Appeal No. SC88325

---

IN THE MISSOURI SUPREME COURT

---

NEAL CLEVENGER AND MITSUE CLEVENGER,

Plaintiffs-Respondents

vs.

OLIVER INSURANCE AGENCY, INC.

Defendant-Appellant.

---

ON TRANSFER FROM THE MISSOURI COURT OF APPEALS FOR THE WESTERN DISTRICT

---

# SUBSTITUTE BRIEF OF APPELLANT

---

ORAL ARGUMENT REQUESTED

---

Hal D. Meltzer No. 38531
Michael S. Cessna No. 39201
Baker Sterchi Cowden & Rice
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108
(816) 471-2121 (Fax) (816) 472-0288

Attorneys for Defendant-Appellant
Oliver Insurance Agency, Inc.

## TABLE OF CONTENTS

## TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

### Missouri Decisions

**Federal Decisions**



**Other State Decisions**



**Statutes**



**Other Authorities**

## JURISDICTIONAL STATEMENT

Defendant/Appellant Oliver Insurance Agency, Inc. ("Oliver Insurance") appeals a judgment of the Circuit Court of Jackson County in favor of Plaintiffs/Respondents Neal S. Clevenger and Mitsue I. Clevenger (collectively "the Clevengers") on causes of action for negligence and promissory estoppel. This appeal was, therefore, within the general jurisdiction of the court of appeals under Missouri Revised Statute section 512.020 and article V, section 3 of the Missouri Constitution. Pursuant to article V, section 10 of the Missouri Constitution, this Court has jurisdiction of this appeal under its May 1, 2007, order of transfer after an opinion by the court of appeals

## STATEMENT OF FACTS

### A. Facts Relevant to the Questions Presented for Determination

Oliver Insurance is an insurance agency that places insurance policies with certain insurance companies on behalf of businesses and individuals. (Tr. p. 264, ls. 1-16) The agency provides retail insurance services, that is, it sells insurance policies that are issued by various insurance companies. (Tr. p. 264, ls. 1-6; p. 269, ls. 5-7) There are certain forms of insurance, such as pollution liability coverage, for which Oliver Insurance must make a request to an insurance broker to place the insurance policy with an insurance company. (Tr. p. 269, ls. 8- 16; Tr. p. 264, ls. 328, ls. 11 -23; p. 376, ls. 1 - 11)

The Clevengers are the owners of an equestrian park for which they had purchased from Oliver Insurance a general liability insurance policy. (Tr. p. 264, ls. 17 – 24) On August 22, 2000, the Clevengers received a letter from Ruth Lehr, an attorney who represented the Jungermans, who are the owners of property that is adjacent to the

equestrian park, on which there is a small lake ("Elm Lake"). Lehr stated that run-off was flowing from the Clevenger's horse stable and that the run-off had caused the lake to become contaminated with fecal coliform bacteria. She stated that the Jungermans intended to "take appropriate action to recover his past damages and expenses" and to abate the stable run-off. (Defendant's Tr. Ex. 244A; *see also* Tr. p. 531, ls. 1-13; Appendix pp. A1-2) In an October 27, 2000, letter, Clevenger assured Lehr that he would provide her with a response. (Tr. p. 532, ls. 9 -15; pg. 967, ls. 1 – 11; p. 968, ls. 1-3) He did not, however, do so during the remaining months of 2000. (Tr. p. 968, ls. 18 – 24) He considered "the allegations in [Lehr's] letter [to be] bogus." (Tr. p. 708, ls. 22 - 23)

Sometime in October of 2000, however, Neal Clevenger contacted Bill Adams, an insurance agent at Oliver Insurance who for many years had been one of Clevenger's insurance agents, to inquire about the availability of pollution liability insurance. (Tr. p. 312, ls. 16 – 19; Tr. p. 527, ls. 24-25; pg. 528, lines 1-3; p. 538, ls. 16-21; p. 548, ls. 16-17; p. 700, ls. 12 -15) Clevenger did not apprise Adams about Jungerman's demand. (Tr. p. 314, ls. 17 – 24; Tr. p. 701, ls. 2 - 8) Adams obtained premium and deductible quotations for pollution insurance coverage from the Chris Leef General Agency ("Chris Leef"), an insurance broker, and then passed along the figures to Clevenger. (Tr. p. 269, ls. 2-16; Tr. p. 329, ls. 3 -14; Tr. p. 702, ls.16 -21) Because the insurance policy was a claims made policy, Adams made certain that the policy's retroactive inception date back to May of 1990, so that the insurance policy would extend coverage to claims that concerned events from May 1990 to the policy period. (Tr. p. 314, ls. 14 – 16; p. 352,

ls. 7 - 22) During a telephone conversation with Clevenger, Adams completed a Site Specific Application for the application for pollution liability insurance, answering the questions in accordance with Clevenger's responses. (Tr. p. 334, ls. 17 – 25, p. 335, ls. 1 -8) On October 24, 2000, Adams sent the application to Chris Leef. (Tr. p. 335, ls. 9 – 13) Adams received a response from Chris Leef regarding the terms and conditions of insurance coverage that was available, which Adams conveyed to Clevenger by telephone on November 14, 2000. (Tr. p 354, ls. 23 – 25, pg. 325, ls. 1 -3) Because Clevenger considered the premium to be costly and the deductible high, he took several months to consider whether to purchase the pollution liability insurance policy. (Tr. p. 357, ls. 3 -5; p. 702, ls. 22 – 25, p. 703, ls. 1 -7)

On January 13, 2001, Lehr met with Clevenger, presenting him a draft settlement agreement, which, among other terms, would have required Clevenger to arrange for the removal and disposal of approximately 300 truck loads of fill that the Jungermans had dredged from Elm Lake. (Tr. p. 688, ls. 1-18; p. 970, ls. 3-13) Clevenger continued to have discussions with Lehr regarding Jungerman's claim throughout May and June 2001. (Tr. P. 693, ls. 22-25; Tr. P. 694, ls. 1-25; Tr. P. 695, ls. 1-16; Tr. p. 983, ls. 19 – 22) In May of 2001, Clevenger asked Adams whether the insurance policy was still available. Adams made inquiry to Chris Leef who confirmed the availability of the insurance policy, but informed him that Clevenger would need to submit a Business Application. (Tr. p. 363, ls. 1 – 10) Clevenger instructed Adams to purchase the insurance policy. (Tr. p. 703, ls. 13 – 19) Adams and Clevenger completed the Business Application during a telephone conversation. Clevenger authorized Adams to sign the application on

Clevenger's behalf. (Tr. p. 390, ls. 22-24; p. 391, ls. 1-18) Adams sent the Business Application to Chris Leef on May 21, 2001. (Tr. p. 363, ls. 11 -24, p. 388, ls. 10-21; p. 389, ls. 17-25; p. 391, ls. 1-18). On May 23, 2001, Select Insurance, a subsidiary of Gulf Insurance (Select will hereafter be referred to as "Gulf Insurance"), issued the Clevengers a pollution liability insurance policy ("the pollution liability policy"). (Tr. p. 265, ls. 2 – 7; 703, ls. 8-19) Adams sent to Neal Clevenger a copy of the Gulf insurance policy on September 27, 2001, which included the Business Application, instructing him to review the pollution liability policy and confirm its accuracy. (Tr. p. 394, ls. 9 -15; p. 705, ls. 3-5, 18 -23)

In June 2001, Clevenger informed Lehr he was receiving bids from contractors for the cost of removing and disposing of the fill. (Tr. p. 693, ls. 22-25; Tr. p. 694, ls. 1-25; p. 695, ls. 1-16) Clevenger proposed that he and the Jungermans share the cost of removal. (Tr. p. 694, ls. 5-15; p. 983, ls. 5 -14) Lehr rejected his proposal and made it clear that Jungerman would file suit. (Tr. p. 983, ls. 5-25; p. 984, ls. 1-15) In response, Neal Clevenger stated that he had insurance and that he would review the terms of his policy. (Tr. p. 984, ls. 5-15) The parties had no further settlement discussions after June of 2001. (Tr. p. 984, lines 22-25, p. 985, ls. 1-11) Eventually, after resolving a dispute with the city over the remediation of the lake, Jungerman arranged to have the fill removed. (Tr. p. 697, ls. 3-8, p. 985, ls. 3-19)

In October 2001, Clevenger instructed Ronald Spradley, the attorney who represented the Clevengers in the subject case, to investigate the Jungerman claim, sending Spradley Lehr's August 22, 2000, letter, the pollution policy, and the Business

Application. (Tr. p. 704, ls. 17 – 25; p. 705, ls. 1 – 7) He asked Spradley, moreover, to review the accuracy of the insurance application that had been submitted to Gulf Insurance through Adams and Chris Leef. (Tr. p. 705, ls. 10 -17)

On October 23, 2001, Clevenger telephoned Adams to inform him that he was amending his Business Application. (Tr. pp. 400-02) On Clevenger's instruction, Spradley sent to Adams the amended application, Lehr's letter, Clevenger's October 27, 2000 response, and Lehr's January 2001 proposed Settlement Agreement. (Tr. p. 711, ls. 1 – 25 Defendant's Tr. Exs. 217B, 244, 244A, 244B, and 219A; Appendix pp. A3-10, A11, A1-2, A12-14, A15) Clevenger's amended application disclosed Jungerman's claim and the allegations of contamination of Elm Lake:

1. In response to Question "O" which asked "has facility ever been sued or requested to pay any damages or to perform any cleanup activities with respect to any actual or alleged pollution incident either on the facility grounds or to an offsite party or location," Respondents amended the application to answer "yes," adding "the facility has never been sued or requested to pay damages, but has received a complaint and request concerning alleged run-off into a nearby lake. Neal Clevenger is currently resolving the problem via a plan that has been submitted to the Missouri Department of Natural Resources, and he expects to receive their approval shortly."

2. In response to Question "R" which asked "is the applicant aware of any pre-existing condition that might lead to a claim under the policy if it were to be issued," Respondents amended the application to answer "yes," adding "the facility has never been sued or requested to pay damages, but has received a complaint and request concerning alleged run-off into a nearby lake. Neal Clevenger is currently resolving the problem via a plan that has been submitted to the Missouri Department of Natural Resources, and he expects to receive their approval shortly."

(Tr. p. 421, ls. 14-24; p. 423, ls. 1-6; p. 8 of Defendant's Tr. Ex. 217B; Appendix p. A10.)

On November 7, 2001, Adams sent to Chris Leef the amended Business Application and the documents pertaining to Jungerman's claim. (Tr. p. 413, ls. 5 -18; Defendant's Tr. Exs. 217B, 220 and 222; Appendix pp. A3-10, A16-17, A18.) Adams informed Clevenger that as a result of this amendment, it was likely that the insurance carrier would issue an exclusion relating to the Jungermans' claims. (Tr. p. 712, ls. 2-6) As Adams had anticipated, Gulf Insurance issued an exclusionary endorsement in late 2001 or early 2002 (effective May 23, 2001), excluding from coverage under the pollution liability policy the claims that are encompassed in the amended Business Application:

> The coverage hereunder shall not apply to a "claim" involving substantially the same general conditions or allegations that gave rise to the demand described or referenced under the Insured's revised response to questions "O" and "R" of the application hereto and made a part of this policy, including any addendum or addenda attached thereto.

(p. 10 of Defendant's Tr. Ex. 225; Appendix p. A28)

In March 2002, Chris Leef sent Adams notice by facsimile informing him that Clevenger's pollution policy was due for renewal on May 23, 2002, and enclosing an application for insurance that was identical to the one that had been completed by Clevenger at the inception of the pollution liability policy for the expiring policy year. (Tr. pp. 431-33) Adams completed the information in the application that had not changed from the amended Business Application for the expiring policy period and then sent the application to Clevenger on March 28, 2002, for completion and signature,

instructing Clevenger to make any necessary changes and return the application by April 16. (Tr. pp. 433-435; Tr. pp. 437-440, l. 23; Tr. p. 712, ls. 11-16). He also enclosed the exclusionary endorsement for the expiring policy period, explaining that the endorsement "in effect, deletes coverage for any claim arising out of the incident that you specifically described at Elm Lake. Obviously this exclusion will carry forward to the next policy term." (Tr. p. 440, ls. 15-22; Defendant's Tr. Ex. 225; Appendix pp. A19-30)

At the time, Clevenger had not heard from Lehr or Jungerman in eight months, so he was not particularly concerned about the Jungerman claim. (Tr. p. 718, ls. 18-25, p. 719, ls. 1-13). Clevenger testified that his principal consideration in determining whether to renew the pollution policy was the cost of the premium -- which had increased by $500 -- and the $10,000 deductible. (Tr. p. 719, ls. 14-21) He was also aware that the exclusionary endorsement would carry over to the renewal policy. (Tr. p. 722, ls. 11-16) Nonetheless, Clevenger completed and signed the renewal application on April 15, 2002, which he then sent to Adams by facsimile. (Tr. p. 443)

Adams forwarded to Chris Leef the renewal application which incorporated the answers that had been previously submitted in regard to questions "O" and "R" of the amended Business Application. (Tr. pp. 444-47) In May of 2002, Clevenger telephoned Adams to ask that he provide written clarification that the pollution policy would provide coverage for claims that pertained to Elm Lake. (Tr. p. 449, ls. 16-21; p. 457, ls. 3-9; p. 725, ls. 16-23) Clevenger requested written clarification because "he wanted some evidence … about the exclusion so there would be no problem in the future." (Tr. p. 725, ls. 16-23) He did not consider an oral response adequate assurance on which to rest the

expenditure of $3700 for a renewal premium. (Tr. pp. 725, ls. 16-25; 726, ls. 1-6; 727, lines 8-19) Adams responded that he would request clarification from Chris Leef or the underwriter. (Tr. p. 543, ls. 1-9; Tr. p. 725, ls. 3-6) Clevenger thus understood that Adams would seek clarification from Chris Leef or the underwriter, Gulf Insurance. (Tr. pp. 724, ls. 13-25; 725, ls. 1-15).

Adams in turn asked Chris Leef to provide clarification of the scope of the exclusionary endorsement. (p. 457, ls. 10-17) On May 22, 2002, Bobbie Linderman at Chris-Leef sent Adams a response by facsimile:

> The carrier has advised me that the endorsement will be added again this year. The exclusion is only for the old claim at the lake. The lake does have coverage.

(Tr. pp. 462, ls. 4-8 Defendant's Tr. Ex. 228; Appendix p. A31) Two days later, on May 24, Adams sent an e-mail to Chris Leef, forwarding the exclusionary endorsement and expressing concerns about the response:

> According to Bobbie's Fax on 5-22-02, the carrier advises that the endorsement only applies "for the old claim at the lake" and that "the lake does have coverage." I don't agree. The way the exclusion is worded, there will never be any coverage for a claim that involves "substantially the same general conditions" as before.
>
> Unless Gulf is willing to amend their exclusion and tie that exclusion only to only the allegations earlier referenced, I will advise the insured not to purchase this coverage, because there will never be any coverage for the possibility of pollution from horse manure entering a neighboring lake. The insured has built a berm and a retention basin, but pollution could still breach those barriers. …
>
> Gary, please see what you can do about getting this endorsement amended.

(Tr. p. 463, ls. 15-25; Tr. p. 464, ls. 4-19; Plaintiff's Tr. Ex. 5[1], a substantively identical copy of which is at LF 000409)) On June 3, 2002, Deb Culley of Chris Leef responded to Adams in an e-mail:

> I did some checking with the underwriter on the exclusion for prior claim and their intent is to only exclude it. Note the exclusion does reference answers to Questions O and R on the app. This is the only claim referred to; however, coverage has now expired.

(Tr. p. 467, lines 13-25, p. 468, lines 1-2; Defendant's Tr. Ex. 322; Appendix p. A35.)

On June 3, 2002, after reading the Chris Leef e-mail, Adams telephoned Clevenger to convey to him what he had received regarding the scope of the exclusionary endorsement and sent copies to him. (Tr. pp. 469, ls. 3-14; 470, ls. 1-19, Tr. p. 728). Significantly, Clevenger testified that his decision to renew the pollution liability policy was based on his June 3 telephone discussion with Adams in which Adams read to Clevenger the May 22, 2002, facsimile, the e-mails, and offered his assessment:

> Q. [By Mr. Spradley]: That's the area I want to ask you about. If you recall the discussions, you'll recall Mr. Meltzer asking you about the documents. I'm asking you what you relied on. Tell the jury what you relied on with respect to your decision to renew the coverage.
>
> A. [Neal Clevenger]: Bill read the faxes, e-mails over the phone to me that we've been talking about. And he just said, "Neal, the way I read these, you have coverage for everything after that August incident or August letter." And I said, "Well, there's [sic] no other pollution issues except that," and I didn't want to continue with insurance if it wasn't covered. But it was good news. He said these are good news documents. We have them in evidence. The way I

[1] Defendant does not presently have a copy of Plaintiff's Tr. Ex. 5 bearing a trial exhibit sticker.

> read these, you're covered for every incident after the August 2000 letter.

(Tr. p. 754, ls. 4-16; *see also* pg. 727, ls. 20-25; p. 728 ls. 1-22; p. 730, ls. 18-23) Clevenger understood that the references to the "old claim at the lake" and the "prior claim" denoted the Jungermans' claim, so that this claim, which was at the time unresolved and presented the risk of a lawsuit, was not covered by the pollution liability policy. (Tr. p. 730, ls. 24-25; pg. 731, ls. 1-25, p. 732, ls. 1-22) On June 7, 2002, Clevenger sent a letter to Adams requesting that he renew the pollution liability policy and pay the renewal premium of approximately $3,725. (Tr. p. 303, ls. 1-6, p. 552, ls. 1-23; p. 729, ls. 16-23)

On July 23, 2002, the Jungermans brought suit against the Clevengers asserting causes of action for negligence, negligence per se, private nuisance and trespass, contending that runoff from the equestrian park had contaminated Elm Lake. (LF 000052-000064) (Tr. p. 620, ls. 23-25; p. 621, lines 1-13) Clevenger sent the complaint (petition) to Adams and instructed him to present a claim under the pollution liability policy. (Tr. p. 622, ls. 16-20) On September 10, 2002, Gulf Insurance denied coverage for the claim and refused to provide a defense because the claims in the lawsuit were the same as the Jungermans' prior claims and was therefore specifically excluded by the exclusionary endorsement. (Tr. p. 624, ls. 11-24; 785, ls. 14-24) In the subject case, Chris Carpenter, an attorney whom Clevenger offered as an expert witness, confirmed that the claims in the lawsuit were the same as the Jungerman's prior claims. (Tr. p. 780, ls. 6-21)

Though Clevenger could have cancelled the pollution liability policy and obtained a refund of the renewal premium after Gulf Insurance denied coverage, he did not do so, and he made no further demand on Gulf to provide coverage. (Tr. p. 673, ls. 18-22; p. 674, ls. 17-25; p. 675, ls. 1-18)

Following the denial of coverage, Clevenger litigated the Jungermans' lawsuit, asserting a Third Party Petition against Oliver Insurance. Eventually the Clevengers entered into a settlement with the Jungermans for $28,200. (Tr. p. 666, ls. 6-19)

The Clevengers sought to recover from Oliver Insurance the settlement the Clevengers had paid to the Jungermans, the $22,200 the Clevengers had paid to an engineering firm, the $40,000 the Clevengers had expended for legal fees in defending the Jungermans' lawsuit, and the $3725 renewal premium that the Clevengers had paid to Gulf insurance. (Tr. p. 653, ls. 1-3; pg. 654, l. 1; p. 657, ls. 14-15; p. 667, ls. 4-25; p. 668, ls. 1-24; p. 669, ls. 3-22)

**B. Disposition of the Case in the Trial Court**

The Clevengers' Amended Joint Third Party Petition against Oliver Insurance asserted causes of action for negligence and promissory estoppel. (LF 000132) Both causes of action rest on the June 3, 2002, telephone conversation between Clevenger and Adams. The case was tried to a jury on January 3 through 10, 2005. During the course of the trial, the trial court ruled that Oliver Insurance could not elicit certain testimony from Neal Clevenger and introduce certain evidence to show that he relied in part on his attorney, Ronald Spradley, in deciding to renew the pollution liability policy. What is more, following Oliver Insurance's closing argument, the trial court instructed the jury to

disregard counsel's argument that the Clevengers' damages were no more than the amount of the renewal premium.

The trial court instructed the jury that to find for Clevengers on their cause of action for promissory estoppel they must, among other elements, find that Adams "promised plaintiff Neal Clevenger that the pollution insurance policy would provide coverage for claims alleging pollution from water runoff from plaintiffs' business property into Elm Lake occurring after August 22, 2000." (LF 000420). Conversely, the trial court instructed the jury that to find for Clevengers on their cause of action for negligence they must, among other elements, find that Adams "failed to determine that the pollution insurance renewal policy would not provide coverage for any claims alleging pollution from water runoff from plaintiffs' business property into Elm Lake occurring after August 22, 2000, or [that Adams] failed to advise plaintiffs that claims for effects on Elm Lake from runoff from plaintiffs' business property after August 22, 2000 would not be covered by the policy." (LF 000423)

The trial court combined the damages for both causes of action on Verdict "C," which did not distinguish between those damages to be awarded under Verdict "A" (promissory estoppel) and Verdict "B" (negligence). Verdict "C" instructed the jury that "the Judge will reduce the total amount of Plaintiffs' damages by any percentage of fault you assess to Plaintiffs" as did Jury Instruction No. 12. (LF 000440; LF 00427) During deliberations, the jury asked the question "[i]f we assess percentages of fault, to what dollar value are these percentages applied?" The trial court responded by admonishing the jury to be guided by the Instructions. (LF 000437) Jury Instruction No. 12 instructed

the jury that "[t]he judge will compute plaintiffs' recovery by reducing the amount you find as plaintiffs' total damages by any percentage of fault you assess to plaintiffs." (LF 000427).

The jury found that the Clevengers were 98.6% at fault on Verdict "B", yet found in favor of plaintiffs on the promissory estoppel claim. The jury found total damages in the amount of $78,223.82, which they entered on the single line for damages on Verdict "C". (LF 000440) In entering judgment, the trial court did not reduce this amount by the percentage of the Clevengers' fault as required in the instructional note in Verdict "C" and Jury Instruction No. 12, but instead the trial court entered a separate judgment for each cause of action. (LF 000441-000443) More problematically, the trial court only applied to the negligence cause of action the Clevengers' percentage of fault (98.6%), resulting in a damage award of $1,095.13 for the negligence cause of action and a damage award in the amount of $78,223.82 for the cause of action for promissory estoppel. (LF 000443) On the basis that "the damages for the two claims are common," the trial court entered a single judgment for the Clevengers in the greater amount of $78,223.82. (LF 000443).

The trial court denied without explanation the Oliver Insurance's Motion for Judgment Notwithstanding the Verdict, to Amend the Judgment, Remittitur, or, in the Alternative, for a New Trial. (LF 000545)

### C. The Opinion of the Court of Appeals

On December 12, 2006, the Missouri Court of Appeals for the Western District reversed the trial court's judgment and remanded the case to the trial court for entry of

judgment in favor of the Clevengers solely on the negligence cause of action in accordance with the jury's verdict. The court of appeals confined its opinion to the issue of whether the Clevengers had made a submissible case of promissory estoppel. The court of appeals concluded that through Neal Clevenger's testimony that Adams had "'assured' him that he had coverage for claims regarding his neighbor's lake" the Clevengers had proven that Oliver Insurance had made a promise. *Clevenger v. Oliver Ins. Agency, Inc.*, No. WD 65500, 2006 WL 3770769 at *3 (Mo. App. W.D. Dec. 26, 2006) (Appendix p. A-46). Nonetheless, the court of appeals held that the Clevengers had failed to make a submissible case of promissory estoppel because the Clevengers had an action in negligence, so that the Clevengers had an adequate remedy at law. *Id.*

On January 30, 2007, the court of appeals overruled the Clevengers' motion for rehearing and denied their motion for transfer to this Court. Thereafter, on May 1, 2007, this Court granted the Clevengers' application for transfer.

## POINTS RELIED ON

**I.** The trial court erred in Denying Oliver Insurance's Motion for Directed Verdict and its Motion for Judgment Notwithstanding the Verdict on the Clevengers' cause of action for promissory estoppel because the Clevengers failed to make a submissible claim of promissory estoppel in that:

A. Bill Adams' June 3 statement was a mere expression of opinion and was not the definite promise made in the contractual sense as required under Missouri law.

B. The Clevengers failed to establish that they relied on any representations made by Bill Adams.

C. The Clevengers had an adequate remedy at law, and, therefore, there was no "injustice" to be cured by enforcement of any promise.

*Zipper v. Health Midwest*, 978 S.W.2d 398 (Mo.App. W.D. 1998)

*Townes v. Jerome L. Howe, Inc.*, 852 S.W.2d 359 (Mo.Ct. App. 1993)

*Central States Life Ins. Co. v. Bloom*, 137 S.W.2d 517 (Mo. 1940)

*Prenger v. Baumhoer*, 939 S.W.2d 23 (Mo.App. 1997)

II. The trial court erred in denying Oliver Insurance's Motion for Directed Verdict and Motion For Remittitur on the damages awarded on the cause of action for promissory estoppel because as a matter of law the Clevengers did not prove damages beyond the amount of the renewal premium in that the evidence established that in reliance on Bill Adams' statements Neal Clevenger did no more than to renew the insurance policy.

*Gomez v. Constr. Design, Inc.*, 126 S.W.3d 366 (Mo.banc 2004).

MO. REV. STAT. § 537.068 (2004)

III. The trial court erred in denying Oliver Insurance's Motion for Judgment Notwithstanding the Verdict, to Amend the Judgment, Remittitur, or, in the Alternative, for a New Trial because in entering judgment on the cause of action for promissory estoppel the trial court awarded the Clevengers the total damages found by the jury in the amount of $78,223.82 in that the judgment is in clear contravention of the explicit directive of Jury Instruction Number 12 and the

instructional note of Verdict "C" informing the jury that in computing the Clevengers' recovery the trial court would reduce the total damages by the percentage of fault that the jury assessed to the Clevengers.

*Trimble v. Pracna,* 51 S.W.3d 481, 493 (Mo. App. S.D. 2001)

*McIlvain v. Kavorinos, et al.*, 219 S.W.2d 349 (Mo. banc 1949).

IV. The trial court erred in denying Oliver Insurance's Motion for Judgment Notwithstanding the Verdict, to Amend the Judgment, Remittitur, or, in the Alternative, for a New Trial because it was an abuse of the trial court's discretion to instruct the jury to disregard the closing argument of Oliver Insurance's counsel to the effect that the proper measure of the Clevengers' damages was the amount of the renewal premium (less any reimbursement that they could have received by canceling the insurance policy) in that the evidence established that recovery in this amount was fair and reasonable compensation for the actual damages that were sustained by the Clevengers.

*United Missouri Bank v. City of Grandview, Mo.*, 179 S.W.3d 362 (Mo.App. W.D. 2005)

V. The trial court erred in denying Oliver Insurance's Motion for Judgment Notwithstanding the Verdict, to Amend the Judgment, Remittitur Or, In the Alternative, for a New Trial because the trial court erred in precluding Oliver Insurance from eliciting testimony that Neal Clevenger relied on his attorney in making decisions regarding the insurance policy in that this evidence was material as to whether Neal Clevenger relied on Bill Adams' putative promise.

*United Missouri Bank v. City of Grandview, Missouri*, 179 S.W.3d 362 (Mo.App. W.D. 2005)

## ARGUMENT

**I. The trial court erred in denying Oliver Insurance's Motion for Directed Verdict and its Motion for Judgment Notwithstanding the Verdict on Respondents' promissory estoppel claim because Clevengers failed to make a submissible claim of promissory estoppel in that:**

**A. Bill Adams' June 3 statement was a mere expression of opinion and was not the definite promise that was made in the contractual sense.**

**B. The Clevengers failed to establish that they relied on any representations made by Bill Adams.**

**C. The Clevengers had an adequate remedy at law, and, therefore, there was no injustice to be cured by enforcement of any promise.**

A motion for judgment notwithstanding the verdict ("JNOV") "challenges the submissibility of plaintiff's case." *Coon v. Dryden*, 46 S.W.3d 81, 89 (Mo.App. W.D. 2001) (citation omitted). The standard of review of "a JNOV is essentially the same as for review of a motion for directed verdict." *Giddens v. Kansas City Ry. Co.*, 29 S.W.3d 813, 818 (Mo. 2000), *cert. denied*, 532 U.S. 990 (2001). This Court reviews *de novo* whether Clevengers made a submissible case of promissory estoppel. *E.g.*, *Environmental Prot., Inspection, Consulting, Inc. v. City of Kansas City, Mo.*, 37 S.W.3d 360, 369 (Mo.App. W.D. 2000). "If a defendant's motion for judgment notwithstanding the verdict identifies one or more elements of the plaintiff's case which are not supported

by the evidence, the motion is properly granted." *Breckenridge v. Meierhoffer-Fleeman Funeral Home, Inc.*, 941 S.W.2d 609, 611 (Mo.App. W.D. 1997).

However, "the determination of whether or not there is sufficient evidence to submit an issue to the jury is a legal question and not an exercise of judicial discretion. *Shackleford v. West Cent. Elec. Co-Op., Inc.*, 674 S.W.2d 58, 63 (Mo.App. 1984)(citation omitted). "A case is not to be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. Neither may any essential fact be inferred. Liability cannot rest upon guess work, conjecture or speculation beyond inferences reasonably to be drawn from the evidence." *Shackleford*, 674 S.W.2d at 63 (citation omitted).

In Missouri, promissory estoppel is a form of equitable relief that "is not a favorite of the law," so that it is to be used "with caution, sparingly, and only in extreme cases to avoid unjust results." *Zipper v. Health Midwest*, 978 S.W.2d 398, 411 (Mo.App. W.D. 1998); *Geisinger v. A & B Farms, Inc.*, 820 S.W.2d 96, 98 (Mo.App. 1991). Each element of a promissory estoppel claim must be proven by clear and convincing evidence. *Blackburn v. Habitat Dev. Co.*, 57 S.W.3d 378, 388 (Mo.App. S.D. 2001).

In order to make a submissible case of promissory estoppel, the Clevengers were required to prove: 1) a promise; 2) on which a party detrimentally relies; 3) in a way the promisor should have expected; and 4) resulting injustice which only enforcement of the promise could cure. *E.g., Response Oncology, Inc. v. Blue Cross & Blue Shield of Mo.*, 941 S.W.2d 771, 778 (Mo.App. W.D. 1997). Measured against this standard, the Clevengers failed to make a submissible case of promissory estoppel because on this

record there is no evidence that Oliver Insurance made a promise to the Clevengers and because the Clevengers had an adequate remedy at law in their cause of action for negligence.

**1. Bill Adams' June 3 statement was a mere expression of opinion and was not the definite promise that was made in the contractual sense.**

The Clevengers must allege and prove that they relied on a definite promise that was made in a "contractual sense." *Zipper*, 978 S.W.2d at 411 (quoting *Prenger v. Baumhoer*, 939 S.W.2d 23, 26 (Mo.App.W.D. 1997)). A promise must be a "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." RESTATEMENT (SECOND) of CONTRACTS, § 2 (1981); *see also Prenger*, 939 S.W.2d at 27 (a promise made in the contractual sense must be a guarantee that accurately and precisely sets forth the commitment made by the promisor). A promise is a legal commitment, and a not a mere prediction or aspiration.

The Clevengers failed to prove that Bill Adams made a contractual promise, that is, a legally enforceable commitment. As evidence of a promise, the Clevengers offered only Neal Clevenger's testimony regarding his conversation with Bill Adams on June 3, 2002:

> Bill read the faxes, e-mails over the phone to me that we've been talking about. *And he just said, "Neal, the way I read these, you have coverage for everything after that August incident or August letter."* And I said, "Well, there's [sic] no other pollution issues except that," and I didn't want to continue with insurance if it wasn't covered. But it was good news. He said these are good news

> documents. We have them in evidence. The way I read these, you're covered for every incident after the August 2000 letter.

(Tr. pg. 754, lines 4-16) (emphasis added) Adams thus offered no more than an opinion or an interpretation as to whether the operative effect of the exclusionary endorsement would exclude the Jungerman's claim. He did not make a commitment to provide the Clevengers with insurance coverage against claims for damage to Elm Lake. "Mere expressions of opinion by interested persons cannot, although subsequently shown to be groundless or false, be regarded as misrepresentations for the purpose of creating an estoppel." *Central States Life Ins. Co. v. Bloom*, 137 S.W.2d 517, 519 (Mo. 1940) (quotation omitted). Therefore, the court of appeals erred in concluding that Adams' "'assur[ance]' … that [Neal Clevenger] had coverage for claims regarding his neighbor's lake" constituted a promise. 2006 WL 3770769 at *3 (Appendix p. A-46).

Adams' statements must also be read in the context in which they were made. Neal Clevenger had made a decision that he would not renew the pollution policy if the exclusionary endorsement excluded from coverage all claims that might be asserted against him for damage to Elm Lake. (Tr. 754, ls. 9-12) His concerns were animated by the cost of the premium and the amount of the deductible. (Tr. p. 719, ls. 14-21) He was not concerned that he might not have insurance coverage for pollution claims. (Tr. p. 543, ls. 4-8) He thus asked Adams to obtain clarification as to the coverage that the pollution policy would provide him. Having received Gulf Insurance's assurances through Chris Leef's fax and e-mail, Clevenger understood that the endorsement would exclude the Jungerman's extant claim. (Tr. p. 730, ls. 24-25; p. 731, ls. 1-25; p. 732, ls.

1-22) It was on this understanding that he agreed to the renewal of the pollution policy. Neither the allegation in the verdict director (Instruction No. 5; Appendix p. A38) nor the evidence they presented at trial even hints at a contractual promise.[2]

Oliver Insurance is an insurance broker who owed a "duty to the [Clevengers] to act with reasonable care, skill, and diligence." *Bell v. O'Leary*, 744 F.2d 1370, 1372 (8th Cir. 1984) (citations omitted) (applying Missouri law); *see also Hall v. Charlton*, 447 S.W.2d 5, 9 (Mo. App. 1969) (same). Thus understood, the only tenable legal basis to hold Oliver Insurance liable to the Clevengers is for negligence. *Cf. Morgan v. Wartenbee*, 569 S.W.2d 391, 397 (Mo. App. 1978). There are no Missouri decisions holding an insurance broker liable for promissory estoppel. *See Bell*, 744 F.2d at 1373 (holding an insurance broker liable for negligence in failing to ascertain whether the plaintiffs were eligible flood insurance); *Morgan*, 569 S.W.2d at 397 (holding an insurance broker liable for negligence in failing to procure the insurance coverage the plaintiff requested); *Hans Coiffures Int'l, Inc. v. Henja*, 469 S.W.2d 38 (Mo. App, 1971) (holding an insurance broker liable for a negligent failure to procure insurance); *Hall v. Charlton*, 447 S.W.2d 5, 9 (Mo. App. 1969) (holding an insurance broker liable for negligent failure to perform in obtaining the requested insurance coverage); *Harris v.*

[2] Oliver Insurance objected to this paragraph of the verdict director and moved for directed verdict twice and judgment notwithstanding the verdict. (Tr. pp. 1072, 1075-76, LF 000433; LF 000444).

*A.P. Nichols Inv. Co.,* (Mo. App. 1930) (holding a broker liable for negligent failure to procure the requested insurance coverage). Accordingly, the trial court should have been granted Oliver Insurance a directed verdict or judgment notwithstanding the verdict.

**2. The Clevengers failed to establish that they "relied" on any representations made by Bill Adams.**

Even if it is assumed that Adams in some manner made a promise to Neal Clevenger, the Clevengers failed to prove that they reasonably "relied" to their detriment on any such promise. Neal Clevenger testified only that in the absence of satisfactory assurances from Gulf Insurance that future claims for damage to Elm Lake would not be subject to the exclusionary endorsement he would not have renewed the pollution liability policy. (Tr. 754, ls. 4-12) What is more, Neal Clevenger apprehended that the references to the "old claim at the lake" and the "prior claim" referred to in the May 22, 2002 Chris Leef e-mail denoted the Jungermans' claim, so that this claim, which was at the time unresolved and presented the risk of a lawsuit, was not covered by the pollution liability policy. (Tr. p. 730, ls. 24-25; pg. 731, ls. 1-25, p. 732, ls. 1-22) Therefore, Clevenger failed to prove that he suffered any detriment in consequence of his reliance on Bill Adams' assessments of the interpretive statements by Chris Leef and Gulf insurance, because his decision to renew the pollution liability policy was informed by both by Adams' opinion that future claims would be covered and his understanding that the Jungermans' claim would not be covered.

That Neal Clevenger did not detrimentally rely on Bill Adams' opinion is manifest in Clevenger's testimony that his decision to amend the 2001 business application to

include the Jungermans' claims rested on the advice of his attorney, Ron Spradley. (Tr. 705, ls. 8-17). It is fundamental that equity is "not … served by allowing a party to enforce a promise where that party's actions were influenced by factors other than the promise." *Kearney Commercial Bank v. Popejoy*, 119 S.W.3d 143, 149 (Mo.App. W.D. 2003); *see also Simpson Consulting v. Barclays Bank*, 227 Ga.App. 648, 490 S.E.2d 184, 193 (1997) (noting that because promissory estoppel is an equitable doctrine, reliance must be reasonable, that is, the plaintiff relied exclusively on such promise and not on his or her own preconceived intent or knowledge).

**3. The Clevengers had an adequate remedy at law, and, therefore, there was no "injustice" to be cured by enforcement of any promise.**

The Clevengers failed to prove that it is necessary to enforce Bill Adams' putative promise in order to avoid injustice. The Clevengers sought only to recover damages that were recoverable in an action for negligence – one of the two causes of action on which their claims rested. The trial court entered a single judgment for the Clevengers because the damages sought under both causes of action were "common." (LF 000443) Because the Clevengers sought the same remedy under alternative theories, the Clevengers cannot as a matter of law prove that the remedy for a cause of action for negligence claim is inadequate. *See Zipper*, 978 S.W.2d at 411-12 (the "most significant" factor in determining whether a promise should be enforced is the "adequacy and availability of a remedy at law"); *see also* RESTATEMENT (SECOND) CONTRACTS § 139 (2)(A) (1981) ("In determining whether injustice can be avoided only by enforcement of the promise, the

following circumstances are significant: (a) the availability and adequacy of other remedies …" ).

**II. The trial court erred in denying Oliver Insurance's Motion for Directed Verdict and Motion for Remittitur on the damages awarded on the promissory estoppel claim because as a matter of law, the Clevengers did not prove damages beyond the amount of the premium paid for the renewal premium in that the evidence established that in reliance on Bill Adams' assessments Neal Clevenger did no more than renew the insurance policy.**

The trial court erred in denying Oliver Insurance's Motions for Directed Verdict (LF 000433; Tr. p. 1076) and Motion for Remittitur (LF 000444-000517). Section 537.068 of the Missouri Revised Statutes permits a trial court to enter remittitur "if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." *Gomez v. Constr. Design, Inc.*, 126 S.W.3d 366, 375 (Mo.banc 2004). A trial court has great discretion in approving the verdict or setting it aside as excessive. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 872 (Mo.banc 1993). This Court interferes with the judgment of the trial court and jury only if the verdict is manifestly unjust. *Gomez*, 126 S.W.3d at 375.

As a matter of law, the Clevengers' damages did not exceed the amount of the renewal premium.[3] Neal Clevenger testified only that in the absence of satisfactory assurances from Gulf Insurance that future claims for damage to Elm Lake would not be subject to the exclusionary endorsement he would not have renewed the pollution liability policy. (Tr. 754, ls. 4-12) What is more, Neal Clevenger apprehended that the references to the "old claim at the lake" and the "prior claim" in the May 22 Chris Leef e-mail denoted the Jungermans' claim, so that this claim, which was at the time unresolved and presented the risk of a lawsuit, was not covered by the pollution liability policy. (Tr. p. 730, ls. 24-25; pg. 731, ls. 1-25, p. 732, ls. 1-22) The only action that was taken by Neal Clevenger in reliance on Bill Adams' assessment is that he renewed the pollution liability policy and paid the renewal premium of $3725.00. More proximately, at the time of the renewal, Neal Clevenger was not concerned about the Jungermans' claim. (Tr. p. 718, ls. 18-25, p. 719, ls. 1-13).

What is more, in the absence of Bill Adams' assessments and Gulf Insurance's and Chris Leef's assurances, Neal Clevenger would not have purchased a pollution liability policy in 2002, so that he would have not have had insurance coverage for the Jungermans' lawsuit. On this record, the Clevengers failed to prove that the expenses and liabilities that attended the Jungerman lawsuit were a result of Neal Clevenger's reliance

[3] Both at the close of the Clevengers' evidence and at the close of all evidence, Oliver Insurance requested that the trial court limit the Clevengers' damages to the renewal premium. (Tr. p. 1073, ls 19-21; Tr. p. 1076, ls. 3-9).

on Bill Adams' assessments. The trial court erred in awarding the Clevengers damages in the excess of the renewal premium.

**III. The trial court erred in denying Oliver Insurance's Motion for Judgment Notwithstanding the Verdict, to Amend the Judgment, Remittitur, or, in the Alternative, for a New Trial because in entering judgment on the cause of action for promissory estoppel the trial court awarded the Clevengers the total damages found by the jury in the amount of $78,223.82 in that the judgment is in clear contravention of the explicit directive of Jury Instruction Number 12 and the instructional note of Verdict "C" informing the jury that in computing the Clevengers' recovery the trial court would reduce the total damages by the percentage of fault that the jury assessed to the Clevengers.**

In Jury Instruction No. 12, the trial court instructed the jury:

> If you assess a percentage of fault to defendant under Instruction No. 8 then, disregarding any fault on the part of plaintiffs, you must determine the total amount of plaintiffs' to be such sum as will fairly and justly compensate plaintiffs for any damages you believe they sustained as a direct result of the occurrence mentioned in the evidence. You must state such total amount of plaintiffs' damages in your verdict.
>
> In determining the total amount of plaintiffs' damages you must not reduce such damages by any percentage of fault you may assess to plaintiffs. **The judge will compute plaintiffs' recovery by reducing the amount you find as plaintiffs' total damages by any percentage of fault you assess to plaintiffs.** If you find that plaintiffs failed to mitigate damages as submitted in Instruction No. 13, in determining plaintiffs' total damages you must not include those damages that would not have occurred without such failure.

(LF 000427) (Appendix p. A42) (emphasis added). Correspondingly, the trial court submitted to the jury Verdict "C" for its completion:

**Verdict "C"**

> Note: Complete the following paragraph if you found for Plaintiffs in Verdict A and/or if you assessed a percentage of fault to Defendant in Verdict B:
>
> We, the undersigned jurors, find the total amount of Plaintiffs' damages, disregarding any fault on the part of Plaintiffs, to be $_____. (Stating the amount).
>
> **Note: The Judge will reduce the total amount of Plaintiffs' damages by any percentage of fault you assess to Plaintiffs.**

(LF 000440) (emphasis added); *see also* Appendix p. A40 for Verdict "C" as completed by the jury.)

The trial court nonetheless entered judgment on the cause of action for promissory estoppel for the total amount of the Clevengers' damages without reducing these damages by the percentage of fault that the jury had assessed to the Clevengers. Therefore, the trial court erred in denying Oliver Insurance's Motion to Amend the Judgment to conform to the jury instructions and verdicts. (LF 000545).

It is a fundamental principle of law that the judgment entered by the trial court must conform to the verdict rendered by the jury "in all substantial particulars." *McIlvain v. Kavorinos, et al.*, 219 S.W.2d 349, 351 (Mo. banc 1949). Jury Instruction Number 12 and the instructional note of Verdict "C" explicitly instructed the jury that the percentage of fault that they assessed to the Clevengers would be applied to the total amount of damages found by the jury. In entering judgment for the total amount of the damages on the promissory estoppel claim, the trial court acted in contravention and variance of the instructions to the jury that informed its verdicts. The "[p]urpose of jury instructions are

to channel the jury's deliberations and guide them in reaching a verdict. *Trimble v. Pracna*, 51 S.W.3d 481, 493 (Mo. App. S.D. 2001). Instruction No. 12 and Verdict "C" explicitly instructed the jury that the trial court would determine the Clevengers' recovery by reducing the total damages by any percentage of fault that the jury assessed to the Clevengers. The jury's verdict was clear, definite, and conclusive. The trial court erred, therefore, in entering judgment for the Clevengers (including judgment on the cause of action for promissory estoppel) for the total amount of damages found by the jury on Verdict "C" without reducing the amount of the total damages by the percentage of fault that the jury assessed to Clevengers.

**IV. The trial court erred in denying Oliver Insurance's Motion for Judgment Notwithstanding the Verdict, to Amend the Judgment, Remittitur, or, in the Alternative, for a New Trial because it was an abuse of the trial court's discretion to instruct the jury to disregard the closing argument of Oliver Insurance's counsel to the effect that the proper measure of the Clevengers' damages was the amount of the renewal premium (less any reimbursement that they could have received by canceling the insurance policy) in that the evidence established that recovery in this amount was fair and reasonable compensation for the actual damages that were sustained by the Clevengers.**

The trial court's exclusion of argument is reversible error when the exclusion amounts to an abuse of discretion. *United Missouri Bank v. City of Grandview, Mo.*, 179 S.W.3d 362, 367-70 (Mo.App. W.D. 2005) (a trial court's error in limiting evidence in closing argument is reversible error where the trial court's error materially affects the

merits of the action). "An abuse of discretion exists when a trial court's ruling is clearly against the logic of the circumstances before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* Reversal is warranted where the complaining party is prejudiced by the exclusion. *Id.*

The trial court erred in instructing the jury to disregard counsel's closing argument that the Clevengers' damages did not exceed the amount of the renewal premium. (Tr. p. 1130, ls. 20-25, p. 1131, ls. 4-25, p. 1132, ls. 1-9) It was a material issue in the trial whether and to what extent the Clevengers had detrimentally relied on Bill Adams' statements about Chris Leef's and Gulf Insurance's assurances regarding the effect of the exclusionary endorsement. This argument was thus material both to liability and damages. The prejudicial effect of this instruction was, moreover, magnified by the trial court's exclusion of this argument in the face of its prior admission of Exhibits 343 and 344 (showing the damages calculations) into evidence, both of which were the subject of a portion of Oliver Insurance's argument (Defendant's Tr. Exs. 343 and 344; Appendix pp. A36-37). Accordingly, Oliver Insurance is entitled to a new trial.

**V. The trial court erred in denying Oliver Insurance's Motion for Judgment Notwithstanding the Verdict, to Amend the Judgment, Remittitur, or, in the Alternative, for a New Trial because the trial court committed error in precluding Oliver Insurance from eliciting testimony that Neal Clevenger relied on his attorney in making decisions regarding the insurance policy in that this evidence was material to whether Neal Clevenger relied on Bill Adams' putative promise.**

The trial court's exclusion of evidence warrants a reversal of judgment when the exclusion amounts to an abuse of discretion. *United Missouri Bank v. City of Grandview, Mo.*, 179 S.W.3d at 367. "An abuse of discretion exists when a trial court's ruling is clearly against the logic of the circumstances before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* Reversal is warranted only if the complaining party is prejudiced by the exclusion. *Id.*

The trial court erred when it ruled that Oliver Insurance could not elicit testimony from Neal Clevenger that he relied in part on his attorney, Ronald Spradley, in deciding to renew the pollution liability policy. This evidence is material to the issue of whether in making the decision to renew the pollution liability policy Neal Clevenger relied on the Bill Adams' assessments regarding the scope of the exclusionary endorsement to the policy.

During the direct examination of Bill Adams, Oliver Insurance's counsel offered into evidence Defendant's Exhibit 236, a July 9, 2002, letter from Neal Clevenger to Bill

Adams, which states that, "As I mentioned, my lawyer, Ron Spradley, noticed the insurance carrier asked what measures had we done to correct the runoff problems." (Appendix p. A33). This letter was in response to the question posed by Chris-Leef in the May 22, 2002, facsimile that was forwarded to Clevenger by Bill Adams. (Tr. Ex. 236A; Appendix A34). The trial court nonetheless excluded the July 9, 2002, letter. (Tr. pp. 482-487; Defendant's Tr. Exs. 236 and 236A, Appendix pp. A33 and A34.)

During the cross-examination of Neal Clevenger and the cross-examination of the Clevengers' expert, Oliver Insurance's counsel introduced and proffered evidence that Neal Clevenger had consulted with his attorney, Ron Spradley, in amending the Business Application for the original policy year. (Tr. pg. 704, lines 17-25; pg. 705, lines 1-17; Tr. pg. 831, lines 19-25; pg. 832, lines 1-25; pg. 833, lines 1-9). The exclusion of this testimony and the July 9, 2002, letter was prejudicial because taken together this evidence would have cast considerable doubt on whether Neal Clevenger principally relied on the advice of Bill Adams in deciding whether to renew the pollution liability policy.

## CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's judgment on the Clevengers' case of action for promissory estoppel and enter judgment for Oliver Insurance on this cause of action. Alternatively, the Court should reduce the Clevengers' recovery for the cause of action for promissory estoppel to the amount of the renewal premium paid that was paid by the Clevengers ($3,725). Alternatively, the Court should reverse the trial court's judgment and remand this matter for a new trial.

BAKER STERCHI COWDEN & RICE, L.L.C.

_____
Hal D. Meltzer MO No. 38535
Michael S. Cessna MO No. 39201

Crown Center
2400 Pershing Rd., Suite 500
Kansas City, Missouri 64108
(816) 471-2121
(816) 472-0288 Facsimile

ATTORNEYS FOR DEFENDANT/APPELLANT
OLIVER INSURANCE AGENCY, INC.

**CERTIFICATE OF SERVICE**

I certify that a copy of the above and foregoing was served via U.S. Mail, postage prepaid, on this __ day of May, 2007, to:

Ronald C. Spradley, Esq.
Belletower Bldg.
4700 Belleview, Suite 210
Kansas City, MO 64112
ATTORNEY FOR PLAINTIFFS

_____
Hal D. Meltzer

## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b), and according to the word count function on the word processing program by which it was prepared, contains ____ words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block, and the Appendix.

The undersigned further certifies that the diskette filed herewith containing the Brief of Appellant in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

_____

Hal D. Meltzer MO No. 38535