

**OPINION SUMMARY**

**MISSOURI COURT OF APPEALS EASTERN DISTRICT**

OAKLEY FERTILIZER, INC., Appellant,	)	
	)	No. ED90951
vs.	)	
	)	Appeal from the Circuit Court of
THE CONTINENTAL INSURANCE	)	St. Louis County
COMPANY, Respondent.	)	
	)	Filed: January 20, 2009

**OPINION SUMMARY**

Oakley Fertilizer, Inc. appeals from the judgment of the Circuit Court of St. Louis County granting summary judgment in favor of its insurance carrier, Continental Insurance Company.

REVERSED AND REMANDED.

Division One Holds: The trial court erred in granting summary judgment in favor of Continental because under Uniform Commercial Code § 2-207(2), whether an additional or different term in the acceptance of a contract “materially altered” the contract is a question of fact which precludes the grant of summary judgment. Further, the undisputed facts in the record are insufficient to sustain the trial court’s grant of summary judgment for Continental either on the grounds that: (1) other parties insured the cargo, or (2) Oakley voluntarily refunded the purchase price to the buyer of the cargo. Finally, summary judgment for Continental cannot be sustained on the grounds that Oakley failed to give Continental notice of the shipment of cargo where Continental did not raise Oakley’s failure to give notice in its answer.

Opinion by: Patricia L. Cohen, J. Kurt S. Odenwald, P.J. and Glenn A. Norton, J., concur.

Attorneys for Appellant: Randall D. Grady and Michael P. Wolf

Attorneys for Respondent: Simon P. Tonkin

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