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Gregory Mower, an Individual; Tree Supply, LLC, an Expired Utah Limited Liability Company, Plaintiffs/Appellants, vs. Michael Moyer, an Individual; And Thrive Wholesale Frowers, Inc., a Utah Corporation, Defendants/Appellees

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GREGORY MOWER, an individual; TREE SUPPLY, LLC, an expired Utah limited liability company, Plaintiffs/Appellants, vs. MICHAEL MOYER, an individual; and THRIVE WHOLESALE GROWERS, INC., a Utah Corporation, Defendants/Appellees.	**BRIEF OF APPELLANT** Appellate Case No. 20150782-CA District Case No. 130300106 (ORAL ARGUMENT REQUESTED)

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, HONORABLE JUDGE JAMES BRADY

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STATEMENT OF JURISDICTION

The Utah Supreme Court had original appellate jurisdiction of this appeal under Utah Code section 78A-3-102(3)(j). On or about October 9, 2015, the Utah Supreme Court transferred the case to the Utah Court of Appeals pursuant to its authority under Utah Code section 78A-3-102(4). R. 526. This Court has taken jurisdiction under Utah Code section 78A-4-103(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1: Did the trial court err in granting summary judgment on Mower's breach of contract claim against Moyer and Thrive?

Standard of review: The appellate court reviews the trial court's summary judgment ruling and its determination that there were no genuine issues of material fact for correctness based on a review of the record as a whole, viewing the evidence and reasonable inferences in the light most favorable to the nonmoving party. See *Helf v. Chevron U.S.A. Inc.*, 2015 UT 81, ¶ 46, --- P.3d --- ("We review a district court's summary judgment for correctness, granting no deference to its legal conclusions, and consider whether it correctly concluded that no genuine issue of material fact existed.") (quoting *Johnson v. Hermes Assocs., Ltd.*, 2005 UT 82, ¶ 12, 128 P.3d 1151); *Poteet v. White*, 2006 UT 63, ¶ 7, 147 P.3d 439 ("Because, by definition, a district court does not resolve issues of fact at summary judgment, we consider the record as a whole and review the district court's grant of summary judgment de novo, reciting all facts and fair inferences drawn from the record in the light most favorable to the nonmoving party.")

In addition, the trial court's ruling should not be afforded any presumption of

correctness because the court failed to comply with Rule 52 of the Utah Rules of Civil Procedure. Both the current and former versions Rule 52 require that when the trial court is ruling on a motion for summary judgment pursuant to Rule 56, the court "must issue a brief written statement of the ground for its decision" "when the motion is based on more than one ground." (Emphasis added). "The purpose of [this] rule is to ensure that the parties have a written indication of the court's action and its underpinnings." *Schuurman v. Shingleton*, 2001 UT 52, ¶ 8, 26 P.3d 227.

"Although failure to adhere to Rule 52 does not, in and of itself, warrant reversal, the presumption of correctness ordinarily afforded trial court rulings has little operative effect when [the appellate court] cannot divine the trial court's reasoning because of the cryptic nature of its ruling." *Gabriel v. Salt Lake City Corp.*, 2001 UT App 277, ¶ 10, 34 P.3d 234 (internal citations and quotation marks omitted).

Here, the Defendants' initial and reply memorandum advanced several grounds for granting them summary judgment on Mower's breach of contract and unjust enrichment claims. However, the trial court's order granting the Defendants' Motion for Summary Judgment simply stated that the Defendants' motion was granted "for the reasons stated in the Thrive Defendants' initial and reply memorandum, and Plaintiff's failure to comply with the applicable rules." R. 504. The trial court failed to explain the basis for its conclusions or identify which of the several grounds advanced by the Defendants that the court relied upon in making its ruling.

Preservation of issue/Grounds for review: This issue was preserved for review by *Plaintiff's Opposition to Defendants' Motion for Summary Judgment* and supported

papers filed with the trial court. R. 455-464.

Issue 2: Did the trial court err in granting summary judgment on Mower's unjust enrichment claim against Moyer and Thrive?

Standard of review: The standard of review for this issue is the same as for Issue 1 discussed above.

Preservation of issue/Grounds for review: This issue was preserved for review by *Plaintiff's Opposition to Defendants' Motion for Summary Judgment* and supported papers filed with the trial court. R. 455-464.

Issue 3: Did the trial court err in granting Defendants summary judgment based on Mower's failure to comply with the applicable Rules of Civil Procedure.

Standard of review: The appellate court reviews the trial court's summary judgment ruling for correctness, but it reviews the trial court's decision to admit Defendants' stated facts as uncontroverted for abuse of discretion. See *Bluffdale City v. Smith*, 2007 UT App 25, ¶¶ 5-7, 156 P.3d 175.

Preservation of issue/Grounds for review: Mower is entitled to appellate review of the trial court's decision to grant summary judgment on the basis of his failure to comply with Rule 7 of the Utah Rules of Civil Procedure because Mower did not get the opportunity to address this issue before the trial court's final order granting summary judgment. See *Bluffdale City v. Smith*, 2007 UT App 25, ¶¶ 1-7 (court addressing trial court's summary judgment ruling based on failure to comply with Rule 7).

DETERMINATIVE LAW

There are no laws whose interpretation is determinative or of central importance to

this appeal.

STATEMENT OF THE CASE

NATURE OF THE CASE

Plaintiff/Appellant Gregory Mower ("Mower") sued Defendants/Appellees Michael Moyer ("Moyer") and Thrive Wholesale Growers, Inc. ("Thrive") (collectively referred to herein as "Defendants") for, among other things, breach of contract and unjust enrichment relating to landscaping trees that Mower shipped from Oregon and sold to Defendants.

TRIAL COURT PROCEEDINGS

In July 2013, Mower filed his initial complaint against Defendants. The named plaintiffs in the complaint were Mower as an individual and an expired Utah limited liability company named Tree Supply, LLC ("Tree Supply"). In May 2015, the trial court granted Mower's attorney's motion to withdraw as counsel for Mower and Tree Supply. In June 2015, the trial court granted Defendants' motion to dismiss Tree Supply as a plaintiff based on its failure to appoint substitute legal counsel. On June 26, 2015, Defendants took Mower's oral deposition.

On July 29, 2015, Defendants moved the trial court for summary judgment on all of Mower's claims. On August 12, 2015, Mower, still unrepresented at the time, filed a memorandum in opposition to Defendants' Motion for Summary Judgment. On August 18, 2015, Defendants filed a reply to Mower's opposition along with a proposed order. That same day (August 18, 2015), the trial court signed the proposed order granting summary judgment after making a small delineation.

TRIAL COURT DISPOSITION

On August 18, 2015, without conducting a hearing, the trial court granted Defendants Motion for Summary Judgment on all of Mower's claims. The court's order was short and simply stated

> Having considered the motion for summary judgment of Defendants Michael Moyer ("Moyer") and Thrive Wholesale Growers, Inc. ("Thrive") (collectively "Thrive Defendants"), together with the memorandum in support thereof, being otherwise fully advised on the matter, and for good cause appearing, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the Thrive Defendants Motion for Summary Judgment is granted. The Court hereby dismisses with prejudice each of Plaintiff's claims against the Thrive Defendants *for the reasons stated in Thrive Defendant's initial and reply memorandum, and Plaintiff's failure to comply with the applicable rules.*

R. 503-04 (emphasis in original).

STATEMENT OF RELEVANT FACTS

Most of the relevant facts are gleaned from the transcript of Mower's oral deposition starting on page 414 of the record (the cover page).

Sometime in the Fall of 2011, Mower owned some buildings on Geneva Road in Orem across the street from a business called Oregon Acres. R. 414 at 22:16-20. At that time, Moyer worked out of the Oregon Acres facility. R. 414 at 22:20-21 and 23:3-4. Mower had some landscaping trees located on his property that he had to remove and offered to sell them to Moyer. R. 414 at 23:1-11. Moyer declined the offer but referred Mower to an individual named Cornelio Garcia. R. 414 at 23:15-24:4.

A few weeks later, Garcia presented Mower the idea of going into business together to purchase landscaping trees and resell them to landscapers for a profit. R. 414

at 15:18-24, 17:23-18:7 and 24:13-17. The two also discussed involving Moyer on the deal. Garcia told Mower that he had worked with Moyer in the past and that he (Garcia) used to be co-owners with Moyer in Oregon Acres but that Garcia had been kicked out somehow. R. 414 at 24:18-25. Garcia then said to Mower "[w]ell, if you can – if you can bring these trees in for me and you – you can – we can agree on a price, I can get a turn-around on our money between 30 and 60 days....I've dealt with these people before, and it's good money." R. 414 at 27:1-5.

At some point that Fall, Moyer moved from the Oregon Acres facility in Orem and began doing business out of a facility in American Fork. R. 414 at 27:12-15.

Mower communicated several times with Moyer regarding a potential deal for the purchase and resale of landscaping trees to Home Depot. R. 414 at 27:15-16. The general terms of this proposed deal were as follows:

> Mower was to put up the money to purchase the trees. Garcia was to facilitate the actual purchase of the trees from wholesalers in the state of Oregon and the shipment of the trees to Utah. Most of the trees would be drop-shipped directly to Moyer in American Fork. Moyer was to then put his label on the trees as well as a label for Home Depot. Moyer was to then ship the trees to Home Depot.

R. 414 at 27:6-15 and 37:6-18.

Mower and Moyer talked several times and eventually negotiated a price for which Moyer would purchase the trees from Mower. R. 414 at 27:15-18. Mower asked Moyer several times for a contract or something in writing regarding the trees, but Moyer told him "Home Depot doesn't give me a contract; so I can't give you a contract...." R. 414 at 27:22-25. However, Moyer assured Mower that he (Moyer) would pay for the

trees that Mower purchased and that Mower would get a return on his investment in purchasing the trees in 30 to 60 days. R. 414 at 73:3-5. Moyer told Mower "[j]ust work with me on this, and this will be a good deal for both of us." R. 414 at 73:10-12.

At some point in October 2011, Moyer met with Mower and made the agreement to purchase the trees from Mower for the Home Depot Contract. R. 460. It is unclear whether the parties met just once or multiple times during October or whether Garcia was present at the meeting(s).

Mower was unclear about Moyer's affiliation with Oregon Acres. Mower did not know if what Garcia had told him about Mower being an owner of Oregon Acres was true. R. 414 at 24:18-20. At the time of negotiating the Home Depot Contract, Mower was unfamiliar with Oregon Acres organization and did not actually know who its owners were. R. 414 at 33:5-19. Mower simply assumed that Moyer was representing Oregon Acres as its owner or co-owner. R. 414 at 32:6-22. This assumption was false, however, as Moyer was never a member or even a manager of Oregon Acres. R. 281. Moyer was simply an employee of Oregon Acres. R. 281.

Mower and Garcia initially conceived of the idea of utilizing a separate business entity to bring in trees from Oregon and wholesale them to landscapers. R. 414 at 15:18-24 and 17:23-18:2. Mower later named this business entity Tree Supply. R. 459, 462-64. Mower also initially envisioned using Tree Supply as part of the Home Depot Deal with Moyer. Mower testified that creating and operating Tree Supply would have been part of or associated with the Home Depot deal with Moyer and that "Tree Supply was the concept or the idea that we had...." R. 414 at 43:22-44:1.

However, Mower never actually utilized Tree Supply as an operating business. Tree Supply had no bank accounts, no lines of credit, and no checking account of any kind. R. 414 at 19:1-7. Tree supply never owned any assets of any kind nor ever purchased any equipment. R. 414 at 18:15-25. Tree Supply never had any employees and no other officers, members and managers other than Mower. R. 414 at 18:3-14. Mower initially registered the business name, but did nothing with the business after that. R. 414 at 21:20-22:1. Tree Supply never paid taxes, filed tax returns or issued W-2s. R. 414 at 22:2-9. Mower did not even register Tree Supply, LLC as a business with the State of Utah as a legal entity until the end of February 2012, several months after negotiating the tree deal with Moyer. R. 459, 462-64.

Mower testified that using Tree Supply as a business "never really happened" (R. 414 at 21:20-21), "never became anything" (R. 414 at 22:1), "went south before it ever got off the ground" (R. 414 at 43:20-21), and "never got going" (R. 414 at 44:2-3). Mower testified that he did not really even know why Tree Supply was even named as a party to the lawsuit against Moyer and Thrive other than he was relying on the advice of his legal counsel at the time. R. 414 at 21:12-18.

More importantly, it was Mower, not tree supply, who supplied the funds, equipment and effort to carry out the Home Depot Contract. Mower purchased the trees from Oregon using his own personal funds. R. 414 at 15:2-17:8. Part of the funds he obtained through personal loans from his friend and son-in-law which he then repaid with funds obtained from cashing in his personal life insurance policy. *Id.* None of the money used to purchase trees from Oregon (or any funds for that matter) ever went into or out of

a Tree Supply account. R. 414 at 15:2-18 and 19:8-10. Mower also personally owned the irrigation equipment and machinery that were used to maintain the trees on the property in Payson. R. 414 at 18:17-23. Mower had some trees shipped directly from Oregon to property in Payson, Utah, and Mower testified that he personally owned those trees. R. 414 at 76:22-24.

Pursuant to the deal negotiated with Moyer, Mower purchased the landscaping trees from Oregon and had most of them shipped to Moyer at his facility in American Fork. R. 414 at 27:6-21. Some of the trees were shipped to a property in Payson, Utah that Mower was borrowing from a friend. R. 414 at 17:9-14 and 48:2-8. On or about February 12, 2012, Moyer showed up uninvited to the property in Payson and took 60 trees. R. 61 and 414 at 44:9-19. When Mower confronting him, Moyer said that he had orders to fill and needed the trees. R. 414 at 46:6-11. Mower then sent Mower an invoice for the 60 trees. The invoice listed "Tree Supply, LLC" at the top and was addressed to "Mike Moyer" under which were printed the words "Oregon Acres." R. 61.

Mower clearly expected Moyer to pay for the trees that he took. R. 414 at 45:15-18. However, Mower never received any money from Moyer. R. 414 at 47:18-48:1, 66:2-9 and 460.

Moyer organized Thrive on March 8, 2012 by filing the Articles of Incorporation. R. 281. Moyer is (or was) a 50% owner of Thrive along with his partner, Ken Bretschneider. R. 281. Shortly after its formation, Thrive acquired the assets of Oregon Acres, LLC. R. 281. Thrive gave Oregon Acres a promissory note as part of the consideration for its assets. R. 281. Oregon Acres continued in existence after Thrive

purchase of its assets as the holder of Thrive's promissory note. R. 281. Mower later confirmed that the business located at the American Fork address to which he had shipped the trees was Thrive. R. 178.

SUMMARY OF ARGUMENTS

The trial court erred in dismissing Mower's breach of contract claim based on Defendants' incorrect argument that Mower was not a party to the Home Depot Contract and thus had no standing to sue thereon. The proper identity of the parties to a contract is, like all other contract terms, determined based on the intent of the parties. To determine such intent for an oral contract, the trier of fact first looks to the parties' communications and expressions in negotiating the contract. If the parties' intent is not clear because of ambiguities in such communications, then the trier of fact looks to extrinsic evidence of the parties' relevant actions and conduct to determine their intent.

The evidence in the current record shows that Mower entered the Home Depot Contract on his own behalf and not as an agent for Tree Supply. The parties' relevant communications in negotiating the Home Depot Contract only refer to Mower. No mention is made of Tree Supply or that Mower is acting as an agent for another entity or in any capacity other than individually. The parties' relevant actions and conduct also show that Mower was contracting in his individual capacity and not as an agent for Tree Supply. Mower personally provided all of the funds and equipment to carry out the contract. Mower never actually used Tree Supply to conduct business, and no funds for the Home Depot Contract ever came through Tree Supply. Mower did not even incorporate Tree Supply as a legal entity until months after negotiating and entering the

Home Depot Contract. At the very least, the evidence shows a genuine dispute of fact as to the parties' intentions regarding Mower's role in the Home Depot Contract.

The trial court also erred in dismissing Mower's breach of contract claim based on Defendants' incorrect argument that neither Moyer nor Thrive could be held personally liable on the Home Depot Contract. Again, the undisputed evidence shows that Mower and Moyer personally met to negotiate and enter into the Home Depot Contract. Defendants argued that Moyer was merely acting as an agent for Oregon Acres and not on behalf of himself or on behalf of Thrive, but this claim is not supported by the evidence in the record. At best, the parties' communications and conduct are ambiguous and show a dispute of fact as to their intentions regarding Moyer's role in negotiating and entering into the Home Depot Contract.

Further, there is at least genuine issues of material fact as to whether Moyer and/or Thrive are liable on the Home Depot contract as a matter of law for actions taken subsequent to the parties' negotiations and initial execution of the contract, including whether Moyer was purporting to contract on behalf of a non-existent corporate entity, whether Thrive later ratified the Home Depot Contract, whether Thrive later assumed the obligations under the Home Depot Contract, and whether Thrive is liable for fraudulently purchasing the assets of Oregon Acres in order to escape liability under the Home Depot Contract.

The trial court also erred in dismissing Mower's unjust enrichment claim based on Defendants' incorrect argument that Mower's claim was barred by an express contract between Tree Supply and Oregon Acres. There is a genuine issue of material fact as to

whether a contract between any of the parties was even formed in this case. Even if a valid contract was formed, there is a genuine dispute of material fact as to whether it governed the receipt of some or all of the landscaping trees at issue so as to preclude Mower's unjust enrichment claim.

Finally, the trial court erred granting Defendants summary judgment based on Mower's failure to strictly comply with the applicable provisions of Rule 7 of the Utah Rules of Civil Procedure in opposing Defendants' Motion for Summary Judgment. Mower substantially complied with Rule 7, and the trial court should have excused his deficient opposition as harmless error and because Mower was an unrepresented party entitled to pro se leniency. More importantly, the court still had a duty analyze the merits of Defendants' summary judgment request regardless of the level of Mower's opposition pleading. Even if the trial court properly deemed Defendants' stated facts as uncontroverted, the court should have denied Defendants' motion because they were not entitled to judgment as a matter of law on Mower's claims.

ARGUMENTS

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS SUMMARY JUDGMENT ON MOWER'S BREACH OF CONTRACT CLAIM.

Defendants asserted, and the trial court erroneously agreed, that Mower's breach of contract claim fails because the undisputed facts show that (1) Mower was not a party to the Home Depot Contract and thus lacked standing to sue thereon, and (2) neither Moyer nor Thrive were parties to the Home Depot Contract and thus had no liability thereon. R. 402, 504.

A. The trial court erred in determining that Mower lacked standing to sue on the Home Depot Contract.

A breach of contract claim requires the existence of an enforceable contract. See *Simmons Media Grp., LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 16, 335 P.3d 885 (citing *Bair v. Axiom Design, LLC*, 2001 UT 20, ¶ 14, 20 P.3d 388) (listing the elements of a breach of contract claim). "The essential elements of an enforceable contract are (1) offer and acceptance, (2) consideration, and (3) competent parties." *Brasher v. Christensen*, 2016 UT App 100, ¶ 17, --- P.3d ---- (citing *Uhrhahn Constr. & Design, Inc. v. Hopkins*, 2008 UT App 41, ¶ 12, 179 P.3d 808; *Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730, 732 (Utah 1985)).

"'A binding contract exists where it can be shown that the parties had a meeting of the minds as to the integral features of the agreement and that the terms are sufficiently definite as to be capable of being enforced.'" *Id.* at ¶ 21 (quoting *LD III, LLC v. BBRD, LC*, 2009 UT App 301, ¶ 14, 221 P.3d 867). "'Whether there is a meeting of the minds depends on whether the parties actually intended to contract, and the question of intent

generally is one to be determined by the trier of fact.'" *Id.* at ¶ 21 (quoting *Terry v. Bacon*, 2011 UT App 432, ¶ 21, 269 P.3d 188).

1. The record shows that Mower was a party to the Home Depot Contract.

To determine the intent of the parties, courts first look to the language of the contract. *Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*, 2016 UT 6, ¶ 24, 367 P.3d 994.

> [T]he best indication of the parties' intent is the ordinary meaning of the contract's terms....Accordingly, if the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and contract may be interpreted as a matter of law....

Id. at ¶ 24 (internal citations and quotation marks omitted).

Determining the parties' intent from an oral contract is more difficult because "the court does not have the option of consulting the language of the contract to guide it in ascertaining the intentions of the parties." *Baker v. Dataphase, Inc.*, 781 F.Supp. 724, 732 (D. Utah 1992). Instead, the court must ascertain the meaning of the words and manifestations of the parties. *Id.* at 732; *Hone v. Advanced Shoring & Underpinning, Inc.*, 2012 UT App 327 ¶ 12, 291 P.3d 832 (both citing *Rex T. Fuhriman, Inc. v. Jarrell*, 445 P.2d 136, 137 (Utah 1968)).

> In determining whether the parties created an enforceable contract, a court should consider all preliminary negotiations, offers, and counteroffers and interpret the various expressions of the parties for the purpose of deciding whether the parties reached agreement on complete and definite terms.

Lebrecht v. Deep Blue Pools and Spas Inc., 2016 UT App 110, ¶ 14, --- P.3d ---- (quoting *1-800 Contacts, Inc. v. Weigner*, 2005 UT App 523, ¶ 4, 127 P.3d 1241).

"A contract is facially ambiguous if its terms are capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*, 2016 UT 6, ¶ 24, 367 P.3d 994.

"If the parties' intentions cannot be determined from the face of the contract, extrinsic evidence must be looked to in order to determine the intentions of the parties." *Id.* at ¶ 24. Whether with a written or oral contract, as such extrinsic evidence "'the court may consider the parties' actions and performance as evidence of the parties' true intention.'" *Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162, ¶ 20, 92 P.3d 768 (quoting *WebBank v. American Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 19, 54 P.3d 1139); see also *Lebrecht v. Deep Blue Pools and Spas Inc.*, 2016 UT App 110, ¶ 14, --- P.3d ---- (discussing extrinsic evidence used to interpret ambiguous oral contracts).

These rules of contract interpretation also govern the issue of determining the proper parties to a contract. For example, in *Marveon Sign Co. v. Roennebeck*, 694 P.2d 604 (Utah 1984), the parties disputed who it was that was intended to be liable on an agreement to purchase signage. Mrs. Roennebeck signed the agreement naming her husband, Fred, as the purchaser and signed over a line that stated "authorized signature." *Id.* at 604. The court admitted extrinsic evidence which indicated that the parties clearly intended Fred (not his wife) to be the purchaser and liable on the contract. The plaintiff dealt exclusively with Fred. He (not his wife) ordered the sign, detailed its specifications, negotiated the price, and then told his wife to sign the contract. *Id.* at 604.

In *Anderson v. Gardner*, 647 P.2d 3 (Utah 1982), the defendant, the manager of a

local radio station, signed a contract for the plaintiff to perform a concert. On a line marked "Employer's Name," the defendant printed his name as "Mr. Jay Anderson – KMOR RADIO." The defendant then signed on the line below marked "Signature of Employer," with no other indication that he was acting as an agent for another. *Id.* at 3-4. The court reasoned that although the words "Employer's name" were ambiguous considered in isolation, the fact that KMOR Radio was not an existing legal entity removed the ambiguity. Thus, the court found the defendant personally liable on the contract without reference to extrinsic evidence as to the parties' intent. *Anderson* at 4).

a. <u>The parties' relevant communications unambiguously show that Mower was an intended party to the Home Depot Contract.</u>

There is no written agreement memorializing the terms of the Home Depot Contract. Thus, the finder of fact is required to ascertain the parties' intent regarding whether they intended to contract with each other from their relevant communications. the only persons involved in negotiating the Home Depot Contract were Mower, Moyer and Garcia. R. 414 at 27 and 460. The current record contains no testimony or other evidence from either Garcia or Moyer as to the content or context of their communications in negotiating the contract. Mower's brief testimony is the only evidence on this point and consists of the following:

- Sometime in the Fall of 2011, Garcia told Mower that he used to be co-owners with Moyer in Oregon Acres but that Garcia had been kicked out of Oregon Acres. However, Mower testified that he did not know if what Garcia had told him about Moyer was true. R. 414 at 24:18-24.

- Garcia then suggested the idea of doing a deal to purchase and resale landscaping trees, saying to Mower "[w]ell, if you can – if you can bring these trees in for me and you – you can – we can agree on a price, I can get a turn-around on our money

between 30 and 60 days....I've dealt with these people before, and it's good money." R. 414 at 25:1-5.

- Mower communicated several times with Moyer regarding a potential Home Depot tree deal as well. Moyer told Mower that he (Moyer) would pay for the trees and that Mower would get a return on his investment in purchasing the trees in 30 to 60 days. R. 414 at 73:2-18. Moyer told Mower "[j]ust work with me on this, and this will be a good deal for both of us." R. 414 at 73:10-12. Mower testified that "Mike and I talked several times, and we – we negotiated a price, which he's conveniently forgot or changed his mind on." R. 414 at 27:15-18.

- In October 2011, Mower met with Moyer and they agreed to terms on the proposed Home Depot Tree Contract. R. 460. It is unclear whether the parties met just once or multiple times during October or whether Garcia was always present.

- Mower testified that he, Garcia and Moyer then "proceeded to put together a deal...with Mike Moyer and Home Depot." R. 414 at 27:6-7.

- Mower testified that the terms of the deal were that Mower was to put up the money to purchase the trees. Garcia was to facilitate the actual purchase of the trees from wholesalers in the state of Oregon and the shipment of the trees to Utah. Most of the trees would be drop-shipped directly to Moyer in American Fork. Moyer was to then put his label on the trees as well as a label for Home Depot. Moyer was to then ship the trees to Home Depot. R. 414 at 27:6-15 and 37:6-18.

- Mower asked Moyer several times for a contract or something in writing regarding the trees, but Moyer told him "Home Depot doesn't give me a contract; so I can't give you a contract...." R. 414 at 27:24-25.

These communications show that Mower was contracting on his own behalf and not as an agent for another entity (e.g. Tree Supply). None of the communications name Tree Supply or even make reference to Mower acting as an agent or in any capacity other than individually.

Defendants focused on Mower's testimony that he initially conceived of the idea of using Tree Supply to facilitate wholesaling trees to landscapers and for the Home Depot Deal. R. 414 at 15:18-24, 17:23-18:2 and 43:22-44:1. However, this evidence of

Mower's subjective intentions is irrelevant to the parties' intent regarding the Home Depot Contract for at least two reasons.

First, there is no evidence in the record that either Garcia or Mower communicated to Moyer the concept of using Tree Supply as a party to the Home Depot contract during their negotiations in the Fall of 2011 or thereafter. If Moyer was unaware of such a plan by Mower and Garcia, then there could have been no meeting of the minds on this point. The current record shows that Mower's initial plans for Tree Supply were nothing more than his unexpressed intentions. As such, they are not evidence of the parties' mutual intent.

Second, Mower's subjective unexpressed intent to enter a contract on behalf of Tree Supply is irrelevant because Tree Supply, LLC did not exist as a legal entity at the time the parties' entered into the Home Depot Contract in October 2011. It was not formally organized until months later at the end of February 2012. R. 459, 462. Just as in the *Anderson* case, the fact that Tree Supply did not exist as a legal entity at the time Mower entered into the Home Depot Contract removes any potential ambiguity created by Mower's testimony as to his intentions in utilizing Tree Supply to facilitate the contract. And just as in *Anderson*, the result is that Mower alone, not Tree Supply, is the proper party to the Home Depot Contract.

b. At the very least, there is a genuine issue of fact as to the parties' intent regarding Mower's role in the Home Depot Contract.

Even if somehow relevant, a review of the entire record shows that Mower's testimony regarding his intentions for using Tree Supply to facilitate the Home Depot

Contract were at best ambiguous and contradictory. Mower repeatedly testified that the business "never really happened" (R. 414 at 21:20-21), "never became anything" (R. 414 at 22:1), "went south before it ever got off the ground" (R. 414 at 43:20-21), and "never got going" (R. 414 at 44:2-3). Taken as a whole, the record clearly shows that Mower was confused about the legal status of Tree Supply and its role in the agreement with Moyer. Mower testified that he did not really even know why Tree Supply was even named as a party to this lawsuit other than he was relying on the advice of his legal counsel at the time. R. 414 at 21:12-18.

Thus, at the very least, the trial court was required to look beyond the parties' communications to each other and Mower's statements about his own intentions and review the evidence of the parties' actions and performances to determine their mutual intent regarding Mower's and Tree Supply's respective roles in the Home Depot Contract. That evidence shows that there is at the very least a genuine dispute of fact as to whether Mower was a party to the contract.

Regardless of Mower's expressed or unexpressed intentions of originally using Tree Supply, the record shows that Mower never actually utilized Tree Supply as an operating business. Tree Supply had no bank accounts, no lines of credit, and no checking account of any kind. R. 414 at 19:1-7. Tree supply never owned any assets of any kind nor ever purchased any equipment. R. 414 at 18:15-25. Tree Supply never had any employees and no other officers, members and managers other than Mower. R. 414 at 18:3-14. Mower initially registered the business name, but did nothing with the business after that. R. 414 at 21:20-22:1. Tree Supply never paid taxes, filed tax returns

or issued W-2s. R. 414 at 22:2-9. Mower did not even register Tree Supply, LLC as a business with the State of Utah as a legal entity until the end of February 2012, several months after negotiating the tree deal with Moyer. R. 459, 462-64.

More importantly, it was Mower, not tree supply, who supplied the funds, equipment and effort to carry out the Home Depot Contract. Mower purchased the trees from Oregon using his own personal funds. R. 414 at 15:2-17:8. Part of the funds he obtained through personal loans from his friend and son-in-law which he then repaid with funds obtained from cashing in his personal life insurance policy. *Id.* None of the money used to purchase trees from Oregon (or any funds for that matter) ever went into or out of a Tree Supply account. R. 414 at 15:2-18 and 19:8-10. Mower also personally owned the irrigation equipment and machinery that were used to maintain the trees on the property in Payson. R. 414 at 18:17-23. Mower testified that he personally owned those trees. R. 414 at 76:22-24. There is no evidence in the record that Mower ever legally transferred ownership of the trees, equipment, machinery or other assets used to carry out the Home Depot Tree Contract to Tree Supply.

Defendants make much of the facts that Mower sent an invoice to Moyer for some trees that Moyer too k from the property in Payson on Tree Supply letterhead. R. 61. However, this evidence is not dispositive of the parties' intent. Mower did not create the invoice until mid-February 2012, months after negotiating the Tree Contract with Moyer. Mower's later reference to Tree Supply does not prove the parties' mutual intent at the time of negotiating and entering into the Home Depot Contract, especially given all the contradictory evidence listed above regarding Mower's earlier inaction in using Tree

Supply.

2. **The record shows that Mower has standing to sue on the Home Depot Contract as a matter of law.**

A person who purports to enter a contract on behalf of a non-existent corporate entity becomes a party to the contract and has standing to sue thereon. See *Gardner v. Madsen*, 949 P.2d 785, 789 (Utah App. 1997). In *Gardner*, the plaintiff, purporting to act as an officer of a corporation, entered into a contract to purchase an ownership interest in a houseboat. The plaintiff clearly signed the written contract on behalf of the corporation and not in his individual capacity. At the time of contracting, however, the corporation had been involuntarily dissolved. Regardless, the court held that the plaintiff was a party to the contract and had standing thereon stating "[an] individual who signs a contract in the name of a nonexistent corporation can be a party to the contract." *Id.* at 789.

The court in *Gardner* cited to the then current version of Utah Code section 16-10-139 which provided: "All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." *Gardner*, 949 P.2d at 789. The court then reasoned that this imposition of liability essentially goes both ways and allows the person purporting to contract on behalf of a non-existent corporation to enforce the contract as well. *Id.*

Since *Gardner*, the legislature revised Utah Code section 16-10-139 and renumbered it as Utah Code section 16-10a-204. The revised version is substantially similar and provides: "All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for

all liabilities created while so acting." The court in *Gardner*, citing the prior version of this statute with substantially similar language, reasoned that *Gardner*, 949 P.2d at 789.

In *Miller v. Celebration Mining Co.*, 2001 UT 64, 29 P.3d 1231, the Utah Supreme Court noted that Section 16-10a-204 only addressed the liability of a person purporting to contract on behalf of a corporation but does not refer to the ability of such a person to enforce contracts. *Id.* at ¶ 8. However, the court in *Miller* did acknowledge the standing rule set forth above in Gardner and termed it a common-law rule known as the "principle of mutuality of obligation." *Id.* at ¶ 9.

Citing the Restatement (Second) of Contracts section 164(1), the court in *Miller* held that a contract is voidable if (1) there is a misrepresentation, (2) the misrepresentation was either fraudulent or material, (3) the misrepresentation must have induced the recipient to make the contract, and (4) the recipient must have been justified in relying on the misrepresentation. *Miller*, 2001 UT 64 at ¶ 10. The court held that the contract in Miller was voidable at the option of the defendants because it met the criteria above. As a result, the court declined to apply *Gardner's* principle of mutuality of obligation because in Miller because doing so in that case "had great potential to create a contract one party never intended to enter." *Miller*, 2001 UT 64 at ¶ 11.

Absent such a situation where the contract is voidable, however, *Gardner* still applied and grants a person purporting to contract on behalf of a non-existent corporate entity standing to sue on said contract.

Here, the undisputed record evidence shows that Mower negotiated and entered into the Home Depot Contract in Fall 2011, but Tree Supply, LLC was not formed as a

legal entity until several months later in late February 2012. R. 459, 462. Thus, according to *Gardner* and *Miller*, Mower has standing to sue on the Home Depot Contract unless the contract was voidable by Moyer.

There is absolutely no evidence in the record to show that the Home Depot Contract was voidable by Moyer. There is no evidence that Mower misrepresented his role to Moyer at the time the parties negotiated and entered into the contract in the Fall of 2011. To the contrary, there is no evidence that Mower even mentioned to Moyer the idea of using another entity for the Home Depot Contract or that Mower even referred in passing to the name of Tree Supply. Thus, Moyer could not possibly have relied on any misrepresentations by Mower that would make the Home Depot Contract voidable. *Gardner* therefore applies and, as a matter of law, Mower has standing to sue on the Home Depot Contract.

B. <u>The trial court erred in determining that Moyer could not be liable on the Home Depot Contract.</u>

Defendants argued, and the trial court apparently agreed, that the evidence is undisputed that Moyer was not a party to the Home Depot Contract and therefore had no liability thereon. Defendants instead claim that the undisputed evidence shows that Moyer was only acting as an agent for Oregon Acres in entering the contract. Again, however, the record does not support these assertions. When viewed as a whole, the evidence shows that there is a genuine dispute of fact as to both whether the parties intended to contract with Moyer individually and whether Moyer became liable on the Home Depot Contract as a matter of law.

1. **Genuine issues of material fact exist as to whether Moyer was personally liable as a party to the Home Depot Contract.**

    a. <u>The parties' relevant communications are at best ambiguous as to their intent regarding Moyer's role in the Home Depot Contract.</u>

Again, because there is no written contract, the court is required to first look to the parties' communications in negotiating to determine their intent as to who would be liable on the Home Depot Contract. As set forth above, the only evidence in the record as to the content or the context of these communications between the parties is Mower's testimony cited above. *See* section (II)(A)(1)(a) above.

These communications definitely do not unambiguously show that Moyer was contracting solely as an agent for Oregon Acres. Most of these communications refer to Moyer solely as an individual and make no mention of him acting as an agent. The only references to Oregon Acres are Garcia's early statement to Mower that Moyer was a co-owner of the business followed up by Garcia's suggestion to Mower of doing a tree deal and his statement that "I've dealt with <u>these people</u> before." R. 414 at 27:1-5 (emphasis added). Given the rest of the communications solely referencing Moyer individually, these statements are at best ambiguous as to the parties' intent regarding Moyer's role in the Home Depot Contract. Thus, the court should have reviewed the parties' actions and performances to discern their intent on this issue.

    b. <u>The evidence of the parties' actions and performances show that there is at least a disputed issue of fact as to whether they mutually intended to have Oregon Acres, instead of Moyer individually, as a party to the Home Depot Contract.</u>

The record shows ample evidence of the parties' actions and performances

regarding the Home Depot Contract from which the trier of fact could find that the Moyer was acting on his own behalf and not as an agent for Oregon Acres, including the following:

- Mower testified that Moyer individually negotiated the Home Depot Contract with him, but Mower made no reference to any other persons affiliated with Oregon Acres involved. Garcia was involved but had previously told Mower that he had been kicked out of Oregon Acres. R. 414 at 24:18-25.

- Mower testified Moyer was originally doing business at a facility in Orem owned by Oregon Acres. R. 414 at 22:16-21 and 23:3-4. However, the terms of the Home Depot Contract called for Mower to have trees shipped from Oregon directly to Moyer at a new facility in American Fork. R. 414 at 27:6-15 and 37:6-18. Because of this change in his location, Mower could have reasonable inferred that Moyer was no longer affiliated with Oregon Acres but was contracting on his own behalf.

- Mower testified that Moyer personally came and confiscated some of Mower's trees from the property in Payson, and Mower expected Moyer to pay for the trees he took. R. 414 at 44:9-19 and 45:15-18. Mower made no mention of expecting payment from Oregon Acres in his testimony.

- Mower was upset that Moyer had not paid him anything for any of the trees he (Moyer) had received. R. 414 at 47:18-48:1 and 66:2-9.

The record does show that Mower invoiced Moyer for the trees taken from the Payson Property and addressed the invoice to "Mike Moyer" under which were printed the words "Oregon Acres." R. 61. However, this evidence is ambiguous as well. It could mean that the parties mutually understood that Moyer was only acting as Oregon Acres' agent, but it could also mean that the parties understood that both Moyer and Oregon Acres had agreed to be liable on the Home Depot Contract. This invoice alone is certainly not conclusive evidence of the parties' intent on this issue given the myriad of other evidence in the record cited above.

In their Motion for Summary Judgment, Defendants cherry picked two isolated parts of Mower's deposition testimony regarding his subjective understandings to argue that it is undisputed Moyer was merely acting as an agent for Oregon Acres, to wit:

- Q: So it was with Oregon Acres, right? That was who [Moyer] was with at the time?
  A: When it started. It was my understanding it was Oregon Acres.

R. 414 at 32:15-18.

- Q: So who was the deal with? Was it with Oregon Acres and Mike Moyer was guaranteeing the deal? Was it with Mike Moyer individually?
  A: It started – with my understanding, it started as what I – I guess what I thought would be an Oregon Acres deal with Mike Moyer as either the owner or the manager or the president. I don't know what he was. And then it transitioned in Thrive....

R. 414 at 34:18-25.

The trial court apparently agreed with this argument which is flawed for at least two reasons. First, a review of the entire record shows that Mower's "understandings" referenced above were based on his flawed assumption that Moyer was an owner of Oregon Acres. R. 414 at 33:5-19, 414 at 32:6-22 and 281.

Second, Mower's testimony cited above only refers his subjective understanding. There is no evidence in the record that Mower communicated his assumptions about Moyer representing Oregon Acres to Moyer or Garcia. The record contains no testimony from either Moyer or Garcia confirming or even addressing that Moyer was acting solely as an agent for Oregon Acres. Without some evidence that all three contracting parties understood Moyer's role, there was no meeting of the minds on this issue. Mower's un-communicated assumptions are not, and cannot be, competent evidence of the parties'

mutual intent. Thus, the court's assumed finding that the parties intended that Mower was not personally liable on the Home Depot contract was not based on undisputed evidence but rather on unsupported speculation.

2. The record shows that there are disputed issues of fact as to whether Moyer became liable on the Home Depot Contract as a matter of law.

As noted above, Utah law provides that "[a]ll persons purporting to act as or on behalf of a corporation, knowing there was no incorporation under this chapter, are jointly and severally liable for all liabilities created while so acting." Utah Code § 16-10a-204; see also *Gillham Advertising Agency, Inc. v. Ipson*, 567 P.2d 163 (Utah 1977) (individual defendant that purportedly signed a contract on behalf of a business entity that did not exist at the time held to be personally liable on the contract); *Murphy v. Crosland*, 886 P.2d 74, 80 (Utah App. 1994) ("[I]f a corporation does not have authority to conduct business, ...because it has not been properly incorporated..., then its agents are also without authority and [the predecessor statute to section 16-10a-204] applies.").

Here, the record shows that Moyer personally met with Mower in October 2011 to negotiate and enter into the Home Depot Contract. R. 456, 460. As discussed below, there is a genuine factual dispute as to whether Moyer was intending at that time to contract on behalf of Thrive. *See* section (II)(C)(1) below. However, Thrive did not exist as a legal entity until several months later. R. 281. If Moyer purported to enter the Home Depot Contract as Thrive's agent prior to Thrive's legal incorporation, then Moyer is personally liable on the contract. This is a factual issue that must be resolved at trial.

C. <u>The trial court erred in determining that Thrive could not be liable on the Home Depot Contract.</u>

The trial court apparently agreed with Defendants' brief argument that the Home Depot Contract was only with Oregon Acres and therefore Thrive could not be liable thereon. R. 402. However, a review of the entire record shows that there are genuine issues of material fact as to whether Thrive is liable on the Home Depot Contract under one or more theories of liability.

A corporation is generally not liable for contracts entered into by an agent purported to act on its behalf prior to its incorporation. See *Tanner v. Sinaloa Land & Fruit Co.*, 43 Utah 14, 134 P. 586, 589 (1913) ("Those who undertake to organize a corporation are not in any sense its agents before it comes into existence....They cannot affect it by their declarations or representations, or bind it by their engagements....") (internal citation and quotation marks omitted).

However, "[i]t is well-established under Utah law that subsequent affirmance by a principal of a contract made on his behalf by one who had at the time neither actual nor apparent authority constitutes a ratification, which in general is as effectual as an original authorization." *Simmons Media Group v. Waykar*, LLC, 2014 UT App 145, ¶ 24, 335 P.3d 885 (internal citations and quotation marks omitted). "Moreover, '[r]atification ... need not be express....Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient....Even silence with full knowledge of the facts may...operate as a ratification." *Id.* at ¶ 24 (quoting *Bradshaw v. McBride*, 649 P.2d 74, 78 (Utah 1982)).

Further, a successor business is liable for the previous debts and liabilities if the predecessor transfers all its assets to another company and:

> (1) the purchaser expressly or impliedly agrees to assume such debts; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the [purchase] transaction is entered into fraudulently in order to escape liability for such debts.

Macris & Associates, Inc. v. Neways, Inc., 2002 UT App 406, ¶ 20, 60 P.3d 1176.

1. **Disputed evidence in the record shows that Moyer may have been acting as an agent of Thrive in entering into the Home Depot Contract and that Thrive subsequently ratified the contract becoming liable thereon.**

There is disputed evidence as to whether Moyer was purporting to act as Thrive's agent at the time that Moyer negotiated the Home Depot Contract with Mower in October 2011. Earlier, Garcia had told Mower that Moyer had at one point been an owner of Oregon Acres. R. 414 at 24:18-25. As part of that same conversation, Garcia suggested the idea of doing a deal to purchase and resale landscaping trees, saying to Mower "[w]ell, if you can – if you can bring these trees in for me and you – you can – we can agree on a price, I can get a turn-around on our money between 30 and 60 days....I've dealt with <u>these people</u> before, and it's good money." R. 414 at 27:12-15 (emphasis added). Based on these statements, a fact finder could reasonable infer that Garcia was referring to entering the tree deal with whatever business Moyer was affiliated with.

Mower then testified that he, Garcia and Moyer proceeded to put together the Home Depot Contract and that, as part of the deal, trees would be drop-shipped from Oregon directly to Moyer in American Fork. R. 414 at 27:6-15 and 37:6-18. Mower knew that when he first met Moyer, Moyer was doing business out of a facility owned by Oregon Acres in Orem. R. 414 at 22:16-21 and 23:3-4. Given the fact that Mower was to ship the trees to a new facility in American Fork instead of to Orem, it is reasonable to

infer that Moyer was representing a new business. Mower later confirmed that the business located at the American Fork address to which he had shipped the trees was Thrive. R. 178. Thus, evidence shows that Moyer may have actually been purporting to act as Thrive's agent in entering the Home Depot Contract with Mower.

It is undisputed that Thrive did not exist as a legal entity at the time until a few months after Moyer purported to enter the Home Depot Contract with Mower. R. 281. However, Thrive would still be liable if it subsequently adopted or ratified the Home Depot Contract entered into by Moyer. There is a dispute of evidence as to whether this occurred. Mower had most of the trees shipped directly to the facility in American Fork, which he later found out was operated by Thrive. Moyer admitted that he is a co-owner of Thrive. R. 281. Thus Thrive, through Moyer, had knowledge of the Home Depot Contract. Further, Thrive did not return any of the trees that it received to Mower or question Mower as to why trees were being shipped to it. R. 414 at 47:18-48:1, 66:2-9 and 460. This evidence raises at least a reasonable inference that Thrive impliedly ratified the Home Depot Contract that had earlier been entered by Moyer.

2. Disputed evidence in the record shows that Thrive may have assumed the Home Depot Contract as a successive purchaser of Oregon Acres assets.

There is disputed evidence as to whether Oregon Acres (as opposed to Moyer individually) is liable under the Home Depot Contract. *See* sections (II)(B)(1)(a) and (b) above. If so, the evidence shows that Thrive may have assumed Oregon Acres' liability under the contract as the purchaser of its assets. Moyer admitted that Thrive acquired all of the assets of Oregon Acres in March 2012 or shortly thereafter. R. 281. As discussed

above, the record contains disputed evidence that at raises at least a reasonable inference that Thrive impliedly ratified, and therefore assumed, the obligations of the Home Depot Contract entered into by Moyer. *See* section (II)(C)(1) above.

3. There are disputed issues of fact as to whether Thrive has successor liability on the Home Depot Contract for fraudulently purchasing Oregon Acres' assets in order to escape Oregon Acres' liability.

Again, there is disputed evidence as to whether Oregon Acres is liable under the Home Depot Contract. *See* sections (II)(B)(1)(a) and (b) above. Again, Moyer admitted that Thrive acquired all of the assets of Oregon Acres. R. 281. At the time of this assumption, Thrive (through its owner Moyer) would have been well aware of Oregon Acres' liability under the Home Depot Contract. Yet Thrive did not return any of the trees that it received to Mower or pay Mower for the trees received by Oregon Acres. R. 414 at 47:18-48:1, 66:2-9 and 460. This evidence raises at least a reasonable inference that Thrive purchased Oregon Acres' assets for the fraudulent purpose of evading Oregon Acres' obligation to pay for the Home Depot Contract trees.

II. THE COURT ERRED IN GRANTING DEFENDANTS SUMMARY JUDGMENT ON MOWER'S UNJUST ENRICHMENT CLAIM.

Defendants asserted, and the trial court erroneously agreed, that Mower's unjust enrichment claim fails because the undisputed facts show (1) that the claim is preempted by the existence of an express contract between Tree Supply and Oregon Acres governing the purchase and sale of the tree, and (2) that, even if there were no governing contract, any claim for unjust enrichment would belong to Tree Supply and not Mower individually. R. 406-07, 504. However, a review of the entire record shows that there

are genuine issues of material fact regarding these issues.

The elements of an unjust enrichment claim are "(1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value." *Howard v. Manes*, 2013 UT App 208, ¶ 30, 309 P.3d 279 (quoting *Rawlings v. Rawlings*, 2010 UT 52, ¶ 29, 240 P.3d 754). Further, "a prerequisite for recovery on an unjust enrichment theory is the absence of an enforceable contract governing the rights and obligations of the parties relating to the conduct at issue." *Ashby v. Ashby*, 2010 UT 7, ¶ 14, 227 P.3d 246. As discussed above, an enforceable contract requires that the parties had a meeting of the minds as to the integral features of the agreement including whether the parties intended to contract. *Brasher v. Christensen*, 2016 UT App 100, ¶¶ 17, 21, --- P.3d ----.

A. <u>There are genuine issues of material fact as to whether an enforceable contract governed the tree transactions at issue.</u>

As discussed above, there are genuine issues of fact regarding the parties' mutual intent as to who they were contracting with. *See* sections (II)(A),(B) and (C) above. The trier of fact could well conclude that the parties' never had a meeting of the minds on this issue and thus did not enter into an enforceable contract at all.

Further, even if such a contract did exist, there are disputed issues of fact as to whether the trees taken or received by Moyer were part of that contract. It is undisputed that Moyer received a large number of trees from Mower which have not been paid for.

R. 414 at 47:18-48:1, 66:2-9 and 460. Defendants' argument assumes that all of these trees were received by Oregon Acres as part of its express contract with Tree Supply, but the evidence does not confirm such speculation.

Nothing in the record shows that Oregon Acres actually received the trees taken by Moyer. The trees shipped directly to Moyer from Oregon (the state) went to American Fork to a different facility than the Oregon Acres facility in Orem where Mower had originally met Moyer. There is no evidence in the record confirming that the American Fork property was Oregon Acres' facility. To the contrary, Mower testified that he visited the facility and it has Thrive's signage. R. 178. Moyer also personally took some of the trees from the property in Payson. Nothing in the record shows that Moyer then delivered these trees to Oregon Acres. Nothing in the record shows that Moyer sold the trees he received from Mower as an agent of Oregon Acres or that Oregon Acres received the proceeds.

There is evidence in the record that Moyer personally received the benefit of the trees. When Mower confronted Moyer about taking the trees from Payson, Moyer told him that he (Moyer) had orders to fill and needed the trees. R. 414 at 46:6-11. There is no evidence in the record that Moyer was fulfilling orders on behalf of Oregon Acres. Also, Mower testified that he asked Moyer several times for a written contract, but Moyer told him "Home Depot doesn't give <u>me</u> a contract; so <u>I</u> can't give you a contract…." R. 414 at 27:22-25 (emphasis added). There is no evidence in the record that Moyer was not referring to himself personally here.

Regardless of whether there was an enforceable contract for the purchase of trees

by Oregon Acres, the current record is insufficient to show that the trees actually received by Moyer were part of that contract as opposed to Moyer keeping the trees or the sale proceeds from the trees for himself or for Thrive. Thus, the trial court erred in agreeing with the Defendants that it is undisputed that an express contract existed between Tree Supply and Oregon Acres precluding Mower's claim for unjust enrichment.

B. There are genuine issues of material fact as to whether Mower could state a personal claim against Moyer or Thrive for unjust enrichment.

The record contains evidence that Mower conferred a benefit (the trees) on Moyer and/or Thrive. In their Motion for Summary Judgment, Defendants argued that any unjust enrichment claim could only belong exclusively to Tree Supply, inferring that Tree Supply owned the trees at issue and not Mower personally. R. 407. As discussed above, there is at least a disputed issue of fact as to whether the trees were owned personally by Mower or by Tree Supply. *See* section (II)(A)(1)(b) above (citing evidence in the record that Mower personally owned the trees taken by Moyer, that Mower personally purchased the trees shipped to Moyer, that Mower personally owned the irrigation equipment and machinery used to maintain the trees, that none of the money used to purchase the trees came from Tree Supply, and that Tree Supply never owned the trees or any assets of any kind).

Further, there is no evidence confirming that Mower ever legally transferred his interest in the trees to Tree Supply. The invoice sent by Mower does not show that it was undisputed that Tree Supply owned the trees. The invoice was sent weeks before Tree Supply even existed as a legal entity. R. 61 and 459, 462. In addition, the invoice only

represented a few of the tree that Moyer received from Mower, specifically the ones that Moyer directly took from the property in Payson. R. 61. The invoice was unrelated to the majority of the trees received by Moyer. As pointed out by Mower in his opposition to the Defendants' Motion for Summary Judgment, simply putting an invoice on letterhead with the name of Tree Supply does not legally transfer any rights to Tree Supply. R. 456.

The record also shows genuine disputes of fact as to whether the trees were received by Moyer personally, by Thrive, or by Oregon Acres. *See* sections (II)(B) and (C) above.

The record shows as least a dispute of fact as to whether the conferee had knowledge of receiving the trees. If the conferee was Moyer, he obviously had knowledge by virtue of personally taking the trees from Payson and from receiving the trees shipped from Oregon. If the conferee was Thrive, then it had knowledge by virtue of Moyer's knowledge and ownership. R. 281.

Finally, the record shows evidence that the conferee (whether Moyer or Thrive) kept the trees without paying for them with knowledge (via Moyer) that the trees were not given gratuitously but as part of a proposed business venture. R. 414 at 45:15-18, 47:18-48:1, 66:2-9 and 460. Thus, there is at least disputed issues of fact regarding whether Mower has a personal claim for unjust enrichment against Moyer or Thrive, and the trial court erred in granting the Defendants' summary judgment on Mower's claim.

III. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS SUMMARY JUDGMENT BASED ON MOWER'S FAILURE TO COMPLY WITH THE RULES OF CIVIL PROCEDURE.

The District Court granted the Defendants' Motion for Summary Judgment "for the reasons stated in Thrive Defendant's initial and reply memorandum, *and Plaintiff's failure to comply with the applicable rules.*" (504) (emphasis in original) Defendants argued that facts listed in their "undisputed statement of facts" should be deemed admitted because Mower failed to properly controvert them pursuant to Rule 7(c)(3) of the Utah Rules of Civil Procedure. Defendants then argued that the court should grant their motion for summary judgment based on Mower's failure to substantially comply with Rule 7. R. 475-76.

The trial court's order is unclear as to whether the trial court was granting summary judgment as some sort of sanction for Mower's failure to comply with Rule 7 or because the court felt that summary judgment was warranted as a natural result of having Defendants' statement of facts deemed admitted. In either case, the trial court erred for at least three reasons. First, Mower's failure to comply with Rule 7 was harmless error. Second, Mower was entitled to consideration as an unrepresented party. Third, the trial court was required to deny Defendants' motion, notwithstanding Mower's deficient opposition, because Defendants were not entitled to judgment as a matter of law.

A. <u>The court abused its discretion in deeming Defendants' stated facts uncontroverted because Mower substantially complied with Rule 7 and his violations amounted to harmless error.</u>

Prior to its repeal and reenactment effective November 1, 2015, Utah Rules of

Civil Procedure Rule 7(c)(3)(B) required that

> [a] memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted....For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials.

"The trial court has discretion in requiring compliance with [Rule 7]." *Bluffdale City v. Smith*, 2007 UT App 25, ¶ 5, 156 P.3d 175 (internal citations and quotation marks omitted). However, the Supreme Court has also interpreted Rule 7 "in a somewhat more relaxed way." *Gary Porter Const. v. Fox Const., Inc.*, 2004 UT App 354, ¶15, 101 P.3d 371. Specifically,

> even where an "opposing memorandum [does] not set forth disputed facts listed in numbered sentences in a separate section as required [by the rule, as long as] the disputed facts [are] clearly provided in the body of the memorandum with applicable record references, ... failure to comply with the technical requirements of [the rule] [is] harmless.

Id. at ¶ 15 (quoting *Salt Lake County v. Metro West Ready Mix, Inc.*, 2004 UT 23, ¶ 23 n. 4, 89 P.3d 155) (interpreting the predecessor rule to Rule 7).

In *Gary Porter*, the appellate court held that the trial court abused its discretion in admitting the plaintiff's facts set forth in its motion for summary judgment as admitted because, even though the defendant's opposition memorandum did not have a section setting forth the facts verbatim, it at least set forth some disputed facts in the body of the memorandum with appropriate record citations which clearly created disputed issues of material fact. *Id.* at ¶ 15.

In *Jennings Investment, LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, 208

P.3d 1077, the appellate court held that the trial court did not abuse its discretion in admitting the plaintiff's facts as uncontroverted in its motion for summary judgment. Central to the court's holding was its determination that "a careful review of [the defendant's] opposition memorandum and the attached Welch affidavits...reveal no basis for any dispute of facts." *Id.* at ¶ 25. Dixie's opposition material simply did not provide a basis for a material dispute of fact, and thus the trial court did not abuse its discretion in deeming the plaintiff's facts uncontroverted. *Id.* at ¶ 28.

Similarly in *Bluffdale City*, the trial court properly deemed the plaintiff's summary judgment statement of facts to be uncontroverted where the defendant's opposition did provide a coherent explanation for the grounds for the dispute, and did not cite to any relevant materials. *Bluffdale,* 2007 UT App 25 at ¶ 10-11. The court also noted that the defendants' compliance with Rule 7 was immaterial because the defendants provided no argument or disputed evidence at all regarding the plaintiff's unjust enrichment claim. *Id.* at ¶ 11 n 2.

Here, Mower failed to strictly comply with Rule 7 because he did not set forth a verbatim restatement of each of the moving's party's facts that are controverted. However, Mower's failure was harmless because he did dispute the relevant facts relied on by Defendants in the body of his memorandum with citations to at least some of the relevant evidence.

Mower adequately disputed Defendants' claim that he was merely acting as an agent of Tree Supply (instead of on his own behalf) in entering the Home Depot Contract. Mower asserted that he personally entered into the Home Depot

Contract with Moyer in 2011 and supported this factual claim by citation to his own affidavit in which he testified that October 2011 "[Mower] met with Michael Moyer and [Moyer] agreed to a contract to purchase trees from [Mower]." R. 455-56, 460. Mower repeatedly noted that he personally owned and provided the trees for the Home Depot Contract. R. 456, 460.

Mower also asserted that he could not have been acting as an agent for Tree Supply at that time because Tree Supply did not yet exist and supported this factual claim by citation to his affidavit and attached exhibit showing that Tree Supply was not formed until Mower filed its Articles of Organization with the state on February 23, 2012. R. 455-56, 459-64. Mower correctly pointed out that the fact that he sent an invoice for some of the trees to Moyer on Tree Supply letterhead does not legally transfer ownership of the trees to Tree Supply or legally assign his rights under the Home Depot Contract to Tree Supply. R. 455-56.

Mower adequately disputed Defendants' claim that neither Moyer nor Thrive could be liable on the Home Depot Contract. Again, Mower showed that he and Moyer personally met and agreed to the Home Depot Contract in 2011. R. 456, 460. Mower correctly pointed out that the evidence in the record was insufficient to show that Moyer was acting solely as an agent for Oregon Acres instead of on his own behalf or on behalf of Thrive. Moyer never affirmatively stated who he was representing in negotiating the Home Depot Contract or that he was acting on behalf of Oregon Acres. R. 457. Mower's initial understanding as to Moyer's role was only his belief, and did not show an undisputed issue of fact

as to the parties' intent. R. 457.

Mower adequately disputed Defendants' claim that there was an express contract between Tree Supply and Oregon Acres that barred his unjust enrichment claim. R. 406-07, 457-58. As discussed above, Mower showed that there are disputed issues of fact as to who the parties to the Home Depot Contract were or even if a contract existed.

In their reply brief, Defendants claimed that Mower agreed that his unjust enrichment claim was moot. R. 481. But that is not true. Mower's acknowledgement that his unjust enrichment claim was plead as an alternative to his breach of contract claim and would be unnecessary was clearly premised on the assumption that there was an express contract between himself and Defendants. R. 458.

B. <u>The court abused its discretion in deeming Defendants' stated facts uncontroverted because Mower was entitled to leniency as an unrepresented party.</u>

Utah courts have adopted a leniency approach to pro se litigants which "seeks to balance the procedural demands of litigation and the rights of unrepresented parties." *State v. Winfield*, 2006 UT 4, ¶ 19, 128 P.3d 1171.

> As a general rule, a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar. Nevertheless, because of [their] lack of technical knowledge of the law and procedure [self-represented parties] should be accorded every consideration that may reasonably by indulged.

Winfield at ¶ 19 (quoting *Lundahl v. Quinn*, 2003 UT 11, ¶ 3, 67 P.3d 1000 and *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983)) (internal quotation marks omitted); see also

Allen v. Friel, 2008 UT 56, ¶¶ 9, 11, 194 P.3d 903.

Such "considerations" include leniency when unrepresented parties make procedural errors or technical rule violations. See *Allen v. Friel*, 2008 UT 56 , ¶ 9, 194 P.3d 903 ("[W]e are reluctant to penalize self-represented litigants for technical rule violations."); *Lundahl v. Quinn*, 2003 UT 11, ¶ 4, 67 P.3d 1000 ("[T]his court generally is lenient with pro se litigants....Where they are largely strangers to the legal system, courts are understandably loath to sanction them for a procedural misstep here or there."). In *Lundahl*, the Supreme Court clarified that where "special leniency on the basis of pro se status is inappropriate,"[1] an unrepresented party "shall be charged with full knowledge and understanding of all relevant statutes, rules, and case law" (implying that an unrepresented party deserving of leniency may be somewhat excused for a lack of knowledge and understanding about such rules and laws). *Id.* at ¶ 5.

The relevant published appellate cases show that Utah courts generally have extended leniency to excuse procedural violations by pro se litigants where the violations did not prevent the court from assessing the merits of the cases. See *Wurst v. Department of Employment Sec.*, 818 P.2d 1036 (Utah App. 1991) (plaintiff's imperfect efforts to preserve an issue with the review board excused); *Bell v. Bell*, 2013 UT App 248, ¶ 24, 312 P.3d 951 (wife's potential preservation problems excused); *Orem City v. Bovo*, 2003 UT App 286, ¶¶ 12-13, 76 P.3d 1170 (defendant's failure to file formal written jury

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[1] Pro se leniency may be inappropriate in exceptional circumstances where a litigant is clearly experienced in the legal system. See *Lundahl* at ¶¶ 2-5 (court declining to extend leniency to pro se litigation who had routinely filed numerous frivolous and harassing proceedings in the appellate courts and had already been previously extended reasonable indulgences).

request excused); *Nicholls v. State*, 2009 UT 12, ¶ 14 n. 6, 203 P.3d 976 (court declined to dismiss appeal even though deficiencies in litigant's brief where it at least provided an adequate basis for appellate review of issues raised); *Midland Funding, LLC v. Pipkin*, 2012 UT App 185, ¶ 3, 283 P.3d 541 (court overlooked inadequate briefing and marshaling issues to reach merits of appeal).

In contrast, pro se leniency cannot excuse certain egregious violations of procedure. For example, courts have dismissed or denied appeals by pro se litigants where their appellate briefing is so inadequate that the courts could not analyze the issues raised. See *Fuller v. Springville City*, 2015 UT App 177, ¶¶ 19-20, 355 P.3d 1063; *Jacob v. Cross*, 2012 UT App 190, ¶¶ 3-4, 283 P.3d 539; *Hampton v. Professional Title Services*, 2010 UT App 294, ¶¶ 2-5, 242 P.3d 796.

Court have also dismissed or denied appeals by pro se litigants where they completely failed in the trial court to preserve issues for appellate review. See *Robinson v. Jones Waldo Holbrook & McDonough, PC*, 2016 UT App 34, ¶¶ 24, 28, 369 P.3d 119 (plaintiff failed to file any opposition to defendant's motion for summary judgment); *Sivulich v. Department of Workforce Services, Workforce Appeals Bd.*, 2015 UT App 101, ¶¶ 5-6, 348 P.3d 748 (plaintiff failed to show any preservation of issues raised on appeal); *State v. Burdick*, 2014 UT App 34, ¶¶ 25-26, 320 P.3d 55 (defendant never argued to the trial court that the police lacked probable cause to arrest him); *Tolle v. Fenley*, 2006 UT App 78, ¶¶ 69-70, 132 P.3d 63 (THORNE, J. concurring) (plaintiff presented to testimony or argument to trial court on statute of limitations issue).

In *Midland Funding v. Pipkin*, the court excused the defendant's appellate briefing

issues but could not excuse the fact that the defendant's summary judgment opposition completely failed to raise any genuine issue of material fact on the plaintiff's debt collection claim. 2012 UT App 185, ¶ 3, 283 P.3d 541. Rather, all the opposition did was repeatedly claim that Pipkin had not been provided with requested documentation about the debt. Defendant did not set forth any facts (or even argument) showing that he did not actually owed the debt claimed. *Id.* at ¶ 4.

Similarly in *Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, 241 P.3d 375, the court declined to extend leniency requested by the defendant where it would not have affected the outcome of the case. The trial court struck affidavits filed by the Strand's purported experts because they did not comply with Rule 702 of the Utah Rules of Evidence. *Id.* at ¶ 17. Strand argued that, as a pro se litigant, the trial court should have allowed him to rewrite the affidavits. The appellate court held that the trial court's refusal was not an abuse of discretion because "[i]t is far from the clear that the problems with those affidavits could have been corrected with a mere rewrite"....and "[i]n any event...the district court granted Strand leniency on many occasions." *Id.* at ¶ 18. However, the court still went on to consider the substantive issues in Strand's case and reviewed the trial court's grant of summary judgment for correctness. *Golden Meadows* at ¶ 19.

Here, even though he did not strictly comply with Rule 7, Mower's opposition provided the trial court sufficient basis to rule on the merits of his arguments, and the trial court abused its discretion in failing to extend leniency to Mower as a pro se litigant. Unlike in the cases of *Jones Waldo*, *Midland Funding* and *Golden Meadows* where the

respective parties completely failed to raise a genuine issue of material fact, Mower's opposition alerted to trial court to disputed factual issues underpinning Defendants' arguments, although imperfectly. Just as in the cases of *Wurst*, *Bell*, *Bovo* and *Nicholls*, the trial court should have overlooked Mower's failure to strictly comply with Rule 7 and not have deemed Defendants' statement of facts uncontroverted.

C. **The court erred in granting Defendants' motion because, even if Defendants' stated facts were deemed admitted, Defendants' were not entitled to judgment as a matter of law.**

"A court may grant summary judgment only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Robinson v. Jones Waldo Holbrook & McDonough, PC*, 2016 UT App 34, ¶ 24, 369 P.3d 119 (quoting *Kranendonk v. Gregory & Swapp, PLLC,* 2014 UT App 36, ¶ 11, 320 P.3d 689 and Rule 56(c) Utah R. Civ. P.). Regardless of whether there are disputed issues of fact, the trial court still has an obligation to determine whether an issue is proper for summary judgment as a matter of law. *Zundel v. Magana*, 2015 UT App 69, ¶ 17, 347 P.3d 444 (citing *Newman v. White Water Whirlpool*, 2008 UT 79, ¶ 15, 197 P.3d 654).

In their "undisputed statement of facts" section of their initial memorandum, Defendants' listed the following facts relevant to Mower's breach of contract and unjust enrichment claims:

- In the fall of 2011, Mower organized Tree Supply for the purpose of doing business brokering trees with Garcia and other landscapers. R. 396 at ¶ 12.

- In or around the spring of 2012, after Garcia and Tree Supply began their venture, Garcia approached Mower about working with Moyer, who had a connection with Home Depot. R. 397 at ¶ 13.

- Mower, through Tree Supply, decided to proceed with the deal involving Moyer and Home Depot ("Home Depot Contract"). R. 397 at ¶ 14.

- Tree Supply understood that the Home Depot Contract was with Oregon Acres, who was acting through Moyer, an officer. R. 397 at ¶ 15.

- Tree Supply understood that the terms of the Home Depot Contract were as follows: [Tree Supply's] responsibility was to fund it and provide the property to bring the trees to. Garcia's responsibility was to go to Oregon and orchestrate the digging and shipping of the trees. Moyer's deal was to receive the trees, and then at that point he was receiving the trees, he was taking them to his property and then he was putting them into baskets, plastic containers, and putting his label on and the Home Depot label, and then Moyer would ship them out at that point. R. 397 at ¶ 16.

- After the parties began performing the Home Depot Contract, Moyer removed approximately 60 trees that were being stored at a property in Payson. R. 397 at ¶ 17.

- Mower disputes that Moyer was entitled to take the trees. R. 397 at ¶ 18.

- Tree Supply sent an invoice to Moyer for the trees. R. 398 at ¶ 19.

- Tree Supply sent the invoice because that was the entity Mower set up for his business brokering trees. R. 398 at ¶ 20.

- Mower signed the invoice in his position as the owner of Tree Supply. R. 398 at ¶ 21.

- If Mower had the necessary funds, he would have kept Tree Supply operating. R. 398 at ¶ 22.

- The trees that were taken from Payson were part of the original deal with Oregon Acres. R. 398 at ¶ 23.

Even if the trial court properly deemed these facts as uncontroverted and did not rely on any other part of the record, the court still erred in granting summary judgment

because these facts, standing alone, do not show that Defendants' were entitled to judgment as a matter of law on Mower's breach of contract and unjust enrichment claims.

Defendants' arguments for dismissing both Mower's breach of contract and unjust enrichment claims are based on the premise that the undisputed facts show that there was an express contract between Tree Supply as the sole seller and Oregon Acres as the sole buyer of the trees at issue, and therefore Mower has no standing to sue and Moyer and Thrive have no liability. But the facts listed in Defendants' "undisputed statement of facts" simply do not support this premise. None of these facts show that the three relevant persons (Mower, Garcia and Moyer) had a meeting of the minds as to their intended roles in the Home Depot Contract.

Defendants' stated facts do not support their claim that "[t]he undisputed facts demonstrate that Mower was not a party to the Home Depot Contract." R. 402. First, Defendants' do not cite to any relevant materials showing either Garcia's or Moyer's intentions, understanding or agreement as to the roles of Mower and/or Tree Supply. Defendants' stated facts only relate to Mower's understandings and intent. They say nothing about whether Mower communicated his intentions to Garcia and Moyer or whether Garcia and Moyer agreed with Mower. The facts set forth by Defendants simply do not answer these questions.

Second, Defendants' stated facts do not clearly show Mower's intent regarding his own role in the contract. These facts appear to show that Mower intended to somehow operate the Home Depot Contract through Tree Supply. But that does not necessarily mean that he intended to make Tree Supply the sole seller party to the contract. The trial

of fact could also reasonably infer from Defendants' stated facts that Mower intended to contract on his own behalf while merely doing business under the trade name of Tree Supply. The trial court should have resolved such inferences in Mower's favor as the non-moving party.

Defendants' stated facts also do not support their claim that Oregon Acres was the sole purchasing party under the contract. Again, Defendants cite no materials showing either Garcia's and Moyer's intent regarding who would be purchasing the trees. Defendants' stated facts are at best ambiguous as to Mower's own intent regarding the identity of the purchasing party. Defendants cited part of Mower's deposition testimony where he stated that "thought [the Home Depot Contract] would be an Oregon Acres deal with Mike Moyer as either the owner of the manager or the president.) R. 397 at ¶ 15. But Defendants' do not show that Mower ever communicated this understanding to Garcia or Moyer. Further, Defendants' cited to other testimony by Mower that raises a strong inference that Mower understood that Moyer would be purchasing the trees on his own. *See* R. 397 at ¶ 13 ("Garcia approached Mower about working with Moyer, who had a connection with Home Depot."); R. 397 at ¶ 14 ("Mower...decided to proceed with the deal involving Moyer and Home Depot...."); R. 397 at ¶ 16 (stating that Mower understood that Moyer's role was to receive the trees, take them to his property, prepare them, and then ship them to Home Depot).

Defendants' stated facts, even if deemed uncontroverted, simply do not show that Mower, Garcia and Moyer had a meeting of the minds as to their intents regarding their roles in the Home Depot Contract. The undisputed facts do not show that there was an

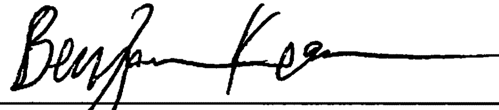
express contract between Tree Supply as the sole seller and Oregon Acres as the sole buyer of the trees. Therefore, the Court erred in ruling that Mower has no standing to sue and Moyer and Thrive have no liability on Mower's breach of contract and unjust enrichment claims.

CONCLUSION

This Court should reverse the trial court's grant of summary judgment to Defendants and remand the case for a trial on the merits of Mower's breach of contract and unjust enrichment claims against Defendant.

DATED: August 5, 2016.

BK LAW, PLLC



BENJAMIN A. KEARNS
Attorney for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

I, Benjamin A. Kearns, hereby certify under penalty of perjury of the State of Utah pursuant to Utah Code section 78B-5-705 that the following is true:

1. This Brief of Appellant complies with the type-volume limitations set forth in Rule 24(f)(1) of the Utah Rules of Appellate Procedure.

2. Excluding the cover page, Table of Contents and Table of Authorities, this Brief contains 13,997 words according to word count of the word processing system used to prepare the Brief.

DATED: August 5, 2016.

BK LAW, PLLC

BENJAMIN A. KEARNS
Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2016, I mailed two true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following:

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BENJAMIN A. KEARNS

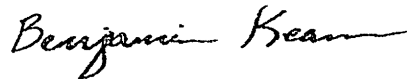
IN THE UTAH COURT OF APPEALS

GREGORY MOWER, an individual; TREE SUPPLY, LLC, an expired Utah limited liability company, Plaintiffs/Appellants, vs. MICHAEL MOYER, an individual; and THRIVE WHOLESALE GROWERS, INC., a Utah Corporation, Defendants/Appellees.	**CERTFICATE RE ADDENDUM** Appellate Case No. 20150782-CA District Case No. 130300106

I, BENJAMIN A. KEARNS, hereby certifiy that no addendum in necessary for the Brief of Appellant filed in this case. There are no constitutional provisions, statutes, rules, or regulations of central importance cited in the brief that are not reproduced verbatim in the brief. This case is not being reviewed on certiorari to the Utah Supreme Court. There are no cases of central importance to the appeal that are not available to the court as part of a regularly published reporter service. There are no parts of the record that are of central importance to the appeal that are not reproduced verbatim in the brief and easily located by citation to page number in the record.

DATED: August 5, 2016.

BK LAW, PLLC



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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2016, I mailed two true and correct copies of the foregoing **CERTIFICATE RE ADDENDUM** to the following:

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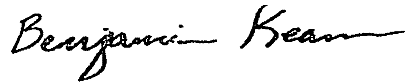

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