

TABLE OF CONTENTS

TABLE OF AUTHORITIES	4
I. INTRODUCTION	6
II. JURISDICTIONAL STATEMENT	6
III. STATEMENT OF FACTS	6
IV. POINT RELIED ON	
RELATOR IS ENTITLED TO AN ORDER DIRECTING RESPONDENT TO	
GRANT RELATOR’S AMENDED APPLICATION FOR CHANGE OF JUDGE	
BECAUSE RULE 51.01 MANDATES THE GRANTING OF AN APPLICATION	
FOR CHANGE OF JUDGE WHEN A CHANGE OF JUDGE WAS EXERCISED	
IN A PREVIOUS CASE THAT WAS DISMISSED WITHOUT PREJUDICE IN	
THAT THE REILING OF A CASE PURSUANT TO MISSOURI STATUTE §	
516.230 IS A NEW ACTION THAT ENTITLES A PARTY TO THE RIGHTS	
AFFORDED UNDER RULE 51.05	9
V. ARGUMENT	9
A. RELEVANT LEGAL STANDARDS	10
1. Missouri Supreme Rule 51.05	10
2. Rule 67.02(a)	11
3. § 516.230, RSMo (1939)	12
B. MANDAMUS IS THE APPROPRIATE REMEDY WHEN AN	
APPLICATION UNDER RULE 51.05 IS NOT GRANTED	12

C. THE AMENDED APPLICATION FOR CHANGE OF JUDGE
SATISFIED ALL REQUIREMENT OF RULE 51.05 12

D. RELATOR IS ENTITLED TO A RULE 51.05 CHANGE
OF JUDGE 13

VI. CONCLUSION 17

CERTIFICATE OF SERVICE AND COMPLIANCE 18

TABLE OF AUTHORITIES

Cases

<i>Davison v. Dairy Farmers of Am., Inc.</i> , 449 S.W.3d 81 (Mo. App. WD 2014)	12
<i>Kirby v. Gaub</i> , 75 S.W.3d 916 (Mo. App. S.D. 2002)	15
<i>Matter of Buford</i> , 577 S.W.2d 809 (Mo. 1979)	10
<i>Pender v. Pender</i> , 634 S.W.2d 244 (Mo. App. WD 1982)	9, 15
<i>State ex rel. Campbell v. Kohn</i> , 606 S.W.2d 399 (Mo. App. ED 1980).....	11
<i>State ex rel. Dir. of Revenue v. Scott</i> , 919 S.W.2d 246 (Mo. banc 1996)...	9, 11
<i>State ex rel. Ford Motor Co. v. Hess</i> , 738 S.W.2d 147 (Mo. App. ED 1987)	11
<i>State ex rel. Frets v. Moore</i> , 291 S.W.3d 805 (Mo. App. SD 2009)	11
<i>State ex rel. Manion v. Elliott</i> , 305 S.W.3d 462 (Mo. banc. 2010)	10
<i>State ex rel. Mountjoy v. Bonacker</i> , 831 S.W.2d 241 (Mo. App. SD 1992).....	11
<i>State ex rel. Wedemeier v. McKenzie</i> , 889 S.W.2d 99 (Mo. Ct. App. 1994)	12
<i>State ex rel. Wesolich v. Goeke</i> , 794 S.W.2d 692 (Mo. App. ED 1990)	11
<i>White v. Tariq</i> , 299 S.W.3d (Mo. App. ED 2009)	9, 13, 15
<i>Williams v. Southern Union Co.</i> , 364 S.W.3d 228 (Mo. App. WD 2011)...	11

Wittman v. Nat'l Supermarkets, Inc., 31 S.W.3d 517 (Mo. App. ED
 2000)..... 9, 11, 15

Statutes and Court Rules

Mo. Const. Article V, § 4.1 6

Missouri Supreme Court Rule 51.05 6,8,10,12,
 13,15,16,17

Missouri Supreme Court Rule 67.02(a) 6,7,11,13

§ 516.120, Rsmo 14, 15

§ 516.230, RSMo (1939) 6,8,12,13,
 15

§ 538.225, RSMo (1986) (Amended in 2005) 14, 15

§ 538.305, Rsmo (2005) 15

I. INTRODUCTION

This Writ proceeding involves the interplay between Supreme Court Rules 51.05 and 67.02 and § 516.230, RSMo (1939). The question presented is 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. Respondent ruled that Relator was precluded from taking a Rule 51.05 change under these circumstances. Relator contends that the refile of the lawsuit constituted a new action which entitles Relator to avail itself of Rule 51.05. Relator seeks a Permanent Order of Mandamus which directs Respondent to take no other action other than to grant Relator's application for change of judge.

II. JURISDICTIONAL STATEMENT

Upon application by Relator Eager Road Associates, LLC, this Court issued a Preliminary Writ of Mandamus on October 29, 2019. (App. 1) This Court has jurisdiction to adjudicate this matter pursuant to Article V, § 4 of the Missouri Constitution.

III. STATEMENT OF FACTS

In May of 2015, Relator filed a five-count petition in the Circuit Court of St. Louis County against its former attorneys Blitz, Bardgett & Deutsch, L.C. (hereinafter referred to as "Defendant"). The case was assigned case number 15SL-CC01543 and will be referred to herein as the "2015 Action". (App. A3).

Count I was a claim for overbilling. Counts II-V asserted claims of legal malpractice, breach of fiduciary duty, fraudulent concealment, and fraudulent misrepresentation, respectively. Along with their Answer Defendant filed a four-count counterclaim which sought payment of unpaid hourly-based legal bills of approximately \$215,000; as well as a claim for quantum meruit which was subsequently quantified at \$4M. (App. A35).

The 2015 Action was originally assigned to Judge Joseph L. Walsh, III. On June 16, 2015, Defendant filed an Application for Change of Judge, which was granted two days later and the matter was reassigned to Judge Tom W. DePriest, Jr. (App. A61). On July 16, 2015, Relator filed an Application for Change of Judge which was likewise granted, and the case was reassigned to Judge Barbara W. Wallace. (App. A62). Following Judge Wallace's retirement, the case was transferred to Respondent on January 9, 2017. (App. A63).

On July 24, 2017, Respondent entered an Order granting BBD's motion for summary judgment on Counts II-V. (App. A64). Trial on ERA's Count I overbilling claim and Defendant's counterclaim was scheduled to begin March 12, 2018. Count I was voluntarily dismissed without prejudice by Relator pursuant to Rule 67.02 on February 28, 2018. (App. A78). Defendant's counterclaim was dismissed with prejudice on March 12, 2018. (App. A80).

The dismissal of the Counterclaim rendered the summary judgment order on Counts II-V final for purposes of appeal. Relator filed a Notice of Appeal on April 6, 2018.¹ (App. A81).

The instant case (the “2019 Action”) was timely filed against Defendant on February 27, 2019, pursuant to MO. REV. STAT. § 516.230, and was assigned to Respondent.² (App. A99). Service was requested on May 20, 2019.

On May 22, 2019, Relator filed an Application for Change of Judge pursuant to Rule 51.05. (App. A104). On June 18, 2019, Defendant filed an opposition to the application, alleging several technical violations but also arguing that Relator had exhausted its one change of judge under Rule 51.05 in the previously dismissed 2015 Action. (App. A105).

Relator filed an Amended Application for Change of Judge on June 26, 2019, which cured all alleged technical defects, leaving only the question of whether Relator was precluded from seeking a change of judge because it had done so previously in the 2015 Action. (App. A112).

The Amended Application for Change of Judge was denied by Respondent on July 8, 2019 on the basis that Relator could not seek a change of judge in the 2019 Action because it had exercised its one Rule 51.05 change of judge in the 2015 Action. (App. A114).

¹ The Eastern District Court of Appeals affirmed the trial court's order. A Motion for Transfer to this Court was filed on November 29, 2019 and Defendant was directed to file a response, which they did on December 20, 2019.

² St. Louis County Local Rule 6.3 states that civil cases “shall be assigned by the Circuit Clerk in a random equal basis.”

IV. POINT RELIED ON

RELATOR IS ENTITLED TO AN ORDER DIRECTING RESPONDENT TO GRANT RELATOR'S AMENDED APPLICATION FOR CHANGE OF JUDGE BECAUSE RULE 51.01 MANDATES THE GRANTING OF AN APPLICATION FOR CHANGE OF JUDGE WHEN A CHANGE OF JUDGE WAS EXERCISED IN A PREVIOUS CASE THAT WAS DISMISSED WITHOUT PREJUDICE IN THAT THE REILING OF A CASE PURSUANT TO MISSOURI STATUTE § 516.230 IS A NEW ACTION THAT ENTITLES A PARTY TO THE RIGHTS AFFORDED UNDER RULE 51.05

White v. Tariq, 299 S.W.3d (Mo. App. ED 2009)

Pender v. Pender, 634 S.W.2d 244 (Mo. App. WD 1982)

Wittman v. Nat'l Supermarkets, Inc., 31 S.W.3d 517 (Mo. App. ED 2000)

State ex rel. Dir. of Revenue v. Scott, 919 S.W.2d 246 (Mo. banc 1996)

V. ARGUMENT

REALTOR IS ENTITLED TO AN ORDER DIRECTING RESPONDENT TO GRANT RELATOR'S AMENDED APPLICATION FOR CHANGE OF JUDGE BECAUSE RULE 51.01 MANDATES THE GRANTING OF AN APPLICATION FOR CHANGE OF JUDGE WHEN A CHANGE OF JUDGE WAS EXERCISED IN A PREVIOUS CASE THAT WAS DISMISSED WITHOUT PREJUDICE IN THAT THE REILING OF A CASE PURSUANT TO MISSOURI STATUTE § 516.230 IS A NEW ACTION THAT ENTITLES A PARTY TO THE RIGHTS AFFORDED UNDER RULE 51.05

Relator challenges the Respondent's denial of the Amended Application for Change of Judge and seeks an order in mandamus from this Court directing Respondent to grant Relator's Amended Application for Change of Judge. The legal reasons for the challenge to Respondent's action and the legal reasons that support the challenge are set forth below.

A. RELEVANT LEGAL STANDARDS

1. Missouri Supreme Rule 51.05

Missouri Supreme Court Rule 51.05 entitles a party to take a change of judge in any civil action upon timely application. Parties in each class are limited to one change. The judge is required by rule to promptly sustain a timely application for change upon its presentation.

As stated by this Court, "Rule 51.05 provides for a change of judge, without cause, if a defendant timely files an application for change of judge." *State ex rel. Manion v. Elliott*, 305 S.W.3d 462, 463 (Mo. banc. 2010).

"We want it clearly understood, however, that in Missouri a party has a right to disqualify the trial judge one time. No judge has any right to impede, forestall, or delay sustaining a motion for change of judge when it is timely filed in proper form and presented to the court. And this is so regardless of what the judge may think the movant's motives may be. In short, a party's motives have nothing to do with the matter. Nor is it of any consequence that the judge may feel personally slighted by the motion. His duty is to sustain it if it is in proper order." *Matter of Buford*, 577 S.W.2d 809, 828 (Mo. 1979).

This Court and the intermediate appellate courts have also repeatedly held that the right to seek a change of judge is to be broadly construed and applied. In fact, this Court declared that the right to a change of judge, when executed timely, is “virtually unfettered.” *State ex rel. Dir. of Revenue v. Scott*, 919 S.W.2d 246, 247–48 (Mo. banc 1996) (citing *State ex rel. Mountjoy v. Bonacker*, 831 S.W.2d 241 (Mo. App. SD 1992)).

“The right to disqualify a judge is one of the keystones of our legal administrative edifice. It is vital to public confidence in the legal system that decisions of the court are not only fair, but also appear fair. Thus, whether the disqualification of a judge hinges on a statute or on a rule, we adhere to the liberal construction of that statute or rule in favor of the right to disqualify. A liberal construction is necessary if we wish to promote and maintain public confidence in the judicial system.” *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 694-95 (Mo. App. ED 1990) (emphasis added) (internal quotations omitted) (citing *State ex rel. Ford Motor Co. v. Hess*, 738 S.W.2d 147, 148 (Mo. App. ED 1987); *State ex rel. Campbell v. Kohn*, 606 S.W.2d 399, 401 (Mo. App. ED 1980)).

2. Rule 67.02(a)

Missouri Supreme Court Rule 67.02 (a) permits a plaintiff to dismiss a civil action without prejudice any time prior to the swearing of the jury panel. A dismissal under Rule 67.02(a) “wipe[s] the slate clean”, *Williams v. Southern Union Co.*, 364 S.W.3d 228, 235 (Mo. App. WD 2011), and “it is as if the suit were never brought.” *State ex rel. Frets v. Moore*, 291 S.W.3d 805, 812 (Mo. App. SD 2009). “A voluntary dismissal without prejudice renders that cause of action a nullity; it is treated as never having been filed.” *Wittman v. Nat'l Supermarkets, Inc.*, 31 S.W.3d 517, 520 (Mo. App. ED 2000).

3. § 516.230, RSMo (1939)

§ 516.230 is commonly referred to as the Missouri Savings Statute. It provides in relevant part that a plaintiff may commence a *new action* within one year after a nonsuit. “The term ‘nonsuit,’ as used in § 516.230, includes a voluntary dismissal without prejudice of an action by a plaintiff.” *Davison v. Dairy Farmers of Am., Inc.*, 449 S.W.3d 81, 84 (Mo. App. WD 2014).

ERA filed the current claim for overbilling within one year of dismissing the claim without prejudice.

B. MANDAMUS IS THE APPROPRIATE REMEDY WHEN AN APPLICATION UNDER RULE 51.05 IS NOT GRANTED

A writ of mandamus lies when a judge, upon proper application for disqualification, fails to disqualify himself. *State ex rel. Wedemeier v. McKenzie*, 889 S.W.2d 99 (Mo. Ct. App. 1994)³.

C. THE AMENDED APPLICATION FOR CHANGE OF JUDGE SATISFIED ALL REQUIREMENTS OF RULE 51.05

Relator’s Amended Application for Change of Judge was filed within 60 days of service on the defendant. A copy of the Application was served on defendant’s counsel that included the date and time when the Application would be presented to the court. Thus, all of the procedural requirements of Rule 51.05 were satisfied.

³ Relator’s original writ petition sought a writ of prohibition. This Court’s Preliminary Writ was for Mandamus.

D. RELATOR IS ENTITLED TO A RULE 51.05 CHANGE OF JUDGE

As stated above, Rule 51.05 allows, in any civil action, a one-time opportunity for every party in a particular class to take a change of judge without cause. Rule 67.02 allows a plaintiff to voluntarily dismiss a lawsuit without prejudice and §516.230 permits the plaintiff to refile the previously dismissed lawsuit within one year.

The issue of law presented in this writ proceedings is whether a Rule 51.05 change of judge taken in a case which is voluntarily dismissed without prejudice serves as the one change of right; thus, barring a party from taking a change when the case is refiled pursuant to §516.230. The case law from Missouri's appellate courts construing the savings statute clearly requires that a lawsuit refiled under the statute must be treated as an entirely new civil action, which necessarily includes the right for both parties to exercise a change of judge under Rule 51.05.

First and foremost, §516.230 expressly states that a case refiled following a dismissal without prejudice is a "new action". This fits squarely with the cases which characterize a voluntarily dismissed case as one that was never brought—a nullity—and that never existed. A suit that was "never brought" cannot have implications on a later refiled suit as long as the requirements of §516.230 are met, as they were here.

A case from the Eastern District Court of Appeals unequivocally reinforces these well-established principles. *White v. Tariq*, 299 S.W.3d (Mo. App. E.D. 2009), was a medical malpractice action. The plaintiffs originally filed the lawsuit in 2000. When the case was filed, the plaintiffs were required to file an affidavit with the court within 90 days of filing (which for good cause shown can be extended an additional 90 days) in

which counsel for plaintiff states that “he or she has obtained the written opinion of a legally qualified health care provider which states that the defendant health care provider failed to use such care as a reasonably prudent and careful health care provider would have under similar circumstances and that such failure to use such reasonable care directly caused or directly contributed to cause the damages claimed in the petition.” § 538.225.1(1986). The same statute also provided that if the plaintiff or his attorney fails to file such an affidavit, “the court *may*, upon motion of any party, dismiss the action against such moving party without prejudice.” § 538.225.5 RSMo (2000).

The plaintiffs voluntarily dismissed the case without prejudice in 2006. The case was refiled in 2007 within the one-year savings period provided by § 516.120. As of the time the case refiled, § 538.225.5 had been amended. The new version of this section, which went into effect in 2005, stated: “If the plaintiff or his attorney fails to file such affidavit the court *shall*, upon motion of any party, dismiss the action against such moving party without prejudice.” § 538.225.6 RSMo (2005).

More than 180 days after the refiling of the lawsuit, plaintiffs filed the required health care affidavit, which prompted the defendant to file a motion to dismiss. The trial court dismissed the case without prejudice, although that ruling was tantamount to a dismissal with prejudice because of the prior voluntary dismissal.

The plaintiffs appealed, arguing that the version of § 538.225 that was in effect when their initial lawsuit was filed in 2000 should control the new case filed in 2006. If the 2005 version of the law governed, dismissal was mandatory. Thus, the question was whether the 2006 action related back to the date of the original filing or whether the 2006

case constituted a new action. The Court of Appeals concluded it was the latter, stating in relevant part:

“Although Plaintiffs filed their original action in 2000, Plaintiffs voluntarily dismissed that action without prejudice. A voluntary dismissal without prejudice renders that cause of action a nullity; it is treated as never having been filed. *Wittman v. Nat'l Supermarkets, Inc.*, 31 S.W.3d 517, 520 (Mo. App. E.D. 2000). Plaintiffs filed their second action in 2007 pursuant to the “savings” statute of Section 516.230, which extends the time to “commence a new action” one year after a plaintiff suffers a “nonsuit.” Mo.Rev.Stat. § 516.230 (2000); *Kirby v. Gaub*, 75 S.W.3d 916, 918 (Mo. App. S.D. 2002)(voluntary dismissal without prejudice is a “species of nonsuit” under Section 516.230). Because Plaintiffs’ “new action” was filed after August 28, 2005, the trial court did not err in applying the 2005 amendments to Section 538.225.” *Id. at p. 4.*

The Court further based its conclusion on the fact that, per § 538.305 (2005), the amendments to the law that went into effect in 2005 were to apply to all causes of action filed after August 28, 2005. *Id.*

Because the refiled action in *White* was a “new action”, the plaintiffs suffered the harshest outcome possible: a dismissal of their case. Thus, it must be concluded that a case refiled pursuant to §516.120 is a new action for all purposes, including the application of Rule 51.05.

Pender v. Pender, 634 S.W.2d 244 (Mo. App. WD 1982), is also instructive. In *Pender*, divorced parents were disputing the custody arrangements for their minor child. During the proceedings, both parents sought and obtained a change of judge under Rule

51.05. The modification action was later dismissed by the newly appointed judge, and the mother filed a new motion to modify the visitation provisions in the decree of dissolution. During the pendency of this new motion, the father moved again to change judge under Rule 51.05, but was denied. Father appealed.

The Western District Court of Appeals concluded that the father's two applications for change of judge occurred in separate actions. In describing the mother's position, the court stated: "The mother does not disagree that the application for change of judge was brought within the time of Rule 51.05(b). The mother contends only that to treat the successive motions (the motion dismissed and then the motion brought anew and adjudicated) as separate and independent civil actions "glorifies form over substance" and distorts the efficacy of the change of judge rule. The mother contends, rather, that the successive motion was in effect nothing more than an amendment of the dismissed motion but in the same civil action, so that the change of judge induced by the father on the first motion exhausted the allowance to that party under Rule 51.05." *Id at pp. 245–46.*

The court rejected the mother's argument, holding instead that the later action as "an altogether new civil action, it entitled a party anew to the prerogative of the Rule 51.05 change of judge procedure." *Id. at p.246.* As such, the lower court "had power only to sustain the application promptly and to take those steps for a successor prescribed by Rule 51.05(e)." *Id.* The case was remanded with instructions to sustain the application for change of judge.

Accordingly, any new action entitles a party to exercise its rights under Rule 51.05. Because Relator's refiling of the overbilling claim constituted a new action. Relator was entitled anew to the prerogative of the Rule 51.05 change of judge procedure.

VI. CONCLUSION

For the foregoing reasons, the Preliminary Writ of Mandamus should be made permanent and Respondent should be directed by this Court to take no other action in this case other than to grant Relator's Application for Change of Judge.

Dated: December 27, 2019.

Respectfully submitted,

McCARTHY, LEONARD &
KAEMMERER, L.C.

By: /s/Brian E. McGovern
Brian E. McGovern #34677
bmcgovern@mlklaw.com
825 Maryville Centre Drive, Suite 300
Town & Country, MO 63017
314-392-5200
314-392-5221 (fax)

MARTIN, PRINGLE, OLIVER,
WALLACE & BAUER, L.L.P.

By: /s/David E. Larson
David E. Larson MO #27146
B. Scott Tschudy MO #46736
One Main Plaza
4435 Main Street, Suite 920
Kansas City, MO 64111
T: 816-753-6006
F: 816-502-7898
E:delarson@martinpringle.com
E:bstschudy@martinpringle.com

Attorneys for Petitioner/Relator

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 December 27, 2019, the foregoing was electronically filed through the Missouri Courts eFiling System and a true and accurate copy was served by U.S. Mail to:

Honorable Brian H. May
Judge of the Circuit Court
Division 1
Courts Building, Fl. 3 North
105 S. Central Ave.
Clayton, MO 63105
314-615-1501
Respondent

James F. Bennett
Carlos Marin
Dowd Bennett LLP
7733 Forsyth Blvd., Suite 1900
St. Louis, MO 63105
jbennett@dowdbennett.com
cmarin@dowdbennett.com
Attorneys for Respondent

/s/ David E. Larson
David E. Larson

CERTIFICATION: RULE 84.06(c)

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

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 3,397 words, according to Microsoft Word, which is the word

processing system used to prepare this brief.

/s/David E. Larson
David E. Larson