IN THE UTAH COURT OF APPEALS

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Sonja M. Jensen; Focus Enterprise, LLC; and William A. Jensen and Sonja M. Jensen Family Limited Partnership, Plaintiffs and Appellant, v. James B. Stinson, MD; Elizabet Thor, MD; Melinda J. McAnulty, MD; Richard Cline, MD; Gary Rabetoy, MD; Richard Lambert, MD; David Tien, MD; Jeff A. Barklow, MD; Nephrology Associates, LLC; Oquirrh Artificial Kidney Center, LLC; West Valley Associates, LLC; Wasatch Artificial Kidney Center, LLC; East Valley Associates, LLC; Summit Dialysis, LLC; Robert Santelli; Mark Caputo; Summit Dialysis II, Inc.; Mercer Utah LLC; William Jensen; and Michael Krupka, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070649-CA F I L E D (July 17, 2008) 2008 UT App 278

Third District, Salt Lake Department, 050902765
The Honorable Denise P. Lindberg

Attorneys: Richard S. Nemelka, Salt Lake City, for Appellant
Matthew L. Lalli, Tyler Murray, Troy L. Booher, Katherine Carreau, and Bart Johnsen, Salt Lake City, for Appellees

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Before Judges Thorne, Davis, and McHugh.

DAVIS, Judge:

Appellant Sonja Jenson (Ex-Wife) appeals the trial court's grant of summary judgment in favor of Appellees, arguing that there were material facts in dispute and that the court erred in denying her Renewed Motion for Intervention on behalf of Focus Enterprise, LLC (Focus). Specifically, Ex-Wife alleges that she overheard Appellee William Jensen (Ex-Husband) negotiating with a representative of Appellee Summit Dialysis, LLC (Summit). Ex-Wife claims that these negotiations were in fact oral contracts that were reduced to writing in the form of an unsigned agreement (the Draft Agreement).[1] "[M]embers of Summit," Ex-Wife alleges on appeal, "conspired with [Ex-Husband] to break the terms of [the Draft Agreement] by removing the Jensens' [eight percent] interest through Focus in Summit, so that [Ex-Husband] would not have to share his interest in Summit with his soon to be Ex-Wife."

We review the granting of summary judgment for correctness. See Utah Golf Ass'n v. City of N. Salt Lake, 2003 UT 38, ¶ 10, 79 P.3d 919. "The issue of whether an oral contract or agreement exists presents questions of both law and fact." Flake v. Flake (In re Estate of Flake), 2003 UT 17, ¶ 27, 71 P.3d 589; see also Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶ 17, 989 P.2d 1077 ("Whether a contract has been formed is ultimately a

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1. Ex-Wife also contends that there are two other agreements, the East Valley Agreement and the West Valley Agreement, and that Summit conspired with Ex-Husband to exclude Ex-Husband via Focus from those agreements in order to prevent Ex-Wife from obtaining a half interest in Ex-Husband's share. However, Ex-Wife has presented no evidence that Ex-Husband or Focus were ever involved in preliminary negotiations of the East Valley Agreement, let alone that any purported oral contract was reduced to writing. As for the West Valley Agreement, there is no evidence that such an agreement ever existed. To this, Ex-Wife replies that "[j]ust because a copy of the signed [West Valley Agreement] could not be found does not mean it didn't exist," and she never addresses why the East Valley Agreement fails to mention Focus or Ex-Husband. "[W]here there was simply some nebulous notion in the air that a contract might be entered into . . . , the court cannot fabricate the kind of a contract the parties ought to have made and enforce it." Valcarce v. Bitters, 12 Utah 2d 61, 362 P.2d 427, 428-29 (1961) (citing Gibbons v. Brimm, 119 Utah 621, 230 P.2d 983 (1951)). Moreover, "[o]ne of the most basic principles of contract law is that, as a general rule, only parties to the contract may enforce the rights and obligations created by the contract." Wagner v. Clifton, 2002 UT 109, ¶ 13, 62 P.3d 440 (citing 17A Am. Jur. 2d Contracts § 421 (1991)). Therefore, we decline to further address the East Valley Agreement or the purported West Valley Agreement.

conclusion of law, but that ordinarily depends on the resolution of subsidiary issues of fact.").[2]

"In determining whether the parties created an enforceable contract, a court should consider all preliminary negotiations, offers, and counteroffers and interpret the various expressions of the parties for the purpose of deciding whether the parties reached agreement on complete and definite terms." Flake, 2003 UT 17, ¶ 28. Ex-Wife offers no evidence of any preliminary negotiations, offers, or counteroffers to prove that the Draft Agreement was in fact a final oral agreement set down in writing rather than merely a proposed contract for which no meeting of the minds occurred among the potential signatories.[3]

In the end, it is irrelevant whether Appellees did not sign the Draft Agreement due to their apprehension over Ex-Husband's pending divorce litigation with Ex-Wife or whether Ex-Husband did not sign the Draft Agreement to prevent Ex-Wife from being able to claim an interest in Summit. Appellees signed a second agreement to form Summit without Ex-Husband (or Focus) being a party to the signed agreement or contributing any capital to the partnership. Cf. Harmon v. Greenwood, 596 P.2d 636, 638-39 (Utah 1979) (determining that an alleged partnership based on oral discussions and a signed letter of intent was not shown where the

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2. Because there was no contract as a matter of law, Ex-Wife's argument that the trial court erred by denying Focus's motion to intervene in this suit is moot. See State v. Sims, 881 P.2d 840, 841 (Utah 1994) ("An issue on appeal is considered moot when the requested judicial relief cannot affect the rights of the litigants. When an issue is moot, judicial policy dictates against our rendering an advisory opinion." (alteration, citations, and internal quotation marks omitted)).

3. Ex-Wife points to her affidavit wherein she claims overhearing numerous discussions between Ex-Husband and a Summit representative who agreed to give Ex-Husband, via Focus, an eight percent interest in Summit and a monthly income of $8,000 from Summit. However, Ex-Wife offers no evidence that such an arrangement, although discussed and set forth in the Draft Agreement, became a final agreement. "An affidavit that merely reflects the affiant's unsubstantiated opinions and conclusions is insufficient to create an issue of fact." Smith v. Four Corners Mental Health Ctr., Inc., 2003 UT 23, ¶ 50, 70 P.3d 904 (internal quotation marks omitted). "The mere assertion that an issue of fact exists without a proper evidentiary foundation to support that assertion is insufficient to preclude the granting of a summary judgment motion." Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983).

alleging party did not receive profits from the proposed partnership).

Affirmed.

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James Z. Davis, Judge

WE CONCUR:

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William A. Thorne Jr.,
Associate Presiding Judge

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Carolyn B. McHugh, Judge