

2016

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

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Brief of Appellee, *Mower v Moyer*, No. 20150782 (Utah Court of Appeals, 2016).
https://digitalcommons.law.byu.edu/byu_ca3/3382

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

GREGORY MOWER, AN INDIVIDUAL; AND TREE SUPPLY, LLC AN
EXPIRED UTAH LIMITED LIABILITY COMPANY
Plaintiffs and Appellant,

v.

MICHAEL MOYER, AN INDIVIDUAL; AND THRIVE WHOLESALE
GROWERS, INC., A UTAH CORPORATION,
Defendants and Appellees

BRIEF OF APPELLEES

On appeal from the Fourth Judicial District Court, Utah County,
Honorable James Brady, District Court No. 130300106

Peter Schofield (#9447)
Adam D. Wahlquist (#12269)
Jacob A. Green (#15146)
KIRTON McCONKIE P.C.
2600 W. Executive Pkwy, #400
Lehi, Utah 84043
pschofield@kmclaw.com
awahlquist@kmclaw.com
jgreen@kmclaw.com
Telephone: (801) 328-3600
Attorneys for Appellees

Benjamin A. Kearns
BK LAW, PLLC
233 S. Pleasant Grove Blvd
Suite 202
Pleasant Grove, Utah 84062
benjamin@bk-law.com
Attorney for Appellant

FILED
UTAH APPELLATE COURTS

OCT 13 2016

IN THE UTAH COURT OF APPEALS

GREGORY MOWER, AN INDIVIDUAL; AND TREE SUPPLY, LLC AN
EXPIRED UTAH LIMITED LIABILITY COMPANY
Plaintiffs and Appellant,

v.

MICHAEL MOYER, AN INDIVIDUAL; AND THRIVE WHOLESALE
GROWERS, INC., A UTAH CORPORATION,
Defendants and Appellees

BRIEF OF APPELLEES

On appeal from the Fourth Judicial District Court, Utah County,
Honorable James Brady, District Court No. 130300106

Peter Schofield (#9447)
Adam D. Wahlquist (#12269)
Jacob A. Green (#15146)
KIRTON McCONKIE P.C.
2600 W. Executive Pkwy, #400
Lehi, Utah 84043
pschofield@kmclaw.com
awahlquist@kmclaw.com
jgreen@kmclaw.com
Telephone: (801) 328-3600
Attorneys for Appellees

Benjamin A. Kearns
BK LAW, PLLC
233 S. Pleasant Grove Blvd
Suite 202
Pleasant Grove, Utah 84062
benjamin@bk-law.com
Attorney for Appellant

LIST OF ALL PARTIES

The identity of the parties to this appeal is contained in the caption.

TABLE OF CONTENTS

| | |
|---|----|
| LIST OF ALL PARTIES..... | ii |
| TABLE OF CONTENTS..... | 1 |
| TABLE OF AUTHORITIES..... | 3 |
| INTRODUCTION..... | 7 |
| STATEMENT OF JURISDICTION | 11 |
| ISSUES PRESENTED | 11 |
| STATEMENT OF THE CASE | 14 |
| STATEMENT OF FACTS | 16 |
| SUMMARY OF ARGUMENTS..... | 18 |
| ARGUMENT | 20 |
| I. The District Court Correctly Dismissed the Breach of Contract Claim | 20 |
| a. Tree Supply, not Mower, was party to the contract..... | 22 |
| b. Oregon Acres, not the Thrive Defendants, was party to the contract | 30 |
| II. The District Court Correctly Dismissed Mower’s Unjust Enrichment Claim. | 36 |
| a. Mower’s unjust enrichment claim is barred by the existence of an express contract governing the same subject matter..... | 36 |

| | |
|--|----|
| b. Mower failed to preserve his unjust enrichment claim for appeal | 38 |
| III. The District Court Did Not Abuse its Discretion by Dismissing the Remaining Claims Because of Mower’s Failure to Comply with the Applicable Rules | 42 |
| a. The district court was within its discretion in dismissing the remaining claims..... | 43 |
| b. The decision to grant Mower leniency was within the sound discretion of the district court | 50 |
| c. The district court did not merely deem the facts undisputed, but if it did, summary judgment was still appropriately granted on Mower’s claims..... | 51 |
| CONCLUSION | 53 |

TABLE OF AUTHORITIES

CASES

| | |
|--|--------|
| <i>Alford v. Utah League of Cities & Towns</i> , 791 P.2d 201 (Utah Ct. App. 1990) | 12 |
| <i>Am. Towers Owners Assoc., Inc. v. CCI Mechanical, Inc.</i> , 930 P.2d 1182 (Utah 1996) | 36 |
| <i>Anderson v. Gardner</i> , 647 P.2d 3 (Utah 1982) | 26, 27 |
| <i>Ashby v. Ashby</i> , 2010 UT 7, 227 P.3d 246 | 37 |
| <i>Bailey v. Bayles</i> , 2002 UT 58, 52 P.3d 1158 | 12 |
| <i>Baker v. Dataphase, Inc.</i> , 781 F.Supp. 724 (D. Utah 1992) | 22 |
| <i>Bluffdale City v. Smith</i> , 2007 UT App 25, 156 P.3d 175 | passim |
| <i>Brigham Truck & Implement Co. v. Fridal</i> , 746 P.2d 1171 (Utah 1987) | 35 |
| <i>Brookside Mobile Home Park, Ltd. v. Peebles</i> , 2002 UT 48, 48 P.3d 968 | 38 |
| <i>Comm. Union Assoc. v. Clayton</i> , 863 P.2d 29 (Utah Ct. App. 1993) | 23 |
| <i>Dairy Prod. Servs., Inc. v. City of Wellsville</i> , 2000 UT 81, 13 P.3d 581 | 35 |

| | |
|--|----------------|
| <i>Decius v. Action Collections Serv., Inc.</i> , 2004 UT App 484, 105 P.3d 956 | 35 |
| <i>Goddard v. Hickman</i> , 685 P.2d 530..... | 14, 43, 50, 52 |
| <i>Golden Meadows Properties, LC v. Strand</i> , 2010 UT App 257, 241 P.3d 375 | 50 |
| <i>Harnicher v. Univ. of Utah Med. Ctr.</i> , 851 P.2d 67 (Utah 1998) | 49 |
| <i>Jennings Investments, LC v. Dixie Riding Club, Inc.</i> , 2009 UT App 119, 208 P.3d 1077 | 33, 44 |
| <i>Johnson v. Hermes Assoc., Ltd.</i> , 2005 UT 82, 128 P.3d 1151 | 11 |
| <i>Jones v. Layton/Okland</i> , 2009 UT 39, 214 P.3d 859 | 14, 43, 51 |
| <i>Macris & Assoc., Inc. v. Neways, Inc.</i> , 2002 UT App 406, 60 P.3d 1176 | 34 |
| <i>Miller v. Celebration Mining Co.</i> , 2001 UT 64, 29 P.3d 1231 | 27, 28, 29, 30 |
| <i>Novell, Inc. v. The Canopy Group, Inc.</i> , 2004 UT App 162, 92 P.3d 768 | 22 |
| <i>Orvis v. Johnson</i> , 2008 UT 2, 177 P.3d 600 | 36 |
| <i>Poteet v. White</i> , 2006 UT 63, 147 P.3d 439, 441 | passim |

| | |
|--|----------------|
| <i>Salt Lake Cnty. v. Metro W. Ready Mix, Inc.,</i> 2004 UT 23, 89 P.3d 155 | 45, 46 |
| <i>Schuurman v. Shingleton,</i> 2001 UT 52, 26 P.3d 227 | 12 |
| <i>Shire Dev. v. Frontier Invs.,</i> 799 P.2d 221 (Utah Ct. App. 1990) | 21, 30 |
| <i>Simmons Media Group, LLC v. Waykar, LLC,</i> 2014 UT App 145, 335 P.3d 885 | 25 |
| <i>Sittner v. Schriever,</i> 2000 UT 45, 2 P.3d 442 | 13, 32, 38, 41 |
| <i>State ex rel. Road Comm’n v. General Oil Co.,</i> 448 P.2d 718 (Utah 1968) | 14 |
| <i>State v. Winfield,</i> 2006 UT 4, 128 P.3d 1171 | 50 |
| <i>Swan Creek Village Homeowners Assoc. v. Warne,</i> 2006 UT 22, 134 P.3d 1122 | 26 |
| <i>WebBank v. Am. Gen. Annuity Serv. Corp.,</i> 2002 UT 88, 54 P.3d 1139 | 22 |
| <i>Weber v. Snyderville W.,</i> 800 P.2d 316 (Utah Ct. App. 1990) | 12 |

STATUTES

| | |
|-----------------------------|----|
| Utah Code §16-10a-204 | 28 |
| Utah Code §78A-4-103 | 11 |

RULES

| | |
|---|--------|
| Rule 7, Utah Rules of Civil Procedure..... | passim |
| Rule 12, Utah Rules of Civil Procedure..... | 15 |
| Rule 52, Utah Rules of Civil Procedure..... | 12 |

INTRODUCTION

Tree Supply, LLC was formed for a single purpose: to sell landscaping trees for a profit. To accomplish this goal, Tree Supply partnered with Cornelio Garcia, who would purchase trees in Oregon, and Oregon Acres, a nursery in Utah that would package and sell the trees; Tree Supply would provide the upfront capital to purchase the trees. However, as with many fledgling business ventures, the deal went south and the business failed.

Seeking to recoup its lost investment, Tree Supply and its principal Gregory Mower filed suit against anyone remotely connected to the deal: Garcia, Rafiky's Nursery, LLC, Dig-A-Tree-Save-A-Tree, LLC, C.C. Mimi's Nursery, Michael Moyer, and Thrive Wholesale Growers, Inc. However, only Michael Moyer (an Oregon Acres employee) and Thrive Wholesale Growers, Inc. (a business formed by Moyer after the events at issue in this appeal) were served with the complaint. The actual parties to the deal, and the parties that may have actually harmed Tree Supply, Garcia and Oregon Acres, were never made parties to this lawsuit. Garcia, while he was

named as a defendant, was never served with the complaint; Oregon Acres was not named as a defendant.

Despite failing to prosecute its claims against those who actually (allegedly) harmed it, Tree Supply pressed forward in its suit against the wrong defendants—Moyer and Thrive—alleging claims for breach of contract, unjust enrichment, conversion, RICO violations, conspiracy, and fraud. However, Tree Supply's claims suffered from one fatal flaw: neither Moyer nor Thrive were involved with Tree Supply's failed business venture.

Eventually, Tree Supply was dismissed from this case, leaving Mower to prosecute the claims in his individual capacity. However, the claims in this case were not Mower's, they were Tree Supply's. Tree Supply was party to the failed venture, and only Tree Supply had standing to prosecute the asserted claims. Because these claims were asserted by the wrong plaintiff (Mower) against the wrong defendants (Moyer and Thrive), the district court ultimately dismissed the claims with prejudice, writing the final chapter of this failed business venture.

Unhappy with the result, Mower appealed, arguing that the district court erred. According to Mower, he was the party wronged by the failed business venture, not the company organized for the express purpose of “[f]arming and harvesting of trees and other nursery products, which are then wholesaled to supply landscape contractors.” R.462. Moreover, Mower claims that Moyer (who was an Oregon Acres employee) and Moyer’s new company, Thrive, are responsible for the failed deal Tree Supply struck with Garcia and Oregon Acres. The facts simply do not support this contention. The district court correctly concluded that the claims asserted in the complaint belonged to Tree Supply, not Mower, and that Moyer and Thrive are not liable for the actions of Garcia and Oregon Acres.

Furthermore, the claims in this case were dismissed for an additional reason: Mower’s failure to comply with the applicable rules. The district court’s dismissal of Mower’s claims for this reason is subject to an abuse of discretion standard. And the district court plainly did not abuse its discretion. Mower admittedly failed to comply with the rules or dispute

any of the facts put forth by Moyer and Thrive in their summary judgment motion.

The district court did not err in dismissing Mower's claims with prejudice. The appellees respectfully ask this Court to affirm.

STATEMENT OF JURISDICTION

Jurisdiction exists under Utah Code §78A-4-103(2)(j).

ISSUES PRESENTED

Issue 1: Did the trial court correctly grant summary judgment on the breach of contract claim when the undisputed material facts showed that the owner of the claim, Tree Supply, had been dismissed from the action, and when the remaining defendants were not party to the contract?

Standard of Review: An appellate court reviews a district court's summary judgment ruling "for correctness, granting no deference to its legal conclusions, and consider[s] whether it correctly concluded that no genuine issue of material fact existed." *Johnson v. Hermes Assoc., Ltd.*, 2005 UT 82, ¶12, 128 P.3d 1151. The facts will be viewed "in the light most favorable to the non-moving party." *Id.* However, just as below, the nonmoving party may not rely on bare allegations or unsupported assertions to demonstrate the existence of a dispute of fact. *Poteet v. White*, 2006 UT 63, ¶7, 147 P.3d 439, 441. Thus, the appellate court's task is "to examine the record and determine whether it establishes at least a dispute of fact as to the elements required." *Id.* at ¶8. Additionally, "an appellate

court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record....” *Bailey v. Bayles*, 2002 UT 58, ¶10, 52 P.3d 1158 (citation and internal quotation marks omitted).

Rule 52 of the Utah Rules of Civil Procedure will not alter this standard. The purpose of Rule 52 is “to ensure that the parties have a written indication of the court’s action and its underpinnings. To comply, the court need only include the basic essentials of the grounds upon which it relies.” *Schuurman v. Shingleton*, 2001 UT 52, ¶8, 26 P.3d 227. However, “failure to protest the trial court’s apparent noncompliance with Rule 52 at the trial level precludes consideration of the omission on appeal.” *Weber v. Snyderville W.*, 800 P.2d 316, 320 (Utah Ct. App. 1990). *See also Alford v. Utah League of Cities & Towns*, 791 P.2d 201, 204 (Utah Ct. App. 1990) (holding that where a party “failed to object or move the trial court to correct” an “oversight” under Rule 52(a), the court of appeals was precluded from considering the error on appeal). Here, if the district court violated Rule 52, Mower did not “protest the trial court’s apparent noncompliance” below. *See* R.1-527. Accordingly, such failure cannot be considered on appeal.

Issue 2: Did the trial court correctly grant summary judgment on Mower's unjust enrichment claim when Mower admitted that a valid contract existed and that there was no need for his unjust enrichment claim?

Standard of Review: Same as Issue 1.

Preservation of Issue: Mower did not raise this issue below; instead, he acknowledged that the claim should be dismissed. *See* R.457-58 ("Given that Defendants admit there was an express contract, then there is no need for the unjust enrichment claim."). Thus, the unjust enrichment claim has not been preserved for appeal. *See Sittner v. Schriever*, 2000 UT 45, ¶16, 2 P.3d 442 ("[F]ailure to raise an argument before the trial court precludes a party from raising that argument on appeal.").

Issue 3: Did the trial court reasonably exercise its discretion when it granted the Thrive Defendants' motion for summary judgment because of Mower's noncompliance with the applicable rules?

Standard of Review: An appellate court will determine whether the trial court abused its discretion in sanctioning a party for noncompliance with the Utah Rules of Civil Procedure. *Bluffdale City v. Smith*, 2007 UT App

25, ¶¶5, 7, 156 P.3d 175. (noting that a “trial court has discretion in requiring compliance with [rule 7 of the Utah Rules of Civil Procedure]”) (internal citation omitted, alteration in original). “A district court abuses its discretion only when its ‘decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice ... [or] resulted from bias, prejudice, or malice.” *Jones v. Layton/Okland*, 2009 UT 39, ¶27, 214 P.3d 859 (alteration and omission in original, citation omitted). Moreover, an appellate court “will presume that the discretion of the trial court was properly exercised unless the record clearly shows the contrary.” *Goddard v. Hickman*, 685 P.2d 530, 534-35 (quoting *State ex rel. Road Comm’n v. General Oil Co.*, 448 P.2d 718, 719 (Utah 1968)).

STATEMENT OF THE CASE

Nature of the Case: Plaintiffs below, Gregory Mower (“Mower”) and his entity, Tree Supply, LLC (“Tree Supply”) brought twelve claims against six different defendants. R.191-221. After Tree Supply and its claims were dismissed from the action, defendants Michael Moyer (“Moyer”) and Thrive Wholesale Growers, Inc. (“Thrive”) (collectively the “Thrive

Defendants”) moved for summary judgment against Mower on all remaining claims. R.376-77; 391-448. The district court granted the Thrive Defendants’ motion and dismissed the claims, ending the case. R.503-04. Only two of the dismissed claims, breach of contract and unjust enrichment, are before this Court on appeal.¹

Course of Proceedings and Disposition Below: Mower’s initial complaint was filed on July 9, 2013. R.1-30. About a month later, on August 22, 2013, Moyer answered the complaint, denying all claims brought against him. R.73-78. That same day, Thrive brought a motion to dismiss under Rule 12(b)(6). R.82-90. Rather than dismiss the claims brought against Thrive, the trial court allowed Mower and Tree Supply to amend their complaint. R.187-88. Mower and Tree Supply filed their amended complaint on September 24, 2013. R.191-221. In the amended Complaint, Mower and Tree Supply failed to distinguish which claims belonged to which plaintiff. *Id.*

¹ Mower also appealed a third claim, conversion, *see* R.515-16, but has not briefed that claim.

After more than a year of inactivity, Mower and Tree Supply's counsel moved the court for leave to withdraw as their counsel-of-record. R.330-34. The court granted that request. R.342-43. Shortly thereafter, in response to the Thrive Defendants' Notice to Appear or Appoint Counsel and subsequent Motion to Dismiss for Failure to Appoint, the court dismissed "Tree Supply's claims in the Amended Complaint." R.376-77.

About six weeks later, the Thrive Defendants moved for summary judgment on all the remaining claims. R.391-448. Mower timely filed his opposition on August 12, 2015. R.455-464. The Thrive Defendants replied on August 18, 2015 at approximately 11:30 a.m. R.468-492, 497. At 8:18 p.m. that same day, the trial court granted the Thrive Defendants motion and "dismis[s]e[d] with prejudice each of Plaintiff's claims against the Thrive Defendants *for the reasons stated in Thrive Defendant's initial and reply memoranda, and Plaintiff's failure to comply with the applicable rules.* R.503-04 (emphasis in original). On September 17, 2015, Mower appealed. R.515-16.

STATEMENT OF FACTS

In 2011, Mower needed to remove a number of trees from his property in Orem, which was directly across the street from Oregon Acres,

a plant nursery and landscaping business. R.422-23. “[O]n a whim,” Mower walked across the street to Oregon Acres and talked with Moyer about removing the trees. R.423. Moyer, an Oregon Acres employee, R.486, was unable to help Mower remove the trees, but referred Mower to Cornelio Garcia (“Garcia”) as someone who could help him remove the trees. R.423-24.

While working together to remove Mower’s trees, Garcia and Mower devised a joint-business venture: buying and selling trees. R.396. Mower organized Tree Supply for the purpose of carrying on this enterprise with Garcia. R.396; 415; 417-18; 430 (Mower testifying that Tree Supply was “part of this deal”); 462. As Garcia and Mower developed this business venture, they decided to involve Oregon Acres. R.397; 424. To facilitate this deal, Garcia and Mower met with Moyer. R.438. Mower knew at that time that Moyer was an agent or representative of Oregon Acres and was acting in that capacity. R.397; 426; 428.

As part of this deal, Tree Supply would provide capital and property to store the trees, Garcia would purchase and transport the trees to Utah, and Oregon Acres would package and sell the trees. R.397; 429. Pursuant

to this agreement, Moyer, on behalf of Oregon Acres, removed approximately 60 trees that were being stored at a property in Payson, Utah in February 2012. R.397; 434-37. Shortly thereafter, Tree Supply sent an invoice to Moyer at Oregon Acres for the 60 trees. R.397; 252. Mower sent the invoice on Tree Supply letterhead, and signed the invoice as the owner of Tree Supply. R.398; 252. However, Oregon Acres never paid Tree Supply for the trees and the business venture failed. Subsequently, Tree Supply and Mower filed their complaint in this action. R.439.

On March 8, 2012, Thrive's Articles of Organization were filed. R. 474; 485-87. Oregon Acres and Thrive do not have a common identity of stock. *Id.* Oregon Acres and Thrive do not have the same directors or stockholders. *Id.* As of October 7, 2013, Oregon Acres continued to exist. *Id.*

SUMMARY OF ARGUMENTS

The district court correctly dismissed the breach of contract claim. A person that is not a party to a contract cannot sue on that contract. Because Mower was not a party to the contract at issue here, he cannot prosecute the breach of contract claim. Relying upon Mower's own deposition testimony, the Thrive Defendants showed below that the

contract in this case was between Tree Supply, Oregon Acres, and Garcia. Mower put forth no evidence to dispute this fact. To the contrary, Mower confirmed this fact. Because Mower is, admittedly, not a party to the contract at issue in this case, he lacks standing to prosecute the breach of contract claim. On this basis alone, the district court should be affirmed.

Moreover, the undisputed facts further show that neither of the Thrive Defendants were a party to that agreement. Accordingly, even if Mower had standing to bring the breach of contract claim, he cannot prosecute it against non-parties to the contract—the Thrive Defendants. Consequently, the district court’s dismissal of the breach of contract claim should be upheld.

The district court correctly dismissed the unjust enrichment claim. An unjust enrichment claim is precluded by the existence of an express contract. Mower conceded below that his unjust enrichment claim was preempted by the contract between Tree Supply, Garcia, and Oregon Acres. Thus, the district court’s dismissal of the unjust enrichment claim should be affirmed.

The district court did not abuse its discretion by granting the Thrive Defendants' summary judgment motion because of Mower's noncompliance with the rules. It is entirely within the discretion of the district court to require compliance with the applicable rules. Moreover, appellate courts presume that the district court did not abuse its discretion. In this case, Mower failed to comply with the then-existing version of Rule 7(c)(3)(B). Not only did Mower fail to provide a "verbatim restatement of each of the moving party's facts that is controverted," he also failed to dispute the facts in the body of his opposition memorandum or support his disputes of fact "by citation to relevant materials, such as affidavits or discovery materials." Given Mower's total failure to comply with Rule 7(c)(3)(B), the district court was justified in granting the Thrive Defendants' motion because of Mower's noncompliance with the rules.

ARGUMENT

I. The District Court Correctly Dismissed the Breach of Contract Claim.

The issue before this Court is not whether the Thrive Defendants breached a contract, but rather, whether a claim for breach of contract can

be prosecuted by a non-party to the contract against defendants who were not parties to the contract. It cannot. *Shire Dev. v. Frontier Invs.*, 799 P.2d 221, 223 (Utah Ct. App. 1990) ("It is axiomatic in the law of contract that a person not in privity cannot sue on a contract."). As the undisputed material facts show, the breach of contract claim belonged to Tree Supply, and when it was dismissed from this action, the breach of contract claim left with it. Thus, Mower cannot prosecute this claim. Even if Mower had standing to enforce the contract, he could enforce it against only Oregon Acres and/or Garcia, not the Thrive Defendants. Accordingly, the trial court's grant of summary judgment on the breach of contract claim should be affirmed.

In his opposition to the Thrive Defendants' summary judgment motion, Mower argued that summary judgment was improper because the Thrive Defendants "have not presented any evidence to support their claim that the contract was between Tree Supply and Oregon Acres, *other than my deposition testimony.*" R.456 (emphasis added). Attempting to obfuscate his admission that his sworn testimony shows that the contract was between Tree Supply and Oregon Acres, Mower argues on appeal that the evidence

in the record creates an issue of fact as to who were parties to the contract. Mower's arguments do not invalidate his prior admission nor do they present this Court with a basis for reversing the court below.

a. Tree Supply, not Mower, was a party to the contract.

Mower's present attempts to dispute the facts he did not dispute below, including his own verified testimony, fail to create a genuine dispute of material fact as to whether he was a party to the contract with Oregon Acres. At issue on appeal is who the parties to an oral contract are. Determining the parties to a contract is a simple matter of contract interpretation. When interpreting a contract, a court's pre-eminent duty is to ascertain and give effect to the intentions of the parties. *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶17, 54 P.3d 1139. Typically, a court will "look to the writing itself to ascertain the parties' intentions." *Id.* at ¶18. Here, however, there is no writing—it is an oral contract. Thus, the intentions of the parties "must be ascertained by reference to the conduct of the parties under the contract." *Baker v. Dataphase, Inc.*, 781 F.Supp. 724, 732 (D. Utah 1992). *See also, Novell, Inc. v. The Canopy Group, Inc.*, 2004 UT App 162, ¶20, 92 P.3d 768 (noting that a contract ambiguity may be resolved by

considering “the parties’ actions and performance as evidence of the parties’ true intention”); *Comm. Union Assoc. v. Clayton*, 863 P.2d 29, (Utah Ct. App. 1993) (noting that “the conduct of the parties” may show assent to the terms of a contract).

The conduct of the parties shows that Tree Supply owns the breach of contract claim, not Mower. In his deposition, Mower admitted that he created Tree Supply as the vehicle for his deal with Garcia and Oregon Acres. *See* R.396; 415-18; 462. Mower communicated this to both Garcia, R.415, and to Oregon Acres. R.397-98; 252. Mower further admitted that Tree Supply, not Mower personally, was a party to the contract. R.397; 456. These statements and actions by Mower conclusively establish that Tree Supply, not Mower, was a party to the contract.

Below, Mower offered no evidence to dispute these facts—he acknowledged their veracity. R.456 (admitting that his own deposition testimony “support[ed the] claim that the contract was between Tree Supply and Oregon Acres”). *See also Poteet*, 2006 UT 63, ¶7 (at summary judgment, sworn testimony cannot be rebutted by unsupported allegations). Despite introducing no evidence to contradict these facts,

Mower now attempts to dispute his own testimony. For instance, Mower now asserts that Tree Supply being a party to the contract was merely “his unexpressed intentions,” and that, consequently, the other parties believed they were contracting with Mower personally. Mower’s Brief at 23. The facts disagree with this assertion. *See* R.252 (Tree Supply sent an invoice to Oregon Acres for the trees); 397-98 (Tree Supply entered into the contract); 415 (testifying that “we [Mower and Garcia] started the idea of Tree Supply....”). Moreover, Mower noted to this Court that Tree Supply was a joint idea between him and Garcia. Mower’s Brief at 12. Certainly, Mower expressed his belief that Tree Supply was a party to the contract through his words and deeds. Mower cannot now, five years after the fact, walk back his conduct showing that Tree Supply was a party to the contract.

Mower also asserts that because Tree Supply was not registered with the State of Utah until February 2012, Tree Supply cannot be a party to the contract. The Record shows otherwise. Mower testified that Tree Supply was formed contemporaneous with the execution of the contract. R.396, 417-18. Moreover, Tree Supply was officially registered with the State of Utah about the time Garcia began purchasing trees pursuant to the contract

and Oregon Acres began attempting to sell the trees. R.397, 459, 462. The timing of these actions indicates that Tree Supply was intended to be a party to the contract, which is entirely consistent with Mower's testimony that the company was formed for the purpose of performing under the contract. R.396-98, 415, 417.

Even if Tree Supply was not officially formed until February 2012, it was still party to the contract because it ratified the contract. "It is well-established under Utah law that [s]ubsequent 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, LLC v. Waykar, LLC*, 2014 UT App 145, ¶24, 335 P.3d 885 (internal citation omitted, alteration in original). Contrary to Mower's claims, such ratification "need not be express." *Id.* "Any conduct which indicates assent by the purported principal [*i.e.*, Tree Supply] to become a party to the transaction ... is sufficient." *Id.* This doctrine has particular application in contract cases to "establish the validity of an act even though certain, express formalities

have not been met.” *Swan Creek Village Homeowners Assoc. v. Warne*, 2006 UT 22, ¶34, 134 P.3d 1122.

Here, Tree Supply’s conduct indicates that it ratified the contract (if it was not already a party). After Oregon Acres received some of the trees, Tree Supply, in an invoice signed by its owner, requested payment for the trees. R.398; 252. If Tree Supply had not ratified the contract, it could not have requested payment for the trees. This conduct demonstrates that Tree Supply, if it was not already a party to the contract, ratified the contract and subsequently became a party thereto.

Mower’s reliance on *Anderson* and *Miller* does not alter this result. In *Anderson v. Gardner*, the court found that Gardner, who purported to sign an agreement as an agent for a radio station, was personally liable on a contract. 647 P.2d 3 (Utah 1982). That case is inapplicable here for two key reasons. First, Gardner signed the contract “without any indication that he is signing for any other party or in any other capacity than for himself.” *Id.* at 4 (noting this is “the key fact”). Here, Mower provided an indication to

both Garcia and Oregon Acres that he was acting on behalf of Tree Supply.² See R.397-98; 415; 252. For example, Mower sent an invoice—the only written demand for payment—on Tree Supply letterhead, then later testified that he signed the invoice as owner of Tree Supply. R.398; 252. This provides a clear indication to Garcia and Oregon Acres that Tree Supply was party to the contract. Second, and most importantly, *Anderson* dealt with whether Gardner was liable under the contract, not whether he could prosecute a breach of contract claim. *Id.* Thus, *Anderson* does not answer the question presented to this Court: whether Mower can sue for breach of contract under a contract he was not a party to. Accordingly, *Anderson* does not show that the trial court erred.

Similarly, *Miller* does not support Mower's claim that the trial court should be reversed. In fact, it shows the opposite—that the trial court correctly dismissed the breach of contract claim. In *Miller*, United Silver Mines, Inc. was dissolved on August 1, 1991. *Miller v. Celebration Mining Co.*, 2001 UT 64, ¶3, 29 P.3d 1231. Three years later, Thomas Miller, who

² As explained above, to determine the parties' intent with regards to this oral contract, the Court should examine the parties' conduct.

had been United's president, entered into a contract with Celebration Mining Company. *Id.* Miller signed the contract as United's president. *Id.* The contract went south, however, and Miller brought suit against Celebration (and others) for breach of contract. *Id.* at ¶4. Celebration moved for dismissal of Miller's breach of contract claim, arguing "because he acted in his capacity as president of United in executing [the contract], he was not a party to the agreement and therefore could not individually enforce its provisions." *Id.* at ¶5. The district court agreed and dismissed Miller's claims. *Id.* The Utah Supreme Court affirmed. *Id.* at ¶6.

On appeal, Miller argued that he had standing to sue under the contract because he would be liable under the contract according to UTAH CODE §16-10a-204. *Id.* at ¶7. At the time, §16-10a-204 provided that "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." *Id.* The Supreme Court noted, however, that the code section "speaks only to the *liability* of 'persons purporting to act as or on behalf of a corporation.'" *Id.* at ¶8 (internal

citation omitted, emphasis in original). The section is silent as to whether such “persons” can *enforce* contracts. *Id.*

Miller, like Mower here, asked the court to apply the principle of “‘mutuality of obligation,’ which requires that where a party is held contractually liable under a given set of circumstances, that party is also able to enforce the contract on its own behalf under those same circumstances.” *Id.* at ¶9. The Court declined to do so, holding that “the application of the principle of mutuality of obligation in a case such as this one has great potential to create a contract one party never intended to enter.” *Id.* at ¶11. In other words, Miller lacked standing to sue on the contract.

The result must be the same here. Mower, like Miller, entered into a contract on behalf of an allegedly non-existent company. In addition, Mower signed the invoice as owner of Tree Supply, just as Miller signed the contract as president of United. R.398. Then, when the deal went south, Mower tried to sue on the contract, just as Miller tried to sue on the

contract in *Miller*. Given the similarity of these two cases, the result must be the same—dismissal of the breach of contract claim.³

Because the undisputed facts show that Tree Supply, not Mower, was a party to the contract, the trial court did not err by dismissing the breach of contract claim. See *Shire Dev.*, 799 P.2d at 223 (“It is axiomatic in the law of contract that a person not in privity cannot sue on a contract.”).

b. Oregon Acres, not the Thrive Defendants, was a party to the contract.

Even if Mower had standing to sue on the contract, he cannot sue the Thrive Defendants. The undisputed material facts show that Oregon Acres, represented by its agent Moyer, entered into the contract with Tree Supply. In his deposition, Mower stated: “Q: So who was the deal with.... 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.” R.397. Mower has put forth no

³ One significant difference exists between *Miller* and the present dispute—the defendants in *Miller* were parties to the contract, while the Thrive Defendants are not. As explained in the following section, this difference provides the Court with an additional ground to affirm the trial court’s dismissal of the breach of contract claim.

competent evidence to rebut this statement. *Poteet*, 2006 UT 63, ¶7 (at summary judgment, sworn testimony cannot be rebutted by unsupported allegations).

Mower subsequently confirmed that the contract was with Oregon Acres, not Moyer, in his opposition below. He stated, “Defendants have not presented any evidence to support their claim that the contract was between Tree Supply and Oregon Acres, *other than my deposition testimony that I thought Mr. Moyer was acting as president of Oregon Acres.*” R.456 (emphasis added). Mower believed he, on behalf of Tree Supply, was contracting with Oregon Acres. He cannot now dispute his sworn testimony on that point. Therefore, the undisputed material facts show that Oregon Acres was party to the contract.

The mere fact that Moyer was present for the contract negotiations and removed trees pursuant to the agreement does not alter this result. Mower knew that Moyer was acting in his capacity as an agent or representative of Oregon Acres. R.397; 426; 428. While a corporation may legally be considered a “person,” it cannot operate independently. The corporation can only operate through its agents. Because Mower knew that

he was meeting with Moyer in his capacity as an agent of Oregon Acres, Mower cannot show that the contract was with Moyer personally. Therefore, Moyer cannot be sued on the contract.

Similarly, Thrive Wholesale Growers cannot be liable under the contract. The trial court below agreed with this sentiment. On appeal Mower argues that Thrive is liable on the contract because (a) Moyer was its agent, (b) Thrive ratified the contract or (c) Thrive is liable as a successor to Oregon Acres. Mower is wrong on all three points.

First, Mower has put no evidence into the record to show that Moyer was Thrive's agent. In fact, the best evidence on this point (Mower's testimony) shows that Mower knew that Moyer was acting as an agent of Oregon Acres. R.397; 426; 428. Thus, there is no evidence in the record to show that Moyer was acting as Thrive's agent beyond Mower's speculation, which is wholly insufficient to defeat a summary judgment motion. *Poteet*, 2006 UT 63, ¶7.

Second, Mower never raised the ratification issue below. See R.455-458. Thus, this issue has not been preserved and can be summarily dismissed. See *Sittner v. Schriever*, 2000 UT 45, ¶16, 2 P.3d 442 ("[F]ailure to

raise an argument before the trial court precludes a party from raising that argument on appeal.”). Even if this claim was properly preserved, there is no evidence in the record to show that Thrive ratified the contract. *See* R.1-527. Mower has presented no evidence that Thrive took any actions to ratify the contract. His only evidence is an affidavit, which was not presented during the summary judgment proceedings, wherein he testified that on an unstated date he went to Moyer’s “place of business ... [that] was called Thrive Wholesale Growers.” R.177-78. Looking past the fact that the affidavit was not presented to the court below,⁴ it does not show that Thrive received any of the trees at issue in this case. Nor does it provide any evidence to show that it was a party to or ratified the contract. Thus, there is no factual basis for Mower’s assertion that Thrive ratified the contract.

⁴ *See, e.g., Jennings Investments, LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶26, 208 P.3d 1077 (A court is “not obliged to comb the record to determine whether a genuine issue as to any material fact exists to prevent summary judgment.”).

Third, Thrive is not a “successor” to Oregon Acres. To be liable for the debts of its predecessor, the purchaser must have purchased all the predecessors assets and

(1) the purchase 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 transaction is entered into [by the seller and the purchaser] fraudulently in order to escape liability for such debts.

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

1176. However, as with his other claims, Mower has put forth no evidence to support his assertion that Thrive is a successor to Oregon Acres. Below, Mower’s sole proof of this claim was to state that “[i]t appears that Thrive Wholesale Growers is a successor to Oregon Acres. They have the same owners, same address, and same employees.” R.456.⁵ Mower provided no documents, testimony, or any other admissible evidence to substantiate this claim. Similarly, Mower’s present claim that the transfer of assets to Thrive was

⁵ By this statement, Mower appears to claim that Thrive is liable as a mere “continuation” of Oregon Acres.

fraudulent is likewise supported by nothing more than Mower's own speculation.

This failure of proof is fatal to Mower's claim. *See Brigham Truck & Implement Co. v. Fridal*, 746 P.2d 1171, 1173 (Utah 1987) ("[C]ontentions, unsupported by any specifications of facts in support thereof, raise no material questions of fact."). *See also Dairy Prod. Servs., Inc. v. City of Wellsville*, 2000 UT 81, ¶54, 13 P.3d 581 ("An affidavit that merely reflects the affiant's unsubstantiated opinions and conclusions is insufficient to create a genuine issue of fact.").

Nevertheless, to be sure, "[a] continuation demands 'a common identity of stock, directors, and stockholders and the existence of only one corporation at the completion of the transfer.'" *Decius v. Action Collections Serv., Inc.*, 2004 UT App 484, ¶8, 105 P.3d 956. There is no common identity of stock and no common stockholders between Thrive and Oregon Acres, and Oregon Acres continues to exist. R.474; 485-87. Therefore, there is no basis for continuation liability. Consequently, Mower has provided no basis for this Court to find that Thrive is liable on the contract.

It is Mower's burden as the plaintiff to prove his claims and present this Court with evidence sufficient to establish a genuine issue of material fact. *See Orvis v. Johnson*, 2008 UT 2, ¶7, 177 P.3d 600. Mower has wholly failed to carry that burden. He has presented no evidence to dispute the fact that he was not a party to the contract. *See, e.g.*, R.456. Likewise, he has pointed to no evidence in the record to show that the Thrive Defendants were parties to the contract. Because Mower has failed to meet his burden, it is undisputed that the breach of contract claim belonged to Tree Supply and could be prosecuted against only Oregon Acres and Garcia. Therefore, this Court must affirm the trial court's dismissal of the breach of contract claim.

II. The District Court Correctly Dismissed Mower's Unjust Enrichment Claim.

a. Mower's unjust enrichment claim is barred by the existence of an express contract governing the same subject matter.

The doctrine of unjust enrichment is "designed to provide an equitable remedy where one does not exist at law." *Am. Towers Owners Assoc., Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1193 (Utah 1996). That is, "if a legal remedy is available, such as breach of an express contract, the

law will not imply the equitable remedy of unjust enrichment.” *Id.* See also *Ashby v. Ashby*, 2010 UT 7, ¶ 14, 227 P.3d 246 (holding that “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”).

Here, it is undisputed that an express contract governed the rights and obligations of the parties relating to the trees at issue in this dispute. See R.397; R.459-60 (“In October 2011, I met with Michael Moyer and he *agreed to a contract...*”) (emphasis added). In fact, Mower recognized this in his opposition to the Thrive Defendants’ motion for summary judgment. He wrote, “[g]iven that Defendants admit there was an express contract, then there is no need for the unjust enrichment claim.” R.458. Therefore, the undisputed facts show that an express contract governed the subject matter of Mower’s unjust enrichment claim and this Court should affirm the trial court’s dismissal of that claim.

b. Mower failed to preserve his unjust enrichment claim for appeal.

Mower's concession on his unjust enrichment claim prevents him from re-raising that claim on appeal. In other words, he failed to preserve his claim. *See Sittner v. Schriever*, 2000 UT 45, ¶16, 2 P.3d 442 ("[F]ailure to raise an argument before the trial court precludes a party from raising that argument on appeal."). As held by the Utah Supreme Court, to preserve an issue for appeal, "the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶14, 48 P.3d 968. A trial court has had such an opportunity when the issue was (1) "raised in a timely fashion;" (2) "specifically raised;" and (3) when the party has "introduce[d] supporting evidence or relevant legal authority." *Id.* (internal citation omitted). Mower has failed to meet all three elements.

In this case, Mower never presented this issue to the trial court, thus it can be considered neither "timely" or "specifically" raised. In fact, when presented with the opportunity to raise his unjust enrichment claim, Mower instead conceded that "there is no need for the unjust enrichment

claim.” R.458. Moreover, Mower introduced no “supporting evidence or relevant legal authority” to support this claim. R.457-58. Mower not only failed to cite to any case law or other applicable authority, the only “supporting evidence” he provided to the court (which, incidentally, he did not reference in defending his unjust enrichment claim) showed that an express contract existed and covered the same subject matter. R.460 (testifying that a contract was agreed to regarding the trees). Therefore, Mower has failed to preserve his unjust enrichment claim for appeal.

c. Mower’s newly-raised arguments do not alter this outcome.

On appeal, Mower asserts a number of new arguments in support of his unjust enrichment claim: (1) that there is no valid contract; (2) that the Thrive Defendants actually received and improperly benefited from the trees; and (3) that the unjust enrichment claim belongs to Mower, not Tree Supply. Even if this Court ignores that Mower’s unjust enrichment claim is barred by the existence of an express contract, and ignores that Mower conceded this claim below, Mower’s appeal still fails.

As to Mower’s first argument, a valid contract exists, as shown above. Mower acknowledged this in his opposition below. R.458 (noting

that “there is no need for the unjust enrichment claim”); 460 (“I met with Michael Moyer and he *agreed to a contract....*”) (emphasis added). There is no basis for finding otherwise.

Mower also makes the perplexing argument that the trees taken from the Payson property were not part of the contract between Tree Supply and Oregon Acres. *See* Mower’s brief at 37-38. Not only was this argument not raised below, it was not pled by Mower in his complaint. R.217-18. As pled by Mower, the unjust enrichment claim is based upon Moyer allegedly receiving a personal benefit from removing the trees Tree Supply purchased for its contract with Oregon Acres. R.217-18 at ¶224.⁶ The claim is also premised upon Moyer removing trees from the Payson property “as part of the Moyer Payson Incidents.” R.218 at ¶225. The “Moyer Payson Incidents” is defined to include Moyer’s removal of trees from the Payson property that were sent there “as part of the Garcia/Moyer Contract.” R.202-03. Accordingly, Mower has never argued, or pled, that the trees Moyer received on behalf of Oregon Acres were not part of the contract. *See also* R. 434-35 (“Q: But these trees were part of that deal? A: Yes.”). Mower

⁶ The unjust enrichment claim was brought against Moyer only, not Thrive.

cannot assert such a claim for the first time on appeal when it was never pled or raised below. *See Sittner* 2000 UT 45, ¶16. It is therefore, undisputed that the contract governs the actions that form the basis of the unjust enrichment claim.

With regards to the second argument, Mower has put forth no evidence to show that the Thrive Defendants received and improperly benefitted from the trees. For instance, Mower argues that certain statements made by Moyer show that he was receiving a personal benefit from the trees. The record paints a different picture. Mower knew that Moyer was acting as an agent of Oregon Acres and that he took the trees in that capacity. R.397; 426; 428. In fact, when Tree Supply requested payment, it sent the invoice to “Mike Moyer – Oregon Acres.” R.252. Moreover, Mower’s only evidence that Oregon Acres did not receive the trees is his own speculation. *See* R.1-527. This is insufficient to defeat a summary judgment claim. *Poteet v. White*, 2006 UT 63, ¶7, 147 P.3d 439,

441.⁷ Thus, there is no evidence that the Thrive Defendants received and improperly benefitted from the trees.

Finally, Mower's remaining argument, that he owned the unjust enrichment claim and could prosecute it against the Thrive Defendants, is also unsupported by the Record. As shown in the preceding section, it was Tree Supply, and not Mower, that purchased the trees involved in the contract. Moreover, as shown, neither Moyer nor Thrive benefited personally from the trees.

Therefore, because Mower conceded this claim, and because neither of the Thrive Defendants received an improper benefit from the trees, the trial court did not err in dismissing the unjust enrichment claim.

III. The District Court Did Not Abuse its Discretion by Dismissing the Remaining Claims Because of Mower's Failure to Comply with the Applicable Rules.

Regardless of how this Court decides the first two issues on appeal, the trial court's decision to grant the Thrive Defendants' motion for summary judgment because of Mower's "failure to comply with the

⁷ Significantly, the unjust enrichment claim was only pled against Moyer, not Thrive. R.217-18.

applicable rules,” R.504, must be upheld unless the trial court abused its discretion in so ordering. *Bluffdale City v. Smith*, 2007 UT App 25, ¶7, 156 P.3d 175. On appeal, it is presumed “that the discretion of the trial court was properly exercised.” *Goddard*, 685 P.2d 530, 534-35 (Utah 1984). To overcome this presumption, Mower must put forth evidence from the record that “clearly shows” that the trial court abused its discretion. *Id.* Mower has not made this showing and the trial court must be affirmed.

a. The district court was within its discretion in dismissing the remaining claims.

“A district court abuses its discretion only when its ‘decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice ... [or] resulted from bias, prejudice, or malice.” *Jones v. Layton/Okland*, 2009 UT 39, ¶27, 214 P.3d 859 (alteration and omission in original, citation omitted). In this case, the district court’s decision was reasonable and consistent with the logic of the circumstances.

When the Thrive Defendants filed their motion for summary judgment, Rule 7(c)(3)(B) provided:

[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 such dispute, supported by citation to relevant materials, such as affidavits or discovery materials.

As provided by this rule, it is the burden of the non-moving party—Mower—to demonstrate that a genuine dispute of fact exists. *Jennings Investments, LC v. Dixie Riding Club, Inc.*, 2009 UT App 119, ¶26, 208 P.3d 1077. A court is “not obliged to comb the record to determine whether a genuine issue as to any material fact exists to prevent summary judgment.” *Id.* Consequently, if a party fails to comply with Rule 7(c)(3)(B), a court may use its discretion to deem facts undisputed or to grant a motion for summary judgment. *See Bluffdale*, 2007 UT App 25, ¶¶3, 12. In this case, the trial court chose the latter and dismissed Mower's claims.

Mower admits he failed to provide a verbatim restatement of each of the moving party's facts that is controverted. R.455-458. *See also* Mower's Appellate Brief at 43 (“Here, Mower failed to strictly comply with Rule 7 because he did not set forth a verbatim restatement of each of the moving party's facts that are controverted.”). This alone supports the trial court's decision and shows that its exercise of discretion was reasonable. *See*

Bluffdale, 2007 UT App 25, ¶12 (noting that it is within the court's discretion to grant summary judgment for noncompliance with Rule 7(c)(3)(B)). In light of this admission, Mower cannot clearly show from the Record that the trial court abused its discretion. Accordingly, the trial court did not abuse its discretion and its order dismissing Mower's claims must stand.

Nevertheless, Mower contends that the court abused its discretion because Mower's noncompliance with the rules was harmless. Mower argues that his noncompliance was harmless because he disputed the Thrive Defendants' facts in the body of his memorandum. However, this argument is unsupported by the Record and is ultimately, fruitless. Moreover, this argument does not clearly show that the court abused its discretion.

In support of his claim that his failure was harmless, Mower relies upon the holding in *Salt Lake Cnty. v. Metro W. Ready Mix, Inc.*, 2004 UT 23, 89 P.3d 155. In that case, the court noted that the non-moving party failed to "set forth disputed facts listed in numbered sentences in a separate section as required by" applicable rules. *Id.* at ¶23n.4. Nevertheless, the court did not penalize the party for this violation because "the disputed

facts were clearly provided in the body of the memorandum with applicable record references.” *Id.* This decision was within the trial court’s discretion. *See Bluffdale*, 2007 UT App 25, ¶9.

However, unlike the party in *Metro West*, Mower not only failed to set forth a verbatim restatement of the Thrive Defendants’ fact, he also failed to dispute those facts in the body of his memorandum with any references to the record or admissible evidence. In the entirety of his opposition, Mower cited to nothing in the record to dispute these, or any other facts asserted by the Thrive Defendants. R.455-458. Because Mower’s opposition is bereft of any citations to admissible evidence or any “coherent explanation of the grounds for the dispute as required by rule 7(c)(3)(B),” *Metro West* is inapplicable and the trial court did not abuse its discretion in granting summary judgment on Mower’s claims. *Bluffdale*, 2007 UT App 25, ¶11.⁸

Bluffdale City v. Smith is the more analogous case to the present dispute. There, the plaintiff filed a motion for summary judgment,

⁸ Even if *Metro West* was applicable, the decision to grant summary judgment because of Mower’s noncompliance with the rules was still within the trial court’s discretion. *Bluffdale*, 2007 UT App 25, ¶5.

“together with a supporting memorandum and the affidavits of [two individuals].” *Id.* at ¶2. In response, the defendants “filed an opposing memorandum with the affidavit of Taylor Smith.” *Id.* However, the defendants memorandum “failed to comply with rule 7(c)(3)(B)” because it “did not contain a verbatim restatement of Plaintiff’s stated facts ... and did not cite to any relevant materials, such as affidavits or discovery materials.” *Id.* at ¶3. The district court found that the defendants “failed to comply with the directives of rule 7(c)(3)(B)” and “granted Plaintiff’s motion for summary judgment.” *Id.* The Utah Court of Appeals affirmed. *Id.* at ¶1.

Like Mower, the defendants in *Bluffdale City* argued that the holding from *Metro West* precluded the court from granting summary judgment. *Id.* at ¶10. This Court disagreed, noting that *Bluffdale City* was distinguishable because the defendants “failed to provide the specific disputed facts together with applicable record references in the body of their opposing memorandum.” *Id.* Because the defendants in *Bluffdale City* “did not include a coherent explanation of the grounds for the dispute as required by rule 7(c)(3)(B)” nor did they, “with the exception of two nonspecific

references to the Smith affidavit, provide supporting citations as the basis for any dispute of fact,” this Court found that the district court did not abuse its discretion “when it granted Plaintiff’s motion for summary judgment based on Defendants’ noncompliance with rule 7(c)(3)(B).” *Id.* at ¶11.

Bluffdale City is nearly identical to the present case. In both instances, the non-moving party failed to comply with Rule 7(c)(3)(B)’s mandate to restate the moving parties facts and controvert the facts with citations to applicable evidence. For instance, in both cases, the party opposing summary judgment attached an affidavit to their opposition, but failed to make more than a “nonspecific reference[]” to it. *See* R.455 (the sole reference to the Mower Affidavit). Moreover, in both cases, the non-moving party failed to explain, with applicable record citations, the basis for any disputes of fact. In light of Mower’s total failure to provide evidentiary support for any of his disputes of fact, the trial court did not abuse its discretion in granting the Thrive Defendants’ motion for summary judgment. *Id.* at ¶11 (where the defendants acted the same as Mower, “the district court did not abuse its discretion when it granted

Plaintiff's motion for summary judgment based on Defendants' noncompliance with rule 7(c)(3)(B)").

Moreover, even if Mower had properly cited to his affidavit in his opposition, his instant argument remains unavailing. A party cannot contradict his deposition testimony by a subsequent affidavit without providing an explanation for the contradictions. *See Harnicher v. Univ. of Utah Med. Ctr.*, 851 P.2d 67, 71 (Utah 1998). In this case, Mower's deposition testimony shows that the contract was between Tree Supply and Oregon Acres. R.397; 456. Mower even acknowledged this fact in the body of his opposition, stating, "Defendants have not presented any evidence to support their claim that the contract was between Tree Supply and Oregon Acres, *other than my deposition testimony.*" R.456 (emphasis added). Nevertheless, Mower attempted to refute his own sworn testimony by his affidavit. As a matter of law, Mower cannot do so. Therefore, even if the court viewed Mower's affidavit and made Mower's arguments for him, Mower has not shown that the trial court abused its discretion.

Accordingly, the trial court did not abuse its discretion in granting the Thrive Defendants' motion because of Mower's failure to comply with

Rule 7(c)(3)(B)'s mandate to restate the moving party's facts and controvert those facts with citations to applicable evidence.

b. The decision to grant Mower leniency was within the sound discretion of the district court.

The decision whether to grant a pro se litigant leniency is within the discretion of the trial court. *See Golden Meadows Properties, LC v. Strand*, 2010 UT App 257, ¶18, 241 P.3d 375 (holding the trial court's decision not to grant a pro se litigant leniency was "not an abuse of its discretion"). Moreover, on appeal, it is presumed "that the discretion of the trial court was properly exercised." *Goddard*, 685 P.2d at 534-35.

Here, the trial court was well within its discretion in deciding not to grant Mower leniency as a pro se litigant. The default rule is that "a party who represents himself will be held to the same standard of knowledge and practice as any qualified member of the bar." *State v. Winfield*, 2006 UT 4, ¶19, 128 P.3d 1171 (internal quotation omitted). The trial court had observed the actions of the parties and the contours of this case from its inception. R.1-527. Based on its knowledge of the parties and the case, the trial court decided not to grant Mower leniency. This decision not to afford

Mower leniency should be upheld as reasonable and within the bounds of its discretion. *See Jones v. Layton/Okland*, 2009 UT 39, ¶27, 214 P.3d 859. Mower has failed to point to any evidence showing that the trial court clearly abused its discretion in so holding, and therefore, the decision must be sustained.

- c. The district court did not merely deem the facts undisputed, but if it did, summary judgment was still appropriately granted on Mower's claims.**

In its order, the trial court granted summary judgment because of "the reasons stated in Thrive Defendant's initial and reply memoranda, and Plaintiff's failure to comply with the applicable rules." R.504. Thus, summary judgment was granted because of Mower's noncompliance with the rules. Despite this clear statement from the court, Mower asserts that the trial court merely deemed the Thrive Defendants' facts undisputed because of his noncompliance. Consequently, Mower asserts that summary judgment was inappropriate because the facts, even if deemed true, do not support the trial court's decision to grant summary judgment.

Disregarding the plain language of the court's order and assuming Mower was correct that the trial court merely deemed the facts undisputed

(rather than granting summary judgment as the order states), Mower's argument does not entitle him to a reversal of the court's decision. The undisputed facts show that the contract at issue was between Tree Supply and Oregon Acres. R.397. As shown above, this alone defeats Mower's breach of contract claim. Moreover, it also shows that an express contract exists, which, as also shown above, defeats Mower's unjust enrichment claim. Therefore, even if Mower's interpretation of the court's order was correct, it would still not entitle him to reversal.

The trial court's exercise of its discretion is afforded great respect and is presumed to be reasonable. *Goddard*, 685 P.2d at 534-35. Mower has failed to make the required "clear showing" that the trial court abused its discretion. As a result, the trial court must be affirmed.

CONCLUSION

For the foregoing reasons, the Thrive Defendants respectfully ask this Court to affirm the decision of the district court.

DATED this 13th day of October, 2016.

KIRTON McCONKIE P.C.

By: *Jacob Green*
*Attorneys for Appellees Michael
Moyer and Thrive Wholesale
Growers, Inc.*

CERTIFICATE OF COMPLIANCE

Counsel for Appellees the Thrive Defendants certifies that this brief contains 9,049 words, including headings and footnotes, but excluding the table of contents and table of authorities, is in Book Antiqua 14-point font, and is otherwise in compliance with all applicable rules.

DATED this 13th day of October, 2016.

KIRTON McCONKIE P.C.



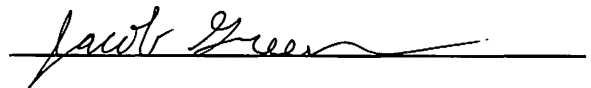
Attorneys for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of October, 2016, the foregoing **BRIEF OF APPELLEES** was served on the following by the method indicated below:

Benjamin A. Kearns
BK LAW, PLLC
233 S. Pleasant Grove Blvd
Suite 202
Pleasant Grove, Utah 84062
benjamin@bk-law.com

(☒) U.S. Mail
(☐) Hand Delivered
(☐) Overnight Mail
(☐) Facsimile
(☐) E-filing/Email

A handwritten signature in cursive script, appearing to read "Jacob Green", is written over a horizontal line.