn. Ct. App. 2003). Admittedly, the Economic Loss Doctrine – despite being well-established – is not the most well-understood and consistently-applied of legal principles. The effect and scope of the doctrine, as well as the apparent inconsistency in the way the doctrine is understood and applied by various courts and states, can be attributed, in part, to a failure to expressly recognize that the doctrine applies to two completely different circumstances, which require different treatment:

(1) to preclude a party from recovering purely economic losses (in the absence of any personal injury or property damage) ***when no contract exists between the parties*** and (2) to limit the recovery of economic losses to those recoverable under the terms of the contract ***when a contract does exists between the parties***. Although not expressly stated in many of the reported decisions addressing the Economic Loss Doctrine in Tennessee and other states, recognizing this fundamental distinction reconciles many court decisions which would otherwise appear to conflict.

This distinction is critical and lies at the very foundation of the Economic Loss Doctrine, given that it is universally recognized that the purpose of this doctrine is to preserve the boundaries between contract law and tort law, as noted above. Obviously, where ***no contract exists between the parties***, tort law governs; and, in many states, purely economic damages cannot be recovered in tort when there has been no personal injury or property damage. And, conversely, ***when a contract does exist between the parties***, the court must look to the terms of that contract and to contract law in order to determine the parties' rights and responsibilities, including the damages recoverable for a breach of the contract.

This case illustrates why the second prong of the Economic Loss Doctrine (where there is a contract between the parties) exists. In looking at Commercial Painting's list of grievances against Weitz, it is clear that all of the obligations which Commercial Painting alleges Weitz breached are obligations which would not have existed but for the fact that Weitz entered into a written, binding subcontract with Commercial Painting to perform the drywall work on the subject Project. Dissatisfied with the remedies afforded by the subcontract and the resulting outcome of the first trial in this case, Commercial Painting presented the same facts and the same damages to a jury and dual-branded its case as both a contract case and a tort case (and a *quantum meruit* case, as well).

It further appears that Commercial Painting sufficiently confused the jury and the Trial Court as to the governing Tennessee law to obtain a jury verdict, and ultimately a final judgment, in *both* tort and contract. Further, the compensatory damages awarded by the jury under each count were in the exact same amount and were based upon the same obligations and the same evidence. Commercial Painting then managed to parlay that into a windfall recovery of $3.9 million in punitive damages ***despite*** the fact that:

1. This was, in reality, a breach of contract case;

2. There appears to have been no evidence of any egregious conduct on Weitz's part; and

3. It appears to be undisputed that, far from being taken advantage of by Weitz, Commercial Painting actually made a substantial profit on the Project.

Tennessee courts have long held that, *where a contract does exist between the parties*, the remedy for a party's purely economic losses is governed by contract law (and the terms of the contract) and tort remedies do not apply. *Messer, id.*

In 2019, the Court of Appeals, in the *Milan* case, reversed a jury's $20 million punitive damages award against a truck manufacturer based upon the Economic Loss Doctrine. *Milan Supply Chain Sols., Inc. v. Navistar Inc.*, No. W2018-00084-COA-R3-CV, 2019 WL 3812483 (Tenn. Ct. App. Aug. 14, 2019), *appeal granted* (Jan. 16, 2020). The Court of Appeals' decision in *Milan* case contains a good discussion of the Economic Loss Doctrine, as recognized in Tennessee, as well as the purpose of the doctrine. After granting permission to appeal, this Court, in its well-reasoned *Milan* decision, agreed with the Court of Appeals that

the Economic Loss Doctrine applied. The logic applied by this Court in *Milan* applies equally, if not more, to the facts of this case. Courts in other states have arrived at the same holding and rule of law, and have done so in the context of construction contracts. *See, e.g., Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282 (Colo. App. 2009).

In an effort to cling to its jackpot winnings, Commercial Painting seizes upon and embellishes a phrase on page 1 of this Court's decision: "a contract between sophisticated commercial parties". Having devoted considerable effort to demonstrating to the jury, the Chancellor, and the Court of Appeals how "sophisticated", smart, and experienced it is (a representation Commercial Painting also makes on its company website: hhtp://www.commercialpaintingcompany.com), Commercial Painting now seeks to declare itself "unsophisticated" and further suggest that a party to a commercial contract is not sophisticated unless it has "bargaining power" at least equal to that of the other contracting party. This argument defies logic and is inconsistent with the record in this case.

Both Weitz and Commercial Painting are experienced commercial contractors. Even assuming that a party's "sophistication" and

"bargaining power" are characteristics that can be measured, to suggest that a commercial contract is enforceable against the larger company, but not the smaller one, is illogical and would wreak havoc on commerce. Both parties had the power to walk away from the relationship if they were not satisfied with the subcontract's terms. But, the record clearly indicates that: (1) neither did, (b) the subcontract terms (including the subcontract price) were heavily negotiated by the parties, and (c) Commercial Painting ultimately elected to enforce the subcontract, rather than seek its rescission.

While this Court knows best what this phrase ("sophisticated commercial parties") was meant to convey, it seems that this Court simply meant that this was a commercial contract between parties that regularly engage in this type of work, rather than a contract with an individual, non-commercial consumer, to whom Tennessee law affords special protections.

Tennessee courts also recognize a rule of law that is closely akin to the second prong of the Economic Loss Doctrine: the Independent Duty Rule. *E Solutions for Buildings, LLC v. Knestrick Contractor, Inc.*, No. M2018-02028-COA-R3-CV, 2019 WL 5607473, at *9 n.7 (Tenn. Ct. App.

Oct. 30, 2019) (in which the Tennessee Court of Appeals held that a tort action arises between contracting parties only when the act complained of constitutes a breach of a common law duty that exists independent of the contractual relationship between the parties).

Because all of the obligations that Commercial Painting alleged Weitz breached are obligations that arose from the written Subcontract between the parties and that would not have existed but for the existence of that Subcontract, the Independent Duty Rule also bars Commercial Painting's recovery of non-contractual damages. *H & M Enterprises, Inc. v. Murray*, No. M1999-02073-COA-R3-CV, 2002 WL 598556, at *3 (Tenn. Ct. App. Apr. 17, 2002) (in which the Tennessee Court of Appeals held that a claim for the intentional tort of conversion was barred because it was predicated on the general contractor's alleged failure to pay its subcontractor in accordance with the terms of the subcontract).

Because Commercial Painting's allegations of misrepresentations appear to rest primarily, if not exclusively, upon plans for completing future work, as reflected in the Project schedule, the decision of the United States Court of Appeals for the Fifth Circuit (applying Texas law),

which is discussed at pages 70-72 of Appellees' Initial Brief in the Court of Appeals, although not controlling, is particularly instructive.

In *Crawford Painting & Drywall Co. v. J.W. Bateson Co., Inc.*, 857 F.2d 981 (5th Cir. 1988), the Court held – on facts remarkably similar to this case in many respects – that the subcontractor's tort claims were barred because the general contractor's scheduling obligations were based upon the subcontract between the parties.

Project schedules are a common feature of most, if not all, complex commercial construction projects. But everyone involved in the construction process also understands that project schedules are primarily forward-looking forecasts and plans – and not guarantees of future results. Like weather forecasts, project schedules change as circumstances change and as unexpected events occur. Unfortunately, it is common on large, complex construction projects, which have many moving parts, for things to not go as planned and for unanticipated delays to occur. While it would be a mistake for a contractor to fail to plan and schedule the work on a project, it would be equally foolish to assume that everything will go as planned and as scheduled. In fact, the number of factors that can affect how long it takes to complete a construction project

and what it will cost, and the unpredictability and uncontrollability of many of those variables, largely account for why construction is such a risky business.

D. Unintended And Adverse Consequences Would Result If The Court of Appeals' Decision Is Reversed

If this Court decides to reverse the Court of Appeals' decision in this case, and thereby send a message to the construction industry and others engaged in commerce that contracting parties in Tennessee can no longer rely upon their commercial contracts, contractors and other businesses will face some hard decisions, for example:

1. Whether to continue to work in Tennessee at all; and
2. If so, how to price and manage the additional risks they would face.

If a contractor cannot rely upon the contractual arrangements that exist, predictability and certainty would be destroyed.

As noted above, construction is, by its very nature, a risky business, not suitable for the faint of heart. To succeed in the construction business, a contractor cannot ignore those risks. Rather, in order to succeed, a contractor **must be able to:**

1. Identify the risks inherent in the construction process, including the risks unique to each individual project it undertakes;

2. Evaluate and assess those risks;
3. Use the contracts which define each party's role, rights, and responsibilities as vehicles for allocating those risks among the various project participants (often by placing each risk on the party in the best position to control that risk);
4. Determine how to price its services so as to account for those risks, without including such a large contingency in its contract price that the owner or the upstream party (e.g., the general contractor, in the case of a subcontract) does not elect to use someone else to perform the work because the contractor's price is too high; and
5. Proactively manage those risks through sound contract administration and project management practices.

If the construction industry can no longer rely upon construction contracts to define, quantify, and limit a party's risks, that would have a detrimental effect on contractors, their employees and vendors, and the Tennessee companies and citizens who use their services. While that may not be this Court's intent – and presumably was not the Trial Court's intent either – it would be a likely consequence of a decision to reverse the Court of Appeals.

E. Reversing The Court of Appeals' Decision Would Create New Tennessee Law That Is Contrary To Tennessee's Sound Public Policy

Under Tennessee law, it is entirely appropriate for a court to consider Tennessee public policy and the practical ramifications of the precedent it will establish in arriving at its decision in a case, and Tennessee appellate courts often do. See., e.g. *John Kohl & Co. P.C. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998); *Blackwell v. Sky High Sports Nashville Operations, LLC*, 523 S.W.3d 624 (Tenn. Ct. App. 2017); *Riggs v. Wright*, 510 S.W.3d 421 (Tenn. Ct. App. 2016); *Main Street Mkt., LLC v. Weinberg*, 432 S.W.3d 329, 340 (Tenn. Ct. App. 2013).

Tennessee case law also establishes that, where the Tennessee Legislature has not pronounced, or provided any guidance regarding, the applicable Tennessee public policy, it is appropriate for courts to do so themselves.

Hyde v. Hyde, 562 S.W.2d 194 (Tenn. 1978) addresses Tennessee courts' right to consider public policy in arriving at their decisions. Basically, public policy is no more and no less than what is believed by the courts and the Legislature to be the best interests of the citizens of the state. "The public policy of a state is to be found in its constitution,

its statutes, and the decisions of its courts. Primarily, it is for the legislature to determine the public policy of the state, and if there is a statute that addresses the subject in question, the policy reflected therein must prevail." *Id.* at 196.

Hanover v. Ruch, 809 S.W.2d 893 (Tenn. 1991) also acknowledges the courts' right to act on public policy when the Legislature has not acted, stating: "Finally, where the legislature has not acted, we have not hesitated to abolish obsolete common-law doctrines. Indeed, we have a special duty to do so where it is the Court, rather than the legislature, which has recognized and nurtured the action." *Id.* at 896.

In *Crawford v. Buckner*, 839 S.W.2d 754 (Tenn. 1992), the Tennessee Supreme Court applied Tennessee public policy considerations to extend the protection afforded by a statute (which was not applicable) more broadly than the Tennessee Legislature did in enacting the statute. A tenant lived in a county where TURLTA (i.e. an Act governing lease contracts between landlords and tenants) was inapplicable because the Act only applied in the most populous counties in the state. A clause exculpating the landlord from any liability for his own negligence was included in the lease. Such clauses are not permitted

under TURLTA in the counties to which it applies. When adopting TURLTA, the Tennessee Legislature made no express decision regarding the enforceability of exculpatory clauses in counties not covered by the Act. The court held that all exculpatory clauses in standardized Landlord/Tenant Lease contracts were invalid in *all* counties in Tennessee. "However, where there is no declaration in the constitution or statutes, and the area is governed by common law doctrines, it is the province of the courts to consider the public policy of the state as reflected in old, court-made rules." *Id.* at 759.

And, in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the Supreme Court of Tennessee overturned the traditional contributory negligence rule and adopted modified comparative fault as the new law of the state. The court cited "justice" as a basis for its decision to adopt the doctrine, rather than waiting for the Tennessee Legislature to act. "Justice simply will not permit our continued adherence to a rule, that in the face of judicial determination that others bear primary responsibility, nevertheless completely denies injured litigants recompense for their damages." *Id.* at 56. "[O]ur abstinence would sanction a 'mutual state of inaction in which the court awaits action by the legislature and the

legislature awaits guidance from the court,' . . . thereby prejudicing the equitable resolution of conflicts." *Id.* (quoting *Alvis v. Ribar*, 421 N.E.2d 886, 896 (Ill. 1981)).

It is clear from the legal authority discussed above that this Court can and should consider Tennessee public policy promoting freedom of contract, the sanctity of contracts, and the need to promote commerce by preserving predictability and reliability. And, it is equally clear, under the facts of this case, that a decision reversing the Court of Appeals' decision in this case would be contrary to Tennessee's sound public policy and the state's and its citizens' best interests. The legal precedent which would result from reinstating the Trial Court's decision could have dire consequences, not just for Weitz, but potentially for all general contractors, sureties, insurers, owners, developers, governmental entities, and lenders performing construction work or providing construction-related services, materials, and equipment in Tennessee, and perhaps in other states as well. It could also adversely impact commerce in the State of Tennessee by introducing great uncertainty and additional risk and costs by depriving contracting parties of their ability

to rely upon the commercial contracts, transactions, and relationships into which they enter.

V. CONCLUSION

For these reasons, AGC and AGC-TN respectfully urge this Honorable Court to affirm the Court of Appeals' decision applying this Court's holding in *Milan* and the Economic Loss Doctrine to this case, thereby enforcing existing Tennessee law, reinforcing the sound public policy of Tennessee, protecting contracting parties' freedom of contract, and protecting contracting parties' expectation interests.

Respectfully submitted this 19th day of October, 2022.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the requirements of Rules 27, 29, 30, and 31 of the Tennessee Rules of Appellate Procedure, including the word limitations contained in Rule 30(e). According to the word count generated by the word processing system used to prepare this Brief, the Brief (excluding the Title/Cover page, Table of Contents, Table of Authorities, Certificate of Compliance, Attorney Signature Block, and Certificate of Service) consists of 7,327 words. The Brief also complies with all other applicable rules and requirements.

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CERTIFICATE OF SERVICE

Counsel for *Amici Curiae* Associated General Contractors of America and Associated General Contractors of Tennessee, Inc. hereby certifies that, on this 19th day of October, 2022, true copies of the foregoing Brief of *Amici Curiae* Associated General Contractors of America and Associated General Contractors of Tennessee, Inc. have been emailed to the following counsel of record in this case:

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