

No. _____

IN THE SUPREME COURT OF ILLINOIS

FRANK C. BEMIS, D.C.,	)	Petition for Leave to Appeal From
Plaintiff-Respondent,	)	the Appellate Court of Illinois, First
v.	)	Judicial District, Sixth Division
STATE FARM FIRE & CASUALTY)	
COMPANY,	)	No. 1-08-0284
Defendant-Petitioner.)	
<hr/>		) There Heard on Appeal From the
KEVIN SNEAD et al.,	)	Circuit Court of Cook County,
Plaintiffs,	)	County Department, Chancery
v.	)	Division,
STATE FARM MUTUAL AUTOMOBILE)	
INSURANCE COMPANY,	)	No. 07 CH 21066
Defendant.)	
<hr/>		) <i>Consolidated with</i>
MARK J. EAVENSON, D.C.,	)	No. 99 CH 12047
Plaintiff,	)	<i>and</i> No. 05 CH 10191
v.)	
STATE FARM MUTUAL AUTOMOBILE	)	Hon. Martin S. Agran, Judge,
INSURANCE COMPANY and STATE	)	Presiding
FARM LIFE INSURANCE COMPANY,)	
Defendants.)	

**PETITION FOR LEAVE TO APPEAL OF
STATE FARM FIRE & CASUALTY COMPANY**

Howard J. Roin
James C. Schroeder
Joshua D. Yount
Nissa J. Imbrock
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606-4637
(312) 782-0600

April 1, 2009

Attorneys for State Farm Fire & Casualty Company

PRAYER FOR LEAVE TO APPEAL

Pursuant to Supreme Court Rule 315, petitioner State Farm Fire & Casualty Company respectfully prays that this Court grant it leave to appeal from the judgment of the Appellate Court of Illinois, First District, Sixth Division.

JURISDICTION

The Appellate Court issued its opinion, which is found in the attached Appendix (“App.”), on February 27, 2009. No petition for rehearing was filed.

POINTS RELIED UPON FOR REVERSAL

In 1999, State Farm was sued in a putative MedPay class action in Cook County, *Snead v. State Farm Mut. Auto. Ins.* (MedPay is short for medical payments; in these cases, plaintiffs allege that State Farm systematically underpays insurance claims seeking to recover for medical expenses.) Over the ensuing decade, the plaintiff’s lawyers in this case—*Bemis v. State Farm Fire & Cas. Co.*—have filed a series of four similar MedPay class actions against various State Farm entities in Madison County (*Siler, Eavenson, Jones, and Bemis*).

Supreme Court Rule 384 authorizes this Court to transfer cases from one circuit court to another when there are common questions and consolidation “*would promote the just and efficient conduct of such actions.*” S. Ct. R. 384(a) (emphasis added). Thus, pursuant to Rule 384, each time plaintiff’s lawyers filed one of their MedPay cases in Madison County, this Court ordered it transferred to Cook County and consolidated with *Snead*. But rather than acquiesce in this Court’s rulings, plaintiff’s attorneys waited a while and then filed another MedPay class action in Madison County—which this Court then transferred and consolidated pursuant to Rule 384. *See Siler* Rule 384 Order (App. 16); *Eavenson & Jones* Rule 384 Order (App. 14); *Bemis* Rule 384 Order (App. 12). As

part of this scheme, once the Madison County case was transferred and consolidated in Cook County the plaintiffs moved for substitution of judge pursuant to 735 ILCS 5/2-1001 in order to remove any judge who has issued rulings adverse to the plaintiffs (Judge Maki in *Eavenson* and *Jones*, Judge Agran in *Bemis*). App. 2-4. Plaintiff's counsel's plan is now obvious: continue to file new MedPay class actions in Madison County and then, following this Court's transfer of the cases to Cook County, move for substitution of judge in order to remove any judge whose rulings were not favorable to their claims.

Plaintiff's counsel are undermining this Court's management of MedPay cases, which it has effectuated through the Rule 384 orders it has issued since 1999. Specifically, plaintiff's use of the substitution of judge statute violates Illinois separation of powers principles by effectively nullifying this Court's 2007 Rule 384 order in *Bemis*, which ordered *Bemis* "consolidated with *Eavenson*... and *Snead*" (C60), evidently to "promote the just and efficient conduct of such actions." Rule 384(a).

State Farm objected to plaintiff's § 2-1001 motion in *Bemis* on the ground that removing Judge Agran from presiding over the three MedPay cases would contradict this Court's aim of promoting efficiency. Judge Agran has presided since 2005 over *Eavenson* and *Snead* (as well as *Jones*, which he dismissed with prejudice in 2006 on a dispositive issue also present in *Bemis*). Judge Agran noted that "[o]bviously, I have put a lot of work into the case. It doesn't make a whole lot of sense to me to move this down the road." C125. But though recognizing that "it is a close question" (C128), he granted the motion to substitute judges for all of the consolidated cases because "[t]he Supreme Court order here consolidated the cases but not specifically before me. Had the order said specifically before me, I would agree without any question [with] your Separation of Power argument." C127. Judge Agran certified his order for appeal under Rule 308 and

stayed it (C148), explaining that “this issue isn’t going to go away because this issue is going to resurrect itself. So I would like to hear what the Appellate Court and possibly the Supreme Court have to say about this issue.” C157.

The First District granted leave to appeal and affirmed in a published opinion. Upholding an “absolute” right to substitute judges if § 2-1001’s prerequisites are met, the court reasoned that “the supreme court’s order does not name any particular Cook County judge that must preside over the consolidated cases” and that “Rule 384 allows for a transfer because of common issues of fact or law, not because of the expertise of any particular trial judge.” App. 7-8. The Appellate Court did not even mention Rule 384’s efficiency requirement, much less attempt to reconcile its decision with the likelihood that this Court’s order transferring *Bemis* necessarily “determine[d] that consolidation” with *Eavenson* and *Snead* “would promote the just and efficient conduct of such actions.” Rule 384(a). And the court did not dispute (nor did plaintiff) that removing the three cases from Judge Agran would be inefficient.

The Appellate Court’s decision warrants review by this Court for several reasons:

First, the decision permits plaintiff to use § 2-1001 to undermine the apparent purpose of this Court’s Rule 384 order: that *Bemis* be transferred and consolidated in order to “promote the just and efficient conduct” (Rule 384(a)) of the MedPay cases. Plaintiff’s gambit is the opposite of efficient: file a new MedPay class action in Madison County, knowing that this Court will order it transferred to Cook County, and then move for substitution of judge—in order to take *all* of the consolidated cases away from the judge who has handled them for years (and issued rulings that plaintiffs do not like) and bring in a new judge who may be more favorably disposed toward the plaintiffs and knows nothing about the case. Thus, the decision allows plaintiff to use a statutory power

to effectively evade the thrust of this Court’s Rule 384 order: a transfer and consolidation to promote efficiency. But the separation of powers principles in the Illinois Constitution require that this Court’s rules and orders be given precedence over statutes concerning judicial administration. The Appellate Court’s ruling stands separation of powers on its head; it gives precedence to statutes over this Court’s rules and orders.

Second, only this Court can say what it intended when it ordered *Bemis* consolidated with *Eavenson* and *Snead* in 2007. The Appellate Court thought the order “merely transferred the case at bar from Madison County to Cook County.” App. 8. This Court’s order plainly did more than that: it ordered the case transferred to Cook County “and consolidated with *Eavenson*...and *Snead*.” C60. And in ordering consolidation with *Eavenson* and *Snead*, the Court necessarily ordered consolidation before Judge Agran, who has been handling *Eavenson* and *Snead* since 2005. It seems evident that the Court’s aim was to “promote the just and efficient conduct” (Rule 384(a)) of all of the MedPay cases by transferring *Bemis* to Judge Agran, who is well versed in the issues due to his work on *Jones*, *Eavenson*, and *Snead*. But only this Court can say what it intended.

Third, the Court should grant review because, as Judge Agran put it, “this issue isn’t going to go away”—“this issue is going to resurrect itself.” C157. Plaintiff’s counsel have filed MedPay class actions against State Farm in Madison County even though this Court has ruled repeatedly that the cases belong in Cook County. Plaintiff’s counsel also have already moved (in *Eavenson*, *Jones*, and *Bemis*) to substitute judges who had issued previous rulings adverse to plaintiffs. Contrary to the Appellate Court’s view, it is neither a “dark[] predict[ion]” (App. 6) nor unsupported speculation (App. 8) to conclude that if the case is taken away from Judge Agran and a new judge issues rulings plaintiffs do not like, then (a) plaintiff’s counsel will file yet another Madison County MedPay class

action, (b) this Court will order the case transferred to Cook County and consolidated with the other MedPay class actions, and (c) the plaintiff will file yet another motion for substitution of judge. In short, plaintiff’s counsel will keep “resurrect[ing]” the issue until they find a Cook County judge they are satisfied with.

STATEMENT OF FACTS

Snead, the first putative MedPay class action against State Farm, was filed in Cook County in 1999. App. 2. Later that year, a different set of lawyers—plaintiff’s counsel in this case—filed a similar MedPay class action, *Siler*, in Madison County. *Id.* Due to the similarity between the suits, State Farm moved in this Court under Rule 384 to transfer *Siler* to Cook County for consolidation with *Snead* to promote the “just and efficient” conduct of the actions. C511. The Court agreed and granted the Rule 384 motion in *Siler*. App. 16. After State Farm moved to dismiss the complaint in Cook County, plaintiff’s counsel first tried to voluntarily dismiss without prejudice; but when the presiding judge refused to allow that, they voluntarily dismissed *Siler* with prejudice. App. 3; C524, 540.

In 2003, plaintiff’s counsel in this case filed two more putative MedPay class actions against State Farm, *Jones* and *Eavenson*. App. 3. State Farm again filed a Rule 384 motion in this Court, asking to have *Jones* and *Eavenson* transferred to Cook County and consolidated with *Snead*. *Id.* This Court again granted the motions and ordered both cases transferred to Cook County and consolidated with *Snead*. App. 14. At the time, *Snead* was in front of Judge Maki, who had dismissed all but one of the five counts of the complaint. App. 3. In Cook County, *Jones* moved for a substitution of judge; State Farm objected, but Judge Maki granted the motion, and the three consolidated cases were sent to Judge Agran in August 2005. *Id.* In 2006, Judge Agran granted State Farm’s motion to

dismiss *Jones* because the claims were based on a worker's compensation policy, and the Worker's Compensation Commission is the exclusive forum for disputes concerning worker's compensation benefits. C408, 473, 477-78. (The *Jones* ruling is directly relevant to *Bemis*, which also arises out of a workers' compensation policy and is subject to a virtually identical motion to dismiss.) Plaintiffs did not appeal the dismissal of *Jones*.

In early 2007, plaintiff's counsel filed *Bemis*, their fourth putative MedPay class action against State Farm in Madison County. App. 3. Like before, State Farm filed a Rule 384 motion to transfer *Bemis* to Cook County for consolidation with the State Farm MedPay cases pending before Judge Agran, telling this Court that Rule 384 transfer and consolidation were warranted because Judge Agran "has had considerable experience in addressing the issues raised in *Snead*, *Jones*, and *Eavenson* and that experience will lead to the just and efficient handling of *Bemis*." C53. In particular, State Farm explained that in *Jones* Judge Agran had already addressed—and dismissed—claims based on the same kind of workers' compensation policy at issue in *Bemis*. C43. This Court again granted the Rule 384 motion, transferring *Bemis* to Cook County for consolidation with *Snead* and *Eavenson*. App. 12.

In Cook County, plaintiff's counsel asked the Presiding Judge of the Chancery Division to "transfer[]" *Bemis* to Judge Agran "[i]n order to effectuate" this Court's order. Supp. R. 72. Plaintiff then moved for a substitution of judge in all three cases. C67-68. Judge Agran "agree[d] they're bouncing from judge to judge in order to try and find one that may or may not be sympathetic to their position" (C126), but granted the motion to substitute in the consolidated cases and certified the issue for immediate appeal. See p. 2, *supra*.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Appellate Court's Opinion Is Contrary To The Separation Of Powers Doctrine.

A. Statutes Used To Override This Court's Rules And Orders Are Unconstitutional As Applied And Violate Separation Of Powers.

“[A]rticle VI, section 1, of the Illinois Constitution of 1970 vests the judicial power in the supreme court, an appellate court, and the circuit courts.” *People v. Joseph*, 113 Ill. 2d 36, 47 (1986). Under this provision, “[t]he supervisory and administrative authority over all the courts is vested in the supreme court, to be exercised in accordance with rules.” *Id.* Thus, “procedural administration of the courts” and judicial “rulemaking” are a particular province of the courts. *Kunkel v. Walton*, 179 Ill. 2d 519, 528 (1997).

Of course, “[w]here matters of judicial procedure are at issue, the constitutional authority to promulgate procedural rules can be concurrent between the court and the legislature.” *Id.* But the legislature’s role is limited: “The legislature may enact laws that *complement* the authority of the judiciary or that have only a *peripheral* effect on court administration.” *Id.* (emphasis added). “[T]his court retains primary constitutional authority over court procedure.” *Id.* Consequently, “[w]here legislation infringes upon the judiciary’s administrative authority, either by directly conflicting with a supreme court rule or by causing more than a ‘peripheral effect on judicial administration,’ the legislation violates the separation of powers doctrine.” *People ex rel. Baricevic v. Wharton*, 136 Ill. 2d 423, 432-33 (1990).

Accordingly, “if a statute conflicts with a rule of this court adopted pursuant to constitutional authority, the rule will prevail.” *Joseph*, 113 Ill. 2d at 45. Accord *People v. Felella*, 131 Ill. 2d 525, 538 (1989). “[E]ven where a statute, standing alone, does not violate the separation of powers clause, ‘the legislature is without authority to interfere

with a product of this court’s supervisory and administrative responsibility.” *Kunkel*, 179 Ill. 2d at 528-29. Thus, where a statute is used to circumvent this Court’s rules and orders, the Court should either “declar[e] the statute causing the encroachment unconstitutional” as applied to the order, or “interpret[] ambiguous statutory language in a manner which avoids constitutional problems.” *Baricevic*, 136 Ill. 2d at 435.

This Court has applied the separation of powers doctrine to address abusive substitution of judge motions. In *Baricevic*, the petitioner, a State’s Attorney, sought a supervisory order to compel a trial judge to grant a series of substitution of judge motions in criminal cases. The Court acknowledged that the statute essentially provided “an absolute right to one substitution of judge” upon the timely filing of a motion alleging prejudice, which ordinarily “is not subject to judicial scrutiny.” *Id.* at 435-36. Nevertheless, the Court rejected petitioner’s request, because he was “using the [substitution of judge] statute to interfere with the judiciary’s assignment authority.” *Id.* at 434. The Court concluded that the petitioner’s “blanket use of substitution motions in all felony proceedings before Judge Wharton, when viewed in conjunction with his earlier attempts at having Judge Wharton reassigned, poses a substantial threat to the dignity and independence of the judiciary.” *Id.* at 435.

Moreover, although the substitution of judge statute in *Baricevic* provided essentially an “absolute right to one substitution of judge” and the statute “is constitutional” on its face (*id.*), the Court held that it “is not powerless to act” when a substitution of judge provision is used “for unconstitutional purposes.” *Id.* at 436-37. Thus, the Court refused to allow an automatic substitution of judge, instead imposing a procedure for that case to ensure that the statute was not being used “to thwart the chief judge of the circuit court’s independence in assigning cases” or otherwise to “violate[]

the separation of powers doctrine.” *Id.* at 438; *see also id.* at 440-41.

Baricevic is not alone. Separation of powers principles have been applied to strike down or limit application of a wide variety of statutes attempting to regulate the judicial process. Statutes directing assignment of judges for post-conviction proceedings, *Joseph*, 113 Ill. 2d at 47, allowing attorneys to conduct voir dire, *People v. Menken*, 54 Ill. App. 3d 199, 200-01 (4th Dist. 1977), authorizing appeals from certain interlocutory orders, *Smith v. Goldstick*, 110 Ill. App. 3d 431, 436 (1st Dist. 1982), and permitting voluntary dismissal without prejudice any time before trial, *O’Connell v. St. Francis Hosp.*, 112 Ill. 2d 273, 281-83 (1986); *Gibellina v. Handley*, 127 Ill. 2d 122, 136-38 (1989), have all been subject to successful separation of powers challenges. These cases reject the notion that litigants have an “absolute right” to litigate in ways authorized by statute when doing so would conflict with judicial prerogatives embodied in this Court’s rules or orders.

O’Connell and *Gibellina* are illustrative. They limited the statutory right to a voluntary dismissal without prejudice where plaintiffs had abused that right in an effort to avoid an involuntary dismissal or other sanction for failure to comply with a Supreme Court rule. *O’Connell*, 112 Ill. 2d at 281-83 (requiring decision on a pending Rule 103(b) motion before ruling on voluntary dismissal); *Gibellina*, 127 Ill. 2d at 136-38 (prospectively requiring decision on any pending dispositive motion before ruling on voluntary dismissal); *see also Arnett v. Young*, 269 Ill. App. 3d 858, 860-62 (1st Dist. 1995) (party absent from court-mandated arbitration may not seek voluntary dismissal of litigation). They confirm a central principle: courts should act to limit the exercise of supposedly “absolute” statutory rights when litigants use them to circumvent the operation of Supreme Court rules and otherwise “infring[e] on the authority of the judiciary to discharge its duties fairly and expeditiously.” *Gibellina*, 127 Ill. 2d at 137;

see also Baricevic, 136 Ill. 2d at 432-41; *Muskat v. Sternberg*, 122 Ill. 2d 41, 48 (1988) (rationale of *O'Connell* and its progeny is that “this court may not be thwarted in its constitutional mandate to render justice fairly and promptly by the manipulation of the statutory provisions relating to dismissal and the refiling of suits”).

To be sure, some cases reject separation of powers challenges to statutes that regulate the judicial process. *E.g.*, *In re Daniel R.*, 291 Ill. App. 3d 1003, 1015 (1st Dist. 1997) (allowing one-time substitution of judge in one of six related child neglect petitions where no Rule 384 consolidation order was entered); *McDaniel v. St. Elizabeth's Hosp.*, 213 Ill. App. 3d 103, 106-07 (5th Dist. 1991) (allowing voluntary dismissal in face of motion to dismiss where voluntary dismissal deemed not abusive). But even those cases, none of which are analogous here, recognize that such statutory regulation is permissible only where it has at most a “peripheral effect on judicial administration.” *Daniel R.*, 291 Ill. App. 3d at 1015-16. That threshold is crossed, this Court’s decisions in *Baricevic*, *O'Connell*, and *Gibellina* show, where (as here) a litigant abuses a purported statutory right to defeat this Court’s efforts to administer the litigation process under this Court’s rules. The Appellate Court’s decision to the contrary is inconsistent with that precedent.

B. Section 2-1001 Is Being Used To Violate The Separation Of Powers Doctrine By Interfering With This Court’s Rule 384 Order.

Plaintiff and his attorneys are attempting to use § 2-1001 to “interfere with a product of this court’s supervisory and administrative responsibility,” *Kunkel*, 179 Ill. 2d at 529—namely, this Court’s Rule 384 order transferring *Bemis* to Cook County and consolidating it with the MedPay cases pending before Judge Agran since 2005. Plaintiff’s motion undermines the Court’s Rule 384 order in two fundamental ways.

First, moving the consolidated MedPay cases away from Judge Agran completely

frustrates the apparent purpose of the Court’s Rule 384 order. This Court is authorized to transfer and consolidate multi-circuit actions in order to “promote the just and efficient conduct of such actions.” Ill. Sup. Ct. R. 384(a). Our Rule 384 motion argued that the Court should transfer *Bemis* and consolidate it with the State Farm MedPay cases already pending before Judge Agran because he “has had considerable experience in addressing the issues raised in *Snead*, *Jones*, and *Eavenson* and that experience will lead to the just and efficient handling of *Bemis*.” C53. In particular, we explained that in *Jones*, Judge Agran already addressed the same kind of workers compensation insurance policy at issue in *Bemis*, dismissing *Jones* with prejudice because ““the benefits that a provider gets are to be determined by the [Workers’ Compensation] Commission,”” not a court. C43. In response to this showing, this Court granted the Rule 384 motion and ordered *Bemis* transferred and consolidated with the Cook County MedPay cases pending before Judge Agran.

It is true that the Rule 384 order did not mention Judge Agran by name. But this Court ordered *Bemis* “consolidated with *Eavenson*...and *Snead*” (App. 12)—which were pending before Judge Agran. So when this Court consolidated *Bemis* with *Eavenson* and *Snead*, it necessarily assigned *Bemis* to Judge Agran. The Court did not need to say anything more specific to direct *Bemis* to Judge Agran. Even plaintiff recognized that transfer to Judge Agran was necessary “to effectuate” this Court’s Rule 384 order. Supp. R. 72. Allowing plaintiff and his counsel to use the substitution of judge statute to, instead, reassign *Bemis*, *Snead*, and *Eavenson* to another judge would countermand this Court’s transfer of *Bemis* to the judge already handling *Snead* and *Eavenson*.

More important, taking *Bemis* away from the judge who (a) has been presiding over the MedPay claims against State Farm entities since 2005, and (b) already has ruled

on an issue in *Jones* that is virtually certain to be a dispositive issue in *Bemis*, would defeat the evident purpose of the Court's order: to "promote the just and efficient conduct" of the MedPay cases. Rule 384(a). Sending a transferred case to the judge who has been handling the cases with which it will be consolidated maximizes fairness and judicial efficiency by minimizing the need for duplicative proceedings and the possibility of conflicting rulings. Here, the gains from litigating before Judge Agran are considerable. He is familiar with the allegations and claims in the various cases, and has already ruled in *Jones* on an issue that is dispositive in *Bemis*. Conversely, allowing plaintiff to force the reassignment of the consolidated cases away from the judge who has been handling them would be disruptive and inefficient. C125 (Judge Agran: "I have put a lot of work into the case. It doesn't make a whole lot of sense to me to move this down the road"). Indeed, because the Appellate Court's ruling would result in the reassignment of *Snead* and *Eavenson* as well, it would interfere with the efficient resolution of those cases, too. As Judge Agran recognized, "there's been a lot of work done on this case before me," and "[m]oving [the case] to another judge" would "delay the case even further." C74.

Second, plaintiff's current substitution of judge motion is part of a larger plan to evade and undermine this Court's multiple Rule 384 orders transferring the State Farm MedPay cases out of Madison County. The Rule 384 orders in *Siler*, *Eavenson*, *Jones*, and now *Bemis* make clear that this Court will not countenance the filing in Madison County of similar MedPay class actions against State Farm. But plaintiff's counsel have refused to accept those orders. Instead, they continued to file State Farm MedPay cases in Madison County. (Plaintiff's counsel admitted that they "fought tooth and nail to keep [*Bemis*] in Madison County." C121.) And when this Court transferred and consolidated

those additional cases pursuant to Rule 384, plaintiff's counsel filed substitution of judge motions to remove the judges who had issued rulings against plaintiffs in the consolidated cases—first, Judge Maki, and now, Judge Agran.

State Farm is “trapped on an unending treadmill.” *Gibellina*, 127 Ill. 2d at 135. It is now clear that plaintiff's counsel are effectuating a careful plan to undermine this Court's management of the MedPay cases—a plan that plaintiff's counsel will continue to execute until this Court puts a stop to it. Plaintiff's counsel will continue to file State Farm MedPay cases in Madison County, hoping for either of two outcomes: (1) this Court allows them to litigate in Madison County, or (2) if the Court continues to apply Rule 384 to transfer and consolidate those cases, then plaintiff's counsel will use their “new” cases to force a substitution of judge until they find a judge who is receptive to their claims. (Because the MedPay cases are putative class actions, plaintiff's counsel should have little difficulty finding new plaintiffs.) Indeed, Judge Agran recognized that “this issue isn't going to go away because this issue is going to resurrect itself” (C157) and that plaintiff's counsel had a “game plan...to get before a judge who [they] feel is...sympathetic” (C124). In short, plaintiff's counsel are exploiting the overlap between Rule 384 and § 2-1001 to override this Court's orders and effectively choose the judge presiding over the MedPay litigation.

Plaintiff's substitution of judge gambit further undermines this Court's Rule 384 orders by putting State Farm between the proverbial rock and a hard place. If State Farm insists on vindicating its right to have the cases transferred and consolidated under Rule 384, it will face the inevitable prospect that plaintiff's counsel will remove the judge who has been presiding over the consolidated MedPay cases, forcing the parties to start over with a new judge. The only way State Farm could avoid that result would be to allow

plaintiff's counsel to proceed with MedPay cases in Madison County and Cook County, which would force State Farm (and the courts) to incur the unwarranted costs and potential conflict of duplicative litigation. Either way, "the just and efficient conduct" (Rule 384(a)) of the cases that this Court apparently intended would be sacrificed.

We do not contend that § 2-1001 is unconstitutional on its face or that every substitution of judge after a Rule 384 transfer should be forbidden. A "for cause" substitution of judge obviously would not raise the same separation of powers issues. *See* 735 ILCS 5/2-1001(a)(3). Similarly, an "of right" motion made before the judge presiding over the consolidated cases has spent substantial time managing the consolidated cases, or before the judge has ruled on a substantial issue, would not undermine the "just and efficient" litigation purpose of the Rule 384 order. But here, plaintiff's motion is part of a pattern of filings plainly calculated to undermine this Court's repeated Rule 384 orders. Indeed, the violation of the separation of powers doctrine here is even greater than in *Baricevic*. There, plaintiff's motions interfered with the chief circuit court judge's judicial assignments. Here, plaintiff's substitution of judge motion in *Bemis* is part of a plan to undermine a series of orders by this Court.

This case involves the meaning and effect of an order issued by this Court in this very case. Under the circumstances, this Court's review is plainly warranted.

II. The Appellate Court's Rationale And Plaintiff's Arguments Conflict With This Court's Precedent.

1. The Appellate Court seemed to think that *Baricevic*'s principles apply only when a member of the executive branch (the State's Attorney in *Baricevic*) uses a statute to intrude upon judicial prerogatives. App. 9-10. Not so. That happened to be the case in *Baricevic*, but this Court's precedent does not limit the separation of powers doctrine to

that situation. Any time a statute is used to interfere with this Court's administrative authority, there is a separation of powers violation, regardless of the litigant's identity.

This Court's decisions make it clear that when a private litigant uses a statute to interfere with this Court's rules or orders, the separation of powers doctrine is violated because a legislative act is being used to undermine judicial prerogatives. It is a different *type* of separation of powers violation than that present in *Baricevic*, but it is no less a violation. For instance, in *O'Connell*, a private medical malpractice suit, this Court held that "sections 2-1009 [the voluntary dismissal statute] and 13-217 [permitting refiling within a year of voluntary dismissal], as invoked by plaintiff, unduly infringe upon this court's constitutional authority to regulate the judicial system in Illinois." 112 Ill. 2d at 281. The Court ruled that in the circumstances present there, those statutes unduly infringed "upon the judiciary as it seeks to discharge its duties fairly and expeditiously," and that a Rule 103 motion to dismiss for lack of diligence in serving the defendants had to be decided before a decision on a motion to voluntarily dismiss. *Id.* at 282. Likewise, in *Kunkel*, another private malpractice suit, the Court held that a statute waiving a plaintiff's privilege of confidentiality with health care providers "encroach[ed] on this court's paramount authority to regulate judicial procedure by court rule." 179 Ill. 2d at 530. *See Gibellina*, 127 Ill. 2d at 138 (holding in suits brought by private litigants that because of the "abusive use of the voluntary dismissal statute," dispositive motions must be ruled on before ruling on a subsequently filed voluntary dismissal motion). In short, the separation of powers doctrine is not limited to cases involving the executive branch.¹

¹ A simple example confirms the point. If a statute permitted petitions for leave to appeal to this Court to be filed one year after an appellate court decision, it would violate separation of powers because it would be contrary to Rule 315(b). The identity of the petitioner attempting to use the statute would not matter.

In re Dominique F., 145 Ill. 2d 311 (1991), cited by plaintiff below, is not contrary to this line of cases. The Cook County public guardian sought a change of venue based on the trial judge's prejudice. The Court held that the separation of powers doctrine did not apply there because the public guardian is "considered to be an arm of the judicial branch"—the judiciary cannot interfere with itself. *Id.* at 323. Moreover, because the public guardian was appointed by the court and is a judicial officer, any abuse of the change-of-venue provision "can be dealt with swiftly and effectively by other means." *Id.* at 321. That is not true here: plaintiff's counsel are not judicial officers; the only way to deal with their misuse of § 2-1001 is to apply the separation of powers doctrine and bar them from using the statute to undermine this Court's Rule 384 order.

2. The Appellate Court declined to apply *O'Connell* because it involved two provisions not at issue here (Rule 103(b) and § 13-217) and "*O'Connell* is to be 'read and applied narrowly,' because a 'general sense of unease with the particular results under the dismissal statute is not necessarily the same as an infringement on [the supreme court's] supervisory authority.'" App. 11 (quoting *Gibellina*, 127 Ill. 2d at 133). But this case *does* involve "an infringement on [this Court's] supervisory authority"—plaintiff has used § 2-1001 in a way that directly undermines this Court's Rule 384 transfer order.

The cases finding separation of powers violations are not made irrelevant because they did not involve the same facts as this case. This Court has never limited constitutional principles to the exact circumstances present in existing precedent. The truth of the matter is that there are only two possible legal rules: either a private litigant can use § 2-1001 to force a reassignment that conflicts with a Rule 384 order, or he cannot. The assertion accepted by the Appellate Court that plaintiff has an "absolute right" to use § 2-1001 in that fashion is plainly wrong, for it would undermine this

Court’s power to administer and supervise the court system, contrary to the principle that “the legislature is without authority to interfere with a product of this court’s supervisory administrative responsibility.” *Kunkel*, 179 Ill. 2d at 529. *See also Baricevic*, 136 Ill. 2d at 432-41 (creating an exception to an otherwise absolute right to substitution of judge). Conversely, if, as we contend, the separation of powers doctrine prohibits such abuse of the substitution of judge statute, then plaintiff’s attempt to remove Judge Agran conflicts with this Court’s direction that *Bemis* be consolidated with cases pending before Judge Agran, evidently to facilitate the “just and efficient conduct” (Rule 384(a)) of the MedPay litigation. The principles this Court established in prior separation of powers cases obviously apply here—and those cases make clear that this Court is not powerless to prohibit a misuse of a purported statutory right that interferes with this Court’s orders.

3. Plaintiff has asserted that the separation of powers doctrine applies only when a statute directly conflicts with one of this Court’s rules. That is not correct. In *O’Connell*, this Court held that statutory provisions, “as invoked by plaintiff,” to dismiss and refile a suit in order to circumvent Rule 103 (requiring prompt service of process) infringed on the Court’s authority to regulate the judicial system. 112 Ill. 2d at 281-83. In *Muskat*, 122 Ill. 2d at 48, the Court reaffirmed that “this court may not be thwarted in its constitutional mandate to render justice fairly and promptly by the *manipulation of the statutory provisions* relating to dismissal and the refiling of suits.” (Emphasis added.) *See also Gibellina*, 127 Ill. 2d at 137-38 (“abusive use of the voluntary dismissal statute” was “infringing on the authority of the judiciary”). The statutes at issue in these cases, on their faces, did not violate separation of powers; in most circumstances, a plaintiff could voluntarily dismiss and later refile without constitutional objection. Instead, the separation of powers violations arose from *abuse* of the statutory right. So too here: we

have never claimed that § 2-1001 is unconstitutional on its face; rather, there is a separation of powers violation on the facts here because plaintiff has used that statute to undermine and effectively evade this Court's Rule 384 order in this case.

Even if a direct statutory conflict were needed to find a separation of powers violation, that conflict is present here. As we have shown, the Court's Rule 384 order assigned *Bemis* to Judge Agran by consolidating the case with other cases already pending before him. Yet the Appellate Court permits the plaintiff to use the substitution of judge statute to take *Bemis* away from Judge Agran. That creates a direct and irreconcilable conflict between the Rule 384 order and the statute.

4. Plaintiff's argument below that, unlike the *Baricevic* prosecutor, he has not tried to control the assignment of judges is belied by the facts. Plaintiff's counsel's campaign to secure a judge sympathetic to their MedPay claims interferes with judicial administration at least as much as the efforts of the *Baricevic* prosecutor to strike and otherwise remove Judge Wharton from the felony docket. On four occasions over eight years, plaintiff's lawyers filed suit in Madison County even though similar litigation was already pending in Cook County. And after this Court transferred all of the cases for consolidation with the Cook County litigation, plaintiff's lawyers have twice moved to strike the Cook County judges presiding over the consolidated litigation—who not coincidentally had been ruling against the plaintiffs. This “game plan” (C124) does even more harm to judicial prerogatives than the abuses of the *Baricevic* prosecutor, who struck only Judge Wharton. Plaintiff's lawyers, by contrast, have shown that they will strike any judge not sympathetic to their cause and keep doing so until they get a judge they want. In addition, the *Baricevic* prosecutor merely attempted to override the ordinary course of assignment of cases by the chief circuit judge. Plaintiff's lawyers are trying to

override a Supreme Court order specifically consolidating *Bemis* with cases pending before Judge Agran and evade a whole series of Supreme Court orders directing consolidation of MedPay claims in order to promote efficiency.

5. Plaintiff argued on appeal that *Bemis* was in Judge Agran's court because of Cook County's case assignment procedures, not this Court's Rule 384 order. Nonsense. This Court ordered *Bemis* consolidated with *Snead* and *Eavenson*, which were pending before Judge Agran. Moreover, plaintiff asked that *Bemis* (and his substitution motion) be sent to Judge Agran "to effectuate" this Court's Rule 384 order. Supp. R. 72. And circuit court assignment procedures are "[s]ubject to the authority of the Supreme Court" under the Illinois Constitution. Ill. Const. art. VI, § 7(c); *see also id.* art. VI, § 16; *Blair v. Mackoff*, 284 Ill. App. 3d 836, 842 (1st Dist. 1996).

6. Plaintiff has made two groundless waiver arguments, which the Appellate Court did not accept. App. 6. First, plaintiff has argued that State Farm waived its separation of powers challenge to his substitution of judge motion by not raising that challenge *before* he made his motion. According to plaintiff, State Farm should have argued the point to Judge Maki when the *Jones* plaintiff moved for a substitution of judge, or to this Court in State Farm's Rule 384 motion to transfer *Bemis*. Plaintiff himself waived this argument by not raising in the trial court, *McKinnon v. City of Chicago*, 243 Ill. App. 3d 87, 91-92 (1st Dist. 1993), and the argument is frivolous.

There is no support for the theory that State Farm was required to raise the separation of powers argument in *Jones* in 2005 in order to preserve it for *Bemis* in 2007. *Jones* was dismissed before *Bemis* was even filed, let alone transferred. And motions and rulings in one case do not automatically apply to another consolidated case. *Ellis v. AAR Parts Trading*, 357 Ill. App. 3d 723, 731 (1st Dist. 2005). The same is true of waiver.

Equally wrong is plaintiff's contention that State Farm somehow waived its argument by not raising it in its Rule 384 motion in *Bemis* in this Court. At the time, plaintiff had not filed his substitution of judge motion. And he chose to keep quiet in his Rule 384 opposition about his intent to do so if this Court granted State Farm's motion. State Farm plainly had no obligation to raise objections to a motion neither made nor even proposed. *See Dimensions Med. Ctr. v. Suburban Endoscopy Ctr.*, 298 Ill. App. 3d 93, 97 (1st Dist. 1998) (no waiver when a litigant waits until a proceeding begins to assert a defense).

Second, plaintiff has also argued that State Farm's separation of powers challenge is premature. According to plaintiff, the issue should not be addressed until the next case, when plaintiff's lawyers file their *fifth* MedPay class action in Madison County and State Farm then files *another* Rule 384 motion. Plaintiff's lawyers are not entitled to so many bites at the apple. Nor may they put State Farm and the Illinois judiciary to such trouble. This Court has ample authority to end plaintiff's lawyers' abuse of § 2-1001 now. *Baricevic*, 136 Ill. 2d at 435-36; *O'Connell*, 112 Ill. 2d at 281-83.

CONCLUSION

This Court should grant the petition for leave to appeal.

April 1, 2009

Respectfully submitted,

Howard J. Roin
James C. Schroeder
Joshua D. Yount
Nissa J. Imbrock
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606-4637
(312) 782-0600

APPENDIX

CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

I certify that this petition conforms to the requirements of Rules 315(d), 341(a) and (b). The length of this petition, excluding the appendix, is 20 pages.

Nissa J. Imbrock

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on April 1, 2009, she caused three copies of the foregoing Petition for Leave to Appeal of State Farm Fire & Casualty Company to be placed with the U.S. Postal Service, proper postage prepaid, for first-class mail delivery to the following, and also e-mailed a courtesy copy of the foregoing Brief to the following:

Bradley M. Lakin (*bradl@lakinlaw.com*)
Robert W. Schmieder (*robs@lakinlaw.com*)
Jonathan B. Piper (*jonp@lakinlaw.com*)
THE LAKIN LAW FIRM, P.C.
300 Evans Avenue
P.O. Box 229
Wood River, IL 62095

The undersigned further certifies that on April 1, 2009, she caused one copy of the foregoing Petition for Leave to Appeal of State Farm Fire & Casualty Company to be placed with the U.S. Postal Service, proper postage prepaid, for first-class mail delivery to each of the following:

Timothy F. Campbell
CAMPBELL & MCGRADY LAW
OFFICE
3017 Godfrey Road
P.O. Box 505
Godfrey, IL 62035

Lawrence Walner
Michael Hilicki
LAWRENCE WALNER &
ASSOCIATES, LTD.
150 North Wacker Drive, Suite 2150
Chicago, IL 60606

William J. Harte
Ronald J. Lukes
WILLIAM J. HARTE, LTD.
111 West Washington Street, Suite 1100
Chicago, IL 60602

Nissa J. Imbrock

CERTIFICATE OF MAILING

The undersigned, an attorney, hereby certifies that on April 1, 2009, before 5:00 p.m., she caused 20 copies of the foregoing Petition for Leave to Appeal of State Farm Fire & Casualty Company to be placed with the U.S. Postal Service, posted at 71 South Wacker Drive, Chicago, Illinois, proper postage prepaid, for first-class mail delivery to the following:

Juleann Hornyak
Clerk of the Court
Illinois Supreme Court
Supreme Court Building
200 E. Capitol
Springfield, Illinois 62701

Nissa J. Imbrock