

**IN THE  
SUPREME COURT OF MISSOURI**

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**Case No. SC92469**

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**STATE OF MISSOURI, EX REL.  
ST. CHARLES COUNTY, MISSOURI,**

*Relator,*

**v.**

**HONORABLE JON A. CUNNINGHAM,**

*Respondent.*

Petition for Writ of Prohibition  
Arising from Circuit Court Case No. 0811-CV08506,  
Eleventh Judicial Circuit, St. Charles County, Missouri

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**RELATOR'S REPLY BRIEF**

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## REPLY ARGUMENT

### **I. The Respondent's Brief referred to irrelevant matters outside the record.**

The Respondent's Brief makes many references to other pending cases and other matters that are (a) completely irrelevant to the sole issue presented in this writ proceeding, and (b) outside of the record now before this Court. The Relator, St. Charles County, Missouri ("County") has filed a motion to strike those statements and arguments related thereto from the Respondent's Brief. They have nothing to do with the present case. The County will not make any further reply in this Brief to those improper factual assertions and arguments.

### **II. The Respondent's entire argument ignores the effect of an appellate reversal and remand.**

Respondent attempts to argue in its Brief that, in effect, a "trial" occurred in the underlying case because there was a hearing on a motion for summary judgment and that "the hearing resulted in a disposition on the merits and judgment being entered." Respondent's Brief, pp. 7-8. This argument completely ignores the fact that, at the time the County filed its voluntary dismissal, there was no longer any "disposition on the merits" or "judgment" in the underlying case, since the trial court's judgment had been "reversed, annulled and for naught held and esteemed" by this Court's mandate. Ex. 8.<sup>1</sup> Respondent's argument would only be available in a hypothetical situation where a

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<sup>1</sup> All references to exhibits herein are to the Exhibits to Relator's Petition for Writ of Prohibition.

plaintiff was awarded summary judgment in its favor, and then filed a voluntary dismissal of its petition before any appellate reversal and remand of the judgment took place. That odd hypothetical does not match the facts here.

Most of the Respondent's argument fails to address the actual procedural posture of the underlying case at the time the County filed its voluntary dismissal: it had been remanded generally to the trial court, to conduct further proceedings.<sup>2</sup> The competing summary judgment motions previously filed by the parties in the trial court were either moot or could have been considered as once again pending, but there was at that time no judgment entered in favor of either party on those motions. There certainly had not been any trial, nor was any trial date even scheduled. Ex. 17.

Respondent cites a section from the *Missouri Practice* series at page 15 of its Brief in support of its interpretation of the applicable rule regarding voluntary dismissals, but that particular section relies exclusively on an outdated and incorrect case. The section cited—2 Missouri Practice, Methods of Practice: Litigation Guide § 8.1 (4<sup>th</sup> ed.)—relies only upon *Smith v. A.H. Robins Co.*, 702 S.W.2d 143 (Mo.App. W.D. 1985) for this proposition while failing to note *Smith's* specific warning label of dicta or to cite more

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<sup>2</sup> Respondent attempts to argue, on page 18 of its Brief, a theory that this Court remanded the case with specific instructions, but does not support its argument with any citations to authority. The cases of *Pinkston v. Ellington*, 845 S.W.2d 627 (Mo.App. E.D. 1992), *Butcher v. Main*, 426 S.W.2d 356 (Mo. 1968), and others cited in the Relator's Brief, at pages 8-9, disprove this unsupported theory.

recent authorities like those discussed in the Relator's Brief. The section also critically omits the "at the trial" portion of the language when quoting from the rule itself. It does not appear, therefore, that this particular point of law in the cited Missouri Practice section has been updated in some time. *Freeman v. Leader Nat. Ins. Co.*, 58 S.W.3d 590 (Mo.App. E.D. 2001), correctly states the law on this point in Missouri.

Once the underlying case was remanded to the trial court, all issues were once again open to consideration in the trial court, and all normal procedural steps were available. These normal procedural steps included the option of the County to voluntarily dismiss the case in the manner provided by Rule 67.02. *See Pinkston v. Ellington*, 845 S.W.2d 627, 629 (Mo.App. E.D. 1992).

**III. The present Missouri Supreme Court Rules include the option of voluntary dismissals in the same manner that has been available in the past.**

Respondent attempts to argue beginning at page 17 of its Brief that cases from prior to this Court's adoption of the current Rules do not apply to their interpretation. It does this out of necessity, since those cases directly contravene the position Respondent asserts. There is no reason, however, to discard those well reasoned cases merely because they predated the adoption of the present form of the Rules. Most of the Rules are based on laws and procedural rules that were already in existence at the time of adoption, and the present rules related to dismissals are no exception. Cases construing the extent of a plaintiff's option to voluntarily dismiss its petition thus apply just as well to the current rules as they did to earlier dismissal procedures.

As an initial matter, this Court explained the history of the adoption of the present

Rules in *State ex rel. Gray v. Jensen*, 395 S.W.2d 143, 145 (Mo. banc 1965), stating:

Our Rules of Civil Procedure were adopted by this court on August 10, 1959, to become effective April 1, 1960. This court had appointed one committee which drafted proposed rules which were then submitted to the bench and bar of the state for comment. Thereafter, this court appointed another committee to revise the proposed rules in the light of the comments and suggestions received. It was the draft of this latter committee which was approved and adopted by the court. The rules as thus drafted and submitted by the committee were accompanied by committee notes following each rule. These were explanatory in nature, giving information as to the source of the proposed rule, any changes made from the language of the statute or rule from which taken, and other explanatory comments. These committee notes are comparable to legislative committee reports which pertain to legislation which is passed and are to be considered in determining the scope and meaning of the rule under consideration, just as the legislative committee reports are considered in construing the legislative enactments.

The “latter committee” referred to in this quotation was the Special Committee on Suggestions Concerning the Proposed Rules of Civil Practice and Procedure. That committee filed a report along with its submission of the proposed rules to the Missouri Supreme Court, and that report is available in the Vernon’s Annotated Missouri Rules database on Westlaw. *See* Committee Report, Special Committee on Suggestions

Concerning the Proposed Rules of Civil Practice and Procedure (Vernon's Annotated Missouri Rules, Westlaw database updated March 15, 2012) (referred to herein as “the Report”).

The Report stated that the intent of the committee drafting the proposed Rules was to “[c]hange no procedural provision which is working reasonably satisfactorily, and is adaptable to a modern system of procedure....” Specifically regarding dismissals, the Report stated (with emphasis added): **“Rule 67 on ‘Dismissal of Actions’ is substantially the same as existing statutes and rules** except that a clarifying rule on final dismissal for failure to amend is added in Rule 67.05.” The Committee specified the “existing” law and procedural rules being compared in the following excerpt from the Report:

In 1849 Missouri by legislative action adopted the Field Code of Civil Procedure, which served as the basis of civil procedure until 1943. In 1943 Missouri adopted a revised Code of Civil Procedure, partially covering the area of civil procedure, incorporating a large part of the Federal Rules of Civil Procedure. In 1945 the people of Missouri granted to the Supreme Court the power to establish Rules of Civil Procedure subject to express limitations.

This Report, when considered along with the cases of *Argeropoulos v. Kansas City Rys. Co.*, 212 S.W. 369 (Mo.App. 1919) and *Camden v. St. Louis Pub. Serv. Co.*, 206 S.W.2d 699, 705-06 (Mo.App. 1947) discussed in the Relator’s Brief, demonstrates that the option of a plaintiff to voluntarily dismiss a case has remained relatively unchanged in

Missouri at least since the use of the original Field Code of Civil Procedure.

*Argeropoulos* and *Camden* therefore continue to have direct application to determining the extent of a plaintiff's right to utilize a voluntary dismissal. This also demonstrates that the outcome Respondent seeks here is to overrule long-established precedent and procedure.

Since Rule 67.02 and similar past rules have been amended often as well as renumbered, it is helpful to keep this active history in mind when reviewing the cases discussing voluntary dismissals. The ultimate effect of these rules has not really changed, though, which the following summary of the history of the rule from a 2009 case makes clear.

In *Garrison v. Jones*, 557 S.W.2d 247 (Mo. banc 1977), the Supreme Court held that the "stage of the proceedings described in [then] Rule 67.01 [now Rule 67.02(a)] as 'prior to the introduction of evidence' refers to the introduction of evidence at the trial of the cause on the merits," and it "does not refer to hearings on pretrial motions or the introduction of evidence with respect to such motions." Shortly thereafter, the Supreme Court amended the rule, effective January 1, 1981, to make that clarification part of the rule itself by adding the words "at the trial" following the phrase "prior to the introduction of evidence." The Supreme Court again amended the rules regarding dismissals in 1994, moving then-Rule 67.01 governing voluntary dismissals to its current placement as Rule 67.02. The language "prior to the introduction of evidence at the trial" was retained. In 2002,

however, when the rules governing dismissal were again revised, the phrase “at the trial” was removed, leaving the rule to instead read, “[ (a) ] Except as provided in Rule 52, a civil action may be dismissed by the plaintiff without order of the court anytime: (1) Prior to the swearing of the jury panel for the voir dire examination, or (2) In cases tried without a jury, prior to the introduction of evidence.” This amendment separated jury-tried and court-tried cases, creating two distinct temporal points in the proceedings after which a plaintiff no longer retains the absolute right to voluntarily dismiss an action. Rule 67.02(a)(1) inserted a new point in jury-tried cases, while Rule 67.02(a)(2) retained the prior point for court-tried cases, albeit without the phrase “at the trial.” Our analysis in the instant case goes slightly further .... In *State ex rel. Fortner v. Rolf*, 183 S.W.3d 249 (Mo.App. W.D. 2005), the 2002 amendment was the version of the rule then in effect, and the Western District went on to reaffirm the continued vitality of the Supreme Court's ruling in *Garrison*, finding that “‘prior to the introduction of evidence’ means evidence adduced only ‘at the trial’ on the merits.” *Fortner*, 183 S.W.3d at 254. “To interpret the rule in a manner that would preclude a plaintiff from voluntarily dismissing a case after the introduction of evidence concerning pre-trial matters for court-tried cases, but to permit a voluntary dismissal up until the point the jury panel is sworn for voir dire examination in jury-tried cases, would create an absurd result.” *Id.* at 255. Effective January 1, 2007, however,

Rule 67.02 was again amended and the phrase “at the trial” reinserted, lending credence to the Western District's holding in *Fortner*. Moreover, the Supreme Court's reincorporation of those three words into the rule serves to emphasize its previous affirmation of *Garrison*, as well as its holding that **a voluntary dismissal without prejudice can be accomplished without leave of the court up until evidence is presented at the actual court trial on the merits.**

*State ex rel. Frets v. Moore*, 291 S.W.3d 805, 810-11 (Mo.App. S.D. 2009) (some citations omitted, emphasis added). That case also specifically addressed summary judgment motions, stating that “[i]n Missouri, ...it is well settled that a motion for summary judgment is a pretrial motion.” *Id.* at 810, footnote 3, citing *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 860 (Mo. banc 1993) and *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993).

Given the overwhelming weight of Missouri authorities on this point, it is plain that the County’s voluntary dismissal was effective at the time of its filing.

\* \* \*

## CONCLUSION

For the foregoing reasons, and for those set forth in the initial Relator's Brief filed in this matter, the County respectfully requests that this Court issue a permanent writ of prohibition to the Honorable Jon A. Cunningham prohibiting him from doing anything in the underlying case other than vacating his order of March 9, 2012 and acknowledging the voluntary dismissal of said case, all as requested in the Petition, and for any such further and other relief this Court deems just.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06 (b)**

I certify that this brief complies with the limitations contained in Rule 84.06 (b), as effective July 1, 2008, and that this brief contains 2,388 words according to the word processing program used to prepare it, exclusive of the cover, the following certificate of service page, this certificate page, signature block, and the appendix.

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