

No. 81833-9

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

BY RONALD R. CARPENTER

2009 FEB -5 AM 7:53

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

N. JACK ALHADEFF, *Plaintiff/Respondent*,

v.

KITSAP COMMUNITY FEDERAL CREDIT UNION dba KITSAP CREDIT UNION,
Defendant/Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT N. JACK ALHADEFF

ROSS LAW ADVISORS PLLC
2010 156th Ave. NE, Suite 100
Bellevue, WA 98007
(425) 460-3124

Michael D. Ross
WSBA No. 13891

LAW OFFICE OF JOHN J. MITCHELL
P. O. Box 11287
Bainbridge Isl., WA 98110
(206) 780-8982

John J. Mitchell
WSBA No. 12757

Attorneys for Respondent

ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES..... 1

II. ARGUMENT 1

 A. Standard of Review 1

 B. The Court Of Appeals Was Correct When It
 Determined That Mr. Alhadeff’s Claims Do
 Not Arise Under Article 5 of the UCC 3

 C. The RCW 62A.5-110(1)(b) Warranty Does
 Not Preclude A Breach Of Contract Claim 4

 D. The RCW 62A.5-110(1)(b) Warranty Does
 Not Preclude Mr. Alhadeff’s Tort Claims 8

 E. The RCW 62A.5-110(1)(b) Warranty Does
 Not Preclude Mr. Alhadeff’s Equitable Claims 9

 F. The Letter Of Credit Itself Cannot Be The
 Agreement That Is The Subject Of The
 RCW 62A.5-110(1)(b) Warranty 9

 G. The Article 5 Statute of Limitations Does
 Not Apply To A Cause Of Action That Does
 Not Arise Under Article 5 15

 H. The Court Of Appeals Correctly Chose
 Not To Follow *Krause* 15

III. CONCLUSION 19

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Federal Cases</u>	
<i>Krause v. Stroh Brewing Co.</i> , 240 F. Supp.2d 632 (E.D. Mich. 2002)	1, 15, 16, 17, 18
<u>State Cases</u>	
<i>Artoc Bank and Trust, Ltd. v. Sun Marine Terminals, Inc.</i> , 760 S.W.2d 311 (Tex.App.-Texarkana, 1988), rev'd, 797 S.W.2d 7 (Tex. 1990)	18
<i>Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc.</i> , 123 Wn. App. 863, 870, 99 P.3d 1256 (2004)	8
<i>Fraternal Order of Eagles</i> , 148 Wn.2d 224, 239 59 P.3d 655 (2002)	14
<i>Gorge Lumber Co. v. Brazier Lumber Co.</i> , 6 Wn. App. 327, 334, 493 P.2d 782 (1972)	3
<i>Haines Pipeline Construction, Inc. v. Montana Power Co.</i> , 830 P.2d 1230 (Mont. 1992)	18
<i>Kenney v. Read</i> , 100 Wn. App. 467, 997 P.2d 455 (2000)	12, 15
<i>Rozner v. City of Bellevue</i> , 116 Wn.2d 342, 347, 804 P.2d 24 (1991)	14
<i>Stalter v. State</i> , 151 Wn.2d 148, 155, 86 P.3d 1159 (2004)	1
<i>S.S. Kreske Co. v. Port of Longview</i> , 18 Wn. App. 805, 811, 573 P.2d 1336 (1977)	3

State v. Lorenz,
152 Wn.2d 22, 34, 93 P.3d 133 (2004) 14

State v. Thorne,
129 Wn.2d 736, 763, 921 P.2d 514 (1996)14

Statutes

RCW 62A.1-103 4, 9, 16

RCW 62A.5-101 11, 19

RCW 62A.5-102(j) 13

RCW 62A.5-103(4) 13

RCW 62A.5-108(1) 13

RCW 62A.5-110 18

RCW 62A.5-110(1)(b) 1, 2, 4, 5, 8, 9, 10, 11, 12, 14, 15

RCW 62A.5-115 1, 2, 4, 8, 15, 17

Court Rules

Fed. R. Civ. P. 12(b)(6) 16

Other Authorities

Article 5 of the Uniform Commercial Code ... 1, 2, 3, 6, 7, 15, 16, 17, 19

Restatement (Second) Of Torts § 46 (1965) 8

Restatement (Second) Of Torts § 525 (1977) 8

U.C.C. § 5-110 17, 18

U.C.C. § 5-111	18
U.C.C. § 5-115	17
U.C.C. § 5-102, Official Comment 3	5
U.C.C. § 5-103, Official Comment 2	3, 5, 15
U.C.C. § 5-110, Official Comment 2	10
3 James J. White & Robert S. Summers, Uniform Commercial Code, § 26-2, at 113 (4th ed. 1995)	13
3 James J. White & Robert S. Summers, Uniform Commercial Code, § 26-9, at 164 (4th ed. 1995)	6, 16

I.

COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals err when it held that the one-year statute of limitations under RCW 62A.5-115 does not bar any of Mr. Alhadeff's claims because his claims do not arise under Article 5 of the Uniform Commercial Code?

2. Did the Court of Appeals err when it held that the letter of credit itself cannot be the agreement to which the beneficiary's warranty under RCW 62A.5-110(1)(b) applies?

3. Did the Court of Appeals err when it chose not to follow the holding of *Krause v. Stroh Brewery Co.*, 240 F. Supp.2d 632 (E.D. Mich. 2002) because it is contrary to the principles underlying Article 5 of the Uniform Commercial Code?

II.

ARGUMENT

A. Standard Of Review

In reviewing a decision of the Court of Appeals reversing a grant of summary judgment, this Court engages in the same analysis as the trial court; its review is *de novo*. *Stalter v. State*, 151 Wn.2d 148, 155, 86 P.3d 1159

(2004).

The sole argument on the motion of Defendant Kitsap Community Federal Credit Union (“KCU”) for summary judgment can be summarized as follows: 1) all of the causes of action asserted against it by plaintiff N. Jack Alhadeff arise under Article 5 of the Uniform Commercial Code, specifically, under the warranty provisions of RCW 62A.5-110(1)(b); 2) the statute of limitations for actions arising under Article 5 is one year; 3) this lawsuit was filed more than one year after plaintiff’s causes of action accrued. As a consequence, KCU argued, all of plaintiff’s causes of action against KCU are time-barred. The trial court accepted KCU’s argument and summarily dismissed all of Mr. Alhadeff’s claims against it.

The trial court did not find any material facts in dispute and ruled as a matter of law that Mr. Alhadeff’s sole remedy was under the warranty provisions of RCW 62A.5-110(1)(b) and, as a consequence, that all of his claims against defendant KCU are barred by the one-year statute of limitations in RCW 62A.5-115. The errors committed by the trial court consisted in its application of the law to undisputed facts. The trial court erred in concluding that any, much less all, of Mr. Alhadeff’s claims arise under Article 5 of the UCC and are time-barred under RCW 62A.5-115.

In its Decision, the Court of Appeals correctly applied the law and reversed the trial court, finding that none of Mr. Alhadeff's claims arises under Article 5 and, therefore, none of his claims is time-barred by the one-year statute of limitations. On review, this Court should determine that the Court of Appeals correctly applied the law.

B. The Court Of Appeals Was Correct When It Determined That Mr. Alhadeff's Claims Do Not Arise Under Article 5 of the UCC

The Court of Appeals framed the legal issue as follows:

Article 5, by its very terms, does not govern every aspect of letter of credit transactions but only "certain rights and obligations" relating to letters of credit. As the official U.C.C. comments note, Article 5 "has no rules on many issues that will affect liability with respect to a letter of credit transaction," and it contemplates that statutory and common law rules apply to and supplement its provisions. U.C.C. § 5-103, cmt. 2. Accordingly, Article 5's statute of limitations does not bar any of Alhadeff's claims that do not arise under the Article. **The question then becomes whether his claims do in fact arise under Article 5.**

Decision, p. 9 (Emphasis added).

Relying on well-established law in Washington that "common law principles apply where U.C.C. provisions do not specifically displace them," *id.* at p. 8 (citing *S.S. Kreske Co. v. Port of Longview*, 18 Wn. App. 805, 811, 573 P.2d 1336 (1977) and *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wn. App. 327, 334, 493 P.2d 782 (1972), the comments to the U.C.C. and RCW

62A.1-103,¹ the Court of Appeals concluded that none of Mr. Alhadeff's eight causes of action² is displaced by RCW 62A.5-110(1)(b), and, therefore, none of his claims was time-barred under RCW 62A.5-115.

KCU agrees that common-law principles apply where U.C.C. principles do not **specifically** displace them, but asserts that, in this case, the warranty provisions of RCW 62A.5-110(1)(b) displace all of the common-law and equitable claims asserted by Mr. Alhadeff. KCU maintains that, by characterizing his claims as arising under the common law, or under principles of equity, Mr. Alhadeff is simply attempting to evade Article 5's statute of limitations. The Court of Appeals rejected KCU's argument on numerous grounds. This Court should do so as well.

C. The RCW 62A.5-110(1)(b) Warranty Does Not Preclude A Breach Of Contract Claim

The Court of Appeals properly construed the scope of the warranty

¹RCW 62A.1-103 provides as follows:

Unless displaced by the particular provisions of [the U.C.C.], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

²Plaintiff Alhadeff asserted two breach of contract claims, four tort claims and two equitable claims against KCU. The merits of these claims were not before the trial court on KCU's motion for summary judgment. The only issue was whether they were time-barred under RCW 62A.5-115.

under RCW 62A.5-110(1)(b) to exclude an action for breach of contract:

Article 5's warranty provides that, if the issuer honors the beneficiary's presentation, the beneficiary warrants to the applicant that "the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit." RCW 62A.5-110(1)(b). The official comments to U.C.C. section 5-110 explain:

In most cases the applicant will have a direct cause of action for breach of the underlying contract. This warranty has primary application in standby letters of credit or other circumstances where the applicant is not a party to an underlying contract with the beneficiary. It is not a warranty that the statements made on the presentation of the documents presented are truthful It is a warranty that the beneficiary has performed all the acts expressly and implicitly necessary under any underlying agreement to entitle the beneficiary to honor.

U.C.C. § 5-110, cmt. 2.

Id. at 9-10 (Emphasis added). The Court of Appeals noted that the comment "directly states that an applicant has a 'direct cause of action' for breach of an underlying contract." *Id.* at 10-11. The Court of Appeals also observed as follows:

"The contract between the applicant and beneficiary is not governed by Article 5, but by applicable contract law, such as Article 2 or the general law of contracts." U.C.C. § 5-102, cmt. 3. As Professors White and Summers have noted:

In most commercial letters of credit cases the warranty will not give the applicant more than it already has. In those cases the very same act that will be a breach of the warranty is likely also to be a breach of an underlying contract and so give the applicant a claim under Article 2 of the UCC or other law. **Note, however, that the applicant's rights under Article 5 are unlikely to be coextensive with those under Article 2. For example, . . . Article 5 has a one-year statute of limitations, Article 2 has a four-year statute.**

3 James J. White & Robert S. Summers, Uniform Commercial Code, § 26-9, at 164 (4th ed. 1995). The same reasoning applies to an underlying contract governed by common law contract rules: a party to an underlying contract has a separate cause of action for breach of that contract, governed by general principles of contract law, including the longer statute of limitations.(fn3)

Id. at 11 (emphasis added).

In the Court of Appeals, KCU attempted to avoid the legal effect of the authorities cited above by arguing the merits of Mr. Alhadeff's two causes of action for breach of contract: his First Cause of Action for breach of KCU's agreement to make valid certifications to Wells Fargo Bank upon drawing on the letter of credit; and his Second Cause of Action for breach of KCU's agreement to pay to Mr. Alhadeff ten percent of the net proceeds from sales of the individual condo units. KCU argued that there was insufficient evidence of any contract offered in opposition to its motion for summary

judgment. The Court of Appeals properly pointed out, however, as follows:

The Credit Union argues that Alhadeff's breach of contract claims fail because there was no contract between them. But the Credit Union moved for summary judgment based on the statute of limitations only, and the trial court ruled only that the statute of limitations barred all of Alhadeff's claims. Whether the contract in fact existed is beyond the scope of the Credit Union's motion.

Id. at 15, fn. 6.

In its Petition For Review, KCU makes the same argument regarding the absence of any "contract" between it and Mr. Alhadeff, ignoring that the merits of Mr. Alhadeff's contract claims were not before the trial court, nor are they before this Court for review. Indeed, as the Court of Appeals stated:

Alhadeff claims that the exchange of letters between him and the Credit Union created a contract that the credit union breached by (1) drawing on the letter of credit even though Meridian was in default on the construction loan, and (2) refusing to pay him 10 percent of the proceeds from the construction project. Although these claims may rely on the same alleged conduct that would be subject to an Article 5 warranty claim, the claims are based on the alleged contract, not Article 5's warranty. **If Alhadeff can prove an enforceable contract, he is entitled to its benefits. And these claims do not arise under Article 5. Rather, they supplement Alhadeff's Article 5 warranty rights and the one-year statute of limitations does not bar them. The same analysis applies to Alhadeff's equitable and tort claims. Because none of them are based on the warranty, the warranty's statute of limitations does not bar them.**

Id. (Footnote omitted; emphasis added).

D. The RCW 62A.5-110(1)(b) Warranty Does Not Preclude Mr. Alhadeff's Tort Claims

Just as KCU attempts to raise the issue of the merits of Mr. Alhadeff's two breach of contract claims, KCU challenges the merits of his tort claims as well. In the Court of Appeals, KCU stated as follows regarding the tort claims:

[Mr. Alhadeff] cannot reasonably assert common law tort claims. All of the actions alleged . . . as negligent involve [KCU's] alleged wrongful certifications upon drawing on the letter of credit. [Mr. Alhadeff] can point to no duty—independent from and meaningfully different than [*sic*] any duty implicit in the letter of credit relationship arising under Article 5—that may have been breached. . . .

Brief of Respondent, p. 10. As the Court of Appeals noted, the merits of Mr. Alhadeff's claims were **not** before the trial court on KCU's motion for summary judgment, which motion was only based on the statute of limitations of RCW 62A.5-115.

Moreover, Mr. Alhadeff's Sixth Cause of Action is for conversion, an intentional tort. KCU neglects to mention that a preexisting duty is **not** a required element of an intentional tort. *Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc.*, 123 Wn. App. 863, 870, 99 P.3d 1256 (2004) (*citing* Restatement (Second) Of Torts § 46 (1965) (infliction of emotional distress) and § 525 (1977) (fraudulent misrepresentation)).

E. The RCW 62A.5-110(1)(b) Warranty Does Not Preclude Mr. Alhadeff's Equitable Claims

With respect to the equitable claims, KCU states only as follows:

“[Mr. Alhadeff] cites no equitable claim that is meaningfully different than [*sic*] what [he] could have asserted as a breach of RCW 62A.5-110(1)(b)'s warranty.” Brief of Respondent, p. 10. KCU provides no analysis for this assertion, which is contrary to the rule stated in RCW 62A.1-103, *i.e.*, that, unless displaced by a specific provision of the U.C.C., the principles of law and equity supplement the provisions of the U.C.C.

F. The Letter Of Credit Itself Cannot Be The Agreement That Is The Subject Of The RCW 62A.5-110(1)(b) Warranty

RCW 62A.5-110(1)(b) provides as follows:

(1) If its presentation is honored, the beneficiary warrants:

...

(b) To the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.

The Court of Appeals discussed the examples provided in the Official Comments to U.C.C. § 5-110 to illustrate the warranty's application:

The comments provide two examples to illustrate the warranty's application. In the first example, a

seller/beneficiary breaches an underlying sales contract by delivering defective goods. When the bank honors the beneficiary's draw on the letter of credit, the beneficiary has also breached its warranty to the applicant/buyer. U.C.C. § 5-110, cmt. 2. In this situation, the applicant has both a breach of warranty and a breach of contract claim against the beneficiary. In the second example, **a beneficiary is authorized to draw on the letter of credit only upon the applicant's default under another agreement; the beneficiary breaches the warranty by drawing on the letter of credit when the applicant is not in default.** U.C.C. § 5-110, cmt. 2. In this situation, the beneficiary has breached its warranty even in the absence of an underlying contract between the beneficiary and the applicant. In either case, the breach of warranty arises "not because the statements [in the documents presented to the issuer] are untrue but because the beneficiary's drawing violated its express or implied obligations in the underlying transaction." U.C.C. § 5-110, cmt. 2.

Decision, p. 10 (emphasis added). The gist of KCU's warranty under RCW 62A.5-110(1)(b) is that its three draws on the letter of credit did not violate some **agreement**, *i.e.*, either an agreement between KCU and Mr. Alhadeff *inter se*, or, some "other agreement intended by [KCU and Mr. Alhadeff] to be augmented by the letter of credit." Thus, the RCW 62A.5-110(1)(b) warranty is given with respect to some agreement to which the beneficiary (here, KCU) is a party.

In the trial court, while attempting to distance itself from the contracts Mr. Alhadeff alleged he had with KCU, KCU took the position that it had no

contractual relationship with Mr. Alhadeff: “There is simply no relationship between the parties other than that arising from the Letter of Credit.” CP 123, ll. 5-7. The trial judge agreed with KCU and made the following finding, which reflects a misunderstanding of the operation of RCW 62A.5-110(1)(b):

I find that the sole relationship that exists between the plaintiff and the beneficiary, Kitsap Credit Union, is through the letters [*sic*] of credit that were presented by the issuer, Wells Fargo. The applicant for that was Mr. Alhadeff.

RP 30.³

Recognizing that a breach by the “beneficiary” of the warranty under RCW 62A.5-110(1)(b) involves a breach of some “agreement,” and not the breach of some “relationship,” KCU modified its argument somewhat in the Court of Appeals to assert that the letter of credit itself is the “agreement” that the beneficiary under a letter of credit warrants when it draws on the letter of credit.

The Court of Appeals rejected this argument and concluded that the letter of credit itself cannot be the “agreement” to which RCW 62A.5-

³There was only one letter of credit issued by Wells Fargo. The letter of credit was not “presented” by the bank; instead, upon each of its three draws, the beneficiary of the letter of credit, KCU, “presented” to Wells Fargo a sight draft together with a letter containing the certification required under the letter of credit, without which Wells Fargo would not have disbursed funds. (A copy of the letter of credit is at CP 104; the sight drafts and accompanying letters are at CP 107-113).

110(1)(b) refers. Notwithstanding KCU's criticism of the Court of Appeals for reaching "this conclusion without any meaningful authority or analysis," Petition For Review, p. 7, the Court of Appeals was correct.

Under RCW 62A.5-110(1)(b), the beneficiary warrants that its drawing on the letter of credit does not violate some agreement in one of two circumstances, *i.e.*, either an agreement between the applicant (here, Mr. Alhadeff) and the beneficiary (KCU), or some "other agreement intended by them to be augmented by the letter of credit." KCU takes the position that it has no agreement with Mr. Alhadeff. Thus, for KCU to have made a warranty as a matter of law under RCW 62A.5-110(1)(b), there must be some "other agreement intended by them to be augmented by the letter of credit."

The Court of Appeals concluded that "[i]t strains the language of RCW 62A.5-110(1)(b) to interpret 'any agreement between the applicant and beneficiary' to include the letter of credit itself." Decision, p. 12. This conclusion is based on the actual relationships between and among the parties to a transaction involving a letter of credit. The Court of Appeals cited *Kenney v. Read*, 100 Wn. App. 467, 997 P.2d 455 (2000) for its description of the relationships of the parties involved in a letter of credit. KCU argues that somehow the Court of Appeals "read too much into *Kenney*" and that the

Court of Appeals' "application of *Kenney* is irrelevant." Petition For Review, 8. To the contrary, *Kenney's* description of the letter of credit itself as a relationship only between the issuer (here, Wells Fargo) and the beneficiary (KCU) is consistent with both RCW 62A.5-102(j) and 62A.5-103(4). RCW 62A.5-102(j) defines a "[l]etter of credit" to mean a "definite undertaking . . . by an issuer to a beneficiary . . . to honor a documentary presentation by payment" RCW 62A.5-103(4), as the Court of Appeals pointed out:

[P]rovides that the rights and obligations of an issuer to a beneficiary are independent of the arrangements underlying a letter of credit. In other words, "the issuer must pay on a proper demand from the beneficiary even though the beneficiary may have breached the underlying contract with the applicant." 3 White & Summers, *supra*, § 26-2, at 113. For this reason, Wells Fargo was obligated to disburse funds to Kitsap Credit Union when the credit union presented a draft accompanied by a conforming statement. RCW 62 A. 5-108(1). Alhadeff makes no claims that Wells Fargo wrongfully honored Kitsap Credit Union's drafts.

Decision, p. 11, fn. 4. Furthermore, the Court of Appeals properly cited to the letter of credit involved in *Kenney* as an example of what Professors White and Summers have termed the "independence principle," which "states that the bank's obligation to pay the beneficiary is independent of the beneficiary's performance on the underlying contract." *Id.* (citing 3 J. White & Summers, *Uniform Commercial Code*, § 26-2, at 164 (4th ed. 1995)).

KCU takes the position that its warranty under RCW 62A.5-110(1)(b) involves the second circumstance where there was some “other agreement intended by them to be augmented by the letter of credit.” This “other agreement.” KCU maintains, was the letter of credit itself. The Court of Appeals disposed of this argument as follows: “To interpret this language to include the letter of credit as augmented by the letter of credit would be just as strained [as an interpretation of “any agreement between the applicant and the beneficiary” to include the letter of credit itself].” Decision, p. 12 (*citing Fraternal Order of Eagles*, 148 Wn.2d 224, 239 59 P.3d 655 (2002) (court will avoid interpretation of a statute that results in “unlikely, absurd, or strained consequences”)). Indeed, KCU does not attempt to explain just how the “agreement intended by [the applicant and the beneficiary] to be augmented by the letter of credit” could possibly be the letter of credit itself.

Not only is KCU’s interpretation of RCW 62A.5-110(1)(b) strained, it violates the plain meaning rule.

The plain meaning rule requires courts to derive the meaning of the statute from the “wording of the statute itself.” *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). Only if the statute is determined to be ambiguous, will a court look to the legislative intent in enacting it. *State v. Thorne*, 129 Wn.2d 736, 763, 921 P.2d 514 (1996).

State v. Lorenz, 152 Wn.2d 22, 34, 93 P.3d 133 (2004). Under the “plain

meaning” of RCW 62A.5-110(1)(b), which is not in any way ambiguous, the “agreement intended by [the applicant and the beneficiary] to be augmented by the letter of credit” cannot be the letter of credit itself.

G. The Article 5 Statute of Limitations Does Not Apply To A Cause Of Action That Does Not Arise Under Article 5

KCU seems to ignore the express language of RCW 62A.5-115, which provides that the one-year statute of limitations applies only to “[a]n action to enforce a right or obligation **arising under** this Article [5].” If Mr. Alhadeff’s claims do not “arise under” Article 5, they are not governed by its statute of limitations.

H. The Court Of Appeals Correctly Chose Not To Follow *Krause*

KCU continues to rely on *Krause v. Stroh Brewery Co.*, 240 F. Supp. 2d 632 (E.D. Mich. 2002), a case that remains without citation in any other reported decision. The Court of Appeals chose not to follow *Krause*, which might be good law in Michigan, but is inconsistent with the law of the State of Washington, explaining its reasoning as follows:

But the *Krause* court failed to recognize the separate nature of a contract underlying a letter of credit transaction. *See Kenney*, 100 Wn. App. at 472 (typical letter of credit transaction involves three separate and distinct transactions). As the comments to the U.C.C. make clear, Article 5 is supplemented by “many rules of statutory and common law.” U.C.C. § 5-103 cmt. 2. And Washington’s version of the

U.C.C. states that "[u]nless displaced by the particular provisions of [the U.C.C.], the principles of law and equity . . . shall supplement its provisions." RCW 62 A. 1-103. Professors White and Summers explain that in most letters of credit cases, "the warranty will not give the applicant more than it already has. In those cases the very same act that will be a breach of the warranty is likely also to be a breach of an underlying contract." 3 White & Summers, *supra*, § 26-9, at 164. Thus, a party that bargains for additional protections in an underlying contract is entitled to the benefit of that protection. And general principles of contract law, including the statute of limitations on a contract action, govern claims for breach of an underlying contract. 3 White & Summers, *supra*, § 26-9, at 164. Because the Krause court's holding is contrary to the principles underlying Article 5, we do not follow it.

Decision, pp. 12-13.

The Court of Appeals did not, however, address another reason why *Krause* cannot be used as authority to dismiss Mr. Alhadeff's tort claims. The plaintiff shareholders in *Krause* asserted tort claims for negligence and conversion, as well as claims for breach of contract/implied contract/third-party beneficiary, unjust enrichment and promissory estoppel. Defendant Strow Brewery Co. filed its motion pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The district court judge dismissed the claims for breach of contract/implied contract/third-party beneficiary, unjust enrichment and promissory estoppel, concluding that these claims all arose under the underlying contract between Stroh and Northland

Beverage Corporation and, therefore, were governed by Michigan's version of UCC §§ 5-110 and 5-115 and time-barred under the one-year statute of limitations.

The district court dismissed the shareholders' tort claims as well, but the basis for the court's dismissal of the tort claims had nothing to do with Article 5 of the U.C.C.; instead, the dismissal of the tort claims was based on their merits, under Michigan common law:

Plaintiffs' two tort claims shall also be DISMISSED. "As a general rule, there must be some active negligence or misfeasance to support a tort. There must be some breach of duty distinct from breach of contract." In other words, "the threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." With regard to the tort claims . . . Plaintiffs' [*sic*] allege that they arise out of the same agreement as do Plaintiffs' Counts II – IV. Therefore, Plaintiffs' tort claims shall be DISMISSED because they do not arise out of a separate and distinct legal duty as does the contractual obligation.

Krause, supra, 240 F. Supp.2d at 636 (citations omitted). The *Krause* court dismissed the tort claims on their merits under Michigan common law, not as time-barred under Article 5 of the U.C.C. The trial court, however, dismissed all of Mr. Alhadeff's claims as time-barred under RCW 62A.5-115. The merits of Mr. Alhadeff's claims, including his causes of action for negligence and conversion, were not before the trial court on KCU's motion

for summary judgment. Mr. Alhadeff's tort claims are not before this Court, as the tort claims were before the district court in *Krause*. Thus, *Krause* cannot constitute a basis for dismissing plaintiff's tort claims.

KCU has never addressed this aspect of the *Krause* case. Its failure to do so suggests its inability to do so. The Court of Appeals did not analyze this aspect of *Krause* because it rightfully chose not to follow *Krause* for other reasons. This Court, however, should not overlook the complete absence of any authority presented by KCU for the dismissal of Mr. Alhadeff's tort claims.

Finally, although it appears that *Krause* is the only reported decision addressing the revised version of U.C.C. § 5-110, other cases have involved litigation under the former U.C.C. § 5-111, which was amended and recodified in Washington as RCW 62A.5-110. In at least two cases, *Artoc Bank and Trust, Ltd. v. Sun Marine Terminals, Inc.*, 760 S.W.2d 311 (Tex.App.-Texarkana, 1988), *rev'd*, 797 S.W.2d 7 (Tex. 1990) and *Haines Pipeline Construction, Inc. v. Montana Power Co.*, 830 P.2d 1230 (Mont. 1992), the plaintiffs asserted claims for breach of the warranty of presentment under former U.C.C. § 5-111, as well as common-law breach of contract claims, based on the same conduct involved in the case at bar, to wit: false

statements made by a beneficiary in its draw request to obtain payment on the letter of credit. In neither case were the common-law claims rejected because they were displaced by Article 5; instead, they rose or fell on their own merits.

III.

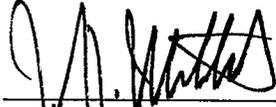
CONCLUSION

Article 5 of the U.C.C. is little known or understood, even among commercial litigators. The reported decisions involving Article 5, both before and after the sections that are relevant on this appeal were revised in 1997, are very few. The trial court's misapprehension of the issues involved on KCU's motion for summary judgment are the result, in part, of the obscurity and complexity of Article 5. With the benefit of the time and concentration necessary to grapple with the difficult issues presented in this case, the Court of Appeals analyzed the law and issued a thorough and convincing decision. In doing so, the Court of Appeals reversed the trial court and granted Mr. Alhadeff his day in court to pursue his claims on their merits against KCU.

This Court should conclude that the Court of Appeals was correct and affirm its decision.

RESPECTFULLY submitted this 5th day of February, 2009.

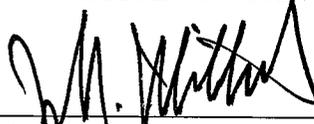
ROSS LAW ADVISORS PLLC



FOR

Michael D. Ross
WSBA No. 13891

LAW OFFICE OF JOHN J. MITCHELL



John J. Mitchell
WSBA No. 12757
Attorneys for Appellant
N. Jack Alhadeff

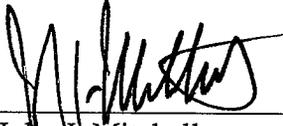
CERTIFICATE OF SERVICE

JOHN J. MITCHELL declares as follows:

On February 5, 2009, I deposited into the U.S. Mail, with postage prepaid, a copy of the Supplemental Brief Of Respondent N. Jack Alhadeff in this matter addressed to the attorney for Petitioner as follows:

Frank R. Siderius, Esq.
Siderius Lonergan & Martin LLP
500 Union St., Ste. 847
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed on Bainbridge Island, Washington on February 5, 2009.



John J. Mitchell