1989

Quantum Associates v. Ogden and Cargo Link International : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

QUANTUM ASSOCIATES, INC., a corporation, and ARNOLD A. GAUB,	:	
Plaintiff/ Appellant,	:	Case No. 890559-CA
v.	:	Priority No. _____
SCOTT D. OGDEN, a/k/a S. D. OGDEN, d/b/a CARGO LINK INTERNATIONAL, and S. D. OGDEN AND ASSOCIATES, CARGO LINK INTERNATIONAL, INC., d/b/a CARGO LINK INTERNATIONAL, a corporation, and GREAT AMERICAN INSURANCE COMPANIES, a corporation, a/k/a GREAT AMERICAN WEST, INC.,	:	
Defendants/ Respondents.	:	

BRIEF OF RESPONDENTS

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STATEMENT OF JURISDICTION

Contrary to the assertion of Appellant, this Court has jurisdiction over this matter pursuant to Section 78-2a-3(2)(j), UTAH CODE ANNOT. This is an appeal from an order of summary judgment granted by the Third District Court in favor of Defendants/Respondents. It was originally appealed to the Utah Supreme Court (although the Notice of Appeal specified this Court), but has now been transferred to this Court.

STATEMENT OF ISSUES FOR REVIEW

1. Does ARNOLD A. GAUB have any ownership interest in the personal property at issue?

2. May ARNOLD A. GAUB, not a licensed attorney, represent the interests of QUANTUM ASSOCIATES, INC., a corporation, in this appeal?

3. Did the lower court commit reversible error when it granted Defendants' Motion for Summary Judgment?

4. Did the lower court have before it genuine issues of material fact?

5. Did ARNOLD A. GAUB or QUANTUM ASSOCIATES, INC. have an ownership interest in personal property for which they had not exercised an option to purchase and for which they paid nothing?

6. Did Respondents owe a duty of care to Appellants with respect to personal property not owned by Appellants?

7. Were Appellants or either of them "buyers" of certain personal property under Section 70A-2-501 UTAH CODE ANN. at the time Respondents delivered the personal property to its owner?

8. Did Respondents breach any contract between them and Appellants when Respondents delivered personal property to its owners?

9. Did a "loss" occur under the applicable insurance policies when Respondents arranged for owners of personal property to obtain possession of that property?

CONSTITUTIONAL AND STATUTORY PROVISIONS

70A-1-201(3)

> (3) 'Agreement' means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act (section 70A-1 205 and 70A-2-208). Whether an agreement had legal consequences is determined by the provisions of this act, if applicable; otherwise by the law of contracts (section 70A-1 103). (Compare 'Contract.')

70A-2-103(1)(a)

> (1) In this chapter unless the context otherwise requires
>
> > (a) 'Buyer' means a person who buys or contracts to buy goods.

70A-2-501

> (1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve months after contracting or for the sale of crops to be harvested within twelve months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in good so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

78-2a-3(2)(j)

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of adjudicative proceedings of agencies of political subdivisions of the state or other local agencies;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from district court in criminal cases, except those from the small claims department of a circuit court;

(g) appeals from orders on petitions for extraordinary writs involving a criminal conviction, except those involving a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including but not limited to divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

STATEMENT OF THE CASE

Nature of the Proceedings Below

Appellants ARNOLD A. GAUB ("GAUB") and QUANTUM ASSOCIATES, INC. ("QUANTUM"), a corporation owned in whole or in part by GAUB, commenced this action by filing a complaint against Respondents SCOTT D. OGDEN, a/k/a S. D. OGDEN, d/b/a CARGO LINK INTERNATIONAL, and S. D. OGDEN AND ASSOCIATES, CARGO LINK INTERNATIONAL, INC., d/b/a CARGO LINK INTERNATIONAL, a corporation (hereafter collectively referred to as "CARGO LINK") and GREAT AMERICAN INSURANCE COMPANIES, a corporation, a/k/a GREAT AMERICAN WEST, INC. (hereafter collectively "GREAT AMERICAN") on September 23, 1986 (Record at 2-5). The Complaint contained three causes of action, two against CARGO LINK and one against GREAT AMERICAN. The First Cause of Action alleged that CARGO LINK breached a

contract between it and Plaintiffs. The Second Cause of Action alleged negligence against CARGO LINK, which negligence allegedly caused GAUB and QUANTUM damage. Finally, the Third Cause of Action alleged that GREAT AMERICAN breached its contract of insurance with GAUB and QUANTUM.

GREAT AMERICAN and CARGO LINK filed a motion for summary judgment on all claims on December 9, 1988. After all supporting and opposing memoranda had been filed, the Third District Court heard oral argument on February 24, 1989. Three days prior to the hearing, counsel for GAUB and QUANTUM filed two documents with the court. The first was entitled Request to Address Specific Issues and for Judgment on Said Issues (Record at 133-4). The second was entitled Publication and Filing of Deposition of Arnold A. Gaub (Record at 135-6). At the hearing on February 24, 1989, the lower court granted CARGO LINK'S and GREAT AMERICAN'S motion for summary judgment. The Order granting Summary Judgment was served upon counsel for GAUB and QUANTUM pursuant to Rule 4-504 Utah Code of Judicial Administration on February 24, 1989 (Record at 139). After the five days for objection to the form of the order had passed without objection, the lower court signed and entered the Order on March 2, 1989 (Record at 138-9).

Appellants filed their notice of appeal to this Court on March 24, 1989. For reasons unknown to Respondents, the Utah Supreme Court had this matter until it was transferred to this Court. (Record at 140).

Statement of the Facts

Respondent Cargo Link International, Inc. is a corporation owned entirely by Scott Ogden (Record at 271, pp. 6-7). CARGO LINK is a custom house brokerage service and international freight forwarding business (Record at 271, p. 6). At all times relevant hereto, CARGO LINK's general duties with respect to the importation of goods were (1) to receive documents from the client regarding the shipment, (2) formalize the clients' documents into U.S. Customs format, (3) submit the formal documents to U.S. Customs, (4) have U.S. Customs release the product from the foreign trade zone, and (5) inform the client that the product was released from U.S. Customs and ready for pick-up from the foreign trade zone (Record at 43, 67-68). The foreign trade zone is a warehouse where imported merchandise can be put and held until the owner chooses to have the goods enter United States commerce. While the merchandise is in the foreign trade zone, it is not subject to customs duties and taxes (Record at 44, 85).

In the early part of 1983, QUANTUM approached CARGO LINK for the purpose of having CARGO LINK facilitate the importation of satellite disk drives which were to be brought from Taiwan, through Los Angeles, to the foreign trade zone located in Salt Lake City, Utah (Record at 43, 57-8, 270, pp. 23-4). There was no written agreement setting forth the duties of CARGO LINK to QUANTUM (Record at 45, 58).

On or about June 8, 1983, QUANTUM and a third party by the name of Richard Soong & Co. ("SOONG") executed an Agreement providing for the importation of 2100 satellite disk drives to Salt Lake City, Utah from Taiwan. GAUB was not a party to the Agreement. (Record at 63, 270, p. 32, Exhibit 3). The shipment came in the form of two shipping containers of 1050 disk drives each. The Agreement provided that QUANTUM was to pay $134,400.00 for the first 1050 disk drives. The Agreement also gave QUANTUM an option to purchase SOONG's second set of 1050 disk drives from SOONG for $189,000.00 within 30 days after the arrival of the disk drives in Salt Lake City. On the face of the Agreement it states,

> Letter of Credit to be opened by Star Valley Bank or by their designated corresponding bank in the amount of $134,400.00 immediately for the first 1050 disk drives. Within 30 days after arrival in Salt Lake City, Utah, Quantum Associates, Inc. has the option of paying $189,000 for the remaining 1050 disk drives, should the product be acceptable.

(Record at 44, 59, 63, 83). A copy of this Agreement was given to CARGO LINK to satisfy CARGO LINK's requirement of a writing setting forth the terms of the 30-day option given by SOONG to QUANTUM (Record at 45, 69, 72-4).

On or about June 16, 1983 GREAT AMERICAN was requested to name Star Valley State Bank as a loss payee under the Business Protector Policy in favor of CARGO LINK's policy No. BP 3 23 97 41 ("First Policy"). The reason for the addition was that GREAT AMERICAN was advised that Star Valley State Bank had an interest in some goods. Star Valley State Bank was added to a certificate

of insurance to make it aware that any goods of QUANTUM's in the custody and control of CARGO LINK were insured (Record at 47, 92-93).

On or about June 30, 1983, QUANTUM informed CARGO LINK of the shipment of 2100 disk drives, which would be coming in two containers of 1050 disk drives each. GAUB made it clear that QUANTUM only owned half of the shipment -- one of the containers. (Record at 70). On that same day, CARGO LINK told QUANTUM that in order for SOONG's second set of disk drives to be released from the foreign trade zone, authorization would have to come from SOONG. This was confirmed with SOONG by Cargo Link on the same day by telephone. CARGO LINK maintained two separate files -- one file for QUANTUM for its 1050 units and one file for SOONG for its 1050 units (Record at 45, 70-73, 83-4). QUANTUM knew that it had to exercise the 30-day option in order to purchase and take control of SOONG's second set of disk drives (Record at 45, 61).

The 2100 disk drives arrived in Salt Lake City in the first or second week of July, 1983 (Record at 46, 75). Within the 30 days after the arrival of the disk drives in Salt Lake City, QUANTUM never informed CARGO LINK that it intended to exercise its option to purchase SOONG's second set of disk drives, nor did Quantum make known to CARGO LINK any claim of rights to those disk drives. QUANTUM never paid any monies to SOONG for SOONG's second set of disk drives (Record at 46, 60, 79).

After the expiration of the 30 days from the date of arrival in Salt Lake City, SOONG instructed CARGO LINK to file an

entry with U.S. Customs to arrange for the release of SOONG's set of disk drives. After the paperwork was done and SOONG's disk drives were released, SOONG arranged for its disk drives to be picked up from the foreign trade zone. CARGO LINK did not physically pick up SOONG's set of disk drives from the foreign trade zone (Record at 46, 86, 77). After SOONG withdrew its set of disk drives, CARGO LINK had no further contact with these disk drives, and did nothing in relation to them (Record at 47, 78).

CARGO LINK fulfilled its contractual obligations with QUANTUM, which withdrew its 1050 disk drives from the foreign trade zone over a period of 6-9 months as it made sales to customers (Record at 46, 76-7, 86).

SUMMARY OF ARGUMENT

CARGO LINK is a business concern engaged in the facilitation of importing goods from out of the United States into a "foreign trade zone" located in Salt Lake City. GREAT AMERICAN is an insurance company who insures goods within the custody and control of CARGO LINK. As a matter of law, neither CARGO LINK nor GREAT AMERICAN had any duties, contractual or otherwise, in favor of individuals or entities which did not own or have an ownership interest in property within the custody or control of CARGO LINK.

There are two sets of disk drives with which this Court must concern itself. The terms of the purchase of these two sets of disk drives by QUANTUM from SOONG were clearly set forth in a June 8, 1983 Agreement (Record at 63). GAUB was not a party to that Agreement as an individual. It is undisputed that QUANTUM

paid the monies owing for the first set of disk drives, and that it was allowed to withdraw those disk drives from the foreign trade zone. There are no allegations that CARGO LINK in any way interfered with QUANTUM's rights to the first set of disk drives. QUANTUM's and GAUB's claims focus on the second set of disk drives.

Each of QUANTUM's and GAUB's three causes of action against both CARGO LINK and GREAT AMERICAN are premised upon one basic assumption, i.e., that QUANTUM or GAUB had an ownership or insurable interest in that set of disk drives. The facts are undisputed, and as a matter of law, neither QUANTUM nor GAUB had an ownership or insurable interest in the second set of disk drives after they failed to exercise the 30-day option to purchase those drives from SOONG for $189,000.00. Neither QUANTUM nor GAUB ever paid $189,000 to SOONG. Neither QUANTUM nor GAUB ever informed CARGO LINK that it intended to exercise the 30-day option to purchase. It is undisputed that after the 30-day option expired, SOONG requested CARGO LINK to process the paper work necessary to allow SOONG to pick up its disk drives from the foreign trade zone. CARGO LINK'S processing of that paper work is the single act of which QUANTUM and GAUB complain.

This appeal should be denied for the reason that QUANTUM, a corporation, did not appeal the lower court's ruling. The Notice of Appeal was signed by GAUB, who is not a licensed attorney. For the reason that QUANTUM may not act in Court matters through persons other than licensed attorneys, the Notice of Appeal is a legal nullity as to QUANTUM, and QUANTUM is not

before this Court on appeal. Because QUANTUM is not before this Court, and because GAUB was not a party to the original purchase agreement for the second set of disk drives, GAUB has no interests to be represented in this appeal. For these reasons alone, the Appeal should be dismissed.

Even if this Court accepts the bare and self-serving allegations of GAUB that he is the alter-ego of QUANTUM, which allegations have no support in the Record, this Court should affirm the lower court's ruling. Because neither QUANTUM nor GUAB ever created an ownership interest in the second set of disk drives by purchasing them from SOONG, CARGO LINK had no contractual or other duties towards QUANTUM or GAUB with respect to SOONG's set of disk drives. Without the existence of contractual or other duties, QUANTUM's and GAUB's claims of breach of contract and negligence against CARGO LINK should fail as a matter of law.

Finally, because QUANTUM or GAUB did not have an ownership interest in SOONG's set of disk drives after the 30-day option had lapsed, they had no insurable interest in those goods. Nor did a "loss" occur under the policies. The mere fact of CARGO LINK's doing the paperwork to facilitate the release of the second set of disk drives to their rightful owner SOONG is not a "loss" under the policies in question. Certainly, neither QUANTUM nor GAUB had an insurable interest in goods for which they paid nothing, and for which they failed to exercise their option to purchase. For these reasons, the trial court's ruling should be affirmed.

ARGUMENT

I. RULE 56 REQUIRED QUANTUM AND GAUB TO AFFIRMATIVELY PRODUCE EVIDENCE SUPPORTING THEIR CLAIMS, WHICH REQUIREMENT WAS NOT SATISFIED.

QUANTUM and GAUB had an affirmative obligation, in response to Respondents' Rule 56 motion, to oppose that motion with evidence of their claims. They failed to do so. Now, QUANTUM and GAUB have injected new matters and evidence into their brief, hoping to confuse the issues sufficiently to obtain a reversal of summary judgment. This Court should affirm the lower court's ruling for the reason that as a matter of law, Respondents are entitled to summary judgment on the basis of the record below.

The "evidence" which this Court must consider on appeal is limited solely to the evidence of record. Rule 56(e) requires that when a motion for summary judgment is supported by specific facts, "an adverse party . . . must set forth specific facts showing that there is a genuine issue for trial." Respondents' motion was supported by specific facts (Record at 43-8), QUANTUM and GAUB never put forth affidavits or other affirmative evidence in opposition to the motion, other than the deposition of GAUB. (Record at 270).

In opposition to Respondent's motion, Appellants attempted to claim that issues of material fact existed with respect to some of the facts set forth by Respondents, although Appellants admitted the truth of a number of the facts. (Record at 100-102). Each and every one of the alleged issues of material fact was responded to and more accurately characterized in

Respondents' Reply Memorandum. (Record at 107-112). Most of Appellants' claimed issues of fact consisted of citations to depositions, which citations were out of context or not supported by the testimony to which Appellants had referred. See, Record at 107-112. Defeating Respondents' motion required GAUB and QUANTUM to specifically identify genuine issues of fact, of which there are none. Appellants simple filing of Mr. Gaub's deposition does not fulfill their obligations to produce affirmative facts.

There is no evidence of record at this time to suggest that QUANTUM's or GAUB's claims are supported by any evidence. On the contrary, the discovery conducted prior to the lower court's ruling established that neither QUANTUM nor GAUB had any interest in the second set of disk drives.

In construing Rule 56(c) of the Federal Rules of Civil Procedure, which is worded identically to the Utah Rule 56(c), the United States Supreme Court recently stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning as essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317 at ___, 106 S. Ct. 2548, at ____, 91 L.Ed. 265, at 273 (1986). This Court cited Celotex with approval in Robinson v. Intermountain Health Care, Inc., 740

P.2d 262, 264 (Utah App. Ct. 1987), and should hold QUANTUM and GUAB to the same standard.

II. QUANTUM, THE PURPORTED OWNER OF THE PROPERTY AT ISSUE, IS NOT BEFORE THE COURT.

Before arguing the merits of the appeal, there are procedural and substantive questions which must be resolved by this Court. The first procedural question is whether Quantum Associates, Inc. is properly before this Court on appeal, since it is not represented by a licensed attorney. The substantive question is whether Arnold A. Gaub has any standing to bring this appeal, given the fact that he did not personally have an ownership interest in the disk drives at issue.

There were two plaintiffs to the original action. One was a corporation by the name of Quantum Associates, Inc. The other was an individual by the name of Arnold A. Gaub. GAUB represents himself and has appeared in these proceedings "pro se". There is no licensed attorney representing QUANTUM before this Court. The issue of representation was not raised in the proceedings below, because QUANTUM and GAUB were both represented by licensed counsel. However, the Notice of Appeal was filed by GAUB, and it has never been clear, until recently, whether GAUB is appealing alone, or whether he purports to also represent QUANTUM. It now appears that GAUB purports to represent himself and the interests of QUANTUM by reason of his recent assertion that he is the alter-ego of QUANTUM. This is new.

Respondents attempted to clarify this issue by moving to dismiss the appeal of QUANTUM for the reason that it was not represented by a licensed attorney. GAUB responded to that motion by asserting, without any support or reference to a court decree or order, that QUANTUM and GAUB are alter-egos of each other. This Court denied Respondents' motion without making particular findings, and required this Brief to be filed by November 29, 1989.

There is no basis, let alone a basis in the Record, for this Court to consider any arguments on appeal applicable to QUANTUM. Indeed, QUANTUM may not now appeal since the time for appeal has run and the Notice of Appeal was filed by GAUB, pro se (Record at 140-143). The Notice of Appeal is a legal nullity as to Quantum for the reason that no licensed attorney acted on its behalf in filing the Notice. GAUB's recent assertion that he is the alter-ego of QUANTUM has no basis in the Record, and cannot, alone, nullify QUANTUM's independent and separate existence as a legal entity. That separate and independent existence requires an attorney to represent QUANTUM.

Under Utah law, "a corporation cannot practice law and must have a licensed attorney representing it in court matters." Tuttle v. Hi-Land Dairyman's Ass'n, 350 P.2d 616, 617 (Utah 1960). GAUB, the co-appellant, is not an attorney. Because a corporation may only act in court matters through a licensed attorney, the Notice of Appeal is a legal nullity as to QUANTUM. Although Utah has apparently not ruled on this precise issue, other jurisdictions have.

In Paradise v. Nowlin, 195 P.2d 867 (Cal. Ct. App. 1948) (cited with approval in Tuttle v. Hi-Land Dairyman's Ass'n, 350 P.2d 616, 618 (Utah 1960)), the California Court of Appeals was asked to dismiss the appeal for failure to pay a filing fee. The court dismissed the appeal, but for "another and more important reason" Id. at 867.

> [T]o wit that the defendant corporation filed the notice of appeal in the superior court and its opposition to the dismissal in this court in propria persona. Such notice and opposition are void by reason of the corporation's lack of power to represent itself in an action in court. Defendant was represented by an attorney at the trial but his services apparently terminated with the entry of judgment in favor of plaintiffs.

Id. The Paradise court went on to cite numerous cases from around the country for the same proposition. Id. at 867-868.

The fact situation here is nearly identical to that of Paradise. In this case, QUANTUM was represented at the trial court level by a licensed attorney, Jack Molgard. However, since the lower court granted summary judgment, Mr. Molgard was apparently dismissed. GAUB has been the only individual named in a representative capacity on the Notice of Appeal and in subsequent pleadings and briefs. Mr. Molgard has not signed any pleadings since he argued his opposition to Respondents' motion in the trial court. Therefore, GAUB may only appeal this matter pro se with respect to those causes of action which belong solely to him.

The ambiguity and impropriety of GAUB's purporting to appear on behalf of QUANTUM were objected to in Respondent's

Objection to Statement of Evidence and Issues, and Proposed Amendments (Record at 165). GAUB never responded to that, and it is not now clear what, if any, issues or causes of action are attributable to GAUB alone. What is clear is that QUANTUM, not GAUB, ever had an option to purchase the property at issue.

The importance of QUANTUM's presence or absence in this appeal is evident. The original agreement by which GAUB purports to have an ownership interest in the second set of disk drives was executed by Richard SOONG as President of Richard SOONG & Co. (USA) and by Arnold GAUB as President of Quantum Associates, Inc. (Record at 63). GAUB did not sign that agreement individually, and therefore GAUB did not have any ownership interests or prospective ownership interests in the second set of disk drives. Nor is there anything in the record to support the new claim that GAUB is the alter-ego of QUANTUM.

For the above reasons, this Court should find that as a matter of law, QUANTUM is not a party to this appeal, and that GAUB has no ownership interest in the second set of disk drives. Therefore, the appeal should be dismissed.

III. APPELLANTS' BRIEF CONTAINS EXTRANEOUS MATERIAL AND FAILS TO CITE TO THE RECORD IN SUPPORT OF ITS ARGUMENTS.

One other procedural defect exists with respect to Appellants' Brief. It contains material not in the record before the lower court, and therefore, that material may not be considered on appeal. Respondents moved this Court to strike Appellants' Brief on these grounds, but the motion was denied without particular findings as to the reason.

It is axiomatic that this Court may only refer to the Record of the proceedings below in order to determine whether reversible error was committed by the trial court. Rule 24(a)(7) of the Rules of the Utah Court of Appeals requires that "[a]ll statements of fact and references to the proceedings below shall be supported by citations to the record. . . ." The Utah Supreme Court has similarly followed the policies behind this Rule in Reliable Furniture Co. v. Fidelity and Guaranty Insurance Underwriters, Inc., 380 P.2d 135, 135 (Utah 1963).

Appellants have not referred to the Record. Instead, they attached 49 purported Exhibits, only some of which are in the Record. Even if this Court considers the Exhibits, many of them support CARGO-LINK's position that there were two sets of disk drives, one belonging to QUANTUM and one to SOONG. (See, Exhibits 6, 8, 20, 21, 24, 25.)

The purpose of Rule 24 is to allow both Respondents and this Court to determine the factual and legal bases for Appellants' arguments. Failing specific citation, Appellants' Brief overly burdens Respondents and this Court with the task of verifying whether specific issues and specific facts were before the court below, and thus at issue on appeal. For these reasons, this Court should strike Appellants' brief and dismiss the appeal with prejudice.

IV. ALL THREE OF APPELLANTS' CAUSES OF ACTION FAIL AS A MATTER OF LAW.

Even if this Court allows Appellants' Brief to stand, relies upon the unsupported assertions of GAUB that there is no

legal distinction between himself and QUANTUM, and allows the interests of QUANTUM to be represented in this appeal, and even if this Court believes that GAUB had a legal right to exercise the option to buy the second set of disk drives, this Court should affirm the lower court's grant of summary judgment.

GAUB and QUANTUM alleged three causes of action against Respondents. Two of these were against CARGO-LINK on theories of breach of contract and negligence. The other claim was against GREAT AMERICAN for breach of an insurance contract. This Court should affirm the trial court for the reasons that as a matter of law, CARGO-LINK did not breach the agreement it had with QUANTUM and GAUB, nor was it negligent in breaching any duties of care towards QUANTUM and GAUB. Those duties did not exist. Also, there was no breach of contract between GREAT AMERICAN, QUANTUM, and GAUB for the reason that QUANTUM and GAUB had no insurable interest in the second set of disk drives, and no "loss" occurred under the policies.

A. Once QUANTUM And GAUB Failed To Exercise The 30-Day Option To Purchase The Second Set Of Disk Drives, CARGO-LINK Had No Contractual Duties Towards It.

QUANTUM and GAUB alleged in their Complaint that they entered into an agreement with CARGO-LINK by which CARGO-LINK was to receive and store 2100 disk drive units for them. QUANTUM and GAUB then assert that because CARGO-LINK did not deliver all 2100 disk drives to QUANTUM and GAUB, CARGO-LINK breached the agreement. These claims are unsupported.

The material facts are not in dispute. CARGO-LINK was not a party to the June 8, 1983 agreement between QUANTUM and SOONG. (Record at 63). Neither QUANTUM nor GAUB ever paid any money to SOONG for the second set of disk drives. (Record at 46, 60, 79). Neither QUANTUM nor GAUB ever indicated to CARGO-LINK that the option to purchase the second set of disk drives was exercised. (Record at 79). The only record evidence of ownership of the second set of disk drives upon which CARGO-LINK could rely was the copy of the June 8, 1983 Agreement which CARGO-LINK had expressly requested for the purpose of understanding who owned the disk drives. (Record at 72-73). That agreement clearly states that the second set of disk drives belonged to SOONG until QUNTUM exercised its right to purchase them.

There was no written agreement between QUANTUM, GAUB, and CARGO-LINK. (Record at 45, 58). There is also no dispute that CARGO-LINK delivered to QUANTUM and GAUB the first set of 1050 disk drives which were purchased from SOONG. (Record at 46, 76-7, 86). Nothing in the record suggests that CARGO-LINK had any contractual duties towards either QUANTUM or GAUB with respect to the second set of disk drives unless and until QUANTUM exercised the 30-day option. No affirmative facts in the Record suggest any ownership interest in the second set of disk drives after QUANTUM's 30 day option expired.

QUANTUM and GAUB argue at page 11 of their brief that CARGO LINK had duties as a warehouseman under § 70A-1-201(3), UTAH CODE ANNOT. That statute does not apply, since it defines

"Agreement" under the U.C.C. Even if CARGO LINK comes within the statutory definition of a warehouseman, assuming a definition exists ("warehouseman" is not defined among the general definitions in § 70A-1-201), that status cannot create duties in favor of individuals with no ownership interest in goods over which CARGO LINK may have had some control. QUANTUM and GAUB cannot have an ownership interest in property for which nothing was paid, and for which the option to purchase was never exercised.

Because as a matter of law neither QUANTUM nor GAUB ever paid SOONG anything for the second set of disk drives, and because neither QUANTUM nor GAUB ever exercised the option to purchase the second set of disk drives, no ownership interest in the second set of disk drives was ever created, and CARGO-LINK never had any contractual duties towards QUANTUM or GAUB regarding them. Therefore, this Court should affirm the lower court's grant of summary judgment on Appellants' breach of contract claim against CARGO-LINK.

B. No Duty Of Care Ever Existed With Respect To The Second Set Of Disk Drives And Therefore, CARGO-LINK Was Not Negligent.

QUANTUM and GAUB's second cause of action is a claim for negligence against CARGO-LINK, alleging that CARGO-LINK failed to exercise care in regard to the second set of disk drives. This cause of action was properly adjudicated by the lower court for the reason that no duty of care in favor of QUANTUM or GAUB ever existed with respect to the second set of disk drives.

In order to breach a duty of care, that duty must exist. "A finding of negligence requires the presence of certain elements, one of which is a duty running between the parties." Hughes v. Housely, 599 P.2d 1250, 1253 (Utah 1979). The only duties in favor of QUANTUM or GAUB that ever arose were with respect to the first set of disk drives, because QUANTUM and GAUB owned them from the outset under the June 8, 1983 agreement. (Record at 63). But because QUANTUM and GAUB never exercised the option to purchase the second set of disk drives, any duty of CARGO-LINK with respect to those drives ran to SOONG, not to QUANTUM.

According to everything that CARGO-LINK had been told, and according to the only writing which CARGO-LINK had received from either party regarding the second set of disk drives, the second set of disk drives was SOONG's property absent QUANTUM's exercise of the 30-day option.

Because CARGO-LINK never had a duty of care towards QUANTUM or GAUB with respect to the second set of disk drives, this Court should find that as a matter of law, the negligence claims of QUANTUM and GAUB should be dismissed with prejudice, and affirm the lower court's ruling.

C. Neither QUANTUM Nor GAUB Had An Insurable Interest In The Second Set Of Disk Drives After The 30-Day Option Expired, Nor Was There A "Loss" Under The Policy.

The third and final cause of action is the breach of contract claim against GREAT AMERICAN. QUANTUM and GAUB assert that the second set of disk drives was insured goods under one or

both of the policies at issue, and that they are entitled to have the loss of the second set of disk drives covered. This Court should affirm the lower court's ruling for the reason that it correctly ruled that as a matter of law, QUANTUM and GAUB had no insurable interest in the second set of disk drives, and that no "loss" occurred under the policies. (The policies are located as Exhibits 2 and 3 in the Record at 269.)

QUANTUM and GAUB assert that they suffered a "loss" under the policies when CARGO-LINK did the necessary paperwork to allow SOONG to pick the second set of disk drives up from the foreign trade zone. QUANTUM and GAUB apparently argue that these actions triggered coverage under the policies in the same way a fire or other accident destroying the disks would trigger coverage. However, QUANTUM's and GAUB's argument presupposes that they had an insurable interest in the second set of disk drives. They do not and never did.

QUANTUM and GAUB argue that they were "buyers" of the second set of disk drives under § 70A-2-501, UTAH CODE ANNOT., and that they therefore had an insurable interest. This argument is misplaced, because the section only gives "buyers" an insurable interest.

Section § 70A-2-103(1)(a) defines a "buyer" as one who "buys or contracts to buy goods." The issue then, is whether QUANTUM or GAUB had a contractual right to purchase the second set of disk drives at the time SOONG asked CARGO LINK to arrange for their release. As a matter of law, no contractual right existed

after the expiration of the 30-day option. To suggest that an insurable interest existed simply because there was, at one time, a contract for purchase of the goods is absurd. To rule that an insurable interest runs, in perpetuity, for goods once they are the subject of a sale contract would throw insurance law into chaos. The U.C.C. only contemplates that a person is a buyer while he still has the right to purchase. QUANTUM and GAUB lost that right 30 days after the second set of disk drives arrived in Salt Lake City.

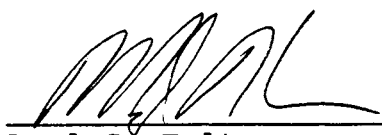
After the 30-day option lapsed, QUANTUM and GAUB had no right, title or interest in the second set of disk drives, and SOONG was free to compel their return out of the foreign trade zone. QUANTUM and GAUB never paid any money for the disk drives in question. QUANTUM had an obligation under the June 8, 1983 agreement (Record at 63) to pay $189,000 within 30 days of the arrival of the goods in Salt Lake City for the second set if it wanted to exercise the option. The record is clear that neither QUANTUM nor GAUB paid any money for the second set of disk drives.

For the reason that neither QUANTUM nor GAUB had an ownership interest in SOONG's second set of disk drives once the option expired, they had no insurable interest in them at the time SOONG picked them up. No "loss" of the property ever occurred. Therefore, this Court should affirm the lower court's ruling that GREAT AMERICAN is entitled to summary judgment on this cause of action.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court affirm the judgment of the Third District Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 1989, I caused four (4) copies of the foregoing BRIEF OF RESPONDENTS to be deposited in the U.S. Mails, first-class postage prepaid, to:

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