

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.	)	
EAGER ROAD ASSOCIATES, L.L.C.	)	
	)	
Petitioner/Relator,	)	
	)	
v.	)	No. SC98072
	)	
HON. BRIAN H. MAY,	)	
JUDGE OF THE TWENTY-FIRST	)	
JUDICIAL CIRCUIT OF ST. LOUIS	)	
COUNTY, MISSOURI,	)	
	)	
Respondent.	)	

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

RELATOR'S REPLY BRIEF

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INTRODUCTION

Respondent advances two procedural arguments has reasons to quash the preliminary writ. Neither are meritorious. The first contention is that Relator's failure to provide the Court with a copy of the transcript along with its Application for Preliminary Writ is fatal. As Relator explains below, the argument is moot because the transcript has been provided and the transcript was not essential for a determination of the issue in question.

Respondent also argues that, because Relator's original Application for Change of Judge did not include a notice of hearing, the amended Application cannot be granted. Case law discussed below is clear that the failure to include a notice of hearing of an application for change of judge is not grounds for denial. Not only was the omission corrected in the amended Application but counsel for BBD attended the hearing.

As to the merits, Respondent concurs with Relator's position that a voluntarily dismissed case is deemed "as if it were never filed." However, Respondent then incorrectly argues that a change of judge is not allowed because of res judicata arising out of the manner in which BBD's counterclaim was terminated in the 2015 action. BBD has made such an argument in their pending Motion to Dismiss, but, as explained below, that issue is irrelevant to this writ proceeding.

RELATOR'S RESPONSE TO RESPONDENT'S "FACTUAL BACKGROUND"

Respondent does not refute the facts as set forth in Relator's Statement of Facts. Accordingly, those facts are deemed true.

Respondent instead added additional facts and focused on reasons why Relator has a motive for Respondent to be removed from this case. It is true that Relator sought to have Respondent recuse himself for cause in the 2015 Action based upon circumstances under which Relator believed Respondent's impartiality might reasonably be questioned. It is also true that Respondent entered many rulings adverse to Relator, including granting of summary judgment on four of the five counts in Relator's 2015 petition; which is presently the subject of a motion to transfer pending before this Court. That said, a party's motive in filing an application for change of judge pursuant to Rule 51.05 is not relevant to this proceeding. To the contrary, an application for change of judge under Rule 51.05 is a change of right.

In addition, Respondent erroneously asserts that Relator's payment of BBD's unpaid legal fees of approximately \$215,000 on the eve of trial of BBD's counterclaim constituted an admission that there was no overbilling by BBD, thus operating as res judicata as to Count I, which had been voluntarily dismissed well prior to that time. Relator made no such admission by its payment of unpaid legal fees. In fact, there were no admissions at all and there was no written settlement agreement. Instead, BBD dismissed all of its counterclaims with prejudice, including a quantum meruit claim in which they were seeking \$4 million in damages in spite of the fact that all fees were billed on an hourly basis. The voluntary dismissal of Count I and this refiled action concern approximately \$2.1 million of legal fees that were paid by Relator. Relator seeks the return of paid fees that were excessive and/or unnecessary, together with punitive damages. The Relator's request in Counts II-V was for damages Relator incurred as a

result of BBD's legal malpractice and related claims that pertained to the standard of care and the concealment of their errors.

LEGAL STANDARD

Respondent mistakenly declares that the standard for review in this writ proceeding is abuse of discretion. The cases relied upon by Respondent for this claim do not involve applications for change of judge premised upon Rule 51.05. The primary case cited by Respondent, *Burgess v. State*, 342 S.W.3d 325 (Mo. banc 2011), was a criminal case in which the court stated: "Rule 51.05, governing the procedure for change of judge, does not apply in a Rule 24.035 proceeding; however, due process concerns allow a movant to disqualify a judge on the grounds that the judge is biased and prejudiced against the movant." *Id.* at 328.

The plain language of Rule 51.05 makes it abundantly clear that the trial court has no discretion and that it must promptly sustain a properly filed application for change of judge. A plethora of cases makes this abundantly clear, including the case cited in Relator's Brief, *State ex rel. Manion v. Elliott*, 305 S.W.3d 462 (Mo. banc 2010). In addition, as this Court stated in *State ex rel. Cohen v. Riley*, 994 S.W.2d 546 (Mo. banc 1999), "Upon the filing of a proper, timely application under the rule, the court has no jurisdiction to do anything other than to grant the application and transfer the cause." *Id.* at 547.

ARGUMENT

Response to Point I

In his first point, Respondent argues a technicality that this writ proceeding should be quashed because the Relator did not comply with Rule 94.03 and provide this Court with a copy of the transcript when it filed the Application for Preliminary Writ. This argument is flawed for three reasons.

First, the rule itself provides that the Relator should include “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 ...” There is nothing in the transcript that is essential to an understanding of the issue presented here. Relator represented to this Court that the Amended Application for Change of Judge was denied because, in Respondent’s view, Relator had exhausted its one free right to a change under 51.05. There is nothing in the transcript that suggests otherwise.¹

Second, because abuse of discretion is not the applicable standard, Respondent’s reasoning to deny the application is not germane. The limited question that this Court is being asked to decide is whether the refiled action constitutes a new lawsuit for Rule 51.05 purposes. If it does, the application for change of judge must be granted. The trial court has no discretion.

Third, Respondent’s procedural argument was rendered moot when Respondent provided this Court with a copy of the transcript in response to Relator’s application for

¹ Also, there is nothing in the transcript that suggests the Amended Application for Change of Judge was denied because Relator failed to satisfy procedural requirements of Rule 51.05.

preliminary writ. Thus, this Court had a copy of the transcript at the time the Court entered their preliminary writ.

Response to Point II

The court's statements in *Jenkins v. Andrews*, 526 S.W.2d 369 (Mo. Ct. App. 1975), and *Burgett v. Thomas*, 509 S.W.3d 325 (Mo. banc 2011), about inconvenience and absurdity, to which Respondent refers in his brief, pertain to situations which either predated Rule 51.05, or involve situations in which an application for change of judge was not timely filed. That is not the situation in the case at bar.

Respondent relies upon *State ex rel. Burns v. Goeke*, 884 S.W.2d 60 (Mo. Ct. App. 1994), and *Muhm v. Myers*, 400 S.W.3d 846 (Mo. Ct. App. 2013), to support his argument that the right to a change of judge under Rule 51.05 is not without its limits. What Respondent fails to mention is the court's observation that "Jurisdiction would be lacking if the judge failed to disqualify himself upon a proper application. A proper application is by definition a timely application, so we must initially raise the issue of timeliness whether addressed by the parties or not." *State ex rel. Burns* at 61. Of course, in the context of this case, Relator's Amended Application for Change of Judge was timely and therefore also proper.

Respondent's reliance on the *Muhm* decision is also misplaced. That case involved motions to modify child custody which receives special treatment under Rule 51.05(a). This section of the Rule provides that, among other things, motions to modify child custody "are not independent civil actions unless the judge designated to rule on the

motion is not the same judge that ruled on the previous independent action.” Once again, that is not the situation here and it was that specific language in the Rule which drove the result in *Muhm*.

Respondent incorrectly relies upon the case of *Jenkins v. Andrews*, 526 S.W.2d 369, for the proposition that Rule 51.05 “should not be interpreted or applied to produce absurd or inconvenient results.” The issue in *Jenkins* was whether or not the application for change of judge was timely filed. The appellate court looked at the fact that the application was filed subsequent to a hearing on a motion for summary judgment where the judge voiced his inclinations that he might grant the motion and also provided the plaintiff an opportunity to amend their petition. The quoted language is mere dicta that is unrelated to the issue at hand and the case is inapplicable to the facts of this matter.

Respondent relies on *Felling v. Giles*, 47 S.W.3d 390 (Mo. Ct. App. 2001), to support the argument that Relator’s overbilling claim is barred by res judicata for improperly splitting a cause of action. Not only is that issue not presently before the court, the holding in *Felling* is not applicable to this case for several reasons. Also, because an application for change of judge under Rule 51.05 is automatic, the Court need not consider other judicial doctrines such as res judicata. Accordingly, Relator will not respond in any further detail to that argument.

In the same vein, Respondent argues that, because the current case is not an independent claim, Rule 51.05 is not available. This position is in stark contrast with *State ex rel. Eckelkamp v. Mason*, 314 S.W.3d 393 (2010). In this case, the plaintiffs filed a wrongful death action against Burlington Northern Santa Fe Railway Company. The

case was tried to a jury before Judge David Mason of St. Louis City Circuit Court. The jury returned a verdict apportioning 90% of fall to the plaintiff's decedent and 10% to the railroad, upon which Judge Mason in her judgment. The plaintiffs appealed the ruling and the court of appeals reversed and remanded due to an evidentiary error.

Upon returning the case to the circuit court, the presiding judge issued an order setting the case for trial, followed by an order assigning Judge Mason to the case. Six days later the plaintiffs filed an application for change of judge pursuant to Rule 51.05. At the hearing on the plaintiff's application, Judge Mason stated: "I can tell you now that there was never any intent, policy, plan, [or] motive of the Presiding Judge at any time to put this case in a random assignment mode. You can ask [the Presiding Judge] to put it on the record on that [sic], if you wish." *Id.* at p. 395.

Following the hearing, Judge Mason denied the application for change of judge on the basis that, as he was the original trial judge, there was no legal basis for "reinstating" plaintiffs' right to an automatic change of judge. The plaintiffs subsequently filed a motion for clarification with the presiding judge, who entered an order stating that the assignment to Judge Mason was random, stating in material part: "The way the ... docketing system works in the Twenty-Second Circuit, upon a remand from the Court of Appeals ... there's no specificity that it's remanded to Judge Mason in Division 17.... [H]istorically, remands don't go back to the same [j]udge.... [T]here's no question that it was a random assignment to Judge Mason. ... [I]f you look at the Local Rules ... we would treat this as almost a new file. I think it's actually given a new case number....

Under Local Rule 6.2.1, “after filing, the clerk shall assign each case triable by a jury to Division 1.” *Id.* at p. 396.

The plaintiffs request for a preliminary writ of prohibition was granted by the court of appeals. The writ was made permanent and Judge Mason was directed to grant the application for change of judge. In so doing, the court reasoned that the remanded case constituted a new filing by virtue of the random assignment of judges required by the local rules in effect. Because it was a new filing, the plaintiffs were entitled to the rights guaranteed under Rule 51.05 even though the same judge presided over the case when it was tried the first time and even though no change was taken previously.

By analogy, the same result is dictated here. When Relator refiled the overbilling case, it was considered a new action pursuant to §516.230. When the case was filed it was subject to St. Louis County Local Rule 6.3, which calls for the random assignment of all case filings with no exceptions for cases refiled following a dismissal without prejudice. Applying the rationale for the court’s holding in *Mason*, Realtor was entitled to its Rule 51.05 rights.

Response to Point III

The Respondent’s final argument is that the Amended Application for Change of Judge was fatally flawed due to a procedural defect-specifically the failure to provide a notice of hearing along with the original application. Their position is incorrect for two reasons. First, Respondent offers no explanation as to why the Amended Application for

Change of Judge, which corrected all of the procedural defects the defendants complained of, is ineffective or improper.

Secondly, Respondent overlooked or ignored the case of *State ex rel. Harry M. Stockman v. Frawley*, 470 S.W.3d 401 (Mo. Ct. App. E.D. 2015). In that case, one of the parties filed a timely application for change of judge but did not include a notice of hearing. The trial court set the application for hearing *sua sponte* and both parties appeared. The trial court denied the application on the basis that it was untimely and because of the failure to file a notice of hearing. The party who sought the change of judge sought and obtained a preliminary order of prohibition from the court of appeals. The writ was made permanent.

The *Stockman* court initially found that the application was timely under Rule 51.05. The court then addressed the legal effect of the failure to serve a notice of hearing as required by Rule 51.05 (c). In that regard, the court stated: “Relator’s failure to comply with Rule 51.05(c) is not fatal to his application. That provision requires the filing party to also serve notice of the time when it will be presented to the court. The purpose of this requirement is to allow the opposing party the opportunity to contest the application. When the application is otherwise timely filed and timely served upon the opposing party and a hearing is held at which the opposing party had an opportunity to contest the application, the lack of notice is not a sufficient basis to deny the application. *State ex rel. Director of Revenue, State of Mo. v. Scott*, 919 S.W.2d 246, 248 (Mo. banc 1996). Such a thin procedural argument alone cannot defeat such a significant right.” *Id.* at p.405 (*internal quotation marks omitted*).

In this case, although Relator's original Application for Change of Judge did not include a notice of hearing, the amended application did. Further, even if this Court only looks to the original application to determine compliance with Rule 51.05, defense counsel appeared at and participated in the hearing and achieved the result they desired. As with *Stockman*, this thin procedural argument alone cannot defeat Relator's significant rights. This argument is without merit.

CONCLUSION

Respondent has failed to come forward with any legally valid reason why Relator's Amended Application for Change of Judge should not be granted. The preliminary writ should be made absolute.

Dated: January 27, 2020.

Respectfully submitted,

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CERTIFICATE

I hereby certify that, in conformity with Rule 55.03(a), the original of this electronic filing was signed by me and will be maintained in my file. I further certify that on January 27, 2020, the foregoing was electronically filed through the Missouri Courts eFiling System and a true and accurate copy was served by U.S. Mail to:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this reply brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 2,845 words, according to Microsoft Word, which is the word

processing system used to prepare this brief.

/s/ David E. Larson

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