No. 1-08-0284

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

<table>
<tr><td>FRANK C. BEMIS, D.C.,
Plaintiff-Appellee,
vs.
STATE FARM FIRE & CASUALTY COMPANY,
Defendant-Appellant.</td><td>Appeal from the Circuit Court of Cook County, County Department, Chancery Division, Hon. Martin S. Agran, presiding

No. 07 CH 21066</td></tr>
<tr><td></td><td>consolidated with</td></tr>
<tr><td>KEVIN SNEAD et al.,
Plaintiffs,
vs.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant.</td><td>No. 99 CH 12047</td></tr>
<tr><td></td><td>and</td></tr>
<tr><td>MARK J. EAVENSON, D.C.,
Plaintiff,
vs.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM LIFE INSURANCE COMPANY,
Defendants.</td><td>No. 05 CH 10191</td></tr>
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REPLY BRIEF OF DEFENDANT-APPELLANT STATE FARM FIRE & CASUALTY COMPANY

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July 2, 2008

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INTRODUCTION

In its opening brief, State Farm showed that plaintiff's use of the substitution of judge statute to remove Judge Agran from the consolidated State Farm MedPay litigation violated separation of powers principles by undermining the just and efficient litigation that the Supreme Court intended to promote through its Rule 384 order. Plaintiff's response does not deny that allowing a substitution of judge here would hinder the just and efficient conduct of the State Farm MedPay litigation. Nor does the response deny that plaintiff's lawyers are executing a game plan to exploit the overlap between Rule 384 and the substitution of judge statute in an effort to secure a judge sympathetic to their claims. Instead, plaintiff asserts that he has an "absolute right" to abuse the judicial system in these ways. Indeed, plaintiff asserts that State Farm cannot challenge that abuse because it is both too late (since State Farm should have objected before plaintiff even moved for substitution of judge) and too soon (since plaintiff's lawyers have yet to file a fifth Madison County MedPay action).

Plaintiff is wrong. State Farm appropriately raised its separation of powers challenge to the substitution of judge in *Bemis* when plaintiff moved for that relief, and this Court correctly agreed with Judge Agran that an immediate interlocutory appeal to resolve that challenge is warranted. As for plaintiff's merits argument that he has an "absolute right" to undermine a Rule 384 order with a substitution of judge, it rests on at least two critical errors. *First*, the Supreme Court's Rule 384 order *did* assign *Bemis* to Judge Agran when it consolidated the case with cases already pending before him. *Second*, the rulings in *O'Connell v. St. Francis Hospital,* 112 Ill. 2d 273 (1986), and *People ex rel. Baricevic v. Wharton*, 136 Ill. 2d 423 (1990), when read together, *do*

establish that a private litigant's abuse of the civil substitution of judge statute violates the separation of powers doctrine. What is more, the substitution of judge to which plaintiff believes he is entitled rips the MedPay litigation from the judge who spent the preceding two years presiding over it and thus destroys the very efficiency gains that motivated the Supreme Court's Rule 384 order. In order to vindicate the Illinois constitution's separation of powers, this Court can and should reject plaintiff's demand to strike Judge Agran. The order granting a substitution of judge should be reversed.

ARGUMENT

I. State Farm Raised Its Separation Of Powers Challenge In A Timely Fashion.

Plaintiff contends 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 the Supreme Court in State Farm's Rule 384 motion to transfer *Bemis*, or to Judge Kinnaird (the Chancery Division Presiding Judge) when plaintiff moved to transfer his case from Judge Rochford to Judge Agran. Pl.'s Br. at 29-31. Plaintiff's waiver arguments are truly frivolous.

To begin with, plaintiff himself waived any waiver argument by failing to raise it below. In neither his papers nor his counsel's statements in open court did plaintiff ever claim that State Farm waived its separation of powers challenge by raising it only after plaintiff actually moved for a substitution of judge. 1/7/08 Reply (SR C622); 1/9/08 Tr. (SR C106; A67); 1/14/08 Tr. (SR C149; A54). Arguments raised for the first time on appeal are waived and do not offer a basis for affirmance. *McKinnon v. City of Chicago*, 243 Ill. App. 3d 87, 91-92 (1st Dist. 1993) (refusing to affirm based on new arguments not presented below). That rule dooms plaintiff's newly asserted waiver claims.

In any event, State Farm was not required to raise its separation of powers challenge before it did. In the first place, plaintiff's assertion that State Farm was required to raise the separation of powers argument in *Jones* in order to preserve it for *Bemis* is plainly wrong. Although both cases were consolidated with the rest of the State Farm MedPay litigation, *Jones* had been dismissed before *Bemis* was even filed, let alone transferred. And even if *Jones* and *Bemis* had been consolidated, *Jones* and *Bemis* would have remained distinct cases. Motions and rulings in one case do not automatically apply to the other. *Ellis v. AAR Parts Trading, Inc*., 357 Ill. App. 3d 723, 731 (1st Dist. 2005) (ruling in one consolidated yet distinct case did not apply to other). The same is true of any waiver. What is more, when plaintiff demanded a substitution of judge in *Jones*, State Farm merely feared that plaintiff's lawyers had a plan to bring suits in Madison County that if transferred would give them an opportunity to strike unsympathetic Cook County judges. When plaintiff's lawyers repeated their gambit, again moving for a substitution of judge in *Bemis*, State Farm's fears were confirmed and the abusive nature of plaintiff's lawyers' scheme became clear. With this new, compelling evidence of abuse in hand, State Farm was able to bolster its position against plaintiff's now-obvious scheme by adding a separation of powers argument. New evidence allows a litigant to make new arguments. *Hart v. Valspar Corp*., 252 Ill. App. 3d 1005, 1009-10 (1st Dist. 1993) (approving reconsideration based on new evidence).[1]

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[1] Plaintiff's related accusation that State Farm engaged in "judge shopping" by seeking a Rule 308 appeal of the *Bemis* substitution of judge order but not the *Jones* substitution of judge order is nonsense. In neither case did State Farm know the identity of the new judge when the current judge granted the substitution of judge motion. 9/2/05 Order (2d Supp. R. C19); 1/14/08 Order (SR C148; A53). And in both cases State Farm preferred to stay with the current judge. 8/5/05 Mem. (SR C461); 1/4/08 Mem. (SR C91).

Plaintiff's assertion that State Farm somehow waived its separation of powers argument by not raising it in its Rule 384 petition is similarly wrong. At that time, plaintiff had yet to file his substitution of judge motion. And he chose to keep quiet in his Rule 384 opposition about his intent to do so if the Supreme Court granted the Rule 384 petition and transferred his case to Judge Agran. 6/13/07 Objs. (Supp. R. 53).[2] State Farm obviously had no obligation to raise objections to a motion neither made nor even proposed. Plus, had State Farm raised substitution of judge arguments, plaintiff undoubtedly would have asserted they were premature. *See* 7/26/05 Tr. at 10 (2d Supp. R. C17) (lawyer for *Jones* plaintiff arguing that objections to *Jones* substitution of judge had to wait). In any event, it is well established that no waiver occurs when a litigant waits until a proceeding is commenced to assert a defense to that proceeding. *Dimensions Med. Ctr., Ltd. v. Suburban Endoscopy Ctr.*, 298 Ill. App. 3d 93, 97 (1st Dist. 1998). Plaintiff has not cited a shred of authority to the contrary. That rule controls here.

Plaintiff's contention that State Farm somehow waived its separation of powers argument by not raising it before Judge Kinnaird in connection with plaintiff's motion to transfer his case from Judge Rochford to Judge Agran also is wholly without merit. Plaintiff's substitution of judge motion was for Judge Agran to decide, not Judge Kinnaird. 735 ILCS 5/2-1001(a)(2)(ii) ("An application for substitution of judge . . . 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" (emphasis added)). And contrary to his current contention, plaintiff's transfer motion expressly noted that

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[2] If plaintiff had told the Supreme Court he intended to strike Judge Agran, State Farm could have registered its opposition and plaintiff may have received the "clarification" he complains (at 31) about not getting. It was plaintiff's own actions, not State Farm's, that caused the "prejudice" plaintiff claims.

"Plaintiff and Defendant are in agreement that [any substitution of judge] motion will need to be presented to Judge Agran and that the case must be transferred to him first." 11/19/07 Mot. at 4 (Supp. R. 72). Indeed, when State Farm tried to contest the *Jones* substitution of judge motion before Judge Kinnaird, she refused to consider the motion and instructed State Farm to raise its arguments with Judge Maki, the judge at whom the motion was directed (just as the lawyer for the *Jones* plaintiff had advocated). 7/26/05 Tr. at 9-11 (2d Supp. R. C16-18) ("That's for Judge Maki to decide"). It was not waiver for State Farm to accept that Judge Kinnaird could not preemptively deny a substitution of judge motion directed at another judge.

II. An Interlocutory Appeal Under Supreme Court Rule 308 Is Appropriate.

With no hint of irony, plaintiff argues not just that State Farm's separation of powers challenge comes too late and therefore is waived, but also that it is premature and thus does not warrant a Rule 308 appeal. According to plaintiff, the separation of powers issue should not be addressed until plaintiff's lawyers file another MedPay class action in Madison County and State Farm then files another Rule 384 motion. State Farm has already explained why it need not sit on its separation of powers challenge until plaintiff's lawyers execute their scheme still another time. *See* Def.'s Br. at 28; pp. 3-5, *supra*. The challenge was timely. *Dimensions Med. Ctr.*, 298 Ill. App. 3d at 97. And this Court has ample authority to end plaintiff's lawyers' abuse of the substitution of judge statute. *Baricevic*, 136 Ill. 2d at 435-36; *O'Connell*, 112 Ill. 2d at 281-83.

Plaintiff's claim that this Rule 308 appeal was improvidently granted is baffling. Both Judge Agran and this Court correctly concluded that State Farm's separation of powers challenge to plaintiff's substitution of judge scheme meets Rule 308's requirements. 1/14/08 Order (SR C148; A53); 3/19/08 Order (A1). That plaintiff thinks

he has good responses to State Farm's separation of powers argument only confirms that the case "involves a legal question as to which there is substantial ground for difference of opinion." Ill. Sup. Ct. R. 308(a). And that a substitution of judge motion does not go to the "merits" of a case has no bearing on whether an immediate appeal "may materially advance the ultimate termination of the litigation." *Id.* Indeed, Illinois courts have several times granted a Rule 308 appeal from a ruling on a substitution of judge motion. *Sahoury v. Moses*, 308 Ill. App. 3d 413, 413 (1st Dist. 1999); *In re Daniel R.*, 291 Ill. App. 3d 1003, 1009 (1st Dist. 1997); *People ex rel. Alexander v. Keogh*, 81 Ill. App. 3d 729, 729 (4th Dist. 1980). Plus, here, Judge Agran specifically found that the substitution of judge issue would "resurrect itself" (1/14/08 Tr. at 9 (SR C157; A62)), that an immediate appeal would "speed up" the MedPay litigation by resolving the issue (*id.*), and that it did not "make a whole lot of sense" to reassign the litigation because he had "put a lot of work into the case" (1/9/08 Tr. at 20 (SR C125; A86)), findings that plaintiff cannot dispute and conveniently ignores in his brief.

III. The Supreme Court Assigned *Bemis* To Judge Agran.

Plaintiff principally stakes his supposed right to a substitution of judge on the notion that the Supreme Court's Rule 384 order merely sent *Bemis* to Cook County Circuit Court, not to Judge Agran in particular. According to plaintiff, *Bemis* was sent to Judge Agran, not because of the Supreme Court's Rule 384 order, but rather because of Cook County's judicial assignment rules. Plaintiff's argument is complete fiction.

First, the text of the Rule 384 order refutes plaintiff's argument. In relevant part, the order commands:

> Pursuant to Supreme Court Rule 384, Beamis et al. v. State Farm Fire & Casualty Co., Madison County No. 07 L 52 is transferred to the Circuit Court of Cook County, Illinois *and consolidated with* Eavenson v. State

> Farm Mutual Automobile Insurance Co., et al., Cook County No. 05 CH 10191 and Snead v. State Farm Mutual Automobile Insurance Co., Cook County No. 99 CH 12047.

6/26/07 Order (SR C60; A140) (emphasis added). Contrary to plaintiff's contention, the order did not merely transfer *Bemis* to Cook County Circuit Court. It also expressly consolidated *Bemis* with *Eavenson* and *Snead*, which were pending before Judge Agran. Thus, when the Supreme Court consolidated *Bemis* with *Eavenson* and *Snead*, it necessarily assigned *Bemis* to Judge Agran. The Supreme Court did not need to say anything more specific to direct *Bemis* to Judge Agran. Indeed, contrary to plaintiff's hypothesizing (at 18-19), one would expect the Supreme Court to say something more specific about who should preside over the consolidated litigation only if the Court contemplated or the parties suggested someone other than Judge Agran in that role. Likewise, there was no reason for the Supreme Court to specifically strip plaintiff of any substitution of judge right, when plaintiff failed to disclose that he intended to exercise that supposed right against Judge Agran. 6/13/07 Objs. (Supp. R. 53).

Second, reading the Rule 384 order as assigning *Bemis* to Judge Agran jibes with State Farm's Rule 384 petition. Contrary to plaintiff's claim (at 19) that State Farm paid no mind to what judge would preside over *Bemis*, the Rule 384 petition made clear that State Farm sought consolidation before Judge Agran. The petition stated that Judge Agran was the Cook County judge presiding over the consolidated MedPay litigation, a fact also revealed by the orders in the supporting record. 5/30/07 Explanatory Suggestions at 10 (SR C10). It explained that the Cook County judge dismissed *Jones* based on a worker's compensation bar that also applies to *Bemis*. *Id.* at 19 (SR C53). And it argued that "[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*." *Id.* Plaintiff (at 19) tries to characterize these points as having been made only in passing, but in reality they prove that State Farm was proposing that *Bemis* be transferred to Judge Agran, whose experience with the consolidated MedPay litigation would facilitate the "just and efficient" handling of the litigation required for a Rule 384 transfer. It is natural, therefore, to read the order granting State Farm's Rule 384 petition as assigning *Bemis* to Judge Agran.

Third, the text of Rule 384 compels the same reading. Plaintiff says (at 18) that by authorizing "transfer . . . to one judicial circuit for consolidated pretrial, trial, or post-trial proceedings" (Ill. Sup. Ct. R. 384(a)), Rule 384 gives the Supreme Court no role in assigning a transferred case to a particular judge. But when the rule talks of transfer *for consolidated proceedings*, it means the Court will consolidate the cases before a single judge. What is more, Rule 384 provides that transfer and consolidation under its authority must "promote the just and efficient conduct of" the consolidated actions. Ill. Sup. Ct. R. 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, in particular, the gains from litigating before Judge Agran are considerable. Not only is he familiar with the allegations in the various cases, he has already ruled in *Jones* on an issue that is dispositive in *Bemis*. *See* Def.'s Br. at 12-14. 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. *See* 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.").

Plaintiff's brief completely ignores that Rule 384 orders must "promote the just and efficient conduct" of consolidated cases and that only keeping the consolidated MedPay litigation before Judge Agran would serve that purpose. Instead, plaintiff protests (at 18) that Rule 384 does not expressly override the substitution of judge statute. But constitutional principles of separation of powers dictate that a Supreme Court directive overrides a statute whenever the statute interferes with the operation of the directive; no express statement that the Supreme Court's directive supersedes inconsistent legislation is necessary. *Kunkel v. Walton*, 179 Ill. 2d 519, 528-29 (1997).[3]

Notwithstanding his current position, plaintiff previously admitted that the Rule 384 order assigned *Bemis* specifically to Judge Agran and not merely to the Circuit Court of Cook County. In his motion asking Judge Kinnaird (as Presiding Judge of the Chancery Division in Cook County) to reassign *Bemis* to Judge Agran from Judge Rochford, plaintiff expressly argued that assigning the case to Judge Agran was necessary "[i]n order to effectuate the Illinois Supreme Court's June 26, 2007 order" granting State Farm's Rule 384 petition. 11/19/07 Mot. at 4 (Supp. R. 72); *see also* Pl.'s Br. at 21 (motion filed "to effectuate the Supreme Court order"). (Indeed, plaintiff was so sure that the Supreme Court's Rule 384 order assigned *Bemis* to Judge Agran that he

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[3] In his fact statement (at 8-10, 14), plaintiff also tries to cast doubt on the fairness and efficiency of the Supreme Court's decision to consolidate proceedings before Judge Agran, asserting that *Snead*, *Siler*, *Jones*, *Eavenson*, and *Bemis* are not identical and that none of the remaining suits have progressed very far. The *Bemis* Rule 384 order, however, conclusively rejected plaintiff's argument (expressly argued to the Supreme Court) that there are meaningful differences among the consolidated cases for purposes of Rule 384. *See* 11/19/07 Objs. at 2-3, 7-9 (Supp. R. 55-56, 60-62). Likewise, although *Snead*, *Eavenson*, and *Bemis* still face pleading challenges, Judge Agran has made a number of rulings in the consolidated litigation, including the *Jones* dismissal that dictates dismissal of *Bemis*. *See* Def.'s Br. at 12-14; 1/9/08 Hrg. Tr. at 20 (SR C125; A86) ("I have put a lot of work into the case."). It is beyond dispute that only by keeping the consolidated cases before Judge Agran will Rule 384's efficiency rationale be served.

filed a substitution of judge motion to strike Judge Agran months before Judge Kinnaird actually assigned the case to Judge Agran. 8/14/07 Mot. (SR C62-63).) Plaintiff's advocacy for that position not only confirms that everyone understood the Rule 384 Order to require consolidation before Judge Agran, it also precludes him from arguing now that the Rule 384 order did not direct *Bemis* to Judge Agran. *Burke v. 12 Rothschild's Liquor Mart, Inc*., 148 Ill. 2d 429, 436-37 (1992) (party waived joint tortfeasor argument by advancing successive tortfeasor argument below).

Judge Kinnaird, too, read the Supreme Court's Rule 384 order as assigning *Bemis* to Judge Agran for consolidation with *Snead* and *Eavenson*. Although the hearing at which Judge Kinnaird considered plaintiff's transfer motion was not transcribed, there is a transcript of the hearing at which Judge Kinnaird considered plaintiff's counsel's nearly identical motion after their *Jones* and *Eavenson* cases were transferred to Cook County and randomly assigned to judges other than the judge then presiding over *Snead* (Judge Maki). *See* 7/21/05 Mot. (2d Supp. R. C1). Judge Kinnaird deemed the random assignment a mistake on the part of the Clerk's office. 7/26/05 Tr. at 6-7 (2d Supp. R C13-14). In her view, "the Supreme Court[,] they want all these pieces together in front of Judge Maki" (*id.* at 9 (2d Supp. R. C16)), so she "ha[d] to put them all in front of Judge Maki" (*id.* at 7 (2d Supp. R. C14)).

As for plaintiff's lengthy disquisition (at 20-22) on the case assignment procedures in Cook County Circuit Court, plaintiff offers no evidence that those assignment procedures, rather than the Rule 384 order, led Judge Kinnaird to send *Bemis* to Judge Agran. Plaintiff did not even mention the assignment procedures in his transfer motion, but instead relied entirely on the Rule 384 order. 11/19/07 Mot. (Supp. R. 71).

Furthermore, 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* Ill. Const. art. VI, § 16 ("General administrative and supervisory authority over all courts is vested in the Supreme Court"); *Blair v. Mackoff*, 284 Ill. App. 3d 836, 842 (1st Dist. 1996) (power of Circuit Court Chief Judge to assign judges is "subject to the authority of the Supreme Court"). And Judge Kinnaird expressly recognized that she assigned *Jones* and *Eavenson* to Judge Maki pursuant to the Supreme Court's Rule 384 order, not Cook County's rules: "I'm not going to ignore an order from the Supreme Court." 7/26/05 Tr. at 5, 9 (2d Supp. R C12, C16). Just so here. The Supreme Court's Rule 384 order, not Cook County's judicial assignment rules, directed *Bemis* to Judge Agran. As we explain below, plaintiff's attempt to override the Supreme Court's Rule 384 order through the misuse of the substitution of judge statute violates Illinois separation of powers principles and therefore should be disallowed.

IV. Precedents Require Illinois Courts To Stop Abuse Of The Substitution Of Judge Statute By A Private Litigant.

In its opening brief, State Farm showed that although no prior case involved the precise facts presented here, the most relevant precedents, when read together, required denial of plaintiff's motion for substitution of judge because it is part of an ongoing effort to use a purported statutory right to interfere with and undermine the Supreme Court's Rule 384 order. Plaintiff responds by trying to distinguish those precedents individually and then declaring victory because none specifically condemns his particular abuses of the substitution of judge statute. Pl.'s Br. at 23-29.[4] Even if the distinctions plaintiff

[4] Plaintiff also tries to make something of the fact that Illinois courts have rejected facial challenges arguing that substitution of judge statutes violate the separation of powers doctrine. Pl.'s Br. at 24-25. But State Farm has never contended that the civil

claims were meaningful in comparing this case to some individual precedent (which they are not, as we will show), they do nothing to refute State Farm's point that the relevant precedents, when read together, establish a legal rule that controls this case.

So although *O'Connell v. St. Francis Hospital*, 112 Ill. 2d 273 (1986), and its progeny involved abuse of voluntary dismissal and refiling statutes, they establish that a private litigant's abuse of a civil statutory right in an effort to evade consequences dictated by a Supreme Court rule violates separation powers principles. *See* Def.'s Br. at 23-24. And although *People ex rel. Baricevic v. Wharton*, 136 Ill. 2d 423 (1990), involved a prosecutor's abuse of a criminal substitution of judge statute, it establishes that abuse of a substitution of judge statute to exert control over judicial assignments violates separation of powers principles. *See* Def.'s Br. at 21-23. Thus, read together, *O'Connell*, its progeny, and *Baricevic* make it clear that where, as here, a private litigant has abused the civil substitution of judge statute in an effort to evade a Supreme Court Rule 384 order, the Illinois constitution's separation of powers provision has been violated. And that separation of powers violation precludes plaintiff from carrying out his abuse of the substitution of judge statute in this case.

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substitution of judge statute is unconstitutional on its face. To the contrary, State Farm always has acknowledged that, ordinarily, even after a Rule 384 transfer, the statute imposes no more than a peripheral effect on judicial administration. *See* Def.'s Br. at 24, 30 n.10. Indeed, in this very case, the substitution of judge motions filed in *Eavenson,* by both sides, and in *Snead,* by the plaintiffs' side, suggest no manipulation of the judicial assignment process and thus raise no separation of powers concerns. They preceded and did not otherwise interfere with any relevant Rule 384 order, and they were not part of a continuing pattern of conduct to secure a sympathetic judge. *See* 3/20/00 Order (SR C574); 2/25/04 Order (SR C187); 3/25/04 Order (Supp. R. 4); 9/24/04 Order (Supp. R. 8). The same is true of the court-driven reassignments, mentioned by plaintiff (at 22), that took *Snead* from Judge Kinnaird to Judge Lott to Judge Maki. On the particular facts here, however, plaintiff's abuse of the substitution of judge statute violates the separation of powers doctrine.

Plaintiff's contention that the cases applying the separation of powers doctrine are irrelevant because they did not involve precisely the same facts as those here obscures that there are only two possible legal rules: either a private litigant can use the substitution of judge statute to force a reassignment that conflicts with a Rule 384 order, or he can not. Plaintiff's contention that he has an "absolute right" to use the substitution of judge statute in that fashion is plainly wrong, for it would undermine the Supreme Court's power to administer and supervise the court system, contrary to the constitutional 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 (internal quotation marks omitted). Conversely, if, as State Farm contends, the separation of powers doctrine prohibits such abuse of the substitution of judge statute, then plaintiff's substitution of judge motion must be denied because, as we have shown, plaintiff's attempt to remove Judge Agran conflicts with the Rule 384 order's direction that *Bemis* be consolidated with cases pending before Judge Agran, in order to facilitate "just and efficient" litigation. *See* pp. 6-8, *supra*.

In short, plaintiff's attempt to distinguish each of the cases on their facts is wholly beside the point. Of course, the facts here are not identical to those in the prior separation of powers cases; after all, no one has misused the substitution of judge statute to undermine a Rule 384 order in this manner before. But even though their facts are not identical, the principle established in the prior separation of powers cases applies here because those cases make it clear that the courts are not powerless to prohibit such a misuse of a purported statutory right.

A. Plaintiff And His Lawyers Have Interfered With Judicial Administration No Less Than The *Baricevic* Prosecutor.

Plaintiff contends that, unlike the *Baricevic* prosecutor, he has not tried to control the assignment of judges. Pl.'s Br. at 23-24, 26-29. But the campaign by plaintiff's lawyers 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. *See Baricevic*, 136 Ill. 2d at 428-29, 434-35. On four separate occasions over eight years, plaintiff's lawyers filed suit in their preferred forum, Madison County, notwithstanding similar litigation already pending in Cook County. *See* Def.'s Br. at 7-10, 15. Over their objections, the Supreme Court, in three separate orders, transferred all four cases for consolidation with the Cook County litigation. *See id.* Immediately after the last two transfers, plaintiff's lawyers moved to strike the Cook County judge presiding over the consolidated litigation, who not coincidentally had been ruling against the plaintiffs. *See id.* at 11-12, 16-17.

Judge Agran had no doubt that these maneuvers were a "game plan" to "get before a judge who you feel is . . . sympathetic to your position." 1/9/08 Tr. at 19 (SR C124; A85). And he agreed that plaintiff's lawyers are "bouncing from judge to judge in order to try and find one that may or may not be sympathetic to their position." *Id.* at 21 (SR C126; A87). What is more, Judge Agran concluded that plaintiff's lawyers could be expected to continue their now-twice-executed scheme in the future, explaining that the substitution of judge issue "isn't going to go away because this issue is going to resurrect itself." 1/14/08 Tr. at 9 (SR C157; A62).

To be sure, plaintiff's lawyers' "game plan" differs from the abuses of the *Baricevic* prosecutor. But Plaintiff's lawyers are trying to control the judicial assignment

process, just like the *Baricevic* prosecutor. First, they attempt to evade the Supreme Court's repeated Rule 384 orders directing MedPay litigation against State Farm to Cook County by filing overlapping class actions in Madison County and contesting any transfer. Then, when the cases are transferred to Cook County, plaintiff's lawyers attempt to exercise their purported "absolute right" to strike the Cook County judge presiding over the consolidated litigation until they get a judge sympathetic to their claims. Plaintiff's lawyers' so-far-twice-executed "game plan" already has resulted in six substitutions of judge—two in *Snead*, two in *Eavenson*, one in *Jones*, and one in *Bemis*—as each motion caused reassignment of three cases. And more substitutions will certainly follow if a new judge in the consolidated MedPay litigation dares to rule against the plaintiffs. In this scheme, plaintiff's lawyers, not the Supreme Court, decide who will hear the MedPay claims.

In at least two ways, moreover, the "game plan" of plaintiff's lawyers does even more harm to judicial prerogatives than the abuses of the *Baricevic* prosecutor. The *Baricevic* prosecutor struck only Judge Wharton, accepting any other circuit judge assigned to a case. 136 Ill. 2d at 428. 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. Likewise, the *Baricevic* prosecutor merely attempted to override the ordinary course assignment of cases by the chief circuit judge. 136 Ill. 2d at 433-35. 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 specifically directing consolidation of MedPay claims against State Farm before a single judge in Cook County.

B. *Baricevic* Condemns Abuse Of The Statutory Right To A Substitution Of Judge.

Plaintiff contends that the *Baricevic* rule against abuse of a substitution of judge statute is confined to abuses by executive branch officers. A close reading of *Baricevic*, however, shows that while the facts in that case involved prosecutorial abuse of the substitution of judge statute, the opinion establishes principles that speak to abuses of substitution of judge statutes more generally.

At the outset, *Baricevic* explains that "'although the provisions regarding the substitution of judges are to be liberally construed, abuse of these statutory rights should not go unremedied.'" 136 Ill. 2d at 431 (quoting *People v. Williams,* 124 Ill. 2d 300, 309 (1988)). As an example of a remedied abuse, *Baricevic* cites authority allowing a court to deny a *criminal defendant's* substitution motion made to delay trial. *Id*. *Baricevic* then opens its discussion of the law by stating that the case before the court presented another such abuse of a substitution of judge statute that "must be dealt with." *Id.* at 432. In reviewing the applicable separation of powers law, *Baricevic* mentions not just executive branch intrusions on judicial authority, but also legislative intrusions. Indeed, the opinion prominently notes that "[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." *Id.* at 432-33 (internal quotation marks omitted). And the opinion repeatedly references how the prosecutor impermissibly "used" the substitution of judge statute. *Id.* at 435, 437, 438. Finally, in describing the new process for judging a challenge to a prosecutor's substitution of judge motion, *Baricevic* explains

that the process "is patterned after" the one applicable to "a defendant's motion for substitution of judge" intended to delay trial. *Id.* at 437.

Although *Baricevic* also certainly relies on the prosecutor being an executive branch officer in finding a separation of powers violation, the statutory nature of the substitution of judge right clearly contributed to that finding. Why else would the decision give so much attention to the substitution of judge statute, analyze the law on legislative interference with judicial prerogatives, and rely on authorities finding abusive substitution of judge motions by private parties? *Baricevic* is best understood as empowering Illinois courts to stop all parties from abusing substitution of judge statutes to the detriment of judicial prerogatives.

C. *O'Connell* and Its Progeny Forbid A Private Litigant's Use Of A Statutory Right To Interfere With Judicial Administration.

Plaintiff argues that *O'Connell* and its progeny involved direct and irreconcilable statutory conflicts rather than "as-applied" challenges to a private litigant's abuse of a statutory right. Pl.'s Br. at 25. That is not so. *O'Connell* and its progeny all hold that a private litigant's abuse of a statutory right violates separation of powers principles to the extent it interferes with judicial administration.

In *O'Connell*, 112 Ill. 2d at 281-83, the Supreme Court ruled that statutory provisions the plaintiff used to dismiss and refile a suit in order to circumvent a Supreme Court rule requiring prompt service of process, "as invoked by plaintiff," infringed on the court's authority to regulate the judicial system. In *Muskat v. Sternberg*, 122 Ill. 2d 41, 48 (1988), the Supreme 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). In

Gibellina v. Handley, 127 Ill. 2d 122, 137-38 (1989), the Supreme Court ruled that "abusive use of the voluntary dismissal statute" was "infringing on the authority of the judiciary" and required it to free circuit courts to decide dispositive motions pending when a plaintiff sought voluntary dismissal. And in *Arnett v. Young*, 269 Ill. App. 3d 858, 860-62 (1st Dist. 1995), the Appellate Court refused to allow a party to exercise a statutory right to voluntarily dismiss her suit in an effort to avoid the consequences imposed by a Supreme Court rule for failure to attend an arbitration.

The statutes at issue in these cases, on their faces, did not violate separation of powers principles. In most circumstances, a plaintiff could still voluntarily dismiss and subsequently refile without constitutional objection. The separation of powers violations instead arose from abuse of the statutory right to do so. Indeed, plaintiff implicitly concedes as much when he describes *O'Connell* as finding a conflict between the Supreme Court rule on diligent service and the voluntary dismissal and refiling statutes "insofar as" the statutes allowed evasion of the rule. Pl.'s Br. at 25. In short, *O'Connell* and its progeny supply ample authority for a court to find that plaintiff's abuse of the substitution of judge statute violates separation of powers principles.

But even if plaintiff were right that a direct and irreconcilable statutory conflict is needed to find a separation of powers violation, that conflict is present here. As we have shown, the Supreme Court's Rule 384 order assigned *Bemis* to Judge Agran by consolidating the case with other cases already pending before him. *See* pp. 6-7, *supra*. Yet plaintiff wants 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 substitution of judge statute.

V. Plaintiff Does Not Deny His Abuse Of The Substitution Of Judge Statute.

Although plaintiff tries (unsuccessfully) to show that Judge Agran had no authority to stop him from exercising his supposedly "absolute" right to obtain a substitution of judge, plaintiff never contests that that he and his lawyers have been repeatedly filing MedPay class actions against State Farm in Madison County and then, when the Supreme Court transfers the cases, are using the substitution of judge statute to strike Cook County judges that rule against them until they secure a sympathetic judge. Nor could he deny that fact. After all, Judge Agran expressly found that plaintiff's lawyers had such a "game plan."

Plaintiff suggests (at 28 n.4) that this mischaracterizes Judge Agran's statements. But the transcripts confirm that Judge Agran believed plaintiff's lawyers had a "game plan" to secure a sympathetic judge. State Farm's counsel accused plaintiff's lawyers of having such a "game plan." 1/9/08 Tr. at 18 (SR C123; A84). Plaintiff's lawyer tried to dispute that accusation. *Id.* at 19 (SR C124; A85). Judge Agran responded, "There isn't any doubt in my mind that this is a game plan." *Id.* He then noted that plaintiff's lawyers wanted "to get before a judge who [they] feel is . . . sympathetic to [their] position" (*id.*) and that "they're bouncing from judge to judge in order to try and find one that may or may not be sympathetic to their position" (*id.* at 21 (SR C126; A87)). After Judge Agran indicated he nevertheless would allow the substitution of judge and State Farm's counsel asked for a chance to brief the appropriateness of a Rule 308 appeal, plaintiff's lawyer again tried to dispute the accusation that he and his colleagues were gaming the system. *Id.* at 21-23 (SR C126-28; A87-89). Judge Agran responded, "However, you want to put it, Mr. Piper, it's what you're doing. You can say you're not doing it. You are doing it." *Id.* at 24 (SR C129; A90).

It is true that Judge Agran also thought that the "game plan" of plaintiff's lawyers was not "necessarily wrong" (1/9/08 Tr. at 19 (SR C124; A85)) and understood that "the defense want[s] to get these [MedPay cases] to Cook County" (1/14/08 Tr. at 8 (SR C156; A61)). But those statements and the others like them that plaintiff cites do not detract from the conclusion that Judge Agran believed plaintiff's lawyers were executing a "game plan" to use the substitution of judge statute to the detriment of the judicial efficiencies that the Supreme Court's Rule 384 order was intended to serve.

Plaintiff does not and cannot deny his abuse of the substitution of judge statute. His only response is that he is entitled to get away with it. Fortunately for the judicial system, Illinois law is to the contrary.[5] As we have shown, the "absolute right" to a substitution of judge that plaintiff claims can be exercised only so long as that right is not abused in a manner that undermines a judicial prerogative. *See Baricevic*, 136 Ill. 2d at 435-36 (court "not powerless to act" when State abusively exercises "absolute right" to substitution); *Arnett*, 269 Ill. App. 3d at 861-62 ("no absolute right" to voluntary dismissal when it conflicts with supreme court rules).

CONCLUSION

Because plaintiff is abusing the substitution of judge statute in a transparent effort to undermine the Supreme Court's Rule 384 order, his substitution of judge motion violates the separation of powers doctrine. State Farm therefore respectfully requests that this Court reverse the order granting plaintiff's motion for substitution of judge.

[5] That includes not just the law regarding separation of powers, but also the substitution of judge law on "testing the waters" before a ruling on a substantial issue and filing a related case to obtain a new right to strike a judge. *See* Def.'s Br. at 29 n.9. Although State Farm raised that law in its opening brief, plaintiff did not respond.

July 2, 2008

Respectfully submitted,

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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 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

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Nissa J. Imbrock

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on July 2, 2008, she caused three copies of the foregoing Reply Brief of Defendant-Appellant State Farm Fire & Casualty Company and the accompanying Second Supplemental Supporting Record 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:

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