

NOT DESIGNATED FOR PUBLICATION

No. 125,232

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LUX BUILDING, LLC and
FARHA CONSTRUCTION, INC.,
Appellants,

v.

PROFESSIONAL MECHANICAL CONTRACTORS, INC.,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge. Oral argument held August 15, 2023. Opinion filed October 6, 2023. Affirmed.

Randall K. Rathbun, of Depew Gillen Rathbun & McInteer LC, of Wichita, for appellants.

Wyatt A. Hoch, *David E. Rogers*, and *Jeremy E. Koehler*, of Foulston Siefkin LLP, of Wichita, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

SCHROEDER, J.: Lux Building, LLC (Lux) and Farha Construction, Inc. (Farha) timely appeal from the district court's orders granting summary judgment for Professional Mechanical Contractors, Inc. (PMC). PMC moved for summary judgment with respect to the contract claim; the district court granted the motion finding the contract was oral and Lux and Farha failed to timely file a petition before the statute of limitations ran. Lux and Farha then amended their petition, claiming fraud by silence, and PMC again moved for summary judgment. The district court granted PMC's second motion, finding this was a

contract claim case, not one of fraud. We observe no error by the district court and affirm.

FACTS

Lux desired to renovate a former office building in Wichita into a mixed-use Leadership in Energy and Environmental Design certified property. In May 2013, Farha assumed the general contractor role for the construction project. Farha subcontracted PMC to perform the HVAC work on the project. PMC was to install a complete chilled water system using a cost-effective system called a Daikin VRV. The HVAC system had multiple problems after installation. In August 2015, PMC refused to provide any more warranty services, and Lux and Farha (collectively Plaintiffs) hired another subcontractor to make the HVAC system operable at a cost of more than \$2,000,000.

Plaintiffs filed a petition against PMC in August 2019, claiming PMC was liable for damages related to faulty and substandard installation of the HVAC system. Plaintiffs alleged PMC failed to follow basic installation requirements, which led to ongoing warranty service calls. PMC answered Plaintiffs' petition, stating it entered an oral contract with Farha regarding the installation, testing, and balancing of the HVAC system. PMC denied entering into a written contract agreement. PMC also asserted a statute of limitations defense, suggesting Plaintiffs' claim was time barred.

PMC moved for summary judgment, contending Plaintiffs were aware of the potential claims as early as August 2015 when PMC refused to provide more warranty services on the HVAC system. PMC also asserted that, at the latest, Plaintiffs were aware of any potential claims by May 2, 2016, when Farha sent a demand letter to PMC to correct the deficiencies in the HVAC system or reimburse Plaintiffs for related costs. A courtesy copy of the letter was sent to Lux.

PMC asked the district court to grant its motion for summary judgment on two grounds: "(1) PMC did not sign a written contract with Farha or Lux; and (2) any claims against PMC for breach of a contract not in writing or sounding in tort are barred by the statute of limitations." PMC asserted the only claim available to Plaintiffs was breach of a written contract, which had a five-year statute of limitations. But PMC claimed it never signed a written contract. The statute of limitations for an oral contract, however, expired three years from the alleged breach—August 2015, when PMC refused to continue providing warranty services—and Plaintiffs filed their petition in August 2019—past the three-year deadline. PMC also noted a claim of negligence or tort had a two-year statute of limitations from when the injured party had knowledge of the fact of injury and was also time barred.

Plaintiffs responded that a written contract existed between the parties by construing multiple documents together as one. PMC then filed a supplemental brief in support of its motion for summary judgment, which contained two affidavits from PMC employees. Kathryn L. Martin, the controller for PMC, provided a sworn statement specifying David Norris, the sole shareholder of PMC, "told me that he would never sign a contract with Farha for The Lux [project] because the scope of PMC's work continued to evolve."

Subsequently, in September 2020, Plaintiffs amended their petition to claim fraud by misrepresentation based on Martin's affidavit and contending PMC knew Plaintiffs were operating under the belief PMC had signed the contract while PMC had no intention of signing the document.

On December 30, 2020, the district court filed two orders, one granting Plaintiffs' motion to amend the petition to continue with the fraud allegations and another granting PMC's motion for summary judgment on the breach of contract claim because the alleged contract was oral and barred by the three-year statute of limitations. The district court

also granted PMC's motion for summary judgment related to any claims arising from negligence or implied warranty claims which were barred by the two-year statute of limitations.

PMC filed another motion for summary judgment related to the claims in Plaintiffs' amended petition alleging fraud by misrepresentation or fraud by silence. PMC claimed (1) Plaintiffs failed to plead their fraud claims with particularity, (2) Plaintiffs could not maintain the fraud claims, and (3) the fraud claims were barred by the statute of limitations.

Plaintiffs responded and stipulated their fraud claim was based on silence, not misrepresentation. Plaintiffs asked the district court to deny PMC's motion for summary judgment as the fraud by silence claim was a question of fact for the jury to determine. Plaintiffs also claimed they first learned of the alleged fraud through the discovery process after the initial petition had been filed and within two years of the amended petition; thus, the statute of limitations had not run.

The district court granted PMC's second motion for summary judgment regarding the fraud by silence claim, adopting and incorporating PMC's pleadings as controlling. The district court explained in part:

"Based on the pleadings before the court the plaintiffs have not nor can [they] plead that the defendant had knowledge of material facts that the plaintiff[s] did not have and could not have discovered by the exercise of reasonable diligence; that the defendant was under an obligation to communicate the material facts to the plaintiff[s]; that the defendant intentionally failed to communicate to the plaintiff[s] the material facts; that the plaintiff[s] justifiably relied upon the defendant to communicate the material facts to the plaintiff[s]; nor that the plaintiff[s] sustained damages as a result of the defendant's failure to communicate the material facts to the plaintiff[s]. Each of the above being [a] necessary element of fraud as suggested by the plaintiff[s].

"This is not a fraud case. The court previously granted summary [judgment] based on the limitations of the applicable statutes of limitation for both written and oral contracts as originally argued by the plaintiffs. The plaintiffs now attempt to maintain this action by amending their petition to include fraud by misrepresentation and by [silence]. However, the facts as they exist and presented by the parties provide no legal basis for the suggested fraud. Efforts to reframe those facts as fraud fail to meet the requirements of law."

Plaintiffs now seek our review on both district court orders granting PMC's motions for summary judgment. After Plaintiffs filed their notice of appeal, PMC twice moved our court to dismiss the appeal, claiming the notice of appeal was filed one day too late. Another panel of this court addressed both motions and found the appeal was timely. Additional facts will be set out as necessary.

ANALYSIS

The Appeal Was Timely

While the statute governing a notice of appeal is to be construed liberally to assure justice in every proceeding, there is a substantive minimum below which a notice of appeal cannot fall and still support jurisdiction. *State v. Laurel*, 299 Kan. 668, 673-74, 325 P.3d 1154 (2014). In *U.S.D. No. 501 v. American Home Life Ins. Co.*, 25 Kan. App. 2d 820, 822, 971 P.2d 1210 (1999), a panel of this court held a notice of appeal was timely filed 30 days from the time the parties were served and received the district court's final decision. In *U.S.D. No. 501*, the final decision was filed on January 17, 1997, but the attorneys for plaintiff did not receive a copy of the decision until May 1, 1997. The notice of appeal was filed on May 23, 1997, and the panel concluded the notice of appeal was timely.

Here, the district court emailed counsel on March 12, 2022, a Saturday, notifying the parties the order granting PMC's second motion for summary judgment had been filed but did not attach the order to the email. The order was available, received, and filed by the clerk on Monday, March 14, 2022. Plaintiffs contended they received the notice of electronic filing at 10:24:46 a.m. on Monday, March 14, 2022. We find the time to file the notice of appeal started running on Tuesday, March 15, 2022, which was the next day after the entry of the judgment was filed by the clerk of the district court. See K.S.A. 2022 Supp. 60-206(a)(1)(A). Similar to *U.S.D. No. 501*, we conclude Plaintiffs' notice of appeal was timely filed on April 12, 2022, and within 30 days of when the order was filed and available to the parties on March 14, 2022. To apply the 30-day rule as the dissent does seems harsh given the fact the parties did not receive the actual order until filed by the clerk of the district court on March 14, 2022. See Kansas Supreme Court Rule 1.05(h) (2023 Kan. S. Ct. R. at 7) (electronically filed document received by the clerk of the appellate court on Saturday or Sunday "will be deemed filed on the next business day that is not a Saturday, Sunday, or Supreme Court holiday").

The District Court Properly Granted PMC's First Motion for Summary Judgment as There Was No Written Contract and the Statute of Limitations Had Expired

Plaintiffs assert nine issues on appeal relating to PMC's successful motions for summary judgment below. Plaintiffs' claims essentially come down to whether the district court erred in finding: (1) The agreement between the parties was oral, not written; (2) Plaintiffs did not properly controvert PMC's statements of fact; and (3) Plaintiffs failed to plead their fraud by silence claim with appropriate particularity and could not maintain a case of fraud.

Our Supreme Court explained:

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo." *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

The contract was oral, and the statute of limitations had expired.

Plaintiffs contend PMC was bound by a written contract to perform HVAC work at the Lux property. Plaintiffs specifically claim the contract was established through a series of writings, including emails, construed together as an enforceable contract detailing the material terms of the agreement. Plaintiffs assert whether a written contract existed was a question of fact and the district court erred in granting PMC's first motion for summary judgment.

PMC admits the parties had an agreement but asserts the contract was oral and Plaintiffs failed to petition for breach of an oral contract within the three-year statute of limitations. PMC also admits the parties negotiated and exchanged contract drafts. PMC focuses on the blank signature line within the four corners of the contract agreement, while Plaintiffs assert the contract was agreed upon through multiple written documents construed together.

A dispute over any contract, promise, or agreement in writing must be brought within five years. K.S.A. 60-511(1). A dispute over any oral contracts, obligations, or liabilities, expressed or implied, must be brought within three years. K.S.A. 60-512.

"The general rule is that a written agreement, contract or promise in writing which falls within the five-year statute of limitations, K.S.A. 60-511(1), must contain all its material terms in writing. A contract which is partly in writing and partly oral is in legal effect an oral contract so far as the statute of limitations may be concerned. The writing necessary to have the additional protection of the five-year statute [of limitations] must be full and complete in itself so as not to require proof of extrinsic facts to establish all essential contractual terms.

"The writing need not, however, be signed by all parties, and where a writing containing all the essential terms of a contract is executed by the party to be charged and the contract is accepted and acted on by the other party the contract is one in writing for purposes of determining which statute of limitations applies. [Citations omitted.]" *Miller v. William A. Smith Constructing Co.*, 226 Kan. 172, 174, 603 P.2d 602 (1979).

The existence of a contract is a question of fact. "In order to form a binding contract, there must be a meeting of the minds on all the essential elements. An unconditional and positive acceptance is required to form a contract; a conditional acceptance of a settlement offer is but a counteroffer, which does not create a contract. [Citation omitted.]" *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012). "For purposes of satisfying the statute of frauds, separate writings may be construed together to determine whether there is sufficient written agreement upon which to base an enforceable contract." *Young v. Hefton*, 38 Kan. App. 2d 846, 856, 173 P.3d 671 (2007). "[T]he plaintiff bears the burden of proving the existence of the contract alleged in the petition." *Sandoval*, 295 Kan. at 282.

Here, the parties agree there was a contract in place but disagree as to whether the contract was written or oral. The parties seemingly never reached a meeting of the minds with respect to any of the final written terms of the contractual agreement. In fact, the

opposite is true. The parties negotiated and exchanged multiple change orders regarding the terms and conditions under the agreement. There was not an unconditional and positive acceptance in writing, which was required to form a contract. Rather, the negotiations and change orders were but counteroffers, which does not create a contract. 295 Kan. at 282.

Plaintiffs argue multiple written documents construed together made up the written contractual agreement, but Plaintiffs provided no documents which, construed together, establish all essential terms of the contract were agreed upon with unconditional positive acceptance. Plaintiffs rely on email communications discussing the initial terms of the agreement. In these emails, PMC acknowledged a final contract "will be forthcoming" and there would be an in-person meeting to go over other documents. Plaintiffs largely rely on an email from PMC on October 9, 2014, stating: "Here is the contract I was referencing this morning. Thanks. Paul." This email does not provide positive acceptance of the final contract in writing. If anything, this email confirms the contract at issue was partly in writing and partly oral as the parties had discussed or referenced the contract earlier in the day. The contract, therefore, had the legal effect of an oral contract so far as the statute of limitations may be concerned, and the three-year statute of limitations applied. See *Miller*, 226 Kan. at 174.

Further, Plaintiffs essentially admit in the amended petition the contract was not in writing. Plaintiffs changed their claim from breach of contract to fraud after discovering the sole shareholder of PMC told another employee he would never sign a contract with Farha because the scope of work continued to evolve.

It is undisputed Plaintiffs were aware of the alleged deficiencies in PMC's work by May 2016, at the latest, when they sent a letter to PMC demanding repairs or reimbursement. Plaintiffs filed their petition in August 2019. Because more than three years accrued from the time Plaintiffs were aware of the deficiencies, the statute of

limitations had expired. The pleadings, depositions, and supporting affidavits show no genuine issue existed as to any material fact, and PMC was entitled to judgment as a matter of law. The district court did not err in granting PMC's first motion for summary judgment.

The District Court Properly Granted PMC's Second Motion for Summary Judgment as Plaintiffs Failed to Present Evidence Supporting Several Elements Required to Prove Fraud by Silence

Plaintiffs make multiple contentions on appeal related to their fraud by silence claim. Plaintiffs assert: (1) The fraud by silence claim was pled with particularity as to each of the five elements of the claim; (2) the district court erred in finding various statements of fact were not properly controverted; and (3) the existence of fraud is a question of fact that should have been determined by a jury.

Generally, a petition need only include a "short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought." K.S.A. 2022 Supp. 60-208(a). Fraud claims, however, "must state with particularity the circumstances constituting fraud," though "[m]alice, intent, knowledge and other conditions of a person's mind may be alleged generally." K.S.A. 2022 Supp. 60-209(b). And a petition asserting fraud must provide details as to each element of the claim. See *Newcastle Homes v. Thye*, 44 Kan. App. 2d 774, 788, 241 P.3d 988 (2010).

Pled with particularity

Plaintiffs' amended petition claiming fraud by silence stated:

"15. On December 6, 2012, PMC and Farha entered into a written agreement to begin the pre-contract work on the Lux project. After the project began, Farha

submitted a contract providing for PMC to do the plumbing and HVAC work on the LUX project.

"16. In June 2013, PMC entered into an agreement with Professional Engineering Consultants, P.A. ('PEC') in which PEC agreed to provide professional services for the LUX mechanical service platform. This contract was shared with Farha. This contract, in addition to the conduct described below, led Farha to believe that the defendant had fully committed to the project.

"17. Defendant knew that the plaintiffs believed that they had entered into a written contract to provide the plumbing and HVAC services for the project. Defendant never had the intention of signing the contract.

"18. In February 2014 alone, the defendant submitted three change orders to the contract, Change Orders 13, 14, 15 for work to be completed outside the original scope. The plaintiffs paid these change orders based upon their belief that the defendant was operating under the contract.

"19. Farha would never have entered into a [three] million dollar subcontract without a signed contract. The defendant was aware that Farha believed PMC was working under a contract and submitted change orders to the contract. The plaintiffs justifiably relied upon the defendant's representation or, in the alternative, defendant's silence in concluding that the parties were operating under a written contract.

"20. On February 14, 2020, the plaintiffs learned that the defendant had never signed the contract on this project and that this failure was not an oversight. According to defendant's controller, the sole shareholder, David Norris, had confided that he would never sign a contract on the LUX project.

"21. The failure to sign the contract was not a mistake on defendant's part. It was a cold and calculating way of doing business to avoid having to fulfill its contractual obligations. The defendant has utilized its refusal to sign the construction contract for the project as a defense to the various claims made by the plaintiffs."

Plaintiffs' petition provided details as to each element of the fraud claim. The petition averred fraud with particularity in compliance with K.S.A. 2022 Supp. 60-209(b).

Elements of fraud by silence

There are five elements to a fraud by silence claim:

"(1) The defendant had knowledge of material facts that the plaintiff did not have and could not have discovered by the exercise of reasonable diligence; (2) the defendant was under an obligation to communicate the material facts to the plaintiff; (3) the defendant intentionally failed to communicate to the plaintiff the material facts; (4) the plaintiff justifiably relied upon the defendant to communicate the material facts to the plaintiff; and (5) the plaintiff sustained damages as a result of the defendant's failure to communicate the material facts to the plaintiff." *Steckschulte v. Jennings*, 297 Kan. 2, 21, 298 P.3d 1083 (2013).

PIK Civ. 4th 127.41 (2014 Supp.).

Knowledge of material facts

Plaintiffs asserted in their amended petition PMC knew Plaintiffs believed the parties entered a written contract in which PMC would provide plumbing and HVAC services for the Lux project but PMC never intended to sign the contract. On appeal, Plaintiffs suggest the issue of whether they exercised reasonable diligence to discover fraud was a question of fact for the jury. Plaintiffs explain they "were under the impression that PMC had signed a contract." Plaintiffs also state it was "unreasonable to believe that Farha would be able to uncover PMC's state of mind concerning its unwillingness to contract, when all manifestations of PMC's intent point to the formation of a contract." Plaintiffs' reply brief primarily responds to PMC's arguments by reiterating points from their original brief.

The first element of a fraud by silence claim states: "The defendant had knowledge of material facts that the plaintiff did not have and could not have discovered

by the exercise of reasonable diligence." *Stechschulte*, 297 Kan. at 21. The problem with Plaintiffs' argument, as PMC points out, is that Plaintiffs should have known by exercising reasonable diligence—by simply looking through their files—PMC had not signed the contract. Plaintiffs allege reasonable diligence would not have uncovered the fact PMC never intended to sign the contract but, again, had Plaintiffs searched their records they would have discovered PMC never signed the agreement. Had Plaintiffs reviewed their files and found the unsigned contract, which was supposed to be signed and returned within seven days, they could have discussed the contract with PMC and determined whether the parties had come to an agreement on the terms and conditions of the project in writing. PMC did not know of any material facts Plaintiffs did not have and could not have discovered.

In its order granting PMC's second motion for summary judgment, the district court correctly explained:

"This is not a fraud case. The court previously granted summary [judgment] based on the limitations of the applicable statutes of limitation for both written and oral contracts as originally argued by the plaintiffs. The plaintiffs now attempt to maintain this action by amending their petition to include fraud by misrepresentation and by [silence]. However, the facts as they exist and presented by the parties provide no legal basis for the suggested fraud. Efforts to reframe those facts as fraud fail to meet the requirements of law."

As the district court noted, Plaintiffs are essentially trying to reframe their contract claim by asserting PMC misled them by never intending to sign the written contract. There is no legitimate reason why Plaintiffs could not have (1) through reasonable diligence determined the contract was not signed, and (2) contacted PMC to figure out why the contract was not executed. There seems to have been ample communication between the parties and various documentation as to the nature and scope of the project through change orders. The pleadings, depositions, admissions on file, and supporting

affidavits show that no genuine issue exists as to any material fact and PMC is entitled to judgment as a matter of law. The district court properly determined there was no genuine dispute of material fact on this element.

Obligation to communicate material facts

"Whether a duty to disclose exists [in a fraud by silence claim] is determined by the facts and circumstances of each case." *Cessna Finance Corporation v. JetSuite, Inc.*, 437 F. Supp. 3d 914, 920 (D. Kan. 2020). As for the second element of fraud—defendant's obligation to communicate material facts to the plaintiff—PMC correctly points out it had no obligation to tell Plaintiffs something they should have known or was obvious. See *Thomas v. Air Midwest, Inc.*, No. 69,728, 1994 WL 17120679, at *4 (Kan. App. 1994) (unpublished opinion) (finding trial court was reasonable in finding defendant had no obligation to advise plaintiff of obvious fact). PMC had no obligation to tell Plaintiffs the contract was unsigned—something Plaintiffs should have known or that would have been obvious had Plaintiffs been diligent and looked through their records.

Plaintiffs contend PMC falsely assured Farha it would not go forward without a written contract and PMC's actions were anything but obvious. Plaintiffs cited Ted Farha's deposition testimony stating there was an email from PMC at the beginning of the job indicating PMC would not perform without a written contract. We have been unable to find the email in the record on appeal. If the email existed, it would be relevant evidence that should have been—but was not—produced during discovery. In fact, the record fails to show any communication in which PMC assured Plaintiffs it would not go forward without a contract. The emails Plaintiffs rely on simply state a contract "will be forthcoming" and "Here is the contract I was referencing this morning." Again, Plaintiffs had possession of the unsigned contract, could have discovered PMC had not signed the contract, and subsequently asked about the agreement. The district court properly determined there was no genuine dispute of material fact on this element.

Intentionally failed to communicate material facts

Our Supreme Court explained: "Intent is usually proven by inference arising from circumstantial evidence because direct evidence of a defendant's state of mind is rarely available." *State v. Gonzalez*, 311 Kan. 281, 288, 460 P.3d 348 (2020). Plaintiffs claim PMC sent the contract to Farha "and stated that they would be operating under that contract." Plaintiffs fail to cite the record in support of this factual statement in violation of Supreme Court Rule 6.02(a)(4) (2023 Kan. S. Ct. R. at 36), and, upon a careful review of the record, we have been unable to find the statement or a document. The record does reflect PMC emailed Plaintiffs in December 2012 with precontract initial terms and requested a letter of intent stating the contract would be forthcoming. The terms of the contract were negotiated but never finalized in writing.

Plaintiffs contend it was suspicious a company would negotiate over a long period on a multimillion-dollar project and exchange several unsigned contracts with proposed changes if there was no intent to proceed under the contract. Plaintiffs rely on Martin's affidavit stating PMC's sole shareholder told her that "he would never sign a contract with Farha for The Lux [project] because the scope of PMC's work continued to evolve." While intent is generally a question of fact, Plaintiffs could have easily discovered the unsigned contract in their file with reasonable diligence. See *Hill v. Perrone*, 30 Kan. App. 2d 432, 438, 42 P.3d 210 (2002).

Plaintiffs rely on *J and B Oil & Gas v. Ace Energy*, No. 122,242, 2021 WL 3708002 (Kan. App. 2021) (unpublished opinion), to support their position. In *J and B Oil & Gas*, there was evidence the defendant told the plaintiff he would sign a contract and later refused. Another panel of this court found there was sufficient evidence to infer fraudulent intent beyond the mere lack of a signed agreement. The panel explained intent and reasonable reliance on a promise were material questions of fact and summary judgment was not appropriate. 2021 WL 3708002, at *10.

J and B Oil & Gas is distinguishable as PMC never refused to sign the contract. Plaintiffs had the unsigned contract and at any time could have determined the status of the written agreement and inquired with PMC to come to a final written agreement. Additionally, Plaintiffs could not have reasonably relied on a signed written promise when, with due diligence, it could have discovered the agreement was unsigned. In fact, Plaintiffs sent a letter to PMC with the subcontract asking for an authorized PMC employee to sign and return the subcontract within seven days. But Plaintiffs never followed up or checked their records for a signed contract after the seven-day period expired.

Plaintiffs also argued there were multiple documents supporting the elements of their fraud claim, not just the Martin affidavit, but failed to disclose what those documents were. The pleadings, depositions, admissions on file, and supporting affidavits show no genuine issue exists as to any material fact that PMC intentionally withheld that it would not sign the contract.

Justifiable reliance upon defendant to communicate material facts

Plaintiffs argue there were extensive communications regarding details of the proposed written contract. Plaintiffs also assert PMC demanded a written contract and explicitly stated it would follow the December 17, 2013 contract. Plaintiffs did not support this allegation with citation to the record.

Even if Plaintiffs were justified in believing PMC would abide by the terms of the contract because of the continued negotiations, they failed to establish a genuine issue of material fact as to the other elements of fraud by silence. This point tends to go to the initial contract claim of whether there was a written or oral agreement. Once more, Plaintiffs could have easily determined there was not an executed contractual agreement

with PMC and, as the district court noted in its order granting PMC's first motion for summary judgment, an oral contract was subject to a three-year statute of limitations.

Damages as a result of defendant's failure to communicate material facts

Plaintiffs argue this prong of the fraud claim is easily established because the written contract would have required PMC to fix the HVAC issues. PMC admitted it refused to perform any maintenance work on the project after August 2015 because Farha would not pay for such maintenance. PMC alleged Plaintiffs needed maintenance performed on the system to fix damaged equipment caused by electrical power surges, not by poor workmanship. Interestingly, we are not certain the December 17, 2013 contract—the contract Plaintiffs assert is the final contract—is in the record on appeal. The October 12, 2013 contract draft was revised, and the date was circled with a suggested changed date in December 2013. The district court noted in its memorandum and order granting PMC's first motion for summary judgment it was uncontroverted that "Farha's representatives sent a revised offer based on [their] negotiations on December 17, 2013."

Regardless, all versions of the contract in the record on appeal state in relevant part and without revision:

"[S]ubcontractor AGREES TO PROTECT AND BE SOLELY RESPONSIBLE FOR ITS OWN Work until it is finally accepted by the Owner. SUBCONTRACTOR warrants its Work against all defects in material and/or workmanship for a period of one (1) year from date of final acceptance by the Owner unless a longer warranty period is required by the Prime Contract."

In one of the initial subcontract drafts dated March 1, 2013, the page with the warranty statement was initialed by a PMC representative, though other pages were not initialed; there were revisions made throughout the document; and the final signature line

was blank. Plaintiffs provided estimates and invoices from another subcontractor who was hired to repair the HVAC system after PMC declined to provide additional warranty work. While Plaintiffs may have sustained damages, the pleadings, depositions, and supporting affidavits do not show Plaintiffs sustained damages because of PMC's omissions or silence about a material fact Plaintiffs did not have and could not discover by exercising reasonable diligence.

Statement of facts not properly controverted

Plaintiffs contend the district court erred in finding they had improperly controverted several of PMC's alleged uncontroverted statements of fact in its second motion for summary judgment. "If the party opposing summary judgment fails to properly controvert the moving party's statement of fact, those facts are deemed admitted." *State ex rel. Stephan v. Commemorative Services Corp.*, 16 Kan. App. 2d 389, 401, 823 P.2d 831 (1991). To survive a motion for summary judgment, the nonmoving party must do more than just controvert facts set forth in the motion for summary judgment. See Supreme Court Rule 141(a)(2), (b)(1)(C) (2023 Kan. S. Ct. R. at 223-24) (controverted facts must "concisely summarize the conflicting testimony or evidence and any additional genuine issues of material fact that preclude summary judgment" and provide "precise references to pages, lines and/or paragraphs . . . of the portion of the record on which the movant relies"). The nonmoving party "has an affirmative duty to come forward with facts to support its claim, although it is not required to prove its case." *Commemorative Services Corp.*, 16 Kan. App. 2d at 401.

The statements Plaintiffs claim to have properly controverted are:

- PMC's Statement of Fact 4: "The Lux did not have a written or oral contract with Farha on the Project."

- PMC's Statement of Fact 7: "PMC did not sign a written subcontract with Farha for the Project because the scope of PMC's work continued to evolve."
- PMC's Statement of Fact 12: "Michael Ramsey with The Lux did not have any contact with PMC and never received any documents directly from PMC about the Project."
- PMC's Statement of Fact 24: "Farha does not have any evidence that PMC intentionally failed to communicate to Farha that PMC would not sign a written subcontract for the Project."
- PMC's Statement of Fact 28: "The Cindy Martin affidavit dated February 11, 2020[,] is the only document identified by Farha allegedly supporting its fraud claims against PMC."
- PMC's Statement of Fact 29: "Farha used to work with subcontractors without a written subcontract 'on a regular basis.'"

Plaintiffs also contend the district court erroneously found their Statement of Fact 43—"PMC told Farha at the beginning of the job that it wouldn't do the job without a written contract"—was irrelevant.

At first glance, it appears Plaintiffs did more than simply controvert the facts at issue. Plaintiffs provided statements explaining why they controverted each fact with reference to the record. Plaintiffs provided and relied on affidavits from Ted Farha with Farha Construction, Kathryn Martin with PMC, and Michael Ramsey with Lux to support their claim. PMC responds by claiming the sham affidavit doctrine caused Plaintiffs' response to the allegedly uncontroverted facts to fail in PMC's second motion for summary judgment on the fraud by silence claim.

Under the sham affidavit doctrine, "a party may not avoid summary judgment by presenting an affidavit that contradicts prior sworn deposition testimony." *Christiansen v. Silverbrand*, 61 Kan. App. 2d 8, 13, 497 P.3d 1155 (2021). There is a two-part inquiry in

determining whether an affidavit is a sham to avoid summary judgment. "First, the court determines whether a contradiction exists. Second, the court determines whether the contradiction is justified. The court must consider the contents and the context of the prior testimony." 61 Kan. App. 2d at 15. "[N]ot every discrepancy in an affidavit [submitted in response to a motion for summary judgment] justifies a district court's refusal to give credence to such evidence." 61 Kan. App. 2d at 20. An affidavit can be used to explain or clarify certain aspects of prior testimony if it does not propose to raise a new matter. See 61 Kan. App. 2d at 24.

We review the district court's decision to strike what it deems a contradictory affidavit for an abuse of discretion. *P.W.P. v. L.S.*, 266 Kan. 417, 431, 969 P.2d 896 (1998). A district court abuses its discretion if its decision is based on an error of fact or law or is arbitrary, fanciful, or unreasonable. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018).

As for PMC's statements of fact 4, 7, 12, 24, and 28, the district court found the statements were not controverted in a responsive manner as "the plaintiff[s] appear[] to be attempting to challenge or amend clear statements given under oath at deposition with subsequent contradictory statements by affidavit."

PMC's Statement of Fact 4: "The Lux did not have a written or oral contract with Farha on the Project."

Ramsey testified in his deposition Lux did not have a written or oral contract with Farha for this project. Ted Farha also testified there was no written contract between Lux and Farha. Plaintiffs tried to controvert this fact in part by explaining that "this depends on the definition of the word 'project.' PMC had signed several contracts on the work it did on the renovation of the Lux." Ted Farha's affidavit supporting this contention discusses PMC's concealment of the fact it would not sign a contract with Farha.

Plaintiffs focus on the relationship and potential agreements between Farha and PMC, not Lux and Farha, as the statement of fact in question asserts. Plaintiffs did not come forward with conflicting testimony or evidence on this point and did not properly controvert PMC's statement of fact. This statement of fact is, therefore, deemed admitted. See *Commemorative Services Corp.*, 16 Kan. App. 2d at 401.

PMC's Statement of Fact 7: "PMC did not sign a written subcontract with Farha for the Project because the scope of PMC's work continued to evolve."

PMC claimed this was an uncontroverted fact and supported its contention with Martin's affidavit and the district court's order granting PMC's first motion for summary judgment in December 2020. Martin's affidavit stated: "During the course of The Lux project, David Norris told me that he would never sign a contract with Farha for The Lux because the scope of PMC's work continued to evolve." The district court's December 30, 2020 order stated: "PMC did not sign a written contract with Lux Building, LLC." Plaintiffs tried to controvert this fact in Ted Farha's affidavit, in which he explained:

"I first learned in February 2020 that David Norris told an employee that 'he would never sign a contract with Farha because the scope of PMC's work continued to evolve.' This makes no sense and is simply an excuse not to be bound by a written contract. PMC had agreed to do the plumbing and HVAC work on the Lux project. Scope of work almost always evolves on big jobs like this and that is why change orders are submitted."

The fact there was no written subcontract was already determined by the district court in its order granting PMC's first motion for summary judgment. Ted Farha merely provided an opinion on why there was no written contract to create a dispute of fact to defeat summary judgment. This fact was not properly controverted. The district court did not abuse its discretion in finding Ted Farha's affidavit an attempt to challenge or amend clear statements given under oath at deposition to avoid summary judgment.

PMC's Statement of Fact 12: "Michael Ramsey with The Lux did not have any contact with PMC and never received any documents directly from PMC about the Project."

PMC asserted in its second motion for summary judgment it had no relationship or communication with Lux and could not have committed fraud by silence. Ramsey testified in his deposition he did not have any personal contact with PMC and never got any documents directly from PMC during the project. Ramsey's affidavit filed after his deposition testimony stated he subsequently recalled sitting in on a meeting with PMC representatives. This subsequent contradictory testimony appears to be an attempt by Farha to avoid summary judgment by trying to establish contact between the parties in a business relationship. This fact was not properly controverted, and the district court did not abuse its discretion in finding Ramsey's affidavit a sham affidavit to avoid summary judgment.

PMC's Statement of Fact 24: "Farha does not have any evidence that PMC intentionally failed to communicate to Farha that PMC would not sign a written subcontract for the Project."

Ted Farha testified in his deposition he did not have any evidence PMC intentionally failed to communicate to Farha that it would not sign a written subcontract for the project. To controvert this statement, Plaintiffs merely cited Ted Farha's affidavit but did not concisely summarize the conflicting testimony on this point as required by Rule 141(b)(1)(C). Plaintiffs cited the same paragraph in Ted Farha's affidavit it relied on to controvert PMC's statement of fact 7, suggesting it made no sense for Norris not to sign the contract and was an excuse not to be bound by the contract.

Now, Plaintiffs appear to admit there is no evidence PMC intentionally failed to communicate to Farha because intent is a state of mind and a question of fact. See *Hill*,

30 Kan. App. 2d at 438. While Plaintiffs have an affirmative duty to come forward with facts to support its claim, they need not prove their case. See *Commemorative Services Corp.*, 16 Kan. App. 2d at 401. "[T]he existence of fraud is normally a question of fact." *Chism v. Protective Life Ins. Co.*, 290 Kan. 645, 654, 234 P.3d 780 (2010). "Intent is usually proven by circumstantial evidence, making summary judgment inappropriate when a state of mind is at issue." *J and B Oil & Gas*, 2021 WL 3708002, at *9.

Ted Farha's subsequent sworn statement does not seem to be an attempt to create a dispute of fact to avoid summary judgment. Rather, the question of intent is a question of fact in and of itself, and the sham affidavit doctrine does not apply. Not every discrepancy in an affidavit submitted in response to a motion for summary judgment justifies a district court's refusal to give credence to such evidence. *Christiansen*, 61 Kan. App. 2d at 20. Because intent is a question of fact for the jury, the district court abused its discretion as a matter of law in finding this statement of fact improperly controverted. See *Hill*, 30 Kan. App. 2d at 438.

PMC's Statement of Fact 28: "The Cindy Martin affidavit dated February 11, 2020[,] is the only document identified by Farha allegedly supporting its fraud claims against PMC."

Plaintiffs controverted this fact in their response to PMC's second motion for summary judgment, asserting the several change orders suggested the parties entered into a contract. In support of this position, Plaintiffs cited Ted Farha's affidavit:

"PMC was able to slide its concealment of the fact that it would not sign the contract past me. It accomplished this by referring to the contract in email and submitting change orders to the contract. It had signed several contracts on this project already. Custom and practice in the industry is to alert the other party to a transaction that you will not be willing to be bound by a written contract. I would have shut this job down immediately had I known they would not sign a contract."

PMC noted Farha was required under an "Amended Notice to Take Deposition *Duces Tecum* . . . to bring certain documents to its deposition, including . . . any documents supporting a claim by Farha for damages due to fraud or misrepresentation by PMC." Ted Farha's deposition testimony reflected he solely relied on the Martin affidavit to support the company's claim of fraud. On appeal, Plaintiffs argue there are multiple other documents that in some way support the elements of the fraud claim but do not disclose what those documents are. Plaintiffs failed to properly controvert this statement of fact, and the district court did not abuse its discretion.

PMC's Statement of Fact 29: "Farha used to work with subcontractors without a written subcontract 'on a regular basis.'"

The district court found PMC's statement of fact that Farha used to work with subcontractors without a written subcontract on a regular basis was controverted in a meaningful way. The district court explained Ted Farha's deposition was self-limiting and his subsequent sworn statements in the affidavit did not conflict with his original deposition testimony. But the district court found this statement of fact irrelevant to the fraud claim. PMC asserted it was uncontroverted that Farha used to work with subcontractors without a written subcontract on a regular basis. In support of this contention, PMC cited Ted Farha's deposition testimony:

"Q. What is Farha's practice and/or policy about entering into written subcontracts with subcontractors for projects?

"A. Depends on the sub and the scope of work. There are subs I have worked with for 20-plus years and, you know, have relationships and we often don't have—we go to work without subcontracts, written subcontracts on I would say on—not today, but used to on a regular basis."

Ted Farha's affidavit stated: "I have worked with trusted [subcontractors] on small jobs in the past without a written subcontract. I would never work on a job of this size

with a party with whom I had not worked before without a written subcontract." This fact was properly controverted as Ted Farha clarified and explained in his deposition testimony when he would work without a written contract.

This fact was likely relevant to the third and fourth elements of fraud by silence: Plaintiffs justifiably relied on PMC to communicate material facts, and Plaintiffs sustained damages because of PMC's failure to communicate material facts. Plaintiffs could not have justifiably relied on PMC to communicate material facts about a written contract if Plaintiffs regularly worked without written contracts. Similarly, damages could not have resulted from PMC not signing the contract—something Plaintiffs did not expect PMC to do. This fact is relevant as it tends to prove a material fact—Plaintiffs' assertion they would not have proceeded with the job if they knew PMC never intended to sign the contract. Still, Plaintiffs cannot show they lacked knowledge of the overarching material fact—the contract was not signed. Regardless of PMC's subjective intent or any damages PMC's actions may have caused, PMC could not have fraudulently concealed a fact Plaintiffs knew, or reasonably should have known, through the exercise of reasonable diligence, based on reviewing the records in their own file.

Plaintiffs' Additional Statement of Fact 43: "PMC told Farha at the beginning of the job that it wouldn't do the job without a written contract."

This fact appears relevant to Plaintiff's claim of fraud by silence. The fact PMC may have told Plaintiffs it would not do the job without a written contract could support Plaintiffs' claim they relied on the fact a contract would be forthcoming. It is relevant to the claim if PMC told Plaintiffs at the beginning of the job it would not work without a contract, never intended to sign a contract, and intended to withhold such information from Plaintiffs. The district court erred in finding this statement of fact irrelevant.

The district court properly determined PMC's statements of fact 4, 7, 12, and 28 were uncontroverted. However, the district court erred in finding PMC's statement of fact 24 was improperly controverted. The district court correctly determined PMC's statement of fact 29 was controverted but erred in finding it irrelevant. The district court further erred in finding Plaintiffs' additional statement of fact 43 irrelevant. Still, the district court was ultimately correct in granting PMC's second motion for summary judgment because Plaintiffs failed to present evidence supporting several elements required to prove their fraud by silence claim. See *Dozier v. Dozier*, 252 Kan. 1035, 1041, 850 P.2d 789 (1993) (party opposing summary judgment must establish each element of cause of action to avoid summary judgment). The crux of Plaintiffs' fraud claim comes down to the fact Plaintiffs could have checked their records at any time during the project and discovered PMC had not signed the contract, particularly within the seven-day period suggested for the return of the signed contract or a few days after. The root of Plaintiffs' claim is contractual, and Plaintiffs' attempt to reframe their contract claim as a complaint of fraud by silence fails.

Affirmed.

* * *

MALONE, J., dissenting: I respectfully dissent because I believe that Lux Building, LLC and Farha Construction, Inc., collectively referred to as the appellants, failed to file their notice of appeal within 30 days from the entry of judgment as required by K.S.A. 2022 Supp. 60-2103(a). Thus, our court lacks jurisdiction to consider this appeal.

I will begin by succinctly stating the facts. The district court electronically filed its signed order granting Professional Mechanical Contractors, Inc.'s (PMC) second motion for summary judgment on Saturday, March 12, 2022, at 8:44 a.m., as reflected on the file stamp of that order. Judge James R. Fleetwood emailed counsel that day notifying them that the order had been filed. The email did not include the order, but it stated that the

district court had reconsidered its prior order denying PMC's motion for summary judgment. The notice of electronic filing was processed by the clerk of the district court and transmitted to the parties at 10:24:46 a.m. on Monday, March 14, 2022, and it contained a filed-stamped copy of the district court's summary judgment order.

The appellants filed their notice of appeal on Tuesday, April 12, 2022. The notice of appeal stated in part that the appellants were appealing "the Order Granting Defendant Second Motion for Summary Judgment filed on March 12, 2022." The notice of appeal was filed 31 days after the summary judgment order was filed on March 12, 2022, but only 29 days after the order was served on the parties on March 14, 2022.

Before briefing, PMC moved to dismiss the appeal, which this court's motions panel denied. PMC filed a motion for reconsideration, which this court also denied. PMC renewed its argument that the appeal is untimely in its substantive brief. The appellants' reply brief asks us again to reject the argument.

The right to appeal is entirely statutory and not a right vested in the United States or Kansas Constitutions. *Wiechman v. Huddleston*, 304 Kan. 80, 86-87, 370 P.3d 1194 (2016). With some exceptions, Kansas appellate courts have jurisdiction to entertain an appeal only if it is taken in the manner prescribed by statutes. 304 Kan. at 86-87. If the record shows that an appellate court lacks jurisdiction, it is the court's duty to dismiss the appeal. *In re Adoption of Baby Girl P.*, 291 Kan. 424, 429, 242 P.3d 1168 (2010).

A judgment is effective when the journal entry or judgment form is signed by the judge and filed with the clerk of the district court. K.S.A. 2022 Supp. 60-258. The clerk then has three days, excluding Saturdays, Sundays, and legal holidays, to serve the judgment form on all counsel of record. K.S.A. 2022 Supp. 60-258. "The notice of electronic filing automatically generated by the approved district court electronic filing

system is an acceptable form of service by electronic means." Supreme Court Rule 122(c)(1)(B) (2023 Kan. S. Ct. R. at 212).

The district court's order granting PMC's second motion for summary judgment was signed by the judge and served as the judgment form. No subsequent journal entry was filed. The district court's order granting summary judgment was filed and became effective on March 12, 2022, and was properly served on the parties. The appellants had 30 days from the entry of judgment to file their notice of appeal. K.S.A. 2022 Supp. 60-2103(a). K.S.A. 2022 Supp. 60-206 tells us how to count those days.

When a deadline is stated in days, the day of the event that triggers the period is excluded in counting. K.S.A. 2022 Supp. 60-206(a)(1)(A). Thereafter, every day is counted, "including intermediate Saturdays, Sundays and legal holidays." K.S.A. 2022 Supp. 60-206(a)(1)(B). The last day of the period is included in counting, but if the last day is a Saturday, Sunday or legal holiday, the period runs until the end of the next day that is not a Saturday, Sunday or legal holiday. K.S.A. 2022 Supp. 60-206(a)(1)(C). In other words, weekends and holidays extend the time period only if the *last day* for doing an act, such as filing a notice of appeal, falls on a weekend or legal holiday. Time is otherwise counted from the day after the event that triggers the period, such as the entry of judgment under K.S.A. 2022 Supp. 60-258, through the last day of the period.

Here, Saturday, March 12, 2022, does not count as one of the days because that is the date the judgment was filed. But March 13, 2022, as an intermediate Sunday, and every subsequent day in the 30-day period are counted toward the deadline. The last day of the 30-day period fell on Monday, April 11, 2022, which was not a weekend or legal holiday. Thus, the appellants' notice of appeal filed on April 12, 2022, was untimely.

This court denied PMC's motion to dismiss the appeal for two reasons, both of which were erroneous. First, this court stated: "Electronic filing *allows* the convenience

of working on the weekends, but it does not *obligate* a 24 hour a day, seven days a week schedule. We read K.S.A. 2021 Supp. 60-206 to roll that filing date forward to the next business day, which was Monday March 14, 2022." But there is no language in K.S.A. 2022 Supp. 60-206 or in the rules applicable to the district courts that rolls the filing date forward to the next business day when an order is filed on a weekend or holiday. The statute only allows the time period for filing a document to be extended to the next business day if the *last day* falls on a weekend or holiday.

On the other hand, under Supreme Court Rule 1.05(h) (2023 Kan. S. Ct. R. at 7), documents that are electronically filed in the appellate courts on a Saturday, Sunday, or Supreme Court holiday "will be deemed filed on the next business day that is not a Saturday, Sunday, or Supreme Court holiday." Rule 1.05(h) governs procedure in the Kansas appellate courts but not the district court. Supreme Court Rule 1.01(d) (2023 Kan. S. Ct. R. at 1). Neither K.S.A. 2022 Supp. 60-206 nor Rule 122 contain a reciprocal provision applicable to district court filings.

Second, in denying PMC's motion to dismiss the appeal, this court observed that "K.S.A. 2021 Supp. 60-206(d) allows for three additional days to be added to any deadline when *service* is made by first-class mail." This court also stated, "The district court's March 2022 decision does not contain a certificate of service. In the absence of any information about how service was made, procedural fairness allows for the presumption of mailing." This finding is erroneous because the record is clear that the district court's March 12, 2022 summary judgment order was not served by mail. The parties do not dispute that the order was served electronically on March 14, 2022. Thus, this court erred by allowing another three days under a presumption of mailing.

Electronic filings may be made at any time as court computers are required to be available to receive e-filings on a 24-hour basis. Kansas Supreme Court Administrative Order 2012-AD-268, effective October 16, 2012, Paragraph H.1. Judge Fleetwood was

allowed to file his order granting PMC's second motion for summary judgment on Saturday, March 12, 2022, and that action did not require appellants' counsel to work on a weekend. But when appellants' counsel received electronic service of the filing on March 14, 2022, including the filed-stamped order of March 12, 2022, the appellants should have known that they had 30 days from the date of the entry of judgment to file a notice of appeal, as those days are counted in K.S.A. 2022 Supp. 60-206. The notice of appeal filed on April 12, 2022, was one day beyond the deadline under K.S.A. 2022 Supp. 60-2103(a). The untimely notice of appeal deprives this court of jurisdiction to hear the appeal. *Wiechman*, 304 Kan. at 86-87.

The Kansas Supreme Court once recognized the unique circumstances doctrine to save an untimely appeal if the appellant could show unique circumstances, such as when the appellant reasonably relied on some judicial action that purportedly extended the time period for bringing an appeal. It is doubtful that the unique circumstances doctrine would apply here because there was no judicial action that purportedly extended the deadline to appeal. But in any event, the Kansas Supreme Court has now rejected the use of the unique circumstances doctrine to save an untimely appeal. *Board of Sedgwick County Comm'rs v. City of Park City*, 293 Kan. 107, 120, 260 P.3d 387 (2011).

The majority finds this appeal was timely filed and cites *State v. Laurel*, 299 Kan. 668, 673-74, 325 P.3d 1154 (2014), for the proposition that the statute governing a notice of appeal is to be construed liberally to assure justice in every proceeding. This citation is misleading because what the *Laurel* court actually says is that "[w]e liberally construe K.S.A. 60-2103(b) 'to assure justice in every proceeding.'" 299 Kan. at 673. K.S.A. 2022 Supp. 60-2103(b) governs the contents of a notice of appeal, and courts liberally construe the provisions of subsection (b) of the statute to assure justice in every proceeding. But the time limitation to file an appeal under subsection (a) of the statute is not liberally construed. In fact, the opposite is true as the timely filing of a notice of appeal is jurisdictional. *Wiechman*, 304 Kan. at 86-87.

The majority also relies on *U.S.D. No. 501 v. American Home Life Ins. Co.*, 25 Kan. App. 820, 822, 971 P.2d 1210 (1999), to support its finding that this appeal is timely. In this workers compensation case, the district court's final decision was filed on January 17, 1997, but the plaintiff's attorneys did not receive a copy of the decision until May 1, 1997. Under those facts, this court found that the notice of appeal filed on May 23, 1997, was timely. This case simply holds that a notice of appeal can be filed more than 30 days after the entry of judgment if the appellant did not receive timely notice of the judgment as required by K.S.A. 60-258. 25 Kan. App. 2d at 822. Here, the parties received timely notification of the district court's summary judgment order on March 14, 2022, two days after the order was filed on March 12, 2022.

Although the result may be harsh, I would find that the appellants failed to file their notice of appeal in a timely manner under K.S.A. 2022 Supp. 60-2103(a), depriving this court of jurisdiction to hear this appeal. As a result, I make no comment on the merits of either issue argued by the parties in this appeal. See *In re Estate of Lentz*, 312 Kan. 490, 504, 476 P.3d 1151 (2020) (finding appellate court should refrain from commenting on merits of case when it lacks jurisdiction over appeal).