Appeal No. SC88325

IN THE MISSOURI SUPREME COURT

NEAL CLEVENGER AND MITSUE CLEVENGER,

Plaintiffs-Respondents

vs.

OLIVER INSURANCE AGENCY, INC.

Defendant-Appellant.

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

SUBSTITUTE REPLY BRIEF OF APPELLANT

ORAL ARGUMENT RQUESTED

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INTRODUCTION

The Clevengers' brief provides no basis for affirming the judgment below and is notable primarily for what it does *not* contain. The Clevengers cause of action for promissory estoppel fails as a matter of law for three reasons: Oliver Insurance Agency, Inc. ("Oliver Insurance Agency") did not make a definite contractual promise to the Clevengers that the Jungermans' claims would be covered by the Gulf Insurance pollution liability insurance policy; the Clevengers suffered no detriment by reason of Neal Clevenger's purported reliance on Bill Adams' June 3, 2002, statements; and, whatever losses the Clevengers incurred in acting on Bill Adams' statements may be remedied through a cause of action for negligence.

That the Clevengers cannot find an evidentiary basis for the judgment is not surprising. There is no legal or factual basis for this judgment. The judgment transforms Oliver Insurance Agency from an insurance agent into an insurance company, effectively imposing upon Oliver Insurance Agency the obligation to insure and defend the Clevengers against their liability to the Jungermans. Oliver Insurance Agency owed the Clevengers the duty of an insurance agent, that is, the duty to act with reasonable care, skill, and diligence. The only plausible basis on which Oliver Insurance Agency could be found liable to the Clevengers is for the breach of this duty, which finds expression in a cause of action for negligence. That cause of action was submitted to the jury in the subject case. The Clevengers' payment of the renewal premium in the amount of $3,725.00 is the only conceivable loss that proximately resulted from Oliver Insurance Agency's negligence, an

amount that the jury found was subject to a reduction of 98.6 percent owing to the comparative fault of the Clevengers. It is, therefore, ineluctable that this record supports a judgment of no more than $1,095.13.

ARGUMENT

I. The Trial Court Erred In Denying Oliver Insurance Agency's Motion For Directed Verdict And Motion for Judgment Notwithstanding The Verdict On The Clevengers' Promissory Estoppel Claim Because The Clevengers Failed To Make A Submissible Claim Of Promissory Estoppel

A. Bill Adams' June 3 statement was a "mere expression of opinion" and was not a definite contractual promise

Over the objection of Oliver Insurance Agency (Tr. p. 1072, ls. 3-11), the trial court instructed the jury that to find for the Clevengers on their cause of action for promissory estoppel, they must find that Bill Adams "*promised* plaintiff Neal Clevenger *that the pollution liability policy would provide coverage* for claims alleging pollution from water runoff from plaintiffs' business property into Elm Lake occurring after August 22, 2000." (LF000420) (emphasis added). The instruction failed to convey to the jury what Missouri law requires a plaintiff to prove in order to establish a cause of action for promissory estoppel. The jury was not informed that to find for the Clevengers on their claim for promissory estoppel it must conclude that Adams made a contractual commitment to Neal Clevenger. On the contrary, the jury was misled into believing that a statement of opinion constituted a definite, contractual promise. *See Rice v. Bol,* 116 S.W.3d 599, 606 (Mo. App. W.D. 2003) ("In determining whether the jury was misdirected, misled or confused by an

instruction is 'whether an average juror would correctly understand the applicable rule of law' being conveyed thereby").

The "essence of the doctrine of promissory estoppel" is that the plaintiff "relied on … a promise in the sense of a legal commitment, and not a mere prediction or aspiration or bit of puffery." *Garwood Packing, Inc. v. Allen & Co., Inc.*, 378 F.3d 698, 705 (7th Cir. 2004); s*ee also Prenger v. Baumhoer*, 939 S.W.2d 23, 27 n.5 (Mo. App. W.D. 1997) ("'a supposed promise that is 'wholly illusory' or a mere expression of intention, hope, desire *or opinion*, which shows no real commitment, cannot be expected to induce reliance'") (emphasis added).[1] The Clevengers failed to make a submissible case of promissory

[1] The Clevengers argue that *Prenger* is distinguishable because Bill Adams and Neal Clevenger did not "contemplate further bargaining," citing *Midwest Energy, Inc. v. Orion Food Systems, Inc.*, 14 S.W.3d 154 (Mo. App. E.D. 2000). (Substitute Brief of Respondents p. 12) This argument is baseless. Oliver Insurance Agency cites *Prenger* for the fundamental principle that a promise must be "made in a contractual sense," that is, "the promise must be sufficiently definite and delineated to support a claim of detrimental reliance." 939 S.W.2d at 26 (internal quotation marks and citation omitted). In *Prenger*, the court held that because the parties had agreed only to negotiate a future contract the "promise [was] … not definite enough to sustain appellant's promissory estoppel claim." 939 S.W.2d at 27. *Midwest Energy* holds only that *Prenger* does not stand for the proposition that a contract that does not satisfy the statute of frauds is not sufficiently definite to state a cause of action for promissory estoppel. *Midwest Energy*,

estoppel because there is not even a hint of promise in a contractual sense in Bill Adams' June 3 statements to Neil Clevenger. On pages 10-11 of their brief, the Clevengers offer this argument as to why Bill Adams' statements to Neil Clevenger constituted a promise:

> And, at Tr. p. 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.' … These *assurances* by Adams were not tentative, nor did they involve further bargaining.

(emphasis added) That is not a promise. Adams merely offered Neal Clevenger his opinion regarding the apparent intent of the insurer based on his reading of Chris Leef's communications.

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14 S.W.3d at 159 n. 4. *Midwest Energy* provides an example of a classic promissory estoppel case. There, the defendant franchisor indicated to the plaintiff that it would extend a franchise, and provided the plaintiff with a franchise agreement specifying an opening date. After the plaintiff had executed the agreement, the franchisor withdrew its offer. 14 S.W.3d at 156–157. The court held that "the trier of fact could find [the defendant] promised [the plaintiff] that a franchise conforming to the specimen would be provided to [the plaintiff] as soon as [the plaintiff] was ready to operate … ." 14 S.W.3d at 160. In stark contrast to *Midwest Energy,* Adams made no contractual promise to Neal Clevenger.

"A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." *Kearney Commercial Bank v. Popejoy*, 119 S.W.3d 143, 147 (Mo. App. W.D. 2003) (citation omitted); *see also City of St. Joseph, Missouri v. Southwestern Bell Tel.*, 439 F.3d 468, 477 (8th Cir. 2006) (applying Missouri law) (same). Stated differently, "a promise is an expression of intention ***by the promissor*** to bring about a specified result in the future." *Kearney Commercial Bank*, 119 S.W.3d at 147 (internal quotations marks and citation omitted) (emphasis added). In this case, Bill Adams simply made no commitment to Neal Clevenger that Oliver Insurance Agency would act in a specific manner.

Oliver Insurance Agency did not make a contractual commitment to insure the Clevengers against claims for damage to Elm Lake. Bill Adams merely offered Neal Clevenger an "expression of opinion," which cannot give rise to an estoppel. *Central States Life Ins. Co. v. Bloom*, 137 S.W.2d 517, 519 (Mo. 1940); *see also Amecks, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W.2d 240, 242 (Mo. App. W.D. 1996) (a "so-called promise in terms of 'estimates' and 'guesstimates'" is "too indefinite to support a claim of detrimental reliance").

Promissory estoppel is a "doctrine of contract law, its purpose is to enforce promises that while not supported by consideration, and so not enforceable under traditional principles of Anglo-American contract law were likely to induce and did induce reliance by the promisee." *Consolidation Serv., Inc. v. Keystone Nat'l Ass'n*, 185 F.3d 817, 822 (7th Cir. 1999) (citation omitted); *see also City of St. Joseph*, 439 F.3d at 477 ("The promise must be definite and made 'in a contractual sense'") (applying Missouri law). Oliver

Insurance is neither an insurer nor even an insurance broker. (Tr. p. 264 ls. 11-23, Tr. p. 269 ls. 8-16, Tr. p. 376, ls. 1-11) Oliver Insurance could not, therefore, make a contractual commitment to provide the Clevengers with pollution liability insurance. Rather, Oliver Insurance Agency could only provide to the Clevengers the professional services of an insurance agent—here in the form of a qualified opinion that the Gulf Insurance pollution liability policy provided the Clevengers with insurance against future claims for damage to Elm Lake. That statement of opinion is not a contractual promise.[2]

B. The Clevengers did not rely on Bill Adams' representations

The Clevengers make no argument that they suffered any detriment by reason of Neal Clevenger's purported reliance on Bill Adams' statements during their June 3, 2002, telephone conversation. There is in fact no evidence that the Clevengers suffered any detriment in renewing the pollution liability insurance policy. Neal Clevenger testified only that in the absence of satisfactory clarification from the insurer that future claims for damage to Elm Lake would be covered, he would not have renewed the pollution liability policy. (Tr. 724, 13-25; Tr. p. 725, ls. 1-15; Tr. p. 754, ls. 4-12) That is, he would simply not have maintained any pollution liability insurance coverage. On this evidence, even if it is assumed that the Jungermans' July 23, 2002, lawsuit was a distinct claim from their

[2] It is telling that in arguing that Adams made a promise to Neal Clevenger the Clevengers focus only on Neal Clevenger's *reliance* on Adams as his insurance agent. (Brief of Respondents pp. 10–11) The Clevengers make no credible argument that Adams made a contractual commitment to Neal Clevenger.

August 2000 demand, which it was not (Tr. p. 780, ls. 6-21), Gulf Insurance's declination of coverage placed the Clevengers in the same position they would have been had Neal Clevenger decided not to renew the pollution liability policy. (Tr. p. 672, ls. 18-25; Tr. p. 673, ls. 1-8) C*f. Cosgrove v. Bartolotta*, 150 F.3d 729, 733 (7th Cir. 1998) ("To 'rely,' in the law of promissory estoppel, is not merely to do something in response to the inducement offered by the promise. There must be a cost to the promisee of doing it"). In the absence of evidence that the Clevengers had foregone an opportunity to obtain an insurance policy from another insurer that would have provided coverage against the Jungermans' lawsuit, the Clevengers cannot show that they relied to their detriment on Adams' predictive statements. *See Smith v. North Am. Co. for Life and Health Ins.*, 775 F.2d 777, 780 (7th Cir. 1985).

C. <u>There is no injustice that requires the enforcement of any promise Oliver Insurance Agency may have made to the Clevengers</u>

Missouri law incorporates Section 90 of the Restatement (Second) of Contracts. *E.g.*, *Kearney Commercial Bank*, 119 S.W.3d at 147. Section 90 makes explicit that a claim for promissory estoppel requires a plaintiff to prove that "injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) of CONTRACTS § 90 (1981). Indeed, "[o]f the factors considered under the Restatement, *the adequacy and availability of a remedy at law is most significant*." *Zipper v. Health Midwest*, 978 S.W.2d 398, 412 (Mo. App. W.D. 1998) (emphasis added). "Promissory estoppel should [not] be enforced" where the plaintiff has other potential claims or remedies. *Kearney Commercial Bank*, 119 S.W.3d

at 149. Because the Clevengers had an adequate legal remedy in the form of a negligence cause of action, the Clevengers failed to make a submissible case of promissory estoppel.

It is material that the only Missouri decision that holds that negligence in the procurement of an insurance policy states a claim for promissory estoppel is *Townes v. Jerome L. Howe, Inc.*, 852 S.W. 2d 359 (Mo. App. E.D. 1993). There, an employer negligently informed a former employee that by paying a premium she could maintain her health insurance coverage under the employer's group medical coverage. After she incurred medical expenses for a surgical operation, the insurer denied coverage on the ground that she was ineligible to participate in the group medical coverage plan. She brought suit and was awarded judgment damages against her former employer for breach of its duty to procure health insurance. On appeal, the court held that because the employer had not received a commission for procuring the insurance the employer could not be held liable for "breaching an insurance's broker's duty to exercise reasonable skill and diligence in procuring insurance." 852 S.W.2d at 360. The court, however, observed that it "may affirm a judgment if it is sustainable on any theory." 852 S.W.2d at 861. The court held that the employer could be held liable for promissory estoppel. *Id.* What is notable about *Townes* is that what necessitated recourse to a cause of action for promissory estoppel was that the former employee could not state an action for negligence against her former employer. The Clevengers, however, stated an action for negligence, so there was no "injustice" that warranted an action for promissory estoppel.

That the Clevengers have no answer to Oliver Insurance Agency's argument is manifest in the Clevengers' frivolous suggestion that it was error for the Court of Appeals

to hold that the Clevengers had an adequate remedy at law in an action for negligence because Missouri law holds that an action that seeks damages is an action at law rather than equity. Substitute Brief of Respondents pp. 14-15. The Clevengers' argument is utterly undeveloped.[3] So far as appears they seek to have this Court eliminate the requirement that an action for promissory estoppel requires a plaintiff to prove that he did not have an adequate remedy at law, apparently on the specious basis that it is some manner inconsonant to apply this requirement to an action at law.[4] What goes

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[3] The Court should not entertain the Clevengers' argument because the Clevengers did not cross-appeal and because the Clevengers did not make this argument in their brief in the Court of Appeals. *See* MO. R. CIV. P. 83.08 (b) (A substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief"). What is more, the Clevengers have abandoned this argument by failing to develop their argument. *Cf. Shaw v. Raymond*, 196 S.W.3d 655, 660 (Mo. App. S.D. 2006) ("When matters referenced as alleged error in a point relied on are not developed in the argument portion of a brief, they are deemed abandoned") (internal quotation marks and citation omitted).

[4] In the Court of Appeals the Clevengers made the equally frivolous argument that the decision of *Hammons v. Ehney*, 924 S.W.2d 843 (Mo. 1996), eliminated the requirement that an action for promissory estoppel requires a plaintiff to prove that he did not have an adequate remedy at law. *Hammons*, of course, does not speak to the requirements of a cause of action for promissory estoppel. To the contrary, the issue in *Hammons* was whether a debtor could maintain an equitable action for contribution against a co-debtor

unremarked is that Missouri law has long recognized that "courts are to apply the doctrine of promissory estoppel with caution, sparingly and only in extreme cases to avoid unjust results." *E.g.*, *Kearney Commercial Bank*, 119 S.W.3d at 146-47 (internal quotation marks and citation omitted). The Clevengers offer no reason why this Court should radically change Missouri law to recognize an action for promissory estoppel as a basis for transforming an action for negligence into an action for breach of contract.

For the proposition that it was error for the Court of the Appeals to hold that they had an adequate remedy at law, the Clevengers cite *Leonardi v. Sherry*, 137 S.W.3d 462 (Mo. 2004) and *Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. 2003).[5] Neither decision speaks

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which could be tried without a jury where the debtor had an adequate remedy at law in the form of a statutory action for contribution which would implicate the co-debtor's constitutional right to a jury trial. 924 S.W.2d at 846. The court held that the debtor could maintain an equitable action because an exception to the adequacy requirement "exists for claims which originated in equity prior to the recognition of a legal claim." 924 S.W.2d at 847. *Hammons* is utterly inapposite to the issues in this appeal. That the Clevengers' argument is baseless finds support in paragraph 18 of their Amended Joint Third-Party Petition in which they allege "[i]njustice can only be avoided by enforcement of Third-Party Defendant's promise." (LF000136)

[5] Equally unavailing is the Clevengers' assertion that the trial court's decision that they had made a submissible case of promissory estoppel was "was consistent" with *Midwest Energy*. Substitute Brief of Respondents p. 15. *Midwest Energy* merely holds that

to the elements of a cause of action for promissory estoppel; both decisions speak to the constitutional right of a trial by jury. *Leonardi* holds that the "existence … of equitable claims cannot alone justify a wholesale denial of … [a] request for a jury trial for [legal] claims." 137 S.W.3d at 474. And *Diehl* holds that an action for damages under the Missouri Human Rights Act is subject to the right of a trial by jury. 95 S.W.3d at 92. There is quite simply no Missouri decision that holds that a claim for promissory estoppel is available where the plaintiff has recourse to a remedy for damages in another cause of action.

II. The Trial Court Erred In Denying Oliver Insurance Agency's Motion For Directed Verdict And Motion For Remittitur Because As A Matter Of Law The Clevengers Did Not Prove Damages Beyond The Cost Of The Renewal Premium

On page 16 of their brief, the Clevengers argue that their damages were not confined to the renewal premium because Oliver Insurance Agency "lulled the plaintiffs into

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"[w]hen the other elements of a section 90 claim are present, the 'injustice element is not appropriate for determination *in a summary judgment proceeding*." 14 S.W. 3d at 161 (emphasis added). What is apposite in the *Midwest Energy* decision is the court's recognition that the elements of an action for promissory estoppel include a "promise" and "injustice absent enforcement." 14 S.W.3d at 158-59.

believing no further actions were necessary."[6] What is more, on appeal the Clevengers now characterize their claims as resting on Oliver Insurance Agency's "negligence" in "procuring the renewal." (Substitute Brief of Respondents p. 7) This argument finds no support in the law or the record.

First, the Clevengers' negligence claim was not an action for failure to procure insurance. In paragraph 9 of their Amended Joint Third-Party Petition, they allege that Oliver Insurance Agency failed to take reasonable care to "determine the exact scope and details of coverage" and failed to properly "advise" them of which of the Jungermans' claims were "excluded from coverage." (LF000134) The trial court instructed the jury, moreover, that in order "to assess a percentage of fault" to Oliver Insurance Agency the jury must find that "Adams failed to determine that the pollution insurance renewal policy would not provide coverage for any claims alleging pollution from water runoff from plaintiffs' business property into Elm Lake occurring after August 22, 2000, or [that Adams] failed to advise plaintiffs that claims for effects on Elm Lake from runoff from plaintiffs' business

[6] It is telling that the Clevengers assert that, "Plaintiffs' evidence established *proximate cause* [sic] and the damages awarded by the jury." Substitute Brief of Respondents p. 16 (emphasis added). The plaintiffs thus couch their damages in terms of a negligence claim rather than a promissory estoppel claim. On this record, it is only the latter claim that would arguably support recovery of the losses the Clevengers incurred in the litigation and settlement of the Jungerman lawsuit (that is, contractual benefit of the bargain damages), which the Clevengers do not argue.

property after August 22, 2000, would not be covered by the policy." (LF000423) Because this case was not submitted to the jury on a failure to procure theory of liability, there was no legally tenable basis for awarding the Clevengers' damages on the basis of a contractual benefit of the bargain measure of damages.

Second, the Clevengers were not "lulled into believing that no further actions were necessary." What goes unremarked in the Clevengers' brief is Neal Clevenger's testimony that he sought assurances from the insurer and Bill Adams regarding the scope of coverage because *"I didn't want to continue with insurance if it was not covered."* (Tr. p. 754, ls. 9-12) (emphasis added) It is fundamental that a plaintiff may recover in a negligence claim those damages that are the "natural and probable consequence[s] of the defendant's actions." *E.g., Williams v. Missouri Highway and Transp. Comm'n,* 16 S.W.3d 605, 611 (Mo. App. W.D. 2000). It is, therefore, significant that Neal Clevenger testified that if he had been told that the pollution liability insurance policy would not provide coverage for future claims for damage to Elm Lake, he would not have renewed the policy; he would not have maintained pollution liability insurance. On this record, the natural and probable consequence of Bill Adams' negligence in opining on the scope of coverage was that the Clevengers paid the renewal premium.

Correspondingly, the Clevengers offer no reason why their claim for promissory estoppel supports their recovery of the settlement they paid to the Jungermans and the defense costs they incurred in litigating the Jungermans' lawsuit. Such a recovery constitutes contractual benefit of the bargain damages; that is, the judgment treats Oliver Insurance Agency as if it were an insurer who was in breach of a contract of insurance,

restoring the Clevengers to the position they would have occupied had Gulf Insurance provided them with coverage for the Jungermans' lawsuit under its pollution liability insurance policy. *See South ex. rel. Stephan v. AF & L Ins. Co.*, 147 S.W.3d 767, 779-780 (Mo. App. E.D. 2004). Such an award for promissory estoppel is legally untenable where, as here, the plaintiffs have other remedies, such as restitution (return of the renewal premium), that "would adequately compensate [their] injury." *Zipper*, 978 S.W.2d at 411-412 (applying RESTATEMENT (SECOND) CONTRACTS § 139(2) (1981)).

It is also material that, as with the negligence claim, the trial court did not submit to the jury the promissory estoppel claim on a failure to procure theory of liability. The trial court instructed the jury that to find for the Clevengers on their cause of action for promissory estoppel, they must find that Bill Adams "promised plaintiff Neal Clevenger that the pollution liability policy *would provide coverage* for claims alleging pollution from water runoff from plaintiffs' business property into Elm Lake occurring after August 22, 2000." (LF000420) (emphasis added). The jury's verdict thus rests not on Oliver Insurance Agency's failure to procure a pollution liability insurance policy, but rather on Oliver Insurance Agency's "promise" that the Gulf Insurance pollution liability policy provided insurance coverage for post-August 22, 2000, claims for damage to Elm Lake. And, again, the only "loss" that the Clevengers incurred in "reliance" on this "promise" was the payment of the renewal premium.[7]

[7] Even if the Clevengers' promissory estoppel claim rested on a failure to procure insurance, which it does not, the Clevengers would not be entitled to recover reliance

Finally, the Clevengers cite *Bell v. O'Leary*, 744 F.2d 1370 (8th Cir. 1984), as support for the proposition that they may recover contractual benefit of the bargain damages. *Bell* is inapposite. There, an insurance broker failed to notify the plaintiff, the broker's client, that federal flood insurance was unavailable for the plaintiff's property, which was located in an unincorporated area and thus ineligible for the federal flood insurance program. The broker nonetheless obtained federal flood insurance for the property. After a flood damaged the plaintiffs' mobile homes, the federal agency denied their claims. The plaintiffs then asserted a cause of action for negligence against the broker.[8] The court held that the plaintiffs could recover from the broker the "full extent of

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damages. Comment e to section 90 of the Restatement (Second) of Contracts enjoins that the "[s]ection is to be applied with caution to promises to procure insurance" because the "appropriate remedy for breach of such a promise makes the promissor an insurer, and thus may result in a liability which is very large in relation to the value of the promised service." The comment observes that "such difficulties may be removed" where "the proof of the promise and the reliance are clear, or if the promise is made with some formality, or if part performance or a commercial setting or a potential benefit to the promissor provide a substitute for formality." There is no such evidence in this case.

[8] It is significant that the plaintiffs in *Bell* did not assert a cause of action for promissory estoppel against the broker. The plaintiffs only asserted a cause of action for promissory estoppel against the federal agency, who was the insurer. 744 F.2d at 1373 n.2. What is more, the negligence claim in *Bell* rested on a loss that had not yet occurred when the

coverage in the invalid policies" because the broker's negligence "foreclosed the opportunity to consider other options that might have been available to the plaintiffs," such as moving their mobile homes before the flood. 744 F.2d at 1372-74. The court held, therefore, that the broker's negligence was the "proximate cause of the losses the plaintiffs suffered." 744 F.2d at 1374. In contrast, the only effect of Bill Adams' negligence in parsing Chris Leff's e-mails and in interpreting the scope of the exclusionary endorsement was that the Clevengers elected to renew the pollution liability policy and paid a renewal premium. There is no evidence that the Clevengers were denied an opportunity to obtain another policy of insurance that would have provided them with insurance coverage for the Jungermans' claim.

Equally unavailing is the Clevengers' reliance on *Townes* and *Branstad v. Kinstler*, 166 S.W.3d 134 (Mo.App. W.D. 2005). Neither decision provides precedential authority for the proposition that the Clevengers may recover contractual benefit of the bargain damages. *Townes* addresses only the issue of whether a former employee could state an action against her former employer for failure to procure a health insurance policy. 852 S.W.2d at 360. The court declined to review the former employer's appeal of the damages award because "the argument portion of the brief has no specific page references to the legal

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broker was acting as an insurance agent for the insured. In contrast the events in this case center on a claim by the Jungermans that was made before the renewal by Gulf Insurance of the claims made pollution liability policy; the Jungermans' subsequent lawsuit was based on this claim.

file or the transcript." 852 S.W.2d at 361. Likewise, in *Branstad* the sole issue on appeal was whether the plaintiff's action for negligent misrepresentation against the insurance agent was barred by the statute of the limitations. 166 S.W.3d at 136.

CONCLUSION

For the reasons stated in this Substitute Reply Brief and in its opening brief, Oliver Insurance Agency respectfully requests that this Court reverse the trial court's judgment on the Clevengers' cause of action for promissory estoppel and enter judgment for Oliver Insurance Agency on this cause of action. Alternatively, Oliver Insurance Agency respectfully requests that this Court reduce the Clevengers' recovery on the cause of action for promissory estoppel to the amount of the renewal premium. Alternatively, Oliver Insurance Agency respectfully requests that the Court reverse the trial court's judgment and remand this matter for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two (2) copies of the above and foregoing Substitute Reply Brief of Appellant Oliver Insurance Agency, Inc., together with a 3 ½ disk containing the brief in Microsoft Word 2003, were served, by placing same in the United States mail, postage prepaid, this 19th day of June, 2007, to:

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06(c) of the Missouri Rules of Civil Procedure, that this brief (exclusive of the cover and any certificates of counsel) contains 5136 words, as ascertained by using the word count feature of the Microsoft Word 2003 word-processing software used to prepare the brief.

I further certify, pursuant to Rule 84.06(g) of the Missouri Rules of Civil Procedure, that the enclosed computer diskette has been scanned for viruses and is virus-free.

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Hal D. Meltzer