



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General

August 27, 1975

ATTORNEY GENERAL OPINION NO. 75-342

Mr. Terry J. Solander
Anderson County Attorney
413 1/2 Oak Street
Garnett, Kansas 66032

Re: Civil Procedure--Small Claims Procedure Act--Venue

Synopsis: The filing of an action under the Small Claims Procedure Act in the county in which the cause of action arose is not prohibited by K.S.A. 1974 Supp. 61-2708, for lack of proper venue may be waived by the defendant in such action. The sheriff may not lawfully refuse to serve process issuing under the Small Claims Procedure Act from a court outside his county for service upon a resident of his county because of improper venue in such case.

* * *

Dear Mr. Solander:

You inquire concerning the interpretation of K.S.A. 1974 Supp. 61-2708, which prescribes venue for actions filed under the Small Claims Procedure Act, K.S.A. 1974 Supp. 61-2701 *et seq.* That action states thus:

"The venue of actions commenced under this act shall be as prescribed in article 19 of chapter 61 of the Kansas Statutes Annotated, except that, without some other basis for venue being present, the county in which the cause of action arose shall not be proper venue for an action against a resident of this state."

Mr. Terry J. Solander
Page Two
August 27, 1975

K.S.A. 1974 Supp. 61-1902 provides thus:

"An action against a resident of this state, other than an action for which venue is otherwise specifically prescribed by law, may be brought in the county:

(1) in which the defendant resides, or
(2) in which the plaintiff resides if the defendant is served therein, or
(3) in which the cause of action

arose, or

(4) in which the defendant has a place of business or of employment if he is served therein, or

(5) in which the estate of a deceased person is being probated if such deceased person was jointly liable with the defendant and a demand to enforce such liability has been duly exhibited in the probate court, or

(6) in which there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with section 61-2401 at the time of the filing of the action."

You ask whether the former statute, K.S.A. 1974 Supp. 61-2708, "prohibits the filing of a small claim action, otherwise proper, in the county in which the cause of action arose without some other basis for venue being present." Improper venue is not, of course, a jurisdictional question. Lack of proper venue may be waived by the defendant to permit an action to proceed in a court of competent jurisdiction in which venue is otherwise improper. In my opinion, K.S.A. 1974 Supp. 61-2708 does not prohibit the filing of an action under the small claims procedure act in the county in which the cause of action arose, even though no other basis for venue is present. The defendant may waive the lack of proper venue, and the action may proceed to judgment on that basis.

You ask, secondly, whether, in light of the foregoing, a sheriff may lawfully refuse to serve process issuing from under the Small Claims Procedure Act outside his county for service upon a resident of his county. In my opinion, the sheriff has no authority whatever to refuse to serve process in the instance you describe. The sheriff has no authority to determine any question

Mr. Terry J. Solander
Page Three
August 27, 1975

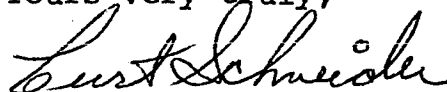
arising in the case in which process is issued, and certainly, no authority to determine the propriety of venue in any such case. K.S.A. 19-812 states thus:

"The sheriff in person or by his undersheriff or deputy, shall serve and execute, according to law, all process, writs, precepts and orders issued or made by lawful authority and to him directed, and . . . shall receive such fees for his services as are allowed by law."

Process issued in a case in which venue may be improper remains, nonetheless, lawful process, and the sheriff has a clear duty to serve such process. Wilful refusal to do so may subject him to civil liability, and constitute, in addition, a ground for an ouster proceeding in the proper circumstances.

In addition, I enclose a copy of a previous opinion issued by this office concerning the taxation of costs under the Small Claims Procedure Act.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

Enclosure



STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

July 23, 1975

Mr. Tracy D. Klinginsmith
County Attorney
Jackson County
206 W. 4th St.
Holton, Kansas 66436

Dear Mr. Klinginsmith:

The letter of July 18, 1975, from Edward S. Dunn, concerning the small claims procedure act, K.S.A. 1974 Supp. 61-2701, et seq., has been referred to me for reply.

The matter of docket fees under the small claims procedure act has been previously treated in Attorney General Opinion No. 74-216, a copy of which is enclosed. As you will note, we concluded that the docket fee is the sole cost authorized to be imposed under the small claims procedure act; no additional costs may be required.

Mr. Dunn also inquired whether an attorney may represent a party in the small claims court. K.S.A. 1974 Supp. 61-2704 provides in part:

"(a) The trial of all actions shall be by the court, and no party to such action shall be represented by an attorney prior to judgment."
(Emphasis supplied)

K.S.A. 1974 Supp. 61-2704 thus expressly prohibits representation by an attorney prior to judgment. By negative implication, then, parties are permitted to be represented by an attorney in post judgment proceedings.

Additionally, Mr. Dunn asked if provision is made under the act for orders of garnishment or attachment after judgment. No provision for execution of judgment is to be found within the statute.

K.S.A. 1974 Supp. 61-2702 states in part:

July 23, 1975
Tracy D. Klinginsmith
Page 2

"Except as otherwise specifically provided or where a different or contrary provision is included in this act, the code of civil procedure before the courts of limited jurisdiction shall be applicable to the processing of small claims and judgments under this act."

The provisions governing enforcement of judgments under the code of civil procedure for courts of limited jurisdiction will, therefore, control.

I trust that this response has been of assistance to you. If you have any further questions, please feel free to contact me.

Very truly yours,

CURT T. SCHNEIDER
Attorney General

by

THOMAS F. WOBKER
Assistant Attorney General

TFW/cgm
Enc.



STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

July 2, 1974

Opinion No. 74- 216

Honorable Charles J. Sell
Judge, Labette County
Probate, Juvenile & County Courts
Labette County Court House
Oswego, Kansas 67356

Dear Judge Sell:

You request an opinion regarding the recently enacted amendment to the small claims procedure act, K.S.A. 1973 Supp. 61-2701, et seq. You desire an interpretation of the new language included in 61-2704 relating to a five dollar (\$5.00) docket fee.

Specifically, you inquire whether in an action filed pursuant to the small claims procedure act any costs in addition to the five dollar (\$5.00) docket fee may be assessed.

House Bill 2014 amends K.S.A. 1973 Supp. 61-2704 to read in pertinent part:

"Upon the filing of plaintiff's small claim, the clerk of the court shall require from the plaintiff a docket fee of five dollars (\$5.00), unless for good cause shown the judge shall waive such requirement. Said docket fee shall be the only costs required in an action seeking recovery of a small claim." (Emphasis supplied.)

The last sentence commands particular attention. It declares plainly and without equivocation that the five dollar (\$5.00) docket fee will be the sole cost required of a party seeking recovery under the act. Kansas courts have held repeatedly that where the language of a statute is clear and unambiguous, no room remains for interpretation. E.g., In Re Jones' Estate, 179 Kan. 744, 298 P.2d 230; Henre v. Bd. of Ed. of Kansas City, 201 Kan. 251, 440 P.2d 606; Phillips v. Vieux, 210 Kan. 612, 504 P.2d 196.

The language presented by 61-2704, as amended, is precise and clearly drawn. Had the Legislature desired the docket fee to be merely one of several costs involved in a small claims action, or to be merely an initial security deposit, it was certainly capable of expressing such a desire. It did not do so. Rather, it amended out previously existing language which required a five dollar (\$5.00) deposit as security for costs. In addition, it inserted into 61-2704 a quite explicit new sentence: "Said docket fee shall be the only costs required in an action seeking recovery of a small claim." (Emphasis supplied.) It is difficult to imagine a more lucid directive. Such a plain and obvious expression of legislative intent must control.

This conclusion is buttressed by the general statutory scheme of the small claims procedure act. K.S.A. 1973 Supp. 61-2702 requires that:

"Except as otherwise specifically provided or where a different or contrary provision is included in this act, the code of civil procedure before courts of limited jurisdiction shall be applicable to the processing of small claims and judgments under this act."

K.S.A. 1973 Supp. 61-2710 likewise directs that:

"The costs of any action commenced in a court of limited jurisdiction under this act shall be taxed against the parties as in other actions in such court."

The pertinent sections of the code of civil procedure before courts of limited jurisdiction are K.S.A. 1973 Supp. 61-2501 through 61-2503. These sections require that security for costs, taxation of costs and items allowable as costs shall be determined by reference to the indicated provisions of the general code of civil procedure: K.S.A. 1973 Supp. 60-2001(b) and (c), 60-2002 and 60-2003. These sections were

amended by Senate Bill 941 enacted by the 1974 Legislature. They serve to define the term "docket fee", which is nowhere defined within the small claims procedure act itself, and to further focus the meaning of 61-2704.

K.S.A. 60-2001(c), as amended, states that:

"The docket fee shall be the only costs assessed in each case for reimbursement for services of the clerk of the district court and the sheriff. Any costs assessed for statutory fees for the stenographer, judge's retirement and law library and the bar docket fee shall be deducted from the docket fee, and the balance of such fee in each case shall be paid to the county treasurer for services of the clerk and sheriff."

It is true that 60-2001(d), another new provision, authorizes the amendment of additional court costs. However, this subsection is inapplicable to a small claims action, since 61-2501(b) makes no reference to 60-2001(d). Also, the requirement of 61-2704 that the five dollar (\$5.00) docket fee be the only cost required in a small claims action is a specific and contrary provision of the sort given controlling effect by the previously quoted language in 61-2702.

It should be mentioned that 60-2003 has been amended to list the docket fee as an item which may be included in costs. K.S.A. 60-2002 continues to provide, as previously, that unless otherwise provided by statute, or by order of the court, costs shall be allowed to the party in whose favor judgment is rendered. Thus, your misgiving over the application of K.S.A. 61-2710 is laid to rest. The cost referred to in K.S.A. 61-2710 is the docket fee; it may be assessed against the unsuccessful litigant.

It appears clear that costs incurred over and above the five dollar (\$5.00) docket fee must be borne by the county. This may present an additional financial burden to the county. A statute, however, is to be construed in accord with its clear and unequivocal provisions; the remedy for inconveniences is a matter of legislative consideration. State, ex rel. Bradley v. Board of County Com'rs of Johnson County, 180 Kan. 168, 302 P.2d 542.

Hon. Charles J. Sell
July 2, 1974
Page 4

In summary, then, it is the opinion of this office that in an action filed under the small claims procedure act absolutely no costs in addition to the five dollar (\$5.00) docket fee may be required.

If you should have further questions, please do not hesitate to call upon us.

Yours very truly,

VERN MILLER
Attorney General

LWB:sm