
IN THE SUPREME COURT OF ILLINOIS

FRANK C. BEMIS, D.C.,)
Plaintiff-Appellee,)
v.)
STATE FARM FIRE & CASUALTY)
COMPANY,)
Defendant-Appellant.)
No. 1-08-0284)
There Heard on Appeal From the)
Circuit Court of Cook County,)
County Department, Chancery)
Division,)
KEVIN SNEAD et al.,)
Plaintiffs,)
v.)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY,)
Defendant.)
No. 07 CH 21066)
Consolidated with)
MARK J. EAVENSON, D.C.,)
Plaintiff,)
v.)
STATE FARM MUTUAL AUTOMOBILE)
INSURANCE COMPANY and STATE)
FARM LIFE INSURANCE COMPANY,)
Defendants.)
No. 99 CH 12047)
and No. 05 CH 10191)
Hon. Martin S. Agran, Judge,)
Presiding)

**REPLY BRIEF OF DEFENDANT-APPELLANT
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

Attorneys for State Farm Fire &
Casualty Company

October 6, 2009

POINTS AND AUTHORITIES

	Page
ARGUMENT	3
I. Plaintiff Is Using The Substitution Of Judge Statute To Interfere Directly With This Court’s Rule 384 Order	3
A. Removing Judge Agran From The Cases Would Frustrate The Purpose Of This Court’s Rule 384 Order	3
Ill. S. Ct. R. 384(a).....	3, 5
<i>People v. Joseph</i> , 113 Ill. 2d 36 (1986)	3
<i>Kunkel v. Walton</i> , 179 Ill. 2d 519 (1997).....	3
B. This Court’s Rule 384 Order, Not Cook County Procedures, Caused This Case To Be Sent To Judge Agran	6
Ill. S. Ct. R. 384(a).....	6
<i>People v. Joseph</i> , 113 Ill. 2d 36 (1986)	7
<i>Burke v. 12 Rothschild’s Liquor Mart</i> , 148 Ill. 2d 429 (1992)	8
C. Plaintiff’s Substitution Of Judge Motion Is An Essential Element Of A Plan To Evade This Court’s Rule 384 Orders And Find A Judge More Favorably Disposed To Plaintiffs’ Claims	8
Ill. S. Ct. R. 384(a).....	9
<i>In re Marriage of Kozloff</i> , 101 Ill. 2d 526 (1984).....	9, 10
II. It Violates Separation Of Powers When A Private Litigant Abuses Statutory Rights To Effectively Nullify This Court’s Rule 384 Order	10
Ill. S. Ct. R. 384(a).....	10, 13, 14
<i>People ex rel. Baricevic v. Wharton</i> , 136 Ill. 2d 423 (1990)	10, 11, 12, 13
<i>O’Connell v. St. Francis Hosp.</i> , 112 Ill. 2d 273 (1986).....	11, 12, 14
<i>Gibellina v. Handley</i> , 127 Ill. 2d 122 (1989).....	11, 12, 13, 14
<i>Muskat v. Sternberg</i> , 122 Ill. 2d 41 (1988).....	12
<i>Kunkel v. Walton</i> , 179 Ill. 2d 519 (1997).....	13

POINTS AND AUTHORITIES
(continued)

	Page
<i>Hoffman v. Hoffman</i> , 40 Ill. 2d 344 (1968).....	12
<i>Dominique F., In re</i> , 145 Ill. 2d 311 (1991)	12
<i>People v. Walker</i> , 119 Ill. 2d 465 (1988).....	12
735 ILCS 5/2-1001	10
III. Plaintiff’s Waiver Arguments Are Baseless	14
<i>Haudrich v. Howmedica, Inc.</i> , 169 Ill. 2d 525 (1996)	15
<i>Dimensions Med. Ctr. v. Suburban Endoscopy Ctr.</i> , 298 Ill. App. 3d 93 (1st Dist. 1998).....	15
<i>Inwang v. Community College Dist. No. 508</i> , 117 Ill. App. 3d 608 (1st Dist. 1983).....	15

INTRODUCTION

State Farm showed in its opening brief that:

- Plaintiff has used the substitution of judge statute, 735 ILCS 5/2-1001, to undermine this Court's Rule 384 order consolidating the MedPay litigation before Judge Agran;
- Cases are transferred and consolidated under Rule 384 *only* when this Court “determines that consolidation...would promote the just and efficient conduct” of the litigation (Ill. S. Ct. R. 384(a));
- Removing Judge Agran from the cases, which he has overseen since 2005, would be highly inefficient, thus defeating the purpose of the Rule 384 consolidation here; and
- The substitution of judge motion here is part of a plan by plaintiff's counsel: if this Court issues a Rule 384 order that prevents them from litigating in Madison County, then plaintiff's counsel will use their “new” case as a pretext to remove from the consolidated MedPay class actions any Cook County judge who has issued rulings harmful to the plaintiffs' claims. Indeed, the harmful rulings in Cook County caused the plaintiffs to file a “new” case in Madison County as the first step in their plan to get away from the Cook County judges who had issued those decisions, either by litigating in Madison County or obtaining a new Cook County judge.

The most striking thing about plaintiff's brief is that it says nothing about any of these points. Plaintiff does not even mention, let alone discuss, the fundamental reason for transferring and consolidating cases under Rule 384—the “just and efficient conduct” of the consolidated litigation (Ill. S. Ct. R. 384(a))—even though Rule 384 made this a

crucial part of the Court’s calculus in deciding to issue the Rule 384 order in *Bemis*. Plaintiff does not dispute that it would be highly inefficient to take the MedPay class actions away from Judge Agran, who has been handling them (and ruling on issues also present in *Bemis*) since 2005. Furthermore, plaintiff does not deny that his substitution of judge motion here was part of a larger plan to try to litigate in Madison County and, failing that, take all of the consolidated cases away from any Cook County judge who has issued rulings adverse to the MedPay plaintiffs, searching instead for a judge who will be more favorably disposed to plaintiffs’ claims—which plainly is contrary to this Court’s express goal in Rule 384 of promoting the “just and efficient conduct” of the cases.

Instead, plaintiff’s argument in this Court rests on the proposition that a private litigant’s exercise of the statutory right to a substitution of judge is sacrosanct and could never violate separation of powers, even when it undermines a Rule 384 order issued by this Court. Pl. Br. 16-22. That simply is not right. This Court has long held that it has the power to remedy the improper abuse of a substitution of judge statute that violates the Constitution; moreover, the Court has ruled on several occasions that private litigants who abuse ordinarily absolute statutory rights may infringe on this Court’s constitutional authority—constitutional violations that this Court has the power to remedy.

That is the situation here. Plaintiff is attempting to use the substitution of judge statute to interfere with this Court’s constitutional authority under Rule 384 to consolidate the MedPay class actions in front of Judge Agran. In issuing its Rule 384 order, the Court evidently concluded that consolidating *Bemis* with the MedPay cases already before Judge Agran would be the most “just and efficient” (Rule 384(a)) way to conduct and resolve the MedPay litigation against State Farm. Allowing plaintiff’s counsel to effectuate their plan and move all of the cases to a new judge because they are

unhappy with the current judge's rulings would be neither just nor efficient. Plaintiff's effort to begin anew with yet another judge should be rejected because it undermines this Court's Rule 384 order consolidating the MedPay cases in front of Judge Agran.

ARGUMENT

I. Plaintiff Is Using The Substitution Of Judge Statute To Interfere Directly With This Court's Rule 384 Order.

A. Removing Judge Agran From The Cases Would Frustrate The Purpose Of This Court's Rule 384 Order.

Under Rule 384, this Court may transfer and consolidate cases with a common question *only* when “the supreme court determines that consolidation...would promote the just and efficient conduct of” the consolidated actions. Ill. S. Ct. R. 384(a). Yet although “promot[ing] the just and efficient conduct” of the consolidated cases is the central purpose of Rule 384, plaintiff's brief does not so much as mention the concept, or even use the words “just and efficient”—a startling (and telling) omission.

Instead, plaintiff simply asserts that “Rule 384 does not contemplate the assignment of cases to particular judges.” Pl. Br. 25. But while the rule itself does not explicitly refer to individual judges, under this Court's broad constitutional powers the Court surely has the authority to determine that the only “just and efficient” way to conduct specific litigation consolidated under Rule 384 is to keep the cases with the judge who has been handling the litigation for years and issued substantive rulings, rather than allowing the lawyers for one side to get rid of the judge because they are not happy with his rulings. See *People v. Joseph*, 113 Ill. 2d 36, 42 (1986) (the Supreme Court is responsible for “*central* supervision of the judicial system”); *Kunkel v. Walton*, 179 Ill. 2d 519, 528 (1997) (the Supreme Court has the “paramount authority to regulate judicial procedure”).

For several reasons, it is apparent that the Court's Rule 384 order here was designed to keep the consolidated cases with Judge Agran:

First, there is no doubt that it would be highly inefficient to move the consolidated cases to a new judge who knows nothing about the litigation. Judge Agran himself noted that “[i]t doesn’t make a whole lot of sense to me to move this down the road”: he has been on the cases “for a couple of years,” “put a lot of work into [them],” and made “substantial rulings.” App. A4; C156. Even the plaintiff does not dispute that it would be much more efficient to keep the cases with Judge Agran rather than send them to a new judge who has no knowledge of these MedPay class actions. See Pl. Br. 26 (noting but not disputing “the supposed inefficiency of having a new judge review the case”).

Second, this Court was well aware from the Rule 384 papers of the efficiencies that would result from consolidating *Bemis* with *Eavenson* and *Snead*, which were pending before Judge Agran: State Farm told the Court that *Bemis* involved “essentially the same allegations” and legal theories as the other cases; that in *Jones* the judge had already dismissed claims involving the “same legal issue” present in *Bemis* (holding that claims arising out of a workers’ compensation policy are barred); and that there were “numerous rulings” in *Snead* and *Jones* that were “similar to those presented by *Bemis*.”¹ C44-46, 52-54. State Farm’s Rule 384 papers cited repeatedly to the appendix of supporting record materials filed with the Court, and those materials showed that Judge Agran had been handling all of the consolidated cases since 2005 and had issued the

¹ Plaintiff asserts (at 5) that the MedPay cases that this Court has ordered consolidated are all “quite different.” As we pointed out in our opening brief (at 26), this Court rejected that argument two years ago, when it ordered *Bemis* consolidated with *Eavenson* and *Snead*.

important workers' compensation ruling in *Jones* (which plaintiffs chose not to appeal after Judge Agran entered final judgment). See *Bemis v. State Farm Fire & Cas.*, No. 104727, Supporting Record, R330-32, 366-84, 387, 390, 539, 553-70 (Ill. S. Ct.). Moreover, State Farm stated explicitly in its Rule 384 motion, “[t]he Cook County judge 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. While this sentence does not refer to the judge by name, only one judge was handling the consolidated cases from 2005 to 2007 and it is clear from the supporting record who that was—Judge Agran.

To be sure, our Rule 384 papers also discussed a variety of other considerations. But with respect to the “just and efficient conduct” of the litigation, the message was unmistakable: the cases should be handled by Judge Agran, who had significant experience with the MedPay cases and had issued substantive rulings that would also apply in *Bemis*.

Third, the Rule 384 order itself directed that *Bemis* be “consolidated with *Eavenson*...and *Snead*.” App. A15. Because *Eavenson* and *Snead* were already pending before Judge Agran, no more was needed to “specify what Cook County judge would preside.” Pl. Br. 21.

Given all of this, and particularly because reassigning the consolidated cases away from the judge who has been presiding over them for years would be extremely inefficient, it is clear that when this Court transferred *Bemis* and ordered it consolidated with *Eavenson* and *Snead* pursuant to Rule 384, it intended that the consolidated class actions would continue to be handled by the same judge who had been presiding over those MedPay cases (and *Jones*) since 2005—Judge Agran. That is the only “just and

efficient” way to continue the litigation, as Rule 384 requires. It would be very inefficient to start over again with a new judge, and patently unjust to allow plaintiff’s counsel to force a reassignment because they are unhappy with the judge’s prior rulings. In short, permitting plaintiff’s counsel to succeed on yet another substitution of judge motion would defeat the central purpose of this Court’s Rule 384 order: the “just and efficient conduct” of this litigation.

B. This Court’s Rule 384 Order, Not Cook County Procedures, Caused This Case To Be Sent To Judge Agran.

In addition to ignoring Rule 384’s “just and efficient” requirement, plaintiff pays no heed to the text of the Court’s Rule 384 order—namely, that *Bemis* must be “transferred to the Circuit Court of Cook County *and* consolidated with *Eavenson*...and *Snead*.” App. A15 (emphasis added). Plaintiff contends that “this Court’s Rule 384 order only got Dr. Bemis’s case as far as Cook County,” that “[j]udicial assignments are made at the Circuit Court level,” that “any action may be assigned to *any judge*,” and that “[t]he fact that these cases ended up in front of Judge Agran was *dictated by a Cook County General Order*.” Pl. Br. 14, 23-24 (emphasis added). This is preposterous.

It was the first part of the Rule 384 order (“transferred to the Circuit Court of Cook County”) that got *Bemis* “as far as Cook County” (Pl. Br. 24). Plaintiff disregards the second half of the order, which provided that *Bemis* must be “consolidated with *Eavenson*...and *Snead*.” App. A15. That meant unequivocally that *Bemis* had to be sent to Judge Agran, who already had *Eavenson* and *Snead*. The Circuit Court had no discretion to assign *Bemis* to “any judge” (Pl. Br. 23) or to look to a Cook County General Order to decide where *Bemis* should be sent. It had to comply with this Court’s order and transfer *Bemis* to Judge Agran. Under the Constitution, the administrative

authority of each circuit's chief judge is "[s]ubject...to the authority of the supreme court." *Joseph*, 113 Ill. 2d at 47. See also *State Farm Br.* 25-26 (citing additional authority).

The fact that *Bemis*, upon arriving in the Cook County Clerk's office, was initially assigned randomly to another judge (Pl. Br. 8) was an obvious clerical snafu that means nothing. Cook County has no authority to disregard a Supreme Court order. Although the hearing at which Judge Kinnaird, the Presiding Judge of the Chancery Division, transferred *Bemis* to Judge Agran was not transcribed, there is a transcript of a similar hearing in 2005, when the same thing happened after this Court ordered *Jones* and *Eavenson* transferred to Cook County and consolidated with *Snead*. At first, the Cook County Clerk's office randomly assigned the two cases to judges other than the judge then presiding over *Snead* (Judge Maki). 2d Suppl. R. C2. Recognizing that the Clerk's office had made a mistake when it assigned the cases randomly—"they didn't have a clue what was going on"—Judge Kinnaird reassigned the cases to Judge Maki. 2d Supp. R. C11, 13. Judge Kinnaird's view was that this was "a no brainer": "the Supreme Court...want[s] all these pieces together in front of Judge Maki," so "I have to put them all in front of Judge Maki"—"I'm not going to ignore an order from the Supreme Court." 2d Supp. R. C12-14, 16.

Moreover, contrary to plaintiff's current contention, when *Bemis* arrived in Cook County, plaintiff told Judge Kinnaird expressly that assigning the case to Judge Agran was necessary "[i]n order to effectuate the Illinois Supreme Court's June 26, 2007 order." Supp. R. 72 (emphasis added). In fact, even before that, plaintiff had already filed his motion for substitution of judge with Judge Agran. C62-63. All this not only confirms that everyone—including plaintiff—understood the Rule 384 order to require

consolidation before Judge Agran, but also precludes plaintiff from arguing that the Rule 384 order did not direct *Bemis* to Judge Agran. See *Burke v. 12 Rothschild's Liquor Mart*, 148 Ill. 2d 429, 436-37 (1992) (party waived argument by advancing contrary argument below).

For all of these reasons, it is absurd for plaintiff to argue that the “cases ended up in front of Judge Agran” because that was “dictated by a Cook County General Order.” Pl. Br. 24. Assignment to Judge Agran *was* dictated—but by this Court’s Rule 384 order.

C. Plaintiff’s Substitution Of Judge Motion Is An Essential Element Of A Plan To Evade This Court’s Rule 384 Orders And Find A Judge More Favorably Disposed To Plaintiffs’ Claims.

State Farm’s opening brief showed that the substitution of judge motion in *Bemis* is part of a broader plan. State Farm Br. 17-20. Plaintiff’s counsel have been involved in MedPay litigation against State Farm since filing *Siler* in 2000. The history of their behavior in this litigation—repeated filings of similar class actions against State Farm in Madison County, followed by Rule 384 transfers to Cook County and motions for substitution of judge once a case arrives in Cook County, in order to remove judges who have issued unfavorable rulings—shows that the ultimate goal of plaintiffs’ counsel is simple: if they can’t litigate in Madison County, they want to effectively select the Cook County judge who will handle the MedPay cases. See *id.* Judge Agran expressly recognized that plaintiff’s counsel’s “game plan” was to “get before a judge who [they] feel is...sympathetic to [their] position”; “[h]owever you want to put it,” Judge Agran said to plaintiff’s counsel, “it’s what you’re doing.” App. A3, A8. Plaintiff does not deny it.

This Court, however, “has long condemned a litigant’s attempt to seek a change of venue after he has formed an opinion, based upon the court’s adverse rulings, that the

judge may be unfavorably disposed towards his cause.” *In re Marriage of Kozloff*, 101 Ill. 2d 526, 530-31 (1984). See also State Farm Br. 19 (citing additional cases). That is exactly what is happening here: plaintiff’s counsel filed similar MedPay class actions in Madison County, hoping to litigate there despite this Court’s previous Rule 384 orders; then, after this Court transferred the cases to Cook County, plaintiff’s counsel moved for substitution of judge to get away from judges who have issued rulings that are harmful to the plaintiffs. It happened first with Judge Maki, and now it is happening again with Judge Agran.

Kozloff is a useful analogue. In that case, this Court reversed the Appellate Court’s holding that each petition to modify a divorce decree was a new action that entitled the petitioner to file a substitution of judge motion. The Court explained that under the Appellate Court’s rationale, a litigant could keep replacing judges by dismissing a petition to modify and refile it as a new proceeding. “Taken to its logical extreme, a resourceful litigant could repeat the process until he found a judge he considered sympathetic to his cause. Obviously, such maneuvering is anathematical to the efficient use of judicial resources.” 101 Ill. 2d at 531.

The reasoning in *Kozloff* fits this case perfectly. If the plaintiff prevails, there will be an easy way for plaintiff’s counsel to get rid of any judge who issues an unfavorable ruling in the MedPay cases: file a similar class action against State Farm in Madison County with another plaintiff; fight to keep the case in Madison County; and when this Court orders the case consolidated in Cook County with the existing MedPay class actions, have the “new” plaintiff file a substitution of judge motion. Repeat until a satisfactory judge is found.

This is certainly not a “just and efficient” (Rule 384(a)) way to conduct the

MedPay litigation. This Court condemned a similar type of ploy in *Kozloff*. It should do so again here.

II. It Violates Separation Of Powers When A Private Litigant Abuses Statutory Rights To Effectively Nullify This Court’s Rule 384 Order.

Having failed to address Rule 384’s “just and efficient” requirement, plaintiff asserts instead that the legislature’s “enactment” of the substitution of judge statute does not violate separation of powers. Pl. Br. 13-18. Plaintiff even takes State Farm to task for not “acknowledg[ing] the existence of” precedent from this Court upholding the constitutionality of change of judge statutes. *Id.* at 13. But as we noted explicitly in our opening brief (at 20, 24)—and as plaintiff well knows—State Farm’s argument is *not* that the substitution of judge statute, 735 ILCS 5/2-1001, is unconstitutional on its face. As a result, cases upholding the general constitutionality of substitution of judge statutes are irrelevant.

Rather, State Farm’s position is that a litigant’s *abuse* of a statutory right—in a manner that undermines orders issued by this Court under one of this Court’s rules—violates the Constitution’s separation of powers doctrine. Plaintiff takes the simplistic and patently incorrect position that if the legislature’s *enactment* of the statute is not unconstitutional, “it follows *a fortiori* that neither does a private litigant’s *exercise* of that statutory right.” Pl. Br. 13. Indeed, according to plaintiff, his exercise of a statutory right can never violate separation of powers, because a private citizen is “not a branch of government.” *Id.* at 18.

This Court has already rejected all of those arguments. To begin with, this Court has made clear that when a statute is being “used...for unconstitutional purposes” by a litigant, “this court is not powerless to act.” *People ex rel. Baricevic v. Wharton*, 136 Ill.

2d 423, 436, 437 (1990) (emphasis added). In *Baricevic*, the Court acted to prevent the State’s Attorney’s improper “abuse” of the substitution of judge statute even though the Court recognized that the statute itself was “constitutional” and under its “unambiguous” terms there was “an absolute right to one substitution of judge” in each case. *Id.* at 432, 435. Plaintiff attempts to distinguish *Baricevic*, arguing that it involved a member of the executive branch (Pl. Br. 19-20), but this Court has never suggested, much less held, that private litigants could not similarly violate the Constitution through the abusive use of a substitution of judge statute—particularly when, as here, the statute is being used to interfere with one of this Court’s orders issued pursuant to a Supreme Court rule.

Indeed, this Court has not hesitated to overturn the abusive use of a seemingly absolute statutory right when a private litigant’s use of a statute infringes on this Court’s constitutional prerogatives. In *O’Connell v. St. Francis Hosp.*, 112 Ill. 2d 273 (1986), a private medical malpractice suit, the Court held that “sections 2-1009 and 13-217, *as invoked by plaintiff*, unduly infringe upon this court’s constitutional authority to regulate the judicial system in Illinois”; under the “circumstances” of that case, the Court ruled that plaintiff’s use of the statutes “constitute[d] an undue infringement upon the judiciary as it seeks to discharge its duties fairly and expeditiously.” *Id.* at 281, 283 (emphasis added).

Likewise, in *Gibellina v. Handley*, 127 Ill. 2d 122 (1989), which involved two private medical malpractice suits and a private product liability action, the Court devised a new procedure for summary judgment motions to deal with “the myriad *abusive uses* of the voluntary dismissal statute,” which “infring[e] on the authority of the judiciary to discharge its duties fairly and expeditiously.” *Id.* at 136, 137 (emphasis added). “This step by our court is necessitated by the noted *abusive use* of the voluntary dismissal

statute.” *Id.* at 138 (emphasis added). The Court acted even though the statute on its face was constitutional and “does not...directly conflict[] with a specific rule of this court.” *Id.* at 133. See also *Muskat v. Sternberg*, 122 Ill. 2d 41, 48 (1988) (stating in a private suit 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); State Farm Br. 22 (explaining why *In re Dominique F.*, 145 Ill. 2d 311 (1991), does not support plaintiff’s argument).

Thus, although “the *potentiality for abuse* of a statute by litigants is a matter quite different from a separation of powers violation,” *People v. Walker*, 119 Ill. 2d 465, 481-82 (1988) (emphasis added), the Court has made clear that a litigant’s *actual abuse* of a seemingly absolute statutory right in a manner that undermines this Court’s prerogatives *does* violate the Constitution. See *Baricevic*, 136 Ill. 2d at 431-37; *Gibellina*, 127 Ill. 2d at 136-38; *O’Connell*, 112 Ill. 2d at 281-83. Compare *Walker*, 119 Ill. 2d at 472 (upholding the facial constitutionality of a substitution of judge statute where the movant’s “good faith” was undisputed).

These authorities also show that plaintiff is wrong in asserting that the right to substitution of judge is “absolute” and trumps the Court’s Rule 384 order. Pl. Br. 16. There was an apparently “absolute” right to a substitution of judge in *Baricevic*, yet the Court held that it was “not powerless to act” and announced restrictions on that statutory right because the statute was being “used...for unconstitutional purposes.” 136 Ill. 2d at 435-36, 437. (In addition, the Court has long held that the “typically” absolute right to a change of judge may be denied “[i]f it becomes apparent that the request is made only to delay or avoid trial”—an exception not found in the statute. *Hoffman v. Hoffman*, 40 Ill. 2d 344, 347-38 (1968).) Similarly, both *O’Connell*, 112 Ill. 2d at 281-83, and *Gibellina*,

127 Ill. 2d at 136-37, involved a plaintiff's seemingly absolute statutory right to voluntarily dismiss and refile a case, but the Court held in each case that the plaintiffs' *abuse* of that statutory right in those cases infringed on this Court's constitutional prerogatives.

Nor is it true that a constitutional violation "arises only when there is an 'unequivocal conflict' between the statute and the judicial rule." Pl. Br. 22 (citing *Gibellina*). In fact, *Gibellina* squarely *rejected* that proposition. The Court there, "assert[ing] our authority to manage the courts," held that "the allowance of an unrestricted right to dismiss and refile an action in the face of a potentially dispositive motion" was "*infringing on the authority of the judiciary*" even though "the cases in this appeal did *not* involve an unequivocal conflict between a specific rule of this court and the Code." 127 Ill. 2d at 137-38 (emphasis added). See also *Kunkel*, 179 Ill. 2d at 528 (separation of powers is violated when a statute "unduly encroaches upon the inherent powers of the judiciary, *or* directly and irreconcilably conflicts with a rule of this court on a matter within the court's authority") (emphasis added); *Baricevic*, 136 Ill. 2d at 432-33 (separation of powers is violated "[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'") (emphasis added); State Farm Br. 24 (discussing additional cases).

In any event, there is a direct conflict here. The Court's Rule 384 order directed that *Bemis* be consolidated with *Eavenson* and *Snead*, which Judge Agran has been handling since 2005. As already discussed, Rule 384(a) requires that consolidation must "promote the just and efficient conduct" of the consolidated cases. Allowing plaintiff's counsel to use section 2-1001 to force a reassignment of the consolidated cases because

they don't like the presiding judge's prior rulings would be neither just nor efficient, and therefore would directly interfere with this Court's Rule 384 order.

The circumstances here are very similar to the circumstances in this Court's decisions involving the misuse of the voluntary dismissal statute, *O'Connell* and *Gibellina*. In both situations, the plaintiff is attempting to use a statutory right to take a case away from a judge when things are going south, hoping to try later with another judge who may be more favorably disposed to the plaintiff's case. But litigants act impermissibly when a statutory right is “invoked for purposes not related to its proper objective,” and this Court has stressed that the “abuse of...statutory rights should not go unremedied.” *Baricevic*, 136 Ill. 2d at 430-31. See also *O'Connell*, 112 Ill. 2d at 281 (plaintiff's invocation of the voluntary dismissal statute “unduly infringe[s] upon this court's constitutional authority to regulate the judicial system of Illinois”); *Gibellina*, 127 Ill. 2d at 136 (“this court is not unaware of, nor can it any longer turn its back on, the myriad abusive uses of the voluntary dismissal statute”). To give effect to this Court's Rule 384 order, the appropriate remedy here is to deny plaintiff's substitution of judge motion, so that the “just and efficient” (Rule 384(a)) litigation of the consolidated MedPay cases may continue before Judge Agran.

III. Plaintiff's Waiver Arguments Are Baseless.

Although State Farm vigorously opposed the substitution of judge motion on separation of powers grounds as soon as it was filed, plaintiff nevertheless asserts that State Farm somehow waived its separation of powers argument because it did not raise that issue in its Rule 384 motion to consolidate *Bemis* with *Eavenson* and *Snead* in Cook County—long *before* plaintiff moved for substitution of judge in *Bemis*. Pl. Br. 28-30. We dealt with this argument in the petition for leave to appeal (at 19-20), but since

plaintiff has resurrected it, we will address it again here.

First, plaintiff waived his waiver argument by not raising it in the trial court when State Farm asserted its separation of powers objection to plaintiff's substitution of judge motion. "It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal." *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996).

Second, plaintiff's contention that State Farm waived an objection to a motion before the motion was even filed—indeed, before *Bemis* was even in Cook County—is ridiculous. State Farm filed its Rule 384 motion *months before* plaintiff filed his substitution of judge motion. And plaintiff chose to keep quiet in his Rule 384 opposition about his intent to move for a new judge if this Court granted State Farm's motion. State Farm plainly had no obligation to object in its Rule 384 papers to a motion not yet made or 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; raising the defense earlier "would have been premature"); *Inwang v. Community College Dist. No. 508*, 117 Ill. App. 3d 608, 613 (1st Dist. 1983) (no waiver where the plaintiff "would have had to anticipate" the defendant's future action in order to object at the hearing).

Nor did State Farm have any obligation to raise its separation of powers argument with Judge Kinnaird (see Pl. Br. 30) when she formally reassigned *Bemis* to Judge Agran in accordance with this Court's Rule 384 order. Judge Kinnaird's role was simply to assign the case to Judge Agran pursuant to the Rule 384 order; she had no authority to issue any rulings in the case. And at that point, as plaintiff told Judge Kinnaird, both parties were "in agreement" that *Bemis* had to be assigned to Judge Agran, who already

was presiding over the consolidated MedPay cases, and that plaintiff's motion for substitution of judge "will need to be presented to Judge Agran." Supp. R. 72. When it was, State Farm promptly raised its separation of powers argument. C91-100. No more was required to preserve the issue.

Finally, there is no basis for plaintiff's suggestion that State Farm engaged in "judge shopping" when it did not seek a Rule 308 appeal after plaintiff's substitution of judge motion was granted in *Jones* in 2005. Pl. Br. 29. *Plaintiff* was the one seeking another judge, not State Farm. This is not a case of "selective[] appeal[s]" of substitution of judge orders (*id.*); State Farm appealed in *Bemis* because it decided enough is enough.

CONCLUSION

The order granting plaintiff's motion for substitution of judge should be reversed. The Court should order that the consolidated MedPay class actions remain before Judge Agran.

October 6, 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

Attorneys for State Farm Fire &
Casualty Company

CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 16 pages.

James C. Schroeder

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 6, 2009, he caused three copies of the foregoing Reply Brief of Defendant-Appellant 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 Reply 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 October 6, 2009, he caused one copy of the foregoing Reply Brief of Defendant-Appellant 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
THE WALNER LAW FIRM, LTD.
20 North Clark Street, Suite 2450
Chicago, IL 60602

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

James C. Schroeder

CERTIFICATE OF MAILING

The undersigned, an attorney, hereby certifies that on October 6, 2009, before 5:00 p.m., he caused 20 copies of the foregoing Reply Brief of Defendant-Appellant 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

James C. Schroeder