SD35173

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

IN THE MARRIAGE OF:

MACKENZIE EVERETT SPEIR,
Appellant,

vs.

JESSICA LYNN SPEIR,
Respondent.

On Appeal from the Circuit Court of St. Clair County
Honorable Jerry Rellihan, Associate Circuit Judge
Case No. 12SR-DR00096-01

BRIEF OF THE APPELLANT

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Preliminary Statement

Judge Dawson dissolved the parties' marriage in 2013, and then retired a year later. When Wife moved to modify the custody and support provisions of the dissolution judgment in September 2016, Judge Rellihan was assigned to hear the modification case.

On October 24, 2016, 19 days after being served Wife's motion to modify, Husband moved for an automatic change of judge under Rule 51.05. Judge Rellihan denied the motion as "untimely". He then went on to hear all further proceedings in the modification case, ultimately entering a judgment granting Wife's motion to modify, changing custody of the parties' two children from joint legal and joint physical to sole legal and sole physical with Wife, and raising Husband's child support from $250 to $739 per month.

Denying Husband's Rule 51.05 motion for change of judge was error. As Judge Rellihan was not the same judge who ruled on the parties' dissolution, and Husband filed his motion within 60 days of service on him of Wife's motion to modify, the law of Missouri is that his motion for change of judge was timely. Judge Rellihan had no power to do anything other than grant it and order a change of judge, and all actions he took in the modification case after October 24, 2016 are void as a matter of law.

This Court should reverse the trial court's judgment, vacate all orders the trial court entered after October 24, 2016, and remand this case for new proceedings before a new judge, including both discovery and trial, setting this case back to the state it was in when the trial court erroneously denied Husband's Rule 51.05 motion.

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of St. Clair County modifying the previous judgment that dissolved the parties' marriage.

This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction, and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in St. Clair County. Under § 477.060, R.S.Mo., venue lies in the Southern District.

Statement of Facts

In September 2013 in Case No. 12SR-DR00096 ("the Dissolution"), the Honorable Michael Dawson, Associate Circuit Judge of the Circuit Court of St. Clair County, entered a judgment dissolving the marriage of Appellant Mackenzie Speir ("Husband") and Respondent Jessica Speir ("Wife") (L.F. 7; Appx. A22).

The Dissolution judgment divided the marital estate, granted the parties joint legal and joint physical custody of their two children, and ordered Mr. Speir to pay $250 per month in child support (L.F. 7-22; Appx. A22-37). Neither party sought any post-judgment relief, and neither party appealed from the judgment (L.F. 6).

More than a year after the Dissolution judgment was entered, a docket entry appears in the Dissolution on December 31, 2014 stating, "Judge Jerry Rellihan assigned to case" (L.F. 6).[1]

Nearly two years later, on September 28, 2016, Wife moved to modify the Dissolution judgment's custody and support provisions (L.F. 36). Her motion was filed as Case No. 12SR-DR00096-01 ("the Modification"), and Judge Rellihan was assigned to hear it (L.F. 24-25).

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[1] While the record does not say precisely why Judge Dawson was replaced, it was because he did not seek re-election, retired effective December 31, 2014, and was succeeded in office by the Honorable Jerry Rellihan, who won the election. The Dissolution docket notes that Judge Dawson was "no longer in office/position" as of that date (L.F. 1).

Process of Wife's motion to modify was served on Husband on October 5, 2016 (L.F. 50; Appx. A38). 19 days later, on October 24, 2016, counsel entered his appearance for Husband and moved for a change of judge under Rule 51.05 (L.F. 25-26, 51; Appx. A39). At a hearing the next day, Judge Rellihan said he believed the motion was untimely because, "the way I read Rule 51.05(b) is the application must be filed prior to any appearance before the trial judge", and counsel for Husband had appeared before Judge Rellihan the day before (Tr. 5). The court then denied Husband's motion for change of judge as "untimely" (L.F. 52; Appx. A40). Husband's counsel moved the court to reconsider on November 1 (L.F. 54), but on November 9 the court again refused a change of judge (L.F. 61).

Thereafter, with Judge Rellihan presiding over all proceedings, the court heard pretrial proceedings, oversaw discovery, entered pretrial orders, heard the trial in July 2017, and ultimately entered judgment on July 27, 2017 (L.F. 24-35, 53, 70-71, 85, 107-08, 112, 117, 118-19, 122; Tr. 12-75; Appx. A1). This included:

- Ordering Husband incarcerated (L.F. 53);
- Withdrawing the order for incarceration but ordering Husband to pay Wife $1,000 in attorney fees (L.F. 70-71, 85);
- Awarding Wife temporary custody of the children (L.F. 29);
- Granting motions to compel, which collectively ordered Husband to pay Wife an additional $1,500 (L.F. 107-08, 118);
- Appointing a guardian ad litem and ordering Husband to deposit $500 for her services (L.F. 112, 119); and

- Allowing Husband's attorney to withdraw (L.F. 117).[2]

Ultimately, in the judgment, the court sustained Wife's motion to modify, granted Wife sole legal and sole physical custody of the children, and ordering Husband to pay $739 per month in child support (L.F. 127-28, 134; Appx. A6-7, A13).

Husband then timely moved the court for a new trial on August 15, 2017, explaining that the denial of the motion for change of judge was error, the motion had been timely, and consequently all orders entered in the case after October 24, 2016, were void (L.F. 34-35, 143-54). The trial court took no action on that motion after 90 days, and Husband timely appealed to this Court (L.F. 34-35, 156).[3]

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[2] Husband went to trial *pro se* (L.F. 121; Tr. 12, 74). The court noted Husband technically was "in default … for failing to abide by" its previous orders to pay money and provide discovery, but it nonetheless allowed the case to come "on for a hearing on the merits, and not a hearing by default" (L.F. 122; Appx. A1).

[3] Husband's notice of appeal filed October 10, 2017, was premature. But it became effective on November 13, 2017, 90 days after the motion for new trial was filed, upon which the motion was denied, and the judgment became final for appeal. Rules 81.05(a)(2)(A) and (b).

Point Relied On

The trial court misapplied the law in denying Husband's Rule 51.05 motion for change of judge, making all actions it took after he filed that motion void as a matter of law *because* under Rule 51.05, when the judge assigned to a dissolution modification case is not the same one who ruled on the original dissolution, any party has 30 days from designation of that new judge or 60 days from service of the motion to modify, whichever is later, in which to move for a change of judge, if filed within that period the judge must grant that motion and has no authority to take any further action in the case, and any actions the judge takes other than granting that motion are void as a matter of law *in that* the Honorable Michael Dawson ruled on the parties' dissolution, the Honorable Jerry Rellihan was assigned to hear Wife's motion to modify filed September 28, 2016, Husband was served with Wife's motion to modify on October 5, 2016, and Husband timely filed his Rule 51.05 motion for change of judge 19 days later on October 24, 2016.

State ex rel. Kramer v. Walker, 926 S.W.2d 72 (Mo. App. 1996)

Wilson v. Sullivan, 967 S.W.2d 225 (Mo. App. 1998)

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

State ex rel. Delgado v. Merrell, 86 S.W.3d 468 (Mo. App. 2002) (S.D. en banc)

Rule 51.05

Argument

The trial court misapplied the law in denying Husband's Rule 51.05 motion for change of judge, making all actions it took after he filed that motion void as a matter of law *because* under Rule 51.05, when the judge assigned to a dissolution modification case is not the same one who ruled on the original dissolution, any party has 30 days from designation of that new judge or 60 days from service of the motion to modify, whichever is later, in which to move for a change of judge, if filed within that period the judge must grant that motion and has no authority to take any further action in the case, and any actions the judge takes other than granting that motion are void as a matter of law *in that* the Honorable Michael Dawson ruled on the parties' dissolution, the Honorable Jerry Rellihan was assigned to hear Wife's motion to modify filed September 28, 2016, Husband was served with Wife's motion to modify on October 5, 2016, and Husband timely filed his Rule 51.05 motion for change of judge 19 days later on October 24, 2016.

Standard of Review

As this case was tried by a court, rather than a jury, the judgment below will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Interpretation of the Supreme Court's Rules is a question of law reviewed *de novo*, using the same principals for interpreting statutes. *State v. Ford*, 351 S.W.3d 236, 237 (Mo. App. 2011). The Supreme Court's intent is determined from the rule's language, with the words used given their plain, ordinary meaning. *Id.*

* * *

Rule 84.04(e) Preservation Statement

Husband raised this issue by moving for a change of judge under Rule 51.05, which was denied as "untimely" (L.F. 51-52). Under Rule 78.07(c), nothing further was required in this judge-tried case to preserve this issue.

Nonetheless, Husband moved the court to reconsider its order denying his motion for change of judge, arguing it was timely, which the court also denied (L.F. 54, 61). After judgment, he moved for a new trial, again arguing the motion for change of judge was timely, had to be granted, and denying it was reversible error (L.F. 143-54). The trial court made no ruling on that within 90 days (L.F. 34-35), deeming it denied. Rule 81.05(a)(2)(A).

* * *

A. Summary

The trial court erred in denying Husband's Rule 51.05 motion for change of judge filed on October 24, 2016. As Judge Rellihan was not the same judge who ruled on the parties' dissolution, and Husband's motion was made within 60 days of service of Wife's motion to modify, the law of Missouri is that his motion for change of judge was timely. The trial court had no power to do anything other than grant it and order a change of judge, and all actions it took after October 24, 2016 are void as a matter of law.

This Court should reverse the trial court's judgment, vacate all orders the trial court entered after October 24, 2016, and remand this case for new proceedings before a new judge, setting this case back to the state in which it was when the trial court erroneously denied Husband's Rule 51.05 motion.

Rule 51.05(a)-(b) provides a "change of judge ***shall*** be ordered in any civil action upon the timely filing of a written application therefor by a party … within 60 days from service of process or 30 days from the designation of the trial judge, whichever time is longer." (Emphasis added) (Appx. A41). If the party timely has filed this, "The judge promptly ***shall*** sustain" it. *Id.* at (e) (emphasis added) (Appx. A41). "Shall" is mandatory language. *City of Cottleville v. Am. Topsoil, Inc.*, 998 S.W.2d 114, 117 (Mo. App. 1999).

So, under Rule 51.05, "a civil litigant has a virtually unfettered right to disqualify a judge without cause on one occasion," meaning that "presentation of a timely application for change of judge requires a prompt change of judge." *State ex rel. Walters v. Schaeperkotter*, 22 S.W.3d 740, 742 (Mo. App. 2000). "As long as the filing of an application under Rule 51.05 is proper and timely, a trial court has no jurisdiction[4] to do anything except grant the application and transfer the cause." *State ex rel. Riggleman v. Briscoe*, 203 S.W.3d 239, 240 (Mo. App. 2006).

The "right to disqualify" under Rule 51.05 "is a keystone of our judicial system, and Missouri courts follow a liberal rule construing it." *Walters*, 22

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[4] While pre-2009 decisions referred to this as "jurisdictional," due to the Supreme Court's clarification of "subject-matter jurisdiction" in *J.C.W. ex rel. Webb v. Wyciskalla*, 279 S.W.3d 249 (Mo. banc 2009), this Court subsequently has clarified that, "rather than lacking jurisdiction," after the timely, proper filing of a Rule 51.05 motion, "the trial judge instead lack[s] authority" to do anything except grant the motion and recuse him- or herself. *Charron v. Mo. Bd. of Probation & Parole*, 373 S.W.3d 26, 29 (Mo. App. 2012).

S.W.3d at 742. "Liberal construction" means that a statute's benefits must be extended to the largest possible class of applicants and the denial of those benefits must be decreased to the smallest possible class. *Cox v. Copeland Bros.*, 589 S.W.2d 55, 61 (Mo. App. 1979).

The law of Missouri is that Husband's October 24, 2016, Rule 51.05 motion for change of judge filed in the Modification was timely and proper. Judge Rellihan was not the judge who ruled on the Dissolution (L.F. 11; Appx. A26), so under Rule 51.05(a) the Modification is the same as any new civil action. *State ex rel. Kramer v. Walker*, 926 S.W.2d 72, 74 (Mo. App. 1996) (Stith, J). This means any party had "60 days from service of process or 30 days from the designation of the trial judge, *whichever time is longer*," in which to seek a change of judge in the Modification. Rule 51.05(b) (emphasis added) (Appx. A41).

Husband was served Wife's motion to modify on October 5, 2016 (L.F. 50; Appx. A38), and so had 60 days – until December 5, 2016 – in which move for a change of judge. He did so on October 24, 2016 (L.F. 51; Appx. A39).

Nonetheless, the court denied Husband's motion as "untimely" (L.F. 52; Appx. A40). This was reversible error. *Cover v. Robinson*, 224 S.W.3d 36, 39 (Mo. App. 2007). As a matter of law, Judge Rellihan lost all power over the case as of October 24, 2016, and all orders he entered afterward are void. *Miller v. Mauzey*, 917 S.W.2d 633, 635-36 (Mo. App. 1996); *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 944 (Mo. banc 1986). The only thing he had power to do on the filing of Husband's timely motion for change of judge was to grant it and order a change of judge. *Id.*

B. Husband had until December 5, 2016, to seek a Rule 51.05 change of judge in the Modification.

Ordinarily, "For purposes of … Rule 51, … motions to modify child custody, child support, or spousal maintenance" under Chapter 452, R.S.Mo., "are not an independent action …." Rule 51.05(a) (Appx. A41). That is, "unless the judge designated to rule on the motion **is not the same judge that *ruled on* the previous independent civil action**." *Id.* (emphasis added) (Appx. A41).

So, if the judge designated to rule on a motion to modify a dissolution of marriage decree *is not* the same as the judge who ruled on that prior dissolution decree, the motion to modify *is* an independent civil action, and the time limits of Rule 51.05(b) begin anew. *Kramer*, 926 S.W.2d at 74.

In *Kramer*, a motion to modify was assigned to one family court commissioner, but a different commissioner had dissolved the parties' marriage. *Id.* at 73-74. This Court's Western District, with now-Supreme Court Judge Laura Stith writing, held this meant Rule 51.05(a)'s limitation did "not preclude [Rule 51.05's] application on the motion to modify", so the time limits of Rule 51.05(b) therefore applied to the modification as if it were a new case. *Id.* at 74. Because the application was timely (measured from the date of service of process *in the modification*), the Court issued a writ prohibiting the trial judge in the modification from doing anything except ordering the change of judge. *Id.* at 74-76.

The same is true here. Here, it was Judge Dawson, not Judge Rellihan, who ruled on the Dissolution and entered the judgment dissolving the

parties' marriage (L.F. 11; Appx. A26). Therefore, Judge Rellihan "is not the same judge that ruled on the previous independent civil action", and Wife's "motion to modify", to which Judge Rellihan was assigned, ***was*** an "independent action". Rule 51.05(a) (Appx. A41); *Kramer*, 926 S.W.2d at 74.

The time limitations of Rule 51.05(b) therefore started anew in this Modification. *Id.* Husband had "60 days from service of process or 30 days from the designation of the trial judge, whichever time is longer," in which to move for a change of judge under Rule 51.05(b).

Judge Rellihan's notion that Rule 51.05(b) requires "the application must be filed prior to any appearance before the trial judge" (Tr. 5) is not correct. That provision states, "*If the designation of the trial judge occurs less than thirty days before trial*, the application must be filed prior to any appearance before the trial judge." *Id.* (emphasis added) (Appx. A41).

"A 'trial' within the meaning of Rule 51.05(b) means a full trial on the merits." *State ex rel. Stockman v. Frawley*, 470 S.W.3d 401, 404 (Mo. App. 2015). Here, the trial on the merits did not occur until July 2017 (Tr. 12). Judge Rellihan was designated far longer than 30 days before then. Rule 51.05(b)'s limitation therefore did not apply. *Stockman*, 470 S.W.3d at 404.

Wife's motion to modify was served on Husband on October 5, 2016 (L.F. 50; Appx. A38). 60 days later was December 5, 2016. Husband therefore had until December 5, 2016, in which to move for a change of judge. *Kramer*, 926 S.W.2d at 74. If he did so, Judge Rellihan "could take no other action than grant the motion." *Cover*, 224 S.W.3d at 39.

C. As Husband timely moved for a Rule 51.05 change of judge on October 24, 2016, the trial court lacked power to deny it or authority to do anything other than grant it.

This is exactly what Husband did. On October 24, 2016, he moved for a change of judge under Rule 51.05 (L.F. 51; Appx. A39). As this was within 60 days of service on him in the Modification – indeed, only 19 days after service, and even within 30 days of the filing of the Modification itself on September 28, 2016 (L.F. 24, 36) – it was timely, and the trial court could take no other action than grant it. *Kramer*, 926 S.W.2d at 74-76.

Husband had an "unfettered right to disqualify" Judge Rellihan under Rule 51.05, and his "presentation of a timely application for judge require[d] a prompt change of judge." *Walters*, 22 S.W.3d at 742. The trial court had no authority "to do anything except grant [it] and transfer the cause" to a new judge. *Riggleman*, 203 S.W.3d at 240.

But the court overruled the timely motion and Judge Rellihan stayed on the case, overseeing the rest of it all the way through to final judgment. This was reversible error. *Cover*, 224 S.W.3d at 38-39; *Miller*, 917 S.W.2d at 635-36. Every single order entered and proceeding heard after October 24, 2016, was without authority and is void. *Id.*; *Raack*, 720 S.W.2d at 944.

This Court now should reverse the trial court's judgment, vacate all other orders the trial court entered in this case after October 24, 2016, and remand this case for a new discovery and trial before a new judge. *Id.*

D. The notation in the Dissolution's docket that Judge Rellihan was "assigned" on December 31, 2014, more than a year after the Dissolution was final and nearly two years before the Modification was filed, is of no consequence.

In opposing reconsideration of the denial of Husband's Rule 51.05 motion, the respondent seemed to suggest that the December 31, 2014, notation on the Dissolution docket that Judge Rellihan was "assigned" that day (L.F. 6) somehow made Husband's motion for change of judge in the Modification untimely (L.F. 59). This is without merit. As a matter of law, the docket notation is of no consequence.

First, the plain language of Rule 51.05(a) makes the docket notation irrelevant. Rule 51.05(a) expressly provides that a motion to modify *is* an "independent action" if "the judge designated to rule on [it] **is not the same judge that *ruled on***" the prior dissolution. (Emphasis added) (Appx. A41). Regardless of whether Judge Rellihan ever was *assigned to* the Dissolution, it plainly was Judge Dawson, not Judge Rellihan, who *ruled on* it. So, either way, the Modification is an independent action. *Kramer*, 926 S.W.2d at 74.

Second, even if Judge Rellihan validly was "designated" for the Modification on December 31, 2014, under the plain language of Rule 51.05(b), Husband's motion still was timely. Rule 51.05(b) provides that a motion for change of judge is due "within 60 days from service of process or 30 days from the designation of the trial judge, ***whichever time is longer***." (Emphasis added) (Appx. A41).

So, even if Judge Rellihan was "designated" in December 2014, Husband was not served in the Modification until October 5, 2016, making the "longer" time limit December 5, 2016. *Kramer*, 926 S.W.2d at 74 (measuring the time limitation as 60 days from service in the modification). His Rule 51.05 motion filed on October 24, 2016, still was timely.

Finally, the judgment in the Dissolution long had been final by the time of the docket notation purportedly "assigning" Judge Rellihan, and as a matter of law an assignment of a judge to a case when it is in procedural limbo after finality does not start the time limits of Rule 51.05 running. *Wilson v. Sullivan*, 967 S.W.2d 225, 227-29 (Mo. App. 1998); *State ex rel. Stickelber v. Nixon*, 54 S.W.3d 219, 223-25 (Mo. App. 2001); *State ex rel. Delgado v. Merrell*, 86 S.W.3d 468, 470-72 (Mo. App. 2002) (S.D. en banc).

Judge Dawson entered judgment in the Dissolution on September 16, 2013 (L.F. 11; Appx. A26). Under Rules 75.01 and 81.05(a)(1), it became final for appeal 30 days later. And it then truly "became final when no appeal was taken." *Wilson*, 967 S.W.2d at 227. At that point, Judge Dawson's authority over the "matter ended," because there was no more case. *Id.*

The notation "Judge Jerry Rellihan assigned to case" came *more than a year later*, on December 31, 2014 (L.F. 6). But if Judge Dawson had no authority over the matter at that point because it was final and over, *id.*, Judge Rellihan certainly did not either. The fact that Judge Rellihan was "assigned" during this period could not affect the application of Rule 51.05 in the subsequent Modification – which itself was filed *nearly two years* after the docket notation (L.F. 36).

This is analogous to when a change of judge occurs after a case is final but is on appeal. At the very least, there a case *is* active in the appellate court, even though it is uncertain whether the case ever will return to the trial court. Ordinarily, there is no right to a change of judge after remand from an appeal. *State ex rel. Burns v. Goeke*, 884 S.W.2d 60, 62 (Mo. App. 1994). But when a new trial judge is assigned *while* the case is on appeal, then once it is remanded to the trial court "the Rule 51.05 timelines" are "triggered anew." *Stickelber*, 54 S.W.3d at 224.

During an appeal, just like after finality in a case *not* appealed, "the judge is not empowered to exercise any judicial function over the case." *Id.* at 223. That is exactly why the Rule 51.05 time period does not *yet* start running:

> A party whose case is on appeal should not have to wager his or her one chance to seek a change of judge as a matter of right upon the possibility that a judge might still be holding the case if the case is remanded on appeal. Put another way, it would be incongruous to consider [an order transferring a case between trial judges while it is on appeal] a designation of the trial judge under Rule 51.05 when it had not yet been determined by the appellate court whether any trial or further judicial proceeding will be necessary. And it would be inconsistent with the principle long expressed favoring liberal construction of the disqualification provisions in favor of the right to disqualify.

Id. at 223-24. So, "the time limit provided in Rule 51.05" cannot "be considered to run against a party during a time in which the judge is not empowered to exercise any judicial function over the case." *Id.* at 223.

In *Stickelber*, Judge Moran heard a case through to judgment for the plaintiff, which the defendant then appealed. *Id.* at 221. While the appeal still was pending, Judge Moran retired. *Id.* The presiding judge transferred all of Judge Moran's cases, including the one at issue in *Stickelber*, to Judge Nixon. *Id.* This Court held that Rule 51.05 allowed the defendant to seek a change of judge away from Judge Nixon after remand, and he was under no obligation to seek a change of judge away from Judge Nixon *while* the case was on appeal and *until* the mandate on appeal issued. *Id.* at 223-25.

Similarly, in *Delgado*, Judge Merrell heard a case through to judgment for the defendant, which the plaintiff appealed. 86 S.W.3d at 469. While the appeal was pending, Judge Merrell lost his bid for reelection. *Id.* Eight months later, but while the appeal still was pending, a vacancy in the circuit arose due to a change in population, and the Governor appointed Judge Merrell to it. *Id.* Two months later, this Court reversed the judgment and remanded the case. *Id.* Nine days after the Court's mandate, the plaintiff filed a Rule 51.05 motion for change of judge, which Judge Merrell denied as "untimely." *Id.*

This Court, sitting en banc, issued a writ of prohibition requiring Judge Merrell to grant the Rule 51.05 change of judge. *Id.* at 470-72. Judge Merrell "ceased being the 'designated' trial judge for the underlying case after the expiration of his term of office." *Id.* at 471. Even though that occurred

entirely while the case was on appeal, the plaintiff had to have the right to a new change of judge *upon remand* from that appeal. *Id.* at 471-72.

The same is true here where there *was no case going on at all* either in the trial court or this Court when Judge Rellihan was "assigned" to the Dissolution. The Dissolution had been final for more than a year, and the Modification was nearly two years away. At that point, Judge Rellihan "was not empowered to exercise any judicial function over the case," because there was no such function to be exercised. *Stickelber*, 54 S.W.3d at 223.

Husband "should not have" had "to wager his … one chance to seek a change of judge as a matter of right upon the possibility that" Judge Rellihan "might still be holding the case" in a modification if a motion to modify someday was filed. *Id.* at 224. "Put another way, it would be incongruous to consider the" December 2014 notation "assigning" Judge Rellihan to the Dissolution "a designation of the trial judge under Rule 51.05" in the Modification when no modification proceeding yet had been filed. *Id.* "And it would be inconsistent with the principle long expressed favoring liberal construction of the disqualification provisions in favor of the right to disqualify." *Id.*

Under the plain language of Rule 51.05(a), the Modification was an independent civil action starting the time limits of Rule 51.05(b) anew. Husband had until December 5, 2016, in which to move for a change of judge under Rule 51.05. His motion filed October 24, 2016, was timely, and the trial court lacked authority to do anything at that point other than grant that motion. Its order denying that motion was reversible error.

E. To remedy this error, the Court should reverse the trial court's judgment, vacate all other orders the trial court entered in this case after October 24, 2016, and remand this case for a new discovery and trial before a different judge.

On receiving Husband's timely Rule 51.05 motion on October 24, 2016, the trial court "could take no other action than grant the motion." *Cover*, 224 S.W.3d at 39. But instead of granting the motion, Judge Rellihan continued to preside over the case, heard pretrial proceedings, oversaw discovery, entered pretrial orders, heard the trial in July 2017, and ultimately entered judgment on July 27, 2017 (L.F. 24-35, 53, 70-71, 85, 107-08, 112, 117, 118-19, 122; Tr. 12-75; Appx. A1). This included:

- Ordering Husband incarcerated (L.F. 53);
- Withdrawing the order for incarceration but ordering Husband to pay Wife $1,000 in attorney fees (L.F. 70-71, 85);
- Awarding Wife temporary custody of the parties' two children (L.F. 29);
- Granting motions to compel, which collectively ordered Husband to pay Wife an additional $1,500 (L.F. 107-08, 118);
- Appointing a guardian ad litem and ordering Husband to deposit $500 for her services (L.F. 112, 119); and
- Allowing Husband's attorney to withdraw (L.F. 117).

The law of Missouri is that all these actions – everything the trial court did in the Modification after October 24, 2016 (L.F. 24-35) – were nullities, and must be vacated. In short, the parties' legal relationship must return to the status of the Dissolution judgment until a different judge says otherwise.

Not only must there be a new trial, but the case below must be set back to "square one".

This is because "[o]nly motions that are taken under submission ***before*** the application for change of judge is filed may be ruled upon by that judge." *Miller*, 917 S.W.2d at 635 (emphasis added). The trial court had no authority to rule on other motions. *West v. Moran*, 586 S.W.2d 68, 70 (Mo. App. 1979); *see also Reynolds v. Reynolds*, 163 S.W.3d 567, 569 (Mo. App. 2005) ("Once an application to change the judge is properly filed, the court must grant the motion" and cannot take any other action). Orders entered without authority in this context are "null and void." *Miller*, 917 S.W.2d at 635-36 (citing *Raack*, 720 S.W.2d at 944 (declaring all orders of a judge acting without authority after invalid denial of a Rule 51.05 motion to be "null and void")).

When a trial court erroneously denies a timely Rule 51.05 motion for change of judge and the case goes all the way through trial to final judgment, the basic required remedy is to reverse that judgment and remand for a new trial before a different judge. *See Cover*, 224 S.W.3d at 39 (where new judge was designated shortly before trial and Rule 51.05 motion was erroneously denied at that time, remedy was to vacate judgment and reverse and remand "for trial before a different judge").

But because the trial court's erroneous denial of Husband's timely motion here came so early in this case, practically every order and proceeding in the whole Modification – everything since October 24, 2016 – also must be vacated. *See Raack*, 720 S.W.2d at 944 (declaring all "subsequent orders"

after erroneous denial of Rule 51.05 motion for change of judge early in case "to be null and void" and issuing writ prohibiting all of them).

Accordingly, this Court should reverse the trial court's judgment, vacate all other orders the trial court entered in this case after October 24, 2016, and remand this case for a new discovery and trial before a different judge.

Conclusion

The Court should reverse the trial court's judgment, vacate all other orders the trial court entered in this case after October 24, 2016, and remand this case for a new discovery and trial before a different judge.

Respectfully submitted,

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in Century Schoolbook, size-13 font, which is not smaller than Times New Roman, size-13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), as this brief contains 5,903 words.

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Certificate of Service

I certify that, on November 15, 2017, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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