NOT DESIGNATED FOR PUBLICATION

No. 125,511

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CREDIT UNION OF AMERICA,
Appellee,

v.

ROBINE E. LUNKWITZ,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Opinion filed February 24, 2023. Reversed and remanded.

David E. Herron II, of Turnbull Law Group, LLC, of Overland Park, for appellant.

Nolan W. Wright, of Gibson, Watson, Marino, LLC, of Wichita, for appellee.

Before MALONE, P.J., HURST and COBLE, JJ.

PER CURIAM: Credit Union of America (CUA) filed a limited action under Chapter 61 in the Sedgwick District Court against Robine Elaine Lunkwitz for breach of a credit agreement. Although it attempted twice to serve Lunkwitz with summons, CUA failed to execute personal service on her. A few months later, an attorney filed on Lunkwitz' behalf a document that indicated the attorney intended to represent Lunkwitz on a limited basis. Despite clear language in the filing stating the attorney represented Lunkwitz only for the purpose of challenging personal jurisdiction based on lack of service, the district court found the filing was a general entry of appearance, which had the same effect as service of process under K.S.A. 61-2902(c). Because the district court

found Lunkwitz appeared, yet failed to timely answer the petition, it granted CUA's motion for default judgment.

On appeal, Lunkwitz argues the district court erred by construing the entry of appearance as a general entry of appearance. We agree. The document her attorney filed clearly stated Lunkwitz' concern with personal jurisdiction. Because we find the district court improperly applied a form over substance analysis, we reverse the district court's entry of default judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On April 6, 2022, CUA filed a petition and summons alleging Lunkwitz breached a credit agreement. CUA claimed Lunkwitz was in default because she owed $2,435.10, plus interest, and she failed to pay such amount when requested. CUA first sought to serve the petition on Lunkwitz' attorney; in fact, the petition alleged Lunkwitz may be served with summons at Turnbull Law Group in Chicago, Illinois. The summons issued to Lunkwitz at the Turnbull Law Group noted the case against Lunkwitz would proceed on May 25, 2022, at the Sedgwick County District Court.

Then, on April 25, 2022, the district court issued an alias summons for Lunkwitz at a residential address in Manhattan, Kansas. The appearance date on the alias summons was modified to May 11, 2022. On May 9, 2022, the alias summons was returned with no service and stated Lunkwitz had moved to Texas. A note in the record of actions indicates the district court held a limited docket on May 11, 2022, but Lunkwitz did not appear.

Two months later, on July 1, 2022, Lunkwitz' attorney, David E. Herron II at Turnbull Law Group in Overland Park, Kansas, filed a document entitled "Entry Of Appearance." The body of the document states:

> "David E Herron II hereby enters a limited appearance as attorney for Defendant Robine E Lunkwitz for the sole purpose of examining whether this court has obtained proper personal jurisdiction over the Defendant by service of process. Service of a summons is NOT waived."

Mr. Herron's signature block was the only signature on the document.

Soon after, CUA moved for default judgment. CUA argued judgment was proper because Herron's entry of appearance failed to comply with the requirements of Supreme Court Rule 115A (2022 Kan. S. Ct. R. at 201) regarding limited representation, and so it acted as a general appearance. Because a general appearance has the same effect as service of process under K.S.A. 61-2902(c), Lunkwitz had 14 days from the date of appearance to file an answer under K.S.A. 2021 Supp. 61-2904(a), but she did not file a timely answer or response to CUA's petition, so CUA argued default judgment was proper. Lunkwitz responded on July 26, 2022, arguing the district court lacked personal jurisdiction because the service of process was insufficient and service of a summons was not waived.

The district court held a hearing on the default judgment motion on August 10, 2022, and both parties presented argument. The court found Herron's limited entry of appearance was insufficient under Supreme Court Rule 115A and, therefore, his entry of appearance acted as a general entry of appearance. As a result, the district court granted default judgment against Lunkwitz because under K.S.A. 2021 Supp. 61-2904(a), she had 14 days from the date of counsel's appearance to file an answer, and she did not. The district court found Herron's defective entry of appearance required default judgment under the circumstances, despite opining that the result was "somewhat harsh." The district court ordered judgment against Lunkwitz in the amount of $2,435.10, plus pre and postjudgment interest and the costs of the action.

Lunkwitz appeals.

ANALYSIS

Although Lunkwitz suggests we scrutinize multiple issues on appeal, each issue presented relates to her argument that the district court lacked personal jurisdiction over her and erred by granting default judgment. On examination, the sole issue for us to decide is whether the district court properly considered the July 1, 2022, filing by Lunkwitz' attorney as a general entry of appearance, sufficient to confer personal jurisdiction.

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019). And to the extent resolution of Lunkwitz' claim requires statutory interpretation, our appellate review is likewise unlimited. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

Lunkwitz argues that the record provides "undisput[able] proof" that she was not served with process and, as a result, personal jurisdiction hinges on whether she voluntary appeared. We agree.

CUA sent the first summons to Turnbull Law Group in Chicago, Illinois. CUA then sought to personally serve Lunkwitz with an alias summons in Manhattan, Kansas, but this alias summons was returned as not delivered because Lunkwitz allegedly had moved to Texas. Thus, the record supports Lunkwitz' claim that she was not personally served.

A limited action is commenced by a plaintiff filing a petition and serving it on the defendant. K.S.A. 61-2902. If a defendant is not served with process, Kansas law is clear

that a voluntary appearance is the only other avenue for the district court to establish personal jurisdiction. "Personal jurisdiction may only be acquired by issuance and service of process as prescribed by statute or by voluntary appearance." *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 92-93, 106 P.3d 492 (2005). "The failure to properly serve parties in interest deprives the court of personal jurisdiction of the unserved parties." *Ford v. Willits*, 9 Kan. App. 2d 735, Syl. ¶ 4, 688 P.2d 1230 (1984). And, a "judgment is void if the court that rendered it lacked jurisdiction" over the parties. 9 Kan. App. 2d 735, Syl. ¶ 5.

In two instances, the Kansas Code of Civil Procedure for Limited Actions specifically notes that the voluntary appearance by a defendant equates to service of process. First, K.S.A. 2021 Supp. 61-3003 governs the methods of service of process for limited actions. Under K.S.A. 2021 Supp. 61-3003(f): "An acknowledgment of service on the summons is equivalent to service. The voluntary appearance by a defendant is equivalent to service as of the date of appearance." Similarly, K.S.A. 61-2902(c)—discussing the commencement of limited actions—provides: "An entry of appearance by the defendant shall have the same effect as service of process on the defendant."

So, we must then define "voluntary appearance" or "entry of appearance" as referenced in these statutes to determine whether Lunkwitz' filing was, in fact, such an entry of appearance. Neither the limited actions code nor the code of civil procedure defines either term, but our Supreme Court has defined appearance as follows: "Broadly speaking, an appearance . . . [is] an overt act by which a party comes into court and submits himself to its jurisdiction and is his first act therein." *Sharp v. Sharp*, 196 Kan. 38, 40, 409 P.2d 1019 (1966).

A panel of this court interpreted the *Sharp* definition to find a defendant voluntarily appeared and submitted to the jurisdiction of the court when he wrote a letter to the district court judge requesting a stay of proceedings. *In re Marriage of Thompson*,

17 Kan. App. 2d 47, 50-53, 832 P.2d 349 (1992) (collecting cases from other jurisdictions where courts examined whether letters, motions to stay, and other filings constituted a general appearance sufficient to confer personal jurisdiction). The panel noted that "[b]ecause an objection to a court's personal jurisdiction must be made in a party's first pleading, we must scrutinize the pleading first filed to determine if the party has properly contested the court's personal jurisdiction." 17 Kan. App. 2d at 51. Notably, the panel found: "There clearly was no intention to consent to Kansas jurisdiction, although [the defendant] may have inadvertently done so." 17 Kan. App. 2d at 52. But that panel also noted that it was "not necessary in [its] resolution of [that] case to base [its] ultimate decision solely on whether [defendant] made a general appearance because" the panel set aside the district court's order for a different reason. 17 Kan. App. 2d at 52, 55 (finding that "because the required notice mandated by K.S.A. 60-255[a] in order to take a default judgment was not given, the child support order is voidable").

Another panel of this court found that "[a]n appearance must be by contact with the court sufficient to place the court on notice of the intent of the party to defend the suit." *Midland Bank of Overland Park v. Rieke*, 18 Kan. App. 2d 830, 834, 861 P.2d 129 (1993); see also *Rose & Nelson v. Frank*, 25 Kan. App. 2d 22, 26, 956 P.2d 729 (1998) (citing *Midland Bank*; also finding: "We do not believe there is any justification for an interpretation of what is required for an appearance in a Chapter 61 proceeding that is inconsistent with what is required in a Chapter 60 proceeding.").

Black's Law Dictionary defines appearance in multiple ways. For example:

> "'The term "appearance" is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction, although in a broader sense it embraces the act of either plaintiff or defendant in coming into court. . . . An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done *with the intention of*

> *appearing and submitting* to the court's jurisdiction.'" (Emphasis added.) Black's Law Dictionary 122 (11th ed. 2019) (quoting 4 Am. Jur. 2d Appearance § 1, at 620 [1995]).

And "voluntary appearance" is an "appearance entered by a party's own will, without the service of process." Black's Law Dictionary 122 (11th ed. 2019).

When viewing these definitions together, it seems that an entry of appearance, then, requires some amount of intent on behalf of the filing party to submit to the court's jurisdiction or seek redress from the court for something other than, or without first submitting, jurisdiction disputes. Here, this court is troubled with the intent piece. Did the filing of a limited entry of appearance by Lunkwitz' counsel demonstrate an intent to yield to the district court's jurisdiction?

There is no doubt that Lunkwitz' counsel titled the filing an "Entry of Appearance." Without additional context, such a title may have been sufficient to equate to a general appearance and conferral of jurisdiction. But this filing included much more than the "Entry" title. Lunkwitz' counsel outlined his clear intention within the filing. Counsel's stated goal was to limit his appearance for the "sole purpose of examining whether [the] court has obtained proper personal jurisdiction over [Lunkwitz] by service of process." And the filing, in no uncertain terms, noted: "Service of a summons is NOT waived."

Even if the document is titled an "Entry of Appearance", we are not bound by the rote heading chosen by counsel. As noted by our Supreme Court: """[T]he law of this state is realistic. Substance prevails over form."""" *Baska v. Scherzer*, 283 Kan. 750, 755, 156 P.3d 617 (2007) (quoting *Murray v. Modoc State Bank*, 181 Kan. 642, 647, 313 P.2d 304 [1957]). And "the designation given the pleading is not the deciding factor because a court must look to substance and not to form." *City of Osawatomie v. Slayman*, 182 Kan. 770, 773, 323 P.2d 910 (1958).

We must acknowledge that this is, by no means, a categorical approval of Lunkwitz' choice to proceed in this manner. Although historically it was once important to distinguish between a special appearance—where the defendant appears specially only to attack the court's jurisdiction—and general appearances, special appearances are no longer necessary, and the distinction has been abolished by K.S.A 60-212(b). *In re Marriage of Thompson*, 17 Kan. App. 2d at 50-51 (citing *Haley v. Hershberger*, 207 Kan. 459, 465, 485 P.2d 1321 [1971]). No doubt, the code for limited actions provided Lunkwitz more appropriate avenues by which to assert her jurisdictional defense. For example, she may have filed an answer containing the affirmative defense of lack of personal jurisdiction under K.S.A. 61-2903 or K.S.A. 2021 Supp. 61-2904 or filed a motion to dismiss under K.S.A. 61-2903(c)—without inadvertently triggering the deadline for the filing of a responsive pleading and opening herself to default judgment. And we cannot answer the question of why Lunkwitz sought relief from the default judgment through appellate review rather than a first attempt at a motion for relief from the judgment before the district court. Regardless, this does not permit us to ignore the clear language included in the filing.

Courts are not in the "gotcha" business; rather, courts prefer actions to be determined on the merits of the case, not on the basis of technicalities, and both the Kansas Code of Civil Procedure and Code of Civil Procedure for Limited Actions supports this preference. See, *e.g.*, K.S.A. 2021 Supp. 60-102 and K.S.A. 61-2806 (code should be "liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding"); K.S.A. 2021 Supp. 60-208(e) ("Pleadings must be construed so as to do justice."); K.S.A. 2021 Supp. 60-261 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Our Supreme Court

> "has consistently declined to construe pleadings to impose outcome determinative consequences on parties for technical irregularities. See *Baska*, 283 Kan. at 755 (noting

'[t]he law of this state is realistic. Substance prevails over form,' when finding the plaintiff intended to bring an action for assault and battery rather than negligence.); *Gibbs v. Mikesell*, 183 Kan. 123, 133, 325 P.2d 359 (1958) (. . . . In construction of petition for purpose of determining its effect, allegations must be liberally construed with a view to substantial justice between the parties.)." *Wilson v. Larned State Hosp.*, No. 112,193, 2016 WL 1079453, at *3 (Kan. App. 2016) (unpublished opinion).

Because the courts prefer to decide cases on their merits, the "courts disfavor procedural obstacles thwarting that objective." *Herington v. City of Wichita*, 59 Kan. App. 2d 91, 109, 479 P.3d 482 (2020) (Atcheson, J., concurring in the decision based on earlier Kansas Supreme Court precedent, but suggesting the Supreme Court reexamine its application of federal claim preclusion law to state law claims over which a federal court has declined to exercise supplemental jurisdiction) (citing *Degen v. United States*, 517 U.S. 820, 828, 116 S. Ct. 1777, 135 L. Ed. 2d 102 [1996] ["The dignity of a court derives from the respect accorded its judgments [and,] [t]hat respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits."]), *rev'd and remanded*, 314 Kan. 447, 500 P.3d 1168 (2021) (Kansas Supreme Court overruling earlier decisions to find state preclusion law applies); see also *Fisher v. DeCarvalho*, 298 Kan. 482, 500, 314 P.3d 214 (2013) ("[T]he law prefers that cases be decided on their merits rather than on technical compliance with procedural rules.").

Certainly, Kansas courts have interpreted the general rules of civil procedure to find "a person can waive the defense to personal jurisdiction by making a general appearance or by filing a responsive pleading without raising personal jurisdiction as a defense." *In re Marriage of Williams*, 307 Kan. 960, 978-79, 417 P.3d 1033 (2018) (interpreting K.S.A. 60-212[b][2].) "This waiver occurs because K.S.A. 2017 Supp. 60-212(h) explicitly states: 'A party waives any defense listed in subsections (b)(2) [lack of personal jurisdiction] by: . . . (B) failing to either: (i) Make it by motion under this section; or (ii) include it in a responsive pleading.'" 307 Kan. at 979.

But unlike the rules of civil procedure under K.S.A. 60-212(h), the code for limited actions under Chapter 61 does not contain an explicit provision stating a party waives the defense of lack of personal jurisdiction by failing to make a motion or include the defense in a responsive pleading. Although Chapters 60 and 61 contain multiple analogous or even identical provisions, and courts have found in various circumstances that the rules of Chapter 60 apply to chapter 61, see, e.g., *Frank*, 25 Kan. App. 2 d at 26 (what is required for an appearance in a Chapter 61 proceeding is not inconsistent with what is required in a Chapter 60 proceeding); as far as can be ascertained, this particular issue would be one of first impression—but we need not reach the issue on these facts. Here, Lunkwitz neither made a general appearance nor filed a responsive pleading, rendering such an analysis unnecessary. And, although the parties spend considerable briefing discussing whether the July 1, 2022, filing complied with Supreme Court Rule 115A—the parties also acknowledged both in briefing and oral arguments that Supreme Court Rule 115A does not apply.

The filing submitted by Lunkwitz' counsel does not fit neatly into any statutory section or Supreme Court Rule. Regardless, as previously stated by our Supreme Court, we "are unwilling to make this case more complicated than it is by exalting form over substance." *State v. Kenney*, 299 Kan. 389, 393, 323 P.3d 1288 (2014) (when deciding whether, strictly speaking, the competence of criminal defendant's representation was before the district judge on a motion to withdraw plea).

The district court found that the July 1, 2022, filing did not follow the requirements of Supreme Court Rule 115A for a limited entry of appearance and, therefore, the filing acted as a general entry of appearance which had the same effect as service of process under K.S.A. 61-2902(c). In our view, by ignoring the clear language outlining Lunkwitz' intention to challenge personal jurisdiction, the district court placed "form over substance in a way courts should avoid." *Rosendahl v. Kansas Dept. of Revenue*, 310 Kan. 474, 486, 447 P.3d 347 (2019) (Stegall, J. with Rosen and Johnson,

JJ., concurring in part and dissenting in part) (quoting *State v. Tafoya*, 304 Kan. 663, 670, 372 P.3d 1247 [2016] [""The law of this state is realistic. Substance prevails over form.""]). The noncompliance with procedural rules, despite otherwise clear language in the filing, should not alone subject a party to judgment. As acknowledged by the district court, such a result is unduly harsh.

Because the filing was not a general entry of appearance, the district court lacked jurisdiction over Lunkwitz and its entry of default judgment is void. *Ford*, 9 Kan. App. 2d 735, Syl. ¶ 5.

Reversed and remanded.