



**In the Missouri Court of Appeals
Eastern District**

JOHN J. SMITH, APPELLANT,

vs.

LORA J. SMITH, RESPONDENT.

No. ED104481

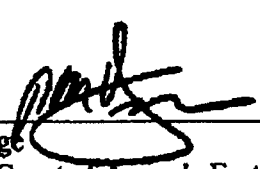
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ORDER

Appellant's Application for Transfer to Missouri Supreme Court is denied.

SO ORDERED.

DATED: **MAY 16 2017**



Chief Judge
Missouri Court of Appeals Eastern District

SCANNED

STATE OF MISSOURI)
) SS
COUNTY OF ST. CHARLES)

FILED

JUN 22 2015

IN THE ELEVENTH JUDICIAL CIRCUIT
STATE OF MISSOURI
CIRCUIT COURT DIVISION

CIRCUIT CLERK
ST. CHARLES COUNTY

JOHN J. SMITH,

Plaintiff,

vs.

LORA J. SMITH,

Movant.

Cause No. 1511-CC00064

Division No. 16

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. This cause of action is a result of a divorce petition filed by the Plaintiff on November 9, 2005, bearing Case No. 0511-FC03508, in St. Charles County, Missouri.
2. On December 21, 2007, the Honorable Thomas J. Frawley (assigned by the Supreme Court) entered a Judgment following a trial.
3. Plaintiff appealed the Judgment of Dissolution in Appeal No. ED 90998. This appeal was dismissed by the Appellate Court on March 24, 2009.
4. On December 16, 2008, Plaintiff filed a Motion to Modify the Judgment of Dissolution of Marriage, Cause No. 0511-FC03508-01 (almost one year following the original decree), with this Motion being amended on April 23, 2010 (leave granted on May 19, 2010).
5. In the meantime, Plaintiff had filed a Motion For Change of Judge on December 30, 2008, fourteen (14) days after filing his original Motion to Modify.
6. Both Motions were denied.
7. On April 9, 2009, a second Motion for Change of Judge was filed by the Plaintiff.
8. On July 20, 2009, a special judge was appointed by Supreme Court to hear the Motion for

Change of Judge.

9. On December 7, 2009, Judge Burkemper, after a hearing, granted Plaintiff's Motion for Change of Judge (*see Defendant's exhibit D*)
10. On March 3, 2011, a hearing on Plaintiff's Amended Motion to Modify and Defendant's Counter Motion was held.
11. On March 30, 2011, the Court entered an order denying Plaintiff's Motion to Modify.
12. On April 27, 2011, Plaintiff filed his Motion for a New Trial.
13. On June 17, 2011, Plaintiff's Motion was denied.
14. From June 17, 2011 until the present, Plaintiff has been the subject of Motions to Compel, Civil Contempt, garnishments, body attachments, and Writ of Commitment for his failure to follow the Judgment in the divorce cause of action.
15. Plaintiff never appealed the Order denying his Amended Motion to Modify.
16. On December 29, 2011, Plaintiff filed a Petition for Writ of Prohibition against the special Judge DeMarce's Order of Commitment and Contempt.
17. Plaintiff was placed in custody on January 9, 2012, and the Writ was denied on January 12, 2012. He then was released on January 13, 2012, after posting bond.
18. On October 11, 2011, Plaintiff filed a separate Declaratory Judgment action asserting the original divorce decree was null and void due to Judge Burkemper's disqualifying Judge Frawley. This was dismissed by the Court on November 12, 2012, and Plaintiff appealed the dismissal, which was also dismissed (ED 99868).
19. In the original divorce case, Plaintiff filed a pleading entitled "Motion to Dismiss for Lack of Jurisdiction and Failure to State a Cause of Action" on May 16, 2014. This was dismissed on August 11, 2014.

20. Plaintiff then filed the same Motion in the original divorce Cause No: 0511-FC03508 on November 4, 2014. Plaintiff dismissed that Motion when he filed this Petition.
21. This Court held a hearing on Plaintiff's Petition on June 12th 2015. Exhibits were admitted by consent and the parties argued their respective positions on the record. The Court took the matter under advisement.

CONCLUSIONS OF LAW

22. Plaintiff argues that any decisions made by Judge Frawley are void due to the Order granting his Motion to Disqualify for cause. Essentially, Plaintiff is claiming that since Judge Burkemper agreed with the allegations of bias and hostility of Judge Frawley, then any decision made prior to the Disqualification Order is nullified, allowing Plaintiff to re-try the divorce action again.
23. This is not the first time a Court has seen a Plaintiff attempt to make this case. It was first seen in Plaintiff's "Petition for Declaratory Judgment" (Defendant's Exhibit "G"), which was denied by Judge Tobben. Next, the issue was re-litigated in Plaintiff's "Petition for Writ of Prohibition Against the Court Acting without Jurisdiction" (Defendant's Exhibit "H"; See Page 10, paragraphs 39-43.). This was denied by the Court of Appeals. Finally, Plaintiff again attempted the same attack in two "Motions to Dismiss for lack of Jurisdiction" (Nos. 0511-FC03508 and 0511-FC03508-01). Both were denied also.
24. When a party contends that a Judgment is void on the face of record, "[t]he existence of every fact essential for a Court to have rendered a valid judgment is presumed and the burden is on the party contesting the judgment to overcome the presumption". (Wright v. Bartimus Frickleton Roberston and Garry, P.C., 364 S.W. 3^d 558, 565 (Mo. App. W.D.

2011).

25. In this instance, Plaintiff contends Judge Frawley considered an Income and Expense Statement not submitted by his attorney (but was admitted into evidence) as playing "fast and loose" with facts in "order to reach a foreordained conclusion" (transcript of Disqualification Hearing, pages 18-19). Plaintiff also claims Judge Frawley was hostile towards him (Disqualification hearing Pages 21-24). However, despite these allegations, Plaintiff is unable to overcome the presumption of validity. As to the consideration of improper income statements, Plaintiff readily admitted at the hearing on his Motion at bar, that it was in Judge Frawley's discretion to weigh the evidence admitted in rendering his judgment. Regarding the hostility claims, these on their face do not invalidate a Judgment, nor can the Plaintiff point to any case where such claims void a previous judgment.
26. As to the Disqualification Order itself, a ruling that a judge be disqualified under Section 508.090, RSMo, requires a finding that the judge appears to be unable to be impartial in its future rulings, but there is no requirement for a finding that a judge was impartial or biased in the past. McPherson v. United States Physicians Mut. Risk Retention Group, 199 S.W. 3^d 462, 490 (Mo. App. W.D. 2003).
27. Plaintiff has failed to cite any case where the disqualification of a judge under Section 508.090, RSMo, resulted in the rulings of that judge prior to the filing of the Disqualification Motion becoming void. Rulings of a judge prior to being disqualified under Section 508.090, RSMo, are not void under Missouri law. See State ex rel. Interstate Motor Freight System, Inc. v. Hall, 409 S.W. 2^d 678, 682 (Mo. banc 1966), Elnicki v. Caracci, 255 S.W. 3^d 44, 50 (Mo. App. E.D. 2008), State ex. Rel. King v.

Huesemann, 776 S.W. 2^d 488, 491 (Mo. App. S.D. 1989).

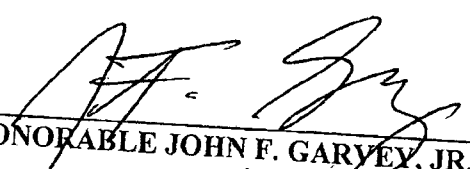
28. Finally, Plaintiff's claim in this case is barred by res judicata. Res judicata, or claim preclusion, "prohibits a party from bringing a previously litigated claim." *Kesterson v State Farm Fire and Casualty Insurance*, 242 S.W. 3d 712, 715-716 (Mo. Banc 2008). He has brought the same case several times, as already noted. All have been denied by either the Circuit or Appellate court. *Smith v. Smith*, 455 S.W. 3^d 26 (Mo. App. E.D. 2014).

WHEREFORE, Plaintiff's "Motion for Relief from Judgments that are Void on the Face of the Records of the Eleventh Circuit Court" is hereby **DENIED.**

SO ORDERED:

Date:

6-19-15


THE HONORABLE JOHN F. GARVEY, JR.

#35879

p.c. Parties of Record

IN THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
FAMILY COURT DIVISION

JOHN J. SMITH,
SSN: 134-46-2396
Petitioner,

LORA JANE SMITH,
SSN: 491-66-2690
Respondent.

Cause No. 0511-FC3508

FILED

JUL 09 2009

Judy Zerr
Circuit Clerk
ST. CHARLES COUNTY

COURT ORDER

On December 16, 2008, Petitioner filed a Motion to Modify which requested abatement of the amounts payable by him to Respondent under the judgment of dissolution of marriage for her maintenance and support.

On December 30, 2008, Petitioner filed a Request for Assignment of New Special Judge which alleged, inter alia, that a disinterested person could reasonably conclude that the undersigned has "at least an appearance of a conflict of interest" that would disqualify him from hearing Petitioner's Motion to Modify.

On January 17, 2009, the Honorable David C. Mobley was assigned by the Missouri Supreme Court to "hear and rule on the motion for disqualification" of the undersigned pending herein.¹

¹ On January 17, 2009, the only pending motion requesting removal of the undersigned from hearing Respondent's Motion to Modify was the Request for Assignment of New Special Judge filed by Respondent on December 30, 2008.

On February 13, 2009, Judge Mobley found there was no properly filed motion to disqualify the undersigned and, therefore, no justifiable issue before him.

On February 25, 2009, Petitioner filed a Motion to Correct Memorandum Order or, in the Alternative, Request for a New Hearing which stated, in pertinent part, that there was no motion to disqualify the undersigned filed and "only suggestions to the Supreme Court regarding the appropriateness of re-assigning" the undersigned to Petitioner's Motion to Modify and, additionally, that the "ruling denying relief was correct."

On April 9, 2009, Petitioner filed a Petition for Change of Judge pursuant to Section 509.090, RSMo., which alleged, inter alia, that the undersigned has "demonstrated actual hostility and prejudice toward Petitioner".

Since Petitioner has filed a verified Petition for Change of Judge and therein has alleged that the undersigned is prejudiced toward him, Petitioner is entitled to appointment of a special judge to hear the Petition for Change of Judge. See Elnicki v. Carachi, 255 S.W. 3d 44 (Mo. App. E.D. 2008).

IT IS THEREFORE ORDERED THAT the Missouri Supreme Court appoint a special judge² to hear and rule upon Petitioner's Petition for Change of Judge.

DATED this 9th day of July, 2009.

² The judges of the 11th Circuit recused themselves by order dated March 30, 2006.

**IN THE CIRCUIT COURT OF ST. CHARLES COUNTY
FAMILY COURT DIVISION**

JOHN J. SMITH,)
)
 Petitioner,)
)
Vs.)
)
LORA J. SMITH,)
)
 Respondent.)

Case No. 0511-FC03550

FILED

MAR 14 2012

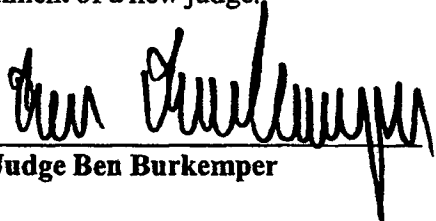
JUDY ZERR
CIRCUIT CLERK
ST. CHARLES CO.

JUDGMENT AND ORDER

On the 1st day of December, 2009, Petitioner's Motion for Change of Judge under Section 508.090 RSMo. and its accompanying Affidavit came on for hearing. Evidence was adduced and arguments were heard. Thereafter, the court took the matter under advisement. Now on this 7th day of December, 2009, the court enters the following Judgment and Order:

1. Petitioner's Motion for Change of Judge is granted. The Honorable Thomas Frawley is hereby disqualified from this cause of action.
2. The presiding judge of the 11th Circuit is directed to contact the Office of State Courts Administrator for the reassignment of a new judge.

DATED: 12/7/09


Judge Ben Burkemper

FILED

DEC - 7 2009

Circuit Clerk
ST. CHARLES COUNTY

Supreme Court of Missouri

en banc

SC96472

ED104481

May Session, 2017

John J. Smith,
Appellant,

vs. (TRANSFER)

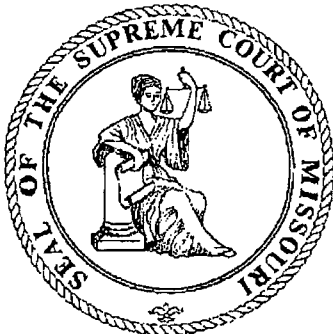
Lora J. Smith,
Respondent.

Now at this day, on consideration of the Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Eastern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2017, and on the 22nd day of August, 2017, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 22nd day of August, 2017.



Betsy AuBuchon, Clerk

Christina L. Lamm, Deputy Clerk