Appeal No. SC88325

IN THE MISSOURI SUPREME COURT

NEAL 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 RESPONDENTS

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RESPONDENTS' STATEMENT OF FACTS

Respondents Neal Clevenger and Mitsue Clevenger (plaintiffs or plaintiffs-respondents) submit this statement of facts to clarify and correct the factual statement provided by Appellant Oliver Insurance Agency, Inc. (defendant) and to further explain the record before this Court. Rule 84.04 (f), Mo. R. Civ. P.

The verdict and judgment for plaintiffs in the amount of $78,223.82 appealed herein arose from plaintiffs-respondents' claims against their insurance agency, defendant Oliver Insurance Agency, Inc., asserted in separate counts for negligence and promissory estoppel in procuring the renewal, in May and June, 2002, of a pollution liability insurance policy for plaintiffs and assuring plaintiffs that the renewal policy provided coverage for claims alleging pollution of a lake on property located north of plaintiffs' equestrian park property in Raytown, Missouri.

The relevant time period involving the renewal of the pollution liability insurance was March 28, 2002 through June 7, 2002. (Tr. 270-72, Ex. 2; Tr. 273-77, Ex. 2B; Tr. 295-306; Ex. 3, 4, 5, 6 and 7).

A. Background

Plaintiffs had used defendant insurance agency's agent, Bill Adams, for virtually all their insurance needs for over twenty (20) years. (Tr. 503-04; 547) A claim in the form of a letter from the lake property owners' attorney was sent to plaintiffs in August of 2000 asserting that runoff from plaintiffs' property was polluting the lake. (Ex. 1.) Plaintiffs did not believe runoff from their property was the cause of any pollution of the lake and believed that the lake owner had a reputation for making frivolous claims. (Tr.

534-35). Nevertheless, plaintiffs contacted their insurance agent (defendant) and asked about obtaining pollution liability coverage. (Tr. 538-39) After some delay, and inquiries by defendant with sources of such insurance coverage, a pollution liability policy was procured in 2001 (the "initial policy") for plaintiffs. (Tr. 312-13; Tr. 538-40). The policy was issued in the spring of 2001; and, after plaintiffs amended the application to disclose the August 2000 claim letter an "exclusion endorsement" was issued by the insurance carrier in late 2001 or early January, 2002. (Apx. A28, Tr. 461). Prior to the renewal notice sent March 28, 2002 by defendant to plaintiffs, plaintiff Neal Clevenger had sent defendant the claim letter from the lake owner's attorney, Exhibit 1 (Tr. 266), the amended application for the original policy disclosing the claim (Tr. 710-11) and the proposed settlement agreement received from the lake owners' attorney (Tr. 267-68).

B. The Renewal Policy

When the policy came up for renewal in the spring of 2002 plaintiffs inquired of defendant if there was going to be coverage for claims alleging pollution of the lake after the August 2000 date. (Tr. 295-97). After several communications with the intermediary which had helped defendant obtain the insurance, defendant's agent Adams assured plaintiff Neal Clevenger that the insurance would provide coverage for claims alleging pollution from runoff after the August 2000 claim. (Tr. 542-47). Relying on this assurance, plaintiffs renewed the insurance. (Tr. 295-306). The renewal policy, issued by a different company than the insurer issuing the initial policy, was not received by plaintiffs until late August or early September of 2002. (Tr. 619, Ex. 9A, Ex. 9B).

In July of 2002 the neighboring lake property owners sued plaintiffs in Jackson County Circuit Court. (Tr. 620-21). The Petition alleged pollution of the lake by runoff from plaintiffs' property continued after August 22, 2000 and alleged damage to the lake from alleged pollution from runoff and threat of contamination of the lake after October 2000 and continuing through July 23, 2002, after the city had installed a storm sewer system (into which runoff from plaintiffs' property then drained) that had not been in place in August 2000. The lake owners alleged they had the right to divert water from this storm sewer system by opening a sluice gate the city authorized in exchange for an easement, to enable them to flush and fill their lake with water from the storm sewer. (Exhibit 8; Tr. 1034-39; 1047-48). Plaintiffs tendered the lawsuit to the insurance company through defendant agent. (Tr. 317-18) The insurance carrier denied coverage, citing the exclusion endorsement, and refused to provide a defense. (Tr. 319-23, Ex. 12). Plaintiffs joined defendant as a third party defendant in the action. Before trial of the lake owners' suit plaintiffs settled with them after first tendering the settlement offer from the lake owners to defendant. (Tr. 666, lines 1-19). Defendant declined to participate in the settlement. Plaintiffs then pursued their third party action against defendant for their expenses of defending and settling the initial action. Trial by jury was had in January, 2005 resulting in the verdict and judgment appealed from. (Apx. p. A6-8).

ARGUMENT

I.

RESPONSE TO POINT I OF APPELLANT'S BRIEF

THE TRIAL COURT PROPERLY DENIED OLIVER INSURANCE'S MOTION FOR DIRECTED VERDICT AND ITS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON RESPONDENTS' PROMISSORY ESTOPPEL CLAIM BECAUSE:

(A) THE AGENT'S ASSURANCES TO NEAL CLEVENGER THAT "YOU ARE COVERED FOR EVERYTHING AFTER THE OLD CLAIM" CONSTITUTED A PROMISE,

(B) THE EVIDENCE CLEARLY SHOWED JUSTIFIABLE RELIANCE BY PLAINTIFFS;

(C) MISSOURI LAW AS DECLARED BY THIS COURT RECOGNIZES THAT CLAIMS FOR DAMAGES, WHICH WOULD INCLUDE PLAINTIFFS' PROMISSORY ESTOPPEL CLAIM, ARE NOT THE KIND OF "EQUITABLE REMEDIES" THAT ARE PRECLUDED IF THERE IS A "REMEDY AT LAW;" AND

(D) MISSOURI LAW PERMITS SUBMITTING MULTIPLE AND ALTERNATIVE THEORIES OF CLAIMS FOR RELIEF SO LONG AS THERE IS ONLY ONE JUDGMENT AND RECOVERY.

Standard of Review

The standard of review of a denial of a judgment notwithstanding the verdict is essentially the same as for review of a denial of a motion for directed verdict. *Giddens v. Kansas City Southern Ry. Co.*, 29 S. W. 3d 813, 818 (Mo. en banc 2000). In determining whether the evidence was sufficient to support the jury's verdict, the evidence is viewed in the light most favorable to the verdict, giving the plaintiff the benefit of all reasonable inferences and disregarding evidence and inferences that conflict with that verdict. *Id.* The appellate court must affirm a judgment if it is sustainable on any theory set forth in the pleadings or supported by the evidence. *Townes v. Howe*, 852 S. W. 2d 359, 361 (Mo. App. 1993); *Miles Homes v. First State Bank*, 782 S. W. 2d 798, 801 (Mo. App. 1990).

Introduction to Respondents' Argument

The Court of Appeals decided this case based upon its conclusion that because plaintiffs had an adequate remedy at law, i.e., an action in negligence, "equitable relief is not appropriate." In doing so, the Court of Appeals revived the old "equity v. law" distinction, inappropriate here under this Court's decisions in *Diehl v. O'Malley*, 95 S.W. 3d 82, 86 [7] (Mo. en banc 2003) and *Leonardi v. Sherry*, 137 S.W. 3d 462, 471 (Mo. en banc 2004). The Court of Appeals took away plaintiffs' judgment based on promissory estoppel, entered on the jury's verdict on that count. Plaintiffs sought transfer to this Court, because of the general interest or importance of this question and requested that existing law concerning this issue be reexamined and clarified. Respondents believe this

is the central and dispositive issue before this honorable Court, but address it in the sequence set forth in appellant's substitute brief, as Point I, C, of this respondents' brief. Supreme Court Rule 84.04 (f).

A. <u>The Statements of Bill Adams to Neal Clevenger were more than "mere expressions of opinion" under the Evidence Presented to the Jury.</u>

The assurances given by defendant's agent, Bill Adams, were under the facts in evidence sufficient promissory statements supporting submission to, and a finding by, the jury of justifiable reliance causing damage. *Midwest Energy, Inc. v. Orion Food Systems, Inc*, 14 S. W. 3d 154, 159 (Mo. App. 2000). Defendant relies on *Prenger v. Baumhoer*, 939 S. W. 2d 23 (Mo. App. 1997); however, as the Court of Appeals held in *Midwest Energy, Inc.*, that case involved a situation in which the parties contemplated further bargaining and, like the present case before this Court, is distinguishable. *Midwest Energy, Id.* at 159, fn 4.

The evidence was that Adams knew that a lot of his clients relied on him to explain what is covered and what is not covered in an insurance policy he was offering his clients. He also understood that Neal Clevenger, as one of his insurance customers, often relied on him to explain what was covered and what was not covered with respect to insurance he was offering to provide Clevenger. (Tr. 311, 503-04). Adams knew that this insurance was being offered in the context of Clevenger deciding whether or not to renew the insurance, and that plaintiffs would not have bought the renewal policy if there would be no coverage. (Tr. 545). Clevenger told Adams, after getting his March 28 letter concerning renewal of the pollution liability coverage, "I told Bill…I wanted to know if

the lake---after the initial claims of Ruth Lehr's letter of August 2000, if any claims would come later, if they were going to be covered." (Tr. 542) (Tr. 543-44). And, at Tr. page 547 Clevenger testified: "After Bill assured me—I mean, he's been my agent for 23 years. If he said the evidence—he said the evidence is here you've got coverage, and he relied on it, I certainly relied on it. I don't question Bill. I mean, he's took care of me all of these years, and he was my agent." These assurances by Adams were not tentative, nor did they involve further bargaining. Adams' assurances to Clevenger satisfied the standard of *Midwest Energy, Inc., supra*, and Section 90, *Restatement (2d) of Contracts*.

B. <u>It is Beyond Dispute under the Evidence that Neal Clevenger Reasonably Relied on Adams' Assurances that Claims alleging Pollution of Elm Lake after the "Old" (August 2000) Claim were Covered.</u>

The testimony of Neal Clevenger, coupled with the fact that Adams had been the Clevengers' insurance agent for over twenty years, and knew they relied on him to explain what was covered and what was not covered, constitute ample evidence for the jury to find justifiable reliance by plaintiffs on Adams' assurances to Neal that the lake is covered for anything after the old claim. (Tr. 311, 547). Defendant's argument at page 26 of defendant's Brief is simply arguing defendant's interpretation of testimony which was for the finder of fact.

Defendant argues, at pp. 28-29 of Appellant's Brief, that because Neal Clevenger had his attorney review the original application for the pollution liability insurance in 2001 and he recommended it be amended to disclose the August 2000 claim letter, this

shows plaintiffs did not rely on Adams' assurances as to coverage by the renewal policy in May of 2002.

This argument fails for two reasons. First, Neal Clevenger testified that the only thing his attorney reviewed was the original application, in 2001. (Tr. 705-06). There was no evidence plaintiffs consulted their attorney about anything in connection with the renewal of the insurance in the relevant period between March and June of 2002. Neal Clevenger testified that his communications were with, and he relied on, Adams in deciding whether to renew the pollution liability coverage. (Tr. 541-47). Second, the renewal policy issued by a different company, Select Insurance Company, was not issued until late August of 2002, over two months after Clevenger made the decision to renew after the discussions with Adams. (Tr. 499-501). Therefore, he could not have consulted with his attorney about the terms of the renewal policy. The testimony clearly shows that Clevenger relied on Adams concerning his insurance coverage. (Tr. 502-05; 541-47).

The transcript references cited by defendant, itself, show that plaintiffs reasonably relied on the statements of Adams assuring Neal Clevenger that the renewal policy would cover the very kind of pollution claims he was concerned about having covered. (Tr. 547; Tr. 754; 543). (Ex. 3, 4, 5).

C. Defendant's Argument that Plaintiffs had an Adequate Remedy at Law Ignores Recent Missouri Supreme Court Opinions Reviewing and Clarifying this Area of Missouri Law.

The Court of Appeals decision and defendant's argument that there was no basis for a submission of promissory estoppel because plaintiffs had an adequate remedy at law

ignore recent decisions of the Missouri Supreme Court. *Leonardi v. Sherry*, 137 S. W. 3d 462, 471, 473 [4,5] and 474 [8] (Mo. en banc 2004); *Diehl v. O'Malley*, 95 S. W. 3d 82, 86 [7] (Mo. en banc 2003): "In reviewing the cases from the past 183 years, it is quite clear that, ordinarily, a suit that seeks only money damages is an action at law rather than equity." *Id*. The trial court's considered decision (Tr. 54-56, Apx. A1-3) to submit the promissory estoppel claim of plaintiffs was consistent with these decisions, and with *Midwest Energy v. Orion Food Systems, Inc.*, 14 S. W. 3d 154, 159-60, 162 [13] (Mo. App. 2000), *transfer denied. See also Estate of Cantonia v. Sindel*, 684 S. W. 2d 592, 595 (Mo. App. 1985). Furthermore, instructions for alternative theories of recovery may be submitted to the jury if there is evidence to support each theory and the alternative theories are not inconsistent. *Manufacturers American Bank v. Stamatis*, 719 S.W. 2d 64, 70 [11] (Mo. App. 1986), *transfer denied*.

II.

RESPONSE TO POINT II OF APPELLANT'S BRIEF

THE TRIAL COURT PROPERLY DENIED OLIVER INSURANCE'S MOTION FOR DIRECTED VERDICT AND MOTION FOR REMITTITUR ON DAMAGES AWARDED PLAINTIFFS ON THEIR CLAIM FOR PROMISSORY ESTOPPEL BECAUSE THEIR RELIANCE CAUSED THEM TO TAKE NO FURTHER STEPS TO PROCURE OTHER INSURANCE WHICH WOULD HAVE COVERED CLAIMS AFTER THE AUGUST 2000 CLAIM AND PROVIDED A DEFENSE TO THE JUNGERMAN LAWSUIT, OR OTHER ACTION TO PROTECT THEMSELVES.

Defendant argues a strained interpretation of the evidence in asserting that "as a matter of law" the Clevengers' damages did not exceed the amount of the renewal premium. The record fully supports the damages found by the jury in the amount of $78,223.82. (Tr. 648-5; 862-63; 657; 661; 665-66; 914-15; 669). Plaintiffs' evidence established proximate cause and the damages awarded by the jury. *Bell v. O'Leary*, 744 F. 2d 1370, 1373-74 [3] (8th Cir. 1984). A trial court may sustain a defendant's motion for directed verdict or a motion for judgment notwithstanding the verdict only when the facts in evidence and the reasonable inferences drawn therefrom are so strongly against a party that no room is left for reasonable minds to differ." *Burns National Lock Installation Co., Inc. v. American Family Mutual Insurance Co.*, 61 S. W. 3d 262, 271 [15] (Mo. App. 2001). *Bell v. O'Leary* is applicable to the issue on this point raised by defendant-appellant. To paraphrase the Court in *Bell*, which also involved a suit against an insurance broker, for failing to determine that his clients did not have coverage for flood losses, when Adams assured Neal Clevenger he was covered for everything except the old claim, this assurance "…lulled the plaintiffs into believing that no further actions were necessary....[defendant] foreclosed the opportunity to consider other options that might have been available to the plaintiffs." *Id.* at 1373-74. (brackets added) Defendant's contention that plaintiffs' reliance on Adams' assurances caused them no damage beyond the premium paid for the pollution liability renewal policy is simply incorrect. *Cf. Branstad v. Kinstler*, 166 S. W. 3d 134, 137 [6] (Mo. App. 2005). The essence of the plaintiffs' case is justifiable reliance causing damage. *Midwest Energy, Id.* at 159. Plaintiffs presented evidence of their reliance and their damages. Adams testified that

third party liability insurance against pollution claims would provide a defense and indemnity if suit was brought by a third party. (Tr. 265). Obviously, Adams' assurances about the scope of the renewal insurance coverage were false; therefore, plaintiffs were required, to their substantial damage, to spend sums from their own pockets to defend and settle the pollution lawsuit. In reviewing a claim of excessiveness of the verdict the appellate court considers the evidence of damages in the light most favorable to the plaintiff. The amount of the damages is primarily for the jury. It is that body which is charged with the function of finding, as a fact, what sum will fairly and reasonably compensate plaintiffs for their injuries. *Washington v. Eickholt*, 360 S. W. 2d 731, 734 [2] [3] (Mo. App. 1962).

III.

RESPONSE TO POINT III OF APPELLANT'S BRIEF

THE TRIAL COURT PROPERLY DENIED OLIVER INSURANCE'S MOTION FOR JUDGMENT NOV, TO AMEND THE JUDGMENT, REMITTITUR OR, IN THE ALTERNATIVE, FOR A NEW TRIAL BECAUSE (A) THE JURY'S FINDING OF THE TOTAL AMOUNT OF PLAINTIFFS' DAMAGES WAS SUPPORTED BY THE EVIDENCE AND PROPER UNDER THE INSTRUCTIONS OF THE COURT, IN THAT (B) JURY INSTRUCTION NO. 12 BY ITS SPECIFIC TERMS APPLIED ONLY TO THE NEGLIGENCE CLAIM WHILE INSTRUCTION NO. 11 PROPERLY INSTRUCTED THE JURY AS TO DAMAGES UNDER THE PROMISSORY ESTOPPEL VERDICT DIRECTING

INSTRUCTION, AND (C) VERDICT "C" WAS THE PROPER FORM OF VERDICT.

Defendant has attempted to seize upon the jury's finding on the negligence claim, under the comparative fault instructions, Instructions No. 8 and No. 12, in Verdict B to assert that the trial court erred in entering judgment on the jury's verdict on the promissory estoppel claim, under Instruction No. 5 and Instruction No. 11. There was no error. Instruction No. 8 was the comparative fault negligence instruction based on defendant's failing to determine that the pollution insurance renewal would not provide coverage for any claims alleging pollution from water runoff into Elm Lake occurring after August 22, 2000. Plaintiffs objected to the giving of Instruction No. 8 as well as No. 9 (Tr. 1070-71) because there was no evidence of any negligence of plaintiffs during the relevant time period in the case: the renewal of the insurance beginning with defendant's notice to plaintiffs dated March 28, 2002 through Neal Clevenger's decision to renew in early June, approximately June 5 according to Clevenger's testimony (Tr. 543-47). Plaintiffs did not cross-appeal because the trial court entered one judgment, based only on Verdict A , the promissory estoppel claim, and Verdict C on which the jury found plaintiffs' total damages to be $78,223.82. (Apx. pp. A43-45). Instruction No. 12, since No. 8 was given by the Court over plaintiffs' objection, correctly told the jury it applied to their findings under Instruction No. 8, the negligence claim. Instruction No. 5

and Instruction No. 11 (Apx. A4, A5) correctly told the jury their findings under these instructions related to the promissory estoppel claim.[1]

Defendant appears to suggest that the jury would have found plaintiffs' total damages in a different amount if the Court had informed them it would only reduce the damages they awarded under Instructions No. 8 and 12, but not on their findings under Instructions No. 5 and No. 11. There is nothing in the record to support this argument. The instructions were MAI. The jury was not, and need not have been, concerned with the function of the trial judge in carrying out a responsibility of the court, not the jury, as to reducing the total amount of damages by any percentage of fault the jury assessed on the negligence claim under Instructions 8 and 12. *See Lindsey Masonry Co., Inc., v. Jenkins & Associates, Inc.*, 897 S. W. 2d 6, 12 [5] (Mo. App. 1995), *transfer denied,* citing *Davis v. Stewart Title Guar. Co.*, 726 S. W. 2d 839, 857 [26] (Mo. App. 1987): Defendant contends that the trial court erred in entering judgment for the total amount of the damages on the *promissory estoppel* claim because this "was in contravention and variance of the instructions to the jury that informed its verdicts." Appellant's Substitute Brief, p. 34. This contention is without merit. The jury was correctly instructed, given that the court overruled plaintiffs' objection to the comparative fault instruction. The jury performed its function, and not the court's judicial function, in rendering its verdict on

[1] Interestingly, appellant did not include Instruction No. 11 in the Appendix to Appellant's Substitute Brief. However, it is set forth in Respondents' Appendix to their Substitute Brief, Apx. A5 and in the trial Transcript at pages 1083-84.

the damages evidence. Therefore, there can be no error in the trial court entering one judgment based on the jury's verdict for plaintiffs on the promissory estoppel claim, for the total amount of plaintiffs' damages as found by the jury under Instruction No. 11. *Pickel v. Gaskin, M. D.*, 202 S. W. 3d 630, 637 [8] (Mo. App. 2006), *transfer denied*. *Bell v. O'Leary*, *supra*, at 1374.

IV.

RESPONSE TO POINT IV OF APPELLANT'S BRIEF

THE TRIAL COURT PROPERLY DENIED OLIVER INSURANCE'S MOTION FOR JUDGMENT NOV, TO AMEND THE JUDGMENT, REMITTITUR OR, IN THE ALTERNATIVE, FOR A NEW TRIAL BECAUSE THE TRIAL COURT WAS CORRECT IN ITS RULING THAT THE ARGUMENT OF DEFENDANT'S COUNSEL MISSTATED THE LAW AND ACTED WITHIN ITS DISCRETION IN INSTRUCTING THE JURY TO DISREGARD COUNSEL'S PROPOSED ARGUMENT THAT PLAINTIFFS' ONLY DAMAGES WERE THE PREMIUM PAID FOR THE RENEWAL POLICY, IN THAT UNDER THE *Bell* AND *Townes* DECISIONS, PLAINTIFFS' DAMAGES WERE NOT LIMITED TO RECOVERY OF THE PREMIUM PAID FOR THE INSURANCE.

The plaintiffs were not limited, as a matter of law, to recovery of only the premium paid for renewal of the insurance policy. *Bell v. O'Leary*, 744 F. 2d 1370, 1373-74 [3] (8th Cir. 1984); *Townes v. Howe*, 852 S. W. 2d 359, 361 [5] (Mo. App. 1993). *See also, Branstad v. Kinstler*, 166 S. W. 3d 134, 137 [6] (Mo. App. 2005).

Accordingly, the trial court did not err and acted within its discretion in sustaining plaintiffs' objection to defendant's attempt to suggest a legal limitation on, and misstate, the plaintiffs' damages. (Tr. 677, lines 10-25, Tr. 678, lines 1-10). The court also did not err, and acted within its discretion, when it sustained the plaintiffs' objection to counsel's attempted argument trying to instruct the jury that plaintiffs' damages were limited to the renewal premium paid for the renewal policy less any refund plaintiffs could have received from canceling the policy. (Tr. 1130, lines 20-25; Tr. 1131; 1132, lines 1-9). The trial court is possessed of broad discretion in the area of closing arguments, not lightly to be disturbed on appeal. *Lewis v. Bucyrus-Erie, Inc.*, 622 S. W. 2d 920, 925 [6] (Mo. banc 1981). It is allowed considerable discretion in permitting or restraining counsel's argument. *Helfrick v. Taylor*, 440 S. W. 2d 940, 947 [10] (Mo. 1969). Defendant's attempt to argue a limitation of plaintiffs' damages to the amount of the unrefundable premium was contrary to the law submitted by the court in the jury instructions and was a misstatement of the law. *Sallee v. Shockley,* 829 S. W. 2d 519, 523 [3] (Mo. App. 1992) . Preventing counsel from making this argument and instructing the jury to disregard it was therefore not an abuse of discretion. *Id.* Defendant's point IV is without merit.

V.

RESPONSE TO POINT V OF APPELLANT'S BRIEF

THE TRIAL COURT PROPERLY DENIED OLIVER INSURANCE'S MOTION FOR JUDGMENT NOV, TO AMEND THE JUDGMENT, REMITTITUR OR, IN THE ALTERNATIVE, FOR A NEW TRIAL BECAUSE THE TRIAL COURT

ACTED WITHIN ITS DISCRETION IN SUSTAINING OBJECTIONS TO EXHIBIT 236 AND THE OFFER OF PROOF THROUGH PLAINTIFFS' EXPERT WITNESS IN THAT THERE WAS NO EVIDENCE THAT PLAINTIFFS' ATTORNEY REVIEWED THE POLICY PRIOR TO THE RENEWAL DATE, THE RENEWAL POLICY WAS NOT RECEIVED BY PLAINTIFFS UNTIL LONG AFTER THE DECISION TO RENEW AND DEFENDANT'S OFFER OF PROOF HAD NO PROBATIVE VALUE AS TO THE ISSUE OF RELIANCE BY PLAINTIFFS ON DEFENDANT'S PROMISE THAT THERE WAS COVERAGE FOR EVERYTHING EXCEPT THE AUGUST 22, 2000 CLAIM.

Defendant attempted to insist throughout the trial that plaintiff Neal Clevenger had his attorney "review the policy" in the fall of 2001, to try to fashion an argument that plaintiffs relied not on their insurance agent, Bill Adams, but on their attorney, in deciding to renew the pollution insurance coverage in the spring of 2002. There is no support in the record for this contention, and the transcript clearly shows that Neal Clevenger denied having his attorney "review the policy" (which referred to the initial policy, issued in the fall of 2001; not the renewal policy, which was issued in late August of 2002 and not received by Clevengers until late August or early September of 2002). (Tr. 705; 706, lines 1-24).

Because there were two "policies (the initial policy and the renewal policy) and the record is clear that Clevengers' attorney did not review either policy, but only reviewed the original application in 2001 after being requested to do so, it seems clear

that defendants' counsel made an intentional misleading attempt to associate Clevengers' attorney with the 2002 policy, which he never saw and never reviewed for plaintiffs. Counsel for defendant continued to press this contention in cross-examining plaintiffs' expert witness about whether the Clevengers' attorney told the expert that he reviewed "the policy." (Tr. 828-29; 831-2; 833, lines 1-15). Clearly, neither the testimony of Neal Clevenger nor the testimony of expert witness Carpenter established that the Clevengers relied on their attorney to review the pollution liability policy originally issued to them, much less that they did not rely on the assurances of Adams in May and early June of 2002 as to the renewal policy providing coverage for claims alleging pollution to the lake after the August 2000 claim. Such argument was not supported by the evidence and in fact was inconsistent with the evidence.

Furthermore, plaintiffs did not receive the renewal policy until sometime in September 2002. (Tr. 549-50). This policy was a new policy issued by a different carrier than the insurer under the original policy. (Tr. 313-14; 499-500; 501, lines 1-6). There was explicit testimony about the discussions between Neal Clevenger and Adams concerning the renewal in the spring of 2002 and what was going to be covered. (Tr. 541-47). There was no evidence of any communications Neal Clevenger had with any attorney during the relevant period involving the renewal of the insurance and the reliance by Clevenger on Adams' assurances. The trial court acted within its discretion in sustaining the objection to the proffered Exhibit 236, a letter dated July 9, 2002 referring to an inquiry being answered by Neal Clevenger several weeks after the renewal decision (Tr. 580-81), and which defendant presented no testimony or other evidence to

show was relevant to the issues in the case, other than its contention that it somehow showed plaintiffs did not rely on Adams' assurances in renewing the pollution liability coverage in late May and early June, 2002. It did not show that. (Tr. 555-669). It was properly excluded.

Furthermore, the testimony (at Tr. 704-05) defendant cites on p. 37 of Appellant's Brief as having been excluded by the court was not excluded. It just did not say what defendant's counsel tried to argue it showed. The proffered testimony cited by defendant (at Tr. 831-833) that was excluded by the trial court also did not show what counsel claimed as to reliance by plaintiffs on anyone except Adams in deciding to renew the policy in May and early June of 2002. The offer of proof was properly denied. There was no error and no abuse of discretion in excluding this evidence relating to a different time period and a different policy.

A trial court has considerable discretion in determining whether evidence should be excluded and the appellate courts will reverse only when the exclusion of evidence shocks the sense of justice or indicates an absence of careful consideration. *Care and Treatment of Cokes*, 183 S. W. 3d 281, 285 [5, 6] (Mo. App. 2005). Even then, they will not reverse unless the error had a material effect on the merits of the action. *Id.* Under all the evidence concerning the events surrounding renewal of the pollution liability insurance and the questions by Neal Clevenger to Adams, and Adams' assurances to

Clevenger, in the relevant time period, exclusion of the proffered testimony and exhibit had no material effect on the merits of the case. [2]

CONCLUSION

The trial court properly overruled defendant-appellant's post-trial motions because the jury verdict for plaintiffs, and the total damages award, on the promissory estoppel claim were supported by the evidence and based on proper jury instructions given by the court. The Court of Appeals misinterpreted or misapplied the law as set forth in the recent decisions of this Court, concerning the plaintiffs' promissory estoppel claim and its submission to the jury. There was no error or abuse of discretion by the trial court. Accordingly, the Order of the Court of Appeals dated December 26, 2006 should be reversed and the judgment of the trial court should be reinstated and affirmed.

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[2] It is probable that the defendant's continued assertion of the events surrounding the original application for the insurance in 2001, and counsel's arguments that events in 2001 showed Neal Clevenger was negligent in not taking action to hire an engineer or take other action in the early weeks after receiving the August 22, 2000 claim letter (Ex. 1), was the reason the jury assigned substantial fault to plaintiffs in Verdict "B" on the negligence claim, apparently accepting defendant's arguments based on a time period that was not the relevant time period. (Tr. 682-84, 710; 737-39; 1122; 1088-89). (Verdict "B", Apx. p. A7). The trial court expressed concern about the relevancy of defendant's contentions. (Tr. 31-32; Tr. 379-87).

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Certificate of Compliance with Missouri Supreme Court Rule 84.06 (b) and 84.06 (g), and Missouri Court of Appeals Western District Special Rules 360 and 361

The undersigned 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 of Microsoft Word by which it was prepared, contains 4,881 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

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

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing Brief of Respondents was served on Appellant by mailing same, First Class U. S. Mail, postage prepaid, to: Hal D. Meltzer, Esq., Baker Sterchi Cowden & Rice LLC, 2400 Pershing Road, Suite 500, Kansas City, MO 64108-2533, attorney for Appellant herein, on this ___ day of June, 2007.

_____
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