NOT DESIGNATED FOR PUBLICATION

No. 125,518

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JEFFREY THOELE,
*Appellant*,

v.

SCOTT LEE, et al.,
*Appellees*.

MEMORANDUM OPINION

Appeal from Miami District Court; STEVEN C. MONTGOMERY, judge. Opinion filed September 15, 2023. Affirmed.

*Geri L. Hartley*, of Hartley Law Group, LLC, of Paola, for appellant.

*Ian M. Bartalos* and *Kevin D. Looby*, of McCausland Barrett & Bartalos P.C., of Kansas City, Missouri, for appellee Lucas Price.

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

PER CURIAM: Jeffrey Thoele appeals the Miami County District Court's dismissal of his contract-related claims against Lucas Price. Thoele argues that the district court applied an improper legal standard when ruling on the defendants' motions to dismiss, that the district court incorrectly interpreted the land lease, and that the district court erred in concluding that Thoele possessed no enforceable lease after December 31, 2018. However, the written lease contained a specific term under which the lease expired on December 31, 2018. It was uncontested that a writing did not exist to extend the lease. The district court found no oral contracts existed between the parties. Under K.S.A. 58-2506 and K.S.A. 58-2502, the assent of the landlord is required for the creation of a valid

holdover tenancy. Under these circumstances, we find the district court properly granted dismissal.

## FACTUAL AND PROCEDURAL BACKGROUND

Most of the relevant facts are undisputed. Thoele entered into a farm lease with Carol Heald on January 10, 2018. According to its terms, the lease authorized Thoele to enter a 40-acre field on Heald's property at 39485 New Lancaster Road in LaCygne for the purpose of maintaining and harvesting a hay crop. The lease began on January 10, 2018—when the agreement was signed by both parties—and terminated on December 31, 2018, though the parties could extend the lease by written agreement with the mutual consent of both parties. The lease required Thoele to pay Heald rent of $1,600 by January 31, 2018, and imposed certain restrictions on Thoele's access to the property. Potentially relevant to this appeal, Thoele was required to fertilize the hay field by April 30, 2018, and to remove the hay from the property by September 15, 2018. Thoele was also required to notify Heald each time he planned to enter the property.

Thoele made the requisite rent payment in January 2018. Thoele alleged that he "acted as the tenant for the 2018 hay season and had no concerns about the enjoyment of his rights under the lease." Presumably, this means Thoele fertilized and harvested a hay crop on the property in 2018 under the terms of the lease. Scott Heald (Carol's son who had a financial power-of-attorney over Carol's affairs) stated that, to his knowledge, Thoele complied with the terms of the lease in 2018.

In his petition, Thoele did not allege that he and Heald negotiated a written extension of the lease agreement for 2019. Thoele presented no evidence to support such an extension and admits on appeal that he had no written lease extension. Throughout the case, Thoele has variously contended that he negotiated an oral agreement with Heald for continued use of the land and that he had a holdover lease by statute. In support of both

theories, Thoele alleged that he fertilized the hay field in late March 2019. He presented no evidence, however, that he informed either Heald or Price that he was entering the land to fertilize the hay field. Thoele also failed to assert that he paid Heald rent for 2019. Rather, Thoele's offer to pay Price $1,600 in July 2019 for the 2019 rent is circumstantial evidence that he failed to pay Heald in January. Without admitting his failure to pay Heald, Thoele essentially concedes the fact by arguing that Heald failed to provide notice of termination for nonpayment of rent under K.S.A. 58-2507.

Thoele alleges that he became aware in January 2019 that Heald had listed her property, which included the leased 40-acre pasture, for sale. Thoele contacted the listing real estate agency to request the listing agent to inform any prospective buyers of his lease interest. While Thoele did not speak directly to the seller's agent, Cathy Pemberton, he spoke to Steve Cutshaw, who reportedly conveyed Thoele's concerns to Pemberton. Cutshaw and Pemberton dispute the information conveyed in their conversations. But, for purposes of this appeal, this court must accept the version of the facts that most benefits Thoele, the nonmoving party. According to Cutshaw, he told Pemberton about Thoele's lease, and Pemberton acknowledged the lease. Cutshaw later reminded Pemberton about the lease. Pemberton never told Cutshaw that the lease had expired.

Heald sold her property, including the 40-acre hay field to Price in mid-February 2019. The closing occurred on May 22, 2019. The sale contract contains a disclosure from Heald about a leasehold interest held by Thoele to harvest the hay crop and provided a contact number for Thoele. However, the disclosure stated that the leasehold interest "shall end on or before December 31, 2018".

In March—between Price's purchase of the property and the closing—Thoele hired Beachner Grain, Inc., to spray the hay field with fertilizer. Thoele alleged that he prepared the field using customary practices but did not detail the work conducted, other than fertilization.

When the hay became mature in July 2019 (after he had taken possession of the property), new owner Price hired Scott Lee to cut and bale the hay. On July 13, when Lee returned to Price's property to move some equipment to another field, he discovered Thoele had loaded most of the bales onto trailers and was preparing to leave the property. Lee confronted Thoele and called the sheriff's department. Thoele claimed a right to the hay under a lease. Price arrived at the property and disputed Thoele's leasehold interest. Because possession of the hay was disputed, the responding deputies permitted Thoele to take the 177 bales he had loaded. Price communicated through the deputy that he did not want Thoele to return to his property.

Thoele contacted Tucker Stewart, an attorney with the Kansas Livestock Association, for advice about his leasehold interest. After speaking with the Miami County Attorney, a detective with the Miami County Sheriff's Department, and Price, Stewart advised Thoele to protect his interest and remove the remaining hay bales. On July 25, Thoele returned to the pasture and loaded the remaining 49 bales of hay. At about the same time, Price received a letter from Stewart, advising Price of Thoele's position that he continued to have a valid oral farm lease. Stewart tendered a check from Thoele in the amount of $1,600 to Price for rent. Price never cashed the check. After Thoele removed the remaining hay bales, Price moved cattle onto the 40-acre section of his property.

Related to the removal of the hay bales, the State charged Thoele with two counts of felony theft, criminal damage to property, and criminal trespass. Thoele ultimately entered into a diversion agreement to avoid criminal prosecution.

Before Thoele entered into the diversion agreement, he filed suit against Price and several other defendants, alleging breach of contract, breach of the duty of good faith and fair dealing, and tortious interference with a contract or business relationship. He also

claimed punitive damages. Each of the defendants filed answers and moved to dismiss for failure to state a claim.

Four days after receipt of Thoele's responses to the motion to dismiss, the district court held a hearing. The court entertained arguments from the defendants, and Thoele responded. Thoele voluntarily dismissed his claim for punitive damages as premature. The court granted the motions to dismiss the remaining claims against all defendants, concluding that Thoele had no valid lease in 2019. Approximately a week later, the court filed its journal entry of dismissal, concluding that the lease was controlled by the terms of the written lease, which terminated on December 31, 2018.

Thoele moved to reconsider the dismissal, arguing he possessed a holdover tenancy by statute that Price failed to terminate properly. Price contested Thoele's motion to reconsider.

On July 28, 2022, Thoele filed a timely notice of appeal from the district court's order of dismissal. However, the district court had not yet ruled on Thoele's motion to reconsider. The district court denied Thoele's motion to reconsider on November 14, 2022. The record contains no additional notice of appeal.

Thoele's failure to file a notice of appeal from the district court's denial of his motion to reconsider does not deprive the court of appellate jurisdiction. The appeal ceased to be interlocutory when the district court ruled on the motion to reconsider. See *Hundley v. Pfuetze*, 18 Kan. App. 2d 755, 757, 858 P.2d 1244, *rev. denied* 253 Kan. 858 (1993). This court, however, lacks jurisdiction to review the district court's ruling on the motion to reconsider because Thoele failed to file another notice of appeal from that ruling. See *Ponds v. State*, 56 Kan. App. 2d 743, 754, 437 P.3d 85 (2019).

## ANALYSIS

*Did the district court err in dismissing Thoele's claims as a matter of law?*

Thoele alleged three causes of action in his petition, all of which depended on the existence of a valid contract. The district court dismissed these claims, concluding as a matter of law that Thoele did not have a valid contract after December 31, 2018, and lacked any contractual relationship with any of the named defendants. Thoele challenges the district court's dismissal of his claims, alleging that the district court improperly applied the governing legal standard when addressing the defendants' motions to dismiss, that the district court improperly construed the terms of the land lease, and that the district court failed to correctly apply statutes governing land tenancies. The arguments are different permutations of the claim that dismissal as a matter of law was not appropriate because Thoele had alleged sufficient facts to support his claims for relief.

### A. *Legal Standard*

Thoele characterizes the district court's ruling as a judgment as a matter of law under K.S.A. 60-250(a)(2), but also references dismissal for failure to state a claim under K.S.A. 60-212(b)(6). The ruling is properly characterized as a dismissal under K.S.A. 60-212(b)(6) because judgment under K.S.A. 60-250(a)(2) is appropriate only during trial, whereas judgment for failing to state a claim is appropriate at the pleading stage. See K.S.A. 2022 Supp. 60-212(b)(6) (listing defenses to a claim for relief that may be raised by motion rather than in a responsive pleading); K.S.A. 2022 Supp. 60-250 (a)(1) (defining judgment as a matter of law); *Amino Brothers Co. Inc. v. Twin Caney Watershed District*, 206 Kan. 68, 73, 476 P.2d 228 (1970) ("Inasmuch as the case at bar was one being tried to a jury, the motion to dismiss was tantamount to, and a more appropriate designation would have been, a motion for directed verdict under K.S.A. 60-250[a].").

Nothing in the district court's judgment suggests that the court applied an inappropriate standard in reaching its judgment, but an improper characterization or even an improper use of the wrong standard would not preclude appellate review. A dismissal of a claim under K.S.A. 2022 Supp. 60-212(b)(6) or judgment as a matter of law under K.S.A. 2022 Supp. 60-250(a)(2) is subject to de novo appellate review. See *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021) (dismissal for failure to state a claim); *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015) (judgment as a matter of law). De novo review permits an appellate court to review the district court's judgment without deference to the district court's conclusion. See *State v. Bates*, 316 Kan. 174, 184, 513 P.3d 483 (2022) ("De novo review means we exercise unlimited review without deference to the legal conclusions of the district court.").

When reviewing a dismissal for failure to state a claim under K.S.A. 60-212(b)(6), an appellate court views the facts pleaded in the petition in a light most favorable to the plaintiff, assuming the truth of those facts and drawing any reasonable inferences from those facts. If those facts and inferences support any claim upon which relief may be granted, dismissal is improper. Dismissal is proper only when the allegations in the petition clearly demonstrate the plaintiff does not have a claim. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019).

The difference between dismissal for failure to state a claim under K.S.A. 2022 Supp. 60-212(b)(6) and summary judgment under K.S.A. 2022 Supp. 60-256 is the information the district court considers in rendering judgment. A dismissal under K.S.A. 2022 Supp. 60-212(b)(6) should be based entirely on the pleadings. If a district court considers matters outside the pleadings, the judgment typically will be considered summary judgment. See *Keiswetter v. State*, 304 Kan. 362, 367-68, 373 P.3d 803 (2016).

The question becomes more complex, however, when, as Thoele did, a party attaches documents to a petition in support of the petition. A court is directed to treat a "written instrument" attached as an exhibit to a pleading as part of the pleading. K.S.A. 2022 Supp. 60-210(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). Kansas courts have recognized that an attached contract becomes part of the petition. See *Thompson v. Phillips Pipe Line Co.*, 200 Kan. 669, 673, 438 P.2d 146 (1968). The district court's journal entry does not identify any sources of information, other than the written lease. This court therefore proceeds as though the district court issued its judgment on the pleadings, along with the attached, written farm lease agreement.

This is particularly true because the district court's judgment is based on the court's interpretation of the farm lease agreement between Heald and Thoele. The interpretation and legal effect of a written instrument is a question of law subject to unlimited appellate review. See *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018).

B. *Contract Interpretation*

The three claims Thoele alleges in his petition hinge on the existence of a contractual relationship. He alleges that Price breached the farm lease agreement—a contractual relationship. He alleges that Price, Lee, Pemberton, Bob Webster, Keller Williams Realty, and Crown Realty have breached the duty of good faith and fair dealing, a duty implied by law in every contract, except employment-at-will contracts. *Estate of Draper v. Bank of America*, 288 Kan. 510, 525, 205 P.3d 698 (2009). Finally, Thoele alleges that the defendants tortiously interfered with his hay harvesting operation, which depends on a legally cognizable contractual right to harvest the hay. Accordingly, Thoele's claims all rise and fall on the existence of one or more valid contractual rights.

1. *Express Contract*

Thoele has never alleged an express oral or written contract with Price or with any of the other defendants. Instead, Thoele has alleged he had a valid lease contract with Heald, which stayed with the land when Heald sold the property to Price. As an abstract legal proposition, a valid leasehold interest may survive a transfer of ownership of the property to which it is attached. See K.S.A. 58-2513.

The district court concluded, however, that Thoele could not establish a valid leasehold interest that survived the sale between Heald and Price because the written lease agreement between Heald and Thoele foreclosed a continuation of the lease after December 31, 2018.

Thoele challenges the district court's construction of the lease agreement. The goal of contract interpretation is to ascertain the parties' intent. When the terms of the contract are unambiguous, courts implement the intent expressed in the plain language of the contract. *Peterson v. Ferrell*, 302 Kan. 99, 104, 349 P.3d 1269 (2015).

A reasonable interpretation of the lease agreement supports the district court's position. The document is not hypertechnical or lengthy. It allows Thoele the use of a 40-acre field on Heald's property to grow and harvest a hay crop. As consideration for this use of the property, Thoele agreed to pay Heald $1,600 by January 31, 2018. Thoele also agreed to additional conditions on his right to use the property, including the obligation to notify Heald before entering onto the property. Most importantly, the lease specifies a one-year term, beginning on January 10, 2018, and ending on December 31, 2018, but also provides, "The Term may be extended in writing upon the mutual consent of both parties."

Thoele previously contended that the use of the word "may" renders the extension provision permissive rather than mandatory. Use of "may" rather than "will" or "shall" generally denotes permissive or discretionary action rather than mandatory action. See *Hill v. Kansas Dept. of Labor*, 292 Kan. 17, 21, 248 P.3d 1287 (2011). Thoele argued that the discretionary or permissive act is placing the extension in writing. He contended therefore that the provision permitting extension does not exclude other means of extending the lease, such as holdover tenancy. Thoele's argument failed to persuade the district court, and he does not renew the argument on appeal.

In construing the extension clause within the written lease agreement, English grammar dictates the construction the district court gave the clause. In context, "may" modifies the verb "to extend," i.e., "The Term may be extended." The auxiliary verb "may" does not modify the prepositional phrase "in writing." Thoele gave the provision a tortured construction by arguing that a written extension was permissive. It was permissive in the sense that neither party was required to seek or grant a lease extension, but, if such an extension was sought and granted, it must be a written extension by the terms indicated in the lease. If, as Thoele suggested at the hearing, a written extension was not the exclusive means of extending the written lease terms, the phrase "in writing" would be rendered superfluous. A court does not readily place an unreasonable construction on a written instrument. *In re Estate of Einsel*, 304 Kan. 567, 581, 374 P.3d 612 (2016). The district court properly construed the agreement to require an express writing to extend the lease term.

Thoele does not allege that he and Heald signed a written extension. Presumably, if such a document existed, Thoele would have attached it to his petition, as he did with the original lease agreement. On appeal, Thoele admitted that he had no written extension of the lease. At various times throughout the case, Thoele has argued an oral agreement. His petition, however, does not allege an oral extension of the lease. Further, even if he had alleged an oral extension, it would not have been valid under the terms of the original

lease. Under the plain terms of the lease agreement, the extension had to be in writing. The district court properly concluded that Thoele did not have a valid express farm lease extension in 2019.

2. *Contract Implied in Fact or Law*

In response to the defendants' motions to dismiss and again on appeal, Thoele maintains he possessed continued lease rights under a contract implied by law. In support of this theory, Thoele relies on K.S.A. 58-2506(d), which provides:

> "Subject to the provisions of this section, a farm or pastureland tenant becomes a tenant from year-to-year by occupying the premises after the expiration of the term fixed in a written lease, in which case the notice of termination of tenancy must fix the termination of tenancy to take place on the same day of the same month following the service of the notice as the day and month of termination fixed in the original lease under which the tenant first occupied the premises. Such notice shall be written and given to the tenant at least 30 days prior to such termination date."

This provision appears to overlap K.S.A. 58-2502, which provides:

> "When premises are let for one or more years, and the tenant *with the assent of the landlord* continues to occupy the premises after the expiration of the term, such tenant shall be deemed to be a tenant from year to year." (Emphasis added.)

C. *Statutory Construction*

K.S.A. 58-2506(d) appears to include no language requiring the landlord to assent to the holdover tenancy. A plain reading of K.S.A. 58-2506(d) permits a tenant to become a year-to-year holdover tenant merely by occupying farmland or pastureland after the end of a lease term. Normally, a court should refrain from reading something into a statute

that is not readily found in its words. *Montgomery v. Saleh*, 311 Kan. 649, 654-55, 466 P.3d 902 (2020). Courts also presume that the Legislature acts with knowledge of the statutory subject matter and existing caselaw. *In re M.M.*, 312 Kan. 872, 875, 482 P.3d 583 (2021).

Moreover, to the extent K.S.A. 58-2506(d) conflicts with K.S.A. 58-2502, K.S.A. 58-2506(d) is the more specific statutory provision because it applies only to farm or pastureland. See K.S.A. 58-2506(a) (including in the definition of pastureland land used for hay production). Thus, K.S.A. 58-2506(d) would control over the more general provision in K.S.A. 58-2502 if the two provisions cannot be reconciled. See *State ex rel. Schmidt v. Kelly*, 309 Kan. 887, 898, 441 P.3d 67 (2019).

However, the two provisions may be read in harmony. An examination of the legislative history establishes that the requirements of a holdover tenancy found in K.S.A. 58-2502 are read into the holdover tenancy created by K.S.A. 58-2506(d). In 1975, K.S.A. 58-2506 had no subdivisions. The overarching purpose of K.S.A. 58-2506 was to establish specific notice requirements for terminating farm leases. The pertinent section of the statute read:

> "That if such tenant becomes a tenant from year to year by occupying the premises after the expiration of the term fixed in a written lease, the notice of termination of tenancy must fix the termination of tenancy to take place on the same day of the same month following the service of the notice as the day and month of termination fixed in the original lease under which said tenant first occupied the premises." K.S.A. 1975 Supp. 58-2506.

The conditional language at the beginning of the quoted section signals that K.S.A. 1975 Supp. 58-2506 was not intended to establish the means of creating a holdover farm tenancy; instead, it was intended to establish guidelines for terminating a holdover tenancy if one was created. Accordingly, K.S.A. 1975 Supp. 58-2506 was to be

read in conjunction with K.S.A. 58-2502 (Corrick 1964), which provided for the creation of a holdover tenancy. When the Legislature amended K.S.A. 58-2506 in 1978 (L. 1978, ch. 215, § 2), it removed the conditional language in the provision. But even though the Legislature removed this language, there is no indication that it intended to separate K.S.A. 58-2506(d) from the requirements of K.S.A. 58-2502. The focus of K.S.A. 58-2506 is the termination of farm or pasture leases and the notice landlords are required to provide tenants. Subsection (d) governs termination and notice for holdover tenancies; it is not intended to govern the creation of a holdover tenancy.

As such, K.S.A. 58-2506(d) must be construed through the lens of K.S.A. 58-2502. This reading of K.S.A. 58-2506(d) is consistent with precedent. See *Becker v. McFadden*, 221 Kan. 552, 555, 561 P.2d 416 (1977) ("The general rule is that when a tenant holds over his term with the consent of the landlord, express or implied, the law implies a continuation of the original tenancy upon the same terms and conditions.").

> "When a farm tenant takes possession of farm property under a written lease, K.S.A. 58–2502 applies and it provides that when premises are leased for one or more years, and the tenant with the assent of the landlord continues to occupy the premises after the expiration of the term, the tenant becomes a tenant from year to year. The assent may be express or implied, and the law implies a continuation of the original tenancy upon the same terms and conditions." *Buckle v. Caylor*, 10 Kan. App. 2d 443, Syl. ¶ 3, 700 P.2d 979 (1985).

A reading of K.S.A. 58-2506(d) that incorporates the requirements of K.S.A. 58-2502 is also consistent with general contract principles that the parties must reach a meeting of the minds, whether the contract is express or implied. *Hercules, Inc. v. United States*, 516 U.S. 417, 424, 116 S. Ct. 981, 134 L. Ed. 2d 47 (1996) ("An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" [quoting *Baltimore & Ohio R.*

*Co. v. United States*, 261 U.S. 592, 597, 43 S. Ct. 425, 67 L. Ed. 816 (1923)]); *Peters v. Deseret Cattle Feeders, LLC*, 309 Kan. 462, 470, 437 P.3d 976 (2019) ("[A]n implied contract cannot be established solely by the employee's subjective understanding or expectation of his or her employment.").

D. *Application of K.S.A. 58-2502 to Facts*

Accordingly, to establish a valid claim upon which relief can be granted based on a farm lease as a holdover tenant under K.S.A. 58-2506, Thoele was required to allege facts that would support these elements: (1) possession of a valid lease for a term of one or more years; (2) the lease involved occupying or leasing pastureland; (3) continued occupation of the pastureland after the end of the express lease term; and (4) the landlord assented to the continued occupancy, expressly or impliedly.

1. *Lease for One Year or More*

In the district court and on appeal, Price has contended that the lease term in the written agreement between Heald and Thoele was not for a year but for a specified term less than a year. The lease began on January 10, 2018—when the agreement was signed by both parties—and terminated on December 31, 2018. However, viewed in a light most favorable to Thoele, this argument is not persuasive. The lease term covered a period 10 days shy of a year, but the lease expressly stated it was "for a one-year term." Price also reads the description of the purpose of the lease as a restriction of the lease to a single hay crop. The statement that "[t]he Tenant shall have the right to use the Property only for the [illegible] fertilization, [illegible] and harvesting of a hay crop" is a restriction of the purposes for which Thoele could use Heald's property. Perhaps "a crop" limited Thoele to harvest a single hay crop per year, but it does not necessarily signal the parties' intent to limit the lease to a period less than a year. If this were the only basis on which the district court dismissed Thoele's contract action, it would not support the judgment.

2. *Occupying Pastureland*

As stated, the written lease between Heald and Thoele involved the fertilization and harvest of hay. By statute, "pastureland" includes land used for hay production. K.S.A. 58-2506(a). "Occupy" is not statutorily defined but has been judicially construed. "[O]ne who leases farm property and performs customary tillage practices, plants crops, or applies fertilizers, herbicides, or pest control is occupying and cultivating the leased premises." *In re Estate of Sauder*, 283 Kan. 694, 703, 156 P.3d 1204 (2007). Though few allegations relate to Thoele's performance of the lease in 2018, his use of the property in 2019 supports an inference that Thoele occupied pastureland within the meaning of K.S.A. 58-2506(a) in 2018 and 2019. None of the defendants disputed that Thoele used Heald's property to cultivate hay and that Thoele complied with the lease terms in 2018.

3. *Continued Occupation*

Thoele continued to occupy the leasehold property in 2019 after the written lease term had expired. Thoele alleged in his petition that he "prepared the agricultural properties (including fertilizing) in accordance with normal practices for 2019 spring/summer harvest." In addition, Thoele alleged that he applied a specific amount of fertilizer to the field in March 2019 and attached an invoice as evidentiary support. These allegations, in a light most favorable to Thoele, establish that Thoele "occupied" the leasehold interest in 2019 after the written lease term had expired for purposes of escaping a motion to dismiss.

4. *Assent*

Under K.S.A. 58-2502, a valid holdover tenancy can be created only with the assent of the landlord. The strength of Thoele's contract claim as a holdover tenant falters on this point.

An implied-in-fact contract exists when the circumstances suggest the parties intended to be bound to certain mutual obligations without a formal exchange of offer and acceptance. The terms of the contractual relationship are determined by the parties' communications and interactions. *Atchison County Farmers Union Co-op Ass'n v. Turnbull*, 241 Kan. 357, 363, 736 P.2d 917 (1987) ("Contracts implied in fact are inferred from the facts and circumstances of the case and are not formally and explicitly stated in words."); *Degnan v. Young Bros. Cattle Co.*, 152 Kan. 250, 255, 103 P.2d 918 (1940); 17 C.J.S., Contracts § 15 (2023) ("[A]n implied-in-fact contract is founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from the conduct of the parties showing, in light of the surrounding circumstances[,] their tacit understanding.").

The existence of a contract is normally a question of fact, but, when the facts are relatively undisputed, the existence and terms of a contract become questions of law for the court's determination. *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012). The party asserting the existence of a contract bears the burden of proving its terms by a preponderance of the evidence. 295 Kan. at 282. None of the allegations in Thoele's petition carry that burden to establish Heald assented to Thoele's continued use of her land after December 31, 2018, or permit reasonable inferences of that assent.

The terms of the lease with Heald required Thoele to pay rent by January 2019. He did not tender payment of rent to Price until July 2019. The lease also required Thoele to notify Heald of each entry onto the property. The allegations in Thoele's petition demonstrate that he did not notify Heald each time he entered the property because he claims he was provided a means of contacting Carol Heald but does not allege that he did so. On appeal, he avers that Carol Heald was not at home or available by phone at the number provided by Mark Heald at the time the fertilizer was applied in 2019. Thoele also complained that he had no means of contacting Scott Heald or Price. These

allegations may aim to demonstrate the unreasonableness of Heald's conduct, but they have the opposite effect of creating a strong inference that Thoele never communicated with Heald in 2019. The facts in the appellate record all suggest that Thoele had no communication with anyone in the Heald family in 2019. Thoele's petition alleges no facts establishing that Heald communicated her assent to his continued occupancy of her property or permitting a reasonable inference of that element.

On appeal, Thoele contends he informed Heald's real estate agent of his intent to fertilize the hay field. This assertion, which is ostensibly supported by a citation to Cutshaw's affidavit, was not included in the allegations within the petition. An attached affidavit is also evidence but not a written instrument of independent legal significance that a court incorporates into a pleading under K.S.A. 2022 Supp. 60-210(c). Even if the court considers Cutshaw's affidavit part of the petition, the affidavit does not support the argument Thoele makes in his brief. Cutshaw stated only that he informed Pemberton that Thoele *had* fertilized the hay field, which means Pemberton was notified of Thoele's conduct sometime after March 20, 2019. Notifying the landlord of performance under the lease *after* the work is completed does not demonstrate the landlord's assent before the tenant occupied the property under K.S.A. 58-2506(d). But, even if notification after the fact would establish some sort of ratification of Thoele's status as a holdover tenant, Cutshaw's affidavit falls short as it only establishes that he communicated Thoele's fertilization of the field to Pemberton. There is no further allegation that Pemberton communicated this fact to Heald. There are no facts supporting a reasonable inference that this information was communicated to Heald.

Thoele entered the property to fertilize the hay field in March 2019. Since the record shows uncontroverted evidence that Heald had signed a sale contract with Price in February 2019, Thoele's presence on the property in March, without more, does not demonstrate that Heald had knowledge that Thoele was operating on the property. Thus her failure to object cannot be deemed assent to Thoele's continued occupancy of the

lease. Thoele implicitly acknowledges that Heald was no longer living on the property because he contends that he was unable to reach Heald at the property or by phone.

Throughout his petition and appellate brief, Thoele takes a position that he became a holdover tenant simply by continuing to occupy Heald's hay field after the written lease term ended on December 31, 2018. Thoele essentially ignores the requirement that the landlord must assent to his continued occupancy of the leasehold. Thoele alleges no facts that establish Heald knew he had continued his occupancy of the leasehold; therefore, Thoele presents no facts that would permit a reasonable inference of assent from Heald's silence. As such, Thoele's contract-based claims fail and the district court's grant of dismissal was proper.

Affirmed.