IN THE SUPREME COURT OF MISSOURI

Case No. SC92469

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

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

A. Introduction

Relator St. Charles County, Missouri ("St. Charles County") seeks the extraordinary relief of a writ of prohibition by claiming that the trial court acted outside its jurisdiction when it denied St. Charles County's efforts to voluntarily dismiss its 2008 action against Respondent/Defendant Laclede Gas Company ("Laclede") under Rule 67.02. St. Charles County attempted to dismiss its lawsuit after four years of litigation on January 31, 2012, *without leave* of the trial court, despite the following substantive and procedural history: (1) the parties presented evidence (both documents and affidavits) to the trial court at a hearing on cross-motions for summary judgment on September 16, 2009; (2) the trial court entered a final judgment on the merits in favor of St. Charles County on November 5, 2009; (3) this Court entered its 7-0, August 30, 2011 Opinion (among other things, reversing that final judgment) and its January 31, 2012 Order and Mandate (that remanded the case back to the trial court for further proceedings consistent with the Opinion as well as awarding certain costs to Laclede); and (4) Laclede's Motion for Judgment in Accordance with Missouri Supreme Court Opinion and Mandate was briefed and argued to the trial court on April 13, 2012. *See St. Charles County v. Laclede Gas Co.*, 356 S.W.3d 137 (Mo. banc 2011); Exhibit 8 (copy of the Court's January 31,

2012 Order and Mandate); and Exhibit 17 (notice of hearing on Laclede's Motion for Judgment in Accordance with Missouri Supreme Court Opinion and Mandate).[1]

The express language of Rule 67.02 and the case law applying it prohibit St. Charles County's attempted dismissal under these circumstances. In addition, it would be grossly unfair to allow St. Charles County (and other similarly situated plaintiffs) to nullify an unfavorable opinion by Missouri's highest court simply by voluntarily dismissing a case, regardless that there has been a final judgment on the merits. For these and all of the reasons set forth herein, St. Charles County should not be permitted to voluntarily dismiss its cause of action.

B. The underlying 2008 lawsuit between the parties

On September 15, 2008, St. Charles County filed a Petition against Laclede in the underlying lawsuit alleging only one count, seeking a declaratory judgment on whether it or Laclede was required to pay for the relocation of Laclede's gas lines from Laclede's easements along Pitman Hill Road in St. Charles County, in order to accommodate St. Charles County's construction project on Pitman Hill Road. Ex. 1.

On December 8, 2008, Laclede filed its Motion for Summary Judgment. Ex. 3. St. Charles County subsequently filed its response to Laclede's Motion for Summary Judgment, as well as its own cross-motion for summary judgment. Ex. 4. Both parties submitted affidavits and documents in support of their respective motions. Exs. 3 and 4;

[1] All exhibit numbers herein refer to the exhibits attached to St. Charles County's Petition for Writ of Prohibition, unless otherwise stated.

see also Petition for Writ of Prohibition, ¶ 5. On September 16, 2009, the trial court heard arguments on the cross-motions for summary judgment. *Id.*, ¶ 6. On November 5, 2009, after considering oral argument together with the motions for summary judgment and responses, the affidavits and the other documentary evidence attached to the motions, the trial court entered its "judgment" granting St. Charles County's Motion for Summary Judgment and denying Laclede's Motion for Summary Judgment. Ex. 5.

C. The appeal in the underlying 2008 Pitman Hill Road lawsuit concerning that Judgment entered by the trial court on behalf of St. Charles County

On December 1, 2009, Laclede filed its Notice of Appeal in the Missouri Court of Appeals, Eastern District. Ex. 6. After briefing and oral argument, the Court of Appeals issued its Opinion on February 8, 2011, affirming the trial court's judgment by a 2-1 majority. *See* Ex. A (copy of the Court of Appeals' February 8, 2011 Opinion). The Court of Appeals' Opinion also included a dissenting opinion, as well as instructions from the Court that the case be transferred to this Court pursuant to Mo. S.Ct. Rule 83.02 because "the issues involved are of general interest and importance." *Id.*

On August 30, 2011, this Court issued its Opinion reversing the summary judgment in favor of St. Charles County in a 7-0 unanimous decision. *St. Charles County*, 356 S.W.3d at 139-40. After St. Charles County filed its Motion for Rehearing, on January 31, 2012, this Court entered its Order and Mandate denying the Motion for Rehearing. Ex. 8. The Court's Mandate ordered that (1) the trial court's judgment in favor of St. Charles County "be reversed, annulled and for naught held and esteemed…;" (2) the case be remanded to the trial court "for further proceedings … in conformity with

the opinion of this court herein delivered…;" and Laclede be awarded its "costs and charges" incurred in the appeal. *Id.*

D. St. Charles County's purported voluntary dismissal and petition for writ of prohibition

On January 31, 2012, within a few hours after this Court issued its Mandate, St. Charles County filed its purported voluntary dismissal with the trial court, claiming it did not require leave of the trial court under Mo. S.Ct. Rule 67.02; in the words of St. Charles County, "[o]nce a plaintiff has voluntarily dismissed an action under this rule, it is as if the suit had never been filed." Ex. 9. On March 9, 2012, after extensive briefing by the parties and oral arguments on whether it was permissible under Rule 67.02 to voluntarily dismiss this action now, without leave of court, the trial court entered its order denying St. Charles County's efforts. The trial court reasoned that St. Charles County's purported voluntary dismissal was void and of no effect because an evidentiary hearing on the summary judgment motions was held, resulting in a disposition on the merits and entry of a final judgment. Ex. 16.

On March 13, 2012, Laclede filed its Motion for Judgment in Accordance with Missouri Supreme Court Opinion and Mandate. On April 13, 2012, this motion was argued to the trial court and taken under advisement.

On March 29, 2012, St. Charles County filed its subject Petition for Writ of Prohibition with the Missouri Court of Appeals, Eastern District, seeking a Writ of Prohibition prohibiting the trial court from denying St. Charles County's claimed authority to voluntary dismiss an action without leave of court, in the circumstances. *See*

Ex. B (St. Charles County's March 29, 2012 Petition for Writ of Prohibition). The next day, on March 30, 2012, the Missouri Court of Appeals entered its order denying St. Charles County's Petition for Writ of Prohibition. *See* Ex. C (March 30, 2012 Order denying Petition for Writ of Prohibition). On April 5, 2012, St. Charles County filed its Petition for Writ of Prohibition with this Court.

POINTS RELIED ON

I. St. Charles County has not met its burden of proof that a Writ of Prohibition is appropriate here, because it has failed to show that the trial court acted in excess of its jurisdiction, or that it will suffer absolute and irreparable harm if the writ is not granted.

State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 576 (Mo. banc 1994)

State ex rel. Stickelber v. Nixon, 54 S.W.3d 219, 221 (Mo. App. 2001)

Mo. Dept. of Social Services v. Administrative Hrg. Comm'n., 826 S.W.2d 871, 872 (Mo. App. 1992)

II. The trial court properly held that St. Charles County was not permitted under Rule 67.02 to voluntarily dismiss the Petition without leave.

Mo. S. Ct. Rule 67.02

Smith v. A.H. Robins Co., 702 S.W.2d 143 (Mo. App. 1985)

State ex rel. J.L. Mason Group of Mo., Inc. v. Village of Dardenne Prairie, 763 S.W.2d 727 (Mo. App. 1989)

III. As a matter of policy, St. Charles County should not be permitted to use Rule 67.02 to voluntarily dismiss an action subsequent to this Court's Opinion,

Order and Mandate to avoid the binding precedential effect of such appellate decisions.

Mo. S. Ct. Rule 67.02

Senior Citizens Bootheel Services, Inc. v. Dover, 811 S.W.2d 35, 40 (Mo. App. 1991)

St. Charles County v. Laclede Gas Co., 356 S.W.3d 137, 140 (Mo. banc 2011)

ARGUMENT

I. Introduction

St. Charles County has the burden of showing that the trial court's ruling is "beyond the bounds of judicial discretion." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994). In particular, a party seeking a writ of prohibition must establish that the respondent court acted "in excess of his jurisdiction, that the action is necessary to prevent usurpation of judicial power, or that [the superior court] must act to prevent an absolute and irreparable harm to a party." *State ex rel. Stickelber v. Nixon*, 54 S.W.3d 219, 221 (Mo. App. 2001). Because "prohibition provides litigants with the means to circumvent the normal appellate process," it "should therefore be employed by the courts *judiciously and with exceptional restraint*." *Mo. Dept. of Social Services v. Administrative Hrg. Comm'n.*, 826 S.W.2d 871, 872 (Mo. App. 1992), citing *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985) (emphasis added). A court should exercise its discretion to issue a writ of prohibition only "when the facts and circumstances of the particular case demonstrate unequivocally that there exists an extreme necessity for preventative action." *Id.*

St. Charles County's Petition for Writ fails to satisfy the extremely high burden of showing that a writ of prohibition is appropriate here. In addition to acting within its jurisdiction, the trial court followed the only permissible course of action under Rule 67.02, by denying St. Charles County's attempt to voluntarily dismiss the underlying action. Moreover, St. Charles County has not argued or shown that absolute and irreparable harm will occur if the writ is not granted.

First, the trial court's ruling is based on the application of Missouri Rules of Civil Procedure and long standing precedent. Specifically, Rule 67.02 and case law interpreting that Rule make clear that a party may not voluntary dismiss its Petition under these circumstances without leave of court. St. Charles County has not cited a single case applying the Missouri Supreme Court's Rules that would authorize a voluntary dismissal under the circumstances here. Instead, St. Charles County's Petition for Writ of Prohibition is based entirely on the fundamentally incorrect proposition: that Rule 67.02 authorizes St. Charles County to voluntarily dismiss its 2008 underlying action, without leave of the trial court, after cross-motions for summary judgment were resolved with the trial court entering a final judgment on the merits, after its consideration of the parties motions, sworn testimony (via affidavits) and documents, after oral argument on those motions, and even after an appeal that resulted in reversal of that judgment by this Court, because there was no "trial." Rule 67.02 does not authorize a party (like St. Charles County here) to voluntarily dismiss the action at this late stage in the proceedings, because three events have occurred in the case: (a) a hearing on a motion for summary judgment took place; (b) evidence was presented at that hearing; and (c) the hearing

resulted in a disposition on the merits and judgment being entered. After these substantive events have taken place in a matter, a "trial" on the merits has occurred and the plaintiff is not permitted to voluntarily dismiss the case.

Second, St. Charles County has failed to show any reason why an appeal after any judgment would not adequately protect St. Charles County's rights, or any irreparable harm that may occur before St. Charles County could pursue such an appeal. A writ of prohibition is an extreme remedy, appropriate when "absolute and irreparable harm" may occur if the petition is not granted. The extraordinary remedy of a writ of prohibition is not required here because an appeal following any judgment in the trial court will offer St. Charles County exactly the same appellate review it seeks here, except at the proper time for such appellate review (rather than in the extraordinary context of a writ proceeding).

St. Charles County will suffer no such harm here if its Petition for Writ is not granted. Rather, St. Charles County would have the opportunity to appeal this exact same issue after the matter is resolved at the trial court level. St. Charles County has failed to show any "absolute and irreparable harm" will occur if this Court does not grant the extraordinary relief sought with a writ of prohibition at this time.

Rather, it is Laclede that will suffer harm if St. Charles County is permitted to voluntarily dismiss without leave. In the proceedings before the trial court, St. Charles County stated that if the underlying action was not dismissed, it may seek leave to assert additional claims that it can require Laclede to relocate its Pitman Hill Road gas lines at Laclede's own expense. *See, e.g.*, Exhibit 11, pp. 7-8 (suggesting that if the underlying

action was voluntarily dismissed, additional "issues" might require "litigation … in a new case."[2]) Yet this Court has already resolved that issue, definitively and unequivocally, in its August 30, 2011 Opinion: "Similarly, in this case, *Laclede cannot be compelled to relocate its gas lines located within the utility easement without compensation from the county*." *St. Charles County v. Laclede Gas Co.*, 356 S.W.3d 137, 140 (Mo. banc 2011) (emphasis added). Any attempt by St. Charles County to amend to add new claims to attack Laclede's constitutional property rights by seeking to require Laclede to pay for moving the subject gas lines without compensation, would be a wilful disregard of this Court's Opinion, Order and Mandate addressing that very issue.

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[2] Such contention would run contrary to the legal principle that parties must litigate all issues arising out of the same transaction or occurrence in one action or are otherwise barred from bringing the claim later. *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 716 (Mo. banc 2008) ("Improper splitting of claims occurs when a party sues on a claim which arises out of the same 'act, contract or transaction' as the previously litigated claims."); *see also Brown v. Jones*, 735 S.W.2d 155, 157 (Mo. App. 1987) (doctrine of collateral estoppel precludes the same parties or those in privity from relitigating issues which have been previously litigated). "The rule against splitting a claim for relief serves to 'prevent a multiplicity of suits and appeals with respect to a single cause of action, and is designed to protect defendants against fragmented litigation, which is vexatious and costly." *Kesterson*, 242 S.W.3d at 716.

In fact, St. Charles County continues its efforts to re-litigate the issue already decided by this Court – in that, who has the obligation to pay for the relocation of gas lines located in utility easements. Both in Missouri state court and federal court, St. Charles County and Laclede are again litigating matters involving the same issues that were decided by this Court in its August 30, 2011 Opinion—both concerning the road project and Laclede's easements at issue in the underlying case, Pitman Hill Road, as well as other St. Charles County road projects that affect other utility easements belonging to Laclede.[3] If St. Charles County is permitted to voluntarily dismiss the

[3] For example, in the Federal Court action, Laclede is still litigating the effect of this Court's August 30, 2011 Order as it relates to, among other things, St. Charles County placing a 200 foot retaining wall over Laclede's lines on Pitman Hill Road (on lines this Court specifically held Laclede had a constitutionally protected property right). *See* Exhibit D, *Laclede Gas Co. v. St. Charles County*, 2012 WL 2565009 at *2-3 (E.D.Mo. July 2, 2012). Rather than reimburse Laclede to relocate those subject lines placed in the Pitman Hill plats, St. Charles County went ahead and built a 200 foot retaining wall over a portion of those lines (at a time it was still awaiting a decision from this Court in the underlying 2008 litigation). *Id.* at *4. *See also* Ex. E (June 29, 2012 Order and Judgment by the Honorable Jon Cunningham denying St. Charles County's Motion for Preliminary Injunction, *St. Charles County v. Laclede Gas Co.*, Case No. 1211-CC00051, Circuit Court of St. Charles County, State of Missouri) (discussed *infra.*), wherein St. Charles County filed suit against Laclede arguing that Laclede was required to relocate its gas

underlying action and then proclaim in other cases that this Court's August 30, 2011 Order in effect had never been issued at all, jurisprudence based on court precedence will be turned on its head.

St. Charles County's Petition for Writ of Prohibition gives the *incorrect* impression that this issue is purely a procedural one, without any significant consequences. St. Charles County's timing in filing a purported voluntary dismissal (mere hours after this Court denied St. Charles County's motion for rehearing in the underlying appeal) only highlights the thinly-veiled attempt to nullify this Court's Opinion and Mandate. St. Charles County is implicitly acknowledging its intent to claim in later proceedings against Laclede that this Court's Order too is a nullity as a dismissal under Rule 67.02 can be interpreted to permit St. Charles County to argue in subsequent proceedings that "it is as if the suit had never been filed." Relator's Brief, pp. 13-14. *See also* St. Charles County's January 31, 2012 Memorandum of Voluntary Dismissal where it states that "[o]nce a plaintiff has voluntarily dismissed an action under this rule [67.02], it is as if the suit had never been filed." Ex. 9. Procedurally, there could be no dismissal under Rule 67.02 that would be "as if the suit had never been filed" because there was a binding Missouri Supreme Court Mandate. Therefore, St. Charles County's memorandum of voluntary dismissal was inconsistent with 67.02(a) and was ineffective to invoke the rule.

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lines, at its own cost, from easements dedicated by essentially the same plat language as the Pitman Hill Road plats – citing in large part this Court's August 30, 2011 Opinion.

Moreover, St. Charles County's voluntary dismissal should not be permitted as a means by which St. Charles County can abolish this Court's Opinion, which resolved almost four years of litigation between these parties, that Laclede's easement is a constitutionally protected property right. Laclede runs the risk of continued harm where it must re-litigate the issue that was resolved by this Court's Order of August 30, 2011.[4] Such a result cannot be the policy this Court had when Rule 67.02 went into effect on April 1, 1960.

Moreover, such a construction of Rule 67.02 would also affect other utilities who have installed their lines in reliance on this Court's prece221dential holding on August 30, 2011 that such utility easements are constitutionally protected property rights. That construction would also affect ratepayers of those utilities – citizens of Missouri who will be potentially exposed to another trial court (claiming this Court's Opinion was effectively "never" issued due to the voluntary dismissal), deciding that such plats do not

[4] *See, e.g.*, Ex. E (order denying St. Charles County Motion for Preliminary Injunction in Ehlmann Road state court action), ¶ 41 (another lawsuit filed by St. Charles County against Laclede wherein Laclede was subjected to defending itself to obtain an order from the trial court that the Ehlmann Road plat language dedicating easements to Laclede was "essentially identical" to the plat language examined by this Court in the Pitman Hill Road plats – a litigation that Laclede continues to be subjected by St. Charles County concerning a constitutionally protected right determined by the Court's Order of August 30, 2011).

constitute an easement (as this Court unequivocally held), thereby causing them to have to subsidize County road projects outside their communities.

For all of these reasons, St. Charles County has failed to show that its requested relief satisfies the extremely high standards for granting a writ of prohibition and that the trial court acted outside its authority requiring St. Charles County's Petition for Writ be denied.

II. The trial court properly held that St. Charles County was not permitted under Rule 67.02 to voluntarily dismiss the Petition without leave of court, and therefore the trial court did not act beyond its jurisdiction in denying St. Charles County's purported voluntary dismissal.

The Missouri Supreme Court Rules, and case law interpreting them, make clear that St. Charles County had no proper basis for attempting to voluntarily dismiss its action at this late stage in the proceedings. Rule 67.02(a) states in relevant part, "[A] civil action may be dismissed by the plaintiff without order of the court anytime … (2) *In cases tried without a jury, prior to the introduction of evidence at trial.*" Mo. S. Ct. Rule 67.02 (emphasis added). The present case falls squarely outside the circumstances described in subsection (2).

Courts have consistently applied Rule 67.02 to cases involving summary judgment motions such that a hearing on a summary judgment motion, where evidence was presented, resulting in a disposition on the merits (all of which occurred in the present case), constitutes a "trial on the merits" under Rule 67.02. In *Smith v. A.H. Robins Co.*, 702 S.W.2d 143, 146 (Mo. App. 1985), *abrogated on other grounds, Speck v. Union*

Elec. Co., 731 S.W.2d 16 (Mo. banc 1987), the court held that "*a hearing on a motion for summary judgment is a trial before the court without a jury*" for purposes of the applicable language in Rule 67.02(a)(2). (Emphasis added). The court in *Smith* further made this point clear: "Summary judgment constitutes a final judgment on the merits and constitutes a bar to future litigation on the same cause of action. … In the case of a summary judgment disposition, a hearing on a motion for summary judgment may constitute 'the trial' for Rule [67.02] purposes if it results in a disposition of the case on the merits." *Id.*

Subsequent cases after *Smith* applied its holding in exactly the same way. *See, e.g., State ex rel. J.L. Mason Group of Mo., Inc. v. Village of Dardenne Prairie*, 763 S.W.2d 727, 729 (Mo. App. 1989) ("A pre-trial hearing before the trial judge which results in a disposition on the merits may constitute an introduction of evidence for purposes of this rule."); and *Senior Citizens Bootheel Services, Inc. v. Dover*, 811 S.W.2d 35, 40 (Mo. App. 1991) (stating that *Smith* stands for the proposition that a case cannot be voluntarily dismissed, without leave of court, where "a motion for summary judgment results in a disposition of the case on its merits").

St. Charles County argues that the rule as recited in *Smith* should be disregarded because that discussion was allegedly dicta. *See* Relator's Brief, p. 12. However, the subsequent cases cited the relevant discussion from *Smith* as persuasive authority on this issue, without any reservation. Moreover, St. Charles County has not cited a single case contrary to the principles discussed in *Smith* (and the subsequent cases citing *Smith*).

In complete accordance with *Smith* and the subsequent cases, The Missouri Practice commentary summarizes the applicable rule as follows:

> The stage of proceedings described in the Rule as permitting plaintiff to dismiss without prejudice 'prior to the introduction of evidence' refers to the introduction of evidence at a trial on the merits. … ***However, a hearing on a motion for summary judgment is a trial before the court without a jury because summary judgment constitutes a bar to future litigation on the same cause of action***. It follows then that the appellant could not dismiss his petition without prejudice ***after the hearing on the motion for summary judgment unless by leave of the court or by stipulation.*** Once evidence is submitted at the trial on the merits, the substantive rights and liabilities of the parties are at stake.

2 Mo. Prac., Methods of Prac: Litigation Guide § 8.1 (4th ed.) (emphasis added).

Smith and the other cases cited above clearly and unambiguously hold that voluntary dismissal is not permitted after three events have occurred in a case (all of which have occurred in this case): (a) a hearing on a motion for summary judgment is heard; (b) evidence is presented at that hearing; and (c) the hearing results in a disposition on the merits. *Smith*, 702 S.W.2d at 146 Id.; *State ex rel. J.L. Mason Group*, 763 S.W.2d at 729; *Freeman v. Leader Nat'l. Ins. Co.*, 58 S.W.3d 590, 595 (Mo. App. 2001); and *Senior Citizens*, 811 S.W.2d at 40. There is absolutely no dispute that all of those events occurred in the present case. The trial court held a hearing on the parties' cross-motions for summary judgment; evidence was presented in support of those motions; and the

hearing resulted in a disposition on the merits (summary judgment in favor of St. Charles County). St. Charles County is not permitted to voluntarily dismiss at its sole discretion under Rule 67.02 as a result.

St. Charles County has not cited a single case holding to the contrary, either to the courts below or here. In the only case cited by St. Charles County in which a voluntary dismissal was permitted (the *Freeman* case—*see* Relator's Brief, pp. 10-12), the dismissal was permitted because *none of the three events* (hearing, evidence, or disposition on the merits) *had yet occurred*. 58 S.W.3d at 594-95. The court in *Freeman* sets forth the procedural history as relevant on this point: "On October 16, 2000, Plaintiffs took a voluntary dismissal without prejudice against [the dismissed defendants] … On October 23, 2000, the trial court granted [one of the dismissed defendants'] motion for summary judgment" without ever holding a hearing. *Id.* (emphasis added).

In other words, the voluntary dismissal in *Freeman* came before the trial court's disposition on the merits—that is, as even St. Charles County's Brief notes, while summary judgment motions were *pending*, *not* after summary judgment was granted, as here. In *Freeman*, there is no record of a hearing on the summary judgment motions ever occurring, nor of evidence being presented at a hearing, rendering the case fundamentally different from the present case. *Id.* The voluntary dismissal in *Freeman* was consistent with Rule 67.02. The facts of *Freeman* stand in stark contrast to those here, where St. Charles County is attempting to dismiss years after (not before) a disposition on the merits, as well as after the summary judgment hearing and presentation of evidence. *Freeman* does not support St. Charles County's attempt to voluntarily dismiss here.

St. Charles County also discusses the 1980 amendment of Rule 67.02 (at that time, Rule 67.01) and the addition of the phrase "at the trial" to the rule. St. Charles County's Brief, pp. 12-13. This 1980 amendment has no bearing on the analysis here. Of all the case law cited by Laclede in its previous briefs and here, the *Smith* case was the earliest—and it was decided in 1985, which is after the amendment cited by St. Charles County. *Smith*, and all of the other cases relied upon by Laclede, apply the same language as currently embodied in the present Rule 67.02.

St. Charles County also relies on two cases from prior to 1950, *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 (Mo. App. 1947), to support its attempt to voluntarily dismiss here. These cases provide no such support, primarily because both were decided before the Missouri Supreme Court rules were enacted—that is, before Rule 67.02 or its predecessor was even in existence.

The Supreme Court Rules, in their earliest form, were adopted by this Court on August 10, 1959 and became effective on April 1, 1960. *See State ex rel. Gray v. Jensen*, 395 S.W.2d 143, 145 (Mo. 1965). *Argeropoulos* and *Camden* were decided based upon the statutes of civil procedure. If there is any conflict between the statutes of civil procedure and the Supreme Court rules on a procedural matter, the Supreme Court has made clear that its rules prevail. *See Ostermueller v. Potter*, 868 S.W.2d 110, 111 (Mo. banc 1993); and *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995). Rule 67.02, and any cases interpreting it (such as *Smith* and the others cited above) must prevail over any cases relying upon the statues of procedure. These cases

cited by St. Charles County do not control here because they were decided well before the Court enacted its rules, including Rule 67.02.

Failing to identify any case law specifically applying Rule 67.02 to support its position, St. Charles County cites language from cases describing the difference between a "general" remand by this Court and one with specific instructions. Relator's Brief, pp. 6-9. These non-specific principles fail to support St. Charles County's voluntary dismissal for at least two reasons. First, this Court did remand with instructions: the remand instructs the trial court to conduct further proceedings consistent with this Opinion, and awards Laclede its costs incurred before this Court. *See* Ex. 8. St. Charles County's attempt to voluntarily dismiss the action would prevent the trial court from following this Court's specific instructions.

Second, this Court's remand to the trial court, whatever its alleged form (specific or general), still requires the trial court to follow the rules of civil procedure, which include Rule 67.02, and its absence of any authorization for St. Charles County's voluntary dismissal here. St. Charles County in essence argues the unsupportable position that because (it contends) this Court's remand contained no specific instructions, the trial court therefore had discretion to ignore the rules of civil procedure and permit St. Charles County's voluntary dismissal. Such argument must fail. This Court's remand presumed that the proceedings upon remand, just like all proceedings, would be conducted by the trial court in accordance with the Missouri Supreme Court Rules. It is beyond question that having remanded this case back to the trial court, this Court through

its "Mandate" was requiring the trial court to follow: (a) the rules of civil procedure; and (b) its Mandate and Opinion.

III. As a matter of policy, St. Charles County should not be permitted to rely on Rule 67.02 to voluntarily dismiss this action subsequent to this Court's Opinion, Order and Mandate to avoid the binding precedential effect of such appellate decisions.

Case law directs that a plaintiff should not be permitted to gain some "undue advantage" through an attempted voluntary dismissal. *Senior Citizens*, 811 S.W.2d at 40. Yet that is exactly what St. Charles County is attempting to do here, by arguing that it can voluntarily dismiss the underlying action and proceed "as if the case had never been filed." This Court ruled against St. Charles County in the underlying action, holding that St. Charles County must compensate Laclede for moving the gas lines at issue. This Court also directed the trial court to proceed in conformity with its opinion. St. Charles County should not be permitted to evade this Court's determination by dismissing its Petition at this late stage and conducting additional litigation as if this case "had never been filed."

This course of conduct is all the more highlighted by the fact that St. Charles County has continued to litigate essentially the same issues that were already decided by this Court in its August 30, 2011 Opinion—in apparent disregard for that Opinion. In the Opinion, this Court held that the easements dedicated in the Pitman Hill Road plats constituted a constitutionally-protected property right belonging to Laclede, and as a result, Laclede could not be required to relocate lines located in those easements without

compensation. *St. Charles County*, 356 S.W.3d at 140. Despite the clear holding of this Court, St. Charles County has continued to litigate this same issue with Laclede.

In the Pitman Hill Road case (the same case previously considered by this Court in issuing the Opinion), St. Charles County installed a 200-foot retaining wall over Laclede's Pitman Hill Road lines and easement *while this Court was still considering the issues* (in July 2011), and threatened to install another 600 feet of retaining walls over Laclede's Pitman Hill Road lines and easements. *See* Ex. D, *Laclede Gas*, 2012 WL 2565009 at **3-4.

On January 18, 2012, St. Charles County filed an action trying to force Laclede to relocate lines from the same type of utility easements, at Laclede's own cost and expense, on another St. Charles County road project (Ehlmann Road). *See* Ex. D, *Laclede Gas*, 2012 WL 2565009 at **2-4; *see also* Ex. E, *St. Charles County v. Laclede Gas Co.*, Case No. 1211-CC00051, St. Charles County Circuit Court, State of Missouri. Litigation between Laclede and St. Charles County concerning the Ehlmann Road case is currently ongoing in two courts: before the federal court (Eastern District of Missouri), in an action filed by Laclede in October 2011, and in the Circuit Court for St. Charles County, in an action filed *several months later* by St. Charles County (concerning the same gas lines, easements and facts as Laclede's federal action). *See id.* The Ehlmann Road lawsuits again concern the *same issue* already decided by this Court: whether Laclede can be required to relocate, at Laclede's own expense, its gas lines from its easements dedicated in subdivision plats. *See, e.g.*, Ex. E, ¶¶40-43 (state court holding that the Ehlmann Road plat language dedicating easements to Laclede was "essentially identical" to the plat

language examined by this Court in the Pitman Hill Road plats and, based on this Court's Opinion in the Pitman Hill Road case, St. Charles County was unlikely to succeed on the merits at trial). Similarly, the federal court granted Laclede's Motion for Preliminary Injunction in the federal action based in large part on this Court's August 30, 2011 Opinion. Ex. D, *Laclede Gas Co.*, 2012 WL 2565009 at *2-3.

St. Charles County's conduct since this Court's issuance of the August 30, 2011 Opinion has indicated an intention to act as if that Opinion had never been issued.[5] St. Charles County's attempt to voluntarily dismiss the underlying action without leave of court is yet another attempt to disregard this Court's Opinion "as if the case had never been filed." Case law requires that Rule 67.02 not be used in such a way as to gain such an undue advantage. Yet that is exactly what St. Charles County is attempting to do here, consistent with its ongoing litigation since the time of (and in disregard of) this Court's August 30, 2011 Opinion.

[5] St. Charles County's continued filing of Petitions for Writ of Prohibition without any authority and its continued attempts at re-litigating in both state and federal courts the issue of whether it is obligated to pay for Laclede's relocation of lines in utility easements that this Court unequivocally determined was constitutionally protected property has crossed the lines of advocacy. This pattern of litigation practice should not be condoned and merits an award of Laclede's attorney's fees in having to defend itself against St. Charles County's Petition for Writ of Prohibition.

In general, as a matter of policy, if plaintiffs were permitted to voluntarily dismiss as St. Charles County has attempted to do here, the consequences would be significant. Any time a plaintiff was awarded summary judgment, but an appellate court later reversed, the plaintiff could attempt to avoid any binding effect from such appellate decisions merely by immediately dismissing the underlying petition. This would substantially prejudice defendants (like Laclede here) who incur significant defense costs pursuing appeals. It would also place such plaintiffs in an unfair "no-lose" situation: after summary judgment in the plaintiff's favor, if the plaintiff wins on appeal, then the judgment is binding against the defendant; but if the plaintiff loses on appeal (like St. Charles County here), then the plaintiff could immediately dismiss the action, creating a situation where such plaintiffs could never lose on appeal.

These same fundamental concerns apply even if this Court were to permit St. Charles County to voluntarily dismiss here. If this Court determines that St. Charles County is permitted to dismiss the underlying action under Rule 67.02, the Court should not permit such voluntary dismissal by St. Charles County to operate as a *de facto* abrogation of this Court's Opinion.

This Court's August 30, 2011 Opinion should still be binding precedent upon the parties, and upon other parties who may encounter the same legal issues. Permitting St. Charles County to voluntarily dismiss at this late stage of the litigation would represent a waste of time and resources by the courts and the parties in undertaking the initial appeal in this matter. More significantly, it would permit a party like St. Charles County an

opportunity to avoid an otherwise binding Opinion of this Court, just because it did not agree with the result, by voluntarily dismissing following conclusion of the appeal.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Laclede respectfully requests that this Court deny St. Charles County's Petition for Writ of Prohibition, grant Laclede its attorneys' fees and costs incurred herein, and grant such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

The undersigned hereby certifies that this brief complies with the limitations contained in Mo. S. Ct. Rule 84.06(b), and that this brief contains 6,163 words according to the word processing program used to prepare it, not including the cover page, the signature block, this certificate of compliance or the certificate of service.

/s/ *Booker T. Shaw*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by operation of the Court's electronic filing system, according to the information available on the system at the time of filing, this 20th day of August, 2012 to:

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and was sent by hand delivery to:

The Honorable Jon A. Cunningham
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