IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX. REL. EAGER ROAD ASSOCIATES L.L.C.,	)	
Petitioner/Relator	)	No. SC98072
vs.	)	
HONORABLE BRIAN H. MAY JUDGE OF THE CIRCUIT COURT OF ST. LOUIS COUNTY, DIVISION 1	)	
Respondent	)	

Proceeding in Mandamus from the Circuit Court of St. Louis County, Missouri
Case No. 19SL-CC00873
The Honorable Brian H. May

Respondent's Brief in Opposition to Relator's Writ of Mandamus

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INTRODUCTION

In 2015, Relator filed a petition against Defendant Blitz, Bardgett & Deutsch, L.C. ("BBD") asserting five counts, and Relator exercised its right to a change of judge without cause under Rule 51.05 early in the case. BBD subsequently filed a motion for summary judgment against Counts II-V of Relator's petition, and the trial court granted that motion, leaving only Count I alive. While litigation continued as to that count, Relator dismissed it without prejudice. Relator attempted to "refile" a claim in 2019 seeking the same relief as the previous Count I and filed another application for a change of judge, which was denied by Respondent, the Honorable Brian May.

Relator now requests a writ requiring Respondent to grant Relator's change-of-judge application, even though Relator already exercised its right to a single change of judge during proceedings on the cause of action. Relator does not contest the clear limits of the Rule but argues they do not apply here because Relator voluntarily dismissed the single count without prejudice from the prior suit and purportedly refiled it pursuant to Missouri's savings statute, §516.230. Relator offers no relevant legal authority for its position and no persuasive policy reason—or *any* policy reason—for allowing a plaintiff to so circumvent the restrictions of Rule 51.05. Indeed, there are none. The Preliminary Writ of Mandamus should be quashed, and Relator's Petition for Writ should be denied.

As an initial matter, Relator is not entitled to a writ because it has not complied with the requisite procedural rules. In particular, Relator has intentionally omitted the only document that sets forth the reasoning of Respondent's ruling under review, in clear contravention of Rule 94.03. As this Court has recognized, the failure to submit such an

essential document improperly asks the Court to presume that the Respondent abused its discretion and is a sufficient basis for denying a writ of mandamus. Given this, Relator's blatant omission of the full record of Respondent's decision below warrants denying the request for a writ.

The substance of Relator's petition also fails to establish an entitlement to an extraordinary writ. Relator's sole argument in support of its petition is that a voluntarily-dismissed action is a 'nullity' and 'as if it was never filed,' and, therefore, Relator concludes the purportedly refiled claim must be considered a new and separate action for purposes of Rule 51.05. This argument fails, however, because the foundational premise is both irrelevant to the facts presented here and incorrect as a matter of law.

First, the facts here do not raise any question about the legal impact of a voluntarily-dismissed lawsuit because Relator did not dismiss its entire action. Rather, this case involves Relator dismissing a single count after its other counts were decided against it and attempting to refile even after it paid BBD's remaining fees notwithstanding allegations of "overbilling." Relator's initial suit alleged five counts, and four of the five counts were dismissed with prejudice after Respondent granted summary judgment for Defendant. Relator then voluntarily dismissed without prejudice only its single remaining count, while counterclaims remained pending. After the dismissal, Relator paid BBD all the relief sought in the counterclaims, and, therefore, the counterclaims were dismissed with prejudice. In this context, it is clear that the proceedings on the prior petition are not a 'nullity,' as legal rights were adjudicated and claims were disposed of on the merits. Relator's attempt to refile raises a single claim arising from the same core of operative

facts, between the same parties, related to the same dispute that was already litigated. That claim is not an independent civil action for purposes of Rule 51.05, and Respondent properly denied Relator's application for a second change of judge.

Second, Relator's characterization of a voluntarily-dismissed action is wrong as a matter of law. A voluntarily-dismissed action is not a legal nullity for all purposes, and Relator cites no authority holding otherwise. It is true that a voluntarily-dismissed action has been deemed 'as if it was never filed' for some purposes, but there are a number of contexts in which a dismissed action has legal consequences. Given this, the impact of a voluntary dismissal without prejudice must be analyzed in the specific context raised, with consideration of the relevant statutory or rule language, legislative intent, and underlying policy. Relator offers no argument as to why, in the context of Rule 51.05, a single voluntarily-dismissed count and purportedly refiled suit should be deemed an independent action.

When the appropriate analysis is undertaken, it is clear that a claim refiled pursuant to the savings statute is not an independent action under the Rule. Cases interpreting Rule 51.05 establish that an action is *not* "independent" for purposes of the Rule when it involves the same issue(s), is between the same parties, and seeks the same relief. When a plaintiff purports to refile a claim under the savings statute, the plaintiff asserts that it involves the same facts, parties, and issues. Therefore, as pled, the 2019 petition cannot be an "independent" civil action.

That interpretation is also supported by the policies underlying Rule 51.05. The right to a single change of judge without cause should not be interpreted to produce absurd

or unfair consequences. Therefore, the Rule imposes strict time and usage restrictions in order to prevent parties from using the change of judge to engage in "judge shopping," unduly delay proceedings, avoid the consequences of adverse rulings, or circumvent the denial of a motion to disqualify a judge for cause. All of these policies and restrictions would be severely undercut if a plaintiff could obtain a second change of judge as of right late in the proceedings, after suffering adverse rulings, simply by voluntarily dismissing part of a lawsuit and attempting to refile a claim seeking the same relief.

Finally, Relator's change-of-judge application was properly denied because it did not comply with the notice and service requirements imposed in Rule 51.05. That Rule clearly states that a copy of the application and notice of the hearing on the application should be served on the opposing party. Relator filed its application for another change of judge prior to the summons being issued or served on Defendant and, yet, Relator did not serve a copy of the application or notice of hearing when the summons was served or when counsel entered its appearance for Defendant. This failure violated clear notice and service requirements in the applicable Rules, and Relator's attempt to cure the problem through belatedly filing and serving an "amended" application a month later should not excuse the defect. Because Relator failed to comply with the mandatory procedures in Rule 51.05, its change-of-judge application was properly denied, and there is no reason warranting the issuance of an extraordinary writ.

FACTUAL BACKGROUND

Relator, Eager Road Associates, L.L.C. ("Relator") filed a petition in May of 2015 against Defendant Blitz, Bardgett & Deutsch, L.C. ("BBD"), alleging "over-billing" and malpractice in connection with legal services BBD performed for Relator (the "2015 Suit"). A3 & A28. The petition included five counts: Count I alleged that BBD billed Relator for unreasonable and excessive legal fees, and the remaining counts challenged the advice and services BBD provided under various legal theories. A28, A29, A31, A30 & A32. BBD filed counterclaims against Relator, seeking unpaid legal fees and interest. A35.

The 2015 Suit was assigned and reassigned to a number of different judges. The suit was first assigned to the Honorable Joseph Walsh, but BBD filed an Application for Change of Judge on June 16, 2015, in order to exercise its right to one change of judge without cause pursuant to Rule 51.05. Resp A31. Accordingly, the case was re-assigned to the Honorable Tom DePriest. A61. Relator then chose to exercise its Rule 51.05 right to a single change of judge and filed an application to do so on July 16, 2015. Resp A31. The case was then re-assigned to the Honorable Barbara Wallace on July 27, 2015. A62. After Judge Wallace retired, the case was re-assigned on January 11, 2017, to Respondent, the Honorable Brian May. A63. Several months after Respondent was assigned to the case, Relator moved to disqualify him for cause on July 6, 2017. Resp A33 & Resp A41. Judge May denied Relator's motion on July 19, 2017, *see* Resp A68, and Relator did not file a petition for a writ seeking review of that order.

Respondent also issued a number of substantive rulings that adversely impacted Relator's claims. For example, Respondent granted BBD's motion for summary judgment

on Counts II-V on July 24, 2017. A64. Relator filed a motion to certify the summary judgment order as final, which Respondent denied on November 7, 2017. Resp A13. Relator then filed a petition for a writ as to this order on January 12, 2018, which was denied on January 16 by the Court of Appeals. *See* Case No. ED106274.

In addition, Adolphus Busch—one of the plaintiffs as to the remaining Count I—refused to appear at a deposition. Respondent issued an order striking Mr. Busch's pleadings on February 6, 2018. Resp A6. Mr. Busch filed a writ as to this order, and the Court of Appeals for the Eastern District ***affirmed*** Respondent's order. *See* Case No. ED106370, February 26, 2018 Order & Resp A118. Busch then took a writ to the Missouri Supreme Court, which was denied on March 7, 2018. *See* SC97003.

Following these and other adverse rulings, Relator voluntarily dismissed Count I without prejudice—right before argument on BBD's motion for summary judgment on that count. Resp A118; Resp A110-111; Resp A112-115. The dismissals left BBD's counterclaims for fees owed as the only claims to be resolved, and they were set for trial on March 12, 2018. On the day of trial, however, Relator paid all fees owed to BBD plus interest. Since BBD received all of the relief it sought, it dismissed its counterclaims with prejudice. Resp A120. Critically, Relator paid over two-hundred thousand dollars to settle the claims seeking unpaid legal fees that were billed using the same methodology Relator challenged as "excessive" in the dismissed Count I. *See* A28-29 & A54-59.

Almost a year later, Relator filed a petition seeking the exact same relief it had sought in the voluntarily-dismissed Count I purportedly pursuant to Missouri's savings statute, Mo. Rev. Stat. §516.230. A99. This time, Relator based its alleged over-billing

claim on a breach of fiduciary duty and, as before, challenged the same legal billing methodology as the fees Relator voluntarily paid to resolve BBD's counterclaims. A99 & Resp A67, Resp A93, & Resp A103. The 2019 petition involved the same parties, was based on the same facts, and raised the same issues regarding the same legal fees as the petition Relator filed in 2015, and this case was re-assigned to Respondent in Division 1. Resp A123. Relator waited over two months to request service, and it only did so on May 20, 2019. *Id.* Two days later, before the summons was issued, Relator filed another Application for Change of Judge under Rule 51.05. A104. BBD was finally served with Relator's petition on May 29, 2019, Resp A123, but Relator did not serve a copy of its Application for Change of Judge upon BBD at the time the summons was served or when BBD's counsel entered its appearance. A107-109.

BBD filed an Opposition to Relator's Application on June 18, 2019, and the trial court called the parties to schedule a hearing for Relator's Application. A105. Relator filed an Amended Application for Change of Judge on June 26, 2019, trying to belatedly comply with the procedural requirements of Rule 51.05. A112. The trial court held a hearing on July 8, 2019, and denied Relator's Application "as explained on the record." A114. Relator has failed to attach the transcript of the July 8 hearing that constitutes that "record."

Relator filed a petition for a writ of prohibition to the Eastern District Court of Appeals on July 24, 2019, seeking an order requiring Respondent to grant Relator's Application for Change of Judge. BBD filed an opposition on August 5, 2019, and the Court of Appeals denied Relator's petition on August 6, 2019. *See* ED108069, BBD August 5, 2019 Opposition and August 6, 2019 Order.

LEGAL STANDARD

"'The purpose of the extraordinary writ of mandamus is to compel the performance of a ministerial duty that one charged with the duty has refused to perform.'" *State ex rel. Robison v. Lindley-Myers*, 551 S.W.3d 468, 473-74 (Mo. banc 2018) (quoting *Furlong Cos., Inc. v. City of Kansas City*, 189 S.W.3d 157, 166 (Mo. banc 2006)). "To be granted relief by mandamus, a litigant 'must allege and prove he has a clear, unequivocal, specific right to a thing claimed'" and establish that he has a 'clear and legal right to the remedy.'" *Robison*, 551 S.W.3d at 474 (quoting *Furlong*, 189 S.W.3d at 166). "Mandamus does not issue except in cases where the ministerial duty sought to be coerced is definite, arising under conditions admitted or proved and imposed by law." *Robison*, 551 S.W.3d at 474 (quotations omitted). "The burden [is] upon [the movant] to show a clear and unequivocal right to relief in mandamus." *State ex rel. Mining v. Davis*, 391 S.W.2d 896, 898 (Mo. 1965).

Further, "[a] denial of an application for change of judge is reviewed for abuse of discretion." *Burgess v. State*, 342 S.W.3d 325, 328 (Mo. banc 2011) (citing *Smulls v. State*, 10 S.W.3d 497, 504 (Mo. banc 2000)). "An abuse of discretion is committed if the trial court's decision defies logic under the circumstances, is sufficiently arbitrary and unreasonable to shock the conscience of the court." *Burgett v. Thomas*, 509 S.W.3d 840, 845-46 (Mo. Ct. App. 2017) (quotation omitted).

ARGUMENT

I. Relator Is Not Entitled to a Writ of Mandamus Because Relator Failed to Include the Transcript where Respondent Explained the Reasons for His Order.

Rule 94.03 provides that "[a] copy of any order, opinion, record or part thereof, document, or other item that may be essential to an understanding of the matters set forth in the petition in mandamus shall be attached as exhibits if not set forth therein." Mo. Sup. Ct. R. 94.03.

Relator has not complied with the requirements of Rule 94.03, and, therefore, Relator is not entitled to a writ of mandamus. *See State ex rel. Prewitt v. Clark*, 849 S.W.2d 27, 28 (Mo. banc 1993). Here, Relator is seeking a writ of mandamus ordering Respondent—the Honorable Brian May—to grant Relator's Application for Change of Judge. Judge May denied Relator's Application in his July 8, 2019 Order, which states in its entirety: "[Relator's] Application for Change of Judge is denied ***as explained on the record***." A114 (emphasis added). While Relator included the July 8 Order in its appendix, Relator failed to include the transcript of the July 8 hearing that is "the record" where Judge May's reasoning is "explained." Relator, therefore, failed to include the only document that sets forth the basis for Respondent's ruling, even though that document is "essential" for a review of the ruling pursuant to an abuse of discretion standard. Mo. Sup. Ct. R. 94.03.

Relator's omission is all the more glaring because Relator was alerted to the need to include the hearing transcript during proceedings before the Court of Appeals. As before this Court, Relator did not to include the transcript of the July 8 hearing with its petition

for a writ before the Court of Appeals. In its opposition, BBD argued—as it does here—that Relator's failure to include the transcript was a sufficient reason to deny the writ. *see* ED108069, which the Court of Appeals did the following day. *Id.* Thus, despite being alerted of its failure by BBD below, Relator has again failed to include the essential record setting forth the substance of the ruling it asks this Court to review.

Relator's failure to do so is fatal. Faced with a similar situation in *State ex rel. Prewitt v. Clark*, 849 S.W.2d 27, 28 (Mo. banc 1993), this Court denied the relator's request for a writ of mandamus because the relator failed to attach documents describing the reasoning of the trial court. *Id.* This Court reasoned:

> In the absence of an order detailing the findings and reasoning of the court below, we will not presume an abuse of discretion or a failure to perform a ministerial duty by that court.

Id. The same should be true here. Relator also has failed to include in its Index any document or "order detailing the findings and ***reasoning*** of the court below" when it denied Relator's Application for Change of Judge, and Relator, in essence, asks this Court to presume an abuse of discretion. This Court has repeatedly held, however, that "[t]he burden [is] upon [the relator] to show a clear and unequivocal right to relief in mandamus." *State ex rel. Mining v. Davis*, 391 S.W.2d 896, 898 (Mo. 1965); *Prewitt*, 849 S.W.2d at 28; *State ex rel. Burnett v. Sch. Dist. of City of Jefferson*, 74 S.W.2d 30, 33 (Mo. banc 1934) ("The burden was upon relator to plead and prove a clear legal right to the relief asked"). Given that Relator failed to include an essential—if not the most essential—document, Relator cannot meet its burden. The Preliminary Writ of Mandamus should be quashed and Relator's Petition for a Writ denied.

II. Relator Is Not Entitled to a Writ Because A Party Cannot Obtain A Second Change of Judge Under Rule 51.05 By Voluntarily Dismissing and Purportedly Refiling A Portion Of A Lawsuit Pursuant to Missouri's Savings Statute.

Missouri law allows a party to request one change of judge in any civil action without proving cause. Mo. Sup. Ct. R. 51.05. Specifically, Rule 51.05 provides that: "A change of judge shall be ordered in any civil action upon the timely filing of a written application therefor by a party. . . . The application need not allege or prove any cause for such change of judge and need not be verified." Mo. Sup. Ct. R. 51.05(a). While this right is designed to permit a party to disqualify a judge for subjective reasons, Rule 51.05 should not be interpreted or applied to produce absurd or inconvenient results. *See, e.g.*, *Jenkins v. Andrews*, 526 S.W.2d 369, 372 (Mo. Ct. App. 1975) ("It has long been settled in this state that the right to disqualify a judge is not to be employed to produce inconvenience and absurdity.") (quotation omitted); *Burgett v. Thomas*, 509 S.W.3d 840, 846 (Mo. Ct. App. 2017) (same).

The Rule also recognizes limits on the right in order to further important policy goals. *First*, the Rule establishes strict time limits for exercising the right. Specifically, "[t]he application must be filed within 60 days from service of process or 30 days from the designation of the trial judge, whichever time is longer." Mo. Sup. Ct. R. 51.05(b). This ensures that the right is exercised early in the proceedings before the judge renders significant substantive rulings, and it prevents a party from interrupting the proceedings and causing undue delay and a waste of resources. As the Court of Appeals aptly explained:

> The rule as it presently exists requires the parties to assess the acceptability of the trial judge within a short period after the judge's identity has been determined and move for change of judge before any proceedings on the record begin. There is no real justification for allowing a party thereafter to move for a change of judge simply because the judge's rulings were contrary to the party's position.

State ex rel. Burns v. Goeke, 884 S.W.2d 60, 62 (Mo. Ct. App. 1994); *see also Muhm v. Myers*, 400 S.W.3d 846, 849 (Mo. Ct. App. 2013).

Second, the Rule limits each party to one change of judge as of right without proving cause for disqualification. *See* Mo. Sup. Ct. R. 51.05(d). This restriction prevents parties from "judge shopping" and unnecessarily delaying resolution of the action in search of the judge perceived to be the most favorable to the party's position. After exercising the right to a single change of judge, a party must satisfy a heavy burden of proving cause in order to disqualify a judge. *Id.*

It is beyond dispute that Relator exercised its right to a change of judge under Rule 51.05 when it filed a timely application a few weeks after the trial judge was identified in the 2015 Suit. Therefore, according to the Rule, Relator is entitled to another change of judge as of right only if it pursues a new, independent action. *See* Rule 51.05. It is also beyond dispute that the claim alleged in Relator's 2019 petition is based on the same operative facts, is between the same parties, and seeks recovery of the same legal fees as Relator's 2015 Suit. Resp A31. Given this, it is clear that the current "over-billing" claim is part of the same cause of action—and only cause of action—Relator has against BBD based on the alleged facts. *See generally Felling v. Giles*, 47 S.W.3d 390, 393-95 (Mo. Ct. App. 2001) (explaining how claims relying on the same core facts and arising from the

same series of transactions constitute a single cause of action); *Berry v. Majestic Milling Co.*, 304 Mo. 292, 304-05 (1924) (same).

Thus, contrary to what Relator asserts is the issue presented, the only question raised here is whether a purportedly "refiled" claim is an independent action for purposes of Rule 51.05 when: (1) the plaintiff voluntarily dismissed without prejudice ***an individual count*** in a prior action after other claims in the action were resolved on the merits, (2) the plaintiff resolved a counterclaim against it by paying all fees plus interest despite alleging "overbilling," and (3) the plaintiff purportedly attempted to "refile" an "overbilling" claim seeking the same relief as the dismissed claim under the Missouri savings statute.[1]

Relator argues that such a claim must be viewed as an independent action because voluntarily-dismissed actions are a "nullity" and treated as if they were never filed. This argument fails for two reasons. First, the argument ignores the critical fact that, here, there is no voluntarily-dismissed *action*—only a dismissed individual claim jettisoned from the rest of the action, which was disposed of on the merits. Under these circumstances, the proceedings pursuant to Relator's 2019 petition are not a new, independent action for

[1] BBD does not concede that the 2019 petition alleges a claim which satisfies §516.230 or which could properly be deemed "refiled." The claims are not the same. However, the scope of the savings statute and whether it is appropriately invoked here is not before the Court. Taking the claim as pled and argued by Relator, for purpose of this writ petition alone, it is clear that this is not an independent action for purposes of Rule 51.05 for all the reasons stated herein.

purposes of Rule 51.05. Second, Relator's argument overstates the legal characterization of a voluntarily-dismissed action, which is *not* considered a "nullity" for all purposes. Rather, the legal impact of a voluntarily-dismissed action must be assessed based on the particular context and interpretive question presented, which Relator fails to do. As explained below, the text, policy, and relevant case law interpreting Rule 51.05 all indicate that a voluntarily-dismissed and refiled claim is not an independent action for purposes of the Rule. Relator is not entitled to another change of judge without cause, and the writ should be denied.

A. When a Single Count Is Voluntarily Dismissed and Refiled While the Other Counts In the Action Are Disposed of on the Merits or Dismissed With Prejudice, the Refiled Count Is Not an Independent Action for Purposes of Rule 51.05.

Contrary to Relator's assertion, the issue presented here is ***not*** "whether the exercise of a change of judge under Rule 51.05 in a lawsuit that is later dismissed without prejudice precludes that party from taking a change when the lawsuit is refiled." Suggestions, at 6, The facts here raise no such question because Relator did not dismiss its entire "lawsuit." Instead, Relator only dismissed one count arising from the same operative facts as its other four counts, which were dismissed with prejudice, *see* A28, A29, A31, A32, A33, and it did so when BBD's counterclaims were still pending. A78-79, A80. For this reason alone, Relator is not entitled to an extraordinary writ. Indeed, when an "appeal in effect presents only hypothetical questions, this court may dismiss the appeal." *St. Louis Cty. v. Vill. of Peerless Park*, 726 S.W.2d 405, 409 (Mo. Ct. App. 1987). "Appellate courts do not render

advisory opinions or decide non-existent issues." *State ex rel. Missouri Cable Television Ass'n v. Missouri Pub. Serv. Comm'n*, 917 S.W.2d 650, 652 (Mo. Ct. App. 1996).

Moreover, that fact also undermines the foundational premise of Relator's sole argument in support of a writ. Relator's entire argument is built upon its assertion that a voluntarily-dismissed action is a 'nullity' and 'as if it was never filed.' But here there is no voluntarily-dismissed action because the *action* was not dismissed without prejudice, only a single individual count. Thus, Relator's 2019 petition seeks to recover on a claim that is based on the same facts as the claims and counterclaims that were already resolved, with prejudice, in the 2015 Suit. Under these circumstances, the 2019 petition cannot be deemed an independent civil action for purposes of Rule 51.05.

The legal distinction between the dismissal of an individual count or counts versus the entire action is well-established in Missouri law. For example, in *Felling v. Giles*, 47 S.W.3d 390, 393-95 (Mo. Ct. App. 2001), the resolution, with prejudice, of some of the counts in an action was held to bar the plaintiffs' attempt to refile certain claims that had been voluntarily dismissed from the action without prejudice. In *Felling*, the plaintiffs initially filed suit alleging 16 counts. *Id.* at 392. The court ordered a separate bench trial on four equitable counts, which resulted in judgment for the defendant. *Id*. In order to facilitate an appeal, the plaintiffs voluntarily dismissed the remaining counts without prejudice. Plaintiffs' appeal was unsuccessful, and they attempted to refile six of the counts that had been voluntarily dismissed. *Id.* at 392-93.

The Court held, however, that the second suit was barred by the doctrine of *res judicata* and the rule against splitting a cause of action. Specifically, the Court of Appeals

explained: "A cause of action which is single may not be split and either filed or tried piecemeal; and the penalty for splitting a cause of action is that an adjudication on the merits in the first action is a bar to the second action." *Id.* at 394 (quotation omitted). The Court found that all of the claims in both suits relied on the same core facts and arose from the same series of transactions. Therefore, plaintiffs had a single cause of action and were obligated to include all theories for recovery in the first suit. *Id.* at 394-95. The Court further held that the fact the claims were initially included and then voluntarily dismissed without prejudice did not save the second suit from the *res judicata* effect of the judgment in the first suit. *Id.* Thus, the fact that only some of the claims were dismissed without prejudice while others were disposed of on the merits was critical to the court's holding that the second suit was barred.

Indeed, even cases cited by Relator acknowledge the important distinction between the voluntary dismissal of an entire action and the dismissal of individual counts. In *Williams v Southern Union Co.*, 364 S.W.3d 228, 234-35, & n.5 (Mo. Ct. App. 2011), and *State ex rel. Frets v. Moore*, 291 S.W.3d 805, 812 (Mo. Ct. App. 2009), the courts relied primarily on the fact that the plaintiffs had dismissed the entire action and not simply an individual count in assessing the preclusive effect of the dismissal on the court's jurisdiction. *Williams*, 364 S.W.3d at 234-35, and *Frets*, 291 S.W.3d at 812. As the *Williams* court explained: "Therefore, in determining the preclusive effect of a voluntary dismissal, courts must examine whether the voluntary dismissal was of the entire action following the court's adverse ruling or whether the voluntary dismissal was of the remaining claims following the court's adverse ruling." *Williams*, 364 S.W.3d at 234, fn.

5. As with *Felling*, these cases demonstrate that a disposition with prejudice of some counts in the action affects the legal impact of that action and of the voluntary dismissal of individual claims.

This distinction also comports with a plain understanding of legal actions. Here, it is obvious that Relator's 2015 Suit is not a 'nullity' or 'as if the action had never been filed.' Four counts in that suit were dismissed with prejudice after Respondent granted summary judgment for defendant, *see* A64, and BBD's counterclaims for unpaid legal fees were dismissed with prejudice after Relator paid all of the fees owed with interest. Resp A121. Thus, legal rights were adjudicated and relief was obtained, and Relator clearly is barred from relitigating the issues decided. Given this, Relator's 2019 petition does not—and cannot—act as a clean slate. It raises a claim arising from the same core of operative facts, between the same parties, related to the same dispute that was already litigated to judgment. Therefore, the refiled claim should not be considered an independent civil action for purposes of Rule 51.05.

B. Voluntarily-Dismissed and Refiled Actions Are Not Independent Actions For Purposes of Rule 51.05.

1. Voluntarily-Dismissed Actions Have Legal Effects On Subsequent Actions.

In any event, Relator's argument also fails because Relator's foundational premise is legally incorrect: Voluntarily-dismissed actions are ***not*** a 'nullity' for all purposes. In fact, there are a number of ways in which an action that has been voluntarily dismissed without prejudice continues to have legal consequences or affects subsequently-filed suits. For instance, §514.170 provides that a defendant can recover costs against the plaintiff

when the plaintiff dismisses a suit, and Rule 67.02(d) and §514.180 authorize a court to order the payment of costs if a plaintiff refiles the previously-dismissed action or files an action based on the same claim. *See, e.g.*, Mo. Rev. Stat. 514.170 & .180; Mo. Sup. Ct. R. 67.02(d); *Blechle v. Goodyear Tire & Rubber Co.*, 28 S.W.3d 484, 487 (Mo. Ct. App. 2000) (explaining that "Rule 67.02(d) gives the power to order payment of costs to the trial court where a previously dismissed action is subsequently brought" and that "Section 514.180 says essentially the same thing").

In addition, if a court orders a non-contingent sanction in a suit that is then voluntarily dismissed without prejudice, the sanction survives the dismissal. *See, e.g., P.R. v. R.S.*, 950 S.W.2d 255, 257 (Mo. Ct. App. 1997). Thus, in *P.R. v. R.S.*, the Court of Appeals held that an order requiring plaintiff to pay $5000 as a sanction for discovery violations survived the subsequent voluntary dismissal without prejudice because there were no contingencies placed on the obligation to pay, and it was not interlocutory. *Id.; see also* Mo. Sup. Ct. R. 67.05 (voluntary dismissal does not discontinue pending ancillary matters or dismiss previously filed counterclaims or cross-claims), 55.03(c) & (d) (discussing sanctions).

A voluntarily-dismissed action also can impact the viability or resolution of subsequent actions. For example, the fact that a suit was filed and voluntarily dismissed can bar a subsequent suit if a plaintiff had previously dismissed the refiled action a second time without filing a stipulation of the opposing party or obtaining leave of court. *See Clark v. Kinsey*, 488 S.W.3d 750, 757 (Mo. Ct. App. 2016). And, some courts have followed prior rulings made in voluntarily-dismissed actions rather than revisit the issue

anew after refiling. *See, e.g., Trout v. Zakhour*, 774 F. Supp. 1204, 1206 (E.D. Mo. 1991) (explaining that issue of fraudulent joinder was decided in dismissed state court action and refusing to "retry the issue and second-guess the state court's decision"). Indeed, even the savings statute Relator attempts to invoke, §516.230, illustrates that voluntarily dismissing an action does not make it 'as if the suit was never filed' for all purposes. If that were the case, any refiled action would have to stand or fall on its own with respect to the statute of limitations.

Thus, it is clear that voluntarily-dismissed actions can—and do—have legal effects, depending on the context, and Relator cites no authority suggesting otherwise. Relator relies on broad statements from a number of cases, but none of the decisions purport to address whether a voluntarily-dismissed action can have any legal impact in any situation. Rather, the cases generally consider whether a court retains jurisdiction to issue substantive rulings in a voluntarily-dismissed suit after the dismissal, *see, e.g., Williams v Southern Union Co.*, 364 S.W.3d 228, 235 (Mo. Ct. App. 2011); *State ex rel. Frets v. Moore*, 291 S.W.3d 805, 812 (Mo. Ct. App. 2009), or address the application of a specific law to the refiled action, *see, e.g., White v. Tariq*, 299 S.W.3d 1, 4 (Mo. Ct. App. 2009); *Wittman v. Nat'l Supermarkets, Inc.*, 31 S.W.3d 517, 520 (Mo. Ct. App. 2000). Such holdings do not establish that a voluntarily-dismissed action has no legal consequence whatsoever.

Given this, it is not enough—as Relator did here—simply to state generalizations and conclude that a voluntarily-dismissed action never has any effect on a refiled claim. Instead, the court must consider the context in which the question arises and determine the legal impact based on the language of the relevant statute or rule, the legislative intent, and

the underlying policy. As explained below, such a consideration demonstrates that a refiled claim seeking the same relief as one voluntarily-dismissed is not an independent action for purposes of Rule 51.05.

2. The Language and Purpose of Rule 51.05 Indicate that a Refiled Action Under the Savings Statute Is Not an Independent Action That Can Authorize Another Change of Judge Without Cause.

The right to a change of judge pursuant to Rule 51.05 applies only to an "independent" civil action. *See* Mo. Sup. Ct. R. 51.05(a) (identifying when certain actions are "independent" for purposes of the Rule). Although Relator does not acknowledge them, there are a number of cases that address whether actions are sufficiently independent to constitute a separate civil action for purposes of Rule 51.05. *See, e.g.*, *Grissom v. Grissom*, 886 S.W.2d 47, 55 (Mo. Ct. App. 1994); *Crain v. Missouri Pacific R.R.*, 640 S.W.2d 533, 535 (Mo. Ct. App. 1982); *State ex rel. Brault v. Kyser*, 562 S.W.2d 172, 174 (Mo. Ct. App. 1978); *State ex rel. Bd of Regents of Southwest Missouri State Univ. v. Bonacker*, 765 S.W.2d 341, 344-45 (Mo. Ct. App. 1989) (discussing cases). These cases demonstrate that the key inquiry is whether the second suit involves different parties, or different issues, or seeks different relief.

When the second suit or proceeding does not include any such differences—when it is between the same parties, based on the same issues, seeking the same relief, it is not an independent separate action that could authorize its own change of judge without cause. *See, e.g.*, *Grissom*, 886 S.W.2d at 55 (contempt hearing did not involve new issues or new relief and, therefore, was not a "civil action"); *Crain*, 640 S.W.2d at 535 (action with same case number was an independent action because it involved different parties,

raised new issues, and sought different relief): *Brault*, 562 S.W.2d at 174 (petition to terminate parental rights was separate proceeding because it raised a new issue and sought different relief). Thus, "a civil action, as that term is used in Rule 51.05, is an independent suit with new issues, new parties, and new relief which constitutes a final judgment reviewable by an appellate court." *Grissom*, 886 S.W.2d at 55; *cf. State ex rel. Richardson v. May*, 565 S.W.3d 191, 194-95 (Mo. banc 2019) (superseding indictment does not provide a second opportunity to file an application for a change of judge under comparable rule for criminal cases); *In re S.M.H.*, 160 S.W.3d 355, 359-60 (Mo. banc 2005) (petition to terminate parental rights is not an independent action for purposes of change-of-judge rule).

Applying that test here, an action that is voluntarily dismissed and then refiled under the savings statute is not an independent action for purposes of Rule 51.05. A refiled action necessarily involves, among other requirements, the same parties, the same issues, and the same requested relief. *See, e.g.*, *Centerre Bank of Kansas City, Nat. Ass'n v. Angle*, 976 S.W.2d 608, 616 (Mo. Ct. App. 1998) ("For a second action to come within the savings statute, it thus must embody the issues set forth in the original action."); *Foster v. Pettijohn*, 213 S.W.2d 487, 490–91 (Mo. 1948) (savings statute only applies where second suit brings the same cause of action against the same defendant); *see also Mackey v. Smith*, 438 S.W.3d 465, 471 (Mo. Ct. App. 2014) (same). By attempting to invoke the savings statute, Relator asserts that the 2019 claim is part of the same cause of action as the 2015 Suit. Given this, it is not an independent action, and Relator cannot obtain another change of judge.

This interpretation is also supported by the policies and restrictions incorporated into Rule 51.05. Courts long have recognized that the Rule is not intended to facilitate judge shopping or manipulative tactics and should not be applied to create inconvenience or absurdity. *See, e.g.*, *Burgett v. Thomas*, 509 S.W.3d 840, 846 (Mo. Ct. App. 2017); *Muhm v. Myers*, 400 S.W.3d 846, 849 (Mo. Ct. App. 2013) (noting that change of judge must be made early, before proceedings on the record, and that there is no justification for allowing a change of judge due to adverse rulings); *State ex rel. Burns v. Goeke*, 884 S.W.2d 60, 62 (Mo. Ct. App. 1994) (same); *Jenkins v. Andrews*, 526 S.W.2d 369, 373 (Mo. Ct. App. 1975) ("To permit appellants to disqualify the judge [after judge had partially heard the case], . . . would nullify the hearing which had been held, result in a deplication of the proceeding already undertaken and permit appellants to take advantage of a tentative expression of opinion by the trial judge on the matter submitted to avoid his action upon it. Such result is not required by Rule 51.05."). For this reason, there are strict time limits in the Rule to ensure that a change is made early in the proceedings and not after adverse rulings on substantive questions, and each party is limited to one change so that it does not become an exercise in delay. If a party wants to disqualify a judge after requesting its one change or after the time has run to do so, the party must meet the heavy burden of proving a cause for disqualification.

Relator's proposed interpretation of Rule 51.05 would severely undermine these policies and restrictions. As demonstrated by the proceedings here, a plaintiff faced with adverse rulings could avoid the impact of those rulings by voluntarily dismissing one count without prejudice, refiling pursuant to the savings statute, and requesting a change of judge

without proving cause. This would result in a number of consequences contrary to the purpose of Rule 51.05: (1) the plaintiff would be able to effectively obtain a change of judge without cause late in the proceedings—well past the time limits in Rule 51.05, thereby creating delay and a waste of resources; (2) a plaintiff could engage in blatant judge shopping and seek a change of judge in order to avoid the impact of adverse substantive rulings; (3) a plaintiff could obtain more than one change of judge as of right during the resolution of its cause of action; and (4) like Relator here is attempting to do, a plaintiff could circumvent the denial of a motion to disqualify a judge for cause. Finally, such an interpretation would also be fundamentally unfair to defendants because only plaintiffs are able to voluntarily dismiss and refile an action, and plaintiffs, therefore, would control the manipulation of Rule 51.05.

Based on many of these considerations, the Illinois Supreme Court held, under nearly identical circumstances, that a voluntarily-dismissed and refiled action is not a "civil action" authorizing a change of judge without cause under Illinois' comparable substitution of judge provision. *Bowman v. Ottney*, 48 N.E.3d 1080, 1085-87 (Ill. 2015). The facts and issue addressed in *Bowman* are remarkably similar to those before the Court here. The *Bowman* plaintiff voluntarily dismissed its action against the defendant without prejudice pursuant to Illinois' voluntary-dismissal statute after the trial court made adverse rulings on substantive issues. *Id.* at 1082. The plaintiff then refiled her action against the defendant in accordance with Illinois' savings statute, and the refiled suit was assigned to the same judge who had presided over the earlier proceedings. *Id.* The plaintiff then moved for a change of judge under Illinois' statutory provision authorizing one substitution of

judge without cause in a "civil action" if timely requested. Like here, the plaintiff argued that she was entitled to a change of judge because a case refiled under the savings statute is a "new and separate action," even though she would not have been entitled to such a change if the original suit had not been voluntarily dismissed.[2] *Id.* at 1083-84, 1086.

The Illinois Supreme Court disagreed. Much like Missouri law, the Court noted that even though the provision authorizing a substitution of judge as of right should be liberally construed, courts "will avoid a construction that would defeat the statute's purpose or yield absurd or unjust results." *Id.* at 1085. The Court then concluded that while refiled cases are considered new actions for some purposes, they should not be deemed a new case for purpose of the substitution of judge provision. *Id.* at 1086. To do so would allow a party to "judge shop" and would undermine the purpose of the provision. *Id.* at 1085-86. Thus, the Court held that the provision "must be read as referring to all proceedings between the parties in which the judge to whom the motion is presented has made substantial rulings with respect to the cause of action before the court." *Id.* at 1086. In other words, "[Plaintiff] cannot use the voluntary dismissal and refiling provisions to

[2] In *Bowman*, the plaintiff did not request a change of judge in the original suit, but the time allotted to do so had long since passed at the time the action was voluntarily dismissed. Therefore, like here, the *Bowman* plaintiff would have been precluded from obtaining a change of judge without proving cause if the suit had not been dismissed. *Bowman*, 48 N.E.3d at 1082 & 1087; 735 ILCS 5/2-1001(a)(2).

accomplish in the [later] suit what she was precluded from doing in the [earlier] suit." *Id.* at 1087.

The Court further found that interpretation consistent with the provision's reference to "any civil action" because the plaintiff had only a single cause of action against the defendant based on the operative facts. *Id.* at 1086. Finally, the Court explained that the plaintiff could have sought substitution for cause in either suit but would have had to satisfy a heavy burden. Allowing a plaintiff to avoid satisfying that burden through the mechanism of a voluntary dismissal and refiling would thwart the purpose of the statute. *Id.* at 1087. Thus, the Illinois Supreme Court addressed the interplay of statutes identical in all relevant respects to the statute and rules at issue here, applied similar interpretive principles as are applicable under Missouri law, and flatly rejected Relator's position. The same result should lie here.

3. Relator Has No Authority To Support Its Assertion That A "Refiled" Claim Is An Independent Action For Purposes of Rule 51.05.

Relator offers no authority in law or policy to support its assertion that a purportedly "refiled" action involving the same issues and same parties is an independent action under Rule 51.05. As noted above, Relator relies primarily on broad generalizations and cases that did not involve a request for a change of judge and Rule 51.05. For example, Relator relies heavily on *White v. Tariq*, 299 S.W.3d 1, 4 (Mo. Ct. App. 2009), but *White* simply addressed which version of a statute applied to a voluntarily-dismissed and refiled action. The Court of Appeals concluded that the version of the statute in effect at the time of refiling governed the claim. *Id.* Nothing in the Court's decision analyzed whether a trial court properly denied

an application for a change of judge under Rule 51.05, and the Court was not tasked with interpreting that Rule or the policies or intent encompassed therein. Moreover, nothing about the question before the Court in *White* involved a plaintiff attempting to gain a one-sided strategic advantage or to circumvent legal restrictions through voluntarily dismissing and refiling a claim seeking the same relief. *White*, therefore, is inapposite to both the legal issue and policy concerns raised herein.

Most of Relator's other cases are equally irrelevant. Much like *White*, the issue in *Wittman v. Nat'l Supermarkets, Inc.*, 31 S.W.3d 517, 520 (Mo. Ct. App. 2000), had nothing to do with Rule 51.05 or whether a supposedly "refiled" claim is an independent action. Rather, *Wittman* addressed the question of whether a refiled claim against a dissolved corporation was barred as untimely under the application of the Michigan corporate survival statute or whether that statute was tolled by a voluntary dismissal and refiling under the savings statute. *Id.* The Court of Appeals held that the survival statute was not tolled, and that the plaintiff's cause of action ceased to exist when the time allotted in the corporate survival statute expired. *Id.* And, *Williams v Southern Union Co.*, 364 S.W.3d 228, 235 (Mo. Ct. App. 2011), and *State ex rel. Frets v. Moore*, 291 S.W.3d 805, 812 (Mo. Ct. App. 2009), simply held that a trial court does not have jurisdiction to issue substantive rulings after a voluntary dismissal. Nothing in the courts' analyses in any of these cases offers insight into whether a refiled suit is an independent action for purposes of Rule 51.05.

Indeed, the only case Relator cites in the change-of-judge context is *Pender v. Pender*, 634 S.W.2d 244, 245-46 (Mo. Ct. App. 1982), but that case—which Relator did

not cite to the trial court—is also distinguishable. *Pender* arose in the unique area of family law and involved two "separate and independent" proceedings before and after dismissal of a motion to modify a child visitation decree. *Id.* In the first set of proceedings, both parties exercised their right to a change of judge, and the motion to modify was subsequently dismissed without prejudice. The mother then filed a new motion to modify and to suspend visitation, and the father—for the first time—moved for custody and requested attorneys' fees. The father also sought a change of judge, which was denied by the trial court. *Id.* The Court of Appeals reversed, reasoning that the first proceeding where the Father obtained a change of judge was separate and independent from the second proceeding after dismissal. *Id.*

This holding is of little relevance here, however, because of the factual and legal distinctions. Most tellingly, the second proceeding in *Pender* involved different issues and sought different relief, as the father asked for custody and attorney's fees for the first time. In addition, *Pender* involved successive motions to modify a visitation decree; it did not involve an action in which a claim was voluntarily dismissed and then a claim seeking the same relief was purportedly "refiled" under the savings statute. Thus, the Court's analysis and holding do not address whether the refiling of the same action under that statute is an independent civil action under Rule 51.05.

In sum, Relator has no relevant authority and offers no persuasive reason why a plaintiff should be able to circumvent the restrictions of Rule 51.05 by voluntarily dismissing a single count and refiling a claim seeking the same relief under the savings statute. The Rule's language and policy and relevant case law all support the opposite

conclusion: A refiled action that raises the same issues, between the same parties, and seeks the same relief is not an independent action authorizing another change of judge as a matter of right.

III. Relator's Application for Change of Judge was Properly Denied Because Relator Failed to Comply with the Requirements of Rule 51.05(c).

Relator also is not entitled to a writ because Relator's change-of-judge application was properly denied as it failed to comply with the applicable procedural requirements. Rule 51.05(c) mandates that "[a] copy of the application [for change of judge] and notice of the time when it will be presented to the court shall be served on all parties." Mo. Sup. Ct. R. 51.05(c). Rule 51.05, thus, "clearly requires notice and service upon the opposing party. Inasmuch as courts are bound to follow the rules provided them by the Missouri Supreme Court, it is not for this court to construe the rule to give it any other effect." *Sims v. Baer*, 732 S.W.2d 916, 920 (Mo. Ct. App. 1987). Further, "a party seeking a change of judge under Rule 51.05 is held to strict compliance with the procedures set forth in that rule." *Minor v. Minor*, 901 S.W.2d 163, 167 (Mo. Ct. App. 1995).

The required time for service of notice is also established in the Rules. Rule 51.05 does not identify a specific time, but Rule 43.01(g) states that "[w]hen provision is made for the time of filing papers and none is made for the time of service thereof, ***copies shall be served on the day of filing or as soon thereafter as can be done***." Mo. Sup. Ct. R. 43.01(g) (emphasis added). Thus, under the plain text of the Rules, Relator was required to serve BBD with a copy of its Application for Change of Judge on the day of filing or as soon as possible after filing.

Relator failed to comply with these simple Rules. Relator filed this case on February 27, 2019, but waited almost three months, until May 20, to request the issuance of a summons. Relator filed its Application for Change of Judge two days later, before the summons was issued. Relator served the summons and petition on BBD on May 29 but failed to serve its Application for Change of Judge along with the petition. BBD's undersigned counsel filed an entry of appearance on June 14, 2019, but Relator still failed to serve its Application on BBD's counsel. Thus, Relator did not serve its Application when it filed it, when it served the summons, or when BBD's counsel entered an appearance. Given the clear requirements in Rule 51.05 and the ease of service through email, Relator's failure to provide the requisite service and notice was inexcusable, and it has offered no justification.

BBD filed an Opposition to Relator's Application on June 18 that pointed out the procedural deficiencies in Relator's Application, and Relator then filed an "amended" Application the following week. Relator served BBD with a copy of the amended Application on June 26, which was the first time BBD was served a copy of either Application or the notice of hearing—over a month after the original filing. See BBD Exhibit 2. In the age of e-mail, serving a one-page motion a month after it was filed is not to do so "*as soon . . . as can be done*," as required by Mo. Sup. Ct. R. 43.01(g). Thus, Relator did not cure its procedural deficiencies by filing a so-called "amended" Application a month later, when it was forced to do so by BBD's Opposition.

This Court should use this opportunity to establish a bright line rule establishing that a party seeking a change of judge must serve its application upon all the non-movants

immediately after filing such application. This bright line rule is the only reasonable interpretation of Rule 51.05(c), which states that a "copy of the application and notice of the time when it will be presented to the court ***shall*** be served on all parties." Mo. Sup. Ct. R. 51.05(c) (emphasis added). This bright line rule, moreover, would ensure that all other parties are immediately notified of the filing of an application for change of judge, and it can be very easily applied by courts. Since Relator did not comply with the requirements of Rule 51.05(c), Relator is not entitled to a writ compelling Respondent to grant its change-of-judge application.

CONCLUSION

For the foregoing reasons, BBD respectfully requests that the Preliminary Writ of Mandamus be quashed and Relator's Petition for a Writ be denied.

January 16, 2020

Respectfully Submitted,

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RULE 84.06(c) CERTIFCATION

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief in Opposition complies with Rule 55.03, and with the limitations contained in Rule 84.06(b) I further certify that this brief contains 9,550 words, excluding the cover, this certificate, the signature block, and the Appendix, as determined by the Microsoft Word 2010 Word-counting system.

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2020, pursuant to Supreme Court Rule 103.08, I electronically filed the foregoing Brief in Opposition with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

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