

IN THE SUPREME COURT OF MISSOURI

Case No. SC90329

OVERLAP, INC.,
Plaintiff/Respondent,

v.

A.G. EDWARDS & SONS, INC.,
Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSOURI

The Honorable Roger Prokes
Circuit Judge, Sitting by Designation

SUBSTITUTE BRIEF OF APPELLANT A.G. EDWARDS & SONS, INC.

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Jurisdictional Statement

This is an appeal from a final judgment entered after a civil jury trial by the Circuit Court of Jackson County, Missouri. The Judgment was entered on February 22, 2008 and a Corrected Judgment was entered on February 25, 2008. (L.F. 1429, 1431). Appellant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative for New Trial, was filed on March 21, 2008 and was denied on May 14, 2008. (L.F. 1543, 1877). Appellant filed its Notice of Appeal on May 22, 2008. (L.F. 1882). The appeal involves the submissibility of claims, evidentiary rulings, instructional issues, and juror misconduct.

This Court has jurisdiction of the appeal pursuant to Art. V § 10 of the Missouri Constitution, in that the Court transferred the case after opinion in the Court of Appeals. The Court now decides the case as though on original appeal. Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. banc 1985).

Statement Of Facts

This case involves a dispute over the use of a software program created by Overlap, Inc. (“Overlap” or “Plaintiff”). The software program (the “Software”) compares the stock holdings of two or more mutual funds and calculates the degree of overlap – i.e., the extent to which the funds hold the same stock. (Tr. 402; L.F. 81¶¶ 5-9). The user inputs the names of the mutual funds to be compared, and the Software calculates the percentage of overlap between the funds, i.e. the Overlap number. (Tr. 407-08, 417-18; Trial Ex. 233A).¹

Overlap sold its Software to various brokerage firms, including A.G. Edwards & Sons, Inc. (“A.G. Edwards” or “Defendant”). (L.F. 31-57). It has sued almost every one of these brokerage firms, including A.G. Edwards, for allegedly distributing the number generated by the Software to the firms’ respective financial consultants. (L.F. 31-57; 58-62). Overlap claims this activity constitutes a breach of the Software license agreements. Id.

I. The Licenses.

During the relevant time period, two different licenses governed the use of the Software. The first license, in effect until December 2000, provided in its entirety:

¹ An example of a report generated by the Software is in the Appendix at A116.

This version of Overlap is licensed in a single use only environment. To obtain licensing for multiple use environments, including networks and multiple installations, call 1-800-OVERLAP.

(the “Original License” a copy of which is in the Appendix at A115) (Tr. 438-40, 507-08; Trial Ex. 230A).

Beginning in December 2000, Overlap changed the license language to provide, in relevant part:

B. YOU MAY:

1. Install and use one copy of the Product on a single computer.

This copy is to be used by only a single user and will be used to the benefit of said single user. If you wish to use the Product for more users you will need an additional license for each user.

* * *

C. YOU MAY NOT . . .

4. Use the product for the benefit of more than one licensed user.

(the “Revised License” a copy of which as it appeared on the computer screen is in the Appendix at A146-54) (collectively the Original License and Revised License are referred to as the “Licenses” or “Agreements”). (Tr. 438-40, 507-08; Trial Ex. 229, 501).

II. A.G. Edwards' Specific Use of the Software.

Overlap claims that A.G. Edwards violated the Software licenses by (1) loading a single copy of the Overlap Software onto multiple computers; and (2) by giving the number generated by the “single user” of the Software to A.G. Edwards' financial consultants who did not have a license to use the Software. (L.F. 32-57).

A. Loading Single Copy Of Software On Multiple Computers.

In or about 1997, A.G. Edwards purchased four (4) Software licenses. Overlap alleges that A.G. Edwards loaded the Software on 51 computers. As part of its trial strategy – not because the evidence established it – A.G. Edwards effectively conceded during closing arguments that the maximum damages that could be awarded on the alleged breach of Licenses was the license fee multiplied by 47 (51 computers minus the 4 licenses purchased). (Tr. 1400).

The jury concluded that A.G. Edwards violated the Software Licenses by loading the Software on more computers than it had purchased licenses. The jury awarded \$22,278 for that breach, which corresponds to A.G. Edwards' suggested method of calculating damages. (L.F. 1293; Tr. 1400).

B. Distribution Of The Number.

The primary issue in this case is A.G. Edwards' circulation of the Overlap number calculated by the Software to its financial consultants.² A.G. Edwards provided the number to some of its more than 7,000 financial consultants, who shared this information with their clients. Overlap's theory is that each of those financial consultants was required to pay a license fee in order to receive the number generated by the Software.

Overlap's interpretation of the Licenses in this litigation differs wildly from how Overlap interprets the Licenses for purposes of marketing and selling the Software. Overlap marketed the Software primarily to individual brokers and financial institutions, including brokerage firms, such as A.G. Edwards, who engaged in the sale of mutual funds and other financial products and services. (Tr. 470-71, 477-79, 504-05, 553-54). Overlap knew that brokerage firms would be using the Software to analyze the mutual fund holdings of clients, and that those firms had employees who assisted the firm's brokers in providing advice with respect to mutual fund holdings (Tr. 478, 552-53).

Overlap did not restrict the financial professionals from sharing the data (i.e. the number) generated by the Software with clients. (Tr. 478, 482; L.F. 81 ¶9,

² The brokers at A.G. Edwards are usually called financial consultants, or "FCs" for short. (Tr. 892). Those three titles are used interchangeably throughout the transcript.

1100). Rather, in its marketing materials, Overlap represented that there were no restrictions on how the Software could be used, stating “[y]ou can use the service as often as you like . . . [h]owever you want to use it . . . [i]t’s yours,” and “[y]ou can use the objective data from Overlap any way you choose.” (Tr. 582-83, 585-86; Trial Exs. 525, 524).

Not surprisingly, Overlap’s principals could not agree on the meaning of the Licenses. William Chennault (creator and inventor of Overlap) testified that a licensed financial consultant could not share the Overlap number with his or her client. (Trial. Ex. 810 at A171). Yet, Kevin Fryer (Overlap’s President) and Al Eidson (Overlap’s Marketing Counsel) have consistently maintained that the license permits a broker to give the Overlap number to a client. (Trial Ex. 812 at A181; Tr. 478, 482; L.F. 81 ¶9, 1100).

Despite telling its customers and prospective customers that you “[can use the Software] any way you choose,” Overlap proceeded with its breach of contract claims on a theory that the Software Licenses prohibited the distribution of the Overlap number to non-licensed persons.

III. A.G. Edwards’ Use Of The Software.

A.G. Edwards provided employees of its Managed Products department (“Managed Products”) with copies of the Software. (L.F. 83 ¶ 19; Tr. 508-09, 1085; Trial Ex. 250 16:21-17:02, 46:25-48:10). Managed Products employees used the Software, among numerous other tools, to assist A.G. Edwards’ financial consultants in regards to the mutual fund holdings of clients. (Tr. 997-99, 1076-

77, 1084-85; Trial Ex. 255 31:01-31:13; 256 17:01-17:15). Managed Products used the Overlap Software in the following ways:

- To respond to calls from financial consultants for the percentage of overlap of client mutual fund holdings. (Tr. 1036, 1062, 1157). The results were provided over the telephone or via facsimile. (Id.)
- To include the Overlap number (i.e. percentage) as a single data point in an elaborate, customized written report for the broker's use in analyzing his/her client's mutual fund portfolio. (Tr. 1099-1100, 1135; Trial Ex. 1222). The report was not to be distributed to clients. (Tr. 1100). An example of this report is in the Appendix at A143-45.
- To include Overlap number as a single data point in presentations to high net-worth individuals. (Tr. 1169-70, 1176-77, 1179-82; Trial Ex. 79).
- To create a chart for internal access reflecting the overlap percentages among the mutual funds offered by American Funds. (Trial Exs. 85, 256 52:08-55:11).

A. A.G. Edwards Wanted To Incorporate The Overlap Number Into Automated Reports That Were Generated By Financial Consultants And Provided To Clients.

A.G. Edwards gave financial consultants the ability to prepare automated mutual fund reports that were approved for and regularly distributed to clients.

(Tr. 1078-80, 1088-95). These reports were offered via A.G. Edwards' intranet, and could be run by the brokers in their branch offices from their computers. (Tr. 1078-81; Trial Ex. 798, 798A). These automated reports analyzed almost every aspect of a mutual fund portfolio, but did not include any information generated by the Overlap Software, i.e. the Overlap number. (Tr. 1079, 1081).³ A.G. Edwards wanted access to the Overlap source code to include the Overlap number in these automated, intranet-based reports. (Tr. 1078-80, 1088-95).

B. Communications Between A.G. Edwards And Overlap

On August 9, 2000, in connection with efforts to use Overlap's source code so as to be able to include the Overlap number in the automated client reports, A.G. Edwards' employee Anne Rauch asked Overlap whether the license agreement covered this new use, i.e. direct use by the financial consultants through an automated program. (Trial Ex. 48, Tr. 511, 1078-80; 1088-95). In a subsequent telephone conversation, Ms. Rauch reiterated Managed Products' desire to include the Overlap number in the reports sent to clients. (Tr. 511). Thus, A.G. Edwards desired to make the Overlap Software directly available to its financial consultants electronically, rather than indirectly by paper. (Tr. 1078-80; 1088-95).

Mr. Fryer testified that he told Ms. Rauch that this was not allowed under the current arrangement, but they could work on a proposal that would allow it.

³ A sample of this report is in the Appendix at A136-42. (Tr. 1005, 1080; Trial Ex. 798A).

(Tr. 512). On September 13, 2000, Mr. Fryer visited Ms. Rauch and some other A.G. Edwards' personnel at A.G. Edward's corporate headquarters in St. Louis, Missouri to discuss the proposal. (Tr. 513).

Mr. Fryer never asked anyone at A.G. Edwards how the Software was currently being used. (Tr. 603-04). He did testify that, during a meeting, "someone" volunteered that the Software was being used for "internal research." (Tr. 603). Mr. Fryer could not recall who made this statement, much less explain what was meant by "internal research." (Id.). He did not claim that A.G. Edwards represented it was using the Software *exclusively* for internal research. (Tr. 603-04; L.F. 1299). There is no evidence that anyone told Mr. Fryer that A.G. Edwards was not providing Overlap reports to its financial consultants.

It is apparent that Overlap and A.G. Edwards were discussing two entirely different things. A.G. Edwards contemplated using Overlap's source code to make the Overlap number available at the brokers' desktop via the automated client reports. (Tr. 1088-95).⁴ Mr. Fryer apparently believed – or wanted to believe – that A.G. Edwards intended to load the Software on every broker's work station. (Tr. 513-14, 602).

Overlap offered two different proposals based on its apparent understanding of A.G. Edwards' intended use. The first proposal would allow

⁴ A.G. Edwards already used data from another company, CDA Weisenberger, to obtain the information provided in the automated reports. (Tr. 1079).

each financial consultant to run the Software on his or her own desktop computer at an annual cost of \$80 per consultant – approximately \$560,000 a year. (Trial Ex. 27; Tr. 514-15, 520-21). The second proposal would permit Managed Products to run reports for financial consultants at an annual cost of \$40 per financial consultant – approximately \$280,000 per year (Trial Ex. 21, 144). A.G. Edwards did not agree to either of these proposals.⁵ (Trial Ex. 21).

Overlap’s claims for fraudulent and negligent misrepresentation arise out of this series of miscommunications.

IV. Procedural History Of The Claims.

Overlap sent a “cease and desist” letter to A.G. Edwards on November 19, 2001, which detailed the alleged license violations and demanded that A.G. Edwards stop violating the licenses. (Tr. 535-36; Trial Ex. 21). Overlap threatened to file a lawsuit unless A.G. Edwards agreed to compensate Overlap for the violations. (Trial Ex. 21).

Despite its threat in the November 19, 2001 letter, Overlap waited over five years to file suit against A.G. Edwards – the company to which it sent the demand letter. Specifically, Overlap initially filed suit on January 21, 2003, but did not name A.G. Edwards as a defendant. (L.F. 31-57). Instead, Overlap sued a different company – A.G. Edwards Capital, Inc. (“AGE Capital”) – which has the same parent as A.G. Edwards. (Id.; L.F. 426) In response, AGE Capital advised

⁵ There was no evidence that A.G. Edwards ever used Overlap’s source code.

Overlap that it sued the wrong party and that the correct defendant was A.G. Edwards. AGE Capital communicated this to Overlap not just once, but ten separate times, all in writing. (L.F. 58, 191, 194, 197, 201, 210, 213, 227, 230, 234). In addition, A.G. Edwards agreed to voluntarily provide information and documents to Overlap regarding its use of the Software, and stated that it was doing so “based on the assumption and expectation that plaintiff will promptly file a motion to substitute parties to correct the error [in suing the wrong party].” (L.F. 191, 194, 197, 201, 210, 234).

Despite being told repeatedly that it had sued the wrong party, Overlap waited until November 20, 2006 before seeking to amend its Petition to add A.G. Edwards as a defendant. (L.F. 63). Overlap did not dismiss AGE Capital from the case, but reasserted the original claims and added two new claims against that company. (L.F. 80-91). Overlap continued to litigate its claims against AGE Capital for another six months until it filed a dismissal on May 31, 2007. (L.F. 454).

V. The Litigation.

The case was tried to a jury beginning January 28, 2008. (L.F. 1276). The Trial Court granted a directed verdict in favor of A.G. Edwards on Overlap’s unfair competition claim. (L.F. 1278). The remaining claims were submitted to the jury. (L.F. 1282-1320).

A. Breach Of The Original License.

The Original License was in effect from 1998 to 2000. (Tr. 437-38, 507-08). Overlap argued that the Original License prohibited A.G. Edwards from distributing the Overlap number to its financial consultants and asked the jury to award \$3.2 million in damages based on the number of financial consultants who could have potentially received the results. (Tr. 1361, 1377-79).

A.G. Edwards argued that the Original License contained no such prohibition. As part of its trial strategy – not because the evidence established it – A.G. Edwards did not dispute damages of \$22,278, based on the 47 computers that Overlap claimed had been improperly loaded with the Software. (Tr. 1399-1403). The jury assessed damages of \$22,278 on Overlap’s claim for breach of the Original License. (L.F. 1293). Therefore, the jury necessarily concluded that the Original License did not prohibit distributing paper reports containing Overlap numbers to financial consultants.

B. Breach Of The Revised License.

The Revised License became effective in December 2000. (Tr. 508). The issue here was whether the Revised License prohibited A.G. Edwards from distributing the Overlap number generated by the Software to its financial consultants. (Tr. 1363, 1401-02). The jury assessed damages of \$1,217,370 on this claim (L.F. 1297), based on the list price for a single license in 2001 (\$165) multiplied by the 7,382 financial consultants who might have seen the number, less the \$660 paid by A.G. Edwards for its four licenses. (Tr. 1377-80). This

verdict necessarily depends on a finding that the Revised License, unlike the Original License, prohibited A.G. Edwards from giving the Overlap number to its financial consultants.

C. Misrepresentation And Fraudulent Omission.

The gravamen of the misrepresentation claim was that A.G. Edwards falsely told Overlap that A.G. Edwards was not providing the Overlap number to its financial consultants, but hoped to do so in the future. (L.F. 88, ¶43). There is no evidence that A.G. Edwards ever made that representation. Rather, Overlap submitted this claim by combining the statement at the September 13, 2000, meeting that A.G. Edwards was using the reports for “internal research” with Ms. Rauch’s e-mail a month earlier that A.G. Edwards hoped to provide electronic access to the Software to its financial consultants in the future. (L.F. 1299, 1306).

Because the starting point for this claim was the August 9, 2000 e-mail, Overlap claimed damages from that date until the end of 2001. (Tr. 1389). The basis for the damages was the list price of a Software license for 2001 (\$165) multiplied by the 7,382 financial consultants on August 9, 2000. (Id.) The jury awarded \$1.8 million in actual damages and \$2.3 million in punitive damages on the fraud claim. (L.F. 1304). The jury also awarded \$1.8 million in actual damages on Overlap’s negligent misrepresentation claim. (L.F. 1310).

Overlap also submitted a theory of fraudulent omission – i.e., A.G. Edwards fraudulently failed to disclose to Overlap that it was giving the Overlap

number to its financial consultants. (L.F. 1300). The jury also awarded \$1.8 million on that claim. (L.F. 1314).⁶

VI. The Judgment.

After trial, the Trial Court ruled that the compensatory damages merged into a single damage award of \$1.8 million which, when combined with the punitive damages award of \$2.3 million, resulted in total damages of \$4.1 million. (L.F. 1432). The trial court entered judgment on February 22, 2008, and a Corrected Judgment on February 25, 2008. (L.F. 1429, 1431).

VII. Juror Issue.

During voir dire, the jury panel was asked: “What I’d like to know now is, anyone that’s on this panel has ever been a party to a lawsuit, either a plaintiff or a defendant in a lawsuit.” (Tr. 181-82). Juror Hillerman (# 8) did not respond. (L.F. 1125; Tr. 182-194). After the trial concluded, an evidentiary hearing was held, where it was established that Juror Hillerman had failed to disclose that he had been sued in 2001, that he was deposed, that the case went to trial, that the jury found against him and awarded \$25,106 in damages, that Juror Hillerman remembered the case at the time of voir dire, recalled being asked about litigation,

⁶ Because Overlap submitted its fraudulent misrepresentation and fraudulent concealment claims under the same generic verdict form, it is impossible to determine on which theory the jury awarded damages. (L.F. 1299-1304). See Mathes v. Sher Express, 200 S.W.3d 97, 105-07 (Mo. App. 2006).

did not raise his hand in response to the question, and admitted that he did not respond because of embarrassment. (Evidentiary Hearing Ex's A, B; May 12, 2008 Tr. 6-18) (L.F. 1878). Based on his testimony, the Trial Court concluded that the concealment was intentional. (L.F. 1878).

Points Relied On

- I. The Trial Court Erred In Submitting Overlap’s Claim For Breach Of The Revised License And In Denying A.G. Edwards’ Motion For Directed Verdict And Judgment Notwithstanding The Verdict On That Claim, Because The Revised License Cannot Be Reasonably Construed To Prohibit A Licensed User From Using The Software Output To Benefit Third Parties, In That Such An Interpretation Produces Absurd Results.

Stonebrook Estates, LLC v. Greene County, 275 S.W.3d 353 (Mo. App. 2008);

Rathbun v. Cato Corp., 93 S.W.3d 771 (Mo. App. 2002);

Pepsi Midamerica v. Harris, 232 S.W.3d 648 (Mo. App. 2007);

Sonoma Mgmt. Co. v. Boessen, 70 S.W.3d 475 (Mo. App. 2002).

- II. The Trial Court Erred In Submitting Overlap’s Claims For Fraud And Negligent Misrepresentation To The Jury And In Denying A.G. Edwards’ Motions For Directed Verdict And Judgment Notwithstanding The Verdict On Those Claims, Because Overlap Did Not Prove The Requisite Elements Of Reliance, Materiality, Causation, Damages, Or A False Representation That The Speaker Knew Or Should Have Known Was False, In That: (1) The Conduct Was

Permitted By The Original License; (2) The Submitted Misrepresentations Were True; (3) Overlap Had No Duty To Disclose Its Alleged Breach Of Contract; and (4) There Was No Evidence That Overlap Was Damaged By The Purported Misrepresentations.

Midwest Bankcentre v. Old Republic Title Co., 247 S.W.3d 116 (Mo. App. 2008).

Ashton v. Buchholz, 221 S.W.2d 496 (Mo. 1949);

Blaine v. J.E. Jones Constr. Co., 841 S.W.2d 703 (Mo. App. 1992);

Mprove v. KLT Telecom, Inc., 135 S.W.3d 481 (Mo. App. 2004).

III. The Trial Court Erred In Submitting Overlap’s Claim For Punitive Damages And Denying A.G. Edwards’ Motion For Directed Verdict And Judgment Notwithstanding The Verdict On That Claim, Because, As A Matter Of Law, Overlap Failed To Prove By Clear And Convincing Evidence That A.G. Edwards Acted With Evil Motive Or Reckless Indifference To The Rights Of Overlap, In That The Fraud Claim Related To Conduct Governed By And Allowed By The Contract And The Claim Was Based On Vague Statements About “Internal Research” And “Future” Use.

Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. banc 1996);

Peters v. General Motors Corp., 200 S.W.3d 1 (Mo. App. 2006);

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003);

Mischia v. St. John's Mercy Med. Ctr., 30 S.W.3d 848 (Mo. App. 2000).

- IV. **The Trial Court Erred In Submitting Overlap's Claims To The Jury And In Denying A.G. Edwards' Motion For Directed Verdict And Judgment Notwithstanding The Verdict On Those Claims, Because Overlap's Claims Are Barred By The Five-Year Statute Of Limitations, In That Overlap Learned By The Time It Sent The November 19, 2001 Cease And Desist Letter That Its Claims Were Against A.G. Edwards, But Did Not Add A.G. Edwards As A Defendant Until November 20, 2006 And There Was No Relation Back Under Rule 55.33(c).**

Rule 55.33(c), Mo. R. Civ. P.;

Windscheffel v. Benoit, 646 S.W.2d 354 (Mo. 1983);

Johnson v. State, 925 S.W.2d 834 (Mo. banc 1996);

Section 516.120, Mo. Rev. Stat.

- V. **The Trial Court Erred In Excluding Parol Evidence As To The Meaning Of The Revised License, Because The Revised License Is Ambiguous, In That It Is Not Clear Whether The Terms "User" And "Use" Indicate Someone Who Received The Software Output.**

Monsanto Co. v. Syngenta Seeds, Inc., 226 S.W.3d 227 (Mo. App. 2007);

Zeiser v. Tajkarimi, 184 S.W.3d 128 (Mo. App. 2006);

Ransom v. Adams Dairy Co., 684 S.W.2d 915 (Mo. App. 1985).

VI. The Trial Court Erred In Denying A.G. Edwards' Motion For New Trial On Grounds Of Intentional Juror Nondisclosure, Because The Trial Court Abused Its Discretion In Finding That A.G. Edwards Waived Its Rights, In That A Litigant Need Not Investigate The Juror's Answers Before The Case Is Submitted.

Brines by and through Harlan v. Cibis, 882 S.W.2d 138 (Mo. banc 1994);

Williams ex rel. Wilford v. Barnes Hosp., 736 S.W.2d 33 (Mo. banc 1987);

Sumners v. Sumners, 701 S.W.2d 720 (Mo. banc 1985);

St. Louis University v. Geary, 2009 WL 3833827 (Mo. banc Nov. 17, 2009).

Argument

According to Overlap, the Licenses prohibited any A.G. Edwards employee, except the “single user” who operated the Software to create the number, from receiving information generated by the Software (i.e. the Overlap number). Under this theory, A.G. Edwards allegedly breached the Licenses by providing Overlap numbers to its financial consultants for use in discussing with their clients their mutual fund portfolio. The principal basis for the actual damage award is the amount of revenue that Overlap might have received if A.G. Edwards bought a license for every single one its financial consultants.

The verdict on the breach of contract claim for the Original License awarded Overlap damages based on the cost of licenses for the 47 additional users that Overlap claimed, not the number of financial consultants that might have reviewed a report or number generated by those users. Thus, the jury necessarily concluded that the Original License did not prevent the single user from sharing reports generated by the Software.

Since the allegedly fraudulent conduct occurred while the Original License was in effect, A.G. Edwards cannot be guilty of fraud for exercising a contractual right.

Moreover, the actual damages (other than the \$22,278 for breach of the Original License) are pure speculation. The basic measure of damages for both fraud and breach of contract is the benefit of the bargain. Overlap’s damage theories rest on a hypothetical bargain that the parties never made; that Overlap

never obtained from any other client; and which A.G. Edwards flatly rejected when Overlap offered it.

I. The Trial Court Erred In Submitting Overlap’s Claim For Breach Of The Revised License And In Denying A.G. Edwards’ Motion For Directed Verdict And Judgment Notwithstanding The Verdict On That Claim, Because The Revised License Cannot Be Reasonably Construed To Prohibit A Licensed User From Using The Software Output To Benefit Third Parties, In That Such An Interpretation Produces Absurd Results.

The Revised License is unambiguous: it does not prohibit the “single user” from sharing the Overlap number or reports generated by the Software with A.G. Edwards’ financial consultants. Any other interpretation would deprive the Software of any utility at all.

A. Standard Of Review.

“Contract interpretation and questions of contractual ambiguity are issues of law, which are reviewed de novo on appeal.” G.H.H. Invs., L.L.C. v. Chesterfield Mgmt. Assocs., L.P., 262 S.W.3d 687, 691-92 (Mo. Ct. App. 2008).

B. Overlap’s Interpretation of the Licenses Is Absurd.

Overlap submitted its claim for breach of the Revised License on the theory that A.G. Edwards “did not use Overlap according to the single user requirements of the contract.” (L.F. 1295). The Revised License provides:

B. YOU MAY:

1. Install and use one copy of the Product on a single computer. This copy is to be used by only a single user and will be used to the benefit of said single user. If you wish to use the Product for more users you will need an additional license for each user.

* * *

C. YOU MAY NOT . . .

4. Use the product for the benefit of more than one licensed user.

(Trial Ex’s 229, 501). In simple terms, this license permits A.G. Edwards to install the Software on one machine per license and allows only one person to operate the machine. Yet, Overlap argues that the only A.G. Edwards’ employee who is permitted to view the Overlap number generated by the Software is the “single user” who operates the machine.

A.G. Edwards’ interpretation is the only one consistent with the purpose of the License: analyzing the portfolios of A.G. Edwards’s clients, and thus must be accepted by the Court. Stonebrook Estates, LLC v. Greene County, 275 S.W.3d 353, 355 (Mo. App. 2008). If the “single user” cannot send the report or share the

Overlap number with the client’s financial consultant, there is no point to creating it in the first place.

In interpreting the terms of a contract, a court considers the object, nature and purpose of the agreement. Sonoma Mgmt. Co. v. Boessen, 70 S.W.3d 475, 481 (Mo. App. 2002) (internal punctuation omitted). Courts “reject an interpretation that involves unreasonable results when a probable or reasonable construction can be adopted.” Stonebrook Estates, 275 S.W.3d at 355:

Where a contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally make, and the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred

Rathbun v. Cato Corp., 93 S.W.3d 771, 781 (Mo. App. 2002).

At least one court has already rejected Overlap’s interpretation of the Revised License, stating:

Read literally, a restriction preventing the software’s use for anyone else’s benefit would prohibit its use to analyze customer portfolios. In fact, a broker could not even use[] the software to formulate advice for an unlicensed customer because such “use” would “benefit” an unlicensed party. This appears to be an absurd result, given that the software’s purpose is to enable brokers to benefit investors. There is also no suggestion that Defendant’s customers are “users,” such that a license must

be obtained for any customer whose portfolio will be analyzed with the software, or for any customer with whom Defendant's brokers discuss the results generated by the software. However, Plaintiff's interpretation of its license appears to lead to these absurd ends.

Overlap, Inc. v. Alliance Bernstein Investments, 2007 WL 4373975 (W. D. Mo. Dec. 14, 2007) at *3 n.2.

If Overlap's interpretation is correct – the only person entitled to the Overlap number is the “single user” of the machine – A.G. Edwards could not legally send the report or number to its clients without buying a license for each client. Even Overlap concedes that such a result is absurd. (L.F. 1100) (“[t]hat a licensed financial consultant can provide this report to his or her client is not disputed”).

The text of the Revised License does not distinguish between the client and the financial consultant, and this Court cannot supply it such a distinction. Pepsi Midamerica v. Harris, 232 S.W.3d 648, 655 (Mo. App. 2007) (“a court may not read into a contract words which the contract does not contain.”).

Overlap's theory produces even more absurd consequences. Under Overlap's interpretation, A.G. Edwards can legally provide the client with the Overlap number, who can then discuss it with his/her financial consultant. However, if A.G. Edwards provides the number directly to the client's financial consultant (an agent of the client), who, in turn, reviews it with the client (the

agent's principal), Overlap contends that A.G. Edwards will have breached the Revised License. This makes no sense at all.

Overlap's interpretation of the Revised License produces absurd results and the Court must reverse the contract judgment on that basis alone.

II. The Trial Court Erred In Submitting Overlap's Claims For Fraud And Negligent Misrepresentation To The Jury And In Denying A.G. Edwards' Motions For Directed Verdict And Judgment Notwithstanding The Verdict On Those Claims, Because Overlap Did Not Prove The Requisite Elements Of Reliance, Materiality, Causation, Damages, Or A False Representation, In That: (1) The Conduct Was Permitted By The Original License; (2) The Submitted Misrepresentations Were True; (3) Overlap Had No Duty To Disclose Its Alleged Breach Of Contract; And (4) There Was No Evidence That Overlap Was Damaged By The Purported Misrepresentations.

Overlap submitted its misrepresentation claim on the theory that A.G. Edwards told Overlap that the only persons who received the Overlap number or reports were those with licenses. It submitted the fraudulent omission claim on the theory that A.G. Edwards did not disclose that financial consultants were receiving the Overlap number. There is no evidence in the record suggesting that A.G. Edwards misrepresented anything or that it had a duty to disclose how it was using the Software.

A. Standard Of Review.

The Court reviews a claim of insufficient evidence to support submission of a claim as a question of law subject to *de novo* review. Entwistle v. Missouri Youth Soccer Ass'n, Inc., 259 S.W.3d 558, 565 (Mo. App. 2008). The court must view the evidence and draw all reasonable inferences in the light most favorable to the plaintiff, and disregard the defendant's evidence that does not support the plaintiff's case. Dildine v. Frichtel, 890 S.W.2d 683, 685 (Mo. App. 1994). However, the court must not "supply missing evidence or give a plaintiff the benefit of unreasonable, speculative, or forced inferences." Id. Every fact essential to liability must be supported by "substantial evidence." Id.

B. Overlap Failed To Make A Submissible Tort Claim, Because It Did Not And Could Not Prove Reliance Or Materiality.

The jury's determination that the Original License prohibits distribution of the Overlap number is a necessary predicate to submissibility of Overlap's tort claims. Overlap's claims are based on A.G. Edwards' purported misrepresentations regarding the distribution of the Overlap number to all of its financial consultants. (L.F. 86-7, 1299, 1306). Even if Overlap can establish such an alleged misrepresentation (which it cannot), the misrepresentation was made in August and September 2000, when the Original License was in effect. (Tr. 438-40, 507-08, 511-12, 603, 1389; Trial Ex. 48).

Since the jury determined that the Original License did not prohibit distribution of the Overlap number to financial consultants, Overlap could not have reasonably relied on the alleged misrepresentation to continue to provide the Software to Overlap at the same price. (L.F. 1299, 1306). The original price paid by A.G. Edwards permitted the conduct and there was no basis for Overlap to change the price. (L.F. 1291, 1293). For this same reason, Overlap cannot establish materiality.

C. Overlap Failed To Establish A Misrepresentation.

Overlap claims that A.G. Edwards told Overlap that A.G. Edwards was not providing the Overlap number to its financial consultants. (L.F. 87, ¶40 (pleading alleging misrepresentation)). There is no evidence that A.G. Edwards ever made such a statement. Instead, Overlap cobbles together two unrelated statements, made at different points in time, neither of which standing alone is in any way false.

Overlap submitted, over A.G. Edwards' objection, the following alleged misrepresentation:

Defendant represented to Plaintiff during the course of its communications with Kevin Fryer regarding expanded usage of Overlap that **Defendant was using Overlap for internal research only, BUT desired to make the Overlap analyses available to all its financial consultants in the future**

...

(L.F. 1299, 1306). (emphasis added).

The use of the word “but” implies an affirmative misrepresentation: that A.G. Edwards was not presently providing the Overlap number to its financial consultants, though it hoped to in the future. Overlap submitted both of these statements, both of which taken alone are true, and joined them with the word “but.” Contrary to the inference Overlap asks the jury to make, the two statements were made at different times, in different conversations in different contexts, and quite possibly by different people. In fact, Kevin Fryer could not identify the person who allegedly made the statement that A.G. Edwards was using the Software for internal purposes during the September 13, 2000 meeting. (Tr. 603). That is the only statement A.G. Edwards ever made about its current use of the Software.

The statement about potential future interest in making the Overlap number available to financial consultants through an intranet application occurred a month earlier, when Anne Rauch sent an email to Mr. Fryer about such use. (Tr. 511-12, 1088-95; Trial Ex. 48).

Viewed separately, the two statements in the instruction are entirely truthful. A.G. Edwards was using Overlap reports for internal research.⁷ The financial consultants were employees of A.G. Edwards and, thus, necessarily

⁷ Contrary to the hypothesized misrepresentations set forth in the verdict directors, Mr. Fryer did not testify that the unidentified speaker told him that A.G. Edwards was using the Software for internal research **only**. (L.F. 1299, 1306; Tr. 603).

“internal” to the company. A.G. Edwards inquired about making the Overlap number available to its financial consultants in the future as part of an automated report.

The first requirement of a fraudulent misrepresentation claim is a “false material representation.” Midwest Bankcentre v. Old Republic Title Co., 247 S.W.3d 116, 129 (Mo. App. 2008). Overlap fails to satisfy this element.⁸ Nor could it. A.G. Edwards had absolutely no reason to misrepresent the use that it was making of the Overlap number. At the time of these representations, A.G. Edwards was operating under the Original License. The jury’s verdict on the breach of contract claim established that the Original License did not prohibit distribution of the Overlap number to financial consultants.

Simply put, A.G. Edwards never made the representation submitted to the jury. The two parts of the representation that Overlap cobbled together, taken separately, and in context, are true. Overlap has no fraud case.

⁸ During closing argument, Overlap’s counsel more or less conceded that the basis for the fraud claim was A.G. Edwards’ failure to disclose that it was providing Software reports to its financial consultants, not any affirmative representation. (Tr. 1381).

D. A.G. Edwards Had No Duty To Disclose Its Alleged Breach Of Contract.

Recognizing that it failed to make a submissible case of fraudulent misrepresentation, Overlap also submitted an instruction for fraudulent concealment, a theory that it **never** pleaded. (L.F. 80-91, 1300). “Concealment was not pleaded” and hence “cannot be substituted for evidence of the affirmative false representations alleged and submitted.” Ashton v. Buchholz, 221 S.W.2d 496, 503 (Mo. 1949).⁹

More fundamentally, there is absolutely no basis for finding that A.G. Edwards had any duty to disclose how it was using reports generated by the Overlap Software. A fraudulent concealment claim does not arise unless the defendant had a duty to disclose the concealed information. Wengert v. Thomas L. Meyer, Inc., 152 S.W.3d 379, 382 (Mo. App. 2004). A duty does not arise merely because one party has superior knowledge. Bohac v. Walsh, 223 S.W.3d 858, 864 (Mo. App. 2007). Rather, it arises only when necessary to assure “fair conduct in the marketplace.” Blaine v. J.E. Jones Constr. Co., 841 S.W.2d 703, 707 (Mo. App. 1992).

This was “an arms-length transaction” and “no fiduciary relationship existed.” Noss v. Abrams, 787 S.W.2d 834, 836 (Mo. App. 1990). Overlap was

⁹ A theory of fraudulent concealment was first suggested by the trial judge during trial. (Tr. 517). At the time, Overlap disclaimed the theory. (Tr. 517-519).

the buyer and A.G. Edwards was the seller. A “seller is more likely to have a duty to disclose than a buyer.” Blaine, 841 S.W.2d at 708. To impose a duty to disclose here, the Court would have to rule that a buyer has a duty to tell the seller exactly how it is using the product – and, if the buyer is using the product in breach of its contract, to disclose the breach as well. That gives the buyer the unenviable choice of admitting liability for breach of contract or getting sued for fraud. The law does not require that. “A potential defendant has no obligation to inform a potential plaintiff that he or she has a cause of action.” McCrary v. Truman Med. Ctr., 916 S.W.2d 832, 833 (Mo. App. 1995).¹⁰

Accordingly, A.G. Edwards had no duty to disclose its use of the reports generated by Overlap Software and it was error to submit the fraudulent concealment claim.

E. Overlap Failed To Establish Any Damages.

Overlap’s fraud damages are the price of an Overlap license multiplied by the number of financial consultants at A.G. Edwards at the relevant time. The only basis for such a claim is Mr. Fryer’s testimony that, had he known the “truth,” he would have asked A.G. Edwards to pay for those licenses. (Tr. 528). There is no evidence that A.G. Edwards would have agreed to any such proposal.

¹⁰ One of Overlap’s problems is that its tort claims are not separate and distinct from its contract claims, and thus fail for this additional reason. O’Neal v. Stifel Nicholas & Co., Inc., 996 S.W.2d 700 (Mo. App. 1999).

Actual damages caused by the fraud are an essential element of a fraud claim. O'Connor v. Follman, 747 S.W.2d 216, 220 (Mo. App. 1988). “If the evidence leaves the element of causal connection in the nebulous twilight of speculation, conjecture and surmise, plaintiff’s burden is not met.” Oldaker v. Peters, 869 S.W.2d 94, 100 (Mo. App. 1993). See also Mprove v. KLT Telecom, Inc., 135 S.W.3d 481, 491 (Mo. App. 2004) (“a damage award must be based on evidence more tangible than a gossamer web of shimmering speculation and finely-spun theory”) (internal punctuation omitted).

As a matter of law, Overlap’s damages fails to make a submissible tort claim because the alleged damages rest on a hypothetical bargain that the parties never negotiated. In Mprove, plaintiff sold some assets on a non-recourse basis – i.e., if the buyer defaulted, the seller’s sole remedy was to reclaim the assets. 135 S.W.3d at 486. The buyer defaulted and plaintiff received only \$225,000 of the \$900,000 purchase price.

Plaintiff claimed that defendant KLT had misrepresented the financial support that KLT or its affiliates would provide to the entity purchasing plaintiff’s assets. Like Overlap, plaintiff claimed that, had it only known the truth, it could have negotiated a much better deal. The court of appeals reversed a verdict for plaintiff because the damage theory was pure speculation:

Copycomm [n/k/a Mprove] presented no evidence that it could have successfully demanded and received any more money “up front” from the party with whom it negotiated the contract. In particular, Copycomm

offered no evidence that CMS would have paid any more money “up front” or agreed to enter into an asset purchase contract with Copycomm under the terms referred to in Mr. Groenteman’s testimony.

. . . . [W]ithout resorting to impermissible speculation and conjecture, the jury had no way to determine whether, had Copycomm known . . . [the truth], Copycomm would have been able to successfully negotiate a different contract with CMS. . . . Thus, even under a fraudulent inducement theory, there was still an insufficient factual and logical basis to support a finding of causation.

135 S.W.3d at 492-93.

Mprove is directly on point and requires a reversal and entry of judgment in favor of A.G. Edwards on the fraud claim. There is no evidence that A.G. Edwards would ever have agreed to pay Overlap a license fee for every one of A.G. Edwards’ financial consultants. In fact, to the contrary, A.G. Edwards flatly refused Overlap’s proposal to pay an annual \$40 per financial consultant license fee. (Trial Ex. 21).

It is unrealistic for Overlap to believe that it would have negotiated such a deal. Overlap never negotiated such a license fee from any of its other clients. Between 1998 and 2001, Overlap’s annual gross revenues from all clients averaged \$185,000 and never exceeded \$330,000. (Tr. 575-76). The \$1.8 million fraud award is more than five times Overlap’s highest gross revenue and almost ten times its average revenue. It is clear that the award rests on a hypothetical

bargain that Overlap could never have negotiated in the real world. Hence, it cannot stand.

Additionally, in so far as the alleged misrepresentations occurred during the period subject to the terms of the Original License, Overlap cannot establish damages. The alleged misrepresentations were in August and September 2000, when the Original License was in effect. (Tr. 438-40, 507-08, 511-12, 603, 1383-84, 1389; Trial Ex. 48). In the verdict on the breach of contract claim for the Original License, however, the jury necessarily concluded that Overlap had allowed A.G. Edwards to share Overlap reports with its financial consultants. (L.F. 1291, 1293). “One suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do.” Walters v. Maloney, 758 S.W.2d 489, 495 n.3 (Mo. App. 1988).

The tort damages that Overlap sought are purely speculative. For that reason alone, the Court must reverse the fraud judgment.

III. The Trial Court Erred In Submitting Overlap’s Claim For Punitive Damages And Denying A.G. Edwards’ Motion For Directed Verdict And Judgment Notwithstanding The Verdict On That Claim, Because, As A Matter Of Law, Overlap Failed To Prove By Clear And Convincing Evidence That A.G. Edwards Acted With Evil Motive Or Reckless Indifference To The Rights Of Overlap, In That The Fraud Claim Related To Conduct Governed By And Allowed By The

**Contract And The Claim Was Based On Vague Statements About
“Internal Research” And “Future” Use.**

Overlap must establish by clear and convincing evidence an entitlement to punitive damages. Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. banc 1996). The clear and convincing standard applicable to punitive damages is a greater burden than the preponderance of the evidence standard applicable for submissibility of Overlap’s tort claims.

If the Court agrees with A.G. Edwards that Overlap failed to make a submissible fraud case, it must set aside the punitive damages. Williams v. Williams, 99 S.W.3d 552, 556-57 (Mo. App. 2003). A punitive damage award cannot stand absent an underlying, viable tort claim. Id. Even if Overlap had a submissible fraud claim, there is no evidence it had an evil motive or reckless indifference to Overlap’s rights.

A. Standard Of Review.

Under Rodriguez, Overlap must prove the elements of its punitive damage claim by “clear and convincing evidence.” 936 S.W.2d at 111. Such evidence is “evidence which instantly tilts the scales in the affirmative when weighed against evidence in opposition.” Peters v. General Motors Corp., 200 S.W.3d 1, 25 (Mo. App. 2006) (citations and internal punctuation omitted). Such evidence must demonstrate that it is “highly probable” that A.G. Edwards’ “conduct was outrageous because of evil motive of reckless indifference.” Id.

The Court also “must scrutinize the evidence in much closer detail” than in cases with a lower burden of proof, id., and it must weigh that evidence to determine whether the scales “instantly tilt” in favor of liability. Id.

B. There Was No Clear And Convincing Evidence Of A.G. Edwards’ Alleged Evil Motive.

The “uniform tenor of the recent cases is that punitive damages are to be the exception rather than the rule.” Menaugh v. Resler Optometry, Inc., 799 S.W.2d 71, 75 (Mo. banc 1990). Punitive damages are an “extraordinary” and “harsh” remedy that “should be applied only sparingly.” Rodriguez, 936 S.W.2d at 110 (Mo. banc 1996) (overruled on other grounds).

In Misischia v. St. John’s Mercy Med. Ctr., 30 S.W.3d 848 (Mo. App. 2000), plaintiff prevailed on his fraud claim at trial. The trial court directed a verdict against him on punitive damages and the court of appeals affirmed. Even though plaintiff had a submissible case for actual damages:

None of the plaintiff’s foregoing allegations dealt with evidence that the misrepresentations in the fraud claim were made with evil motive or reckless indifference to the rights of plaintiff.

30 S.W.3d at 866.

To make a submissible claim for punitive damages, Overlap must present evidence of malice, in addition to the alleged fraud. There is no such evidence in the record. To the contrary, the evidence is clear that A.G. Edwards did not act maliciously:

- The allegedly fraudulent statements were in the August 2000 e-mail and the September meeting. (Tr. 511-12, 603, 1383-84, 1389; Trial Ex. 48). Ms. Rauch initiated those discussions because A.G. Edwards wanted to include the Overlap number in its monthly automated reports; she was “not sure if your licensing agreement allows for this or not;” and she wanted Overlap to “let me know what we need to do.” (Trial Ex. 48). This evidence suggests good faith, not evil motive.
- A.G. Edwards never told Overlap that A.G. Edwards was not sending the Overlap number to its financial consultants. Rather, Mr. Fryer inferred from A.G. Edwards’ consideration of making automated reports containing an Overlap number available in the future as meaning that A.G. Edwards had not made the reports available in written form.
- There was no reason for A.G. Edwards to misrepresent its practice of providing the Overlap number to the financial consultants. In August and September of 2000, the parties were operating under the Original License which, as the jury’s verdict demonstrated, imposed no contractual limits on A.G. Edwards’ use of the number generated by the Software.

If the evidence “instantly tilts” in any direction, it is in favor of A.G. Edwards.

It is also useful to analyze the evidence in light of the reprehensibility standards that the Supreme Court of the United States has developed for analyzing the amount of a punitive award. In State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003), the Court identified five criteria to determine reprehensibility:

- Whether “the harm caused was physical as opposed to economic.” Here, the profits Overlap lost on its hypothetical bargain are purely economic.
- Whether the conduct “evinced an indifference to or reckless disregard of the health or safety of others.” Overlap’s purely economic loss does not satisfy this criterion.
- Whether the target “had financial vulnerability.” There is no evidence that Overlap is financially vulnerable and its repeated willingness to litigate with its clients suggests otherwise.
- Whether “the conduct involved repeated actions or was an isolated incident.” There is no evidence that A.G. Edwards is a repeat offender in dealing with software vendors.
- Whether “the harm was the result of intentional malice, trickery or deceit.” If Overlap did have a submissible case of actual damages, this is the only criterion that it could possibly satisfy, and A.G. Edwards’ disputes any such conclusion.

“The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” 538 U.S. at 419. Here, the only factor that could possibly weigh in favor of punitive damages is the alleged fraud itself, which, under Misischia, is not enough to satisfy the clear and convincing standard.

Overlap did not have a submissible case for punitive damages and the Court must reverse that portion of the judgment.

IV. The Trial Court Erred In Submitting Overlap’s Claims To The Jury And In Denying A.G. Edwards’ Motion For Directed Verdict And Judgment Notwithstanding The Verdict On Those Claims, Because Overlap’s Claims Are Barred By The Five-Year Statute Of Limitations, In That Overlap Learned By The Time It Sent The November 19, 2001 Cease And Desist Letter That Its Claims Were Against A.G. Edwards, But Did Not Add A.G. Edwards As A Defendant Until November 20, 2006 And There Was No Relation Back Under Rule 55.33(c).

A. Standard Of Review.

“The running of the statute [of limitations] is a question of law for the trial court to decide.” Straub v. Tull, 128 S.W.3d 157, 159 (Mo. App. 2004). “Such questions of law are granted *de novo* appellate review with no deference being paid to the trial court’s determination of law.” Id.

B. Overlap's Claims Are Barred By The Statute Of Limitations.

Overlap's claims are subject to five-year statute of limitations. Mo. Rev. Stat. § 516.120. Overlap knew about its claims by at least November 19, 2001, when it sent a cease and desist letter to A.G. Edwards. (Trial Ex. 21). Overlap did not initiate this litigation against A.G. Edwards, but instead filed its claims against AGE Capital. (L.F. 31-57). Plaintiff did not add A.G. Edwards as a defendant until November 20, 2006,¹¹ more than five (5) years after the cease and desist letter. (L.F. 63-79, 80-91, 92). Moreover, at that time, Overlap amended to add claims against AGE Capital. Id. For that reason, Overlap's claims are time barred.

C. The Relation Back Doctrine Does Not Save Overlap's Claims.

Overlap erroneously invokes the relation back doctrine set forth in Missouri Rule of Civil Procedure 55.33(c) in an effort to save its claims. The relation back doctrine provides that an amendment "*changing* the party against who the claim is asserted" relates back to the original pleading under certain, prescribed circumstances. Mo. R. Civ. P. 55.33(c) (emphasis added).

¹¹ Overlap filed its First Amended Petition with its Motion for Leave to File First Amended Petition on November 20, 2006. In granting that Motion, the Court deemed the First Amended Petition filed on November 27, 2006. For purpose of this argument, and to give Overlap any benefit of the doubt, A.G. Edwards will use the earliest date. Regardless, the amendment was untimely.

Overlap did not *change* the party against whom the claims are asserted, but instead *added* a second defendant, thus relation back does not apply. Windscheffel v. Benoit, 646 S.W.2d 354, 357 (Mo. 1983). For relation back to apply, Overlap would have had to replace AGE Capital with A.G. Edwards. Not only is AGE Capital not replaced, but Overlap asserted two *new* claims against it, one for fraud and one for negligent misrepresentation. (L.F. 80-91). Rule 55.33(c) does not save Overlap's untimely claims.

Implicitly conceding that it cannot satisfy the change in party requirement of Rule 55.33(c), Overlap claims that it is nonetheless entitled to relation back because its amendment sought to correct a misnomer. Without any analysis of the facts of this case, the Court of Appeals agreed, and applying Watson v. E.W. Bliss Co., 704 S.W.2d 667, 670 (Mo. banc 1986), the Court of Appeals ruled that the addition of A.G. Edwards related back to the date the original Petition was filed. Such a result is entirely inconsistent with the fact that Overlap intentionally sued AGE Capital. This was not a case of misnomer.

In Watson, the plaintiff filed its original petition within the limitations period against a defendant that did not exist, E.W. Bliss Company, Gulf & Western Heavy Duty Division. Id. at 668. Plaintiff filed an amended petition outside of the limitations period correcting the name of the defendant to an existing entity, E.W. Bliss Division of Gulf & Western Manufacturing Co., a wholly-owned subsidiary of Gulf Western Industries, Inc. Id. at 669-70.

Applying an objective standard, the Court concluded that plaintiff always intended to sue the same party, but was simply *mistaken* in describing the defendant in the original petition. Id. at 669. The Court stated that the correction of a misnomer has nothing to do with Rule 55.33(c)'s requirement concerning a change in party, but will relate back to the original petition as long as the correct defendant had notice of the original lawsuit. Id. at 670-71.

After Watson, the Supreme Court clarified that there is no misnomer where a plaintiff *intentionally* sued the original defendant. Johnson v. State, 925 S.W.2d 834, 835 (Mo. banc 1996). The fact that an incorrect name is used is “immaterial if the corporation was not thereby misled by the name designation” **and there is “no intention on the part of plaintiff to sue a different entity.”** Id. (emphasis added). See also, Bailey v. Innovative Management & Investigation, Inc., 890 S.W.2d 648, 652 (Mo. banc 1994); State ex rel. Hilker v. Sweeney, 877 S.W.2d 624, 628 (Mo. banc 1994) (“‘relation back’ is triggered only by a mistake in identifying a party defendant and not by a mistake in failing to add a party defendant”). Overlap’s conduct in amending to restate the initial claims and adding new claims against AGE Capital is clear indicia of its intent to sue AGE Capital and is not indicia of a misnomer.

The record is clear that Overlap intended to and did sue AGE Capital. Overlap sent a demand letter threatening to sue A.G. Edwards.¹² (Trial Ex. 21). Yet, when Overlap initiated this litigation, it sued AGE Capital, not A.G. Edwards. (L.F. 31-57). Overlap’s lawyer testified that AGE Capital was sued because he “had some information suggesting that [AGE Capital] was the proper entity to be sued.” (Tr. 735-36). When Overlap finally filed its Amended Petition, instead of substituting parties as one might expect in the case of misnomer, Overlap **added** A.G. Edwards as a defendant and continued to assert claims against AGE Capital. (L.F. 80-91). By continuing to assert claims against AGE Capital, Overlap continued to believe that it had viable claims against AGE Capital and that it was a proper defendant. These facts belie any conclusion of misnomer.

Finally, even assuming there was a misnomer in this case (which there was not), where a plaintiff learns of the identify of the proper party defendant before the running of the statute of limitations, the law mandates that plaintiff timely correct the misnomer.¹³ Tyson v. Dixon, 859 S.W.2d 758, 762 (Mo. App. 1993). There can be no dispute that Overlap was aware of the identity and potential liability of A.G. Edwards before the limitations period expired but did nothing

¹² A.G. Edwards was the party to the contract at issue. (L.F. 117 at ¶6; L.F. 280 at ¶¶ 6 and 7).

¹³ In Watson, the plaintiff discovered the identity of the proper party after the limitations period expired. Accordingly, Watson offers no guidance on this issue.

about it. (L.F. 58, 160, 190-249; Trial Ex. 21). In fact, AGE Capital repeatedly advised Overlap that it had sued the wrong company and that the correct defendant was A.G. Edwards. (L.F. 58, 191, 194, 197, 201, 210, 213, 227, 230, 234). In all, Overlap was told at least *ten times* prior to the expiration of the statutes of limitations that A.G. Edwards should be the defendant. Accordingly, relation back does not save Plaintiff's time barred claims against A.G. Edwards.¹⁴

V. The Trial Court Erred In Excluding Parol Evidence As To The Meaning Of The Revised License, Because The Revised License Is Ambiguous, In That It Is Not Clear Whether The Terms “User” And “Use” Indicate Someone Who Receives The Software Output.

If the Court determines that the Revised License is ambiguous, then the trial court necessarily abused its discretion in excluding parol evidence of its meaning. That evidence was also independently admissible as proof of A.G. Edwards' good faith, both on fraudulent intent and punitive damages. Regardless

¹⁴ See also, Springman v. AIG Mktg., Inc., 523 F.3d 685, 689 (7th Cir. 2008) (relation back does not apply where a plaintiff does not substitute for years after discovering the mistake because “the not-yet-named defendant can no longer assume that ‘the action would have been brought against’ him had it not been for plaintiff's mistake”).

of the ambiguity of the contract, therefore, the trial court abused its discretion in excluding it.

A. Standard Of Review.

The standard of review of evidentiary rulings is abuse of discretion. Stokes v. Nat'l Presto Indus., Inc., 168 S.W.3d 481, 483 (Mo. App. 2005). When the trial court applies “the wrong standard of law,” it necessarily abuses its discretion. Id. at 484. As previously explained, whether a contract is ambiguous is a question of law. G.H.H. Invs., 262 S.W.3d at 691-92. If this Court concludes that the Revised License is ambiguous, then “parol evidence is required to determine the parties’ intent.” Zeiser v. Tajkarimi, 184 S.W.3d 128, 133 (Mo. App. 2006).

Moreover, “evidence admissible for one purpose may be admitted even though it may be improper for other purposes.” Ransom v. Adams Dairy Co., 684 S.W.2d 915, 918 (Mo. App. 1985).

Here, the excluded evidence bore directly on whether A.G. Edwards’ conduct was reasonable and hence relevant to the fraud and punitive damages issues, *regardless* of the meaning of the Revised License.

B. The Trial Court Improperly Excluded Parol Evidence.

If the Revised License¹⁵ was ambiguous, it was reversible error for the trial court to exclude the parol evidence offered by A.G. Edwards. Monsanto Co. v.

¹⁵ As to the Original License, the jury correctly concluded that distributing the number to financial consultants was not prohibited by that agreement, and thus

Syngenta Seeds, Inc., 226 S.W.3d 227, 233 (Mo. App. 2007). That evidence included:

- Expert testimony regarding the definition of “user” as referring to the person who operates the Software - not the recipient of the Overlap number. (Offer of Proof Ex. 683 at 13-17).¹⁶

assessed \$22,278 in damages based on evidence that the Software was installed on 51 computers. A.G. Edwards does not challenge that verdict except on the statute of limitations grounds in Section IV, thus the interpretation of that agreement is not at issue in this appeal.

¹⁶ Overlap will likely argue that the testimony of A.G. Edwards’ expert Paul Carmichael was properly excluded because it was irrelevant. In an offer of proof, Mr. Carmichael testified that, in his opinion, the Software would be rendered useless if it were interpreted consistent with Overlap’s theory of the case. (Tr. 716). He also testified about customs and usage in the computer software industry. (Tr. 707-717). To the extent parol evidence is admissible, it is reversible error to prohibit an expert from testifying regarding the meaning of contract terms in light of industry customer and usage. Busch & Latta Painting Corp. v. State Highway Comm’n, 597 S.W.2d 189, 202 (Mo. App. 1980). Mr. Carmichael’s testimony was also relevant to establish the meaning of technical words in a contract. Id.; see also, L.F. 1148-49.

- An admission that Overlap distributed brochures to brokerage firms telling them that they “can use the objective data from Overlap any way you chose” and “however you want to use it.” (Tr. 479, 1103-07, 1306-07; Offer of Proof Ex. 808 pp. 38, 41, 48-53, 60-61; Trial Ex’s 524, 525).¹⁷
- A statement on Overlap’s website that “You can use the [Overlap] service as often as you like. However you want to use it.” (Tr. 1306-07; Offer of Proof Ex. 528).
- Testimony from Overlap’s principals that they disagreed among themselves as to who was considered a “user” or the circumstances in which Overlap results could be shared with others. (Compare Offer of Proof Ex. 810, p. 72, 74-75, 80-82, 86-88 with Offer of Proof Ex. 812, p. 35-36, 38, 52-53, 106-107 and Offer of Proof Ex. 813, p. 9-10).
- Evidence of Overlap’s exclusion of “clients” from the definition of “user” even though the client benefits from the Software. (Tr. 1306-07; Offer of Proof Ex’s. 518 p. 15, 519, 520; Offer of Proof Testimony, Tr. 1243-44).

¹⁷ Trial Exhibits 524 and 525 were admitted into evidence on other issues, but the Trial Court’s parol evidence ruling prevented A.G. Edwards from arguing to the jury that they should consider these statements when interpreting the agreement.

- Testimony from Overlap that at least under some circumstances the licenses permit the “user” to share the Overlap number with a financial consultant. (Offer of Proof Ex. 812, pp. 64-67).
- Expert testimony regarding the unconventional, nonsensical, and ambiguous nature of the Revised License, as well as the opinion that nobody in the industry would purchase the product if it were subject to a license as interpreted by Overlap.
- Expert testimony that licenses operate to restrict who can operate the software, not the number generated by the program, and that based on the customs and usage of the industry, there are no limitations in the Revised License on the distribution of the number calculated by the Software. (Offer of Proof Ex. 683 at 13-17).

Overlap’s position is that the Revised License prohibited A.G. Edwards from sharing the Overlap number with its financial consultants. If the Revised License is susceptible to that construction, the evidence proffered by A.G. Edwards was certainly competent to show that such was not the real intention of the parties. It establishes that:

- Overlap itself did not interpret a “user” to include people such as clients or financial consultants who do not operate the Software but merely receive the number calculated by it.

- Overlap intended the single user provision to restrict who could operate the Software, not to restrict who could receive the Overlap number.
- Overlap’s self-serving interpretation of the single user provision was completely contrary to industry custom and practice and therefore highly unlikely to have been the meaning intended by the parties.

Thus, it is quite likely that the admission of this evidence would have produced a different verdict on the breach of contract claim with respect to the Revised License.

Moreover, all of this evidence is relevant to the fraud claim. Missouri courts have always allowed a “wide range” of evidence to “show the relationship of the parties and the facts attending” the allegedly fraudulent statements. Lowther v. Hays, 225 S.W.2d 708, 713 (Mo. 1950).

The test of relevance is “whether an offered fact tends to prove or disprove a fact.” Kansas City v. Keene Corp., 855 S.W.2d 360, 367 (Mo. banc 1993). Proof that Overlap thought it was permissible to share the number with financial consultants, and that such was the industry custom, would show that both parties expected A.G. Edwards to do so. Such a showing could permit a jury to at least infer the complete absence of any motive for A.G. Edwards to tell Overlap that it was not sharing the Overlap number with financial consultants, much less to mislead Overlap.

Finally, all of this evidence is relevant to punitive damages. In determining whether to award punitive damages and, if so, in what amount, the “jury must, of necessity, consider all of the facts and circumstances surrounding the incident.” Wisner v. S.S. Kresge Co., 465 S.W.2d 666, 669 (Mo. App. 1971).

If both parties expected A.G. Edwards to share the Overlap number with its financial consultants, in accordance with industry custom, A.G. Edwards would have absolutely no reason to misrepresent its practices to Overlap. That bears directly on whether A.G. Edwards had an evil motive or reckless indifference to Overlap’s rights. The parol evidence tends to prove the opposite.

If the Revised License is ambiguous, the trial court committed reversible error in excluding A.G. Edwards’ evidence. Even if the License unambiguously prohibited sharing the Overlap number with financial consultants, that evidence bore directly on both fraud and punitive damages and it was reversible error to exclude it.¹⁸

¹⁸ Because the trial court found the Revised License unambiguous, it was obligated to provide the jury with the clear meaning of the Revised License. J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club, 491 S.W.2d 261, 264 (Mo. 1973). It did not. Instead, the trial court elected to “let the [Jury] figure out whether or not [it could] understand [the Revised License].” (Tr. 103-04; see also, L.F. 1295). To the extent that the jury was required to “figure out” what the Revised License meant, the jury should have had the benefit of A.G. Edwards’ parol evidence.

VI. The Trial Court Erred In Denying A.G. Edwards' Motion For New Trial On Grounds Of Intentional Juror Non-Disclosure, Because The Trial Court Abused Its Discretion In Finding That A.G. Edwards Waived Its Rights, In That A Litigant Need Not Investigate The Juror's Answers Before The Case Is Submitted.

The trial court found that Juror Hillerman had intentionally failed to disclose his involvement in prior litigation. (L.F. 1878). Despite that finding, the trial court overruled A.G. Edwards' motion for new trial, because A.G. Edwards had not raised the issue until after trial. (L.F. 1570; 1881). That ruling was an abuse of discretion, because this Court has squarely held that a litigant need not investigate the truthfulness of a juror's answers before the case is submitted.

A. Standard Of Review.

This Court reviews a trial court's decision denying a new trial for abuse of discretion. Williams ex rel, Wilford v. Barnes Hosp., 736 S.W.2d 33, 38 (Mo. banc 1987). Under current Missouri law, the trial court abuses its discretion if it denies a new trial when a juror intentionally fails to disclose his or her involvement in prior litigation. Id.

B. Juror Hillerman's Intentional Nondisclosure Of His Involvement In Prior Litigation Warrants A New Trial.

Since at least 1940, this Court has held that a juror's intentional nondisclosure of involvement in prior litigation is "per se prejudicial, requiring a

new trial.” St. Louis University v. Geary, 2009 WL 3833827 (Mo. banc Nov. 17, 2009) at *11. The reason for this rule is simple: “[h]onest men do not hesitate to divulge information touching their qualification as jurors.” Bass v. Durand, 136 S.W.2d 988, 990 (Mo. 1940).

In Brines by and through Harlan v. Cibis, 882 S.W.2d 138 (Mo. banc 1994), the jury returned a verdict for the defendant doctors in a medical malpractice case. In the first appeal, the court of appeals ordered a new trial because one of the jurors should have been stricken for cause. The second trial also produced a defense verdict and plaintiff successfully appealed to this Court.

One of the jurors had been sued eight times in the six years prior to trial. The trial court found that the nondisclosure was unintentional, but this Court held that finding was an abuse of discretion. 882 S.W.2d at 139. Quoting Williams, this Court held:

Noting the importance of full juror disclosure, this Court held that “[i]f a juror intentionally withholds material information requested on voir dire, bias and prejudice are inferred from such concealment. For this reason, a finding of intentional concealment has ‘become tantamount to a per se rule mandating a new trial.’”

Id. at 140. Accord, Webb v. Missouri-Kansas-Texas R. Co., 116 S.W.2d 27, 29 (Mo. 1937) (when “there is a dispute as to liability, and an objectionable juror is permitted to try the case, it is difficult to conceive how that could be harmless error”).

1. Juror Hillerman's Nondisclosure Was Per Se Prejudicial.

In its transfer application, Overlap asked this Court to reconsider this long-established rule. Overlap speculated that, because Juror Hillerman had been a defendant in the undisclosed litigation, any bias he might have would be against Overlap rather than A.G. Edwards. Overlap asks this Court to require proof of prejudice before granting a new trial.

Missouri courts have never followed that proposal. In Brines, for example, seven of the eight lawsuits against the non-disclosing juror were collection suits by doctors, so he was hardly likely to favor the defendant doctor. This Court nonetheless ordered a third trial.

In Seaton v. Toma, 988 S.W.2d 560 (Mo. App. 1999), the jury returned a verdict for the defendant doctor in a medical malpractice case. One of the jurors had intentionally failed to disclose that her husband had sustained injuries similar to those of the plaintiff. In Groves v. Ketcherside, 939 S.W.2d 393 (Mo. App. 1996), the jury also returned a defense verdict in a medical malpractice case. One of the jurors intentionally failed to disclose that he had unsuccessfully sued a doctor for the wrongful death of his wife. In both cases, the courts ordered new trials even though, by Overlap's reasoning, the jurors should have favored the losing plaintiff.

The reason for this rule is simple. Intentional nondisclosure can only occur when the venireperson deliberately refuses to answer a clear question – i.e., lies under oath. “A man who uses dishonest means to get on a jury, does not usually

do so for the purpose of honestly deciding the case on the law and evidence.” Lee v. Baltimore Hotel Co., 136 S.W.2d 695, 698 (Mo. 1939). Thus, intentional nondisclosure prejudices the entire judicial process.

That is why § 561.026(3), Mo. Rev. Stat., excludes felons from jury service. The Committee Comment to the 1973 statute states that it “decided to exclude all convicted felons from jury service (unless pardoned) in order to help maintain the integrity of the jury system.”

An untruthful answer also prejudices the process by affecting counsel’s use of challenges. The “concealment of material information on voir dire by a prospective juror deprives both litigants of the opportunity to exercise peremptory challenges or challenges for cause in an intelligent and meaningful manner.” Williams, 736 S.W.2d at 36. Had Juror Hillerman disclosed his prior litigation experience, either party may have elected to exercise a peremptory strike, thus changing the composition of the jury.

2. A.G. Edwards Did Not Waive Its Right To A New Trial.

Overlap’s transfer application also asked this Court to hold that A.G. Edwards waived its right to an impartial jury by failing to investigate and challenge Juror Hillerman before the case was submitted, which was the reason the trial court denied the motion for new trial. Brines specifically rejected that theory, and that part of the opinion drew no dissent:

In our view, the delays and logistical difficulties in imposing a duty to investigate every juror’s answers outweigh the benefits derived from that

duty. The requirement that litigants challenge jurors when the nondisclosure becomes apparent is sufficient to prevent abuse.

882 S.W.2d at 140.

Relying on dictum in McBurney v. Cameron, 248 S.W.3d 36 (Mo. App. 2008), the trial court held and Overlap argues that the advent of Case.net eases the burden of locating undisclosed claims during trial. This Court has specifically rejected that argument. A party's access to information about undisclosed claims before the verdict does not change the rule.

In Piehler v. Kansas City Public Service Co., 211 S.W.2d 459 (Mo. 1948), the transit company had records identifying every person who had made a claim against it for personal injury. When it challenged a juror for nondisclosure, plaintiff argued that the transit company's standard practice was to "omit[] checking those records until after an adverse result." 211 S.W.2d at 463. This Court still reversed the judgment.

In Woodworth v. Kansas City Public Service Co., 274 S.W.2d 264 (Mo. 1955), presented the same facts. Plaintiff argued that the transit company "had in its archives the records of the venireman's claim of 1942, and so had knowledge thereof and could not have been prejudiced." 274 S.W.2d at 271. This Court held it made no difference, since "there was no showing that defendant's counsel" knew of the claim at trial, and affirmed an order granting a new trial. Id.; see also, Rodenhauser v. Lashley, 481 S.W.2d 231 (Mo. 1972).

Requiring a party to determine whether the jurors have told the truth during the trial is impractical and unworkable. Not every court is on Case.net. Federal courts are not.¹⁹ Neighboring states like Kansas and Illinois are not. In a large metropolitan area, it may be necessary to search the records in several counties – Jackson, Clay and Platte in Missouri, Johnson and Wyandotte in Kansas.

If the juror has a common last name such as Jones or Smith, Case.net may or may not contain sufficient information to determine whether the juror and the litigant are the same person.²⁰ Issues also arise with respect to persons who use maiden names, have been divorced, and whose names include generational suffixes (i.e. Robert Smith, Sr.). A party might have to review the actual pleadings for identifying information such as an address. The process may take days and a short trial will be over before the investigation is complete.

It is simply unfair to impose that burden on trial counsel, who is already working 12 to 16-hour days preparing for the next day's trial. And that burden is

¹⁹ While federal court dockets are available to search online, that information is available through PACER, a paid, subscription service.

²⁰ A Litigant Name Search of all participating courts for “Smith” prompts an error message: “Your inquiry was not processed. You have attempted to search a ‘common’ Last Name which would result in a timeout before the results could be returned. Please narrow your search with additional criteria.” Narrowing the search to “Robert Smith” results in 3629 records.

especially unfair when it falls on a one or two-person law firm whose resources are exhausted simply by taking the case to trial.

If the Court does decide to adopt Overlap's proposed waiver rule, it should apply it prospectively only. This Court has held that changes in decisional law will have prospective-only application in two circumstances. First, the new rule will apply prospectively "when the change pertains to procedural as opposed to substantive law." Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. banc 1985). The timing for a challenge to juror nondisclosure is obviously procedural.

Second, the Court will apply a new rule prospectively "[i]f the parties have relied on the state of the decisional law as it existed prior to the change." Sumners, 701 S.W.2d at 723. Here, this Court had held – without dissent – that A.G. Edwards did not need to investigate potential juror nondisclosure until after the trial and Edwards' counsel relied on that holding. (4-10-08 Tr. 32-33).²¹

The trial court abused its discretion in denying A.G. Edwards' motion for new trial based on Juror Hillerman's intentional nondisclosure.

²¹ The trial started six days after the Western District handed down its dictum in McBurney (4-10-08 Tr. 33).

Conclusion

For these reasons, A.G. Edwards respectfully prays that the Court reverse the judgment and remand with instructions to enter judgment in favor of A.G. Edwards on Overlap's tort and contract claims. In the alternative, the Court should reverse the judgment and remand for a new trial on all issues decided adversely to A.G. Edwards.

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**Certificate Of Service And
Compliance With Court Rules**

Pursuant to Missouri Supreme Court Rules 84.05 through 84.07, the undersigned hereby certifies that on the 25th day of November, 2009, the original and 9 copies of the Substitute Brief of Appellant (“Brief”) and a CD containing the Brief were hand delivered to the Court for filing and that on this same date two copies of the Brief and one copy of the CD containing the Brief were served on counsel for the Respondent by overnight mail at the address shown below:

Patrick Stueve
Stueve Siegel Hanson
460 Nichols Road, Suite 200
Kansas City, MO 64112

The undersigned further certifies that:

- (1) Pursuant to Rule 84.06(c), the original and all copies of the Substitute Brief of Appellant include the information required by Rule 55.03, the Brief complies with the limitations contained in Rule 84.06(b), and the Brief contains 13,915 words calculated in accordance with Rule 84.06(b), as reflected in the word count of the Microsoft Word word-processing system used to prepare the Brief.
- (2) Pursuant to Rule 84.06(g), the undersigned further certifies that the CD containing the Brief of Appellant filed with the Court and served on opposing counsel have been scanned for viruses and are virus-free.

Respectfully submitted,

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