

## High court considers 'do-over' in dispute about change of judge rule

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The Missouri Supreme Court is considering whether a dispute between a prominent St. Louis law firm and a former client that is now on its fourth judge can be transferred once again. The question is, would that new judge count as the case's fifth, or its second?

Eager Road Associates LLC sued Blitz, Bardgett & Deutsch in 2015 regarding the outcome of litigation that arose from a St. Louis County development. According to court records, Eager Road's members, Don Musick, Adolphus A. Busch IV and Alan Skop claimed the firm pushed them into an "aggressive litigation strategy" against a bank that resulted in an allegedly unfavorable settlement.

The suit alleged Eager Road had been overbilled and also brought claims of legal malpractice, breach of fiduciary duty, fraudulent concealment and fraudulent misrepresentation. Blitz Bardgett denied the allegations and counter-sued, seeking \$218,250 in unpaid legal bills and a quantum meruit claim for \$4 million worth of legal services.

The suit originally was assigned to St. Louis County Circuit Judge Joseph L. Walsh III. Blitz Bardgett asked for a change of judge, and the case went to Judge Tom W. DePriest Jr. Then Eager Road sought its own change of judge, and the case was reassigned to Judge Barbara W. Wallace. After Wallace retired, the case was transferred to Judge Brian H. May in 2017.

Later that year, May granted summary judgment to the law firm on all counts except the overbilling claim and the counterclaim. Shortly before a scheduled March 2018 trial, Eager Road dismissed its remaining claim, and Blitz Bardgett dropped its counterclaim when its former client paid its outstanding bill.

But in 2019, Eager Road refiled its overbilling claim as a separate action. The case was assigned to Judge May once again, prompting Eager Road to file for a change of judge.

Under Supreme Court Rule 51.05, each party in a civil action may request a change of judge without having to provide a reason. The question is, did Eager Road exhaust that entitlement in the 2015 case, or is the rule's benefit refreshed now that the plaintiff has filed a new claim under a new case number?

David E. Larson of Martin, Pringle, Oliver, Wallace & Bauer, an attorney for Eager Road, argued that the change of judge motion is still available. When a claim is dismissed without prejudice, he said, it's as if the claim never had been brought.

"In our view, the overbilling claim is a complete standalone cause of action," he said.

But Jim Bennett of Dowd Bennett, an attorney for the law firm, said the 2015 case and the refiled 2019 case were part of the same litigation and should be treated that way.

"It's the exact same parties, the exact same relief, the exact same issues," he said. "Really, the only issue is, does nonsuit make this a do-over?"

In fact, the original litigation technically is ongoing. After the Court of Appeals Eastern District affirmed May's summary judgment ruling last year, Eager Road asked the Supreme Court to review it. That motion remains pending.

Judge Patricia Breckenridge asked Bennett if his approach would require courts to determine whether two actions really shared the same parties, issues and relief.

"Yes there might be a few people who would take advantage of it, maybe in a way that everyone would think they shouldn't," she said. "But it doesn't require courts to go in . . . and litigate whether someone's entitled to a change of judge." In contrast, she said, treating the new filing as a new case was "pretty cut and dried."



But Bennett argued that Eager Road's use of the "savings statute" made it clear that this was a continuation of earlier litigation. That statute allows plaintiffs who "suffer a nonsuit" to refile their cases within one year of dismissal even if the statute of limitations has expired.

"I think this is an equally bright-line rule," he said.

Though Larson took the opposite view, he was careful to take note of his audience.

"I'm up here talking to you about how you interpret your rules," he told the Supreme Court. "I don't mean to be presumptuous."

The case is *State ex rel. Eager Road Associates LLC v. May*, SC98072.

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