

2002

# Ken Harris v. Rick Albrecht: Rick Albrecht Insurance Agency, Inc.; and State Farm Fire and Casualty Company : Reply Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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KEN HARRIS.

Plaintiff/Appellee

vs.

RICK ALBRECHT; RICK ALBRECHT  
INSURANCE AGENCY, INC.; and  
STATE FARM FIRE & CASUALTY  
COMPANY,

Defendants/Appellants.

Case No. 20020370-SC

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REPLY BRIEF OF APPELLANTS

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REVIEW BY WRIT OF CERTIORARI OF THE DECISION OF THE  
COURT OF APPEALS OF UTAH REVERSING SUMMARY JUDGMENT  
ENTERED IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH  
COUNTY, THE HONORABLE GARY D. STOTT PRESIDING

---

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**FILED**  
UTAH SUPREME COURT

PAT BARTOLOMEW  
CLERK OF THE COURT

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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	)	
	)	
Plaintiff/Appellee	)	
	)	
vs.	)	Case No. 20020370-SC
	)	
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INSURANCE AGENCY, INC.; and	)	
STATE FARM FIRE & CASUALTY	)	
COMPANY,	)	
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## **ARGUMENT**

### **I. THE COURT OF APPEALS INCORRECTLY STATED THE LAW PERTAINING TO THE EXISTENCE OF LEGAL DUTIES AND CONTRACT FORMATION.**

The Utah Court of Appeals held that “[w]hether a contract to procure insurance or a duty to procure a policy of insurance ultimately exists, are questions of fact best left to the trier of fact.” Harris v. Albrecht, 2002 UT App 98, ¶ 29, n.6, 46 P.3d 241. Even Harris admits in his brief that this statement is “unfortunately-worded,” (Harris’ Brief, p. 17) and concedes that “where the operative facts [are] not in dispute” the determination of whether a contract or duty exists is a “pure question of law.” (Harris’ Brief, pp. 17, 35 n.12.)

However, Harris nonetheless believes the decision of the Court of Appeals should be affirmed, claiming the existence of disputed “operative facts.” As explained below, no such dispute exists for purposes of summary judgment.

### **II. NO UNDERLYING OR SUBSIDIARY FACTUAL QUESTIONS PRECLUDE SUMMARY JUDGMENT.**

There are no questions of material fact that would preclude the making of a legal decision as to whether a duty or contract to procure exists in this case. It is true that in some instances a jury may have to resolve disputed “subsidiary issues of fact” before a court can make the ultimate legal determination regarding the existence of a contract or legal duty. See O’Hara v. Hall, 628 P.2d 1289 (Utah 1981). According to Harris, the

following “underlying factual question” precludes summary judgment in the present case:

Harris maintains that he instructed Albrecht to procure insurance for his business, and that Albrecht agreed. See R. at 330. *Albrecht denies that Harris ever gave such an instruction, and denies that he ever agreed. See* Brief of Appellants, at 7. *This is a classic factual dispute. Until this factual dispute is decided, no court (whether the district court, court of appeals or this Court) can decide the overarching legal issues regarding the existence of a duty . . .*<sup>1</sup>

(Harris’ Brief, pp. 22, 35 n.12) (emphasis added.) Thus Harris contends summary judgment is inappropriate.

However, the “classic factual dispute” over the alleged phone conversation was not an issue for purposes of summary judgment. Albrecht<sup>2</sup> conceded the issue for purposes of the motion. R. 216 (¶ 19). This was acknowledged by the Court of Appeals in footnote 3 of its decision: “Albrecht denies making such statement. However, *Albrecht argues that*

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<sup>1</sup> Strangely, after asserting that the existence of duty could not be decided until the factual issue was resolved, Harris asserts that the Court of Appeals *did* decide implicitly that a duty existed:

the court of appeals in essence decided (without explicitly saying so), that, based on the facts as alleged by Harris, Albrecht *did* have a duty to exercise reasonable care in the procurement of insurance, but that final determination of the legal question would have to await the factfinder’s resolution of the underlying factual dispute. This determination was correct.

(Harris’ Brief, p. 22 n. 7) (emphasis in original). However, Harris’ characterization is inaccurate. The Court of Appeals very clearly stated that “we do not decide today that a contract or a duty exists.” Harris, 2002 UT App 98, ¶29 n.6, 46 P.3d 241. Therefore, contrary to Harris’ contention, the Court of Appeals did not implicitly find that a duty existed.

<sup>2</sup> Just as in the opening brief, “Albrecht” will refer to all the appellants collectively.

*even if he did make such a statement, it neither established a contract to procure insurance nor a duty to procure insurance.”* Harris, 2002 UT App 98, ¶ 4 n.3, 46 P.3d 241 (emphasis added).<sup>3</sup> Likewise, Justice Davis in his dissent expressly acknowledged the absence of any dispute over this fact (for summary judgment purposes) stating that the motion was “based on a given set of facts.” Id. at ¶ 31 (Davis, J., dissenting).<sup>4</sup> Further, the argument of whether the terms and circumstances are too indefinite to give rise to legal obligations implies that the facts are being challenged only as to their legal sufficiency.

As long as it is assumed for purposes of argument that the alleged conversation did take place, it is appropriate for a court to decide the “overarching legal issues regarding

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<sup>3</sup> At the trial court level and before the Court of Appeals Albrecht disputed making the statement, but for purposes of summary judgment asked that it be assumed the statement was made.

<sup>4</sup> The majority of the Court of Appeals held that summary judgment was precluded because the jury needed to consider four particular facts. Id. at ¶ 27. However, the four facts referred to were either expressly or implicitly undisputed and/or immaterial for purposes of summary judgment. First, Albrecht did not dispute for purposes of summary judgment that he and Harris had an on-going, eight-year, relationship. As noted by Albrecht in the record, Harris had purchased policies through Albrecht including automobile policies, a homeowner’s policy, boat insurance, R.V. insurance, and a liability policy. R. 427. Second, Albrecht did not dispute for purposes of summary judgment that the parties regularly conducted business over the phone. R. 424. Third, and related to the second, Albrecht did not dispute for purposes of summary judgment that Harris rarely discussed with Albrecht the particulars of insurance coverage sought by Harris. Id. Fourth, Albrecht did not dispute, for purposes of summary judgment, the assertion that Harris told Albrecht that he wanted to place business coverage on his office and its contents and, in response, that Albrecht replied he would take care of it and that he would come out and look at the equipment. R. 216 (¶ 19).

the existence of a duty.” (Harris’ Brief, p. 22.) Therefore, there are no factual questions precluding summary judgment.

A somewhat similar scenario arose in the case of Gabrielson v. Warnemunde, 443 N.W.2d 540 (Minn. 1989), where the plaintiff sued an insurance agent for failing to cover a boat under a homeowner’s policy. A factual dispute existed, but the defendant, “for the purposes of the motion for summary judgment . . . accepted Lacanne’s version of the facts . . .” Id. at 543. The trial court granted summary judgment holding there was no duty even under the plaintiff’s version of the facts. The court of appeals reversed stating that the jury should determine whether the facts and circumstances of the case gave rise to a duty. On appeal to the Supreme Court of Minnesota, the court of appeals was reversed on the following basis:

The court of appeals held that his case should go to the jury for a determination of whether the facts and circumstances of the case give rise to a duty of care owed by Warnemunde to LaCanne. This is erroneous. The existence of a legal duty is a question for the court, not the jury. . . . The existence of a legal duty depends on the factual circumstances of each case. It is not, however, the jury’s function to determine whether the facts give rise to a duty.

Id. at n.1. The court then reversed the court of appeals, stating that “[u]nder the present facts, the trial court was correct in concluding that no duty existed.” Id. at 545.

Like Gabrielson, Albrecht conceded the facts for purposes of summary judgment, and it therefore was the duty of the Court of Appeals to determine whether a duty or contract existed based on that given set of facts. As stated in Gabrielson, “it is not . . . the jury’s

function to determine whether the facts give rise to a duty.” Id.

**III. THERE WAS NO SOURCE FROM WHICH THE TERMS OF A POLICY FOR HARRIS’ BUSINESS, NOR THE CONTENTS THEREOF, COULD HAVE BEEN IMPLIED - THEREFORE, NO CONTRACT TO PROCURE WAS CREATED.**

The important rule of law stated in the cases cited by Harris in his brief is that in order to form a valid contract to procure insurance, all of the essential terms of the ultimate insurance contract must at least be capable of being *implied from other sources or circumstances*. See Hamacher v. Tummy, 352 P.2d 493, 497 (Or. 1960). Despite Harris’ contentions, there was no source from which the terms of a policy for Harris’ business, nor the contents thereof, could have been implied. Therefore, no contract to procure was created.

**A) Harris’ Argument of Implying Terms and Contents from a “Standard Policy”.or Sales Brochure Is Flawed.**

Contrary to Harris’ contention, there was no basis for Albrecht to imply from a brochure or “standard policy” what Harris’ contents may have been, or what options, coverages, limits, etc. Harris would have desired. Although Harris points out that Albrecht referred to a “standard policy” in the briefing below (Harris’ Brief, p. 44 n.16), there is no such thing as a “standard policy” in the sense used by Harris. R. 159 (pp. 33, 35, 51-52, 83-84). There are certain automatic coverages included in a policy once contents have been identified, and options, limits, deductibles, other coverages, etc. have been decided by the prospective insured. R. 159 (pp. 17, 61, 143); R. 365-362. However,

there is no “standard policy” that could be defaulted to without certain crucial information from the prospective insured, e.g., contents, etc. R. 159 (pp. 33, 35, 51-52, 83-84).

It is not difficult to illustrate why implying contents or terms from a brochure or “standard policy” would not have been possible in this case. For instance, if Albrecht were to “cut and paste” the automatic coverages from the sales brochure as Harris argues, Harris would have received \$5,000 in valuable papers coverage.<sup>5</sup> R. 159 (pp. 17, 61, 143); R. 365-362. Harris claims \$940,000 for lost valuable papers, not \$5,000. R. 205, 390. Thus, an agent is clearly not justified in speculating as to a prospective insured’s property or insurance needs, as argued by Harris.

**B) Harris’ Argument Regarding the Parties’ Prior Dealings is Flawed.**

Harris argues that in the past, Albrecht had always been able to procure automobile or similar policies with limited information, and therefore Albrecht should have done so on Harris’ business. However, in their prior dealings, Harris at least identified for Albrecht the object or objects to be insured. For instance, Harris states: “[a]s it worked, Harris would call Albrecht, tell him, for instance, *what type of car* he wanted to add, and Albrecht would place the coverage.” (Harris’ Brief, p. 32) (emphasis added.) Unlike this, Harris never told Albrecht what the contents of his business were.

Further, Harris never before had a business policy, and because Albrecht had no knowledge of the contents of Harris’ business nor of the terms Harris may have desired,

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<sup>5</sup> Assuming State Farm would have been willing to insure Harris.

R. 186 (pp. 107-09), there was no source from which to imply the contents or terms of a policy.

**C) The Cases Cited by Harris Regarding Contracts to Procure Insurance Are Either Inapposite, Or, Actually Support Albrecht's Position.**

The cases cited by Harris regarding contracts to procure insurance are either inapposite, or, actual support Albrecht's position. For instance, Harris cites Lakeview Farms, Inc., v. Patten, 640 N.E.2d 1092 (Ind. Ct. App. 1994) in support of his case. However, in Lakeview, just like Albrecht presently argues, the court held that the alleged contract to procure insurance was insufficiently definite to be enforced. Because there was no course of dealing from which to infer the essential terms, a verdict for the plaintiff was reversed. Thus, Lakeview entirely supports Albrecht's position, not Harris'. Further, Lakeview does not involve an insurance agent situation. Lakeview involved an employer's promise to procure medical insurance for an employee.

Harris also cites the case of Hamacher v. Tummy, 352 P.2d 493 (Or. 1960), wherein a prospective insured brought an action against certain insurance agents ("agents") for their alleged failure to procure insurance on buildings owned by the plaintiff. The plaintiff was an owner of a saw and planing mill that were already insured. The policy limited the insurance company's liability for claims to 90% of the actual cash value of the property at the time of a loss, up to \$170,000. The plaintiff subsequently made substantial improvements to the mill. An appraisal showed the property value had increased to

\$226,000.00. The plaintiff made even more improvements after the appraisal, increasing the property value further. Consequently, the plaintiff and one of the agents met to discuss the possibility of increasing the amount of insurance for the mill. The agent suggested the insurance be increased to 95% of the current insurable value of the mill. The plaintiff decided he would do that. The plaintiff provided the agent with a written appraisal report for the mill and the agent took the report to his office to determine the total insurable value of the mill. Before the agent could return to discuss the insurance value, a fire damaged plaintiff's mills to the extent of \$174,166.58. At the time of the fire, the defendants had not procured additional insurance and the plaintiff recovered only \$139,396.29. The plaintiff sued the agents for the remaining uncovered amounts and was defeated at the trial court level.

On appeal, the court recognized the rule that, before a party can have a duty to procure insurance, there must be an agreement on all the essential elements of the contract to be procured:

[w]here a person seeks to enter into a contract of insurance with an insurance company or its agent it is understood that **the negotiations will not ripen into a contract until the parties arrive at an agreement as to all the elements which are essential to an insurance contract, including the subject matter to be covered, the risk insured against, the amount of indemnity, the duration of the coverage and the premium.**

Hamacher, 352 P.2d at 349 (emphasis added). The court also stated that, absent sufficient information from the insured to enable the agent to obtain the insurance, no liability for failure to procure can attach:

Obviously, liability for failure to procure insurance could not arise unless the agent had sufficiently definite directions from his principal to consummate the final insurance contract.

Id.

The trial court in Hamacher was reversed and the case was remanded based largely on the trial court's instruction to the jury that a contract to procure insurance must be proven with the same certainty as a contract of insurance. Id. at 496. Since the plaintiff and defendants had insured the mills under a prior policy, the court held that, in that instance, a jury might use that prior course of dealing to ascertain the essential elements of the insurance to be procured. Specifically, the Oregon Supreme Court noted that:

[t]he principal vice of the instruction is that it could be considered by the members of the jury as prohibiting them from finding a contract to procure insurance from the facts short of an express agreement to that effect. **There were facts from which a contract to procure insurance could reasonably be implied. As we have already indicated, at the time of the negotiations in question there were in existence several policies of insurance on the buildings and equipment on the plaintiff's plant site. These policies were executed only after the defendants had discussed with plaintiff at some length his fire insurance program, and the terms of the policies embodied the original program upon which the parties had reached agreement. The previous coverage is relevant in the present case. From the fact that the parties had agreed upon a five year term as the duration of the coverage under the policies already in force, it would be reasonable to infer that the additional coverage was to be for the same term.**

Id. at 497-98 (emphasis added, quoting Patterson, Principles of Insurance Law (2<sup>nd</sup> Ed.) p. 88). Thus, in Hamacher, the Court held that a contract to procure could exist absent an express agreement so long as the essential terms could be implied from "policies already

in force.” Hamacher, 352 P.2d at 497-98.

Applying Hamacher to this case, Harris cannot prevail because, as already explained, there was no prior course of dealing for *business* insurance from which the essential terms could be implied.

The other cases cited by Harris are like Hamacher, in that they acknowledge the general rule requiring agreement on all essential contract terms, at least by implication. See Bulla v. Donahue, 366 N.E.2d 233, 236 (Ind. App. 1977) (holding that the “terms and conditions of the proposed policy need to be sufficiently definite to enable the agent or broker to procure a policy consistent with the applicant's insurance needs”); Marshall Investments, Inc. v. Cohen, 634 P.2d 133, 141 (Kan. App. 1981) (“we do not question the general rule that to prove the existence of an agreement there must be evidence of reasonable definiteness that there was a meeting of the parties' minds upon subject matter and terms. . . .”); Olvera v. Charles Z. Flack Agency, Inc., 415 S.E.2d 760, 762 (N.C. App. 1992) (“determining whether an agent has undertaken to procure a policy of insurance, a court must look to the conduct of the parties and the communications between them”); Rena, Inc. v. T.W. Brien Underwriters, 708 A.2d 747 (N.J. Sup. Ct. App. Div. 1998) (if no express agreement, terms must at least be found by implication).

In Bulla, the plaintiffs sued an insurance agent for failing to obtain automobile coverage. One of the plaintiffs went to her agent’s office with her current policy and

informed the agent she wanted the same coverages. The agent then placed a call to another agent in order to obtain lower premiums and the second agent was given five pages containing the plaintiffs' prior insurance information. The plaintiffs also executed a check for the premium and sent the check and the information to the second agent. Upon receipt of the information and the check, the second agent decided he did not want the business and he failed to submit the information to an insurance company. However, he did not inform either the first agent nor the plaintiffs that coverage would not be placed through him. Soon afterward, one of the plaintiffs' automobiles was involved in an accident.

The court held the second insurance agent liable for failure to procure an insurance policy and found the insured had given the second agent sufficient information to enable him to obtain a policy. Specifically, the court found the insured had provided the agent with a list of the desired coverages, deductibles desired, automobiles to be insured, drivers of the vehicles, and liens on the vehicles. In short, unlike the instant case, the court found the list contained all of the information necessary for the second agent to obtain a policy of insurance, as well as a premium payment.

In Marshel Investments, another case cited by Harris, an oil and gas leasehold owner whose well burned in a fire brought an action against an insurance agent for failure to procure "above-ground equipment" coverage for his well. The agent had asked the plaintiff for a detailed description of the plaintiff's equipment. In response, the plaintiff

claimed he obtained the descriptions from an employee and then provided the descriptions to the insurance agent, thus giving the agent the information needed to secure the policy. See id. at 135.

In Rena, Inc., which arose out of a fire at a bar and restaurant, an owner of the property brought an action against an insurance broker for failing to name it as an additional insured on an insurance policy purchased by the lessee of the property. The case involved the issue of whether an insurance agent had a duty to third persons, other than direct clients, in certain circumstances. Rena stands for the proposition that an agent may have a duty to persons other than the client who may reasonably expect to be covered under an insurance policy.

A review of Rena reveals the court did not address issues similar to those currently before the court in the present case. The Rena court did not address the issue of what information an insurance agent would need in order to procure an insurance policy. However, the Rena court did state that an agent would have to have information sufficient to procure insurance for the “risks indicated.” This tangential treatment of the issue before the Court indicates that an insured would have to specifically indicate the risks sought to be covered before the agent could reasonably be expected to procure the insurance.

In Olvera, a coverage dispute arose after a home was destroyed by a fire. The home was originally purchased by Willie Little, who purchased a homeowners policy for the

residence through Agency, an insurance broker. The homeowner then conveyed the home to his mother and sister, who in turn sold it to the plaintiff. Five months after the plaintiff purchased the home, a bill for the insurance policy arrived in the mail addressed to Little. The plaintiff took the bill to Agency and told a receptionist that she wanted to pay the bill and have the same insurance coverage switched over to her name. The receptionist took payment for the insurance coverage and informed the plaintiff coverage would be in effect for a year. Soon afterward the house was destroyed by a fire. After suit was filed, the trial court granted Agency's directed verdict motion. On appeal, the court found the plaintiff told Agency she wanted the same coverage that was already in place and she paid the premium for the coverage. Under those facts, the court found all of the necessary terms of a policy could be inferred.

In contrast to these cases cited by Harris, there was no basis for Albrecht to imply from any source the terms of a policy nor the contents for Harris' business. Albrecht had no knowledge of the contents of Harris' business nor his alleged extensive upgrades, (R. 186 (pp. 107-09)), and Harris had never before insured the business. Without any prior business policies or other source of information regarding Harris' business, Harris' alleged phone conversation with Albrecht was, at best, an unenforceable agreement to agree. See Homestead Golf Club, Inc. v. Pride Stables, 224 F.3d 1195, 1200-01 (10<sup>th</sup> Cir. 2000) (parties consummated "[an] agreement to agree, which was 'unenforceable because [it] leaves open material terms for future consideration, and the courts cannot create these

terms for the parties”). Justice Davis was correct in pointing out that the parties’ actions were preliminary, or, “amounted to little more than an inquiry about insurance.” Harris, 2002 UT App 98, ¶ 39, 46 P.3d 241.

**D) Damages are Speculative.**

It is speculative to decide now what amount of insurance Harris would have ultimately purchased or qualified for, especially in the area of valuable papers. In that respect, the present case is similar to the case of Wagner v. Falbe, 74 N.W.2d 742 (Wis. 1956), where the court held that the parties had not agreed on the amount of insurance to be purchased:

the amount of damages recoverable . . . of course depend on the terms of the order which the insurance agent undertook to fulfil. In the case at bar, how much insurance did Wagner order and Schmitz agree to obtain? . . .[U]ntil it is known *how much* insurance the agent was to obtain she cannot establish in what amount her husband was damaged because he obtained none . . .

Id. at 744 (emphasis in original). The court concluded that “[i]t was useless, then, to submit appellant’s case to the jury and the nonsuit was properly directed.” Id.

Similarly, the expectation damages in the case at hand would be unascertainable by the jury because even according to Harris, the contents of the business and policy terms were never discussed. R. 186 (pp. 107-09).

**V. NEGLIGENT FAILURE TO PROCURE - HARRIS’ ARGUMENT THAT ALBRECHT NEGLIGENTLY FAILED TO NOTIFY HARRIS OF THE NEED FOR “ADDITIONAL INFORMATION” FAILS AS A MATTER OF LAW.**

Harris argues that Albrecht, as part of his duty to procure, had a duty to notify Harris

that “additional information” was needed before a business policy could be written.

Harris states:

if Albrecht had said, ‘Ken, I’d love to insure your business but I can’t until I have some additional information,’ Albrecht would likely have protected himself from liability because Harris would have known that no policy would or could yet issue.

(Harris’ Brief, p. 28 n.11.) However, this argument fails for the following reasons.

**A) Albrecht Had Not Yet Assumed a Duty to Procure.**

There is authority that the tort duty to procure insurance arises from the contract to procure.<sup>6</sup> See Couch on Insurance §§ 46:49, p. 46-70, 71, 72; 46:65, p. 46-96 (3d ed. 1997); Johnson v. George Tenuta & Co., 185 S.E.2d 732, 736 (N.C. Ct. App. 1972); Bank of French Board Inc. v. Bryan, 83 S.E.2d 485 (N.C. 1954); Sanchez v. Martinez, 653 P.2d 897, 901 (N.M. Ct. App. 1982).<sup>7</sup> No contract to procure was formed in this case, and therefore there could be no negligent failure to perform any contractual duties.

At a minimum, as even Harris concedes, the request for insurance must be clear and specific in order to trigger a duty to procure insurance. See Small v. King, 915 P.2d

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<sup>6</sup> Harris attacks this concept, which is curious (and instructive) since he claims to be confident that all of the elements of a contract to procure are present in this case. (Harris Brief, p. 20 n. 6.)

<sup>7</sup> Harris suggests that these authorities are too old, just dicta, and, in any event only stand for the proposition that a contract to procure is a sufficient, but not a necessary condition for creating a duty to procure sounding in tort. (Harris’ Brief, p. 21 n. 6). However, Albrecht does not cite these cases as mandatory authority, just as persuasive. Further, it can be fairly inferred from the authorities cited that the duty to procure is derivative of the contract to procure.

1192, 1194 (Wyo. 1996); (Harris' Brief, p. 19) (instructions must be "clear, explicit, absolute, and unqualified"). Here, the alleged phone conversation was short, vague, and contemplated further negotiations as Albrecht would be coming out to look at the equipment. Thus, no duty to procure had yet been assumed by Albrecht.

**B) Albrecht Did Notify Harris That Additional Information Was Needed.**

Even if Albrecht did have a duty to notify Harris that additional information was needed, there can be no doubt that Albrecht did so inform Harris. Even according to Harris' alleged phone conversation, Albrecht told Harris that he would come see the "equipment," "office," and "stuff." R. 186 (pp. 117-121). Because this inspection never took place (Harris' Brief, p. 30) (R. 186 (p. 123)), Harris had or should have had an absolute knowledge that no policy had been issued.

**C) Whether Albrecht's Actions Warranted an Assumption by Harris That He Was Properly Insured Is a Question of Law under the Circumstances of this Case.**

The third element of a negligent failure to procure claim requires that "the agent's actions warranted an assumption by the client that he was properly insured." Harris v. Albrecht, 2002 UT App 98, ¶ 11, 46 P.3d 241. Citing to several Utah cases which hold that the issue of "reasonable reliance" is a question of fact, Harris claims that a jury should be allowed to decide whether he was warranted in assuming that he was properly insured.

However, where there is clearly no reasonable reliance, the issue of “reasonable reliance” can be decided as a matter of law. See Gold Standard v. Getty Oil Co., 915 P.2d 1060, 1067 (Utah 1996) (in a misrepresentation case, the court stated that no matter how naive or inexperienced, a person or entity cannot continue to heedlessly accept a representation in the face of subsequent contrary writings).

Albrecht’s alleged actions in this case clearly did not warrant an assumption that Harris was properly insured. Approximately, five months after the alleged conversation (R. 186 (p. 107)); R. 7), Harris admits he still had not received a policy or bill from Albrecht, nor had Albrecht come to visit the office to look at the equipment, and no premium had ever been paid. See Harris, 2002 UT App 98, ¶ 38, 46 P.3d 241 (Davis, J., dissenting); R. 186 (pp. 117-121). Thus, Justice Davis was correct in his dissent by stating that the third element of a negligent failure to procure claim was not met as a matter of law. See Harris, 2002 UT App 98, ¶ 38, 46 P.3d 241 (Davis, J., dissenting).

**D) The Cases Cited by Harris Regarding Duty to Procure Insurance Are Either Inapposite, Or, Actually Support Albrecht’s Position.**

The cases cited by Harris regarding duty to procure insurance are either inapposite,<sup>8</sup>

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<sup>8</sup> The case of Industrial Development Associations v. F.T.P., 591 A.2d 682 (N.J. Super. Ct. 1991) cited by Harris is entirely inapposite to the issue of when an agent’s duty to procure is triggered. In that case, an excess insurance broker was inspecting the premises and discovered that the sprinkler system was inoperative. The broker did not tell anyone. The case revolved around whether the broker had a duty to inform the other parties and insurers that the system was inoperative. Id. 472. The case has nothing to do with whether a prospective insured’s conversation with an agent was legally sufficient to

or, actually support Albrecht's position. Many of Harris' cases involve situations where the insured has already given specific directions to the agent as to what should be insured, and the agent subsequently fails to obtain the insurance, or, mistakenly obtains inadequate or incorrect coverage. For instance, in Black v. Illinois Fair Plan Association, 409 N.E.2d 549 (Ill. Ct. App. 1980), but unlike the case at hand, the insured gave the agent all the information needed to procure a fire insurance policy for his new parcel of real property and a policy was procured, except the agent mistakenly wrote the wrong address on the application, causing the wrong property to be insured. This is different from the case at hand in that Harris never told Albrecht what the contents of his business were.

In Shapiro v. Amalgamated Trust and Savings Bank, 283 Ill. App. 243 (1935), another case cited by Harris, an existing policy was at issue. The buildings to be insured were specifically identified, a policy was delivered to the insured, and premiums were paid.

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trigger a duty on the part of the agent to procure insurance.

Harris also cites Gabrielson v. Warnemunde, 443 N.W.2d 540 (Minn. 1989), which is also inapposite to this case because Gabrielson dealt with what constitutes "special circumstances" as would increase the scope of the agent's duty of care. Incidentally, however, Gabrielson involves an existing policy. Also, the court held that "long acquaintance," several consecutive years of procuring and maintaining the same homeowners policy, the agent's admission that it was the agent's own "responsibility," the fact that "most insureds are unfamiliar with their policies and rely on their agents," were not "special circumstances" such as would expand the duty of care on the agent. Id. at 544-46. Finally, as mentioned earlier in this brief, this case confirms that whether an insurance agent owes a particular duty is a question of law, not fact.

The policy contained an unfortunate exclusion which the insured did not know about. When the property was damaged by fire, the exclusion precluded recovery under the policy.

The insured brought suit arguing that the agent knew the exclusion essentially gutted the insured's policy based on the insured's circumstances. In response, the insurer argued that the insured should have read the policy and would have noticed the exclusion. The court held that the insurer cannot avoid liability by saying that the insured could have discovered by reading the policy that the insurance issued was not the insurance requested.

In Mets Donuts, Inc. v. Dairyland Insurance Company, 166 A.D.2d 508 (N.Y. Sup. Ct. 1990), the facts again involved an existing policy of insurance. The insured lessee of the premises made a specific request for \$75,000 in contents coverage and \$10,000 for lost-income coverage. A policy was procured but the agent apparently made an error, and procured \$75,000 in premises coverage and \$10,000 in contents coverage. The case has nothing to do with whether a prospective insured's conversation with an agent was sufficient to trigger a legal duty on the agent's part. Mets Donuts is a case regarding the liability of an agent for securing the wrong terms of coverage, and thus is a "breach of duty" case, not an "existence of duty" case.

In the case of Fleetwood Motors, Inc. v. John F. James & Sons, Inc., 237 N.Y.S.2d 668 (1963) cited by Harris, the prospective insured (car dealer) had made a specific

request for auto theft insurance to an insurance broker. The broker took the order and submitted a written application to Aetna (and had oral conversations with other insurers). None of them wanted to insure the dealer. However, the broker forgot to notify the insured of that fact until after several cars had been stolen.

The dealer sued the broker for failure to procure insurance. The broker offered evidence of a letter that was purportedly sent informing the dealer that no insurer would underwrite his property. However, the court found that the letter had been backdated and was written after the loss occurred.

Thus, Fleetwood is a case where a broker had all the information he needed and had already made a written attempt to place the insurance with an underwriter. The broker apparently failed to tell the dealer that his business was not wanted. This is entirely different from the present case where it is undisputed that Harris had not yet conveyed the information regarding Harris' business.

All of the other cases cited by Harris on the duty to procure insurance are likewise distinguishable, mostly involving existing policies. See Bonner v. Bank of Coughatta, 445 So. 2d 84 (La. Ct. App. 1984) (life insurance agreement already in place, with premiums being paid); Lee v. Andrews, 667 P.2d 919 (Mont. 1983) (agent failed to procure the automobile coverage after admittedly being given all the information needed to procure the policy); Sanchez v. Martinez, 653 P.2d 897 (N.M. Ct. App. 1982) (agent failed to renew a pre-existing homeowners' policy); Bayly, Martin & Fay, Inc v. Pete's

Satire, Inc., 739 P.2d 239 (Colo. 1987) (though the insurance agent had knowledge that the insured requested and required liquor liability insurance to be included in the insurance purchased for each of his restaurants, and though the agent had included liquor liability coverage in each restaurant policy obtained for the insured previously, the agent nonetheless failed to include it in the insurance policy for the most recent restaurant); South West Auto Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995) (involving a particular coverage which was not included in the policy obtained for the insured); Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc., 607 P.2d 763 (Or. Ct. App. 1980) (the insured specifically requested his policy include workers compensation coverage that limited any single loss to \$25,000, but the agent failed to include this coverage in the policy procured); R.H. Grover, Inc. v. Flynn Ins. Co., 777 P.2d 338, 341 (Mont. 1989) (cursory treatment of issue, and court found “it is impossible to imply that Flynn [the defendant] had a ‘duty’ to procure insurance under these facts,” and consequently held that the trial court had erred by submitting the “failure to procure” claim to the jury).

In summary, unlike the case at hand, the cases cited by Harris stand for the proposition that once the essential terms of the ultimate contract of insurance have been agreed to, if the agent then fails to execute a policy pursuant to that agreement, he can be negligent for the failure to procure, or for failing to notify the prospective insured that no one was willing to underwrite the specified property.

In the present case, where there was never an agreement as to what was being procured, and where the alleged conversation left the details for future ascertainment, Albrecht was not under a duty toward Harris.

### **CONCLUSION**

The only issue that went before the trial court was purely a legal one, which asked whether, based on the facts as alleged by Harris, Albrecht had a duty or contract to procure insurance. As with all contracts and duties, it is the province of the court to decide whether certain undisputed words and actions are sufficient to give rise to a legal obligation, including an obligation to procure insurance. Based on the undisputed facts of this case, there was insufficient detail, as a matter of law, to trigger a duty or contract to procure insurance. Defendants ask that this Court reverse the Court of Appeals' decision, and affirm the grant of summary judgment in all respects.

DATED this 26 day of December, 2002.

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### CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of December, 2002 a true and correct copy of the foregoing **Reply Brief of Appellants** was served by the method indicated below, to the following:

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