NOTICE
Decision filed 10/02/19. The text of this decision may be changed or corrected prior to the filing of a Peti ion for Rehearing or the disposition of the same.

2019 IL App (5th) 190078-U

NO. 5-19-0078

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

EMERICK FARMS, a General Partnership; FAYETTE FARMS, a General Partnership; and BENJAMIN EMERICK, Individually, Plaintiffs-Appellants,	)	Appeal from the Circuit Court of Fayette County.
v.	)	No. 12-L-8
JAMES E. MARLEN and JOANN MARLEN, Individually, and JAMES E. MARLEN, as Trustee of the James E. Marlen and JoAnn Marlen Declaration of Trust, Dated January 27, 2010, Defendants-Appellees.	)	Honorable Michael D. McHaney, Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: After a bench trial and remand after appeal, the circuit court improperly entered judgment in defendants' favor.

¶ 2 The plaintiffs, Emerick Farms and Fayette Farms, general partnerships, along with Benjamin Emerick, filed an action in the circuit court of Fayette County, alleging damages against the defendants, James E. Marlen and JoAnn Marlen, individually, and James E. Marlen, as trustee of the James E. Marlen and JoAnn Marlen Declaration of

Trust, dated January 27, 2010 (the Trust). The plaintiffs sought compensation for the defendants' breach of oral agreements to lease lands to the plaintiffs for farming, or in the alternative, for the defendants' unjust enrichment pursuant to tillage and fertilizer services the plaintiffs completed on the defendants' land in reliance on the lease agreements. In 2016, after a bench trial, the circuit court found that the defendants breached the oral lease agreements, and the circuit court entered judgment in the plaintiffs' favor for lost profits and costs. On appeal, we reversed the circuit court's judgment, concluding that the plaintiffs' breach of oral contract actions, found in counts I and II of their complaint, were barred by the statute of frauds, should have been dismissed on the defendants' motion, and could not support the circuit court's judgment. We remanded the cause to the circuit court to consider the evidence in light of the unjust enrichment/*quantum meruit* allegations in counts III and IV of the plaintiffs' second-amended complaint. On remand, the circuit court entered judgment in the defendants' favor. For the following reasons, we reverse the circuit court's judgment, and we remand the cause for the circuit court to enter judgment for the plaintiffs in the amount of $121,182.89.

¶ 3 I. BACKGROUND

¶ 4 In the plaintiffs' second-amended complaint, filed on August 19, 2013, the plaintiffs alleged that on October 18, 2011, James verbally agreed to allow Emerick Farms to lease for farming 254 acres, known as the Augsburg St. James Farm (also referred to in the record as "Prairie Farms"), in Fayette County, from January 1, 2012, to December 31, 2013, under the terms shown summarized in an unsigned "Amendments to

Lease" attached to the complaint. The plaintiffs alleged that on October 18, 2011, James also verbally agreed to allow Fayette Farms to lease for farming 531 acres, known as the Butts Engele Farm in Fayette County, from 2012 through 2013 under terms summarized in an unsigned "Illinois Cash Farm Lease," attached to the complaint.

¶ 5 The plaintiffs also alleged that during conversations on October 6, 2011, Benjamin, acting as tenant and on behalf of both of the plaintiffs, verbally advised James that he needed to apply fall fertilizer and perform fall tillage on the two farms, and James authorized and consented to the purchase and application of such fertilizer and tillage on the farms, based upon the parties' verbal agreement and mutual understanding that the plaintiffs would farm the properties in 2012 and 2013. The plaintiffs alleged that Emerick Farms and Fayette Farms thereby provided and obtained fertilizer application and fall tillage for each of the farm properties, in contemplation and in reliance on the renewal or continuance of the farm leases for the 2012 farming year.

¶ 6 The plaintiffs alleged that on December 9, 2011, James sent a letter to Benjamin disregarding the agreements previously reached. The plaintiffs alleged that this letter was received before the lease renewals had been signed by both parties, but after the tillage and fertilizer were provided for the two farms. The plaintiffs alleged that the defendants thereafter refused to perform the lease agreements and leased the property to another tenant farmer.

¶ 7 In counts I and II, previously addressed in the prior appeal to this court, the plaintiffs sought judgment against the defendants for breach of the lease agreements. In count III, entitled "Quasi-Contract, Unjust Enrichment, *Quantum Meruit*," Emerick

Farms alleged that in the event the court should find that the lease agreement described in count II was unenforceable, the court should nevertheless require James and the Trust to pay $41,719.71 for the reasonable value of the fall tillage and fertilizer application on the Augsburg St. James Farm. Emerick Farms alleged that James and the Trust would be unjustly enriched if they retained the benefits without compensating Emerick Farms and that Emerick Farms provided the benefits under the reasonable belief that it would be farming the land in 2012. Emerick Farms attached to its complaint a December 20, 2011, invoice (hereinafter referred to as Plaintiffs' Exhibit 8) from Emerick Farms to James for fall tillage and fall fertilizer totaling $41,719.71. Included in Plaintiffs' Exhibit 8 were "Machinery Cost Estimates" and a Crop Production Services, Inc. (CPS) invoice to Emerick Farms listing ship dates of October 29, 2011, and October 30, 2011, for fall fertilizer on the Augsburg St. James Farm.

¶ 8 In count IV, also entitled "Quasi-Contract, Unjust Enrichment, *Quantum Meruit*," Benjamin and Fayette Farms alleged that if the court found the oral lease agreement described in count I unenforceable, the court should nevertheless require James and JoAnn to pay $79,463.18 for the reasonable value of the fall tillage and fertilizer application on the Butts Engele Farm. Benjamin and Fayette Farms alleged that James and JoAnn would be unjustly enriched if they retained the benefits without compensating Benjamin and Fayette Farms and that Benjamin and Fayette Farms provided the benefits under the reasonable belief that they would farm the land in 2012. The plaintiffs attached to their second-amended complaint a December 20, 2011, invoice (hereinafter referred to as Plaintiffs' Exhibit 9) from Fayette Farms to James for fall tillage and fall fertilizer

amounting to $79,463.18. Included in this invoice were “Machinery Cost Estimates” and a CPS invoice to Fayette Farms listing a ship date of October 15, 2011, for fall fertilizer.

¶ 9 On March 14, 2016, the circuit court heard evidence on the plaintiffs’ claims. With regard to counts III and IV, the evidence revealed that in 2011, pursuant to written agreements, the plaintiffs leased the farm ground at issue from the defendants, but the written leases terminated by their terms on December 31, 2011. On November 3, 2011, as a result of discussions between James and Benjamin, James sent a proposed, unsigned written lease to Benjamin, but Benjamin did not return the paperwork because he was busy in the field. The proposed leases were not signed by any of the defendants. Thereafter, on December 9, 2011, James notified the plaintiffs that he would not be renewing the leases and advised the plaintiffs to disregard the forms sent on November 3, 2011.

¶ 10 At trial, the evidence also revealed that in reliance upon the proposed agreement to lease the property in 2012, the plaintiffs expended funds for tillage and fertilizer for the properties in October 2011, prior to receiving notice that James would not be renewing the leases. Benjamin testified that he began fall tillage between October 5 and October 25 phone conferences with James. Benjamin explained that a tenant farmer would not perform fall tillage on leased land if the farmer was not planning to farm that land the following year. Benjamin testified that he discussed fall tillage and fertilizer with James and that he would “[a]bsolutely not” have performed tillage nor applied fertilizer in October 2011 without James’s assurance that the plaintiffs would farm the land the following year.

¶ 11 Benjamin testified that he played a management role in the plaintiffs' farming operations, overseeing six employees and hiring fertilizer application services by CPS, as revealed in the invoices. Benjamin testified that, in contemplation of the following farming year, he calculated the amount of fertilizer to apply to the farms after considering the bushels per acre harvested and tables calculating the mineral amounts removed during harvest. Benjamin testified that he checked his calculations against standard soil tests performed every four years. Benjamin testified that in 2011, after calculating the amount of fertilizer to apply to the defendant's property, he ordered and paid for the fertilizer and its application. Benjamin testified that he contacted CPS and confirmed that the ship date listed on its invoice was the application date, *i.e.*, the date CPS physically spread the fertilizer on the land.

¶ 12 Benjamin testified that the plaintiffs prepared invoices to show the cost per acre for tillage and fertilizer application. Benjamin identified Plaintiffs' Exhibit 8, the December 20, 2011, invoice from Emerick Farms to James. Benjamin testified that the invoice originated from his office and that he reviewed it before submitting it to James. Benjamin identified the second page of the invoice entitled "Machinery Cost Estimates," which was included to explain the cost per acre for the tillage. Benjamin also identified the CPS invoice included as the third and fourth page, which was intended to explain the cost of fertilizer, seed, and chemical applied to the Augsberg St. James Farm. Benjamin testified that he ordered the fertilizer from CPS and paid for it. Benjamin testified that from the CPS invoice, he knew it was applied to the ground on October 29, 2011. Plaintiffs' Exhibit 8 was admitted into evidence over the defendants' objection.

¶ 13 Benjamin also identified Plaintiffs' Exhibit 9, an invoice from Fayette Farms to James for tillage and fertilizer for the Butts Engele Farm. This invoice also included "Machinery Cost Estimates" and a CPS invoice. Benjamin testified that he was instrumental in preparing the document and reviewed it before submitting it to James. Benjamin testified that the fertilizer was applied on October 15, 2011, as revealed in the CPS invoice. Plaintiffs' Exhibit 9 was not offered into evidence.

¶ 14 James testified that he was aware of the fall tillage completed on the Butts Engele Farm but had not visited the Augsburg St. James Farm during the relevant timeframe. James acknowledged that fall tillage involved turning over weeds and farm residue to mix it with the earth to enhance the deterioration of the materials in order to prepare to plant in the spring. James also acknowledged that farm tenants did not generally complete fall tillage on property if they were not planning to farm the property the following year because fall tillage "jump starts" spring work for quicker planting. James acknowledged that Benjamin had notified him on December 9, 2011, of the quantities and cost of fertilizer applied to the farms in October 2011. James also acknowledged that he had received Exhibits 8 and 9, the invoices and attachments regarding the fall tillage and fertilizer applied on the farms.

¶ 15 After the bench trial, the circuit court stated that it was "resolving credibility in favor of the plaintiffs and against the defendant[s]" and granted "judgment in favor of the plaintiffs for the full amount asked for plus costs." On March 21, 2016, the circuit court entered written judgment in favor of the plaintiffs and against the defendants, finding that the defendants breached the agreements to lease the farms for 2012 and 2013. The circuit

court awarded judgment in the plaintiffs' favor in the amount of $264,830.80, which included lost profits and costs. The circuit court failed to address counts III and IV that were pled in the alternative to counts I and II.

¶ 16 On appeal from the circuit court's 2016 judgment, this court determined that the plaintiffs' breach of oral contract actions, found in counts I and II of their complaint, were barred by the statute of frauds and should have been dismissed on the defendants' motion. *Emerick Farms v. Marlen*, 2017 IL App (5th) 160260-U. Because the circuit court had failed to address counts III and IV, we reversed the circuit court's order entering judgment in the plaintiffs' favor on counts I and II, and we remanded the cause for the circuit court to consider the evidence in light of the plaintiffs' allegations in counts III and IV of their second-amended complaint. *Id.* On May 22, 2017, the plaintiffs filed a petition for rehearing, which was denied on May 30, 2017. On July 5, 2017, the plaintiffs filed a petition for leave to appeal to the Illinois Supreme Court, and this petition was denied on September 27, 2017.

¶ 17 Thereafter, on January 16, 2019, after hearing arguments, the circuit court entered judgment in defendants' favor. The court stated that it had "considered the evidence in light of the plaintiffs' allegations in counts [III] and [IV] of their second[-]amended complaint" and found in favor of the defendants. On February 13, 2019, the plaintiffs filed a notice of appeal.

¶ 18 II. ANALYSIS

¶ 19 In this appeal, we address whether the circuit court properly entered judgment in the defendants' favor on counts III and IV of the plaintiffs' second-amended complaint.

In counts III and IV, entitled "Quasi-Contract, Unjust Enrichment, *Quantum Meruit*," the plaintiffs sufficiently alleged, in the alternative to their breach of oral contract actions, that the defendants were unjustly enriched by tillage and fertilizer services they performed on the defendants' land. See *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 287 (2010) (home remodeling contractor who violated written contract provision of Home Repair and Remodeling Act and entered into an oral contract for home remodeling work may enforce the oral contract or seek recovery in *quantum meruit* against homeowner who refuses to pay); *Roti v. Roti*, 364 Ill. App. 3d 191, 201 (2006) (when oral contract is rendered unenforceable pursuant to statute of frauds, *quantum meruit* is the proper remedy).

¶ 20 "In an action for 'quasi-contract' (or, contract implied in law), a plaintiff asks the court to remedy the fact that the defendant was 'unjustly enriched' by imposing a contract." *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 500 (2001). "A quasi-contract exists independent of any agreement or consent of the parties." *Id.*; see also *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334 (1977) ("The right to recover on a [quasi-contract], although phrased in contract terminology, is not based on an agreement between parties but is an obligation created by law."). "In fact, the intention of the parties is entirely disregarded." *Village of Bloomingdale*, 196 Ill. 2d at 500. "A quasi-contract, therefore, is 'no contract at all,' but a 'rule of law that requires restitution to the plaintiff of something that came into the defendant's hands but in justice belongs to the plaintiff.' D. Dobbs, Dobbs Law of Remedies § 4.2(3), at 580 (2d ed. 1993)." *Id.* "Such an action is based on the principle that no one ought to enrich himself unjustly at

the expense of another." *Id.* "Liability is based on the principle of unjust enrichment and the contract is the remedy." (Emphasis omitted.) *Id.*

¶ 21 "Quasi-contract claims include unjust enrichment and *quantum meruit* actions. See 66 Am. Jur. 2d *Restitution and Implied Contracts* §§ 2, 8 (2001)." *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 9 (2004). "The two types of actions are similar, in that the plaintiff must show that valuable services or materials were furnished by the plaintiff [and] received by the defendant, under circumstances which would make it unjust for the defendant to retain the benefit without paying." *Id.* "In a *quantum meruit* action, the measure of recovery is the reasonable value of work and material provided, whereas in an unjust enrichment action, the inquiry focuses on the benefit received and retained as a result of the improvement provided by the contractor. 66 Am. Jur. 2d *Restitution and Implied Contracts* § 9 (2001)." *Id.* Nevertheless, even if a person has received a benefit from another, he is liable for payment only where the circumstances of the benefit's receipt or retention are such that, as between the two persons, it is unjust for the receiver to retain it. *Id.* The mere fact that one benefits another is not of itself sufficient to require the other to make restitution therefor. *Id.*

¶ 22 To recover under a *quantum meruit* action, the plaintiff must prove that: (1) he performed a service to benefit the defendant, (2) he did not perform this service gratuitously, (3) the defendant accepted this service, and (4) no contract existed to prescribe payment for this service. *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 979 (2010). The burden is on the plaintiff, "who 'must show that valuable services' were furnished by him, that they were received by the defendant, and

that the circumstances are such that it would be unjust for the defendant to retain these without paying for them. See *Hayes Mechanical*, 351 Ill. App. 3d at 9." *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 979. "Accordingly, 'the measure of recovery is the reasonable value of work' (*Hayes Mechanical*, 351 Ill. App. 3d at 9), and, in order to recover under this doctrine, the provider must prove that the services performed were 'of some measurable benefit to the defendant' (*Van C. Argiris & Co. v. FMC Corp.*, 144 Ill. App. 3d 750, 753 (1986))." *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 979.

¶ 23 In this case, the plaintiffs presented evidence that they performed fall tillage and fertilization services to benefit the defendants, that they did not perform the services gratuitously, that the defendants accepted the fall tillage and fertilization services on their property, and that no contract existed to prescribe payment for the services. The defendants argue, however, that the plaintiffs failed to show delivery and value of a benefit because Benjamin did not witness the delivery and application of the fertilizer. The defendants also argue that although not so specified by the circuit court in its 2019 order, they believe that the circuit court reconsidered its prior ruling on the admissibility of Plaintiffs' Exhibit 8 and found it erred because the exhibit's admission was contrary to Illinois Rules of Evidence 602 and 802. Ill. Rs. Evid. 602, 802 (eff. Jan. 1, 2011). The defendants thus counter that there was no evidence offered as to the occurrence and reasonable value of the uncompensated benefit because Plaintiffs' Exhibit 8 was admitted in error and because Plaintiffs' Exhibit 9 was not admitted into evidence.

¶ 24 At trial, Benjamin identified Plaintiffs' Exhibit 8, an invoice for tillage and fertilization services performed on the St. James Augsburg Farm in the amount of

$41,719.71. Plaintiffs' Exhibit 8, which included a CPS invoice showing fertilizer application ship dates of October 29, 2011, and October 30, 2011, was admitted into evidence. Likewise, Benjamin identified Plaintiffs' Exhibit 9, an invoice for tillage and fertilization services performed on the Butts Engele Farm in the amount of $79,463.18, and this exhibit included a CPS invoice listing a fertilizer application ship date of October 15, 2011. As noted by the defendants, Exhibit 9 was not offered into evidence. Benjamin testified that he communicated with CPS to confirm the dates fertilizer was applied, which were listed as ship dates in the CPS invoices included in Plaintiffs' Exhibit 8 and 9, and paid the CPS invoices, but he did not witness the fertilizer application himself.

¶ 25 Illinois Rule of Evidence 602 provides: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Ill. R. Evid. 602 (eff. Jan. 1, 2011). Illinois Rule of Evidence 802 provides: "Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Supreme Court, or by statute as provided in Rule 101." Ill. R. Evid. 802 (eff. Jan. 1, 2011).

¶ 26 The defendants thus argue that because Benjamin did not personally witness the application of the fertilizer, his testimony that fertilizer was applied to the defendant's property and in what amounts lacked an adequate foundation and was based on hearsay. Under the Illinois Rules of Evidence, "hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). A lay witness's testimony

cannot be based on hearsay, because a lay witness may only testify to matters within the witness's personal knowledge. See Ill. R. Evid. 602 (eff. Jan. 1, 2011).

¶ 27 However, in Illinois, business records are admissible as an exception to the hearsay rule. Ill. S. Ct. R. 236 (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Jan. 1, 2011). "The theory upon which entries made in the regular course of business are admissible as an exception to the hearsay rule is that 'since their purpose is to aid in the proper transaction of the business and they are useless for that purpose unless accurate, the motive for following a routine of accuracy is great and the motive to falsify nonexistent.' " *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 414 (2005) (quoting Michael H. Graham, Cleary and Graham's Handbook of Illinois Evidence § 803.10, at 817 (7th ed. 1999)). "Thus, it makes no difference whether the records are those of a party or of a third person authorized by the business to generate the record on the business's behalf." *Id.*

¶ 28 Illinois Supreme Court Rule 236, applicable to civil cases, codifies the business records exception to the hearsay rule and provides:

> "(a) Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal

knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

¶ 29 "Because the accuracy of the record is presumed (for how could an inaccurate business record be of any value to the business that produced it?), Rule 236 requires only that the party tendering the record satisfy the foundational requirements that (1) the record was made in the regular course of business *** (2) at or near the time of the event or occurrence." *Kimble*, 358 Ill. App. 3d at 414. "A sufficient foundation for admitting records may be established through testimony of the custodian of records or another person familiar with the business and its mode of operation." *Id.* "[A] record made in response to a singular occurrence or event does not require the conclusion that it was not made in the regular course of business." *Id.* at 415.

¶ 30 "Once a witness has established the foundational requirements of a business record, '[t]he records themselves should be introduced.' " *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733 (2006) (quoting *Smith v. Williams*, 34 Ill. App. 3d 677, 680 (1975)). "Business records should only be barred from admission if they are irrelevant, prejudicial or for some other legally appropriate reason." *Id.* "A reviewing court will not disturb a trial court's decision regarding the admissibility of business records absent an abuse of discretion." *In re Estate of Weiland*, 338 Ill. App. 3d 585, 600 (2003).

¶ 31 Initially, we reject the defendants' suggestion that Plaintiffs' Exhibits 8 and 9 may be offered only as evidence of the fact of payment and reasonableness of the charge. See Ill. R. Evid. 803(24) (eff. Jan. 1, 2011) (receipt or paid bill as *prima facie* evidence of payment and reasonableness is not excluded by hearsay rule). Rule 236, in addition to

Illinois Rule of Evidence 803(6), provides for the admission of business records made in the regular course of business near the time of the event. Ill. R. Evid. 803(6) (eff. Jan. 1, 2011); *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 99 (the adoption of Illinois Rule of Evidence 803(6) relating to the admission of business records did not make any substantive changes to the requirements under Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992) so that caselaw developed under Rule 236 is still applicable to the admission of business records); Ill. R. Evid., Committee Commentary (noting that Rule 803(6) retains the hearsay exception for business records under Rule 236 but removes the distinction between civil and criminal business records). Pursuant to Illinois Supreme Court Rule 236, the invoices, writings, or records of the tillage and fertilization were admissible as evidence of the work performed if made in the regular course of business at the time.

¶ 32 Here, invoices included in Exhibits 8 and 9 originated from the plaintiffs' businesses, were prepared by Benjamin, and included additional supporting invoices prepared by CPS. Benjamin testified that he attached the "Machinery Cost Estimates" to explain the cost per acre for tillage and included the CPS invoices to explain the cost of fertilizer, seed, and chemical applied, and James acknowledged Exhibits 8 and 9 as invoices he received from the plaintiffs for the tillage and fertilization of his farms. Benjamin testified to the work identified therein, including the fertilizer application date, and the necessity for such work, considering his calculations based on the prior harvest, relevant tables, and periodic soil samples. Benjamin testified as to the timeframe when the work was being performed, and the dates on the invoices corresponded to the same

timeframe, so the invoices were prepared within a reasonable time of the work being performed. The CPS invoices were dated October 31, 2011, within 2 to 11 days of fertilizer application, and the Fayette Farms and Emerick Farms invoices were dated December 20, 2011. At Benjamin's direction, CPS applied the fertilizer and submitted the invoices, and Benjamin relied on the invoices to pay CPS in the regular course of the farming operations. Through Benjamin's testimony, the plaintiffs provided sufficient foundational evidence of the compilation of the invoices related to the tillage and fertilizer application. Therefore, the exhibits qualified as business records under Rule 236 and were admissible as records of the tillage and application of fertilizer on the defendants' farms. See *Union Tank Car Co. v. NuDevco Partners Holdings, LLC*, 2019 IL App (1st) 172858, ¶ 35 (where third-party invoices were maintained by authenticating witness, relevant portions of the third-party invoices were identified, and third-party invoices were relied on to make payments to third party, the foundational requirements for the business records exception were satisfied); *City of Chicago v. Old Colony Partners, L.P.*, 364 Ill. App. 3d 806, 820 (2006) (documents from architecture firm properly admitted as business records based on testimony of defendant's property manager who testified that she maintained the documents from the architecture firm on site in the ordinary course of business and confirmed that defendant received documents even though property manager could not testify as to how they were generated).

¶ 33 The defendants complain because Benjamin was not associated with CPS, which applied the fertilizer and prepared portions of the exhibits. The evidence revealed, however, that CPS prepared the invoice in question at Benjamin's direction for use in the

farming operations, after Benjamin ordered the application of fertilizer to the defendants' farms, and that Benjamin paid for these services pursuant to the invoice. "A witness may produce business records for admission into evidence even if he is not the original entrant." *Birch v. Township of Drummer*, 139 Ill. App. 3d 397, 406 (1985) (business records admissible pursuant to Rule 236 "can be either those of a party or of a third person"). "Anyone familiar with the business and procedure may testify as to the records." *Id.* at 407 (audit or inventory report prepared at request of one business by another is admissible for it is useless unless accurate); see generally *Autotrol Corp. v. Continental Water Systems Corp.*, 918 F.2d 689, 695 (7th Cir. 1990) (court rejected argument that in-house counsel was improper witness to testify to amount of fees incurred and that only proper witnesses to testify to fees were lawyers who billed them). "The modern trend necessarily tends to be more liberal in the admission of business records as business becomes more complex." *Birch*, 139 Ill. App. 3d at 406.

¶ 34 The defendants also complain that this evidence was improperly admitted because Benjamin did not personally witness the fertilization. "Notably, lack of personal knowledge by the maker may affect the weight afforded the evidence, but not its admissibility." *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 29; see also *Northbrook Bank & Trust Co. v. Abbas*, 2018 IL App (1st) 162973, ¶ 50. "Under Rule 236, 'it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible.' " *Avdic*, 2014 IL App (1st) 121759, ¶ 29 (quoting *Cole Taylor Bank v. Corrigan*, 230 Ill. App. 3d 122, 130 (1992)). Thus, Benjamin's lack of personal knowledge affected only the weight, and not the

admissibility of this evidence. See *Kimble*, 358 Ill. App. 3d at 415 (diagram made at behest of supervisor, along with narration, qualified as business records even though creator of diagram had not personally witnessed the accident; such failings affect only weight, not admissibility of this evidence).

¶ 35 Benjamin's testimony revealed that the plaintiffs maintained and relied on the CPS statements in the course of the farming operations and made payments based on them. This diminishes the concern that they are inaccurate or falsified, which forms the basis of the general rule prohibiting hearsay evidence. See *Union Tank Car Co.*, 2019 IL App (1st) 172858, ¶ 37; *Kimble*, 358 Ill. App. 3d at 414. Thus, Exhibits 8 and 9, the invoices documenting the application and cost of fertilizer and tillage, were admissible as evidence of the application and cost of fertilizer and tillage pursuant to the business records exception to the hearsay rule. As noted by the defendants, however, although Exhibit 9 was identified and testimony elicited with regard to it, it was not offered and admitted into evidence. The plaintiffs counter that although not formally admitted into evidence at trial, Exhibit 9 was attached to their complaint, admitted to by James, and thus, may be considered by the trial court.

¶ 36 "It is generally true that a document must be offered by its proponent and admitted into evidence by the trial court before it may be considered as evidence." *Jill Knowles Enterprises, Inc. v. Dunkin*, 2017 IL App (2d) 160811, ¶ 21. "It is error to permit the trier of fact to consider documents that have not been tendered or admitted into evidence." *Id.* However, under section 2-606 of the Code of Civil Procedure, "a written instrument

attached to a pleading as an exhibit constitutes part of the pleading for all purposes and need not be introduced into evidence to be considered." *Id.* ¶ 26.

¶ 37 In this case, in asserting that the defendants were unjustly enriched by the plaintiffs' tillage and fertilization of the defendants' fields, the plaintiffs attached to their second-amended complaint the invoices for tillage and fertilization, documents upon which their cause of action relied. See 735 ILCS 5/2-606 (West 2012) (if claim is founded upon written instrument, a copy must be attached to the pleading as an exhibit). Plaintiffs' Exhibits 8 and 9 were attached to the second-amended complaint, and during trial, James identified both exhibits and acknowledged that he had received them as invoices due for the tillage and fertilization of the defendants' property. Accordingly, those documents were not required to be admitted into evidence to be considered by the trial court. See *Jill Knowles Enterprises, Inc.*, 2017 IL App (2d) 160811, ¶ 26 (where answer admitted the existence of written contract, account reconciliation, and invoices, they were properly considered by trial court even though documents were not admitted into evidence); *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 33 (consideration of copy of settlement agreement, on which the cause of action was based, was proper because it was attached to the complaint pursuant to section 2-606); *William Aupperle & Sons, Inc. v. American National Bank & Trust Co. of Chicago*, 28 Ill. App. 3d 573, 576 (1975) (lien waivers attached to the defendants' pleadings as an exhibit in an action to foreclose mechanics' lien constituted part of pleading for all purposes and were not required to be introduced in evidence in order to be considered); *Lipschultz v. So–Jess Management Corp.*, 89 Ill. App. 2d 192,

199-200 (1967) (lease and riders attached to complaint and admitted by the answer were properly considered by the court even though the documents were not offered into evidence).

¶ 38 Accordingly, we conclude that the evidence supported the conclusion that the defendants received a $121,182.89 benefit from the plaintiffs' fall tillage and fertilization work on their property, under circumstances making it unjust for the defendants not to pay restitution. We hereby reverse the circuit court's order entering judgment in the defendants' favor, and we remand the cause to the circuit court to enter judgment on counts III and IV in the plaintiffs' favor.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we reverse the judgment of the circuit court of Fayette County, and we remand the cause for the circuit court to enter judgment in favor of the plaintiffs for $121,182.89, which includes awards of $41,719.71 on count III and $79,463.18 on count IV.

¶ 41 Reversed and remanded with directions.