2010 WL 5853983 (Ill.) (Appellate Brief)
Supreme Court of Illinois.

ESTATE OF Mary Ann WILSON, A Disabled Person.
Arnetta Williams, Guardian of the Estate of Mary Ann Wilson, Petitioner-Appellant,
v.
Karen A. Bailey, Respondent-Appellee.

No. 108487.
January 5, 2010.

On Petition for Leave to Appeal from the Illinois Appellate Court, First District, Appeal No. 1-07-1433
There Heard on Appeal from the Circuit Court, First District, Cook County, Illinois
Circuit Court No. 06 P 3549
Honorable Maureen E. Connors, Circuit Judge presiding

**Brief and Argument of Arnetta Williams, Guardian of the Estate of Mary Ann Wilson**

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***i *TABLE OF AUTHORITIES***

***1 *INTRODUCTION***

On October 16, 2006, Karen Bailey filed a motion for substitution of judge for cause pursuant to section 2-1001(a)(3) of the Code of Civil Procedure. Ms. Bailey argued that the trial court was biased against her based on activities which happened during a hearing four months before, on June 8, 2006. The motion was filed the day before numerous matters were scheduled for hearing including a petition for the issuance of a recovery citation. The recovery citation charged Ms. Bailey with exploiting over $250,000 from Mary Ann Wilson utilizing a power of attorney for property at a time when Mrs. Wilson was 86 years old and suffering from sever dementia. The recovery citation relied upon statements made by Ms. Bailey during her deposition and source material documenting Ms. Bailey's conversion of Mrs. Wilson's financial assets.

Arnetta Williams, who had been appointed as Mary Ann guardian, argued the motion failed to satisfy the pleading requirements of section 1001(a)(3)(ii) of the statute, was untimely and was filed for an improper purpose. The guardian also argued that Ms. Bailey's motion was insufficient on its face and failed to meet the threshold required before a motion for substitution was required to be transferred to another judge for a ruling on the merits. The trial court denied Ms. Bailey's motion for substitution of judge as insufficient.

After a trial, judgment was entered against Bailey for over $295,000. Ms. Bailey appealed the denial of her motion and the entry of the judgment. A majority of the appellate court agreed with Ms. Bailey finding the motion was sufficient and should have been transferred to another judge for hearing. The majority opinion vacated the judgment against Bailey and found all orders entered after she filed her motion were null and void. Justice O'Malley dissented, finding that the majority opinion ignored section 1001(a)(3)(h), which requires that the petition must first satisfy the enumerated pleading requirements and other threshold requirements before a transfer is required. Furthermore, the dissent reasoned, by ignoring section 1001(a)(3)(h), the majority opinion had effectively overruled a series of cases which have adopted the threshold requirement.

***2 *ISSUES PRESENTED FOR REVIEW***

**I. THE TRIAL COURT PROPERLY DENIED BAILEY'S MOTION FOR SUBSTITUTION OF JUDGE**

A. STANDARD OF REVIEW

B. THE REQUIREMENTS OF SECTION 2-1001(a)(3)(ii) MUST BE SATISFIED BEFORE IT IS REQUIRED THAT A CASE BE TRANSFERRED TO ANOTHER JUDGE FOR A SECTION 2-1001(a)(3)(iii) HEARING ON THE MERITS

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ii. BAILEY'S MOTION DOES NOT SPECIFY THE STATUTORY PROVISION UPON WHICH IT IS BASED

iii. BAILEY'S MOTION IS NOT SUPPORTED BY SPECIFIC AND ACTIONABLE ALLEGATIONS OF PREJUDICE

iv. BAILEY'S MOTION IS NOT SUPPORTED BY SPECIFIC AND ACTIONABLE ALLEGATIONS OF BIAS STEMMING FROM AN EXTRA-JUDICIAL SOURCE

v. HAVING WAITED 130 DAYS TO FILE, BAILEY'S MOTION FOR SUBSTITUTION OF JUDGE FOR CAUSE IS UNTIMELY

C. THE TRIAL COURT HAS THE RIGHT TO DETERMINE AS A THRESHOLD MATTER WHETHER A PETITION FOR SUBSTITUTION OF JUDGE SATISFIES THE REQUIREMENTS OF 735 ILCS 5/2-1001(a)(3)(ii)

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E. THE APPELLATE COURT ERRED BY, ITSELF, SEARCHING THE RECORD TO REVIVE A STATUTORILY DEFICIENT PETITION

F. IF AFFIRMED THE MAJORITY DECISION WILL OPEN THE FLOOD GATES TO A DELUGE OF MOTIONS FOR SUBSTITUTION OF JUDGE FOR CAUSE

***3 II. THE MAJORITY OPINION FAILED TO CONSIDER OR EVALUATE THE ALLEGATIONS OF JUDICIAL BIAS IN TERMS OF THE TRIAL COURT'S SPECIFIC REACTION TO THE EVENTS TAKING PLACE AND *SERIOUSLY LIMITS* THE COURT'S PARAMOUNT OBLIGATION TO PROTECT ITS WARD**

**CONCLUSION**

***STATEMENT OF FACTS***

***Background***

On May 3, 2006, after receiving a report of abuse, the City of Chicago Department of Aging directed one of its employees to go to the home of 86 year old Mary Ann Wilson ("Mary Ann") and her **elderly** companion, Clifford Service ("Clifford"), to do a well being check. [1] (A1 5-7). On the same day, Sherry Ponce De Leon, a public health nurse, employed by the City of Chicago Department on Aging, accompanied by two (2) City of Chicago police officers removed Mary Ann. and Clifford, from her home. (V7 228; V8 006 - 007). Mary Ann and Clifford were driven in a City of Chicago vehicle directly to the hospital where both were admitted. (A1 5-7). Ms. Ponce De Leon testified that during the car ride to the hospital Clifford said, "Mary Ann, you are finally going to get help." (V8 010). Mary Ann was admitted to the hospital due to the following: "failure to thrive and aphasia, organic brain syndrome and abandonment." (A1 5-7). She also was suffering from a thyroid disorder ***4** and Parkinson's disease. (A1 5-7). While at the hospital, Mary Ann had a psychiatric evaluation. (A1 6). The psychiatric consultant described her as "oriented only to name, cannot give her medical history, concentration impaired; impression: organic brain syndrome with agitation." (A1 6).

On Friday, May 12, 2006, Isaac Heard, Sr., Mary Ann's brother, filed with the Circuit Court of Cook County, a Petition for the Appointment of a Guardian for a Disabled Person. (A1 3). Mr. Heard nominated Arnetta Williams ("Arnetta"), Mary Ann's cousin, for appointment as her guardian (the "plenary petition"). (A1 3). Due to the emergency nature of the matter, a petition for Arnetta's appointment as temporary guardian was also filed (the "temporary petition"). (A1 15). On the same date, the court appointed Sandra Thiel as Guardian *ad Litem* (GAL Thiel) pursuant to 755 ILCS 5/11a-10 of the Probate Act of 1975. (755 ILCS 5/1-1 *et seq* (West 2006)). (A1 4). GAL Thiel was directed to meet with Mary Ann over the weekend, and to provide the court with a written report of her findings on May 15, 2006. (A1 4). On May 15, 2006, Arnetta and GAL Thiel, appeared before the court for a hearing to determine whether it was necessary to appoint a temporary guardian for Mary Ann, pursuant to 755 ILCS 5/11a-4 of the Probate Act. (755 ILCS 5/1-1 *et seq* (West 2008)). GAL Thiel told the court about her meeting with Mary Ann, her investigation into the situation leading to Mary Ann's admittance to the hospital and her current status. (A 1 5-7). GAL Thiel's impression of Mary Ann's condition was:

"She was very frail, thin and weak. She did not know where she was, her address, if she ever had children, why she was in the hospital, how she got there, her age, date of birth, or what medication she takes or what it was for. She was completely confused and forgetful, disoriented." (A1 5; A2 4-5).

The GAL advised the court that a "Power of Attorney for Health Care" and a "Power of Attorney for Property," both dated January 16, 2004, naming Karen Bailey ("Bailey"), as agent, had been attached to Mary Ann's chart at the hospital. (A1 6-11; A2 6-7). Preliminary information was presented to the court, including a copy of a bank ***5** statement, which indicated that at least one sizable financial account belonging to Mary Ann had been "zeroed out" by Bailey utilizing the power of attorney for property. (A2 7). Given the physical and mental condition of the alleged disabled person on the date she was removed from her home, and the serious allegations of financial abuse which purportedly occurred by utilizing the financial power of attorney, GAL Thiel recommended "that the powers of attorney be suspended for the time being." (A2 8-9). Based on the preliminary information and the GAL'S recommendation, the court suspended the powers of attorney naming Bailey as agent and entered an order appointing Arnetta as temporary guardian for Mary Ann. (A1 12-16; C2 5-9). The temporary order directed Arnetta to arrange routine medical care for Mary Ann, to arrange for her placement at a rehabilitation center, to investigate her funds and mail, and to investigate "powers of attorney." (A1 12-15). By separate order, Bailey's powers of attorney dated January 15, 2004 and January 16, 2004, were suspended and Arnetta was directed "to collect from Karen A. Bailey the signature stamp bearing Mary Ann Wilson's name." (A1 16).

***The Emergency Motions***

On June 7, 2006, after Arnetta had been appointed temporary guardian, but prior to hearing on the petition for appointment of a plenary guardian, Bailey filed notice of an Emergency Motion to Vacate Order of Temporary Guardian for Disabled Person and Estate [of Mary Ann Wilson, an alleged disabled person] and Motion for Injunctive Relief and Accounting (the "emergency motions") which she scheduled for hearing the next day. (A1 30). The notice and emergency motion was received by Arnetta's attorney on June 7, 2006, around "noontime." (A2 43).

On June 8, 2006, Arnetta and her attorney, Bailey and her attorney and GAL Thiel appeared in response to Bailey's notice of motion. (A2 19-24). The court asked Arnetta for a progress report on how Mary Ann was doing and whether, as directed, she had learned anything in her investigation of Mary Ann's assets. (A2 22-24). Arnetta first described ***6** Mary Ann's living situation and health before reporting the results of her investigation into Mary Ann's financial status. (A2 19-26). Arnetta told the court that between August, 2005 and May, 2006, Karen Bailey had spent at least $184,000 of Mary Ann's money. (A2 22-24). Arnetta also advised the court that as of May 17, 2006, she had secured Mary Ann's house by having the locks changed. (A2 21).

At the conclusion of Arnetta's report, the court directed its attention to Bailey's emergency motions. (A2 24). Bailey's attorney immediately began to argue the merits of the emergency motions without objection from Arnetta or GAL Thiel (A2 24-25). Arnetta and GAL Thiel waived their right to respond in writing to the emergency motions, so the court agreed to proceed instanter with the hearing. (A2 43).

Bailey opined, consistent with her written motions, that the trial court should vacate its orders entered on May 15, 2006 appointing Arnetta as temporary guardian for Mary Ann Wilson and Sandra Thiel as her guardian *ad litem* because the guardianship court lacked subject matter jurisdiction to enter any orders on Mary Ann's behalf. (A1 32-73, A2 24-60). Bailey argued she was the agent for Mary Ann pursuant to a duly executed power of attorney for property and a duly executed power of attorney for health care. Bailey maintained that the orders entered on May 15, 2006 were entered improperly because the court had not first made a finding, pursuant to 755 ILCS 45/2-10(a) of the Power of Attorney Act, that Bailey was not acting for the benefit of Mary Ann or that "her action or inaction has caused or threatens substantial harm to the principal's person or property in a manner not authorized or intended by the principal." 755 ILCS 45/2-10(a). (A1 32-38; A2 24-60). Bailey urged the guardianship court to enter a temporary restraining order (TRO) enjoining Arnetta and GAL Thiel from pursuing any further investigation into Bailey's activities as Mary Ann's agent until after the court had conducted a "preliminary injunctive hearing." Bailey also asked the court to immediately reinstate her agency powers on behalf of Mary Ann and to return to her control over Mary Ann's finances and medical care. (A1 32-38, A2 24-60).

***7** Before ruling on whether to grant the emergency motions and return her to control of Mary Ann's finances and health care decisions, Bailey was placed under oath. (A2 24-40). The court asked Bailey a series of questions concerning her tenure as agent for Mary Ann prior to the time protective services removed her from her home. (A2 24-40). The guardianship court delved into Bailey's handling of her financial affairs, including what happened to more than $180,000 of Mary Ann's money. (A2 26-43). The court inquired about Bailey's knowledge of Mary Ann's health care, treatment and supervisory needs. (A2 26-43). Among other things, Bailey was unable to advise the court as to the actual value of Mary Ann's estate on the date she began acting as agent. (A2 26-27). She testified that she had withdrawn $25,000 in cash from Mary Ann's UBS account which she placed in a lock box kept in a locked closet at Mary Ann's home. According to Bailey, she did this, "pursuant to Mary Ann's and her [purported] husband Clifford's instructions," and thereafter, cashed out another account for $151,000 which Bailey testified she also placed in the box in Mary Ann's closet. (A2 31-38). As Bailey was testifying, Arnetta's attorney and GAL Thiel tendered to the court a large number of cancelled checks drawn on Mary Ann's accounts, most of which were payable to, and all endorsed by, Bailey. The checks totaled over $100,000.00. (A2 38-39). In an attempt to determine whether Bailey's actions as Mary Ann's agent were prudent, the court inquired about Bailey's method of safeguarding the several hundred thousand dollars which Bailey testified she had placed in the box in Mary Ann's closet.

Court: How many people were in and out of that house, had access to the house?

BAILEY: Only me, and then we have a caretaker, knew nothing about the money, nothing. The closet was always locked.

Court: Were you there all the time when the caretaker was there?

BAILEY: Yes.

***8** Court: Every minute of the day?

BAILEY: Yes.

Court: You were there?

BAILEY: I was there.

Service: Usually, I was there.

Court: Folks, I don't believe that.

BAILEY: He's a musician. He worked at nighttime and he had to have let her in because Mr. Service would not let her in.

Court: So when the care giver was there you were in the room the whole time, you never left? Why did you have a caretaker?

BAILEY: Mr. Service had a stroke in October (2005). The VA gave him a caretaker. We made arrangements with the VA to take care of her. (A2 37-38).

After Bailey testified, the court heard additional argument from counsel including analysis of the court's authority to act derived directly from the terms and provisions of the power of attorney, rather than from the provisions of the Probate Act. (A2 40-49). Arnetta pointed out that, *inter alia*, the power of attorney Bailey was relying upon in support of her right to control Mary Ann's financial affairs, contained a provision authorizing the court to enter court orders notwithstanding any other provision of the document. (A1 52; A2 43). The power of attorney, (on page 13 in Article V1 at paragraph A.), in the section entitled Termination and Revocation, provided that the power of attorney could be "revoked, suspended or terminated ... by court order." (A1 52; A2 43)

At the conclusion of the hearing, the court rejected Bailey's contention that it lacked subject matter jurisdiction. The court denied Bailey's emergency motion seeking her return to control of Mary Ann's finances or to allow her to make Mary Ann's health care decisions. ***9** (A2 44-59). The court refused to issue a TRO or preliminary injunction enjoining Arnetta or GAL Thiel from continuing their court-ordered investigation into Bailey's activities, or to vacate the orders appointing a temporary guardian and a GAL to act on Mary Ann's behalf. The court did not rule out the possibility that Bailey might regain her right to control Mary Ann's health care and financial decisions at a later date, stating:

At some point maybe she will account for every penny, that could happen, but until I get an accounting for every penny, maybe everything she says is true, all the money can be accounted for, but if it can't be, I will be remiss to allow her to go back to control [Mary Ann's] money at this point, okay. (A2 45).

At the end of the June 8, 2006 hearing, the court entered two orders. The first order authorized the GAL to file an Emergency Petition to Revoke Agency and for Accounting (A1 6-7), set a response date of June 27, 2006, required Bailey to file her accounting by June 27, 2006 and set all these matters for status on June 29, 2006. (A1 74). The second order, drafted by Bailey's attorney, noted that the parties were present before the court because of Bailey's emergency motions and reflected the court's denial of Bailey's request for a TRO. (A1 75).

***Further proceedings***

On June 14, 2006, the case came before the court for hearing on the petition for appointment of a plenary guardian. The plenary petition was entered and continued to June 29, 2006. (A1 77). At the same time, the court granted Bailey's oral motion to set June 29, 2009 for hearing on her emergency motion, with responses due by June 27, 2006. (A1 77). Arnetta's verified answer to the emergency motion including six (6) affirmative defenses was filed on June 22, 2006. (A1 78-86).

On June 27, 2006, Bailey failed to file an accounting. Instead, she filed a short motion to amend her emergency motion containing only (3) paragraphs. (A1 92-93). She also filed a 735 ILCS 5/2-619 Motion to Dismiss Emergency Petition to Revoke Agency and ***10** Accounting containing six paragraphs, (A1 97-101), and a response to the affirmative defenses set forth in Arnetta's verified answer to the emergency motion. (A1 104-107). Bailey noticed these new motions for 10:00 a.m. two days later. (A1 95).

On June 29, 2006, the parties appeared and the court again heard oral argument from Bailey's attorney. Bailey's attorney again claimed that all actions taken by the court after the filing of the emergency motion were invalid because the court lacked subject matter jurisdiction having failed to comply with the provisions of the "power of attorney act," including the court's right to appoint a GAL or temporary guardian on Mary Ann's behalf. (A2 71 -78). After rejecting Bailey's argument, the court asked Bailey about compliance with the court's order requiring her to file an accounting on or before June 27, 2006. (A2 70). Bailey told the court she was unable to file an accounting because she kept her records at Mary Ann's house and those records had disappeared. (A2 70). Bailey claimed that Arnetta was involved in the disappearance of the accounting records, and the disappearance of the $200,000 which Bailey had placed in the lock box in Mary Ann's closet. (A2 87-88). In support of this contention, Bailey argued that Arnetta's hiring a locksmith to change the locks of Mary Ann's house on May 17, 2006 was not authorized in the order appointing her as temporary guardian. (A2 83). The Court pointed out, "It would certainly be reasonable that a temporary guardian would secure the residence," (A2 84), after which, the court expanded the temporary guardian's authority to include the right to secure the residence. [2] (A2 84).

***11** The next day, June 30, 2006, Bailey filed the third version of her emergency motion now entitled: "Supplemental Amended Motion to Vacate Order of Temporary Guardian and Guardian ad Litem." She also filed a Motion to Order Temporary Guardian to Vacate Real Property of the Alleged Disabled Person and Amended Motion for an Accounting of Money of Alleged Disabled Person and her Husband and Injunctive Relief in support of her position that the temporary guardian was responsible for the disappearance of the money Bailey had placed in the box in Mary Ann's closet. (A1 110-117).

On July 5, 2006, the court entered an order appointing Arnetta as Mary Ann's plenary guardian. (A1 119). The court also denied Bailey's emergency motion, as to those counts seeking injunctive relief, and set August 2, 2006, as a status date, to discuss the counts of Bailey's emergency motion and her amended emergency motion which the court had not denied. (A1 122-123). And the court also denied Bailey's motion to dismiss GAL Thiel's emergency petition to revoke agency and for accounting which had been filed on June 27, 2006, and her supplemental amended motion to vacate order of temporary guardian and guardian ad litem and motion to order temporary guardian to vacate real property of the alleged disabled person and amended motion for an accounting of money of alleged disabled person and her husband and injunctive relief (filing date unknown). (A1 122-123). Once again, the court ordered Bailey to file an accounting of all assets and financial transactions involving the estate Mary Ann Wilson extending the filing date to July 21, 2006. (A1 122-123). The court specifically required of Bailey that her accounting satisfy the statute defining the proper form for inventories and accounts required by the Cook County Rules. (A1 122-123).

On July 12, 2006, Bailey filed an Interlocutory Notice of Appeal from the order entered on July 5, 2006. (A1 123). Bailey's appeal was based upon the court's denial of her request for a TRO, preliminary injunction, and the refusal of the court to allow her to regain control over Mary Ann's finances and health care decisions ("*Wilson I*"). *See: In re Estate* ***12** *of Wilson,* 373 Ill. App. 3d 1066 (1st Dist. 2007). In *Wilson I*, the appellate court affirmed, in total, the propriety of the guardianship court's

actions. The appellate court rejected Bailey's argument that the trial court lacked subject matter jurisdiction to act as it had on behalf of Mary Ann. *Id*.

On July 27, 2006, Bailey filed a signed, but non verified document entitled, "Accounting." (V1 003 - 008). In the Accounting, Bailey stated that there had been $9,000 not $200,000 in cash in the box in Mary Ann's closet. (V1 003 - 008). On August 31, 2006, an emergency hearing was held on Arnetta's Emergency Motion to Quash a Subpoena which Bailey had served on SBC for Arnetta's personal phone records. (V1 015-032). After oral argument, Bailey agreed to withdraw the subpoena. (V1 21).

On September 8, 2006, Bailey filed her fourth emergency motion, this time entitled: "Amended Emergency Motion to Vacate Order of Temporary Guardian for Disabled Person and Estate and Motion for Injunctive Relief and Accounting and of Guardian for Disabled Person and Estate," (A 37-79), and a notice of motion scheduling the matter for September 11, 2006,[3] three (3) days later. (V1 35 -36). On September 11, 2006, Bailey filed and set for hearing on September 13, 2006, a Motion to Compel Unrestricted Visitation. (V1 80 -84). On September 13, 2009, Arnetta filed a Petition to Authorize Listing of Real Estate, (V1 85-114) and GAL Thiel filed a Petition for Attorney's Fees. (V1 115-117). The order entered on September 13, 2006, approved Arnetta's Inventory, granted leave for the her to file a Petition to List Real Estate which was scheduled for hearing on October 17, 2006, provided for a status hearing on Bailey's accounting and motion for unrestricted visitation on October 17, 2006 and granted Bailey's oral motion authorizing her to review documents being held in Arnetta's attorney's office. (V1 118-119).

***13** On September 6, 2006, Arnetta (now plenary guardian) took Bailey's deposition. (V1 and V2 196-301). Upon receipt of the deposition transcript, Arnetta drafted a recovery citation pursuant to 755 ILCS 5/16-1. (755 ILCS 5/1-1 *et seq* (West 2008)), and motion to revoke powers of attorney. (V1 122-249; V2 252-310). In her deposition, Bailey acknowledged, under oath, that between August, 2005 and April, 2006, she withdrew $297,708.95 from her accounts while acting as Mary Ann's agent for which she could not account. (V1 122-249; V2 252-310). The transcript of Bailey's deposition was attached, in its entirety to the recovery citation. (V1 196-249; V2 252-301). A notice of motion and certificate of service with the recovery citation and deposition transcript was filed with the Clerk of the Circuit Court on September 28, 2006 and served on all parties of record by mail on September 28, 2009. (V1 122-123). The motion for issuance of the recovery citation directed against Bailey was scheduled for hearing on October 17, 2006. (V1 122 -123).

On October 16, 2006, Bailey filed her two-page moion for substitution of judge, (V2 311-314), which she scheduled for hearing on October 17, 2006. (V2 311). Multiple other substantive matters had already been scheduled for hearing on that day. On October 17, 2006, the trial court stayed all other pending matters so the motion for substitution of judge could be addressed, and set a briefing schedule and a hearing date of November 2, 2006. (V2 356). Arnetta filed a response. (V2 363-450). Bailey filed a reply. (V2 362). On November 2, 2006, after hearing oral argument, the motion for substitution of judge was denied. (V2 494).

On March 29, 2007, after a prolonged trial, the court found that Bailey: (1) stood in a fiduciary relationship to Mary Ann; (2) was in breach of her fiduciary responsibility to Mary Ann; and (3) had not acted for the benefit of Mary Ann. (V4 821-822; V8 238-249). The court entered judgment against Bailey in the amount of $297,708.95 in favor of Arnetta Williams as guardian of the estate of Mary Ann Wilson. (V4 821-822).

***14** On April 16, 2007, Bailey filed her second of notice of appeal which resulted in the opinion in *Wilson II. In re Estate of Wilson*, 389 Ill.App.3d 771 (1st Dist. 2009). (V4 826). As grounds for her Notice of Appeal, Bailey stated as follows:

Karen A. Bailey ... hereby appeals the Judgment Order entered against her on March 29, 2007 by the trial court which revoked her authority to act as agent for Mary Ann Wilson and entered judgment against Karen A. Bailey and in favor of the estate of Mary Ann Wilson in the amount of $297,708.95.

By this appeal, Karen A. Bailey seeks reversal of the aforesaid judgment in its entirety. (V4 821-822).

On appeal, Bailey went beyond the specifics of her Notice of Appeal by also arguing that the trial court had erred by denying her motion for substitution of judge for cause, (735 ILCS 5/2-1001 (a)(3) (West 2009), had abused its discretion by revoking Bailey's purported powers of attorney, by refusing to grant Bailey's emergency petition to dismiss petition to revoke agency and for accounting, and by entering judgment against Bailey for $297,708.95. (V4 826).

The only issue addressed by the appellate court in *Wilson II is* whether the trial court erred by failing to transfer Bailey's motion for substitution of judge for cause to another judge for a hearing on the merits.

*The March 31, 2009 Appellate Opinion*

On March 31, 2009, in a split decision, the majority of the appellate court panel reversed the trial court's denial of Bailey's petition to substitute judge for cause. *In re Estate of Wilson*, 389 Ill.App.3d 771 (1st Dist. 2009). The appellate court held that a trial court has no discretion when presented with a section 1001(a)(3) of the Illinois Code of Civil Procedure motion for substitution of judge. Id. at 781. All section 1001(a)(3) petitions must be transferred for hearing to another judge no matter what the form or substance of the petition. *Id*. at 782. In ruling, the majority of the appellate court panel also castigated the trial court for taking an assertive stance on behalf of Mary Ann during the June 8, 2006 hearing. ***15** *Id*. at 783-784. The appellate court found that all orders entered after October 16, 2006, the filing date of the motion for substitution were null and void. *Id*. at 785.

Justice O'Malley dissented, finding that the majority appellate opinion ignored §1001(a)(3)(ii) of the Code of Civil Procedure, which requires that the petition must set forth first satisfy the pleading requirements set forth in the statute before it is mandated that the matter be transferred to another judge for hearing. *Id*. at 787. The dissent held that, contrary to the position of the majority appellate court, a section 1001(a)(3) petition must first satisfy the provisions of section 1001(a)(3)(h) by presenting allegations of prejudice supported by affidavit which if true constitute actionable bias or prejudice before the petition need be transferred to another judge for a hearing on the merits. *Id*. at 787. The dissent found that the majority's opinion, by ignoring section 1001(a)(3)(h), had created an "automatic transfer rule" which would allow any litigant at any time in the proceedings, and no matter how inadequate or frivolous their petition, to obtain a full hearing before a judge other than the assigned trial judge. *Id*. at 787. Furthermore, the dissent reasoned, by ignoring section 1001(a)(3)(ii), the majority opinion had effectively overruled the series of cases which have adopted the threshold requirement including: *In re Estate of Hoellen*, 367 Ill.App.3d 240 (1st Dist. 2006), *Alcantar v. Peoples Gas, Light & Coke Co.*, 288 Ill.App.3d 644 (1997), and *City of Quincy v. Weinberg*, 363 Ill.App.3d 654 (4th Dist. 2006) *Id*. at 790.

On September 30, 2009, this court granted the guardian's petition for leave to appeal.

***16** ***ARGUMENT***

**I.**

**THE TRIAL COURT PROPERLY DENIED BAILEY'S MOTION FOR SUBSTITUTION OF JUDGE**

**A.**

***STANDARD OF REVIEW***

Proper determination of a 735 ILCS 5/2-1001 (a)(3) petition for substitution of judge can involve separate questions of fact and law. *Lake County Riverboat*, 313 Ill. App.3d 943 (2nd Dist. 2000). Questions of fact are reviewed for manifest error, and questions of law are reviewed de novo. *Lake County Riverboat*, 313 Ill.App.3d at 951. When a trial court denies a substitution for cause motion based on a failure to meet the requirements of 735 ILCS 5/2-1001(a)(3)(ii) (West 2009), the standard of review is *de novo. Corral v. Mervis Indus.*, 217 Ill. 2d 144, 152 (2005). *See also, In re Marriage of O'Brien*, 393 Ill.App.3d 364 (2nd Dist. 2009).

**B.**

***THE REQUIREMENTS OF SECTION 2-1001(a)(3)(ii) MUST BE SATISFIED BEFORE IT IS REQUIRED THAT A CASE BE TRANSFERRED TO ANOTHER JUDGE FOR A SECTION 2-1001(a)(3)(iii) HEARING ON THE MERITS***

A petition for substitution of judge must meet the requirements of the Illinois Civil Code of Procedure section 735 ILCS 5/2-1001. Section 2-1001 provides four situations in which a substitution of judge may be had in a civil action: involvement of the judge in the action, (735 ILCS 5/2-1001(a)(1)); substitution as of right, (735 ILCS 5/2-1001(a)(2)); substitution for cause, (735 ILCS 5/2-1001(a)(3)); and substitution in contempt proceedings, (735 ILCS 5/2- 1001(a)(4)). 735 ILCS 5/2- 1001 (West 2009).

***17** In seeking a substitution for cause, a litigant must first satisfy the rudimentary pleading requirements set forth in section 2-1001(a)(3)(ii), as to form, and then satisfy certain threshold requirements which the various courts have determined animate the statute, (*See Estate of Hoellen*, 367 Ill.App.3d 240, 248 (2006)), before it is required that the matter be transferred to another judge for a section 2-1001(a)(3)(iii) hearing on the merits. *Alcantar v. Peoples Gas, Light & Coke Co.*, 288 Ill.App.3d 644 (1997). To satisfy the statute, a party seeking a substitution of judge for cause must petition the court, setting forth the specific allegations, demonstrating actionable bias or prejudice, which justify the substitution. *See* 735 ILCS 5/2-1001(a)(3)(ii). And the petition must include an affidavit of the party requesting the substitution. If a petition for substitution is in compliance with the requirements of 735 ILCS 5/2-1001(a)(3)(ii), a judge other than the judge named in the petition, must hold a hearing on whether sufficient cause exists to warrant a substitution of judge. *See* 735 ILCS 5/2- 1001(a)(3)(iii).

In the instant case, the majority appellate court have disregarded the provisions of Section 2-1001(a)(3)(ii) of the Code of Civil Procedure, in contravention of long established rules of statutory interpretation. *See: Fisher v. Waldrop*, 221 Ill.2d 102, 112 (2006). Bailey omitted from her motion, specific allegations of prejudice supported by an affidavit which, if true constitute actionable bias or prejudice stemming from an extrajudicial source and resulting in an opinion on the merits on some basis other than from what the judge learned from her participation in the case." *Alcantar* at 649-50 (1997). The appellate court dismissed Bailey's failure to satisfy the pleading requirements of Section 2-1001(a)(3)(ii), as inconsequential. However, as the dissent observed, in *Wilson II*, there is no reasonable way to read Section 2-1001(a)(3)(ii) "in a manner where specific allegations and an affidavit are not required." *Estate of Wilson*, at 788 (1st Dist. 2009). Justice O'Malley's noted that ***18** the legislature would not have "included section 2-1001(a)(3)(ii) in the statute if it really did not mean to require specific allegations and an affidavit in support of the petition." *Id*. at 788-789.

The primary objective of statutory construction is to "ascertain and give effect to the legislative intent." *People v. Perry*, 224 Ill.2d 312 (2007) The best indicator of the legislative intent is the language of the statute itself. *Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.*, 225 Ill.2d 103 (2007) And when the statutory language is clear and unambiguous, it must be applied as written, without resort to extrinsic aids of statutory construction and without rendering any part meaningless or superfluous. *People v. Jones*, 214 Ill.2d 187 (2005), *People v. Collins*, 214 Ill.2d 206 (2005). The majority appellate court's ruling renders Section 2-1001(a)(3)(ii) meaningless and rewards Bailey for her omissions.

The majority appellate court's decision abolishes the basic procedural or facial sufficiency requirements heretofore mandated before a hearing on the merits before another judge is required upon the filing of a motion for substitution of judge for cause. The majority has created a new "automatic transfer rule" which gives wayward litigants incentive "to roll the dice" on a motion for substitution to delay the proceedings or for other impermissible reasons. *Wilson at* 786. If the majority's interpretation of Section Section 2-1001(a)(3) is affirmed, there will be no restrain on a party's ability to stop or delay proceedings by stating any allegations even if the alleged bias alleged is "based on an irrational reason such as the judge's race or gender or just a bad feeling." *Wilson at* 790. As Justice O'Malley understood, "It seems logical to me that minimal requirements are written into the statute to address patently frivolous claims and potential abuses of the provision as a delay tactic. I do not believe, and Illinois law does not support the ***19** interpretation, that the legislature intended transfer to another judge to be automatic or controlled

by the whim of a creative or desperate litigant." *Wilson at* 790. *See also People v. Johnson*, 201 Ill.Dec. 53, 159 Ill.2d 97 (1994) [The satisfaction of such requirements insures that a motion for substitution of judges is not frivolously made.]

**i.**

***BAILEY'S MOTION IS NOT SUPPORTED BY AFFIDAVIT***

The failure to attach an affidavit to a motion for substitution of judge and failure to present the motion in proper form can be a reason to deny the motion. *In Re Marriage of Roach*, 245 Ill. App. 3d 742, 747 (4th Dist. 1993). A petition for change of venue which is not verified by the affidavit of the petitioner may be disregarded. *Federal Nat. Mortg. Ass'n v. Schildgen*, 252 Ill.App.3d 984 (1st Dist. 1993). Where a petition for substitution of judge is not verified by an affidavit, it is properly denied by the trial court. *Id*.

Bailey's motion for substitution of judge is not supported by affidavit or verified and, therefore, does not satisfy the requirements of section 2-1001(a)(3)(h). Bailey's motion for substitution of judge for cause was properly denied.

**ii.**

***BAILEY'S MOTION DOES NOT SPECIFY THE STATUTORY PROVISION UPON WHICH IT IS BASED***

Bailey never cited the specific statute upon which she relied as authority for her motion. In *People v. Flynn*, the defendant filed an untimely motion for substitution of judge for cause without reference to the statutory authority for his motion or compliance with the requirement that the motion be supported by affidavit. The motion was denied and the ruling affirmed on appeal. *People v. Flynn*, 341 Ill.App.3d 813 (2nd Dist., 2003) Like *Flynn*, Bailey's motion for substitution was inadequate and was properly denied by the trial court.

***20 iii.**

***BAILEY'S MOTION IS NOT SUPPORTED BY SPECIFIC AND ACTIONABLE ALLEGATIONS OF PREJUDICE***

The right to a substitution of judge for cause is not absolute, and the burden of establishing cause rests with the moving party. *In re C.S.* 215 Ill.App.3d 600 (1991), *People v. Andricopulos*, 162 Ill.App.3d 899, *appeal denied* 18 Ill.2d 546 (1988). A motion to substitute the trial judge for cause requires an examination of the bases for the requested substitution. *Marriage of O'Brien*, at 373 (2nd Dist. 2009) The underlying purpose of this requirement is to bar parties from avoiding an expected adverse ruling by classifying the judge as biased or prejudiced. *City of Chicago v. Marquardt*, 30 Ill.App.2d 108, 111 (1st Dist. 1961) [It is an abuse of the Venue Act to attempt to use it to avoid an expected adverse ruling, and the court may look to see if the defendant is really seeking to have his trial before a judge who is not prejudiced against him or merely seeking to avoid a trial.] Therefore, the allegations in a substitution for cause petition must be specific and not conclusory in nature. *People v. Jones*, 97 Ill.2d 346 (2001) opinion after remand 219 Ill.2d 1, rehearing denied, certiorari denied 549 U.S. 830. To prevail on a motion for substitution of judge for cause, a petitioner *must specify actual allegations of prejudice. In re Marriage of Zannis*, 114 Ill.App.3d 1034 (1st Dist. 1983) The party seeking substitution must demonstrate, through specific allegations supported by affidavit, facts that, if true, constitute "actual prejudice." *People v. Jones*, 219 Ill.2d 1 (2006); *Marriage of O'Brien*, at 373; *Estate of Hoellen*, at 248 (1st Dist. 2006). If the facts alleged, if taken as true, do not constitute "actual prejudice" then the motion is insufficient, on its face, and must be dismissed. *In re Moses W.*, 363 Ill.App.3d 182 (2006)

Furthermore an allegation of judicial bias must be viewed in context, and evaluated in terms of the trial judge's specific reaction to the events taking place. *People v. Jackson*, 205 Ill.2d 247, 276-277 (2001) In *Jackson*, the defendant alleged the trial court was biased ***21** against him. *Id*. However, the defendant's affidavit was deficient. The affidavit failed to identify the location in the record where the judge's allegedly biased actions occurred. *Id*. As a result, this court was unable to properly consider

the entire context of the judge's comment. In finding the defendant had waived the issue of judicial bias, this court held that, "principles of fundamental fairness do not require a relaxation of the procedural bar. *Id*.

Bailey's motion lacked specific allegations of prejudice which, if true constituted actionable bias or prejudice. *Alcantar* at 649-50 (1997). The trial court properly denied her motion for substitution of judge for cause.

**iv.**

***BAILEY'S MOTION IS NOT SUPPORTED BY SPECIFIC AND ACTIONABLE ALLEGATIONS OF BIAS STEMMING FROM AN EXTRA-JUDICIAL SOURCE***

A trial judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice, who must present evidence of personal bias stemming from an extra-judicial source and evidence of prejudicial trial conduct in order to obtain a substitution for cause. *In re Marriage Petersen*, 319 Ill.App.3d 325, 339 (1st Dist. 2001); *see also Alcantar v. People's Gas Light and Coke Co.*, 288 Ill.App.3d 644, 649 (2d Dist. 1997). The *Peterson* court cited *Liteky v. United States*, where the United States Supreme Court explained that, in disqualifying a judge on the basis of bias or prejudice:

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

Moreover, "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555, 114 S.Ct. at 1157, 127 L.Ed.2d at 491.

***22** In *Liteky*, the United State Supreme Court wrestled with the question of what kind of "bias" or "prejudice" warrants a substitution of judge. *See Id*. at 550-551 (1994) The Supreme Court discussed the difference between actionable "bias" or "prejudice" derived from an "impermissible extrajudicial source," and non actionable bias or prejudice that developed as a result of activities occurring within the context of a specific court proceeding. *Liteky at* 550-551. The Court reasoned:
It seems to us that the origin of the "extrajudicial source" doctrine, and the key to understanding its flexible scope (or the so-called "exceptions" to it), is simply the pejorative connotation of the words "bias or prejudice." Not *all* unfavorable disposition towards an individual (or his case) is properly described by those terms. One would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). The "extrajudicial source" doctrine is one application of this pejorativeness requirement to the terms "bias" and "prejudice" as they are used in §§ 144 and 455(b)(1) with specific reference to the work of judges.

The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. *As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." Emphasis added*

The appellate court rewarded Bailey's omissions by ignoring the explicit requirements of §2-1001(a)(3)(h). On October 16, 2006, Bailey filed her deficient motion entitled: "motion for substitution of judge." The October 16th motion lacked specific allegations of prejudice, was unsupported by an affidavit and did not even reference the statute upon which it was based. (V2 313-314). On October 30, 2006, Bailey filed another ***23** motion entitled: "motion for reassignment of case," which consisted of two paragraphs without a single allegation of prejudice and which once more was not supported by affidavit. (V2 361). The October 30, 2006 motion referenced two non existent statutes and omitted a prayer for relief. (V2 361). On November 2, 2006, Bailey filed an "amended motion for reassignment of case," which was exactly the same as her October 30, 2006 motion except this motion was double spaced and contained a prayer for relief. (V2 362). No other pleadings were ever filed, nor was leave requested to file a motion seeking to cure the deficiencies of the October 16, 2006, October 30, 2006, or November 6, 2006 motions, even after the deficiencies of the pleading was pointed out. (V2 363-450). In Arnetta's response to Bailey's motion for substitution for cause, she expressly took issue with the breadth of Bailey's omissions and, in particular, her failure to specify actual allegations of prejudice deriving from an extra-judicial source. (V2 367-372). Arnetta pointed out the deficiencies with Bailey's motion stating: "Bailey has omitted from her motion, a statement in context, of the specific language relied upon to demonstrate the prejudice which forms the basis of her motion; nor has she chosen to include, as an attachment or exhibit, a copy of the transcript of the proceedings before the court on June 8, 2006, leaving everyone else in the position of having to guess as to the specifics of why she believes the record demonstrates prejudice sufficient to justify granting a motion for substitution." (V2 367). On October 6, 2006, Bailey filed a reply to Arnetta's response to the motion for substitution. (V2 357-360). In the October 6 reply, Bailey, as she had before, refused to specify the actual allegations of prejudice upon which she based her motion for substitution. (V2 357-360).

Finally, on November 20, 2006, Bailey filed a document she titled substitute amended reply to response to motion for substitution of judge for cause, which is the same document as she filed on October 6, 2006, except this document is double spaced, has corrected some of the typos, and contains twenty-one pages of a transcript. (V3 537-565). Again there is no reference in the November 20, 2006 document to specific allegations of ***24** prejudice, only generalities and Bailey's conclusion that prejudice existed. After three attempts at filing a proper motion, and two duplicate reply briefs, Bailey never set out the actual allegations of prejudice she believed supported her motion for substitution.

Also, in her reply, Bailey once again mischaracterized the June 8, 2006 proceedings. Bailey repeated once more that the only issue of concern before the court on June 8, 2006 was whether the court had "subject matter jurisdiction" to appoint a temporary guardian or a GAL. Bailey's position was rejected in *Wilson I* when the appellate court ruled unanimously that, at all times after the original filing seeking the appointment of a guardian, the trial court did have subject matter jurisdiction. The *Wilson I* opinion affirmed that the court's actions on June 8, 2006, in seeking information from Bailey to aid in evaluating the propriety of acting on her request to reinstate the powers of attorney, was appropriate. *See: In re Estate of Wilson*, 373 Ill. App. 3d 1066 (1st Dist. 2007)

On June 8, 2006, Bailey was asking the court to put her back in charge of handling Mary Ann's financial and health care affairs. To make the determination, the court had to decide whether her activities as Mary Ann's agent were reasonable and not negligent. At that point, the court had an affirmative duty to determine whether authorizing Bailey to resume making financial and health care decisions for Mary Ann was prudent. That the trial court's questions were penetrating and assertive was not personal. To the contrary, the court was merely fulfilling its statutory and common law responsibilities, a fact which the majority in *Wilson II*, ignored. The trial court was castigated by the majority appellate court, in *Wilson II*, and charged with bias, for engaging in activities it was legally bound to pursue. *In re Estate of Wilson*, 389 Ill.App.3d 771 (1st Dist. 2009).

***25 v.**

***HAVING WAITED 130 DAYS TO FILE, BAILEY'S MOTION FOR SUBSTITUTION OF JUDGE FOR CAUSE IS UNTIMELY***

A motion for substitution of judge based on actual prejudice must be brought "at the earliest practical moment after the alleged prejudice has been discovered." *In re: Misao*, 245 Ill.App.3d 742, 747 (4th Dist. 1993). Prompt submission of the motion is designed to prevent a litigant from seeking a substitution of judge for cause only after he has formed an opinion that the judge may be unfavorably disposed toward the cause. *In Re Marriage of Kozloff*, 101 Ill. 2d 526 (1984), *Paschen Contr. v. Ill. St. Hwy Auth.*, 225 Ill.App.3d 930 (2nd Dist., 1992). The courts do not permit a party "to test the judicial waters and substitute judges merely because they do not like what they have found." *In re Petersen*, 319 Ill. App. 3d 325, 339 (1st Dist. 2001), *In re Misao*, 245 Ill. App. 3d at 746 (4th Dist. 1993).

*Rizzuto v. Rematt*, 273 Ill.App.3d 447 (1st Dist. 1995), is analogous to the instant case. In *Rizzuto*, the court held that plaintiffs' motion for substitution of judge was properly denied as untimely. The court found that the petitioner's delay of more than two (2) months after the alleged prejudice had occurred during which time the trial court had ruled against him on two (2) substantive matters was "on its face" sufficient grounds for denial of the petitioner's petition. *Id*. The *Rizzuto* Court noted that the basis for the substitution motion were statements allegedly made by the trial court on January 8, 1991 and February 26, 1991. However the Plaintiffs waited until April 30, 1991 to file their motion. As happened in the instant case, in the interim between the time of the alleged statements and the filing of the motion, the trial court judge in *Rizzuto*, denied two substantive matters involving plaintiffs' requests "for injunctive relief." *Id*. 451, *See also: Resnick v. Reznitsky*, 56 Ill.App.3d 418 (1st Dist. 1977), *Heerey v. Berke*, 179 Ill.App.3d 927 (1st Dist. 1989). On its face, Bailey's motion for substitution of judge for cause was untimely.

***26** In criminal cases, as well as civil cases, a petition for substitution of judge for cause must be brought "at the earliest practical moment after discovering the alleged prejudice." *People v. Johnson*, 159 Ill.2d 97, 123 (1994). In, *Johnson*, this Honorable Court addressed, 725 ILCS 5/114-5(d), the criminal counterpart of section 2-1001(a)(3), which provides, [A]ny defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion." 725 ILCS 5/114-5(d) However, as discussed by this court in *Johnson*, a 5/114-5(d) motion must satisfy certain threshold requirements and be in proper form before it is required that the matter be sent to another judge for hearing. *Id*. at 123-124 (1994). One threshold requirement is that "the defendant must make the motion at the earliest practical moment after discovering the alleged prejudice." *See People v. Taylor*, 101 Ill.2d 508, 518 (1984) The Johnson defendant filed his motion in late July, 1990 but waited almost four months before bringing the motion to the court's attention. *Johnson* at 121 -122. As a result, this court affirmed the trial court's ruling that the motion for substitution for cause was properly denied as untimely. *Id*.

Bailey's Motion was untimely. The alleged prejudicial actions of the trial court which form the basis for her motion occurred, according to her, on June 8, 2006, at the hearing on her original emergency motions. Presumably, Bailey was aware of her own subjective feelings that Judge Connors was biased at the moment Judge Connors spoke. Yet, Bailey did not file her motion the next day, which would have been the "earliest practical moment after the alleged prejudice has been discovered." *See: Misao*, 245 Ill. App. 3d at 747. Bailey delayed filing her motion not for a day or not for a week or not even for a month. Bailey waited 130 days, over four (4) months until October 16, 2006 to file her section 2-1001(a)(3), motion for substitution. Furthermore during the interim, Bailey's attorney(s) was present in court not less than eight additional times, several of which involved matters ***27** where the trial court made substantive rulings. For example, on or about *July 5, 2006*,[4] the trial court heard extensive oral arguments on multiple matters and entered several orders including the order appointing Arnetta as Mary Ann's plenary guardian. (A1 118-119). The triail court denied Bailey's renoticed emergency motion filed June 7, 2006 and denied her motion to dismiss emergency petition to revoke agency and for accounting filed June 27, 2006, as well as her supplemental amended motion to vacate order of temporary guardian and guardian ad litem and her motion to order temporary guardian to vacate real property and her amended motion for an accounting of money of alleged disabled person and her husband and for injunctive relief (filing date unknown). (A1 122-123).

The parties were again before the court on *August 29, 2006* when the court heard oral arguments on Arnetta's emergency motion to quash Bailey's subpoena served on SBC Midwest for Arnetta's personal phone records. (V1 15-31). And they were back in court on or about *September 13, 2006* for the hearing on Arnetta's motion for approval of her Inventory of Mary Ann's assets.

On September 13, 2006, the Inventory was approved, after which, the trial court set a number of other matters for hearing on October 17, 2006. (V1 C118-121).

Bailey filed her motion for substitution of judge on October 16, 2006 and noticed it for October 17, 2006, On October 17, 2006, the date Bailey appeared before the trial court for the first time after having filing her motion for substitution the day before, the following matters were scheduled: 1) Bailey's amended accounting, (V2 305-310), 2) Bailey's second amended emergency motion to vacate, 3) Arnetta's response to amended emergency motion to vacate, 4) Bailey's reply to response to amended emergency motion to vacate, 5) Guardian's motion to revoke powers of attorney, 6) Arnetta's petition for ***28** issuance of citation in recovery and for other relief (V1 135-249), 7) Bailey's petition for issuance of preliminary injunction, 8) Guardian's petition for issuance of subpoena to Legacywriter.com [5] for copies of all documents prepared, the date thereof and by whom ordered along with the balance of its file for the estate planning documents allegedly ordered by Bailey purporting to affirm the principal and agent relationship between Bailey and Mary Ann Wilson (V2 349-355); 9) Guardian's motion to list real estate (V1 453-490); 10) Guardian's petition to authorize annulment proceeding (V1 24-345); 11) GAL's petition for payment of GAL fees; and 12) Bailey's response to petition for payment of GAL fees.

Bailey waited 130 days after she knew about the alleged bias before submitting her otherwise deficient motion for substitution. The motion was filed immediately before Arnetta was scheduled to present the petition for the issuance of a recovery citation seeking a judgment in an amount in excess of $275,000 against Bailey and immediately before Arnetta's request for a subpoena to issue to Legacywriter.com for information confirming that the powers of attorney being relied upon by Bailey were a fraud.

***29 C.**

***THE TRIAL COURT HAS THE RIGHT TO DETERMINE AS A THRESHOLD MATTER WHETHER A PETITION FOR SUBSTITUTION OF JUDGE SATISFIES THE REQUIREMENTS OF 735 ILCS 5/2-1001(a)(3)(ii)***

The Majority Opinion in *Wilson II* effectively abrogates the cases of *In re Estate of Hoellen*, 367 Ill.App.3d 240 (2006), *Alcantar v. Peoples Gas, Light & Coke Co.*, 288 Ill.App.3d 644 (1997), and *City of Quincy v. Weinberg*, 363 Ill.App.3d 654 (4th Dist. 2006), each of which holds that a motion for substitution of judge for cause must meet a threshold showing of bias before the matter is transferred to another judge for a hearing. *In re Estate of Wilson*, 389 Ill.App.3d 771 (1st Dist. 2009). In *Alcantar*, before the court was a motion seeking a substitution of judge for cause. *Id*. at 649. The assertion in *Alcantar* was that the trial judge had predetermined the outcome of the case. *Id*. The allegation of bias involved a comment by the judge that he was strongly inclined to grant a motion for sanctions, before the briefing had been completed or a complete hearing was held. *Id*. The litigants claimed the trial court had erred by not transferring the case to another judge for a hearing on the merits. *Id*. at 649-650 The *Alcantar* court stated:

In order to be entitled to a hearing before another judge on whether a substitution for cause is warranted, the motion must allege grounds that, if taken as true, would justify granting a substitution for cause. In *People v. Damnitz*, 269 Ill.App.3d 51 (1994), the defendant claimed that the trial court violated procedures mandated by statute when it refused to transfer to another judge defendant's motion for substitution of judge for cause. The court disagreed, finding that a transfer to another judge was not necessary since defendant failed to establish even a threshold basis for his substitution motion. The court noted that the alleged bias of a trial judge "must be shown to have stemmed from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Damnitz*, 269 Ill.App.3d at 57 (1994) See *Liteky v. United States*, 510 U.S. 540, 114 S.Ct 1147, 127 L.Ed.2d 474 (1994) (judicial rulings alone almost never constitute valid basis for a bias or partiality motion).

The threshold showing of prejudice warranting transfer to another judge was not met in the instant case. Benjamin & Shapiro alleged that the trial judge's prejudice was evident from his comment that he was strongly inclined ***30** to grant Peoples Gas' motion for sanctions. The trial court made this remark after granting summary judgement in Peoples Gas' favor on the basis that the evidence clearly showed that there was no gas explosion. *The trial judge's remark regarding sanctions was based on the evidence in the case and does not meet a threshold showing of prejudice against Benjamin & Shapiro*. See *Hartnett v. Stack*,

241 Ill.App.3d 157, 171, 180 Ill.Dec. 634, 607 N.E.2d 703 (1993) (the trial judge's remark that "there will be a sanctions hearing against the Defendant in my opinion" does not show that the trial judge was prejudiced against defendant). The trial court therefore properly denied Benjamin & Shapiro's motion for substitution without transferring the matter for a hearing before a different judge. *Alcantar v. Peoples Gas and Light Company*, 288 Ill.App.3d 644, 649 (1st Dist. 1997) [Emphasis added]

The majority opinion also impacts the recent case of *Williams v. Estate of Cole*, 393 Ill.App.3d 771 (1st Dist., 2009). In *Cole*, a different divided panel of the First District, rejected the rationale of the majority's opinion relied upon in reaching its ruling in *Wilson II*. Instead the *Cole* court adopted the reasoning of Justice O'Malley in the dissent in *Wilson II. See Williams*, 393 Ill.App.3d 771 (1st Dist. 2009). The issue decided in *Cole*, is the same as in the instant matter, although there are some factual differences. The question to be decided was whether the trial court erred in denying the *Cole* petition for substitution of judge for cause, pursuant to section 2-1001(a)(3), by not transferring the petition for a hearing before a different judge. The majority of the panel in *Cole*, consistent with the dissent in *Wilson II*, adopted the *Alcantar* finding which requires a section 2-1001(a)(3) motion satisfy "a threshold basis by alleging grounds which, if taken as true, support a granting of substitution for cause," *Id*. (1st Dist., 2009). *Cole*, reiterated that as a threshold matter, the allegations of bias "must stem from an extrajudicial source, resulting in an opinion on the merits on some basis other than from what the judge learned from her participation in the case." *Alcantar* at 649-50 (1997).

Consistent with *Alcantar, Estate of Hoellen* and now *Estate of Cole*, Bailey's motion for substitution of judge failed to satisfy a 'threshold basis' by alleging grounds which, if taken as true, support a granting of a motion for substitution for cause.. Furthermore, "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not ***31** support a bias or partiality challenge." *Liteky*, at 555. Bailey's motion for substitution of judge is devoid of "specific allegations supported by affidavit, stating facts which, if true, constitute "actual prejudice." The trial court was correct in finding that Bailey's motion for substitution of judge failed to satisfy a threshold basis by alleging grounds which, if taken as true, support a granting of substitution for cause, and therefore, it was not necessary to transfer the matter for a hearing before another judge.

The threshold requirement is not new, nor is it limited to the specific cases cited above. The threshold requirement sets the parameters required to satisfy the pleading requirements mandated by section 2-1001(a)(3)(ii) or 725 ILCS 5/114-5(d), its criminal counterpart. *See People v. Johnson*, 159 Ill.2d 97 (1994). In, *Johnson*, this Honorable Court reiterated the basic understanding of the threshold requirements necessary to properly plead a motion for substitution of judge for cause. *Id*. 123. If the specifics of the affidavit are insufficient, the threshold has not been met and the case need not be transferred to another judge for hearing. *Id*. 123-124. If the allegations of bias or prejudice are insufficient, for example, because the allegations lack specificity or the allegations do not contain allegations which constitute actionable bias, the threshold has not been met and the case need not be transferred to another judge for hearing. *Id*. If the motion is untimely, the threshold has not been met and the case need not be transferred to another judge for hearing. *Id*.

Bailey's motion for substitution of judge is devoid of specific allegations supported by affidavit and failed to state facts, which, if true, constitute "actual prejudice." As such, Bailey's motion does not meet the threshold showing of bias required before a case must be transferred to another judge for a hearing on the merits. Bailey's motion was properly denied by the trial court.

***32 D.**

***IN THE ABSENCE OF A REPORT OF PROCEEDINGS, THIS COURT SHOULD ASSUME THAT THE TRIAL COURT'S RULINGS WERE CORRECT***

Bailey did not submit, as part of the common law record, a transcript of the oral arguments heard by the court on November 6, 2006 in support and opposition of her Motion for Substitution of Judge for Cause. Supreme Court Rule 321 requires that the record on appeal include any report of proceedings prepared in accordance with Rule 323.(155 Ill.2d R. 321). Without

knowledge of the evidence or arguments presented, or the basis for the trial court's decision, the reviewing court presumes that the trial court's decision was proper. *Webster v. Hartman*, 195 Ill.2d 426 (2001), *In re K.S.*, 317 Ill.App.3d at 832-33 (5th Dist. 2000), *Jurgensen v. Haslinger*, 295 Ill.App.3d 139, 142-143 (1st Dist., 1998).

In *Foutch v. O'Bryant*, this Court reviewed the denial of a motion to vacate a judgment order. *Foutch v. O'Bryant*, 99 Ill.2d 389, 392 (1984). The motion in *Foutch* was filed within thirty days of the judgment order. *Id*. Defense counsel in *Foutch* claimed that they never received notice of the trial date and only learned of the judgment order after it had been entered. *Id*. No court reporter was present and there was no transcript of evidence or report of proceedings. *Id*. The *Foutch* court affirmed the denial of the defendant's motion because the order made clear that, "the parties were present and that the court having heard the evidence, adduced the arguments of counsel and now being fully advised in the premises, finds: (1) that the defendant's motion should not be granted." 99 Ill.2d at 392. In affirming the appellate court (which had affirmed the trial court's decision denying the motion to vacate), this court held that absent a transcript of the proceedings, "*it must be presumed that the denial of the motion was in conformity with the law and was properly supported by evidence*." *Id*.

***33** In *Skaggs v. Juris*, 28 Ill.2d 199 (1963), the plaintiff argued that because the record failed to disclose the evidence heard by the trial court in support of an award made by the court, it must be assumed that none was heard and that the award was therefore improper. *Id*. In rejecting this contention, this court observed, "the court stated that its order was based upon the court having heard the evidence and the arguments of counsel and being fully advised in the premises. In such a situation, unless there is a contrary indication in the order or in the record, it is presumed that the court heard adequate evidence to support the decision that was rendered." *Id*. Where it is alleged that the evidence presented was actually insufficient to support the court's finding, the burden of preserving said evidence rests with the part who appeals from said order. No record of the evidence heard on May 23 and 24 regarding the commissioner's claim is before this Court and therefore it must be assumed that the evidence that was heard fully supported the Court's finding that the commission was entitled to $3,989.40. *Id*. The holding in *Skaggs* is applicable here. Because Bailey failed to include the relevant report of proceedings, this court should assume that the trial court's ruling was correct. 99 Ill.2d 389 (1963).

Oral arguments were heard on November 6, 2006. (V2 494). The oral arguments were considered by the trial court in reaching its determination that the motion for substitution "does not meet a threshold showing of prejudice sufficient to require a section 2-1001(a)(3)(iii) hearing." (V2 494). Bailey waived the issue of whether the motion for substitution for cause was wrongfully denied by failing to provide the appellate court with a copy of the transcript of the oral arguments of the proceedings. *Foutch v. O'Bryant*, 99 Ill.2d 389, 391-92(1984), *Jurgensen v. Haslinger*, 295 Ill.App.3d 139, 142-143 (3rd Dist. 1998), *Landau & Associates, P.C. v. Kennedy*, 262 Ill.App.3d 89 (2nd Dist., 1994).

***34 E.**

***THE APPELLATE COURT ERRED BY, ITSELF, SEARCHING THE RECORD TO REVIVE A STATUTORILY DEFICIENT PETITION***

The Majority Appellate Court erred by engaging in an after-the-fact investigation of the record for purposes of filling in the blanks left by Bailey "to revive a statutorily insufficient petition." *Wilson*, at 793 (1st Dist. 2009) The dissent in *Wilson II*, strongly disagreed with the majority's approach in support of Bailey's position since she, "apparently did not find anything in the record sufficiently supportive of her claim of bias that would merit inclusion in her petition or in her briefs on appeal." *Id*. at 791. The dissent took issue with the majority's one sided advocacy on behalf of Bailey particularly since the majority had criticized the trial court for its advocacy on the disabled person's behalf. *Id*. at 791.

**F.**

***IF AFFIRMED THE MAJORITY DECISION WILL OPEN THE FLOOD GATES TO A DELUGE OF MOTIONS FOR SUBSTITUTION OF JUDGE FOR CAUSE***

There could be no limit to the number of motions for substitution of judge for cause presented if the reasoning of the majority opinion in this case is affirmed. If the requirements of 735 ILCS 5/2-1001(a)(3)(h) are ignored and no threshold prerequisites are required, it could result in a deluge of substitution for cause motions. The unknown consequences of such a situation could potentially impose enormous burdens on the circuit courts, which would at the whim of any party be required to revisit the merits of countless rulings at any point in the proceedings. The burdens would not be accompanied by any benefits to the judicial system in terms of fairness, because the appellate process already provides an adequate avenue for correcting errors resulting from improper denial of 735 ILCS 5/2-1001(a)(3) rulings.

***35 II.**

**THE MAJORITY OPINION FAILED TO CONSIDER OR EVALUATE THE ALLEGATIONS OF JUDICIAL BIAS IN TERMS OF THE TRIAL COURT'S SPECIFIC REACTION TO THE EVENTS TAKING PLACE AND *SERIOUSLY LIMITS* THE COURT'S PARAMOUNT OBLIGATION TO PROTECT ITS WARD**

Mary Ann's situation was dire. The court had been advised by GAL Thiel that Mary Ann had been removed from her home by protective services and hospitalized. (A1 5-7). On May 14, 2006 after meeting with her, GAL Thiel had reported that [Mary Ann] "did not know where she was, her address, if she ever had children, why she was in the hospital, how she got there, her age, date of birth, or what medication she takes or what it was for." (A1 5).

By June 8, 2006, preliminary information had already been presented to the trial court including bank statements and cancelled checks which indicated that at least one sizable financial account belonging to Mary Ann had been "zeroed out" by Bailey. (A2 7). Bailey herself acknowledged that she spent Mary Ann's money on an addition to her own house, and had placed over $150,000 in a box in Mary Ann's closet. (A2 26-45). On June 8, 2996, the trial court was just doing its job. The court was investigating questions concerning, "the immediate welfare and protection of the alleged disabled person and his or her estate." See755 ILCS 5/11a-4.

A probate court has special duty to protect the interests of a disabled persons' estate. *Perry v. Estate of Carpenter*, 918 N.E.2d 1156, 2009 WL 3823105 (1st Dist. 2009). In a guardianship proceeding, the court's "paramount concern" is the immediate welfare of the alleged disabled person and his or her estate. *In re Serafin*, 272 Ill.App.3d 239, 244(1995). The proceedings of June 8, 2006 took place before a plenary guardian was appointed. In determining, on a temporary basis, whether to suspend, revoke or honor, powers of attorney purportedly granted to an agent by an alleged disabled person, a guardianship court must act expeditiously to ensure compliance with its statutory and ***36** common law obligations. Therefore, allegations of judicial bias must be viewed within the context of a procedure where the court is mandated to use its best efforts to ensure the safety and welfare of a person who may be unable to protect her own interests. In such a situation, the procedures are designed to protect the alleged disabled person, without precluding additional proceedings at a later date, to ensure that the interests of other interested persons are considered. Consistent with its obligations to the alleged disabled person, while still evidencing its open mindedness here, the trial court found:
"At some point maybe she will account for every penny, that could happen, but until I get an accounting for every penny, maybe everything she says is true, all the money can be accounted for, but if it can't be, I will be remiss to allow her to go back to control [Mary Ann's] money at this point, okay." (A2 45).

The majority in *Wilson II*, however, treated the case as if the trial court's primary obligation was to Bailey not Mary Ann. Whatever actions were taken by the trial court on June 8, 2006, such actions were taken pursuant to its affirmative obligations and based on clear matters of concern. To restrict a guardianship court's actions, as the majority appellate court, apparently, believes is appropriate, will impede a trial court, in guardian-ship cases, from carrying out the obligations to which it is charged.

In the recent case of *Perry v. Estate of Carpenter*, the court reiterated the importance of a guardianship court remaining vigilant in the protection of its wards.

As often stated, 'courts are under a duty to protect the interests of a minor or a disabled person who is party to the judicial proceedings before it.' *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 328 Ill.App.3d 255, 272, (2002). The need to protect the interest of a disabled person may not comport with traditional contract law interpretation, however, when equitable interests intervene, those interests supersede all else. 'If there is a clash between a rule of equity and a rule of law, the former, of course, prevails.' *7 J. Pomeroy, Modern American Law 215* (1914). *Perry v. Estate of Carpenter*, 918 N.E.2d 1156, 2009 WL 3823105 (1st Dist., 2009)

***37** In support of her assertion of bias, Bailey argued that the court had assumed the role of an advocate without remaining impartial. However ignored in her assertions is any consideration of the context in which the purported bias occurred. On June 8, 2006, the trial court was performing its statutorily mandated responsibilities. Its "advocacy" was within the purview of its obligations, and is a necessary and customary practice, in guardianship cases where a ward's welfare is at issue. The opinion of the majority appellate court interjects a serious impediment to the trial court fulfilling its mandate to vigilantly protect the ward and her estate. As recently reiterated by this court:

A disabled person is viewed as "a favored person in the eyes of the law" and is entitled to vigilant protection. *In re Estate of Wellman*, 174 Ill.2d 335 (1996) ("[t]he trial court protects the disabled person as its ward, vigilantly guarding the ward's property and viewing the ward as a favored person in the eyes of the law"). Once a person is adjudicated disabled, that person remains under the jurisdiction of the court, even when a plenary guardian of the person has been appointed. *In re Estate of Nelson*, 250 Ill.App.3d 282, 286-87, 190 Ill.Dec. 212, 621 N.E.2d 81 (1993). The court has a duty to judicially interfere and protect the ward if the guardian is about to do anything that would cause harm. *Nelson*, 250 Ill.App.3d at 287, 190 Ill.Dec. 212, 621 N.E.2d 81. To fulfill this duty, the court's authority is not limited to express statutory terms. *In re Mark W.*, 228 Ill.2d 365 (2008)

The dissent properly delineates the responsibilities of a court sitting in a guardianship case and the manner in which those responsibilities are to be performed. As contrasted with the majority opinion, the dissent considered the context in which the June 8, 2006 proceedings occurred. By viewing the situation in context, Justice O'Malley, did not consider the trial court's "inquiry of Bailey to be adversarial, hostile or sarcastic when read in its entirety and in light of the troubling facts that had been disclosed to the court by the GAL, the temporary guardian and Bailey herself." *Wilson*, at 793 (1st Dist. 2009) In addition, while acknowledging that the trial court was less than convinced that Bailey was at Mary Ann's house, "every minute of the day" when a caretaker was present, (A2 37-38), the dissent did not view the statement, "as an indication of the court's bias, but rather, the ***38** circuit court's finding based on respondent's testimony and credibility." See *Liteky v. United States*, 510 U.S. 540 (1994) (judicial rulings alone almost never constitute valid basis for a bias or partiality motion). *Id*.

The dissent, consistent with this Court's repeated statements, correctly acknowledged:

Moreover, the questioning undertaken by the circuit court that Bailey complains of, concerned the immediate welfare and protection of the alleged disabled person and her estate. Bailey was seeking to regain control of Wilson's finances and healthcare through a TRO and emergency motion when she was examined by the court. In this case "the immediate welfare and protection of the alleged disabled person and his or her estate shall be of paramount concern, and the interests of the petitioner, any care provider, or any other party shall not outweigh the interests of the alleged disabled person." 755 ILCS 5/11a-4 (West 2006).

Respondent refers to actions in which the circuit court was not only permitted, but indeed required, to take given the physical and financial circumstances under which Wilson was brought to the attention of the court. Moreover, this was not a case where the judge summarily denied Bailey's motion for substitution of judge. The judge allowed a brief in support of the motion, a response and a reply to the response before a hearing was had on the motion. In addition, when taken together with the timing of the petition and the short shrift that respondent gave the motion in both the lower court and on appeal, the circumstances suggest that the purpose of the petition may have been merely to delay the proceedings.

The trial court at all times acted in a judicious and proper fashion, being mindful first, of its special duty to vigilantly protect Mary Ann as a favored person in the eyes of the law. *In re Estate of Wellman*, at 348. Had the trial court done otherwise, it would been derelict in the performance of its responsibilities by elevating Bailey's interests above that of its ward. The majority appellate opinion, if affirmed, will impede the ability of every court sitting in guardianship in the State of Illinois from complying with its statutory and common law obligations to vigilantly protect its wards.

***39** ***CONCLUSION***

The facts of this case clarify why the legislature included section 2-1001(a)(3)(h) in the Code of Civil Procedure and required, at the least, that a litigant satisfy a rudimentary or threshold standard of pleading before requiring a transfer to another judge for a section 2-1001(a)(3)(iii) hearing on the merits. Stated another way, section 2-1001(a)(3)(h) helps insure there exists a standard which requires some indicia of good faith before automatically mandating a section 2-1001(a)(3)(iii) hearing take place upon the filing of a motion for substitution of judge for cause. After multiple court appearances involving substantive matters, Bailey filed a deficient motion containing vague, imprecise and evasive allegations of bias, unsupported by affidavit, which were never clarified in any subsequent pleading. The motion was filed over four months after the alleged bias became known and, the day before, multiple motions were scheduled for hearing. The motions scheduled to be presented by the guardian included a recover citation which sought a finding that Bailey had breached her fiduciary duty to Mary Ann and had engaged in financial exploitation of her in an amount exceeding $250,000. While certainly there will be occasions in which a trial court incorrectly construes the requirements of section 2-1001(a)(3) by failing to transfer the case for a section 1001(a)(3)(iii) hearing, this is not one of those cases.

***40** WHEREFORE, Arnetta Williams, Guardian of the Estate of Mary Ann Wilson, hereby requests that this Honorable Court reverse the ruling of the majority appellate court and affirm the trial court's denial of Bailey's deficient motion for substitution of judge for cause.

**Appendix not available.**

Footnotes

1 The record on appeal consists of two (2) sets of common law volumes. The first set consists of two (2) volumes prepared for the appeal in *In re Estate of Wilson*, 373 Ill. App. 3d 1066 (1st Dist. 2007) (Wilson I). Volume 1 consists of the common law record and Volume 2 consists of the transcripts of the proceedings heard on May 15, 2006, June 8, 2006 and June 29, 2006. The first volume will be cited to as "A # Page #. The second set of common law volumes of record consists of eight (8) volumes prepared as at the time of filing of *In re Estate of Wilson*, 389 Ill.App.3d 771, 905 N.E.2d 957, 329 Ill.Dec. 119 (1st Dist. 2009) (Wilson II) which will be cited to as "C# Page #. There are two (2) supplemental volumes of record, and it will be cited to as "S# Page #.

2 Not mentioned by Bailey is that her husband, David Service, is the only person known to have a key to Mary Ann's house between May 3, 2006 and May 17, 2006, the day the temporary guardian secured the house by having a locksmith change the locks. (V6 183). There is nothing in the record to indicate that David Service or Karen Bailey were prevented from using their key to enter Mary Ann's house between May 3, 2006 and May 17, 2006. (V7 107). Between May 3, 2006 and May 16, 2006, Arnetta did not have a key to the house. (V7 133). Nor did she inspect the house or enter the house for any purpose until May 17, 2006. (V7 133)

3 Bailey never explained the reason for her fourth request for injunctive relief since she had already filed a notice of appeal objecting to the denial of her prior motions based on the same argument and seeking the same relief.

4 The July 5, 2006 order denying Bailey's emergency motion to vacate orders based on a lack of subject matter jurisdiction, for a TRO and preliminary injunction is the order appealed from in Wilson I.

5 Arnetta had discovered a recent charge on one of Mary Ann's credit cards for services provide by a company named Legacywriter.com. Legacywriter.com is a web based internet company where the public can, for a fee, open an account and generate estate planning documents. Because Arnetta had letters of office as Mary Ann's guardian, the company was able to advise that an account had been opened in 2006 which contained estate planning documents including a will and powers of attorney purportedly prepared by Mary

Ann. However, absent a subpoena, Legacywriter.com was limited in providing any additional information besides that information set forth in Arnetta's petition for issuance of subpoena. (V2 349-355)

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