NOT DESIGNATED FOR PUBLICATION

No. 109,788

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

LINDA MONSLOW,
Appellee,

and

H. VINCENT MONSLOW,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed April 18, 2014. Affirmed.

H. Reed Walker, of Law Offices of Reed Walker, P.A., of Overland Park, for appellant.

Scott C. Nehrbass, *James D. Oliver*, and *Matthew D. Stromberg*, of Foulston Siefkin LLP, of Overland Park, for appellee.

Before LEBEN, P.J., GREEN and HILL, JJ.

Per Curiam: Linda Monslow and H. Vincent Monslow divorced in 1992. As part of the journal entry and decree of divorce, Vincent was required to pay Linda 40% of his share in any income derived from two patents that he held. Several years later, Vincent sold his interest in the patents for $595,000. Vincent never told Linda about the sale. Linda sued Vincent and eventually obtained a $216,481.06 judgment against him. *In re Marriage of Monslow*, No. 102,949, 2011 WL 4440181, at *11 (Kan. App. 2011)

(unpublished opinion), *rev. denied* 294 Kan. 943 (2012). Because Vincent failed to pay the judgment, Linda started garnishment proceedings against him. The request for garnishment listed the current principal balance of the judgment as $216,481.06. The Stanley Bank (Bank), which held an account in Vincent's name, answered the garnishment order, stating that it held $76,409.73 in Vincent's account. The trial court entered an order directing the Bank to pay the entire amount in Vincent's account—$76,409.73—to Linda. Later, Vincent filed a postjudgment motion to quash the garnishment. Vincent argued that the garnishment should be quashed for failure to comply with K.S.A. 2012 Supp. 60-733[a] because the garnishment order misstated the amount to be withheld. The trial court denied Vincent's motion.

Vincent raises two issues for our consideration: (1) that Linda failed to strictly comply with K.S.A. 2012 Supp. 60-733(a) because the garnishment request and order stated an inaccurate amount to be withheld; and (2) that his motion to quash the garnishment order was timely. Finding no merit in Vincent's first argument, we affirm.

In 1992, Linda filed a divorce petition in Johnson County District Court. As part of the journal entry and decree of divorce, Vincent was required to pay Linda 40% of his share in any income derived from two patents that he held. Vincent later sold his interest in the patents for $595,000. Vincent never told Linda about the sale.

Once Linda discovered that Vincent had sold his interest in the patents, she sought a court order to obtain her 40% share of the proceeds to which she was entitled under the terms of the divorce decree. In particular, Linda moved for a restraining order to preserve the patent proceeds that Vincent had deposited in an account at the Bank. On April 26, 2007, the trial court entered a restraining order prohibiting Vincent—or anyone on his behalf—from distributing the proceeds from the patent sales. Linda served the Bank with a copy of the restraining order and a copy of the lien notice.

On June 29, 2009, the trial court entered judgment for Linda in the amount of $283,278.98. The award constituted 40% of the patent sale proceeds plus prejudgment interest. Vincent appealed the trial court's ruling. Ultimately, Linda's award was reduced to $216,481.06 by our court. *In re Marriage of Monslow*, 2011 WL 4440181, at *11. When Vincent failed to pay the judgment, Linda tried to garnish the proceeds from the Bank. Over the next several months, Linda made multiple requests to garnish the patent proceeds from the Bank. Linda's garnishment requests, however, were either dismissed or quashed.

On October 11, 2012, Linda filed another garnishment request with the trial court. Linda listed the current principal balance of the judgment as $216,481.06, *i.e.*, the same amount listed by our court in its previous *Monslow* decision. The trial court entered an order of garnishment for 110 % of that amount the same day. The garnishment request and order were served on both Vincent and the Bank. The Bank answered the garnishment request, stating that it held $76,409.73 in Vincent's account.

On October 31, 2012, the trial court ordered the Bank to pay the entire amount in Vincent's account—$76,409.73—to Linda. On November, 8, 2012, Vincent filed a postjudgment "motion to quash garnishment." Vincent argued that the garnishment should be quashed because it failed to comply with K.S.A. 2012 Supp. 60-733[a]. Vincent contended that the amount listed in the garnishment request and order was inaccurate because Linda had seized $80 from his pocket during an October 7, 2009, hearing regarding his failure to pay the judgment. Based on the balance listed in the garnishment documents, Vincent maintained that the garnishment must be quashed because it should have listed $216,401.06 as the principal balance.

The trial court denied Vincent's motion to quash the garnishment. In doing so, the trial court held that even though the garnishment misstated the current principal balance by $80 any error was harmless because the Bank held fewer funds than the judgment

balance owed to Linda. The trial court also ruled that "the garnishment request and order for garnishment substantially complied with the Kansas statutes as required by law" and that the motion to quash was untimely because it was filed after the funds had been paid to Linda.

Did the Trial Court Err When It Denied Vincent's Motion to Quash the Garnishment Order?

Vincent argues in his brief that his motion to quash should have been granted because "strict compliance is required," and Linda's "failure to apply a partial satisfaction of judgment [$80] did not constitute even substantial compliance."

On the other hand, Linda contends that she substantially complied with the garnishment statutes because her "garnishment complied with the notice and other legal requirements of the statute[s]" even though the garnishment did not account for the $80 obtained from Vincent at a prior hearing.

Vincent's first appellate argument requires statutory interpretation. Interpretation of a statute is a question of law over which appellate courts have unlimited review. *Jeanes v. Bank of America*, 296 Kan. 870, 873, 295 P.3d 1045 (2013).

Under Kansas law, "a garnishment proceeding has been held to be a special, independent, provisional remedy, and governed entirely by our code." Before discussing the merits of Vincent's appeal, it would be helpful to set forth a general overview of garnishment law in Kansas as applied to the facts of this case. *Buzbee v. Allen County State Bank*, 191 Kan. 112, 115, 379 P.2d 250 (1963).

> "The current statutory scheme for garnishment, adopted by the Kansas Legislature in 2002, sets forth a detailed procedure by which a debtor's funds or other property may be

attached. See K.S.A. 60-719 *et seq.* Under the Kansas garnishment statutes, earnings or wages of a debtor are treated differently than the funds that we consider in this case. See K.S.A. [2012 Supp.] 60-733(c). We deal here with the garnishment of funds held by a financial institution. See K.S.A. [2012 Supp.] 60-731 and K.S.A. [2012 Supp.] 60-733(g). In this situation, there are three key persons involved: A judgment creditor (garnishor), in this case [Linda, who] is owed money by the judgment debtor; the judgment debtor, in this case [Vincent, who] owes money to the judgment creditor; and the garnishee, in this case [the Bank], which holds money of the judgment debtor.

"Order of Garnishment

"After judgment has been entered against the judgment debtor in a civil case, K.S.A. [2013 Supp.] 60-731 provides that the creditor may institute garnishment proceedings to attach property owned by the debtor but held by the garnishee. When the garnishment involves funds held by a financial institution, like [Vincent's] bank account [] . . . , the judgment creditor must have a good faith belief that the funds to be garnished belong to the judgment debtor. K.S.A. [2012 Supp.] 60-733(g). In such cases, the order of garnishment must include the following statement: '"If you hold any funds, credits or indebtedness belonging to or owing the judgment debtor, the amount to be withheld by you pursuant to this order of garnishment is not to exceed [110% of the amount owed by the judgment debtor]."' . . . K.S.A. [2012 Supp.] 60-733[(a) and] (c). After service of the order of garnishment, the judgment creditor must give the judgment debtor notice that the order has been served and must inform the debtor that the debtor has the right to demonstrate that the subject property is exempt from garnishment. K.S.A. [2012 Supp.] 60-735." *LSF Franchise REO I v. Emporia Restaurants, Inc.*, 283 Kan. 13, 19-20, 152 P.3d 34 (2007).

K.S.A. 2012 Supp. 60-736 involves the garnishee's duty to answer the garnishment order:

"Within 14 days after service . . . upon a garnishee of an order of garnishment the garnishee shall complete the answer in accordance with the instruction accompanying the answer form stating the facts with respect to the demands of the order send the completed

answer to the judgment creditor and judgment debtor at the addresses listed on the answer form."

If an answer is not filed, then the judgment creditor may file a motion with the court. "At the hearing on the motion, the court may grant judgment against the garnishee for the amount of the judgment creditor's judgment or claim against the judgment debtor . . . ." K.S.A. 60-741.

"*Answer of Garnishee*

"The garnishee bank's answer must contain a statement that '"[t]he amount of the funds, credits or indebtedness belonging to or owing the judgment debtor which I shall hold shall not exceed [the amount held by the bank subject to garnishment]."' (Emphasis added.) K.S.A. [2012 Supp.] 60-733(d)(1). The garnishee must also state in its answer whether the judgment debtor owns the account(s) in question in joint tenancy with the persons not subject to garnishment. K.S.A. [2012 Supp.] 60-733(d)(2). Once the garnishee answers the order of garnishment, any interested party may file a response. In addition, the parties may conduct limited discovery regarding the garnishee's statements.

"*Hearing*

"K.S.A. [2012 Supp.] 60-735(b) provides that a judgment debtor may request a hearing to assert any claim that the accounts in question are exempt from garnishment within [14] days after it receives notice of the service of garnishment. If such a hearing is requested, the judgment debtor bears the burden of proof to show that any of the funds in question are exempt from garnishment. K.S.A. [2012 Supp.] 60-735(c). In addition, if a party files a reply to the garnishee's answer, that party has the burden of proof to demonstrate the validity of its reply. K.S.A. [2012 Supp.] 60-738.

"*Judgment*

After hearing the parties' arguments, the court shall 'enter an order determining the exemption [of the subject property] and such other order or orders as is appropriate.'

> K.S.A. [2012 Supp.] 60-735(c). If the court determines that the property in question is owed by the judgment debtor and held by the garnishee, it may enter judgment by (1) ordering payment into court, impoundment, foreclosure sale, etc., or (2) rendering judgment against the garnishee in the amount of the garnishee's indebtedness to the judgment debtor or for the value of the judgment debtor's property that the garnishee holds. K.S.A. 60-721(a)(3), (4). If a garnishee bank holds funds in two or more accounts owed to the judgment debtor, the bank may pay the garnishment judgment from any one or more of these accounts. K.S.A. [2012 Supp.] 60-733(e)." *LSF Franchise REO I*, 283 Kan. at 20-21.

When determining whether the parties of a garnishment proceeding have complied with the statutory framework described above, our Supreme Court has held that "the proceeding must be conducted in substantial conformity to the statute and the conditions for its exercise are conclusive and exclusive of all others." *Buzbee*, 191 Kan. at 115. In this case, the parties concede that the garnishment request and order were properly served upon Vincent and the Bank and that the Bank properly answered the garnishment order. Thus, Linda contends that she substantially complied with the statutory framework required for a garnishment proceeding. Conversely, Vincent's appellate argument points to Linda's failure to reduce the principal judgment balance by $80 as support for his position that Linda did not strictly comply with the garnishment statutes.

Moreover, Vincent contends that the garnishment order did not strictly comply with the garnishment statutes because K.S.A. 2012 Supp. 60-733(a) requires that "[t]he written direction of a party seeking an order of garnishment attaching funds, credits or indebtedness held by a bank, savings and loan association, credit union or finance company shall state the amount to be withheld, which shall be . . . 110% of the amount of the current balance due under the judgment." In other words, because the garnishment request and order failed to account for the $80 that Linda previously seized and because the garnishment request and order did not constitute 110% of the current balance due, the garnishment request and order did not strictly comply with the garnishment statutes.

> "As the discussion above illustrates, garnishment proceedings affect only property owned by a judgment debtor. See K.S.A. 60-729. This ownership requirement that runs throughout the garnishment statutes codified early Kansas caselaw—which remains good law to this day—that 'a judgment against the garnishee must be limited to *the actual, and not apparent, property of the defendant in the possession or under the control of the garnishee* at the time the garnishee summons is served upon him." (Emphasis added.) *Septer v. Boyles*, 149 Kan. 240, Syl., 86 P.2d 505 (1939)." *LSF Franchise REO I*, 283 Kan. at 21-22.

Yet, when K.S.A. 2012 Supp. 60-733(a) directs the judgment creditor to require the garnishee to withhold 110% of the amount of the judgment creditor's claim or 110% of the amount of the current balance due under the judgment, the legislature's use of such an arbitrary percentage (110%) shows that it knew that the amount withheld under the order of garnishment might not be the actual amount owed by the judgment debtor between when the order of garnishment was served on the garnishee and the time the garnishee answered the order of garnishment. See K.S.A. 60-732(c)(2). K.S.A. 2012 Supp. 60-735(b) provides the judgment debtor with the ability to request a hearing to assert any claim of exemption from garnishment. Indeed, K.S.A. 2012 Supp. 60-739(b) states that "[t]he judgment creditor shall promptly refund to the judgment debtor any overpayment of the claim." As has been noted under K.S.A. 2012 Supp. 60-735(b) and K.S.A. 2012 Supp. 60-739(b), the legislature understood that an order of garnishment might end up withholding an amount in excess of what a judgment debtor would actually owe under the garnishment order. As a result, Vincent's argument that the garnishment statutes require strict compliance is not warranted by the law.

Moreover, Vincent's strict compliance assertion is contradicted by K.S.A. 60-732(a) which reads as follows: "The order of garnishment shall be substantially in compliance with the forms set forth by the judicial council." In this case, the garnishment request and order were served on both Vincent and the Bank. After which, the Bank answered the garnishment order declaring that $76,409.73 was in Vincent's account. The

record shows that Linda followed the procedural process for garnishment actions and that the garnishment order contained the requisite language required under Kansas law. See K.S.A. 2012 Supp. 60-733(a)-(c).

In support of his strict compliance argument, Vincent first relies on *Buzbee*. In that case, on April 19, 1957, Bill Buzbee obtained a $750 judgment against the owners of Darby Termite Control (Darby Termite). In September 1961, Buzbee filed an affidavit of garnishment that was served on Darby Termite and the Allen County State Bank (bank). Because the bank did not file an answer to Buzbee's garnishment, the trial court entered a default judgment against the bank for the full amount of the judgment plus interest and costs.

The bank moved to quash the garnishment and vacate the default judgment. The bank argued that the trial court should have quashed the garnishment and vacated the default judgment because its vice president had sent Buzbee's counsel a letter stating that Darby Termite had only 99 cents in its bank account. In other words, the bank argued that it complied with the statutory garnishment proceedings even though it did not file an answer to the garnishment summons. The trial court rejected the bank's argument. Later, the bank raised the same argument with our Supreme Court. Our Supreme Court rejected the bank's argument, holding that "[t]he [bank] had an affirmative duty to file its answer in the district court of Sedgwick County, and it cannot be said that its letter . . . indicating the extent of the bank's liability to [Darby Termite] may be treated as such an answer." 191 Kan. at 116.

Vincent contends that "t[]he *Buzbee* decision shows that the court required strict compliance with the garnishment procedures, even when only 99¢ was at issue, despite its 'substantial compliance' *dicta*." Vincent's reliance on *Buzbee* is misplaced. In *Buzbee*, our Supreme Court never declared that strict compliance with the garnishment statutes is necessary when determining whether the parties of a garnishment action have complied

with the garnishment procedures. Rather, our Supreme Court expressly stated that the proceeding must be conducted in "substantial conformity to the statute." *Buzbee*, 191 Kan. at 115.

The *Buzbee* holding indicates that the bank did not substantially comply with the garnishment procedures when it failed to file an answer to the garnishment. As mentioned earlier, the current garnishment statutes require the garnishee to send its answer within 14 days after service of the garnishment order. K.S.A. 2012 Supp. 60-736. If the garnishee fails to do so the "court may grant judgment against the garnishee for the amount of the judgment creditor's judgment or claim against the judgment debtor." K.S.A. 60-741.

In *Buzbee*, the bank never filed an answer to the garnishment order. Certainly, a party's failure to answer a garnishment order, as required under K.S.A. 2012 Supp. 60-736, constitutes a failure to substantially comply with the procedures of the garnishment statutes. Thus, it is disingenuous for Vincent to argue that *Buzbee* requires the garnishment request and order must strictly comply with the garnishment statutes. Vincent seems to confuse the *Buzbee* court's statement regarding the 99 cents amount in the bank account with the procedural requirement of filing an answer to the garnishment. Thus, the *Buzbee* holding provides no support for Vincent's appellate argument. See *McCreery v. McCreery*, 210 Kan. 99, 103-04, 499 P.2d 1118 (1972) (Even though a garnishee's answer was not strictly in conformity with the requirements of the statute, it did constitute an appearance and in the light of the discovery tools available to the judgment creditor no judgment should be rendered against the garnishee for default without providing the garnishee with an opportunity to fully answer and present its defenses.).

Vincent also cites *Nelson v. Thornberg*, 504 F. Supp. 199 (D. Kan. 1980), in support of his position. *Nelson* involved a prejudgment garnishment from Cowley County. The judgment debtor moved to dissolve the prejudgment garnishment order,

arguing that the judgment creditor failed to properly serve it with the order. The judgment creditor conceded that he failed to follow the service procedures under the garnishment statutes. Even so, the judgment creditor argued that the judgment debtor suffered no harm because the judgment debtor became aware of the garnishment in time to reply to the garnishee's answer and in time to move to dissolve. The judgment creditor noted that the vice president of the garnishee bank had mailed a copy of the garnishment order to the judgment debtor.

The trial court rejected the judgment creditor's argument, holding that "the garnishee's mailing of the order of garnishment to [the judgment debtor] some ten days after the order was issued was inadequate service under the Kansas statutory scheme." *Nelson*, 504 F. Supp. at 202. In reaching its decision, the *Nelson* court stated that "[u]nder Kansas law, garnishment is an extraordinary remedy and the statutory procedures must be strictly followed. *Buzbee v. [Allen County State Bank]*, 191 Kan. 112, 379 P.2d 250 (1963)." 504 F. Supp. at 202. Here, Vincent relies on the above language to support his position that strict compliance applies to Kansas garnishment procedures.

But, *Nelson* will not bear nearly the weight of reliance which Vincent places on it. First, even though the *Nelson* court used the term "strict" in its opinion, a reading of the opinion shows its similarities to *Buzbee*. It cannot be said that a judgment creditor's failure to follow the service of process requirements constitutes substantial compliance with the garnishment statutes. As a result, Vincent's reliance on the *Nelson* court's use of the term "strict" is unpersuasive. Moreover, the underlying facts of this case are distinguishable from *Nelson*. Unlike *Nelson*, which involved a prejudgment garnishment and the judgment creditor's failure to properly serve the judgment debtor with the order of garnishment, Linda complied with the applicable garnishment procedures in this case.

Finally, Vincent's strict compliance or technicality argument is unappealing and not warranted by at least two statutes. For example, K.S.A. 60-2105 provides in part:

"The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done . . . ." Moreover, K.S.A. 2012 Supp. 60-261 states in part: "At every stage of the proceeding, the court must disregard all errors or defects that do not affect any party's substantial rights."

As a result, we are persuaded that the trial court properly rejected Vincent's strict compliance argument. Because we are affirming the trial court's judgment denying Vincent's motion to quash the garnishment, it is not necessary for us to address Vincent's second argument of whether his motion to quash the garnishment was timely filed.

Affirmed.