

Summary of SC92469, *State ex rel. St. Charles County, Missouri v. The Honorable Jon A. Cunningham*

Proceeding originating in St. Charles County, Judge Jon A. Cunningham

Argued and submitted Oct. 23, 2012; opinion issued Feb. 26, 2013, and modified on the Court's own motion April 30, 2013

Attorneys: The county was represented by St. Charles County Counselor Joann M. Leykam and Tobi J. Dible and Greg H. Dohrman of the county counselor's office in St. Charles, (636) 949-7540; and Laclede Gas Company was represented by Booker T. Shaw, Mary M. Bonacorsi, Carl J. Pesce and Paul D. Lawrence III of Thompson Coburn LLP in St. Louis, (314) 552-6000.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: This case originally was appealed to this Court after summary judgment was entered for the county. This Court reversed the judgment for the county and sent the case back to the trial court. The county then sought to dismiss the case. The trial court overruled the county's motion to dismiss, and the county seeks to compel dismissal in this Court. In a 4-2 decision written by Judge George W. Draper III, the Supreme Court of Missouri quashes its preliminary writ, determining the circuit court properly overruled the county's motion to dismiss filed pursuant to Rule 67.02. This Court's mandate technically was a general mandate. The case in the trial court involved competing motions for summary judgment (judgment on the pleadings), and a hearing on a motion for summary judgment is considered a trial for purposes of Rule 67.02 governing voluntary dismissals. Because the county did not file its motion to dismiss before that trial, the motion is untimely. Moreover, allowing the county to dismiss the case now would prejudice the other party, would waste judicial time and economy, and would thwart the intent of the rule.

Judge Zel M. Fischer dissents. As conceded by the principal opinion, this Court's prior opinion was a general remand because it gave no directions other than for the circuit court to have further proceedings in conformity with the opinion. The express terms of Rule 67.02 and cases interpreting it permit voluntary dismissal of a petition without leave of court until evidence has been introduced at trial. The county filed its voluntary dismissal before any summary judgment motion was granted against it, and there is no dispute that there never was any evidence introduced, nor was there ever a trial. Therefore, the dismissal was effective as of the filing date, depriving the circuit court of authority to take further action in the case.

Facts: St. Charles County filed a petition in September 2008 seeking a declaratory judgment as to whether the county or Laclede Gas Co. had to bear the cost of relocating Laclede's gas lines due to a county road project. Both parties filed motions for summary judgment (judgment on the pleadings). The circuit court entered judgment in the county's favor. On appeal, this Court reversed the judgment and remanded (sent back) the case. *St. Charles County v. Laclede Gas Co.*, 356 S.W.3d 137 (Mo. banc 2011). On the same day this Court's mandate issued (making the Court's decision final) and the case was remanded to the circuit court, the county filed a motion asking the circuit court to dismiss its case voluntarily pursuant to Rule 67.02. Laclede opposed

the motion, asking the court to issue judgment in accordance with this Court's opinion and mandate. The circuit court ultimately overruled the county's motion to dismiss the case, finding a voluntary dismissal was improper because the case previously was resolved by summary judgment. The county now asks this Court to make permanent its writ (order) prohibiting the circuit court from overruling the county's motion.

WRIT QUASHED.

Court en banc holds: Because the circuit court did not err in overruling county's motion to dismiss, this Court's preliminary writ is quashed.

(1) There are two types of remands: a general remand, which does not provide specific direction and leaves all issues open to consideration in a new trial; and a specific remand with directions, which requires the trial court to enter a judgment in conformity with the mandate. While the language of the opinion contemplates obligating the circuit court to enter a judgment in conformity with this Court's mandate, the remand technically was general, leaving all issues open to reconsideration, as there was no language dictating the next step for the circuit court to take. But this does not end the inquiry, as there were opposing summary judgment motions filed in the case. Allowing a simple dismissal at this stage would prejudice Laclede because the only way in which Laclede could seek a favorable ruling on its summary judgment motion would be to refile its own lawsuit, which wastes judicial time and economy. Further, this result is prohibited by the Court's rules providing that an appealable judgment following a summary judgment motion is the equivalent to a bench trial on the merits of the case.

(2) The county's attempt to dismiss its case voluntarily pursuant to Rule 67.02 fails because it was not filed before the introduction of evidence at trial and its assertions frustrate the purpose of the rule, impeding the orderly administration of justice. For the purposes of a voluntary dismissal under Rule 67.02, a hearing on a motion for summary judgment may constitute a trial before the court without a jury if it results in a disposition of the case on the merits. The disputed issues between the county and Laclede were litigated fully through summary judgment, which was appealed. Allowing the county to dismiss its case voluntarily after a determination of the law as set forth by an appellate court would thwart the intent of this Court's rules, would waste judicial resources and unjustly would tip the scales of justice in the county's favor.

Dissenting opinion by Judge Fischer: The author would apply the rule as written and make permanent this Court's preliminary writ.

(1) This Court's general remand gave no directions other than to have further proceedings in conformity with the opinion. The mandate does not add to or subtract from the opinion. Had this Court intended to grant summary judgment in Laclede's favor, this Court could have done so pursuant to Rule 84.14, but it did not.

(2) The result in this case is less important than this Court's obligation to follow the rules as they are written. Given the history of Rule 67.02 and cases interpreting it, voluntary dismissal pursuant to Rule 67.02(a)(2) is permitted without leave of court and is allowed until evidence has been introduced at the trial in a court-tried case. It is well-settled that a motion for summary

judgment – which sometimes may result in a judgment on the merits – is a pretrial motion. Because the county filed its voluntary dismissal before summary judgment was granted against it and before evidence was introduced at a trial, its voluntary dismissal was effective as of the filing date. Once the case was dismissed, the circuit court could take no further action, and any attempted action is viewed as a nullity.

(3) This Court has the constitutional authority to change the rules of procedure but rule changes do not take effect until six months after they are published. Judicial economy does not justify rule changes by judicial decision.