

2002

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

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Lynn C. Harris; Harris and Carter; Ryan M. Harris; Jones, Waldo, Holbrook and McDonough; Attorneys for Appellee.

Paul M. Belnap; Byron G. Martin; Strong and Hanni; Attorneys for Appellants.

---

## Recommended Citation

Brief of Appellee, *Harris v. Albrecht*, No. 20020370.00 (Utah Supreme Court, 2002).  
[https://digitalcommons.law.byu.edu/byu\\_sc2/2177](https://digitalcommons.law.byu.edu/byu_sc2/2177)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

**IN THE UTAH SUPREME COURT**

---

KEN HARRIS,	:	
	:	
Plaintiff/Appellee,	:	Case No. 20020370-SC
	:	
vs.	:	Court of Appeals No. 20001045-CA
	:	
RICK ALBRECHT; RICK ALBRECHT	:	District Court Case No. 980404110
INSURANCE AGENCY, INC.; and	:	
STATE FARM FIRE & CASUALTY	:	
COMPANY,	:	
	:	
Defendants/Appellants.	:	

---

**BRIEF OF APPELLEE  
(ORAL ARGUMENT REQUESTED)**

---

**REVIEW BY WRIT OF CERTIORARI  
TO THE UTAH COURT OF APPEALS**

---

Paul M. Belnap  
Byron G. Martin  
STRONG & HANNI  
9 Exchange Place, Suite 600  
Salt Lake City, Utah 84111

Lynn C. Harris (USB #1382)  
HARRIS & CARTER  
3325 North University Avenue, Suite 200  
Provo, Utah 84604

Ryan M. Harris (USB #8192)  
JONES, WALDO, HOLBROOK & McDONOUGH  
170 South Main Street, Suite 1500  
Salt Lake City, Utah 84101

*Attorneys for Defendants/Appellants*

*Attorneys for Plaintiff/Appellee*

---

**IN THE UTAH SUPREME COURT**

---

KEN HARRIS,	:	
	:	
Plaintiff/Appellee,	:	Case No. 20020370-SC
	:	
vs.	:	Court of Appeals No. 20001045-CA
	:	
RICK ALBRECHT; RICK ALBRECHT	:	District Court Case No. 980404110
INSURANCE AGENCY, INC.; and	:	
STATE FARM FIRE & CASUALTY	:	
COMPANY,	:	
	:	
Defendants/Appellants.	:	

---

**BRIEF OF APPELLEE  
(ORAL ARGUMENT REQUESTED)**

---

**REVIEW BY WRIT OF CERTIORARI  
TO THE UTAH COURT OF APPEALS**

---

Paul M. Belnap  
Byron G. Martin  
STRONG & HANNI  
9 Exchange Place, Suite 600  
Salt Lake City, Utah 84111

Lynn C. Harris (USB #1382)  
HARRIS & CARTER  
3325 North University Avenue, Suite 200  
Provo, Utah 84604

Ryan M. Harris (USB #8192)  
JONES, WALDO, HOLBROOK & McDONOUGH  
170 South Main Street, Suite 1500  
Salt Lake City, Utah 84101

*Attorneys for Defendants/Appellants*

*Attorneys for Plaintiff/Appellee*

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....	1
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES .....	2
STATEMENT OF THE CASE .....	2
STATEMENT OF THE FACTS.....	3
A.    Ken Harris and His Business Experience .....	3
B.    Rick Albrecht and His Business Experience .....	5
C.    The Relationship Between Harris and Albrecht .....	6
D.    The Conversations Relating to Business Insurance .....	9
E.    The Fire .....	10
F.    Elements of a Business/Commercial Policy .....	11
SUMMARY OF THE ARGUMENT.....	12
STANDARD OF REVIEW .....	14
ARGUMENT .....	15
I.    GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO HARRIS’S NEGLIGENCE CLAIM.....	16
A.    DUTY: Albrecht Had a Duty to Follow Harris’s Instructions and to Exercise Reasonable Care in the Procurement of Insurance, and This Duty Attached as Soon as Harris Instructed Albrecht to Procure the Insurance and Albrecht Agreed .....	17
B.    BREACH: Albrecht’s Duty Required Him Either to Procure The Insurance or to Notify Harris that the Insurance Could Not Be Procured .....	23

C.	REASONABLE RELIANCE: Harris Reasonably Relied Upon Albrecht's Assurance That He Would Take Care of the Insurance Request.....	30
II.	GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO HARRIS'S CLAIM FOR BREACH OF A CONTRACT TO PROCURE INSURANCE .....	34
A.	Disputed Questions Related to Formation and Breach of a Contract Are Questions of Fact to Be Decided by the Jury.....	34
B.	Credible Evidence Exists Supporting Each of the Elements of Harris's Claim For Breach of a Contract to Procure Insurance.....	37
1.	A claim for breach of a contract to procure insurance is different from a claim for breach of a contract of insurance. ....	37
2.	Harris can prove each of the necessary elements of a contract to procure insurance. ....	40
III.	STATE FARM IS LIABLE ON BOTH CAUSES OF ACTION.....	47
	CONCLUSION .....	48
	CERTIFICATE OF SERVICE .....	50

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<u>Gulf-Tex Brokerage, Inc. v. McDade &amp; Assocs.,</u> 433 F. Supp. 1015 (S.D. Tex. 1977) .....	26
--	----

### **STATE CASES**

<u>AMS Salt Indus., Inc. v. Magnesium Corp. of Am.,</u> 942 P.2d 315 (Utah 1997) .....	17
---	----

<u>Bank of French Board v. Bryan,</u> 83 S.E.2d 485 (N.C. 1954) .....	21
--	----

<u>Bayly, Martin &amp; Fay, Inc. v. Pete's Satire, Inc.,</u> 739 P.2d 239 (Colo. 1987) .....	24
---	----

<u>Berkeley Bank for Co'ops v. Meibos,</u> 607 P.2d 798 (Utah 1980) .....	31
--	----

<u>Black v. Illinois Fair Plan Ass'n.,</u> 409 N.E.2d 549 (Ill. Ct. App. 1980).....	25
--	----

<u>Bonner v. Bank of Coushatta,</u> 445 So. 2d 84 (La. Ct. App. 1984) .....	20
--	----

<u>Boone v. Lowry,</u> 657 P.2d 64 (Kan. Ct. App. 1983).....	40
---	----

<u>Boston Camping Dist. Co. v. Lumbermens Mut. Cas. Co.,</u> 282 N.E.2d 374 (Mass. 1972) .....	42
---	----

<u>Brighton Corp. v. Ward,</u> 2001 UT App 236, 31 P.3d 594 .....	35
--	----

<u>Bulla v. Donahue,</u> 366 N.E.2d 233 (Ind. Ct. App. 1977).....	38
--	----

<u>Caddy v. Smith,</u> 877 P.2d 667 (Or. Ct. App. 1994) .....	19, 23, 41
--	------------

<u>Cal Wadsworth Constr. v. City of St. George,</u> 865 P.2d 1373 (Utah Ct. App. 1993) .....	35
<u>Cal Wadsworth Constr. v. City of St. George,</u> 898 P.2d 1372 (Utah 1995) .....	35
<u>Collins v. Sandy City Board of Adjustment,</u> 2002 UT 77, 52 P.3d 1267 .....	1, 15
<u>Connor v. Union Pac. R. Co.,</u> 972 P.2d 414 (Utah 1998) .....	18
<u>Draper City v. Estate of Bernardo,</u> 888 P.2d 1097 (Utah 1995) .....	14
<u>Duncanson v. Service First, Inc.,</u> 157 So. 2d 696 (Fla. Ct. App. 1963) .....	40
<u>Durham v. Margetts,</u> 571 P.2d 1332 (Utah 1977) .....	1, 15
<u>Dwiggins v. Morgan Jewelers,</u> 811 P.2d 182 (Utah 1991) .....	23
<u>Ferree v. State,</u> 784 P.2d 149 (Utah 1989) .....	17
<u>Fleetwood Motors, Inc. v. John F. James &amp; Sons, Inc.,</u> 237 N.Y.S.2d 668 (Sup. Ct. 1963) .....	27, 30
<u>Furtak v. Moffett,</u> 671 N.E.2d 827 (Ill. Ct. App. 1996).....	42
<u>Gabrielson v. Warnemunde,</u> 443 N.W.2d 540 (Minn. 1989).....	19
<u>Haggans v. State Farm Fire &amp; Cas. Co.,</u> 803 So. 2d 1249 (Miss. Ct. App. 2002) .....	26
<u>Hamacher v. Tamy,</u> 352 P.2d 493 (Or. 1960).....	27, 37, 46
<u>Harline v. Barker,</u> 912 P.2d 433 (Utah 1996) .....	15

<u>Harris v. Albrecht,</u> 2002 UT App 98, 46 P.3d 241 .....	passim
<u>Herm Hughes &amp; Sons, Inc. v. Quintek,</u> 834 P.2d 582 (Utah Ct. App. 1992) .....	35
<u>Howarth v. First Nat'l Bank of Anchorage,</u> 596 P.2d 1164 (Alaska 1979).....	36
<u>Howarth v. First Nat'l Bank of Anchorage,</u> 540 P.2d 486 (Alaska 1975).....	36
<u>Industrial Dev. Assocs. V. F.T.P., Inc.,</u> 591 A.2d 682 (N.J. Super. Ct. App. Div. 1991), <u>aff'd</u> , 602 A.2d 733 (N.J. 1992).....	25
<u>Johnson v. George Tenuta &amp; Co.,</u> 185 S.E.2d 732 (N.C. Ct. App. 1972) .....	21
<u>Kitchen v. Cal Gas Co.,</u> 821 P.2d 458 (Utah Ct. App. 1991) .....	23
<u>Lakeview Farms, Inc. v. Patten,</u> 640 N.E.2d 1092 (Ind. Ct. App. 1994).....	42
<u>Lamb v. B &amp; B Amusements Corp.,</u> 869 P.2d 926 (Utah 1993) .....	14
<u>Lee v. Andrews,</u> 667 P.2d 919 (Mont. 1983) .....	20, 41
<u>Mackey v. Cannon,</u> 2000 UT App 36, 996 P.2d 1081 .....	36
<u>Marshel Investments, Inc. v. Cohen,</u> 634 P.2d 133 (Kan. Ct. App. 1981).....	20, 23, 39, 41, 42
<u>McCornick v. Queen of Sheba Gold Min. &amp; Milling Co.,</u> 23 Utah 71, 63 P. 820 (1900) .....	18
<u>Mets Donuts, Inc. v. Dairyland Ins. Co.,</u> 560 N.Y.S.2d 790 (App. Div. 1990) .....	25



<u>Nunley v. Westates Casing Servs., Inc.</u> , 1999 UT 100, 989 P.2d 1077 .....	35
<u>O'Hara v. Hall</u> , 628 P.2d 1289 (Utah 1981) .....	34, 35
<u>Olvera v. Charles Z. Flack Agency, Inc.</u> , 415 S.E.2d 760 (N.C. Ct. App. 1992) .....	28, 39
<u>Precision Castparts Corp. v. Johnson &amp; Higgins of Oregon, Inc.</u> , 607 P.2d 763 (Or. 1980) .....	19
<u>ProMax Dev. Corp. v. Mattson</u> , 943 P.2d 247 (Utah Ct. App. 1997) .....	35
<u>Rena, Inc. v. T.W. Brien, Underwriters</u> , 708 A.2d 747 (N.J. Super Ct. App. Div. 1998) .....	28, 39
<u>R.H. Grover, Inc. v. Flynn Ins. Co.</u> , 777 P.2d 338 (Mont. 1989) .....	20, 21
<u>Roeske v. Diefenbach</u> , 249 N.W.2d 555 (Wis. 1977) .....	36
<u>Ron Shepherd, Inc. v. Shields</u> , 882 P.2d 650 (Utah 1994) .....	15
<u>Sanchez v. Martinez</u> , 653 P.2d 897 (N.M. Ct. App. 1982) .....	15, 23, 24, 25
<u>Schreiter v. Wasatch Manor, Inc.</u> , 871 P.2d 570 (Utah Ct. App. 1994) .....	23, 30
<u>Shapiro v. Amalgamated Trust and Savings Bank</u> , 283 Ill. App. 243 (1935) .....	15
<u>Silcox v. Skaggs Alpha Beta Inc.</u> , 814 P.2d 623 (Utah Ct. App. 1991) .....	23
<u>Skerl v. Willow Creek Coal Co.</u> , 92 Utah 474, 69 P.2d 502 (1937) .....	18
<u>Small v. King</u> , 915 P.2d 1192 (Wyo. 1994) .....	42

<u>Southwest Auto Painting and Body Repair, Inc. v. Binsfeld</u> , 904 P.2d 1268 (Ariz. Ct. App. 1995) .....	19, 23, 26, 27
<u>Stockberger v. Meridian Mut. Ins. Co.</u> , 395 N.E.2d 1272 (Ind. Ct. App. 1979).....	21
<u>Travelers Ins. Co. v. Kearl</u> , 896 P.2d 644 (Utah Ct. App. 1995) .....	31
<u>Valcarce v. Bitters</u> , 362 P.2d 427 (Utah 1961) .....	35
<u>Walker Drug Co. v. La Sal Oil Co.</u> , 902 P.2d 1229 (Utah 1995) .....	14
<u>Weber v. Springville City</u> , 725 P.2d 1360 (Utah 1986) .....	18
<u>Zions First Nat’l Bank v. National Am. Title Ins. Co.</u> , 749 P.2d 651 (Utah 1988) .....	18

## STATE STATUTES AND RULES

Utah Code Ann. § 31A-23-305(2) .....	2, 14, 47
Utah Code Ann. § 78-2-2(3)(a).....	1
Utah R. Civ. P. 56(c).....	1, 14, 15

## OTHER AUTHORITIES

16A John Alan Appleman and Jean Appleman, <u>Insurance Law and Practice</u> § 8836 (1981).....	19
3 George J. Couch, <u>Couch on Insurance</u> § 25:47 (2d rev. ed. 1984) .....	24
3 George J. Couch, <u>Couch on Insurance</u> § 46:28 (3d ed. 2000) .....	19, 25, 33
Thomas J. Trenkner, J.D., <u>Liability of Insurance Broker or Agent to Insured for Failure to Procure Insurance</u> , 64 A.L.R. 3d 398 (1975) .....	39

## **JURISDICTIONAL STATEMENT**

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(a), because this is an appeal from a judgment of the Court of Appeals.

### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

The issues presented on appeal are as follows:

- a. Whether the Court of Appeals correctly reversed the district court's entry of summary judgment on Harris's claim for negligence and remanded that claim for trial?
- b. Whether the Court of Appeals correctly reversed the district court's entry of summary judgment on Harris's claim for breach of contract and remanded that claim for trial?

For both of these issues, the standard of review is correctness. "When exercising [its] certiorari jurisdiction, [this Court] review[s] the decision of the court of appeals and not that of the trial court. On certiorari, [this court] review[s] the decision of the court of appeals for correctness." See Collins v. Sandy City Board of Adjustment, 2002 UT 77, ¶11, 52 P.3d 1267.

The underlying standard of review is provided by Utah R. Civ. P. 56(c). Under that rule, summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). The court of appeals applied "the same standard as that applied by the trial court." Durham v. Margetts, 571 P.2d 1332, 1334 (Utah 1977). On certiorari review, this Court applies the same underlying standard, but grants the decision of the court of appeals no deference.

These issues were preserved in the trial court for appeal. See R. at 118 (Defendants' Motion for Summary Judgment), 140-222 (Defendants' Memorandum in Support of Motion for Summary Judgment, and Exhibits), 230-411 (Plaintiff's Memorandum in Opposition to Motion for Summary Judgment, and Exhibits), 467 (Minute Entry), 483-88 (Ruling), and 504 (Transcript of Oral Argument).

### **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES**

Harris is unaware of any constitutional provisions, statutes, ordinances, rules, or regulations determinative of his claims against Rick Albrecht or the Rick Albrecht Insurance Agency, Inc. One state statute is relevant to Harris's claims against State Farm Fire & Casualty Company, namely, Utah Code Ann. § 31A-23-305(2). That statute reads, in its entirety, as follows:

There is a rebuttable presumption that every insurer is bound by any act of its agent performed in this state that is within the scope of the agent's actual (express or implied) or apparent authority, until the insurer has canceled the agent's appointment and has made reasonable efforts to recover from the agent its policy forms and other indicia of agency. Reasonable efforts include a formal demand in writing for return of the indicia, and notice to the commissioner if the agent does not promptly comply with the demand. This Subsection (2) neither waives any common law defense available to insurers, nor precludes the insured from seeking redress against the agent individually or jointly against the insurer and agent.

### **STATEMENT OF THE CASE**

The complaint in this case was filed in Fourth District Court in Provo on May 18, 1998. See R. at 10. On or about May 3, 2000, Defendants filed a Motion for Summary Judgment, and an accompanying memorandum of law. See id. at 118, 140-222. On or about June 30, 2000, Harris filed a memorandum of law opposing Defendants' Motion

for Summary Judgment. See id. at 230-411. On or about September 18, 2000, Defendants submitted a reply memorandum in support of their motion. See id. at 416-57. The district court heard oral argument on Defendants' motion on October 11, 2000. See id. at 467. At the hearing, in a ruling from the bench, the district court granted Defendants' motion. See id. On or about November 3, 2000, the district court reduced its ruling to writing. See id. at 484-88. On or about November 17, 2000, the district court entered a cost judgment in favor of Defendants. See id. at 489-90. On November 29, 2000, Harris filed a Notice of Appeal from the district court's written ruling of November 3, 2000, see id. at 491-93, and on December 15, 2000, Harris filed an Amended Notice of Appeal in order to incorporate the district court's November 17, 2000 cost judgment in this appeal, see id. at 500-02.

During the spring and summer of 2001, the parties briefed the case before the Utah Court of Appeals. The matter came before the Court of Appeals for oral argument on November 20, 2001. On April 11, 2002, the Court of Appeals issued its decision reversing the district court's entry of summary judgment, and remanding the case to the district court for trial. See Harris v. Albrecht, 2002 UT App 98, 46 P.3d 241.

On May 13, 2002, Albrecht filed a Petition for Writ of Certiorari with this Court. On July 5, 2002, this Court granted the writ. See Order.

## **STATEMENT OF THE FACTS**

### **A. Ken Harris and His Business Experience**

Harris is an architect with over 35 years of experience in the field, having begun his career in the mid-1960s at a firm known as Dixon & Long. See R. at 354. In 1981,

he was made a partner in the Dixon firm, after which time the firm was known as Dixon and Harris Architects. Id. at 353-54. In 1987, Harris formed a separate company, known as Harris and Olsen Architects, id. at 352-53, and, in 1990, the name of the business was changed to Ken Harris Architect, id. at 351.

When Harris was a partner in Dixon and Harris, Mr. Dixon handled the business portion of the partnership, including decisions regarding whether to purchase business insurance. Id. at 353. After leaving Dixon and Harris, Harris handled such business decisions for his own companies, but elected not to purchase business insurance in the early years because the business was small at that time and Harris didn't have much to insure. Id. at 351. By way of illustration, at the time he began Ken Harris Architect in 1990, Harris was using materials inherited/purchased from Mr. Dixon that were manufactured in the late 1950s. Id. By 1990, the inherited architectural equipment was "used up" and "worn out" and was of little value, and Harris did not see a need to insure it. Id.

Beginning in 1990, and over the next few years, Harris's business grew and the business got "busier and busier." Id. To keep up with the growth in his business, in the mid-1990s Harris hired several new employees, see id. at 345, and made a "tremendous investment in equipment," id. at 350. Harris refurbished the whole office with new equipment, including new furniture, new desks, new chairs, new drafting work-stations, a custom-built desk for himself, a new conference table and chairs, and new wall cabinets. Id. In addition, Harris added to the office at least 30 framed architectural renderings of work performed by the office over the years, each worth over \$1,000.00. Id. Around this same time, Harris purchased seven new top-of-the-line CAD drafting computers, two

plotters, a scanner, large copy machines and a new phone system. Id. The business had undergone a “big change” from drafting on table-tops using T-squares and triangles to a system of computer-oriented CAD drafting and design. Id. In Harris’s mind, this was done to have Ken Harris Architect be the best architectural firm in Provo. Id.

In the summer of 1997, after all of the above-listed purchases and upgrades to the business, Harris made the decision to purchase business insurance for Ken Harris Architect. Id. at 330-31.

**B. Rick Albrecht and His Business Experience**

Rick Albrecht (“Albrecht”) received his insurance license in 1985, id. at 303, and he has done business through the Rick Albrecht Insurance Agency, Inc. (“the Agency”) since 1988, id. at 301. The Agency sells insurance exclusively through the State Farm Fire & Casualty Company (“State Farm”), meaning that Albrecht and the Agency can sell everything that State Farm offers, but cannot sell anything other than State Farm products. Id. at 304. Albrecht has personal “binding authority” (within his limits) from State Farm for all of State Farm’s policies, including commercial policies. Id. at 290.

Albrecht has received training from State Farm regarding various types of insurance policies, including business policies. Id. at 304. Because of his experience and training, Albrecht believes he is a “skilled” insurance agent and is at least more skillful than 50% of all insurance agents. Id. at 302-03. He believes that he is competent and is qualified and knowledgeable to write and sell fire insurance. Id. at 275.

Albrecht acknowledges that, in addition to insurance coverage and products, he is also selling service to his clients. Id. at 290. Albrecht agrees that, over time, his clients

typically learn to trust him and rely upon him, and to rely on the fact that he will sell them competitive products. Id. Albrecht agrees that, as an agent for each of his clients, he has a responsibility to do the following:

- (a) fill the needs of, and get the appropriate kind of insurance for, the individual client, id. at 289;
- (b) get the best insurance available pursuant to the instructions of the client, id.;
- (c) follow-up with every client who has asked for insurance so that the process is finished up and the insurance is in place, id. at 287; and
- (d) to inform the client—out of “common sense,” if nothing else—if they are ineligible for coverage or if the agent will be unable to procure the insurance coverage, id. at 292.

According to Albrecht, he, as an agent, would “rapidly” notify an existing client if, for whatever reason (such as, he had “[in]sufficient information”), the requested insurance could not be procured, so that the client would not be exposed to a loss without insurance coverage. Id. at 287, 292.

### **C. The Relationship Between Harris and Albrecht**

In 1989, Harris’s brother-in-law, who was also in the insurance business, referred Harris to Albrecht for his auto insurance needs. Harris’s brother-in-law highly recommended Albrecht, and stated that Albrecht had a good reputation in the insurance community. Id. at 286, 354-55. The first contact between Harris and Albrecht occurred in 1989, and was a telephone conversation. Harris called and asked if he could place insurance coverage on his automobiles. In response, Albrecht said that such insurance could be procured. Harris gave Albrecht the information Albrecht asked for in relation to the coverage, and Albrecht placed the coverage with State Farm. Id. at 340-41.



After that, Harris also ordered homeowners coverage from Albrecht, id. at 341, 354-55, and some time later, Harris also purchased boat insurance, R.V. insurance, and a liability umbrella policy from Albrecht, id. at 342. Finally, Harris also purchased homeowners coverage for his new home from Albrecht. Id. at 285, 333. Over the years there were times when Ken Harris had four or five different automobiles, plus boats, R.V.s, and homes, insured through Albrecht. Id. at 342.

Harris did not initially “shop around” for insurance coverage or pricing, because Albrecht came highly recommended. Id. at 341. Even in later years, Harris did not “quiz” Albrecht about the price of every policy he purchased, because over the years, through their many dealings, Harris had come to believe that Albrecht would treat him fairly and had confidence that Albrecht would timely obtain a good product at a reasonable price. Id. at 329. According to Harris, the two men “rarely” discussed the particulars of the various coverages Harris sought to obtain from Albrecht. Id. at 337.

As a rule, the relationship between Harris and Albrecht was almost exclusively telephonic. Id. at 274, 331. The two “rarely met face-to-face, if ever.” Id. at 285-86, 336. The parties do remember at least one occasion where they met face-to-face, see id. at 286, 340, but Harris estimates that 95-98% of all business between Harris and Albrecht was conducted over the phone, id. at 340. Over the years, according to Harris, the two men talked on the phone “every couple of months.” Id. at 325. Albrecht estimates that, at least four times a year, he or his staff would speak with Harris. Id. at 279. All billings

or applications were by mail from Albrecht to Harris.<sup>1</sup> Id. at 285. Over the years, this system worked very well for Harris and Albrecht, and was the same system in place between Albrecht and Harris's children, who also telephoned Albrecht from time to time regarding their insurance needs. Id. at 284-85.

Harris described the relationship as follows: "I had a relationship with Rick; he took care of me, . . . he worked hard to answer my questions. And when I had a vehicle to cover, to place, he placed it every single time." Id. at 331. Harris "would call Mr. Albrecht and tell him what I needed, tell him I changed a car, I added a car, my child wanted to insure a car, I had added a motor home, I had added a boat or I bought a boat, tell him to place the coverage, and he would do it." Id. Over time, Harris gained trust and confidence in Albrecht. Id. Albrecht recalls that Harris did not have to ride or push Albrecht to make requested changes, modifications or additions to the insurance coverage. Id. at 273. Harris stated that "never once in all the time that we have done business, not once have I ever had to call Rick Albrecht back and say, what happened? Where is this? Where's my bill? Not once did he ever give me concern to worry about what I'd asked him to do." Id. at 328; id. at 326 (stating that "I never worried about his part of the business and what he should be doing, I absolutely never did that").

---

<sup>1</sup> Over the years, as Harris received billings from State Farm on the various insurance policies obtained through Albrecht, he paid them. Some of the billings were annual, and some were semi-annual. Id. at 343. As a matter of course, Harris did not review each mailing and/or billing for specific coverage or declarations from State Farm because Harris "had an insurance agent that took care of that for [him]." Id.

Over time, it became Harris's practice to listen to Albrecht's recommendations and to rely upon Albrecht's knowledge of the product and of Harris's situation. Id. at 339. Typically, Harris followed Albrecht's recommendations. Id. Albrecht believed that Harris and Harris's family members trusted him, and that they had good reason to trust and rely upon his expertise as an insurance agent. Id. at 273. In fact, Albrecht agreed that, based upon the parties' long-standing business relationship, Harris would be reasonably justified to rely upon Albrecht to place coverage that was ordered and to believe that there was coverage in place. Id. at 271, 273.

#### **D. The Conversations Relating to Business Insurance**

Harris vaguely remembers that, on one occasion early in their relationship, Albrecht brought up the subject of business insurance, and Harris asked Albrecht to "look into it for him." Id. at 335. For the reasons set forth above, however, Harris did not elect to purchase business insurance at that time. Id. at 334-35.

The next time that the two men discussed insurance for the architect business was in mid-summer 1997, after Harris had made substantial new investments in his company. Id. at 330. Harris remembers this conversation as a "very short conversation" in which Harris "called Mr. Albrecht and told him I wanted him to place business coverage on my office and its contents, and he said okay, he would take care of that, he would come out and look at the equipment." Id. Harris described the exchange as a "typical conversation" between the two men, in that, over the years, whenever "I had a need, I called him, asked him to fill the need, and he'd said okay and do it." Id. Harris stated that "whatever I needed, whenever I called on an insurance related item, I would call Mr.

Albrecht, tell him what I needed, and he would take care of it every single time. He never let me down except for this last time.” Id.

Following this phone call and order to Albrecht, Harris felt and thought that his business had insurance coverage. Id. Following the phone call, Harris was confident that “it was over,” cross that off the checklist as “that one’s done,” “forget about that one.” Id. “I had called him—I did my thing—I called Rick, told him to take care of it. He’s always done it before, he took care of me every time, he would do it again.” Id.

#### **E. The Fire**

On December 1, 1997, a fire destroyed the building in which Ken Harris Architect was located. That day, from the scene of the fire, Harris used his cell phone to call Albrecht. During the phone call, Harris described to Albrecht the events of standing there watching his building burn down to the ground. Id. at 320. During the conversation, Harris asked Albrecht about business insurance coverage. Id. Harris said “You placed that coverage we talked about, didn’t you?” Id. Albrecht replied that “We talked about it, Ken, but we never did anything about it.” Id.; see also id. at 276-77. These tidings “absolutely devastated” Harris, and he was in a “state of shock after that.” Id.

In this conversation, Albrecht said he would check to make sure that business insurance had not been procured. Id. at 319. Albrecht called back within an hour and told Harris that, for certain, there was no coverage. Id. Several days later Harris called Albrecht and asked if Harris’s homeowners policy had any coverage for the fire, and Albrecht looked it up and informed Harris that it did not. Id. at 318.

## **F. Elements of a Business/Commercial Policy**

As stated above, Albrecht has binding authority, within limits, on all policies he sells, including commercial policies. Id. at 290. According to Albrecht, who was relying upon a State Farm sales brochure typically provided to potential customers seeking business insurance (id. at 360-65), the general categories of coverage applicable to an business office would be:

- (a) “office furniture” (includes computers, drafting tables); id. at 280-81
- (b) “valuable papers and records”; id. at 281<sup>2</sup>
- (c) “Property of others” up to \$2500.00; id. at 280
- (d) “loss of income; id., and
- (e) “extra expense”, id.

As a State Farm agent, Albrecht has binding authority granted to him by State Farm. Id. at 261, 263-64. If an agent binds a business policy and the total amount of exposure to State Farm exceeds \$100,000, then the Field Underwriter is notified by the company to inspect the business. Id. at 244. The policy is “bound” and remains in effect while the underwriter surveys the business to see if any loss control measures are necessary. Id. at 243. If such measures are deemed necessary, then the insured is notified to put the measures in place within 90 days or the coverage will be terminated. Id.

Using a damage summary prepared by Harris, State Farm’s Field Underwriter for the Utah area, Dick Mirabelli, identified items that could have been covered under a State Farm Insurance business policy. Id. at 239-41. After a review of each category, the only

---

<sup>2</sup> Albrecht claimed to have a \$15,000.00 binding limit, id. at 281, when in fact it was actually a \$25,000.00 binding limit as per the State Farm documents and the testimony of Dick Mirabelli, the Field Underwriter for the Utah area of State Farm, id. at 263, 358.

ones that were questionable were any that could be characterized as personal property and not business property. All other categories were deemed eligible and subject to coverage. Id. at 239. General categories that were not questioned were losses in the area of furniture (business personal property such as computers), loss of income, property of others, and valuable papers. Id. at 239-41.

Using the same damage exhibit, Mirabelli next went back through the list of losses and identified any that would require loss control measures, e.g., regarding the storage, protection and back-up/copies of items to be covered under the policy. Id. at 239. The area of “valuable papers” was identified as needing loss control measures, id., and there would need to have been an endorsement on the fire-related loss of income, id. at 238.

Mirabelli explained that his own authority is \$5 million (all coverages under a business policy combined) under these circumstances. Id. at 261.

### **SUMMARY OF THE ARGUMENT**

In mid-summer 1997, Harris telephoned Albrecht and personally asked him to procure insurance for Harris’s architectural business. Albrecht responded to Harris’s request by assuring Harris that he would take care of the request and would procure the requested insurance. Accepting these basic facts as true, as it must for the purposes of this appeal, this Court must conclude that the district court erred in entering summary judgment in favor of Defendants, and that the court of appeals was correct in reversing the judgment of the district court and remanding the case for trial.

Harris asserts two separate and independent causes of action against Defendants in this case, and genuine issues of material fact remain to be decided on each one. First,

Harris claims that Albrecht (and, vicariously, State Farm) breached his duty to Harris by failing to procure insurance that he promised to procure. As soon as an insurance agent agrees to procure insurance for a client, that agent has a legal duty to follow the instructions of the client by either (1) procuring the requested insurance, or (2) notifying the client of the agent's inability to procure the insurance. In this case, Albrecht did neither—he failed to procure the requested insurance, and also failed to follow up with Harris in any manner whatsoever, whether to gather additional information, to tell Harris that the insurance could not be procured, or for any other purpose. Under these circumstances, genuine issues of material fact remain to be decided by the jury regarding Albrecht's breach of duty. Therefore, the district court's decision on this point was erroneous, and the court of appeals was correct to reverse that decision and remand the case for a determination as to whether Albrecht breached his duty to Harris.

Second, Harris claims that Albrecht (and, vicariously, State Farm) breached a contract with Harris to procure insurance for Harris's business. When Harris asked Albrecht to procure the business insurance, and Albrecht assured Harris that he would take care of the request, a contract to procure insurance was formed. By failing to procure the requested insurance, and by failing to even call Harris to follow-up or to inform him that he could not procure the insurance, Albrecht breached this contract to procure insurance. At a minimum, genuine issues of material fact remain to be decided by the jury regarding Albrecht's breach of this contract. Therefore, the district court's decision on this point was erroneous, and the court of appeals was correct to reverse that

decision and remand the case for a determination as to whether Albrecht breached the contract to procure insurance.

Finally, the district court also entered summary judgment in favor of State Farm. This decision was also erroneous, and the court of appeals correctly reversed that decision, because under Utah law an insurer “is bound by any act of its agent performed in this state that is within the scope of the agent’s actual (express or implied) or apparent authority.” See Utah Code Ann. § 31A-23-305. State Farm is bound by Albrecht’s actions, and therefore is also liable for Albrecht’s failure to procure the insurance requested by Harris.

### **STANDARD OF REVIEW**

Utah R. Civ. P. 56(c) allows entry of summary judgment only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The party seeking summary judgment has “the affirmative burden of establishing that there [are] no material issues of fact.” Lamb v. B & B Amusements Corp., 869 P.2d 926, 928-29 (Utah 1993). In reviewing the evidence presented, the court is to “view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party.” Walker Drug Co. v. La Sal Oil Co., 902 P.2d 1229, 1230 (Utah 1995). At the summary judgment stage, “a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist.” Draper City v. Estate of Bernardo, 888 P.2d 1097, 1100 (Utah 1995). “A genuine issue of material fact exists where, on the basis of the



facts in the record, reasonable minds could differ on any material issue.” Ron Shepherd Ins. Inc. v. Shields, 882 P.2d 650, 655 (Utah 1994).

It is well-settled that “entitlement to summary judgment is a question of law,” and that, therefore, an appellate court is to “accord no deference to the trial court’s resolution of the legal issues presented.” Harline v. Barker, 912 P.2d 433, 438 (Utah 1996). The court of appeals, in conducting this *de novo* review, was to “apply the same standard as that applied by the trial court.” Durham, 571 P.2d at 1334. In reviewing the court of appeals’ decision, this Court is to use the same underlying standard (as set forth in Rule 56(c)), but is to review the decision of the court of appeals for correctness. See Collins, 2002 UT 77, ¶11, 52 P.3d 1267.

### **ARGUMENT**

Harris asserts two separate and independent causes of action against Defendants for their failure to procure insurance: one claim, grounded in tort, for negligence, and one claim for breach of a contract to procure insurance. It is well-established that

liability [of an insurance agent] may be predicated either upon the theory that defendant is the agent of the insured and has breached a contract to procure a policy of insurance, or that he owes a duty to his principal to exercise reasonable skill, care, and diligence in securing the insurance requested and negligently failed to do so.

See Sanchez v. Martinez, 653 P.2d 897, 900-01 (N.M. Ct. App. 1982). Harris has asserted both causes of action here, and (despite Defendants’ continuing efforts to conflate these two claims) these claims must be treated and analyzed separately, because they contain slightly different elements and requirements of proof.

The court of appeals remanded both claims for trial, and, Harris submits, this outcome was the correct one. This Court should affirm the determination of the court of appeals, and its decision to remand this case for trial, because disputed issues of material fact remain as to both of Harris's causes of action. Where, as here, genuine issues of fact remain to be decided by the jury, the district court's entry of summary judgment was inappropriate. This case should be remanded to the district court for trial.

**I. GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO HARRIS'S NEGLIGENCE CLAIM**

The district court's decision to enter summary judgment on Harris's negligence claim was erroneous, and the court of appeals correctly reversed that decision, because genuine issues of fact remain to be decided on that claim. To prove up his claim of negligence, Harris must show that Albrecht had a duty to procure insurance, that Albrecht breached that duty, and that Harris was justified in relying upon Albrecht's assurance that he would take care of the insurance request. See Harris v. Albrecht, 2002 UT App 98, ¶11, 46 P.3d 241. As discussed above, there is record evidence to support Harris's claim that he instructed Albrecht to procure business insurance for Ken Harris Architect, that Albrecht agreed to take care of the request, that Albrecht, in fact, did not take care of the request, and that Harris was justified in assuming that he was insured. For the purposes of this appeal, this Court must assume these facts to be true. If these facts are true, then, under applicable law, Albrecht breached his duty to Harris, and, therefore, summary judgment in favor of Defendants on Harris's negligence claim is improper.

**A. DUTY: Albrecht Had a Duty to Follow Harris’s Instructions and to Exercise Reasonable Care in the Procurement of Insurance, and This Duty Attached as Soon as Harris Instructed Albrecht to Procure the Insurance and Albrecht Agreed**

Albrecht had a duty to follow instructions and to exercise reasonable care in the procurement of insurance for Harris. That duty attached as soon as Harris instructed Albrecht to procure insurance for his business and Albrecht agreed. The court of appeals correctly determined that, under the facts viewed in a light most favorable to Harris, it would be possible for a court to conclude, *as a matter of law*, that Albrecht owed a duty to Harris to exercise reasonable care in procuring insurance for Harris. The court of appeals’ decision should be upheld.

Defendants make much of an unfortunately-worded footnote in the court of appeals’ opinion, where the court of appeals noted that “whether a . . . duty to procure a policy of insurance ultimately exists” is a “question[] of fact best left to the trier of fact.” See Harris v. Albrecht, 2002 UT App 98, ¶29 n.6. It is, of course, well-established that “the question of whether a duty exists is a question of law.” See AMS Salt Indus., Inc. v. Magnesium Corp. of Am., 942 P.2d 315, 319 (Utah 1997); see also Ferree v. State, 784 P.2d 149, 151 (Utah 1989) (same). However, the legal question—whether a duty exists—is often dependent upon one or more underlying factual questions, and this Court has clearly held that, if reasonable minds can differ on the underlying factual questions, then those questions “should be left for the jury to decide.” See AMS Salt, 942 P.2d at 319-20 (stating that “if the trial court determines that there is disputed evidence which is material to the relevant question of law, then the issue should be left for the jury to

decide”); see also Weber v. Springville City, 725 P.2d 1360, 1363-65 (Utah 1986) (determining that the legal “duty” question was dependent upon a factual issue, and that the underlying factual issue was for the jury). After the factfinder has decided the underlying factual issues, then the court can finally determine, as a matter of law, whether a duty exists.

In the duty-to-procure-insurance context, as in many other duty contexts,<sup>3</sup> the existence of a legal duty on the part of the agent is dependent upon underlying factual issues. The court of appeals, in essence, held that a duty arises on the part of an insurance agent when the client asks the agent to procure insurance and the agent agrees. See Harris v. Albrecht, 2002 UT App 98, ¶11.<sup>4</sup> This holding is completely in accord with established law nationwide.

---

<sup>3</sup> For instance, the existence of a fiduciary duty—a legal issue—is dependent upon the factual issue of whether a person is a fiduciary. See, e.g., Zions First Nat’l Bank v. National Am. Title Ins. Co., 749 P.2d 651, 654-55 (Utah 1988); McCornick v. Queen of Sheba Gold Min. & Milling Co., 23 Utah 71, 77, 63 P. 820, 822 (1900). And, the existence of a landowner’s duty to a visitor on the land—a legal issue—depends upon the factual issue of the status of the visitor (e.g., invitee, licensee, trespasser). See, e.g., Connor v. Union Pac. R. Co., 972 P.2d 414, 416-19 (Utah 1998); Skerl v. Willow Creek Coal Co., 92 Utah 474, 482, 69 P.2d 502, 505 (1937).

<sup>4</sup> The court of appeals’ core holding was its pronouncement that, “[t]o establish a claim for failure to procure insurance, a plaintiff must prove” three elements: (1) an undertaking by an insurance agent to procure insurance; (2) the agent’s failure to use reasonable diligence in attempting to place insurance and his failure to notify the client promptly if he has failed to obtain insurance; and (3) the agent’s actions warranted an assumption by the client that he was properly insured. See Harris v. Albrecht, 2002 UT App 98, ¶11. The first of these elements deals with the agent’s duty, the second deals with the agent’s breach of that duty, and the third deals with the client’s reasonable reliance upon the agent’s assurance. Thus, the court of appeals appears to be stating that, in order to show that an insurance agent owes a duty of reasonable care to a client, the client must show “an undertaking by an insurance agent to procure insurance.”

Courts and commentators agree that an insurance agent's duty to his clients extends far enough to include an "obligation to deal with [the] principal in good faith *and to carry out instructions*." 16A John Alan Appleman and Jean Appleman, Insurance Law and Practice § 8836, at 64 (1981) (emphasis added); see 3 George J. Couch, Couch on Insurance § 46:28 (3d ed. 2000) (stating that "[t]he insured's agent *must strictly follow the insured's instructions* which are clear, explicit, absolute, and unqualified" (emphasis added)); see also, e.g., Gabrielson v. Warnemunde, 443 N.W.2d 540, 543 (Minn. 1989) (stating that an insurance agent's duty includes the duty "to act in good faith and follow instructions").

It follows, then, that when an insured instructs his agent to procure a particular kind of insurance, the agent is under a duty to procure that insurance. See Caddy v. Smith, 877 P.2d 667, 669 (Or. Ct. App. 1994) (stating that, "[d]epending on the nature of the instructions, [the agent's] duty may include an obligation to procure insurance"). Under established law, in order for the agent's duty to procure insurance to attach, all that must happen is (1) the insured must issue clear instructions to the agent instructing the agent to procure the insurance, and (2) the agent must agree to procure the requested insurance. See Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc., 607 P.2d 763, 765 (Or. 1980) (stating that "[b]y promising to procure insurance, the agent incurs a duty to do so"); see also Southwest Auto Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268, 1269 (Ariz. Ct. App. 1995) (reversing a district court's entry of summary judgment, and holding that once the plaintiff had asked the agent to procure insurance and the agent agreed, the agent owed a duty to the plaintiff); Marshel Investments, Inc. v.

Cohen, 634 P.2d 133, 141 (Kan Ct. App. 1981) (duty attached upon customer's request for "complete insurance coverage" on an oil and gas well, and upon agent's assurance that he would take care of the request); Bonner v. Bank of Coushatta, 445 So. 2d 84, 87 (La. Ct. App. 1984) (duty attaches after "agreement by the insurance agent to procure insurance"); Lee v. Andrews, 667 P.2d 919, 920-21 (Mont. 1986) (duty attached upon customer's request for insurance and agent's assurance that he "would take care of it"); Caddy, 877 P.2d at 669 (same). Perhaps the most concise summary of this area of insurance/tort law was offered by the Montana Supreme Court, which opined that applicable law "requires [1] a client's request to procure certain insurance, followed by [2] an agent's commitment to do the same, [in order] to put the agent under a 'duty' to procure." R.H. Grover, Inc. v. Flynn Ins. Co., 777 P.2d 338, 341 (Mont. 1989) (citing Andrews, 667 P.2d at 919) (emphasis added). The court of appeals' holding in this case<sup>5</sup> was therefore entirely in keeping with the established position of courts nationwide.<sup>6</sup>

---

<sup>5</sup> It is noteworthy that Defendants do not question—either in their Petition for Writ of Certiorari or in their opening brief—the propriety of the court of appeals' core holding (Paragraph 11 of the opinion). The only "questions presented" for review by this Court, according to Defendants, are whether the court of appeals' unfortunately-worded statements in footnote 6 of its opinion were erroneous. See Petition for Writ of Certiorari, at 1 (setting forth questions presented); Brief of Appellants, at 1 (setting forth issues on appeal). In short, Defendants have not challenged, and do not ask this Court to review, the court of appeals' core holding, in Paragraph 11 of its opinion, regarding the elements that must be shown in order to prove up a claim for failure to procure insurance.

<sup>6</sup> Defendants attempt to conflate Harris's tort claim with his contract claim by arguing that "the duty to procure insurance sounding in tort does not arise until the agent has contracted to procure the policy." See Aplt's. Br., at 44. In essence, Defendants maintain that, in order for a tort duty of reasonable care to exist, all of the elements of a contract to procure insurance must already exist. Id. Defendants' position is simply not supported by law or logic. First, Defendants' position runs contrary to the case law and

Under the court of appeals' holding (and under established law nationwide), the legal question regarding whether an insurance agent owes a tort duty to one of his customers is dependent upon two underlying factual issues: (1) did the customer instruct the agent to procure insurance; and (2) did the agent agree to procure the insurance. If reasonable minds can differ on the underlying factual issues, then the court cannot, on summary judgment, determine as a matter of law whether a duty exists. That inquiry must await determination, by the factfinder, of the underlying unresolved factual issues.

---

authorities cited immediately above. Second, the cases and authorities Defendants cite do not support Defendants' position—none of the cited authorities stands for the proposition that, in order for a tort duty to arise, each and every element of a valid contract of insurance must be shown. The Johnson case deals with the issue only in dicta, and in any event involved a situation where it was undisputed that the plaintiff did not even make a request that insurance be procured. See Johnson v. George Tenuta & Co., 185 S.E.2d 732, 736 (N.C. Ct. App. 1972). The 50-year-old French Board case contains only a cursory treatment of the issue, and actually came out in favor of the client. See Bank of French Board v. Bryan, 83 S.E.2d 485 (N.C. 1954). And the Stockberger case, in devoting most of its energies to the claimant's breach of contract claim (rather than to the tort claim), states that an agent will be held to the reasonable care standard, and will be liable for breaching obligations to which he agreed. See Stockberger v. Meridian Mut. Ins. Co., 395 N.E.2d 1272, 1279 (Ind. Ct. App. 1979). To the extent that these cases and authorities stand for the unremarkable proposition that, in order for a tort duty to arise, there must be some level of assent by the agent that he will procure the requested insurance, these cases are not contrary to the cases and authorities cited by Harris above, see, e.g., R.H. Grover, 777 P.2d at 341 (stating that the agent must commit to procure the insurance), and are not contrary to the court of appeals core holding, see Harris v. Albrecht, 2002 UT App 98, ¶11 (stating that there must be "an undertaking or agreement by an insurance agent to procure insurance"). In short, in order for a tort duty of reasonable care to arise, it is not necessary to prove each element of a contract to procure insurance. This is so because the agent can comply with the tort duty in ways (i.e., following up with the client to obtain additional necessary information or to tell him that the insurance has not been procured) other than actually procuring the insurance, while compliance with a contract actual duty, by contrast, requires that the insurance policy actually be procured.

The court of appeals resolved this situation in the appropriate and proper manner by deferring decision on the duty issue until after the factfinder has decided the underlying factual issues. In this 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 issue regarding the existence of a duty.<sup>7</sup> At the summary judgment stage, all courts must view the facts in a light most favorable to the non-moving party (here, Harris), and must assume that Harris did in fact instruct Albrecht to procure insurance, and must assume that Albrecht agreed. Once the court makes these assumptions, it becomes evident that summary judgment cannot be entered in favor of Defendants on the duty issue, because it is possible, if the factual questions come out Harris's way, for Albrecht to have had a duty to Harris. The court of appeals' resolution of this claim was proper, and should be affirmed.

---

<sup>7</sup> Defendants argue that there are no underlying issues of fact to be decided because, for summary judgment purposes, Defendants must assume that the facts as recounted by Harris are true. Defendants assert that only a legal issue remains, namely, "whether, based on the facts as alleged by Harris, Albrecht had a duty . . . to procure insurance." See Aplt.' Br., at 19. 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 that legal question would have to await the factfinder's resolution of the underlying factual dispute. This determination was correct.



**B. BREACH: Albrecht's Duty Required Him Either to Procure The Insurance or to Notify Harris that the Insurance Could Not Be Procured**

While the question regarding the existence of a duty is a question of law, questions related to breach of a duty are questions of fact for the jury, and “cannot be appropriately decided in summary judgment.” Schreiter v. Wasatch Manor, Inc., 871 P.2d 570, 575 (Utah Ct. App. 1994). Accordingly, negligence/breach claims are almost never appropriate for resolution on summary judgment. See Kitchen v. Cal Gas Co., Inc., 821 P.2d 458, 461 (Utah Ct. App. 1991) (stating that “summary judgment is generally improper in the issue of negligence and only in clear-cut cases, with the exercise of great caution, should a court take the issue of negligence from the province of the jury”). The issue of negligence as a whole is a question of fact for the jury, see Dwiggins v. Morgan Jewelers, 811 P.2d 182, 183 (Utah 1991), and it is only when the facts are undisputed and “only one conclusion can be drawn from them” that such issues are appropriately decided on summary judgment,” Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623, 624 (Utah Ct. App. 1991).

Questions related to the breach of an insurance agent's duty, once that duty attaches, are questions of fact governed by the reasonable care standard. An insurance agent who commits to procure insurance has the duty to “exercise reasonable skill, care, and diligence in securing the insurance requested.” Sanchez, 653 P.2d at 900-01; see also Binsfeld, 904 P.2d at 1270-71; Marshel Investments, 634 P.2d at 141; Caddy, 877 P.2d at 669. It is important to emphasize that this “reasonable care” standard does not require, in every case, that the agent actually procure insurance for the client.

Rather, the standard requires the agent to *exercise reasonable care* in his efforts to procure the insurance requested. This standard of reasonable care requires the agent to *either* (1) actually procure the insurance, *or* (2) follow-up with the client, if necessary, to obtain additional information that may be necessary or to tell the client that the insurance cannot be procured. Courts and commentators across the country are in full agreement on this score. See, e.g., Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc., 739 P.2d 239, 243 (Colo. 1987) (stating that "an insurance broker or agent who agrees to obtain a particular form of insurance coverage for the person seeking such insurance has a legal duty to obtain such coverage or to notify the person of his failure to do so"); Sanchez, 653 P.2d at 901 (stating that the duty assumed by an insurance agent includes the duty to either procure the insurance or, alternatively, to "seasonably notify the principal that [the agent] is unable to [procure the insurance] in order that the principal may obtain insurance elsewhere"); see also 3 George J. Couch, Couch on Insurance § 25:47, at 371-73 (2d rev. ed. 1984) (stating that an insurance agent "is liable to the insured for loss if he fails to give prompt notice of his refusal to procure insurance; or fails to give immediate notice, or notice within a reasonable time, of his inability to procure insurance, unless the insured knows of that fact").

It should be explicitly noted here that the scope of the agent's duty is not diminished at all by any failure of the insured to investigate whether the agent has performed his duty. Any duty to follow-up is the agent's, not the insured's. It is well-settled that "[t]he liability of the agent for harm caused the insured is not affected by the fact that the insured took no steps to investigate to see that his or her instructions had

been followed, there being no suspicious circumstances, since, in the absence of any element of knowledge, the insured has a right to rely upon a presumed obedience to his or her instructions upon the part of his or her skilled agent.” See 3 George J. Couch, Couch on Insurance § 46:28 (3d ed. 2000) (emphasis added); see also, e.g., Black v. Illinois Fair Plan Ass’n, 409 N.E.2d 549 (Ill. Ct. App. 1980) (stating that “in the instant case the defendant was the agent of the plaintiffs in procuring the insurance policy and it cannot avoid liability because of an alleged failure on the part of plaintiffs to ascertain whether the agent has faithfully performed the duty for which he was employed” (citation omitted)); Shapiro v. Amalgamated Trust and Savings Bank, 283 Ill. App. 243, 247 (1935) (same); Industrial Dev. Assocs. v. F.T.P., Inc., 591 A.2d 682, 684 (N.J. Super. Ct. App. Div. 1991) (stating that where an agent “took no steps whatsoever to follow-up,” the agent could be said to have “failed to exercise reasonable skill, care and diligence in the execution of his commission”), aff’d, 602 A.2d 733 (N.J. 1992); Sanchez, 653 P.2d at 899 (holding that, even where customer did not follow up with the agent for twenty (20) years, the agent was nonetheless liable for failure to procure insurance); Mets Donuts, Inc. v. Dairyland Ins. Co., 560 N.Y.S.2d 790, 791 (App. Div. 1990) (stating that “[i]n the absence of any showing that an insured is aware of the discrepancy between the coverage it claims to have requested and that actually obtained by the insurance agent, an insured has a right to rely upon the agent’s presumed obedience to his or her instructions”).

Defendants devote several pages of their brief arguing that Albrecht could not possibly have procured insurance for Harris’s business because Harris did not communicate to Albrecht, during the parties’ “very short conversation,” many intricate

and allegedly necessary details about the requested insurance. See Brief of Appellants, at 12-15, 29-33. Defendants ignore both the law regarding the reasonable care standard as well as the reality of the insurance procurement process.<sup>8</sup>

First, the reasonable care standard does not require Albrecht to actually procure the requested insurance if he truly cannot do so.<sup>9</sup> The standard does, however, require him to, at a minimum, communicate with Harris and inform him either that the insurance cannot be procured, or that further information is needed. See Gulf-Tex Brokerage, Inc. v. McDade & Assocs., 433 F. Supp. 1015, 1018-19 (S.D. Tex. 1977) (stating that an insurance agent's duty includes the "duty to keep the plaintiff informed as to the progress of the request"). An agent cannot simply "forg[e]t about the insurance" and do nothing to contact the insured and keep him apprised of the status of the request. See Fleetwood

---

<sup>8</sup> Defendants also muddle the distinction between duty (a question of law) and breach (a question of fact). Whether an agent's duty includes the specific obligation to follow-up with the client is an issue related to breach, not to duty. "An insurance agent's duty is to exercise reasonable care, skill, and diligence in procuring insurance for the insured." See Binsfeld, 904 P.2d at 1271. Whether the agent breached that duty by taking or failing to take some specific action (such as, for instance, failing to follow up with the client) is a breach issue, and is a question of fact. Id.

<sup>9</sup> Defendants' argument that "[i]f no insurance could have been obtained, then a duty to procure insurance could not have been breached" is simply incorrect. See Aplt's. Br., at 31. Defendants cite Haggans v. State Farm Fire & Cas. Co., 803 So. 2d 1249 (Miss. Ct. App. 2002), for the proposition, but that case is completely inapposite. In that case, it truly was impossible for the agent to procure insurance—the evidence in the record was that no insurance carrier writing insurance in the entire state of Mississippi would provide the precise type of coverage (contents coverage for an unoccupied building) desired there. See Haggans, 803 So. 2d at 1252. In this case, by contrast, it is certainly possible to obtain business insurance, at least where the agent fulfills his duty to the client to follow-up and obtain the requisite information. And, in any event, as the authorities cited above in text show, the reasonable care standard requires, at a minimum, that an agent contact the insured to inform him when insurance cannot be procured as promised.

Motors, Inc. v. John F. James & Sons, Inc., 237 N.Y.S.2d 668, 669 (Sup. Ct. 1963). If an agent truly cannot procure the requested insurance, the agent must at least notify the client that the insurance cannot be procured, or contact the client to obtain whatever additional information is necessary to procure the insurance.

Second, Defendants ignore the realities of the situation. Most insureds, including Harris, are laypersons when it comes to the intricacies of the insurance industry. They cannot be expected to know the specific types of insurance available, and the specific types of information required by insurance companies before a policy can issue. See, e.g., Binsfeld, 904 P.2d at 1269. It is for this precise reason that laypersons hire insurance agents—to guide them through the insurance thicket. See Hamacher v. Tummy, 352 P.2d 493, 497 (Or. 1960) (stating that “[t]he insurance broker holds himself out as an expert in his field and in dealing with his clients ordinarily he invites them to rely upon his expertise in procuring the insurance which best fits their requirements”). The best evidence of the complexity of insurance applications is demonstrated by the addendum to Defendants’ brief. See Aplt’s. Br., at Exhibit C (copy of insurance application). It is difficult to imagine how any layperson could be expected to know, without being told by the insurance agent hired for that purpose, that these specific types of information are required. To turn the burden to follow-up around, and impose it upon laypersons, would be to impose a large and undue burden upon potential lay insureds to educate themselves

with respect to each type of insurance coverage available, each piece of information required, etc.<sup>10</sup>

It makes the most sense, both from a legal and a policy standpoint, to impose the duty to follow-up on the agent, at least once the insured has expressly instructed the agent to procure the insurance and the agent has agreed. An insurance agent can easily protect himself from liability *by refusing to promise to procure insurance* until such time as, for instance, a firm instruction is issued, or additional information is provided.<sup>11</sup> It seems but a small burden to ask insurance agents to be more precise in the language they use in conversations with insureds and potential insureds. The duty to follow-up is rightly placed on the agent, at least after the agent expressly agrees to take care of the request.

Perhaps the most persuasive evidence in this case that the duty to follow up should rightly be (and in fact is) placed on the agent is Albrecht's deposition testimony. Albrecht himself stated that an insurance agent, out of "common-sense," has an

---

<sup>10</sup> To impose the burden upon insureds to educate themselves and to follow up on their own, without prodding, to provide each piece of information required to place a policy, would make a large part of an insurance agent's job, as presently constituted, obsolete. Laypersons hire insurance agents for the precise purpose of having the agent guide the layperson through the insurance application process. Indeed, Albrecht acknowledges that, in addition to selling insurance policies themselves, agents also sell "service" to their clients. See R. at 290.

<sup>11</sup> For instance, 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. However, Albrecht did not say that; rather, he expressly told Harris that he would take care of his request. In this instance, according to both law and policy, the ball is in the agent's court to follow-up and to inform Harris that additional information is required, or that the insurance cannot be procured, etc.

“obligation” to follow-up with an insured in the event coverage could not be issued as requested. Albrecht engaged in the following exchange with counsel:

Q: . . . . If at any time from that point on—from the point that he says “I want the insurance. I want State Farm to insure me in this situation,” and this process starts, you agree, do you not, that for the same common-sense reasons you discussed previously, that if any time the process stops—the verbal binder ends, there isn’t sufficient information given to finish out the—for whatever reason the process ceases, you have an *obligation*, as the agent, to contact that individual and say, “Hey, I don’t want you to be under the misunderstanding that you have coverage here. You don’t. There are things we need to do”? That’s true, isn’t it, for the same common-sense reasons we talked about before?

A: We would either make a phone call. If we were unable to reach them on the phone, we would send a letter. We would—

Q: That’s a “Yes”?

A: —we would contact them either by phone or by letter, yes.

Q: So there are no misunderstandings, correct?

A: So there’s no misunderstandings, so it’s not something they thought was covered is—not covered was covered.

Q: And that protects you and it protects them?

A: Protects both parties.

Q: And if you don’t do that, then you expose both your client to a potential loss without coverage and it exposes you to problems, correct?

A: Correct.

See R. at 287 (emphasis added).

Simply put, the scope of an insurance agent’s tort duties to an insured are to exercise reasonable care in the procurement of insurance. This duty to exercise

reasonable care includes—even according to Albrecht himself—the duty to follow up with the insured to make sure that *either* the coverage is in place *or* to inform the insured that it is not in place. Albrecht failed to meet this standard, because, for whatever reason, he did absolutely nothing by way of complying with Harris’s instructions. He did not visit Harris’s business. He did not call Harris and ask for additional information. He did not call Harris and inform him that the policy could not be procured. And he did not procure the requested insurance. This is a breach of duty. An agent cannot simply forget about an insured’s request, and then blame the insured when things go awry because the insured did not provide pieces of information about which the insured had no way of even knowing. See Fleetwood Motors, 237 N.Y.S.2d at 670.

As noted above, issues related to breach of duty are questions of fact. See Schreiter, 871 P.2d at 575. At a minimum, questions of fact remain on the issues related to Albrecht’s breach of duty. The court of appeals correctly determined that summary judgment on these issues was improper.

**C. REASONABLE RELIANCE: Harris Reasonably Relied Upon Albrecht’s Assurance That He Would Take Care of the Insurance Request**

The final element of the test set forth by the court of appeals is whether “the agent’s actions warranted an assumption by the client that he was properly insured.” See Harris v. Albrecht, 2002 UT App 98, ¶11. The court of appeals properly concluded that it was inappropriate for an appellate court “to make such a determination, which we believe is a proper question for the trier of fact.” Id. at ¶28 n.5.



This Court has long held that “[t]he issue of actual reliance and the reasonableness of the reliance is, of course, for the jury to determine.” See Berkeley Bank for Co’ops v. Meibos, 607 P.2d 798, 801 (Utah 1980); see also Travelers Ins. Co. v. Kearn, 896 P.2d 644, 648 (Utah Ct. App. 1995) (stating that the question of reasonable reliance “is one of fact to be determined at trial”). As with any question of fact, questions of reasonable reliance must be given to the jury unless reasonable minds cannot differ on the reliance issue based on the evidence presented.

In this case, the record is replete with evidence that Harris’s reliance upon Albrecht’s assurance was reasonable. During the eight-year period over which the two men conducted business, Harris and Albrecht had developed a personalized business relationship. In the beginning, Albrecht was highly recommended to Harris as a qualified and competent insurance agent with a good reputation in the community. See R. at 286, 354-55. Over time, Harris purchased automobile insurance from Albrecht for as many as 4 or 5 vehicles, and, in addition, asked Albrecht to procure other types of insurance for him, including homeowners’ insurance, boat insurance, R.V. insurance, and a liability umbrella policy. Id. at 285, 333, 341, 354-55. Harris did not ask for insurance quotes from other agents, because Albrecht had come so highly recommended, and because Albrecht always treated Harris well. Id. at 341. Indeed, over the years Harris came to have great confidence in Albrecht, and came to believe that Albrecht would obtain for him a good product at a reasonable price. Id. at 329.

The relationship between Harris and Albrecht was almost exclusively a telephonic one, and the two men met only rarely in person. Id. at 274, 285-86, 331. Over the years,

the two men talked on the telephone approximately 4-6 times per year. Id. at 279, 325. The way the relationship worked was that Harris would telephone Albrecht when Harris needed to make some type of change in his insurance coverage—e.g., add an automobile, home, or boat to the policy, add the name of a child to the policy, etc.—and would ask Albrecht to effect the requested change. Id. at 331. Typically, Harris, relying on Albrecht’s knowledge and expertise, would grant Albrecht great latitude in filling in the particulars of the requested insurance coverage. Id. at ¶¶ 339. This was because, over the years, Harris had developed a great deal of trust and confidence in Albrecht because every time he asked Albrecht to make a change in coverage, Albrecht took care of the request competently. Id. at 326, 328, 331. Albrecht confirmed that Harris relied on Albrecht’s expertise, and that Harris and Harris’s family members trusted him to take care of their insurance needs, id. at 271, 273, and that based upon the parties’ long-standing relationship, Harris was reasonably justified in relying upon Albrecht to obtain coverage that Harris asked Albrecht to procure, id.

Typically, during the telephone conversations, the two men would not discuss the particulars of the requested coverage. Id. at 337. As it worked, Harris would call Albrecht, tell him, for instance, what type of car he wanted to add, and Albrecht would place the coverage. Id. Albrecht would then mail to Harris any documents he needed to have, such as, for instance, billings and applications, and Harris’s practice was that he did not typically review the mailings he received from Albrecht, again relying on the expertise and competence of his highly recommended and experienced agent. Id. at 343. Over the years, Albrecht did such a fine job for Harris in procuring the coverages

requested—even in the absence of any detailed discussions regarding the particulars of coverage—that Harris never had to even follow-up with Albrecht to make sure that the coverages had been procured. Id. at 273, 326, 328.

In the face of this evidence, the question of reasonable reliance should be submitted to the jury. It must be remembered that, under the law, it is the agent’s duty—not the client’s—to follow up on the insurance request if additional information is required, and “the insured *has a right to rely* upon a presumed obedience to his or her instructions upon the part of his or her skilled agent.” See 3 George J. Couch, Couch on Insurance § 46:28 (3d ed. 2000) (emphasis added); see generally supra Part I.B. Even Albrecht agrees, testifying that Harris would be reasonably justified in relying upon Albrecht to obtain coverage that Harris asked Albrecht to procure. See R. at 271, 273. It would be entirely reasonable for a jury to conclude that, based upon the eight-year course of dealing between Harris and Albrecht, Harris reasonably relied upon Albrecht’s assurance that he would take care of the insurance request. A reasonable jury could conclude that Albrecht’s actions warranted an assumption by Harris that he was properly insured.

In sum, then, Harris has presented evidence on all three elements of his negligence claim sufficient to warrant sending that claim to the jury. The district court improperly denied Harris his chance to present his case to the jury. The court of appeals restored that right, and this Court should affirm the determination of the court of appeals.

## **II. GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO HARRIS'S CLAIM FOR BREACH OF A CONTRACT TO PROCURE INSURANCE**

The district court's decision to enter summary judgment on Harris's breach of contract claim was erroneous, and the court of appeals correctly reversed that decision, because genuine issues of fact remain to be decided on that claim. The record contains ample evidence that the parties came to an oral agreement, under which Albrecht committed to procure business insurance for Harris's business, and that Albrecht breached that agreement by failing to procure the requested insurance. Because genuine issues of material fact remain to be decided on this claim, summary judgment is improper.

### **A. Disputed Questions Related to Formation and Breach of a Contract Are Questions of Fact to Be Decided by the Jury**

As an initial matter, it must be noted that questions regarding whether an oral contract was formed, and whether such a contract, if formed, was breached, are questions of fact that are to be decided by the factfinder. This Court has stated that "where the existence of a contract is the point in issue and the evidence is conflicting or admits of more than one inference, *it is for the jury to determine whether the contract did in fact exist.*" O'Hara v. Hall, 628 P.2d 1289, 1291 (Utah 1981) (emphasis added). The Court went on to state that "[w]hether the parties intended to enter [into] a binding contract is . . . an issue of fact" because "the question of intent generally is one to be determined by the trier of fact." Id. The Court reversed a legal judgment by the district court, and

remanded the case so that the trier of fact could decide whether or not a valid contract had been formed by the parties. Id.<sup>12</sup>

The Utah Supreme Court's formulation of these principles in O'Hara comports with other states' pronouncements. See, e.g., Howarth v. First Nat'l Bank of Anchorage,

---

<sup>12</sup> This principle was reiterated by the court of appeals in 1993, when the court, citing O'Hara, stated that "[t]he issue of whether a contract exists may present both questions of law and fact, depending upon the nature of the claims raised." See Cal Wadsworth Constr. v. City of St. George, 865 P.2d 1373, 1375 (Utah Ct. App. 1993). The court noted that its standard of review "turns on whether the claim is one of fact or law, because a ruling on whether a contract exists may embody several subsidiary rulings." Id. This Court reviewed the court of appeals' opinion in Wadsworth, and affirmed it in all respects, noting along the way that the subsidiary rulings contained in the determination as to whether a contract exists—e.g., whether an offer was accepted—were indeed questions of fact. See Cal Wadsworth Constr v. City of St. George, 898 P.2d 1372, 1378 (Utah 1995). Since Wadsworth, Utah's appellate courts have reaffirmed this principle. See, e.g., Brighton Corp. v. Ward, 2001 UT App 236, ¶14, 31 P.3d 594; ProMax Dev. Corp. v. Mattson, 943 P.2d 247, 257 (Utah Ct. App. 1997), cert. denied, 953 P.2d 449 (Utah 1997).

The cases cited by Defendants are not to the contrary. Indeed, the principal case relied upon by Petitioners, Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶17, 989 P.2d 1077, cites to O'Hara with approval, and holds that "the issue of whether a contract exists may present questions of both law and fact" and that "[w]hether a contract has been formed is ultimately a conclusion of law, but that ordinarily depends on the resolution of subsidiary issues of fact." Id. (citing O'Hara). The other cases cited by Petitioners involve situations where the operative facts were not in dispute—what was in dispute was the legal effect of those undisputed facts. See Herm Hughes & Sons, Inc. v. Quintek, 834 P.2d 582, 582-84 (Utah Ct. App. 1992); Valcarce v. Bitters, 362 P.2d 427, 427-28 (Utah 1961). In those situations, the determination as to whether a contract exists is a pure question of law.

In the situation presented by this case, by contrast, the underlying "subsidiary" issues of fact are hotly in dispute. Thus, in order for any court to decide, as a matter of law, whether a contract of insurance existed between Harris and Albrecht, the factfinder must first decide, as a matter of fact, whether Albrecht ever agreed to procure insurance. The parties' testimony is conflicting on that point, and that factual conflict must be adjudicated by the factfinder before any determination can be made with respect to the existence of a contract.

596 P.2d 1164, 1167 (Alaska 1979) (reversing entry of directed verdict, and stating that “[w]here the existence of an oral contract and the terms thereof are contested and the evidence is conflicting, it is for the trier of fact to determine whether the contract did in fact exist and, if so, the terms of such contract”); cf. Roeske v. Diefenbach, 249 N.W.2d 555, 558 (Wis. 1977) (stating that “[t]he existence of an oral contract of insurance is a question of fact”). Indeed, the Alaska Supreme Court has explained that

[o]ral contracts are often, by their very nature, dependent upon an understanding of the surrounding circumstances, the intent of the parties, and the credibility of witnesses. *If a dispute exists with respect to the terms of the oral contract, then summary judgment is not appropriate.* Instead, the trier of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement.

Howarth v. First Nat’l Bank of Anchorage, 540 P.2d 486, 490 (Alaska 1975) (emphasis added).

It is also beyond dispute that questions related to the breach of any contract, whether oral or written, are questions of fact for the jury’s determination. See Mackey v. Cannon, 2000 UT App 36, ¶15 & n.1, 996 P.2d 1081 (stating that “[w]hether a party has materially breached a contract is generally a question of fact for the fact finder”).

Thus, so long as “any credible evidence,” see Diefenbach, 255 N.W.2d at 558, viewed in the light most favorable to Harris, supports Harris’s contention that an oral contract exists and was breached, then summary judgment is inappropriate and the question should go to the jury.

**B. Credible Evidence Exists Supporting Each of the Elements of Harris's Claim For Breach of a Contract to Procure Insurance**

**1. A claim for breach of a contract to procure insurance is different from a claim for breach of a contract of insurance.**

Certainly, the record contains sufficient evidence supporting Harris's breach of contract claim to preclude summary judgment on that count. That record evidence is canvassed below. As an initial matter, however, it must first be pointed out that Harris's claim is *for breach of a contract to procure insurance—not breach of a contract of insurance*. See R. at 4-5. This distinction is crucial, because, although the elements of this claim are identical to the elements of a claim for breach of a contract of insurance, the standards of proof that a plaintiff must meet are considerably more relaxed in the context of a claim for breach of a contract to procure insurance.

Utah's appellate courts have not yet had an opportunity to address these issues. But some of Utah's sister states have thoroughly discussed the distinctions between a contract to procure insurance and a contract of insurance. One of the cases to most fully discuss the differences is Hamacher v. Tummy, 352 P.2d 493 (Or. 1960). In that case, the court addressed the following specific question: "Must the promisee of a contract to procure insurance prove all of the essentials of a contract of insurance with the same specificity that is required of a promisee asserting the existence of a contract of insurance?" Id. at 497. The court went on to answer the question in the negative. In so doing, the court stated that

[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 of

the elements which are essential to an insurance contract, including the subject matter to be covered, the risk insured against, the amount of the indemnity, the duration of the coverage, and the premium. In entering into a contract to procure insurance, obviously the owner is seeking the same ultimate objective, that is, a contract of insurance, but the performance for which he bargains is the services of the insurance agent in obtaining the best possible terms consistent with the owner's insurance needs. *Such a contract could arise even though the agent was given the authority to ascertain some of the facts essential to the creation of the ultimate contract of insurance, such as the appraised value of the property to be covered or the most advantageous premium. . . . Obviously, liability for failure to procure insurance could not arise unless the agent had sufficiently definite directions from his principal to enable him to consummate the final insurance contract. . . . [However,] an express agreement is not necessary; the scope of the risk, the subject matter to be covered, the duration of the insurance, and other elements can be found by implication.*

Id. (emphasis added). The court also emphasized that another reason for relaxing the standards of proof in the “contract-to-procure” context is that “[t]he insurance broker holds himself out as an expert in his field and in dealing with his clients ordinarily he invites them to rely upon his expertise in procuring the insurance which best fits their requirements.” Id. Accordingly, the court concluded that the trial court had erred by ruling that the plaintiff had to prove the elements of the contract to procure insurance with the same specificity as in a “contract-of-insurance” case, and reversed the decision of the trial court and remanded the case for a new trial. Id. at 502.

A great many other courts around the country have addressed similar issues and reached the same conclusions—that a contract to procure insurance is not the same thing as a contract of insurance, and that the former can be proven through more relaxed standards of proof than can the latter. See, e.g., Bulla v. Donahue, 366 N.E.2d 233, 236 (Ind. Ct. App. 1977) (stating that “an agreement to procure insurance may arise even



though the agent is given authority to ascertain some of the facts essential to the creation of the ultimate contract of insurance” and that “[t]he terms and conditions of the proposed policy need only be sufficiently definite to enable the agent or broker to procure a policy consistent with the applicant’s insurance needs”); Marshel Investments, 634 P.2d at 142 (stating that “less strict proof is required for an oral agreement to procure insurance than for a contract of insurance” because, “[a]fter all, in cases such as this, the terms of the contract of insurance and its cost are within the field of expertise of the agent or broker and it is for this expertise that the agent or broker is sought out”); Rena, Inc. v T.W. Brien, Underwriters, 708 A.2d 747, 760 (N.J. Super. Ct. App. Div. 1998) (stating that “[t]he terms of the contract to procure the insurance, and scope of the risk and subject matter to be covered may be found by implication” (citations omitted)); Olvera v. Charles Z. Flack Agency, Inc., 415 S.E.2d 760, 762 (N.C. Ct. App. 1992) (stating that in the context of an agreement to procure insurance, “[a] ‘bare acknowledgement’ of a contract to protect the insured against casualty of a specified kind is enough, even if the parties’ communications have not settled all the terms of the contemplated contract of insurance” (citations omitted)).<sup>13</sup>

---

<sup>13</sup>Indeed, one scholar has stated that, although “several of the older cases held that the duty to procure insurance could not arise unless the parties reached a definite agreement as to all the terms of the proposed policy,” “it is now generally held that the terms and conditions of the proposed policy need only be sufficiently definite to enable the broker to procure a policy consistent with the applicant’s insurance needs.” Thomas R. Trenkner, J.D., Liability of Insurance Broker or Agent to Insured for Failure to Procure Insurance, 64 A.L.R. 3d 398, 406-07 (1975).

Thus, Harris need not prove the elements of the parties' contract to procure insurance with the same degree of specificity as is required in the context of insurance contracts themselves.

**2. Harris can prove each of the necessary elements of a contract to procure insurance.**

Harris can prove all of the necessary elements of a contract to procure insurance. In this case, the evidence falls into two categories. First, the parties, in their 1997 conversation, agreed on certain things. Second, the parties' course of dealing, over the eight-year period during which Albrecht served as Harris's insurance agent, provides evidence from which this Court can imply the remaining necessary terms of the agreement with sufficient specificity.

From the parties' conversation in the summer of 1997, it is clear that Harris offered to enter into a contract to procure insurance, and that Albrecht accepted that offer. See R. at 330. The basic contractual requirements of offer and acceptance can be easily proven through the plain terms of the parties' 1997 conversation. Indeed, Defendants have never taken the position, that (if the conversation occurred) there was no valid offer and acceptance.<sup>14</sup>

---

<sup>14</sup>Also, at no point during this litigation have Defendants mounted any argument based on a lack of consideration. It is well-settled that "payment of a premium is not necessary to the validity of a contract to procure insurance and that an agreement to accept a policy if issued is sufficient consideration since it carries with it the implied promise to pay whatever premium would be due thereon." Duncanson v. Service First, Inc., 157 So. 2d 696, 699 (Fla. Ct. App. 1963); see also Boone v. Lowry, 657 P.2d 64, 71 (Kan. Ct. App. 1983).

Moreover, from the parties' 1997 conversation, it is also clear that at least some of the particular terms of the contract to procure insurance were adverted to. For instance, it was clear that the subject of the insurance was business insurance coverage on Harris's architect offices, and that the risk or peril insured against would include fire. Id.

Defendants, however, have not focused their arguments on either lack of offer and acceptance, or on failure to prove that the requested insurance was business coverage for Harris's offices. Rather, Defendants have chosen to focus their argument on another ground, arguing that, even assuming that there was a valid offer and acceptance including some of the terms of a contract to procure insurance, some of the other allegedly essential terms of the offered and accepted contract were not sufficiently definite to form an enforceable contract. Essentially, Defendants have taken the position that a simple request for full coverage against loss to a commercial business is insufficient to create a contract of insurance. See R. at 192-201; see also Aplt's. Br., at 22-23, 29. While this may or may not be true, it is irrelevant, because such a request, if accepted, is clearly sufficient to form the basis for a *contract to procure insurance*, and numerous courts have so held. See, e.g., Marshel Investments, 634 P.2d at 135-36 (holding that a valid contract to procure insurance existed where the plaintiff asked the agent for "complete insurance coverage" on an oil and gas well and to "[t]ake care of me . . . . I need complete coverage"); Andrews, 667 P.2d at 920 (holding that a valid contract to procure insurance existed where the plaintiff told the agent that he needed insurance on his car and the agent replied that he "would take care of it"); cf. Caddy, 877 P.2d at 669 (holding that an agent was liable to the plaintiff where the plaintiff asked the agent for insurance to

cover “any liability” for those “working on the job” and the agent replied that he “would take care of it”).<sup>15</sup> This is because the terms of an agreement to procure insurance may be implied into the parties’ contract from other sources, such as the parties’ past course of dealing, and/or the agent’s expertise, see Marshel Investments, 634 P.2d at 142; Hamacher, 352 P.2d at 498, and because the terms of an oral contract to procure insurance “need only be sufficiently definite to enable the agent or broker to procure a policy consistent with the applicant’s insurance needs,” Lakeview Farms, Inc. v. Patten, 640 N.E.2d 1092, 1093 (Ind. Ct. App. 1994) (citations omitted)).

In this case, Harris and Albrecht had developed a personalized business relationship over the eight-year period during which the two men conducted business. Indeed, over the years Harris came to have great confidence in Albrecht, and came to believe that Albrecht would obtain for him a good product at a reasonable price. Id. at 329. As the relationship progressed, Harris, relying on Albrecht’s knowledge and expertise, would grant Albrecht great latitude in filling in the particulars of the requested insurance coverage. Id. at 339. This was because, over the years, Harris had developed a

---

<sup>15</sup> Other courts have held that a request for “full coverage” is insufficient to trigger a contract to procure insurance. See, e.g., Furtak v. Moffett, 671 N.E.2d 827, 830 (Ill. Ct. App. 1996); Boston Camping Dist. Co. v. Lumbermens Mut. Cas. Co., 282 N.E.2d 374, 376 (Mass. 1972); Small v. King, 915 P.2d 1192, 1194 (Wyo. 1994). Harris submits that these cases are wrongly decided. However, most of those cases may be distinguishable in any event, because, in most of those cases, the customer did not narrow his request to “full coverage” in one particular area of insurance, such as oil and gas, automobile, etc., as did the customers in Marshel and Andrews. Rather, in the other cases, the customer stated that “he wanted insurance coverage from A to Z, second to none.” See Boston Camping, 282 N.E.2d at 376. In this case, however, Harris’s request was clearly limited to business insurance, making most of the other cases distinguishable.

great deal of trust and confidence in Albrecht because every time he asked Albrecht to make a change in coverage, Albrecht took care of the request competently. Id. at 326, 328, 331. Albrecht confirmed that Harris relied on Albrecht's expertise, and that Harris and Harris's family members trusted him to take care of their insurance needs, id. at 271, 273, and that based upon the parties' long-standing relationship, Harris was reasonably justified in relying upon Albrecht to obtain coverage that Harris asked Albrecht to procure. id. Over the years, Albrecht did such a fine job for Harris in procuring the coverages requested—even in the absence of any detailed discussions regarding the particulars of coverage—that Harris never had to even follow-up with Albrecht to make sure that the coverages had been procured. Id. at 273, 326, 328.

From this course of dealing, it is clear that Harris and Albrecht had a relationship in which Harris was relying, to a large degree, on the expertise of Albrecht. Rather than discuss with Albrecht particular elements of the coverage, Harris would trust Albrecht, as an experienced agent, to obtain for him the best possible product at the most reasonable price. The parties' 1997 conversation was typical of the prior conversations. Harris telephoned Albrecht and asked him to procure insurance covering Harris' architect offices. Id. at 330. The parties had discussed business insurance once before. Id. at 335. Harris decided to purchase business coverage in 1997, rather than previously, because he had recently upgraded the equipment in his offices, and, consequently, had a greater need for business insurance than ever before. Id. at 345-50. In the 1997 conversation, Albrecht agreed to procure business insurance coverage for Harris's architect offices. Id. at 330. After the conversation, Harris felt that his business was covered, and he felt like

that particular task had been accomplished. Id. He had confidence in Albrecht, based on the parties' past relationship, that Albrecht would take care of his request, as Albrecht had done every time in the past. Id. Albrecht agreed that this confidence and reliance was reasonable. Id. at 271, 273.

The parties' eight-year course of dealing shows that Harris had always relied on Albrecht to find the requested coverage for a reasonable price (a factor that would include both duration and premium) and within reasonable limits. Thus, these remaining additional contractual terms can be implied with sufficient particularity from the parties' past course of dealing.

Moreover, these terms can also be gleaned, at least to some extent, from the terms and conditions of State Farm Fire & Casualty Company's standard business insurance policy.<sup>16</sup> Many of the terms and conditions of that standard business policy are found in the State Farm business/commercial insurance brochure. See R. at 360-65. According to the brochure, "State Farm's Business Policy" will provide "[c]omprehensive coverage for your building & business personal property," meaning that "your property will be insured against accidental direct physical loss from any cause not specifically excluded." Id. at 364. The "[p]roperty covered includes" buildings, garages, storage buildings, auxiliary

---

<sup>16</sup> Defendants assert that "there is no such thing as a 'standard' business policy." See Aplt.' Br., at 12. However, this contention is belied by Defendants' argument before the district court that "with respect to valuable papers, plaintiff would have needed to decide whether he was satisfied with the \$5,000 available *under the standard policy* or whether he wanted additional coverage at an additional cost." See R. at 195 (emphasis added). As discussed above, there certainly is a standard State Farm business policy, which of course can be varied from customer to customer at the customer's request.

buildings, floor coverings, furniture, fixtures, glass, appliances, equipment, merchandise, and other items. Id. In addition, the insured “will have all of these additional coverages at no additional premium”: “valuable papers and records—up to \$5,000”; “personal effects”; coverage for loss of income; and many other items. Id. Certainly, this standard policy can be varied from customer to customer as the customer requests, but there can be no doubt that there is in fact a standard baseline State Farm business policy from which some of the terms of the parties’ contract to procure insurance can be drawn.<sup>17</sup>

In fact, State Farm field underwriter Dick Mirabelli testified that this standard policy, had it been in effect at the time of the fire that consumed Harris’s business, would have covered nearly all of the items damaged in the fire (with the exception of some items that were solely personal property and not business property). See id. at 239-41.

Harris and Albrecht, over a period of eight years, had developed a relationship in which Harris gave Albrecht a great amount of leeway to come up with the particulars of the insurance coverage Harris requested. Time and time again, valid insurance policies went into effect without Harris ever having told Albrecht to obtain insurance, for

---

<sup>17</sup> The district court refused to consider the brochure, because “Plaintiff didn’t see the brochure or know of its contents until this litigation was commenced.” See R. at 486. This was error. Harris, for more than eight years, had relied on Albrecht’s expertise, and had allowed him great latitude in filling in the details of the insurance policies he requested down through the years. Based on this relationship, and absent a phone call from Albrecht requesting additional information, Harris had every reason to expect Albrecht to fill in some of the unspoken terms of the requested business insurance policy from the “standard policy” outlined in the brochure. Indeed, given the way the relationship between Harris and Albrecht had historically functioned, this is precisely the type of source that Harris would have expected Albrecht to use to fill in some of the details of the insurance.

instance, at a certain premium or for a certain duration. Harris let Albrecht fill in the details, and relied upon Albrecht's considerable expertise in doing so. And the relationship had functioned without a hitch until 1997. Under these conditions, the particulars of the insurance Harris requested in 1997—to the extent these particulars are not evident from the parties' short conversation in 1997—can be inferred from the parties' past relationship, notably Harris's long-term reliance on Albrecht's expertise, and from the particulars of the standard State Farm business policy set forth in the brochure. See Hamacher, 352 P.2d at 497 (stating that “a contract [to procure insurance] could arise even though the agent was given the authority to ascertain some of the facts essential to the creation of the ultimate contract of insurance, such as the appraised value of the property to be covered or the most advantageous premium”).<sup>18</sup>

Given these facts and the applicable law, Harris and Albrecht, in 1997, entered into a valid and binding contract to procure insurance. At the very least, because the existence of an oral contract is a question of fact for the jury, a genuine issue of material fact remains on this point. The district court's entry of summary judgment on this claim was improper, and should be reversed.

---

<sup>18</sup> It must also be remembered that, as discussed above, Albrecht is the expert (and Harris the layman) when it comes to insurance matters. If Albrecht had really needed additional information in order to issue the policy, it is his duty as the expert (and not Harris's duty as a layman) to follow up with Harris to obtain the specific information needed.



### III. STATE FARM IS LIABLE ON BOTH CAUSES OF ACTION

Finally, State Farm is liable for Albrecht's actions in failing to procure the business insurance Harris requested, because, at all times relevant to this action, Albrecht was acting as an agent of State Farm, and had authority to bind State Farm.

There is no dispute that Albrecht is an "agent" of some type for State Farm. Indeed, the record demonstrates that Albrecht sells *only* State Farm insurance products, and does not sell insurance from any other insurance company. See R. at 304. The Utah Legislature has proclaimed that

[t]here is a rebuttable presumption that every insurer is bound by any act of its *agent* performed in this state that is within the scope of the agent's actual (express or implied) or apparent authority, until the insurer has canceled the agent's appointment and has made reasonable efforts to recover from the agent its policy forms and other indicia of agency.

Utah Code Ann. § 31A-23-305 (emphasis added). Thus, the agent's acts bind the insurance company when the agent's acts are within the scope of the agent's authority. Applied to this case, this Utah statute means that State Farm is bound by the acts of Rick Albrecht when Albrecht's acts are within the scope of his authority.

The record clearly demonstrates that Albrecht's act of offering to procure insurance for Harris was within the scope of his authority. Albrecht testified that he has authority to bind State Farm, up to certain limits, on all policies, including commercial insurance policies. See R. at 290. State Farm field underwriter Dick Mirabelli confirmed this, testifying that State Farm grants its agents—including Albrecht—authority to bind State Farm, id. at 261, 263-64, and that the binding authority granted by State Farm to Albrecht was specifically set forth in Deposition Exhibit 2, id. at 358. That exhibit page

is entitled “Your Binding Authority,” and states that State Farm had granted Albrecht authority to bind the company up to specified limits set forth there. See id.

Albrecht clearly had authority to bind State Farm up to certain limits. Thus, Albrecht’s actions in offering to procure insurance for Harris were performed within the scope of Albrecht’s authority, and State Farm is therefore bound by those acts, at least up to the limits of Albrecht’s undisputed binding authority.

### **CONCLUSION**

When Ken Harris telephoned Rick Albrecht during mid-summer 1997 and asked Albrecht to procure insurance on Harris’s business, and when Albrecht assured Harris that he would take care of the request, Albrecht assumed a duty to exercise reasonable care in the procurement of the requested insurance. This duty, at a minimum, requires the insurance agent to either (1) actually procure the insurance, or (2) follow-up with the client to obtain further information or to tell the client that the insurance, for whatever reason, cannot be procured. Albrecht did none of these things—in fact, Albrecht did nothing at all. By his actions (or, more accurately, his inactions), Albrecht breached his duty to exercise reasonable care in the procurement of the requested insurance, and, in addition, Albrecht breached the contract to procure insurance that the parties had entered into during the telephone conversation. At the very least, genuine issues of material fact remain regarding these issues, because, as stated above, issues related to breaches of duty are questions of fact for the jury, as are questions related to the formation of oral contracts. For all the foregoing reasons, the judgment of the district court should be reversed, and this case should be remanded to the district court for trial.

DATED this 24<sup>th</sup> day of October, 2002.

By R. M. Harris  
Ryan M. Harris  
JONES, WALDO, HOLBROOK & McDONOUGH

Lynn C. Harris  
HARRIS & CARTER  
*Attorneys for Plaintiff Ken Harris*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of October, 2002, I caused to hand-delivered two copies of the foregoing **BRIEF OF APPELLEE** upon the following:

Paul M. Belnap  
Byron G. Martin  
STRONG & HANNI  
9 Exchange Place, Suite 600  
Salt Lake City, UT 84111

Ron Hain  
J