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**IN THE APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT**

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FRANK C. BEMIS, D.C.,	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Cook County, County Department,
vs.	)	Chancery Division, Hon. Martin S.
STATE FARM FIRE & CASUALTY	)	Agran, presiding
COMPANY,	)	
Defendant-Appellant.	)	No. 07 CH 21066
<hr/>		)
	)	<i>consolidated with</i>
KEVIN SNEAD et al.,	)	
Plaintiffs,	)	
vs.	)	
STATE FARM MUTUAL AUTOMOBILE	)	No. 99 CH 12047
INSURANCE COMPANY,	)	
Defendant.	)	
<hr/>		)
	)	<i>and</i>
MARK J. EAVENSON, D.C.,	)	
Plaintiff,	)	
vs.	)	
STATE FARM MUTUAL AUTOMOBILE	)	No. 05 CH 10191
INSURANCE COMPANY and STATE	)	
FARM LIFE INSURANCE COMPANY,	)	
Defendants.	)	

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**BRIEF OF DEFENDANT-APPELLANT STATE FARM FIRE &  
CASUALTY COMPANY**

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

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*Counsel for Defendant-Appellant*

ORAL ARGUMENT REQUESTED

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## INTRODUCTION

This is an interlocutory appeal pursuant to Supreme Court Rule 308 from an order granting plaintiff Frank C. Bemis’s motion for substitution of judge under 735 ILCS 5/2-1001(a)(2). That motion sought to remove Cook County Circuit Judge Martin Agran from Bemis’s putative MedPay class action and two similar suits against State Farm that the Supreme Court consolidated before Judge Agran after transferring *Bemis* from Madison County pursuant to Supreme Court Rule 384.<sup>1</sup> Judge Agran mistakenly believed that he had no recourse to stop plaintiff’s lawyers’ repeated manipulation of the substitution of judge statute even though (a) Judge Agran presided over the consolidated State Farm MedPay litigation since 2005, and made many rulings in the litigation, including a ruling on an issue that will be dispositive in the *Bemis* case; (b) the Supreme Court’s Rule 384 order was premised on efficiency gains that would be lost if Judge Agran were removed from the consolidated cases; and (c) constitutional separation of powers principles require that Illinois Supreme Court rules and orders be given

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<sup>1</sup> In “MedPay”—short for “medical payments”—class actions, plaintiffs allege that an insurer systematically underpays insurance claims seeking to recover for medical expenses. Here, the consolidated MedPay suits name a number of different State Farm companies as defendants, each of which has a separate legal identity. All of the defendants, however, are opposed to the substitution of judge motion. For simplicity’s sake, this Brief refers to all of the various State Farm defendants as “State Farm.” State Farm categorically denies the plaintiffs’ claims in the MedPay cases, including the assertion that such claims are suitable for class action treatment. This Court need not address the merit of the MedPay claims in order to decide this appeal.

precedence over statutes that concern judicial administration. There is no jury verdict or question on the pleadings. For the reasons explained below, State Farm asks that this Court reverse the order granting the motion for substitution of judge and instruct that further proceedings in the consolidated cases continue before Judge Agran.

### **ISSUE PRESENTED**

Whether plaintiff's use of the substitution of judge statute, 735 ILCS 5/2-1001, in this case violates Illinois separation of powers principles by undermining the Supreme Court's Rule 384 order transferring *Bemis v. State Farm Fire & Casualty Co.* and consolidating it with *Eavenson v. State Farm Mutual Automobile Insurance Co. et al.*, and *Snead et al. v. State Farm Mutual Automobile Insurance Co.* in order to promote the just and efficient conduct of the consolidated actions.

### **JURISDICTION**

This Court has jurisdiction over this appeal by virtue of Supreme Court Rule 308 and the Court's March 19, 2008 order granting State Farm's request for leave to appeal under that rule. 3/19/08 Order (A1). State Farm timely filed its Application for Leave to Appeal Pursuant to Supreme Court Rule 308 on January 28, 2008. 1/28/08 Application (A14). The substitution of judge order being appealed and the Circuit Court certification of that order for immediate appeal both were entered January 14, 2008. 1/14/08 Order (SR C148; A54).<sup>2</sup>

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<sup>2</sup> Parenthetical references to "SR" signify that the cited document appears in the Supporting Record that State Farm submitted with its Application for Leave to Appeal Pursuant to Supreme Court Rule 308 on January 28, 2008, at the pages following the

## RULES AND STATUTES INVOLVED

This appeal involves Illinois Supreme Court Rule 384(a), which allows the Supreme Court to transfer civil actions for consolidation to “promote the just and efficient conduct of such actions.” The rule reads:

**(a) Motion to Consolidate–Transfer.** When civil actions involving one or more common questions of fact or law are pending in different judicial circuits, and the supreme court determines that consolidation would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions, the supreme court may, on its own motion or on the motion of any party filed with the supreme court, transfer all such actions to one judicial circuit for consolidated pretrial, trial, or post-trial proceedings.

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This appeal also involves 735 ILCS 5/2-1001(a)(2), which allows litigants to obtain a new judge in certain circumstances. The statutory provision reads:

(a) A substitution of judge in any civil action may be had in the following situations:

\* \* \*

(2) Substitution as of right. When a party timely exercises his or her right to a substitution without cause as provided in this paragraph (2).

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“SR.” Parenthetical references to “A” indicate that the cited material appears in the Separate Appendix submitted with this brief, at the pages following the “A.”

(i) Each party shall be entitled to one substitution of judge without cause as a matter of right.

(ii) An application for substitution of judge as of right shall be made by motion and shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties.

(iii) If any party has not entered an appearance in the case and has not been found in default, rulings in the case by the judge on any substantial issue before the party's appearance shall not be grounds for denying an otherwise timely application for substitution of judge as of right by the party.

### **STATEMENT OF FACTS**

Plaintiff filed this suit in Madison County. On State Farm's motion, however, the Illinois Supreme Court transferred the case to Cook County and consolidated it with a group of pre-existing cases pursuant to Supreme Court Rule 384. Indeed, this is one of four putative MedPay class action cases that plaintiff's lawyers filed against State Farm in Madison County between 1999 and 2007, all of which the Supreme Court transferred to Cook County and consolidated with pre-existing State Farm MedPay cases pursuant to Rule 384. In order to fully understand the context of this appeal, it is important to know the circumstances that led to the Supreme Court's multiple Rule 384 orders.

**A. *Snead v. State Farm, The Original MedPay Class Action, Was Filed In Cook County.***

In 1999, the law firm of Lawrence Walner & Associates, Ltd. led a group of lawyers that filed a putative class action in the Circuit Court of Cook County entitled *Snead v. State Farm Mutual Automobile Insurance Co.* *Snead* Compl. (SR C549); *Snead* 2nd Am. Compl. (SR C576). The *Snead* complaint alleged that State Farm systematically denied insurance claims seeking reimbursement for medical expenses. *Snead* Compl. ¶ 9 (SR C551). As noted earlier (*see p. 4 n.1, supra*), such cases are sometimes referred to as “MedPay” cases.

**B. *After Snead Was Filed, Plaintiff’s Attorneys Filed a MedPay Class Action In Madison County Called Siler v. State Farm, But The Supreme Court Transferred Siler To Cook County And Consolidated It With Snead.***

Shortly after *Snead* was filed, a second group of lawyers, led by the Lakin Law Firm, filed a MedPay class action in Madison County entitled *Siler v. State Farm Mutual Automobile Insurance Co.* *Siler* Compl. (SR C484).<sup>3</sup> Because the *Snead* case already

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<sup>3</sup> Initially, the Lakin Law Firm was teamed with a Chicago law firm called Freed & Weiss, and together, along with a changing set of other lawyers, they brought each of the transferred State Farm MedPay cases preceding *Bemis*. *Eavenson* Compl. at 25 (SR C186); *Jones* 1st Am. Compl. at 17 (SR C405); *Siler* Compl. at 17 (SR C500). Shortly prior to the filing of *Bemis*, the Lakin Law Firm and Freed & Weiss had a much publicized falling out, after which Freed & Weiss ceased representing any of the plaintiffs in the State Farm MedPay cases. *See Freed* Compl. ¶¶ 21, 59, 61 (A188, 199); *see also Metro. Life Ins. Co. v. Am. Nat’l Bank & Trust Co.*, 288 Ill. App. 3d 760, 764 (1st Dist. 1997) (“This court may take judicial notice of public documents that are included in the records of other courts.”).

was pending in Cook County at the time *Siler* was filed, and because *Siler* was a MedPay class action very similar to *Snead*, State Farm moved pursuant to Supreme Court Rule 384 to transfer *Siler* to Cook County for consolidation with *Snead*. 8/25/00 Order (SR C517). State Farm argued that transferring *Siler* to Cook County and consolidating it with the pre-existing *Snead* cases would promote the “just and efficient” conduct of the actions. 7/3/00 Explanatory Suggestions at 11 (SR C511). The Supreme Court agreed and granted State Farm’s Rule 384 motion. 8/25/00 Order (SR C517).

When *Siler* arrived in Cook County, State Farm renewed its motion to dismiss the *Siler* complaint. See 3/6/01 Mot. (SR C519); 3/6/01 Mem. (SR C524). Facing the prospect of having to litigate in Cook County rather than Madison County, plaintiff’s counsel promptly tried to voluntarily dismiss the *Siler* complaint without prejudice. 5/31/01 Mot. (SR C540). Because a dispositive motion already was pending, however, the court refused to allow the *Siler* plaintiffs to dismiss without prejudice. 6/27/01 Order (SR C547). Plaintiff’s counsel then voluntarily dismissed the *Siler* case *with prejudice*. 8/3/01 Agreed Order (SR C548).

**C. Plaintiff’s Attorneys Filed Two More MedPay Class Actions In Madison County, And After The Supreme Court Transferred The New Cases To Cook County And Consolidated Them With *Snead*, They Used The “New” Cases To Force A Substitution Of Judge.**

Plaintiff’s attorneys waited a few years and then, in 2003, filed two more MedPay cases in Madison County against State Farm companies: *Jones v. State Farm Fire & Casualty Co.* and *Eavenson v. State Farm Mutual Automobile Insurance Co. et al.* See *Jones* 1st Am. Compl. (SR C389); *Eavenson* Compl. (SR C162); *Eavenson* 1st Am. Compl. (SR C188). Given the similarities and overlap between the *Snead*, *Jones*, and *Eavenson* cases, and given the Supreme Court’s previous Rule 384 Order in *Siler*, State

Farm once again filed a Rule 384 motion, this time seeking to have *Jones* and *Eavenson* transferred to Cook County and consolidated with *Snead*. 2/21/05 Mot. (SR C240).

Plaintiffs' counsel opposed State Farm's Rule 384 motion, arguing, among other things, that Cook County would not be a more convenient forum. 3/21/05 Objection at 15-19 (SR C286-90). State Farm, on the other hand, argued that the cases should be "consolidate[d] in Cook County before a court that already is addressing the issues as a result of presiding over the *Snead* action." 2/21/05 Explanatory Suggestions at 14 (SR C262). State Farm explained that "[i]t would be flatly inconsistent with the purpose of Rule 384, which is to 'serve the convenience of the parties' and 'promote the just and efficient conduct' of the cases, to allow [plaintiffs' counsel] to force State Farm and the Illinois courts to re-litigate issues already being addressed in *Snead*." 2/21/05 Explanatory Suggestions at 15 (SR C263). The Supreme Court again agreed with State Farm, and as it had done with *Siler*, transferred both *Jones* and *Eavenson* to Cook County for consolidation with *Snead*, which at the time was pending in front of Cook County Circuit Judge Maki. 4/6/05 Order (SR C298).

Meanwhile, before *Jones* and *Eavenson* were consolidated with *Snead*, the litigation between the *Snead* plaintiffs and State Farm had continued. Among other things, Judge Maki had dismissed all but one of the five counts of plaintiff's complaint. See 6/13/03 Order (SR C608); 4/27/04 Order (SR C619); 1/18/05 Order (SR C620). (In their unsuccessful opposition to State Farm's Rule 384 motion directed at *Jones* and *Eavenson*, plaintiff's counsel had complained that one of the reasons State Farm sought transfer and consolidation was to take advantage of the rulings the *Snead* court already had made in favor of State Farm. 3/21/05 Objection at 8-9 (SR C279-80).)

Knowing that the MedPay litigation before Judge Maki was not going their way, as soon as *Jones* and *Eavenson* arrived in Cook County, plaintiff's lawyers (in the name of the *Jones* plaintiff<sup>4</sup>) filed a substitution of judge motion seeking to move all three consolidated class actions away from Judge Maki. 6/23/05 Mot. (SR C413). State Farm vigorously opposed the substitution of judge motion, arguing that it would undermine the Supreme Court's Rule 384 transfer order, which was designed to facilitate the just and efficient resolution of the consolidated cases. 8/5/05 Mem. (SR C461-71). Moreover, State Farm predicted that, if the substitution of judge motion were granted, then plaintiff's counsel would be emboldened to continue filing copycat suits in Madison County, knowing that when the Supreme Court inevitably transferred such cases to Cook County, plaintiff's counsel would be able to use the "new" case and the substitution of judge statute as a pretext to force the reassignment of the consolidated cases away from any judge who had been unsympathetic to their cause. 8/5/05 Mem. at 6-7 (SR C466-67). Significantly, however, State Farm neglected to argue, as it does here, that under Illinois separation of powers principles, the Supreme Court's administration of justice in its Rule 384 order takes precedence over the purported statutory right to a substitution of judge. Consequently, Judge Maki granted the substitution of judge motion, and in 2005 *Snead*,

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<sup>4</sup> The other plaintiffs were not eligible to file an "of right" substitution of judge motion. *Eavenson* had already exercised his right to a substitution of judge before the Supreme Court transferred the cases to Cook County. 2/25/04 Order (SR C187). *Snead* also exercised his right to a substitution of judge (3/13/00 Mot. (SR C570-73); 3/20/00 Order (SR C574)), and in any event, as noted above, Judge Maki made numerous substantive rulings concerning *Snead*.

*Jones*, and *Eavenson* were reassigned to Cook County Circuit Judge Agran. 8/25/05 Order (SR C472).

**D. Since 2005, Judge Agran Has Made Numerous Rulings Against Plaintiffs In The Consolidated MedPay Cases.**

*Jones*. Once the MedPay cases were reassigned to Judge Agran, State Farm pursued its motion to dismiss *Jones*. State Farm argued, among other things, that *Jones* must be dismissed because it was based on a State Farm Fire & Casualty Co. workers' compensation policy, and "the Worker's Compensation Act provides that the [Workers' Compensation] Commission is the exclusive forum for resolution of disputes concerning workers' compensation benefits." 1/21/05 Mot. at 3 (SR C408). This argument in *Jones* is particularly relevant to plaintiff's counsel's new *Bemis* case because *Bemis* also arises out of a State Farm Fire & Casualty Co. workers' compensation policy and therefore is subject to a virtually identical motion to dismiss.

Judge Agran granted State Farm's motion and dismissed *Jones* with prejudice. 5/1/06 Order (SR C473). Judge Agran ruled that Jones's claim was barred because "the benefits that a provider gets are to be determined by the [Workers' Compensation] Commission" and that "the circuit courts have no original jurisdiction over workmen's comp. proceedings wherein benefits are determined under the Act." 5/1/06 Hrg. Tr. at 4-5 (SR C477-78). Plaintiff's attorneys chose not to appeal the dismissal of *Jones*.<sup>5</sup>

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<sup>5</sup> Because *Jones*, *Eavenson*, and *Snead* were consolidated but not merged, *Jones* remained an independent case, with its own docket number. See, e.g., *Heritage Pullman Bank v. Am. Nat'l Bank & Trust Co. of Chi.*, 164 Ill. App. 3d 680, 684 (1st Dist. 1987) (explaining that, where two actions are consolidated "to permit a single hearing of evidence relating to common issues" and the actions "retained their separate docket

*Eavenson*. After the MedPay cases were assigned to Judge Agran, State Farm also tried to pursue its motion to dismiss the *Eavenson* case. See 8/27/04 Mot. (SR C214); 8/27/04 Mem. (SR C221). Plaintiff's lawyers (who have represented Eavenson and all of the other plaintiffs in the transferred State Farm MedPay cases), however, initiated a long and thus far successful effort to prevent Judge Agran from deciding the motion to dismiss.

First, plaintiff's lawyers demanded discovery. Pl.'s 1st Set of Reqs. For Admis. (SR C300); Pl.'s 1st Set of Interrogs. (SR C310); Pl.'s 1st Set of Reqs. for Produc. (SR C318). Judge Agran, however, ruled that they were not entitled to additional discovery and ordered them to respond to State Farm's motion to compel arbitration or dismiss the suit, which had been pending since August 2004. 2/24/06 Order (SR C323).

Next, plaintiff's lawyers engaged in a long and complicated arbitration-related scheme, which was calculated to move control of the *Eavenson* case back to the Madison County courts. Specifically, they tried to engineer a situation in which the case would be arbitrated by a "neutral" arbitrator chosen by a Madison County judge. Although the Supreme Court had transferred *Eavenson* to Cook County, the scheme even included

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numbers," the consolidation "did not result in the merging of the two matters into a single suit"). Consequently, the dismissal of *Jones* was an appealable order, which became final when plaintiff's attorneys did not appeal during the 30-day period after the dismissal. Out of an abundance of caution, Judge Agran entered an order pursuant to Illinois Supreme Court Rule 304(a) stating that there was no just reason for delaying appeal (8/16/06 Order (SR C483)), and plaintiff's attorneys did not appeal then either.

filing a new *Eavenson* action back in Madison County. *See* 9/14/06 Pet. (SR C324).<sup>6</sup> To make a long story short, Judge Agran rejected the arbitration scheme, ruled that there would be no arbitration, and directed Eavenson to respond to State Farm's motion to dismiss. 12/7/06 Order (SR C329); 12/7/06 Hrg. Tr. at 6-7 (SR C337-38). Plaintiff's lawyers appealed, and obtained a stay while the appeal was pending, thereby deferring resolution of State Farm's motion to dismiss. 2/14/07 Order (SR C365). Ultimately, on September 28, 2007, this Court affirmed Judge Agran's order. 9/28/07 1st Dist. Order (SR C366; A167). (The particulars of the arbitration scheme are set forth in this Court's September 28, 2007 order.) Plaintiff's lawyers sought rehearing, and that motion was denied on November 1, 2007. 11/1/07 1st Dist. Order (SR C383).

Finally, once the arbitration-related appeal was rejected and the stay was lifted, plaintiff's counsel requested a long briefing schedule to respond to State Farm's motion to dismiss (even though State Farm's motion and brief had been filed over three years earlier). Consequently, the hearing on State Farm's motion to dismiss was not scheduled to occur until January 9, 2008. 10/11/07 Order (SR C382). As we explain below,

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<sup>6</sup> The Madison County court dismissed the Madison County action on the grounds that the Supreme Court had transferred the case to Cook County, and therefore any such action should have been filed in Cook County. 1/10/07 Order (SR C345); 1/10/07 Hrg. Tr. at 16-17 (SR C361-62). Plaintiff's lawyers appealed to the Fifth District Appellate Court, but after the First District rejected their scheme (*see* p. 14, *infra*), the Fifth District granted State Farm's motion to dismiss the appeal. 1/15/08 Order (SR C388); *see also* 12/21/07 Mot. (SR C384).

plaintiff's counsel's latest substitution of judge motion prevented that January 9, 2008 hearing from happening.

**E. Plaintiff's Attorneys Filed This Case (*Bemis*)—Their Fourth MedPay Class Action in Madison County—And After The Supreme Court Transferred *Bemis* to Cook County and Consolidated It With the State Farm MedPay Cases Pending Before Judge Agran, Plaintiff's Counsel Again Used The “New” Case (*Bemis*) To Force a Substitution of Judge.**

On January 18, 2007—about a month after Judge Agran rejected the arbitration scheme in *Eavenson*, and only four months after he dismissed *Jones* because of the Workers' Compensation Act bar—plaintiff's attorneys filed yet another MedPay class action against State Farm in Madison County: *Bemis v. State Farm Fire & Casualty Co.* *Bemis* Compl. (SR C1; A116).

As it had with plaintiff's counsel's three previous Madison County MedPay class actions, State Farm filed a Rule 384 motion to transfer *Bemis* to Cook County for consolidation with the pre-existing State Farm MedPay cases, which already were pending before Judge Agran. State Farm argued 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*.” 5/30/07 Explanatory Suggestions at 19 (SR C53; A160). In particular, State Farm explained that in *Jones* Judge Agran already addressed the State Farm Fire & Casualty Co. workers' compensation policy at issue in *Bemis*, holding that *Jones* must be dismissed with prejudice because “the benefits that a provider gets are to be determined by the [Workers' Compensation] Commission,” not a court. *Id.* at 9 (SR C43; A150), quoting 5/1/06 Hrg. Tr. at 4 (SR C477). On June 26, 2007, the Supreme Court again granted State Farm's Rule 384 motion, transferring *Bemis* to Cook County for consolidation with *Snead* and *Eavenson*. 6/26/07 Order (SR C60; A140).

Apparently unhappy with Judge Agran's numerous rulings in *Snead*, *Eavenson*, and *Jones*, plaintiff's attorneys immediately moved for a substitution of judge.<sup>7</sup> Plaintiff's counsel set their substitution of judge motion for hearing on January 2, 2008, one week before the date set for the hearing on State Farm's motion to dismiss *Eavenson*. 12/11/07 Notice of Mot. (SR C65).

State Farm strongly opposed plaintiff's counsel's substitution of judge motion. State Farm showed that, under well-established separation of powers principles, the Supreme Court's exercise of its judicial authority in its Rule 384 order takes precedence over plaintiff's purported statutory right to substitution of judge. 1/4/08 Mem. at 4-9 (SR C95-100). State Farm further showed that in these consolidated cases, plaintiff's counsel were using the substitution of judge statute to undermine the Supreme Court's efforts in its Rule 384 orders to "promote the just and efficient conduct" of these cases. Ill. Sup. Ct. R. 384. Plaintiff's counsel's primary response was their assertion that they "have an absolute right [to a substitution of judge] and [they] should be allowed to exercise it." 1/9/08 Hrg. Tr. at 19 (SR C124; A85).

**F. Judge Agran Granted Plaintiff's Substitution of Judge Motion, But Certified For An Interlocutory Appeal Pursuant To Supreme Court Rule 308, Which This Court Allowed.**

Judge Agran did not dispute that under Illinois law, Supreme Court orders concerning the administration of justice should be given precedence over conflicting

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<sup>7</sup> Plaintiff's counsel filed their substitution of judge motion to remove Judge Agran even before the *Bemis* case arrived in Judge Agran's courtroom (8/14/07 Mot. (SR C62-63)), and refiled the substitution of judge motion after *Bemis* arrived on Judge Agran's docket (12/11/07 Mot. (SR C67-68; A114-15)).

statutory rights. Judge Agran agreed that plaintiff's substitution of judge motion was part of a "game plan . . . to get before a judge who [plaintiff's counsel] feel is . . . sympathetic to [plaintiff's] position." 1/9/08 Hrg. Tr. at 19 (SR C124; A85). (Judge Agran brushed aside plaintiff's denials, telling plaintiff's counsel: "However you want to put it, . . . it's what you're doing. You can say you're not doing it. You are doing it. It is what it is." *Id.* at 24 (SR C129; A90); *see also* 1/14/08 Hrg. Tr. at 7 (SR C155; A60) ("it's obvious what's taken place here").) Judge Agran also agreed that granting plaintiff's substitution of judge motion would be inefficient. 1/9/08 Hrg. Tr. at 20 (SR C125; A86) ("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[.]"). And Judge Agran made it clear that if the Supreme Court's Rule 384 order had expressly transferred the cases to him by name, he "would [have] agree[d] without any question [to State Farm's] Separation of Power argument." *Id.* at 22 (SR C127; A88). But because the Rule 384 order did not expressly mention him by name ("It doesn't say [they are] to be consolidated before me"), Judge Agran concluded that plaintiff's substitution of judge motion did not directly conflict with the Supreme Court's order. *Id.* at 20 (SR C125; A86).

Although he granted the substitution of judge motion, Judge Agran expressly found that the separation of powers issue was a "close" and "interesting question." 1/9/08 Hrg. Tr. at 23 (SR C128; A89). As a result, he stayed the substitution of judge order to preserve the status quo and certified it for an interlocutory appeal. 1/14/08 Order (SR C148; A53); *see also* 1/10/08 Mot. (SR C140). Specifically, Judge Agran ruled that "[t]he substitution of judge order involves a question of law as to which there is substantial ground for difference of opinion (whether plaintiff's use of the substitution of

judge statute in this case violates Illinois separation of powers principles by undermining the Supreme Court's Rule 384 order transferring and consolidating these cases in order to promote the just and efficient conduct of these actions)." 1/14/08 Order (SR C148; A53). Judge Agran further ruled that "an immediate appeal from the [substitution of judge] order may materially advance the ultimate termination of the litigation." *Id.* Judge Agran explained:

As far as moving it along, obviously how ever they [the Appellate Court or Supreme Court] rule on this will more likely than not put an end to this particular aspect of your various battles in litigation.

So I think it's probably a good issue to send to the Appellate Court at this point in time. I think it will resolve something that down the road will certainly speed up this litigation and speed up other litigation.

\* \* \*

[I]t's not that I have any great desire to keep these cases. I'll be glad to move them on to somebody else, but then it just becomes somebody else's problem. And 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.

1/14/08 Hrg. Tr. at 8-9 (SR C156-57; A61-62).

State Farm thereafter sought leave to appeal Judge Agran's order granting the motion for substitution of judge. 1/28/08 Application (A14). State Farm showed that plaintiff's abusive use of the substitution of judge statute to undermine the Supreme

Court's Rule 384 order violated separation of powers principles under applicable Illinois precedents and that Judge Agran's ruling to the contrary warranted immediate appeal. *Id.* at 22-26, 32-34. Plaintiff countered that the litigation strategies of private parties raise no separation of powers concerns, that he has an "absolute right" to a substitution of judge, and that any concern with plaintiff's use of the substitution of judge statute should be addressed in connection with future Rule 384 motions. 2/7/08 Answer (A2). Notwithstanding plaintiff's arguments, this Court granted leave to appeal pursuant to Supreme Court Rule 308 on March 19, 2008. 3/19/08 Order (A1).

### STANDARD OF REVIEW

The *de novo* standard of review applies to the substitution of judge order that is the subject of this appeal. Appeals that arise under Supreme Court Rule 308 and appeals that raise a separation of powers challenge to the application of a statute both necessarily present a question of law subject to *de novo* review. *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, ---, 879 N.E.2d 893, 897 (2007) ("An interlocutory appeal pursuant to Supreme Court Rule 308 is ordinarily limited to the question certified by the circuit court, which, because it must be a question of law, is reviewed *de novo*."); *In re Adoption of K.L.P.*, 198 Ill. 2d 448, 453 (2002) (party's "separation of powers argument presents a question of law, which we will review *de novo*").

### ARGUMENT

#### **I. The Illinois Separation Of Powers Doctrine Establishes That Supreme Court Orders Supersede Statutory Enactments That Impede The Administration Of Justice.**

"[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 constitutional 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.* “[P]rocedural administration of the courts” and judicial “rulemaking,” therefore, are a particular province of the courts. *Kunkel v. Walton*, 179 Ill. 2d 519, 528 (1997).

This does not mean, of course, that the legislature can have no role in court administration. As the Supreme Court explained in *Kunkel*:

Where matters of judicial procedure are at issue, the constitutional authority to promulgate procedural rules can be concurrent between the court and the legislature. The legislature may enact laws that complement the authority of the judiciary or that have only a peripheral effect on court administration.

*Id.* The Supreme Court has established, however, that courts—and particularly the Supreme Court—“retain[] 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) (internal citations omitted). *Accord, Kunkel*, 179 Ill. 2d at 528 (“the separation of powers principle is violated when a legislative enactment unduly encroaches upon the inherent powers of the judiciary, or directly and irreconcilably conflicts with a rule of th[e] Supreme C]ourt on a matter within the court’s authority”).

In accordance with these principles, “if a statute conflicts with a rule of th[e] Supreme C]ourt 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) (the “supreme court rules shall be read together with the Civil Practice Law” but “[i]f a legitimate legislative enactment irreconcilably conflicts with a supreme court rule, the rule will prevail”). Moreover, “even 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 (internal citations omitted). Thus, where a statute is being used to circumvent the Supreme Court’s rules and orders, the court should either “declar[e] the statute causing the encroachment unconstitutional” as applied to the court order, or “interpret[] ambiguous statutory language in a manner which avoids constitutional problems.” *Baricevic*, 136 Ill. 2d at 435.

The Supreme Court already has applied the separation of powers doctrine to address abusive substitution of judge motions. In *Baricevic*, the petitioner, the State’s Attorney of St. Clair County, sought a supervisory order to compel a trial judge to grant a series of substitution of judge motions. *Id.* at 435-38. The Court acknowledged that the statute unambiguously provided “an absolute right to one substitution of judge upon the timely filing of a written motion alleging that the judge is prejudiced.” *Id.* at 435 (internal citation and quotation marks omitted).<sup>8</sup> Nevertheless, the Supreme Court

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<sup>8</sup> *Baricevic* involved chapter 38, paragraph 114-5(c) of the Illinois Revised Statutes, the substitution of judge provision in the Code of Criminal Procedure. Although that provision technically requires “an allegation of prejudice,” the Supreme Court explained that it essentially is an “automatic right to a substitution of judge” similar to a peremptory

rejected petitioner's request (*id.* at 436), explaining that petitioner was "using the [substitution of judge] statute to interfere with the judiciary's assignment authority" (*id.* at 434), which threatened the constitutional separation of powers:

[T]he chief judge of each circuit court has "general administrative authority over his court." Where 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.

*Id.* at 432-33 (internal citations omitted). The Supreme 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.

Significantly, the Supreme Court acknowledged both that the substitution of judge statute provides essentially an "absolute right to one substitution of judge" and that, on its face, the statute "is constitutional." *Id.* Nevertheless, the Supreme Court held that it "is not powerless to act" (*id.* at 436) where the substitution of judge provision is used "for unconstitutional purposes" (*id.* at 437). Thus, the Supreme Court refused the petitioner's demand for an automatic substitution of judge and instead imposed a procedure for that case to ensure that the substitution of judge statute was not being used "to thwart the

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challenge of a judge because the prejudice allegation ordinarily "is not subject to judicial scrutiny." *Baricevic*, 136 Ill. 2d at 436.

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 hardly an outlier. Illinois courts have applied the separation of powers doctrine to strike down or limit the application of a wide variety of statutes attempting to regulate the judicial process. Statutes directing the 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 any interlocutory order (*Smith v. Goldstick*, 110 Ill. App. 3d 431, 436 (1st Dist. 1982)), and permitting voluntary dismissal without prejudice at 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. The cases finding these statutes, or particular applications of them, unconstitutional 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 Supreme Court rules or orders.

Take, for instance, the *O'Connell* and *Gibellina* cases. 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 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 the *Baricevic* principle that 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 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”).

It is true, of course, that there are cases that reject separation of powers challenges to statutes that regulate the judicial process, including ones that distinguish *Baricevic*, *O’Connell*, and *Gibellina*. *See, 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 had been 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 was deemed not abusive). But even those cases, none of which are factually 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, *Baricevic*, *O’Connell*, and *Gibellina* show, where (as here) a litigant abuses a purported statutory right to defeat judicial efforts to administer the litigation process under the Supreme Court rules.

## **II. Plaintiff's Use Of The Substitution Of Judge Statute Violates The Separation Of Powers Doctrine By Interfering With The Supreme Court's Rule 384 Order.**

Plaintiff and his attorneys are attempting to use the substitution of judge statute to “interfere with a product of th[e] court’s supervisory and administrative responsibility” (*Kunkel*, 179 Ill. 2d at 529)—namely, the Supreme Court’s Rule 384 order transferring *Bemis* from Madison County to Cook County and consolidating it with the MedPay cases that have been pending before Judge Agran since 2005. Plaintiff’s substitution of judge motion interferes with and undermines the Supreme Court’s Rule 384 order in two fundamental ways.

First, by moving the consolidated MedPay cases away from Judge Agran, it completely frustrates the purpose of the Supreme Court’s transfer and consolidation order. Rule 384 authorizes the Supreme Court 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). State Farm’s Rule 384 motion argued that the Supreme Court should transfer *Bemis* to Cook County and consolidate it with the State Farm MedPay cases already pending before Judge Agran 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*.” 5/30/07 Explanatory Suggestions at 19 (SR C53; A160). In particular, State Farm explained that in *Jones*, Judge Agran already addressed the State Farm Fire & Casualty Co. workers compensation insurance policy at issue in *Bemis*, holding that *Jones* must be dismissed with prejudice because “the benefits that a provider gets are to be determined by the [Workers’ Compensation] Commission,” not a court. *Id.* at 9 (SR C43; A150), quoting 5/1/06 Hrg. Tr. at 4 (SR C477). In accordance with State Farm’s showing, the Supreme Court granted State Farm’s Rule

384 motion and ordered *Bemis* transferred and consolidated with the Cook County MedPay cases, which already were pending before Judge Agran.

To be sure, as Judge Agran noted, the Rule 384 order did not mention him by name. But allowing plaintiff and his counsel to use the substitution of judge statute to, in effect, reassign *Bemis*, *Snead*, and *Eavenson* to another court would countermand the Supreme Court's transfer of *Bemis* to the court where *Snead* and *Eavenson* were already pending. More important, by 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*, it would defeat the primary purpose of the Supreme Court's Rule 384 order, which was to "promote the just and efficient conduct" of the MedPay cases. *See* Ill. Sup. Ct. R. 384(a). Indeed, because plaintiff's substitution of judge motion 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 himself 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." 1/2/08 Hrg. Tr. at 5 (SR C74; A97). Thus, even though the Rule 384 order did not specifically mention Judge Agran, the reassignment that plaintiff and his attorneys demand would completely undermine the Supreme Court's order.

Second, plaintiff's current substitution of judge motion is part of a larger plan to evade and undermine the Supreme Court's multiple Rule 384 orders transferring the State Farm MedPay cases out of Madison County. Since its initial Rule 384 order in *Siler*, the Supreme Court has made it clear that it will not countenance the filing in Madison County of copycat MedPay class actions against State Farm. 8/25/00 Order (SR C517);

4/6/05 Order (SR C298); 6/26/07 Order (SR C60; A140). But plaintiff's counsel have refused to accept the Supreme Court 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." 1/9/08 Hrg. Tr. at 16 (SR C121; A82)). And when the Supreme Court transferred and consolidated those additional cases pursuant to Rule 384, plaintiff's counsel filed substitution of judge motions to remove the judges that issued rulings against plaintiffs in the consolidated cases—first, Judge Maki, and now, Judge Agran.

Thus, it is now clear that plaintiff's counsel are effectuating a carefully crafted plan to undermine the Supreme Court's management of the MedPay cases. Plaintiff's counsel will continue to file State Farm MedPay cases in Madison County until the Supreme Court allows them to litigate there. (Because the MedPay cases are putative class actions, plaintiff's counsel should have little difficulty finding new plaintiffs.) And if the Supreme 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. Indeed, Judge Agran expressly recognized that "this issue isn't going to go away because this issue is going to resurrect itself" (1/14/08 Hrg. Tr. at 9 (SR C157; A62)) and that plaintiff's counsel had a "game plan . . . to get before a judge who [they] feel is . . . sympathetic to [plaintiff's] position" (1/9/08 Hrg. Tr. at 19 (SR C124; A85)). In short, plaintiff's counsel are exploiting the overlap between Rule 384 and the substitution of judge statute to override the Supreme Court's orders and effectively choose the judge presiding over the MedPay litigation.

Plaintiff's substitution of judge gambit further undermines the Supreme Court's Rule 384 orders by putting State Farm between the proverbial rock and hard place. If State Farm insists on vindicating its right to have the MedPay cases transferred and consolidated pursuant to Rule 384, then it will face the inevitable prospect that plaintiff's counsel will remove the judge who has been presiding over the consolidated MedPay cases, thereby 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. In either case, "the just and efficient conduct" of the litigation intended by the Supreme Court would be sacrificed.

In the face of the undeniable abuse and inefficiency resulting from his lawyer's substitution of judge scheme, plaintiff has said that both State Farm and the courts are powerless to take corrective action now, and that State Farm must wait to raise its objections in future Rule 384 motions to transfer future Madison County MedPay suits. 2/7/08 Answer at 9 (A11). In other words, plaintiff says nothing can be done until his lawyers execute their substitution of judge scheme still another time by filing their fifth copycat MedPay suit in Madison County. 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. Plaintiff's abusive substitution of judge motion, which seeks to remove the judge who has presided over the MedPay cases for three years because his lawyers dislike the judge's rulings, undermines the Supreme Court's goal of "just and efficient" litigation now, and this Court has ample authority to address and correct the problem now.

The Illinois Supreme Court showed in *Baricevic* that courts need not and should not allow substitution of judge motions that interfere with the separation of powers or the administration of justice. *See* pp. 19-24, *supra*. As in *Baricevic*, plaintiff’s counsel’s conduct here, which includes multiple filings in Madison County and repeated demands for substitution of judge, “poses a substantial threat to the dignity and independence of the judiciary.” 136 Ill. 2d at 435. Indeed, the violation of the separation of powers doctrine here is even greater than the one in *Baricevic*. In *Baricevic*, plaintiff’s motions interfered with the chief circuit court judge’s judicial assignments. *Id.* at 432-33. Here, plaintiff’s substitution of judge motion in *Bemis* is part of a plan to undermine a series of orders by the Supreme Court itself.<sup>9</sup> Because plaintiff’s substitution of judge motion plainly is being used “for unconstitutional purposes” (*id.* 437) in defiance of the Supreme

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<sup>9</sup> Plaintiff’s counsel’s substitution of judge scheme also conflicts with the well-established principle that “a motion for substitution of judge may be denied if the movant had an opportunity to ‘test the waters’ and form an opinion as to the judge’s reaction to her claim.” *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (3d Dist. 2004). Moreover, the case law establishes that where a judge has made rulings in a prior case, one cannot file a related case and then demand a substitution of judge. *See Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 399 (1st Dist. 2002); *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 247-48 (1st Dist. 2006). And because plaintiff’s motion will result in the reassignment of *Snead* and *Eavenson*, too, plaintiff’s counsel effectively have appropriated in those cases an additional “of right” substitution of judge that is not available under the statute. *See* 735 ILCS 5/2-1001(a)(2)(i), (ii).

Court's orders, it should have been denied and Judge Agran's order granting it should be reversed.<sup>10</sup>

## CONCLUSION

Plaintiff's attorneys' scheme—repeatedly filing MedPay class actions against State Farm in Madison County, with the intent to either secure a Madison County forum or use each “new” case transferred to Cook County as a pretext to remove any judge that has ruled against them in the consolidated litigation—violates the separation of powers doctrine. State Farm submits that unless plaintiff's substitution of judge motion is denied, his use of the statute will undermine the Supreme Court's Rule 384 order and its goal of promoting “just and efficient” litigation. Indeed, it is the opposite of efficient to allow plaintiff and his counsel to force reassignment of the State Farm MedPay cases after Judge Agran has presided over them for years and made rulings directly applicable to plaintiff's case. And it is the opposite of just to allow plaintiff's counsel to carry out a plan to remove any judge who has made rulings against plaintiffs. State Farm therefore

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<sup>10</sup> This is not to say that every substitution of judge after a Rule 384 transfer should be forbidden. A “for cause” substitution of judge, which requires a judicial finding that substitution is warranted, 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, where plaintiff's motion is part of a pattern of filings plainly calculated to undermine the Supreme Court's repeated Rule 384 orders, relief is warranted.

respectfully requests that this Court reverse the order granting plaintiff's motion for substitution of judge and reject plaintiff's and his counsel's attempt to use the substitution of judge statute to further their scheme to circumvent the Supreme Court's Rule 384 orders in this case.

April 23, 2008

Respectfully submitted,

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

*Counsel for Defendant-Appellant*

**CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341**

The undersigned, an attorney, certifies that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief (including the Points and Authorities), is 31 pages.

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Nissa J. Imbrock

## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on April 23, 2008, she caused three copies of the foregoing Brief of Defendant-Appellant State Farm Fire & Casualty Company and the accompanying Separate Appendix to 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 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 23, 2008, she caused one copy of the foregoing Brief of Defendant-Appellant State Farm Fire & Casualty Company and the accompanying Separate Appendix to 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  
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