

2015

**Reperex, Inc., a Utah Corporation, Brad Ball, and David Ball,  
Plaintiffs-Appellants v. Child, Van Wagoner & Bradshaw PLLC, a  
Utah Limited Liability Company, J. Russton Bradshaw, Coldwell  
Banker Commercial, and Duane Bush, Defendants-Appellees :  
Brief of Appellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

REPEREX, INC., a Utah Corporation,  
BRAD BALL, and DAVID BALL,

Plaintiffs-Appellants

v.

CHILD, VAN WAGONER &  
BRADSHAW PLLC, a Utah Limited  
Liability Company, J. RUSSTON  
BRADSHAW, COLDWELL BANKER  
COMMERCIAL, and DUANE BUSH,

Defendants-Appellees

**BRIEF OF APPELLEE**

Appellate Case No. 20150246-SC

District Court No. 110916924

APPEAL FROM JUDGMENT ON THE PLEADINGS, SUMMARY JUDGMENT  
AND FINAL JUDGMENT FROM VERDICT  
ENTERED BY JUDGE TODD M. SHAUGHNESSY  
THIRD DISTRICT COURT FOR SALT LAKE COUNTY

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UTAH APPELLATE COURTS

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## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction pursuant to Utah Code Ann. 78A-4-103(2)(j) (“cases transferred to the Court of Appeals from the Supreme Court). The Supreme Court has jurisdiction pursuant to Utah Code Ann. 78A-3-102(j) (“Orders, judgments, and decrees of any court over which the Court of Appeals does not have original appellate jurisdiction.”).

## **STATEMENT OF ISSUES FOR REVIEW**

Bradshaw generally agrees with Reperex’s statement of issues for review, except as noted hereinafter:

Subpart (c): the issue is properly framed as whether the District Court erred in granting summary judgment to the accountant pursuant to Utah Code Ann. 58-26a-602. Unfortunately, Reperex’s brief omits a statement of constitutional provisions, statutes, etc. whose interpretation is determinative, as required by Utah R. App. P. 24(a)(6), wherein the text of this statute is stated. However, as will be more fully discussed hereinafter, that statute states that an account is not liable to persons with whom they are not in privity of contract for civil damages, except for fraud, or where the accountant (a) knew that the primary intent was to benefit third parties, and (b) it was identified in writing that the professional services performed on behalf of the client were intended to be relied upon by the third party seeking to establish liability. *See* Utah Code Ann. 58-26a-602.

The trial court concluded that there was no dispute of fact that Bradshaw: (1) was not in privity of contract with Reperex, and (2) that there was no writing sufficient to meet the requirements of Utah Code Ann. 58-26a-602(2)(b). As such, the proper question for review is whether the Trial Court properly granted summary judgment where the undisputed facts demonstrated that the accountant had no contractual privity with Reperex, did not provide any direct services to Reperex, and where Bradshaw did not identify in writing to Mays, his client, that the professional services he performed on behalf of Mays, and not Reperex, were intended to be relied upon by Reperex.

Subpart (d): The issue presented for appeal is more properly whether the Trial Court properly granted summary judgment based on Utah Code Ann. 58-26a-602, where Reperex was unable to identify any written document from Bradshaw to Mays in which Bradshaw identified in writing to Mays that the professional services he performed on Mays' behalf were intended to be relied upon by Reperex.

Although Reperex states that there were "numerous writings, emails and documents from the accountant," none of those documents evidence any of the requirements of Utah Code Ann. 58-26a-602. None of the documents referenced were to Mays or directed to Mays, none indicate that services were performed with the intent that any party rely on Bradshaw's services. Indeed, the single email referenced by Reperex was sent by Bradshaw to Mays' business sale broker some four months before Reperex became interested in purchasing Mays' business, and therefore could not have identified Reperex as the "particular person," since Reperex was not then known to Bradshaw, Mays, or Mays' broker.

Subpart (e): in stating the issue for appeal, Reperex misstates the actual claims alleged in its Complaint against Bradshaw. Reperex alleged the following counts: I Fraud; II Negligent Fraud (essentially negligent misrepresentation) and III Breach of Fiduciary Duty of Bradshaw. The trial court made a specific and express finding at summary judgment that there was no duty owed from Bradshaw to Mays due to the lack of privity, and the lack of any written communication indicating an intent that Reperex rely on Bradshaw's professional services provided to Mays, and not Reperex. Further, Reperex never alleged the cause of action of Fraudulent Nondisclosure, which is a separate cause of action from Fraud. Accordingly, the more appropriate statement for appeal is whether the trial court erred in disallowing Appellants' instruction where said instruction includes an express duty requirement, and the trial court had already concluded that there was no duty owed from Bradshaw to Reperex.



## **DETERMINATIVE STATUTES**

The following statute is determinative as to this appeal:

### **Utah Code Ann. 58-26a-602. Privity**

A licensee, a CPA firm registered under this chapter, and any employee, partner, member, officer, or shareholder of a licensee or CPA firm are not liable to persons with whom they are not in privity of contract for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by that person, except for:

- (1) Acts, omissions, decisions, or conduct that constitute fraud or intentional misrepresentations; or
- (2) Other acts, omissions, decisions or conduct, if the person performing the professional services:
  - a. Knew that the primary intent of the client was for the professional services to benefit or influence the particular person seeking to establish liability; and
  - b. Identified in writing to the client that the professional services performed on behalf of the client were intended to be relied upon by the particular person seeking to establish liability.

## **STATEMENT OF THE CASE**

The case pertains to claims brought by Reperex against J. Russton Bradshaw, a professional CPA, and Child Van Wagoner & Bradshaw, an accounting firm where Mr. Bradshaw was employed. Bradshaw served as the tax accountant for Steve Mays and Mays Custom Tile (hereinafter, collectively, "Mays"), which was a business that Reperex and the Balls purchased. Reperex thereafter alleged claims against Bradshaw for: 1) Fraud; 2) Negligent Fraud; and 3) Breach of Fiduciary Duty of Bradshaw. Reperex's counts 2 and 3 were dismissed at summary judgment, wherein the court found it to be undisputed that Bradshaw was not in contractual privity with Reperex, and owed no duty based on the parties' relationship, or lack thereof. Reperex's fraud claim was tried to a jury, wherein the jury rendered a unanimous verdict in favor of Bradshaw. In that trial, the court refused to give a jury instruction on the claim of Fraudulent Nondisclosure, as such instruction contains a duty element, and the court had already determined that Bradshaw owed no independent duty to Reperex.

## **STATEMENT OF FACTS**

1. Child Van Wagoner & Bradshaw and J. Russton Bradshaw (collectively “Bradshaw”) were hired on a contract basis by Steve Mays to prepare tax returns for an entity known as Mays Custom Tile (hereinafter “Mays”). (Rec. 1029, ¶ 1; 1045, ¶ 4).

2. The tax returns Bradshaw was contracted to provide to Mays were prepared in the ordinary course of business, and were not prepared pursuant to any specific transaction or undertaking. (Rec. 1029, ¶ 2; 1045, ¶ 5).

3. Mays’ in-house bookkeeper maintained QuickBooks records for Mays, and provided information to Bradshaw in order to allow Bradshaw to prepare tax returns. (Rec. 1029, ¶ 4; 1045, ¶ 7).

4. In February or March of 2008, Mays contacted Bradshaw and requested that Bradshaw print off QuickBooks files provided to Bradshaw by Mays’ bookkeeper, so that Mays could provide those documents to a prospective buyer apparently named Cobb. (Rec. 1030, ¶ 10; 1046, ¶ 13).

5. Bradshaw engaged in limited email discussions with Mays and Mays’ broker, Duane Bush, regarding the documents he had provided. (Rec. 1118-1138). However, none of those emails refer in any way to attestation services to be provided to Mr. Cobb or any other buyer. (*See id.*). Further, none of those emails contain any statement that Bradshaw intended for Mr. Cobb, or any other buyer, to rely on the services provided by Bradshaw to Mays. (*See id.*).

6. At the time the emails referenced in Paragraph 5 were provided, in February and March of 2008, Reperex and the Balls had not commenced reviewing Mays' business for purchase, and were not known to Bradshaw. (Rec. 1047, ¶ 20).

7. Mr. Cobb did not purchase Mays' business for reasons unknown to Bradshaw. (Rec. 1030, ¶ 12; 1046 ¶ 15).

8. In August of 2008, Mays again contacted Bradshaw and asked for financial documents to be printed off. (Rec. 1030, ¶ 13; 1046, ¶ 16).

9. Mays stated that he did not know how to print off the documents, and requested that the new buyer, Reperex, come with Mays and Duane Bush to Bradshaw's office to review the documents. (Rec. 1030, ¶ 14-15; 1046, ¶ 17-18).

10. Brad and David Ball, Mays, and Mays' broker Duane Bush came to Bradshaw's office on August 11, 2008. (Rec. 1031, ¶ 16; 1047, ¶ 19).

11. Bradshaw had no interaction with Dave or Brad Ball prior to the August 11, 2008 meeting. (Rec. 1031, ¶ 17; 1047, ¶ 20). The fact that Bradshaw had never met the Balls or anyone from Reperex prior to August 11, 2008 was undisputed by Reperex at summary judgment. (Rec. 1100).

12. Bradshaw did not and never has entered into a contract with Reperex, Brad or David Ball to provide accounting services to those parties. (Rec. 1031, ¶ 18; 1047, ¶ 21; 1100 at response to ¶ 18).

13. In fact, in summary judgment briefing, Reperex did not dispute that Bradshaw did not enter into a contract with Reperex to provide accounting services to

Reperex, David or Brad Ball. (Rec. 1100). Instead, at that time, Reperex claimed only that it was a “third-party beneficiary” of Bradshaw’s contract with Mays. (Rec. 1100).

14. Reperex’s own expert stated that there was nothing in his review of interactions between Reperex and Bradshaw that could allow him to conclude that Reperex was Bradshaw’s “client” in any respect, nor could he conclude that Bradshaw provided accounting services to Reperex. (Rec. 1271-74, 1314:21-25, 1315:1-2, 1317:18-25, 1320:10-18).

15. Although Reperex frequently states that “attestation services” were provided by Bradshaw to Reperex, there is no citation to the record to any agreement, email, contract, or other evidence which would support the conclusion that any such services were provided by Bradshaw to Reperex. (Rec. 1369, ¶ 2).

16. As such, Reperex provided no facts at summary judgment which would indicate a dispute of fact as to whether Reperex enjoyed contract privity with Bradshaw in any respect, and the trial court determined that this fact was undisputed. (*id.*).

17. Additionally, Bradshaw did not provide to Mays, Bush, or Reperex any document indicating that Bradshaw intended for Reperex to rely on accounting services he had provided to Mays. (Rec. 1032, ¶ 24; 1048, ¶ 27).

18. In summary judgment briefing, Reperex did not dispute that Bradshaw had not identified Reperex in writing nor provided any document to Reperex, Mays, Bush, or any other party indicating that Bradshaw intended for Reperex to rely on his accounting services. (Rec. 1103 at response to ¶ 24).

19. Instead, Reperex only referred to the emails between Bradshaw and Mays/Bush, which occurred several months prior to the time Reperex began investigating the purchase of Mays' business, which referred to a prior potential buyer, which emails did not and could not have identified Reperex as a party intended to rely on Bradshaw's services, and which in fact do not establish that any party was intended to rely on Bradshaw's accounting services provided to Mays. (Rec. 1118-1138).

20. As a result, the trial court found that it was undisputed that there was "no writing from Bradshaw to either Mays, Mays Custom Tile, or [Reperex] in which it was asserted by [Bradshaw] that [Reperex] was entitled to rely on the accounting services and information provided by [Bradshaw] to Mays and Mays Custom Tile. (Rec. 1369, ¶ 3).

21. At the August 11<sup>th</sup> meeting, Bradshaw printed and handed various documents to Reperex. (Rec. 1031, ¶ 19; 1047, ¶ 23).

22. It is undisputed that Bradshaw had no further interactions with Reperex after the August 11<sup>th</sup> meeting. (Rec. 1032, ¶ 28; 1048, ¶ 31; 1105).

23. In light of the undisputed facts above – namely, 1) there undisputedly is no contractual privity between Bradshaw and Reperex, and 2) there undisputedly is no written document from Bradshaw indicating to Mays that Reperex was intended by Bradshaw to rely on the accounting services provided by Bradshaw to Mays, the court granted Bradshaw's Motion for Summary Judgment in part, dismissing Reperex's second cause of action (Negligent Fraud) and third cause of action (breach of duty). (Rec. 1368-70).



24. A four-day jury trial was held with respect to Reperex's fraud claim against Bradshaw. (Rec. 1825-1828).

25. At the conclusion of the parties' respective cases, Reperex moved the court to instruct the jury on Fraudulent Nondisclosure, found at Instruction No. CV1811 of the Model Jury Instructions, 2d ed. (Rec. 1828, p. 6:11 – 12:2).

26. Bradshaw opposed the instruction on the basis that: 1) the instruction was with respect to a separate claim that had not been alleged by Reperex as plaintiff, and 2) the court had already determined that there was no duty owed by Bradshaw to Reperex. (*id.*).

27. The court declined to instruct the jury as to Fraudulent Nondisclosure, which contains a duty element, on the basis that the court had already ruled that Bradshaw did not owe Reperex a duty as a result of 58-26a-602 of Utah Code Annotated, and the fact that Reperex was unable to provide any case law indicating that an independent duty was owed between parties in the respective roles that Reperex and Bradshaw held during this transaction. (Rec. 1828, p. 11:21-25, 12:1-2).

28. The jury ultimately rendered a unanimous verdict against Reperex and in favor of Bradshaw on Reperex's fraud claim. (Rec. 1790).

## **SUMMARY OF ARGUMENTS**

### **1) Dismissal of Reperex's Negligent Fraud and Breach of Fiduciary Duty Claims.**

Utah Code Ann. 58-26a-602 states that an accountant is not liable to a party with whom he or she lacks privity of contract for the accountants' acts, omissions, decisions, or other conduct in connection with professional services, unless the accountant knew that the primary intent of the client was for the professional services to benefit or influence the particular person seeking to establish liability; and the accountant identified in writing to the client that the professional services performed on behalf of the client were intended to be relied upon by the particular person seeking to establish liability. Reperex is not in contractual privity with Bradshaw – there is no contract, agreement, or even any facts which would suggest a contract between those parties. Therefore, under the cited section of code, in order to demonstrate that a duty exists between Reperex and Bradshaw, Reperex must show that there was a written statement or agreement in which Bradshaw expressly identified, in writing, to Mays that Bradshaw intended for Reperex to rely on Bradshaw's professional accounting services. Because Reperex cannot identify such a writing, Bradshaw owed no fiduciary or other legal duty to Reperex, and Reperex's claims requiring a showing of duty were properly dismissed.

### **2) The Trial Court Properly Declined to Instruct the Jury Regarding Fraudulent Nondisclosure.**

Reperex sought to instruct the jury on Fraudulent Nondisclosure. That claim requires a showing of a duty or other obligation owed by the nondisclosing party to the party failing to receive the requested information. Because the trial court properly

determined that Bradshaw owed no duty to Reperex pursuant to Utah law, the trial court properly determined that the requested instruction was not relevant to the case and should not be given to the jury. Additionally, Reperex did not allege fraudulent nondisclosure in its complaint, and failed at any time to attempt to amend its pleadings to conform to evidence, even if such evidence were produced at trial, which it was not.

## ARGUMENT

### **I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON REPEREX'S NEGLIGENCE AND BREACH OF DUTY CLAIMS.**

The trial court's ruling to dismiss Reperex's negligence and breach of duty claims was proper based on the facts, or lack thereof, demonstrated by Reperex to the trial court at summary judgment. In order to prevail on a claim of negligent misrepresentation, a plaintiff must demonstrate the existence of a duty running between the parties. *Smith v. Frandsen*, 2004 UT 55, ¶ 9, 94 P.3d 919. [A] duty to disclose is a necessary element of the tort of negligent misrepresentation. *Id.* at ¶ 11. It would seem apparent that a claim of breach of duty also requires a finding of a relationship between parties that would create such a duty.

Utah law is clear as to the limitations and required events in order to create a duty between a professional accountant and a party who does not enjoy contractual privity with the accountant. Section 58-26a-602 of Utah Code Annotated unambiguously sets forth a default rule with two exceptions:

A licensee, a CPA firm registered under this chapter, and any employee, partner, member, officer, or shareholder of a licensee or CPA firm are not liable to persons with whom they are not in privity of contract for civil damages resulting from acts, omissions, decisions, or other conduct in connection with professional services performed by that person, except for:

- (1) Acts, omissions, decisions, or conduct that constitute fraud or intentional misrepresentations; or
- (2) Other acts, omissions, decisions or conduct, if the person performing the professional services

- a. Knew that the primary intent of the client was for the professional services to benefit or influence the particular person seeking to establish liability; and
- b. Identified in writing to the client that the professional services performed on behalf of the client were intended to be relied upon by the particular person seeking to establish liability.

Utah Code Ann. 58-26a-602. Accordingly, if there not contractual privity between the person seeking to establish liability, there must exist: 1) demonstrated knowledge of the accountant that the primary intent of the client was to benefit the third party, and 2) the accountant must identify in writing to the client that the accounting services rendered were intended to be relied upon by the particular person seeking to hold the accountant liable. *Id.* As the Utah Supreme Court has held, “the contours of [Utah Code Ann. 58-26a-602] are clear,” and “unambiguously sets forth the above default rule with two exceptions ...” *Reynolds v. Bickel*, 2013 UT 32, ¶¶ 10, 12, 307 P.3d 570. Plainly, then, the party seeking to establish liability must establish either contractual privity or the two step requirement of the statute.

A. Reperex Failed to Demonstrate Contractual Privity with Bradshaw.

There are no facts in the record which would suggest that the trial court erred in finding that, undisputedly, there is no contractual privity between Bradshaw and Reperex. Although here, as below, Reperex makes repeated assertions that the parties had contracted with one another, and/or that Bradshaw “agreed” to provide “attestation services” to Reperex, Reperex does not and cannot cite to any fact provided to the trial court which would support those conclusions. (*See Appellants’ Brief at p. 36-37*).

While arguing for privity, Reperex actually argues against privity wherein Reperex concedes that it was, at best, a third-party beneficiary of the contract between Bradshaw and Mays: “this agreement wherein Mr. May would provide the company accountant was an agreement where the Balls would be the third party beneficiary of Bradshaw’s which Mr. May bought and paid for.” (Appellant’s brief at 37; *see also* Rec. 1113). Even if the third-party beneficiary relationship were supported by facts, which it is also not, Reperex cites to no case law or other authority indicating that a third party beneficiary is tantamount to contractual privity, much less that such a situation would trigger liability under Utah Code Ann. 58-26a-602. Reperex therefore shoots down its own argument as to privity by conceding that it was, at best, a third party beneficiary without privity of contract.

Of course, being a third party beneficiary to a contract is not the same as contractual privity – the concepts are distinct under the law. Privity includes the requirement to reach an agreement, provide consideration, and receive consideration; Reperex did none of those things with Bradshaw. Reperex also repeats the conclusion that it received “attestation services” from Bradshaw, despite the lack of any facts on the record that would establish such. “Attestation” is a term of art referring to an accountant attesting to the veracity of documents, which is a specific and contracted-for service provided by an accountant. While Reperex states in its brief that that “an agreement was reached between the Balls and Mr. May, wherein Mr. May would hire and pay for his accountant Bradshaws to provide the accounting and attestation services in a due diligence meeting ...,” there is no citation to any portion of the record to support that



claim. (*See* Appellants' Brief at 36 for lack of citation to the record). Simply put, Reperex states facts that it wishes were true, but which were not provided to the trial court, and which are unsupported by any fact, testimony, or evidence in this case.

As a final grasp to avoid the privity requirement, Reperex cites to out of state cases which would apparently support a finding of "near privity" to allow liability between an accountant and a third party who was not his client. However, the privity requirement relied upon by the trial court comes from clear Utah statute, not common law. Utah Code Ann. 58-26a-602 is clear in its requirement: privity of contract must be found in order to allow a party to obtain civil damages resulting from an accountant's professional services. Reperex does not assert or argue that the statute is unclear in any respect, but instead urges that this court ignore the plain statutory language and intent, which would controvert the statute's plain requirements. Of course, Reperex cannot succeed in that endeavor, as the requirements of Utah's law are clear, and other jurisdiction's case law cannot create liability where Utah's legislature has expressly limited it.

B. No Writing Exists That Meets the Requirements of Utah Code Ann. 58-26a-602(2)(b).

Because no privity of contract between Bradshaw and Reperex can be found, Reperex is required to show that the accountant: (a) knew that the primary intent of the client was for the professional services to benefit or influence the particular person seeking to establish liability; and (b) identified in writing to the client that the professional services performed on behalf of the client were intended to be relied upon by

the particular person seeking to establish liability. As the trial court found, it is undisputed that no such writing exists.

The requirements of Utah Code Ann. 58-26a-602 are clear, and “have the purpose of ensuring that the party to be bound has made written acknowledgment of its legal obligations.” *Reynolds*, 2013 UT 32 at ¶ 16. Note that the statute uses the language “particular person,” and as such, the clear requirement of Utah Code Ann. 58-26a-602 is that the particular person entitled to or intended to rely on the accountant’s services must be identified in writing as well.

Reperex relies on *Reynolds v. Bickel* for the contention that a series of emails can establish the pertinent section’s written identification requirement. However, the facts of this case are, in reality, nothing like the facts of *Reynolds*, other than both cases involved accountants. In *Reynolds*, there was a series of twenty-five email exchanges and eleven spreadsheets provided directly from the Defendant accountant to the party seeking to establish liability. *Reynolds*, 2013 UT 32 at ¶ 13. The exchanges named the third-party, by name, five times in each spreadsheet. *Id.* Further, the party contracting for the services, or the party in privity, was involved in the communications and email exchanges. *Id.* at ¶ 19. In sum, the *Reynolds* opinion concluded that in light of all of the parties’ interactions, the defendant accountant, for three months, “provided ongoing tax advice” to the reliance third party, which was known to all parties involved. *Id.* at ¶ 23.

The facts at issue in this case are far removed from those of *Reynolds*. First, and most glaringly, Reperex cannot identify any email or other writing from Bradshaw to his client, or any other party for that matter, which identifies Reperex or the Balls as the

“particular party” for whom the advice provided is intended to be relief upon. (*see* Rec. 1118-38). All of the emails identified were dated February 20, February 21, February 22, March 12, March 13, and March 27, 2008. (*Id.*). Reperex and the Balls did not even begin investigating the purchase of Mays’ company until July of 2008. The emails cited by Reperex were communications between Bradshaw and Mr. Bush pertaining to a prior potential buyer, Mr. Cobb, and were sent before either Bradshaw, Mr. Bush, or Mr. Mays even knew Reperex existed. As such, the emails provided did not and could not have identified Reperex as the party for whom any services were provided.

In its appeal, Reperex would have the court significantly expand Utah Code Ann. 58-26a-602 by ignoring the identification of the “particular person” requirement, and expanding it to include any potential purchasers or third parties who may come across the information provided by Bradshaw, which clearly is not the intent or plain reading of the statute. As *Reynolds* states, the intent of the law is to allow the accountant to identify the party to whom he may become liable. *Reynolds*, 2013 UT 32 at ¶ 16. Without that limitation, the accountant would potentially be liable to an unknown number of individuals or parties to whom Mays or Mr. Bush might have provided the information contained in the February/March emails. A protection against incurring liability to unknown and unknowable individuals at the time services are rendered, such as Reperex in this case, is the exact reason that Utah Code Ann. 58-26a-602’s limitations. At the time Bradshaw sent the emails to Mr. Bush in February and March of 2008, Bradshaw could not have known or intended that Reperex would rely on his services. There was no due diligence meeting planned between Reperex and Mays. There was no services or

information that Bradshaw intended to be provided to Reperex. There was no involvement between the parties to this case. It is undisputed that Reperex and Bradshaw met and communicated exactly one time, and there is no written document from Bradshaw before or at that meeting asserting that Bradshaw intended for Reperex to rely on his professional services at that meeting. (Rcc. 1031, ¶ 17; 1047, ¶ 20, 1100). To expand Utah Code Ann 58-26a-602 to include any subsequent third party who might later become involved is a gross and unwarranted expansion of the statute, and ignores the plain requirement that the accountant's writing identify the "particular person" who may assert liability. Reperex's appeal of this issue thus is fatally flawed.

Second, even if the emails somehow included Reperex as the "particular person," which they do not, Reperex has failed to cite to any language in the emails that demonstrates intent by Bradshaw or Mays that Bradshaw's accounting services would be relied on by any party. (*See* Appellants' Brief at 39). While Reperex's brief flatly states that "the emails and documents sent by Bradshaw to Bush for his prospects show that Bradshaw's professional services were intended to be relied upon," there is no citation to any email or actual language to support this position. (*see* Appellants' Brief at 39). Similarly, although Reperex's brief states that "Bradshaw's numerous written responses to questions also show that he was giving accounting advice and that he intended to give the accounting advice," (*see* Appellants' Brief at 39), no citation to any email so stating is provided. Absent from Reperex's brief is any discussion or analysis as to how providing tax returns prepared for the purpose of paying taxes, or providing QuickBooks records, consists of "accounting advice" under *Reynolds*. Again, on appeal, it is Reperex's burden

to demonstrate from the record what the facts are and how they court erred; Reperex cannot manufacture facts it wished had been presented below.

In any event, in *Reynolds*, the court found that accountant provided three months' accounting services to the third party, which included direct advice from the accountant to the third party regarding tax consequences of that specific third party, as well as addressing other tax and accounting issues that specific third party may sustain as a result from the sale. *Reynolds*, 2013 UT 32 at ¶ 23. In this case, the opposite is apparent. The recipient of the emails and information was Mr. Bush, who was the listing agent for Mays, and not the buyer's agent working for Reperex. (*See* Rec. 1118-38). As such, the emails in question were not even sent to the buyer at that time, much less to Reperex. (*Id.*). The emails do not contain any accounting advice. (*Id.*). The emails do not indicate that Bradshaw knows or intends for those emails to be provided to and relied upon by even the known buyer, much less any unknown party that may come into contact with Mr. Bush at some time in the future. (*Id.*).

Even though Reperex has failed in its obligation on appeal to cite to the record, a full review of the record indicates that no accounting services, advice, or other services were provided by Bradshaw to the benefit of Reperex. In fact, even Reperex's own accounting expert stated that he could not "conclude that Bradshaw provided accounting services to Reperex." (Rec. 1271-74, 1314:21-25, 1315:1-2, 1317:18-25, 1320:10-18). If there were no services provided, it goes without saying that no party could have intended that Reperex rely on said services, or lack thereof. The facts indicate that this case is substantially different from *Reynolds*, and there is no writing or collection of writings that

would meet the requirements of Utah Code Ann. 58-26a-602. Because privity is admittedly lacking, and because there is no writing indicating an intent for a specific party to rely, the court correctly dismissed Reperex's negligent misrepresentation and breach of duty claims.

## **II. THE TRIAL COURT WAS CORRECT IN DECLINING TO INSTRUCT THE JURY ON FRAUDULENT NONDISCLOSURE.**

Because the finding of a duty or special relationship is a key element of fraudulent nondisclosure, the trial court was correct in rejecting Reperex's proposed jury instruction as to that issue. The proposed instruction was as follows:

I have determined that Reperex was in a buyer-seller relationship with Defendants' client, May's Custom Tile, Inc., and that this relationship created a duty upon Russ Bradshaw and/or Child Van Wagoner and Bradshaw to disclose an important fact to Reperex. You must decide whether Child Van Wagoner and Bradshaw, and/or Russ Bradshaw failed to disclose an important fact. To establish that Defendants failed to disclose an important fact, Plaintiffs must prove all of the following:

1. That Russ Bradshaw and/or Child Van Wagoner and Bradshaw knew that tax returns prepared and filed by May's Custom Tile, and/or other accounting records were incorrect and failed to timely disclose it to Plaintiffs;
2. That Plaintiffs did not know that tax returns prepared and filed by May's Custom Tile, and/or other accounting records were incorrect; and
3. That Russ Bradshaw's and/or Child Van Wagoner and Bradshaw's failure to disclose that tax returns prepared and filed by May's Custom Tile, and/or other accounting records were incorrect was a substantial factor in causing Plaintiffs' damages.

This instruction lines up with the elements of the cause of action of fraudulent nondisclosure, which requires a showing of the following elements: "(1) that the



nondisclosed information is material, (2) that the nondisclosed information is known to the party failing to disclose, and (3) that there is a legal duty to communicate. *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 10, 143 P.3d 283. As the Utah Supreme Court noted in *Yazd*, “these elements are presented in inverse order of importance.” *Id.* To this point, “a person who possesses important, even vital information of interest to another has no legal duty to communicate the information where no relationship between the parties exists.” *Id.* at ¶ 17.

Thus, the proposed instruction requires a finding of a duty existing between Bradshaw and Reperex. As Bradshaw was the accountant for the seller, and not a party to the transaction, the only assertion of duty under the proposed instruction could come as a result of Bradshaw’s professional accounting services. However, the trial court was correct in ruling that, under Utah Code Ann. 58-26a-602, Reperex was not entitled to claim damages against Bradshaw due to the fact that he was not their accountant and there was no indication that Reperex was entitled to rely on his accounting services under Utah Code Ann. 58-26a-602.

A. Reperex’s Brief Fails to Cite to Facts Claimed.

A review of Reperex’s appellant’s brief demonstrates glaring deficiencies regarding citations to factual support. A party’s argument must contain citations to the parts of the record relied upon. Utah R. App. P. 24(a)(9). Reperex’s brief makes wild assertions of facts pertaining to Reperex’s claimed reliance on Bradshaw’s services, which are not supported by citations to the record indicating that such is the case. Pages

45 and 46 of the brief seem to set out what Reperex's counsel wish the evidence was, but lack citations to demonstrate that is actually what it was.

Indeed, the record does not contain any evidence, testimony, or other support for the contention that "the Balls were wholly dependent on Bradshaw for truthful due diligence information," that "the Balls were depending on the knowledge, influence, sophistication and cognitive ability of the May's Tile Company accountant as having superior knowledge," or that "Bradshaw's knowledge that the Balls, who knew nothing of the truth of the company, and who were entirely dependent on the company's accountant to give truthful information." (*See* Appellant's Brief, p. 46). The court must note that there are no citations to the record supporting these statements. (*See id.*).

Reperex cannot be allowed to manufacture allegations in order to try to show some deficiency in the parties' relationship that, frankly, did not exist and is not borne out by the testimony or facts. Also glaringly missing from the brief or record is also any knowledge that Bradshaw had regarding the Balls' claimed reliance on his services.

B. The Accountant's Duty is Well Defined by Statute, and the Trial Court was Correct in Determining that the Issue Had Been Conclusively Determined in Bradshaw's Favor.

Because the Utah legislature has defined the extent to which an accounting professional may be liable to a party with whom he has no contractual privity, the issue of duty in this instance is well defined, and the trial court properly applied it in declining to instruct the jury as to fraudulent nondisclosure. Utah case law makes it clear that "duty is a purely legal issue for the court to decide." *See Normandeau v. Hanson Equipment, Inc.*, 2009 UT 44, ¶ 17, 215 P.3d 152. "It is axiomatic that one may not be

liable to another in tort absent a duty.” *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 11, 143 P.3d 283. “A relationship that is highly attenuated is less likely to be accompanied by a duty than one, for example, in which parties are in privity of contract.” *Id.* at ¶ 16. “Legal duty, then, is a product of policy judgments applied to relationships.” *Id.* at ¶ 17. “Typically, courts cede authority over matters of policy to the political branches of government.” *Id.* at ¶ 20.

Utah’s legislature created a duty between an accountant and a third party by drafting Utah Code Ann. 58-26a-602, but also specifically defined the parameters in which that duty is created. Utah Code Ann. 58-26a-602 creates a limited duty of an accountant except in specific situations. The legislature’s policy decision is unmistakable – except in cases of clear fraud, in order for a duty to exist between an accountant and a non-client, the accountant’s intent for the specific non-client individual to rely on his services must be identified in writing. *Reynolds* is clear as to this policy determination and its underlying purposes. *Reynolds*, 2013 UT 32 at ¶ 16. As the policy limiting an accountant’s duty fully stated by statute, and its elements are not met by the facts of this case, there is no need to further analyze the relationship between these parties. Under Utah Code Ann. 58-26a-602, Bradshaw owed no duty or obligation to disclose to Reperex.

C. Utah Case Law Does Not Support a Finding of Duty Owed by Bradshaw to Reperex.

Even if further analysis of this question were necessary, the facts on record of this case fall well short of those in the cases cited by Reperex for creation of a duty.

Undisputedly, Reperex has not and cannot cite to case law creating a duty between an accountant and a third party non-client, absent application of the specific statutorily-created duty in Utah Code Ann. 58-26a-602. Notably, *Reynolds* does not stand for the proposition that an independent duty exists between an accountant and a non-party client, but rather applies the statutory duty created by Utah Code Ann. 58-26a-602. *Reynolds*, 2013 UT 32 at ¶ 15.

In reviewing whether the facts and circumstances of parties' relationships support the finding of an independent duty, "a relationship that is highly attenuated is less likely to be accompanied by a duty than on, for example, in which parties are in privity of contract." *Yazd*, 2006 UT 47, ¶ 16. A finding of disparate age, knowledge, influence, bargaining power, sophistication, and cognitive ability are some of the circumstances that the court may consider. *Id.* However, *Yazd* requires more than that – it requires a showing of a "disparity in one or more of these circumstances [that] distorts the balance between the parties in a relationship to a degree that one party is exposed to unreasonable risk ...." *Id.* Only in such cases is the creation of a duty applicable, in order to prohibit the advantaged party from exploiting the difference. *Id.*

Notably, in *Yazd* and *Moore v. Smith*, 2007 UT App 101, 158 P.3d 562, which are the cases relied upon for the creation of a duty, the parties in those cases enjoyed undisputed contractual privity. In both, the allegedly non-disclosing party was a builder who contracted to sell a home to the buyer without disclosure of defects. Calling in the language of *Yazd* and *Moore*, a relationship in which the parties are in privity of contract is more likely to be accompanied by a duty. *See Yazd*, 2006 UT 47 at ¶ 16. Secondly,

those cases involve specific circumstances of a lay person buying a home from a licensed contractor, who is actively selling them the home. The court in both cases noted that a lay person is not in a position to evaluate the building practices used in a home, and the fact that lay persons should be entitled to buy homes without undergoing prohibitively expensive investigation procedures. *See Yazd*, 2006 UT 47 at ¶ 24; *see also Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 2009 UT 65, ¶ 30, 221 P.3d 234. As such, the *Yazd* and *Moore* opinions create a very specific and limited duty between a home builder and purchaser. As *Davencourt* further notes, there must be privity of contract in order for even that duty to apply. *See Davencourt*, 2009 UT 65 at ¶ 33. Accordingly, even the cases cited by Reperex do not create an independent duty to non-contracting parties, even where those parties enjoy a significant disparity of knowledge and ability.

In the case at bar, there admittedly is no privity of contract between Reperex and Bradshaw. Under *Moore* and *Yazd*, that fact would automatically work against Reperex's assertion of creation of a duty. Again, no case has been cited by Reperex which shows creation of a duty between non-contracting parties. Additionally, the relationship between Bradshaw and Reperex was quite attenuated, consisting of only one brief meeting between the parties, and no direct communications outside of that meeting. (Rec. 1031, ¶ 17; 1047, ¶ 20). Indeed, Reperex does not dispute that Bradshaw had never met the Balls or anyone from Reperex prior to August 11, 2008, and had no interaction with them after that date, either. (Rec. 1100). Finally, as it pertains to the application of *Yazd* and *Moore* to this case, there are no facts cited from the record that would indicate

that Reperex was at a significant age, knowledge, influence, bargaining power, sophistication, or cognitive disadvantage. (See Appellants' Brief at 46 for lack of any citation to record supporting these contentions). More importantly, there are no facts alleged that would demonstrate that Bradshaw somehow used any advantage to the detriment of Reperex.

Actually, the record would suggest the opposite – that this was an arm's length business transaction between experienced and equally matched individuals. Brad Ball holds an MBA degree from Brigham Young University and had owned a business. (Rec. 1826, p. 26:11-13, 26:21-23). David Ball also holds a bachelor's degree from BYU, (Rec. 1826, p. 82:3), including a minor in accounting. (Rec. 1827, p. 139:2-7). Both Brad and David Ball believed themselves to be quite "adept" at reviewing accounting issues, business forecasting, and other issues pertaining to running and operating a business. (See Rec. at 1827, p. 136:24 – 137:19, 139:2-13). Notably, Reperex was aware that it could have hired its own accountant to review the financial information, but declined to do so. (Rec. 1827, p. 139:14 – 141:2). These facts, coming from the testimony of the Balls themselves, would indicate that Reperex was not at a disadvantage in any respect in this transaction, such that an independent duty must be created to avoid one party from exploiting the other. Accordingly, even if the application of "life circumstances" could trump the clear language of the statute, Reperex has failed to demonstrate any facts that, under application of *Yazd* or *Moore*, would give rise to an independent duty between non-contracting parties.



Creation of a legal duty is an operation of law, as the trial court noted. Such duty is created through statute or binding common law jurisprudence. The trial court correctly noted that Reperex had not and could not provide any case law creating an independent duty between an accountant and a non-client third person, and that pursuant to the only statute that would operate to create such a duty had not been met by Reperex. The trial court therefore correctly declined to instruct the jury as to the cause of action of fraudulent nondisclosure.

D. Fraudulent Nondisclosure is a Separate Cause of Action Which Was Not Alleged by Reperex.

As an alternative basis to support the trial court's refusal to instruct the jury, fraudulent nondisclosure is a separate claim, distinct from fraud and negligent disclosure, which had not been alleged by Reperex. As stated above, the cause of action of fraudulent nondisclosure contains three elements, which are distinct from the nine elements of a common law fraud claim. *Yazd*, 2006 UT 47, ¶ 10, 143 P.3d 283.

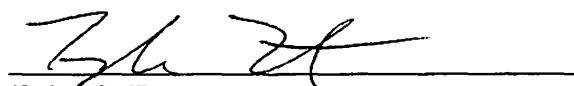
In its complaint, Reperex alleged only claims for common law fraud, negligent fraud, and breach of duty. As such, Bradshaw objected to the jury instruction both on the basis that the duty element had been dismissed by the court, and also on the fact that it was a cause of action that had not been alleged. (Rec. 1828, p. 6:17 – 7:13). Reperex never sought to amend its pleadings to conform to the evidence, and as such, was not entitled to present the separate claim to the jury in any regard. This provides an alternative basis for the court's decision not to instruct the jury as to fraudulent nondisclosure.

## CONCLUSION

Based on the foregoing, the court should dismiss Reperex's appeal. Reperex has failed to, and indeed cannot show, that a duty existed between Bradshaw and Reperex with respect to Bradshaw's accounting services provided to Mays. Accordingly, dismissal of Reperex's duty-based causes of action was appropriate by the trial court.

DATED this 28<sup>th</sup> day of September, 2015.

OLSEN SKOUBYE & NIELSON, LLC

A handwritten signature in black ink, appearing to read 'Tyler S. Foutz', is written over a horizontal line.

Tyler S. Foutz

*Attorney for Appellees Child, Van Wagoner &  
Bradshaw PLLC and J. Russton Bradshaw*

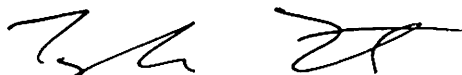
## CERTIFICATE OF SERVICE

I hereby certify that on this 28<sup>th</sup> day of September, 2015, I caused to be delivered two (2) true and correct bound copies of the foregoing BRIEF OF APPELLEE to each of the following by the method indicated below.

J. Spencer Ball	( x ) U.S. Mail, Postage Prepaid
7084 South 2300 East, Suite 250	( ) FedEx Overnight Delivery
Salt Lake City, Utah 84121	( ) Hand Delivery
<i>Attorney for Appellants Reperex, Inc.,</i>	( ) Facsimile
<i>Brad Ball and David Ball</i>	( ) Email:

Shane W. Norris	( x ) U.S. Mail, Postage Prepaid
Law Division of NRT, LLC	( ) FedEx Overnight Delivery
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<i>Attorney for Appellees Child, Van</i>	( ) Email:
<i>Wagoner &amp; Bradshaw PLLC, Coldwell</i>	
<i>Banker Commercial and Duane Bush</i>	

OLSEN SKOUBYE & NIELSON, LLC



Tyler S. Foutz  
*Attorney for Appellees Child, Van Wagoner &  
Bradshaw PLLC and J. Russton Bradshaw*

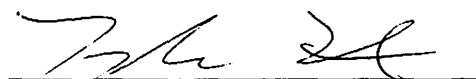
**RULE 24(f)(1) CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing BRIEF OF APPELLEE complies with the Type-Volume Limitation and Typeface Requirements in Utah R. App. P. 24(f)(1)(A) and 27(b).

1. This brief complies with the Type-Volume Limitation of Utah R. App. P. 24(g)(5) because this brief contains 7,708 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B);
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013; Times New Roman Font; double-spaced; size 13.

DATED this 28<sup>th</sup> day of September, 2015

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