No. 126008

In the

Supreme Court of Illinois

PALOS COMMUNITY HOSPITAL, a not-for-profit community hospital,

Plaintiff-Appellant,

v.

HUMANA INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the Illinois Appellate Court, First Judicial District, No. 1-19-0633.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 13 L 7185.
The Honorable **Diane M. Shelley**, Judge Presiding.

BRIEF AND APPENDIX OF APPELLANT

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E-FILED
11/4/2020 6:07 PM
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ORAL ARGUMENT REQUESTED

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Introductory Paragraph

This is a lawsuit for breach of contract and fraud brought by Palos Community Hospital ("Palos") against Humana Insurance Company ("HIC"), alleging that Humana under-reimbursed Palos for medical services provided to Palos patients over many years. Palos appealed to the Appellate Court from a final judgment entered after an adverse jury verdict. Before the trial court had ruled on any substantial issue in the case and well before trial had begun, Palos filed a motion for substitution of judge "as a matter of right" under 735 ILCS 5/2-1001(a)(2). The trial judge saw the parties only twice before Palos made its motion. The judge denied the motion solely on the ground that in those two proceedings, Palos had "tested the waters" in respect to the judge's leanings on the merits of the case. The Appellate Court, First District, affirmed the judgment in full, including the order denying Palos's motion for substitution of judge, re-affirming the First District's adherence to the "test the waters" doctrine and agreeing with the trial judge that Palos had tested the waters. This Court granted Palos leave to appeal to resolve whether the testing the waters doctrine is valid and, if so, whether Palos tested the waters. No question is raised on the pleadings.

Statement of Issues Presented for Review

Palos's Petition for Leave to Appeal, which the Court allowed, presented two issues:

1. The Illinois Legislature, in section 2-1001(a)(2) of the Code of Civil Procedure, has directed that "[e]ach party shall be entitled to one substitution of

judge without cause as a matter of right" and that "[a]n application for substitution of judge as of right . . . 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." 735 ILCS 5/2-1001(a)(2). The test the waters doctrine is an additional, unwritten, judicially created limitation on parties' rights under section 2-1001(a)(2), barring a party from seeking a substitution of judge as of right — even before the trial court has ruled on any substantial issue in the case and before trial or hearing begins — if the party tested the waters and learned of the judge's leanings. The doctrine was created before the currently operable 1993 amendments, amendments that eliminated the need to allege prejudice. Is the test the waters doctrine valid?

2. If the test the waters doctrine is valid, did Palos test the waters before moving for substitution of judge as of right?

Statement of Jurisdiction

This Court has jurisdiction under Rule 315(a). Palos timely filed a petition for leave to appeal from the Appellate Court's April 17, 2020 published opinion. This Court allowed leave to appeal on September 30, 2020.

Text of the Statutory Provision at Issue

Section 2-1001(a)(2) of the Code of Civil Procedure (735 ILCS 5/2-1001(a)), as amended effective January 1, 1993, provides the following:

Substitution of Judge

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

situations:

* * *

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

(i) Each party shall be entitled to one substitution of judge as a matter of right.

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

Statement of Facts

Palos is a not-for-profit community hospital in Palos Heights, Illinois. R.2456; R.2465.[1] In 2013, Palos sued HIC in the Circuit Court of Cook County for breach of contract and fraud, alleging underpayments for reimbursements for medical treatment. C.122-229 (original complaint); C.857-1013 (amended complaint). The case was initially assigned to Judge Sanjay Tailor. C.10648.

In October 2016, Judge Tailor appointed Judge James Sullivan (ret.) (a Law Division mediator-list member) as a "discovery master" to mediate discovery disputes at the parties' expense. S.2395-98; C.10142. Both sides had previously filed

[1] This brief uses the following citation conventions: A-[page] (appendix to the brief); R.[page] (report of proceedings); C.[page] (common law record); S.[page] (supplemental record).

motions to compel. C.7834-8227. Judge Tailor told the parties that if they did not reach a mediated resolution, then Judge Sullivan could submit a recommendation to the court, with an opportunity for the parties to object. C.10142. Judge Sullivan submitted a recommendation on March 20, 2017 (C.10240); Judge Tailor never addressed it.

Instead, when the parties appeared on March 21, 2017 in Judge Tailor's courtroom for a status hearing, Judge Diane Shelley was on the bench in his place and the parties learned for the first time that Judge Tailor had been transferred to the Chancery Division and that their lawsuit had been re-assigned to Judge Shelley. A-025-53. Judge Shelley saw the parties twice — on March 21 and April 13, 2017 — before Palos filed a motion for substitution of judge. *Id.*; A-054-68. There is no dispute in the record that Judge Shelley did not rule on "any substantial issue in the case" (Section 2-1001(a)(2)(ii)) before Palos filed its substitution motion. Nor is there any dispute that the trial in the case did not begin for more than a year after Palos filed its motion for substitution of judge.

The facts necessary to understand this appeal fall into three categories: (1) what was said during the two, transcribed proceedings preceding the substitution motion; (2) the content of Judge Shelley's written orders (a) denying the substitution motion and (b) denying reconsideration; and (3) Palos's filings in the trial court and the Appellate Court preserving (a) its challenges to the validity of the test the waters doctrine and (b) its contentions that even if the doctrine is valid, it did not test the waters.

The Proceedings Before Palos Moved for Substitution of Judge as of Right

Judge Shelley began the March 21, 2017 proceeding by telling the parties that she was "not clear" on the claims and parties, and sought "a quick overview" to help her "come up to speed." A-028. Judge Sullivan attended the hearing and tendered a recommended discovery ruling (dated March 20, 2017 and addressed to Judge Tailor, but never given to him). A-027-28; C.10240. Palos asked to present written objections and Judge Shelley said, "I will give you an opportunity to present that to the Court [and not] deviate from the procedure [for objections] that Judge Tailor has already established in this case." A-032-37. Judge Shelley set an April 4, 2017 deadline for objections. A-034-35 (14 days from March 21, 2017).

On April 4, 2017, Palos made two filings: (1) a motion to strike, which challenged the recommendation as beyond the remit of a discovery master under Illinois Constitution, Art. VI, § 14 (C.10177-245),[2] and (2) an objection to the recommendation itself (C.10264-636). Palos noticed the motion to strike for presentment on April 13, 2017, to set a briefing schedule. A-058; C.10241.

At the April 13, 2017 presentment hearing, Judge Shelley said that precedent might exist for judges to seek assistance in resolving discovery disputes, but also said that she was "not making any type of an announcement" and had an "open mind." A-057-58, A-061.

[2] Under Art. VI, § 14, "There shall be no fee officers in the judicial system." *See Walker v. McGuire,* 2015 IL 117138, ¶¶ 13-18, 39 N.E.3d 982 (discussing provision).

The Substitution Motion and the Motion to Reconsider

Palos moved for substitution of judge as of right under 735 ILCS 5/2-1001(a)(2) on April 20, 2017. C.10638-39. On May 4, 2017, Judge Shelley denied the motion in a written order, relying solely on the test the waters doctrine. A-069-70. The order states that Palos had "tested the waters" by learning the court's "unequivocally expressed opinions" on "setting aside the [discovery master] appointment" and "discern[ing] the court's disposition toward a very important issue in the case, the production of certain documents which are at the heart of this controversy." *Id.* The May 4, 2017 order's characterization of the March 21 and April 13, 2017 proceedings cannot be squared with the transcripts of those proceedings. A-025-53, A-054-68. There was no discussion concerning the trial court's anticipated disposition of the discovery master's recommendation at either the first status hearing or at the presentment hearing.

On May 16, 2017, Palos moved for reconsideration. C.10673-728. On June 5, 2017, Judge Shelley denied reconsideration in a written order. A-071-77. In the order, the court stated that it had "indicated its position on Judge Sullivan's appointment" during the March 21, 2017 hearing, and that once it had done so, "the right to substitution as of right was no longer timely" under the test the waters doctrine. A-073-74. In the reconsideration order, the court also stated that when the parties appeared at the April 13, 2017 presentment hearing, the court had "reiterated that on its face it had no problem with Judge Sullivan's appointment." A-075. The court concluded that because the discovery dispute about which Judge

Sullivan had submitted his recommendation "is arguably of substantial strategic importance" to resolving the breach of contract claim, the court's comments concerning the validity of Judge Sullivan's appointment "indicated its opinion on a substantive matter which goes to the heart of the case." *Id*.

Contrary to any intimation that she had signaled an opinion that Judge Sullivan's appointment was valid, on June 7, 2017, Judge Shelley ruled that appointing a special master to recommend judicial rulings violated the Constitution's "fee officer" prohibition and granted Palos's motion to strike. S.2552-54; C.10769-70.[3]

Preservation of Issues

Palos preserved in the trial court and in the Appellate Court its challenges both to the continued validity of the test the waters doctrine and to the applicability of the doctrine to its substitution motion, should this Court conclude that the doctrine has continued validity.

First, on April 20, 2017, Palos filed a two-page substitution motion, stating (a) that the trial court had not made any substantial ruling; (b) that Palos had not previously exercised its absolute right to take a substitution of judge; and (c) that it had "timely exercised that right." C.10638-39. Following the trial court's May 4,

[3] The June 7, 2017 order cited the 1870 Illinois Constitution, as amended in 1964 (art. VI, §8). The operative 1970 Constitution contains the same "fee officer" prohibition. *See* Ill. Const. 1970, art. VI, §14; *Walker*, 2015 IL 117138, ¶ 18 (discussing history).

2017 denial of the substitution motion as untimely under the test the waters doctrine, Palos moved for reconsideration and alternatively for certification under Rule 308. C. 10673-728. In its supporting brief, Palos (1) identified the split of authority concerning the continued validity of the test the waters doctrine (C.10679, C.10686-7) and (2) argued that even if the test the waters doctrine were valid, Palos had not tested the waters (C.10679-684, C.10689).

Second, on November 8, 2018, following entry of final judgment after trial, Palos renewed its objections to the denial of its substitution motion (and the denial of reconsideration on that motion) as part of its post-judgment motion for JNOV and alternatively for a new trial. C.20360-61. *See also* C.21467 (reply); C.21485-86 (re-affirming denial of substitution motion under the test the waters doctrine on denial of new trial motion).

Third, on September 19, 2019, in its opening brief to the Appellate Court, Palos (1) noted the split of authority concerning the test the waters doctrine, (2) argued that it had not tested the waters, and (3) noted that the court could, in the alternative, "reverse by adopting the analysis of the Fourth District [in *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, 996 N.E.2d 1131] and Justice Kilbride [in his dissent in *Bowman v. Ottney,* 2015 IL 119000, ¶¶ 33-42, 48 N.E.3d 1080 (Kilbride, J. dissenting)], resolving the split." 09/19/19 Opening Br. 26-29 & n.15.

Fourth, in its April 17, 2020 opinion, the Appellate Court made the following observation concerning Palos's preservation of the issue:

> Palos argued in its brief that the testing of the waters

> exception is not a valid exception to section 2-1001. We disagree. While there may be a conflict with other appellate districts, "'testing of the waters' remains a viable objection to substitution of judge motions as of right in the First District." *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 36.

A-010 ¶ 30 n.1.

Argument

Since 1993, Section 2-1001(a)(2) has granted a party one substitution of judge "as a matter of right," provided that the trial or hearing has not begun and the judge to whom the substitution motion has been presented has not ruled on a "substantial issue" in the case. In this case, it is undisputed that Palos moved for substitution of judge before the trial or hearing began and before the trial court had ruled on a substantial issue.

The trial court nonetheless denied Palos's substitution motion based solely on the test the waters exception to section 2-1001(a)(2), an exception not found in the statute that this Court has characterized as a "judicial gloss" on a party's otherwise absolute statutory right. *Bowman*, 2015 IL 190000, ¶ 14, 48 N.E.3d at 1084 (internal citation, quotation omitted). In *Bowman*, the Court recognized the split of authority concerning the test the waters exception, but declined to decide the exception's "continued validity," having concluded that the issue was not squarely before it because facts in that case did not "explicitly implicate[]" the exception. *Id.*, ¶ 27, 48 N.E.3d at 1087.

The exception is explicitly implicated here. For three independent, but reinforcing, reasons, the Court should hold that the test the waters exception has

no continued validity.

First, the exception is flatly inconsistent with the statutory text. *See* Section I.A., below. The text creates the right to a substitution of judge and limits that right; it neither invites nor requires a "judicial gloss." Courts that have attempted to justify applying the exception have pointed to a statutory "policy" against judge shopping — but the only policy in the statute comes from the text itself. The statute states that a party has an absolute right constrained only by clear limitations — the start of the trial or hearing or a ruling on a substantial issue, not commentary about the issue, much less judicial eye-rolling during an argument. Those limitations, chosen and expressed in plain language by the Legislature, prevent judge shopping. There is no basis to rewrite the statute to impose extra-textual constraints, particularly when the Legislature has balanced competing policies — granting a party an absolute substitution right subject to two specific textual constraints preventing judge shopping. Courts should not second-guess or amend the policy balance that the Legislature chose.[4]

Second, the test the waters exception has proved to be subjective and fluid

[4] The statutory right under Section 2-1001(a)(2) stands in contrast to circumstances where a judge has a familial or financial interest in the case or where the judge is demonstrably prejudiced against a litigant. *See, e.g., Danhauer v. Danhauer,* 2013 IL App (1st) 123537, ¶ 25, 2 N.E.3d 424 (prejudice for "cause" relates to alleged bias derived from an extrajudicial source or a high degree of favoritism or antagonism that would render fair judgment impossible). The federal system and every state system of which Palos is aware provides for the latter types of challenges, none of which is implicated by Section 2-1001(a)(2).

in its boundaries and resistant to meaningful appellate review. *See* Section I.B, below. Neither commends the exception. The exception asks whether enough information has been revealed to allow the judge to conclude that the movant has formed an opinion about the judge's inclinations on the merits of the case. It is literally that — the court's conclusions about a litigant's belief about the judge's leanings. This will frequently be a contested question, with unpredictable and inconsistent trial and appellate court answers. *See In re Estate of Gay*, 353 Ill. App. 3d 341, 345-46, 818 N.E.2d 860, 864-65 (3d Dist. 2004) (McDade, J., specially concurring) (noting incompatibility of the testing the waters exception with *de novo* appellate review concerning the propriety of denying a substitution motion).

In contrast, the statutory constraints — the start of the trial or hearing or a ruling on a substantial issue — are clear and predictable, both in the trial court and on appellate review. The start of the trial or hearing is an objective, discernable point in time; a body of law has developed concerning issues that are and are not substantial; and whether there has or has not been a ruling on a substantial issue will be clear on the record.

Third, an historical survey reinforces the conclusion that the test the waters exception has been rendered obsolete. *See* Section I.C, below. This Court did not develop the exception in response to an abstract concern about judge shopping; it developed the exception in response to a concrete concern about the operation of the substitution of judge statute long before the Legislature amended the statute, creating the absolute right subject to express limitations. When, instead, the statute

(beginning in the 1800s) previously required an allegation of judicial bias (but one that need not be proven), litigants could potentially learn information about the judge's views of the merits before filing a substitution motion. The test the waters exception allowed the Court to separate legitimate substitution motions (those based on pre-case knowledge or on innocuous knowledge learned within a case) from illegitimate ones (those based on *within-the-case-acquired* knowledge concerning the trial court's view of the merits). And as the exception evolved, the Court specified particular within-the-case circumstances that made a motion illegitimate — for example, a pre-trial ruling on a substantive issue.[5]

The Legislature codified the start of the trial or hearing and the substantial issue limitations in 1971, undercutting any ongoing need for a judicially created exception to prevent judge shopping. And, as noted above, the Legislature went a step further in 1993 by eliminating the need to allege bias, establishing an absolute right to substitution subject only to the two textual constraints. As this Court observed in *Bowman,* "[w]ith the 1993 amendment, section 2-1001 was rewritten to eliminate the requirement that a party seeking substitution must allege bias or prejudice on the part of the presiding judge[,]" but this amendment did not "change the requirement that the motion be brought before the judge to whom it

[5] The Court has never suggested that a party's due diligence before filing a substitution motion (including learning about the judge's pre-bench background, judicial assignments, decisions, reversal rate, and the like) is judge shopping. It isn't. It is instead simply the informed exercise of a clear statutory right.

is presented has ruled on any substantial issue in the case." 2015 IL 119000, ¶ 16, 43 N.E.3d at 1084. Since history shows that the test the waters exception developed as a judicial counterweight to the loose allege-but-not-prove-prejudice standard under the earlier versions of the statute, the elimination of the need to allege bias also eliminated the need for that counterweight.[6]

To the extent that the Court concludes that test the waters remains a valid exception to a party's absolute statutory right to a substitution of judge, notwithstanding the 1993 amendments, Palos did not test the waters before filing its substitution motion. *See* Section II, below. The transcripts of the two proceedings that preceded Palos's motion show that there was discussion only of the propriety of a purely procedural matter — appointing a discovery master — not commentary revealing the trial court's inclination on any issue of substance.

The consequences of an improper denial of a substitution motion are extreme; given the statutory right, they must be. But circumstances under which years of litigation will have to be done over will be extremely rare if the Court holds that the test the waters exception cannot be squared with the 1993 amendments. Without the exception to fall back on, trial courts will lack the

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[6] Beyond testing the waters, the Court has also held that a party may lose its right to substitution of judge when the motion was "motivated by a desire to avoid or delay the proceedings." *Bowman*, 2015 IL 119000, ¶ 15, 48 N.E.3d at 1085 (citing *Hoffmann v. Hoffmann*, 40 Ill. 2d 344, 348, 239 N.E.2d 792 (1968)). There has been no contention at any stage in this case that Palos's April 20, 2017 motion (following the March 21 and April 13, 2020 hearings) was made for purposes of delay. Accordingly, the concerns articulated in *Hoffman* are not implicated by this appeal.

temptation of elastic application; they will grant motions if the trial or hearing has not begun and if they have not ruled on a substantial issue and they will deny motions if the trial or hearing has begun or they have ruled on a substantial issue.

The 1971 and 1993 amendments show that the Legislature has been fully cognizant of historical developments in respect to the statutory right that it first created in 1819. When the Legislature discarded after nearly 175 years the legal fiction of needing to allege prejudice, but not prove it, the Legislature knew what it was doing. Discarding testing the waters does not mean charting a new course through the wilderness; it simply means following the evolution of the statute from requiring a bare allegation of prejudice to obtain a substitution to providing for a single substitution as "a matter of right" and applying the Legislature's express criteria on the right's limits, without grafting on additional ones.

Statement of the Standard of Review

The first issue presented is whether the test the waters doctrine is valid. The validity of this judicially created exception to Section 2-1001(a)(2) presents a pure question of statutory interpretation. The standard of review of this issue is accordingly *de novo*. *See Bowman*, 2015 IL 119000, ¶ 8, 48 N.E.3d at 1083 (interpreting Section 2-1001(a)(2) *de novo*).

The second issue presented is whether, if the test the waters doctrine is valid, Palos tested the waters before moving for substitution of judge as of right. The standard of review of this issue — the denial of a motion for substitution of judge as of right — is also *de novo*. *Schnepf*, 2013 IL App (4th) 121142, ¶ 27, 996

N.E.2d at 1135-36 (reviewing denial of motion for substitution of judge as of right *de novo*); *Gay*, 353 Ill. App. 3d at 343, 818 N.E.2d at 863 (same).

I. The Test the Waters Doctrine Is Invalid.

A. The Test the Waters Doctrine Is Inconsistent with Current Law.

Since 1993, the substitution of judge statute has been fundamentally incompatible with the judicially created test the waters exception. The statute itself contains two express timing limitations — the motion must be made before the "trial or hearing" begins and it must be made before the judge to whom the motion has been presented has ruled on a "substantial issue" in the case. And if neither of these events has occurred, then a single substitution of judge is "a matter of right." 735 ILCS 5/2-1001(a)(2).

In *Bowman*, the Court recognized the 1993 statutory change, as well as the Legislature's retention of the "substantial issue" limitation (a limitation first added in 1971):

> Prior to the 1993 amendment . . . a party seeking a substitution of judge was required to allege bias or prejudice . . . It was recognized, however, that allowing charges of judicial bias to be made without proof would invite litigants to engage in "judge shopping" or to seek a substitution as a delay tactic. Yet, requiring proof of a claim of prejudice presented other difficulties by requiring either that the accused jurist sit as judge in his own cause or that another judge be brought in on short notice to pass upon the personal views of a colleague. The reconciliation of these conflicting policy concerns was encompassed in the statutory provisions and in the judicial gloss which has been put upon those sections.

Bowman, 2015 IL 119000, ¶ 14 (internal citations omitted).

The "judicial gloss" is no longer appropriate in light of the Legislature's

elimination of the predicate for the gloss's existence: requiring an allegation of bias, but not requiring that it be proved. The Court has long followed the interpretive maxim that when the Legislature acts, it is fully aware of this Court's decisions:

> We assume not only that the General Assembly acts with full knowledge of previous judicial decisions, but also that its silence on this issue in the face of decisions consistent with those previous decisions indicates its acquiescence to them.

United States v. Glispie, 2020 IL 125483, ¶ 10 (quoting *In re Marriage of Mathis*, 2012 IL 113496, ¶ 25, 986 N.E.2d 1139; internal quotations omitted). Here, the Legislature has not been silent.

The brief legislative history of the 1993 amendment is as clear as the text that the Legislature enacted. Senator Dunn stated:

> Currently under the law,[7] if you wish to make a change of judge — which is called a substitution of judge — you must file an affidavit and show that there is prejudice that exists. What this bill does is to give you the right as a litigant, the right to substitute out a judge without stating a matter of prejudice. And what I would say to you is that that is a judgment call that, in all probability, an individual — a litigant — would make in conjunction with his attorney, and there have been something that the lawyer feels that, for a particular reason, he does not want this judge to hear that particular issue. And that's the purpose of the bill.

87th General Assembly, Senate Transcript, May 19, 1992 at 114-15. The bill passed the Senate 54-0. *Id*.

Twenty years after the 1993 amendment, the Fourth District recognized that

[7] As discussed below, the Senator could have added, "and since 1819."

test the waters exception did not survive because the amendment eliminated the rationale for the existence.

> The "test the waters" doctrine was rendered obsolete [in 1993] by introduction of the right to a substitution of judge without cause under the new version of section 2–1001(a)(2). The doctrine not only does nothing to advance the functioning of section 2–1001(a)(2), it affirmatively frustrates its purpose. By inviting the trial judge to make the potentially nuanced, subjective determination of whether he has tipped his hand at some point during the proceedings, the doctrine undermines the movant's right to have the fate of his case placed in the hands of a different judge.

Schnepf, 2013 IL App (4th) 121142, ¶ 50.[8]

Courts seeking to uphold the doctrine have succumbed to recursive incoherence — rejecting a substitution motion that they are convinced fits squarely within the statutory text because the text in their view insufficiently captures *an unstated policy* behind the text. And this is so even though the text is hardly ambiguous or in need of policy amplification. For example, in *Bowman*, the Appellate Court majority refused to reverse what it perceived to be an erroneous denial of a substitution motion under the plain language of the statute on the ground that "the policy behind the rule *defeats* the *seemingly bright-line language of the statute*." *Bowman v. Ottney*, 2015 IL App (5th) 140215, ¶ 15, 25 N.E.3d 733 (emphases added), *aff'd on other grounds*, 2015 IL 119000, ¶ 15. The Appellate Court

[8] Noting the shift caused by the 1993 amendments, the Fourth District reflected that "[u]nder the old version of the statute, the 'test the waters' doctrine was seen by many as an appropriate layer of judicial gloss intended to limit changes of venue to those necessary to remedy a party's sincere fear of prejudice. . . . Now, however, prejudice is irrelevant[.]" *Schnepf*, 2013 IL App (4th) 121142, ¶ 53.

continued:

> We are cognizant of the concerns inherent in th[e] determination [to apply the test the waters doctrine], as we cannot remain in established territory by finding that the current action is a re-commencement of the previous action. We also remain mindful of the contradiction of these tenets before us: that the provisions of this statute are to be liberally construed and interpreted to effect rather than defeat the right of substitution, yet our courts strongly disfavor allowing a party to "shop" for a new judge after determining the original judge's disposition toward the case.

Id. ¶ 18 (internal citations omitted).

The Fifth District's rationale is judicial legislation in all but name: judicially divined "policies" do not "defeat" clear statutory text. This Court should reject it. The Legislature expressly addressed any concern about judge shopping through the "substantial issue" exception, as the Fourth District recognized. *See Schnepf*, 2013 IL App (4th) 121142, ¶ 54 (Legislature's "bright line" limits on invoking substitution "already address[]" concerns about judge shopping).

Five years ago in *Bowman*, this Court declined to decide the "continued validity" of the test the waters doctrine in light of the 1993 amendments, concluding that the doctrine's validity was not presented by the facts in the case. *Bowman,* 2015 IL 119000, ¶ 27. This case presents the facts squarely — Palos's motion for substitution of judge was denied solely because the trial court concluded (and the Appellate Court agreed) that Palos had tested the waters. If the doctrine is invalid, then every order entered by the trial court after April 2017 must be vacated.

This Court's decision in *Bowman* itself is entirely consistent with rejecting the testing the waters doctrine. The issue in *Bowman* was whether the phrase "in the case" under section 2-1001(a)(2) "must be read as referring to all proceedings between the parties in which the judge to whom the motion is presented *has made substantial rulings* with respect to the cause of action before the court." *Id.* ¶ 21 (emphasis added). The Court said "yes" because it refused to "construe section 2-1001(a)(2) in a matter that facilitates or encourages 'judge shopping'" and treating a re-filed action as a new "case" for purposes of the substitution statute would do just that. *Id.* ¶¶ 20-21. But the trial court in *Bowman* had made substantial rulings in the first action. That in turn invoked the 1971 statutory limitation and the judicial decisions that preceded that amendment, decisions that characterized motions made after a substantial ruling as "judge shopping" because they gave the movant a preview of the judge's view of the case. *See* Section I.C, *infra*.

The trial court in this case made no ruling on a substantial issue, relying solely on the test the waters doctrine. Because the doctrine is inconsistent with 735 ILCS 5/2-1001(a)(2), this Court should reverse.

B. The Doctrine Creates Uncertainty and Undermines Appellate Review.

While the Court can appropriately stop at the text, strong policy reasons also support rejecting the testing the waters doctrine's continued validity.

It is not coherent to require the trial judge — and then the Appellate Court — to peer into a movant's mind to see whether they have divined an inclination

from the judge about the way the ship is headed. This Court has neither required nor endorsed this kind of divination. Instead, a trial judge knows that a litigant knows too much about their disposition when the judge *has disposed* of an issue of substance in the case. As discussed above, this is the very standard captured in the statute. Requiring more than this has led courts down endless rabbit holes of trying to figure out "how much more" is too much.

A lack of clear standards undermines predictability and frustrates appellate review. Every articulation supporting testing the waters after the 1971 and 1993 amendments harkens back to the judicial decisions (discussed in Section I.C) that prompted those amendments — the need for clear standards on how much of a peek at the merits is too much and the need to eliminate a claim of prejudice that needn't be proven. Palos is not aware of any decision that grapples with why testing the waters remains essential — or even desirable — in light of these amendments.

In contrast, the statutory substantial issue test is clear, workable, and subject to appellate review. The parties and the trial court know *whether* there has been a ruling. A body of law has developed both before and after the 1971 amendment concerning what is and is not substantial. A trial court can apply this developed body of law to the facts of the case in determining whether a motion for substitution of judge is timely. And a reviewing court can then apply this same body of law to the trial court's ruling when conducting its *de novo* review.

In *Gay*, Judge McDade reflected that the test the waters doctrine is "too subjective and elusive" a benchmark to provide for meaningful appellate review. 353 Ill. App. 3d at 345-46. Specifically, in the case before the court, Judge McDade saw no "objective way to characterize [the trial judge's] conduct as 'tipping the hand'" as opposed to "anything more than . . . sound case and courtroom management." *Id*. at 345. Additionally, though, Judge McDade noted that testing the waters was inconsistent with *de novo* appellate review:

> even if we had a transcript of the proceedings, we would still be ignorant of inflection, facial expressions or body language that could more clearly indicate whether or not the judge had actually tipped his hand. We have no objective basis for making a meaningful judgment and are, therefore, totally reliant on the judge's own subjective recollection and reconstruction in reviewing his decision. This standard seems totally inappropriate for *de novo* review.

Id.[9]

Clarity has another benefit — because the Legislature has said how much of a peek is too much, enforcing the statutory limit means fewer erroneous denials of change of judge motions. Since the erroneous denial of a litigant's statutory right to a substitution of judge means a do-over, clear rules will guide trial courts in knowing whether the case merits granting the motion, promoting the efficient administration of justice.

[9] As discussed below, the two proceedings before the trial court in this case were transcribed, but this did not constrain the trial court under the testing the waters doctrine from characterizing its view of what had occurred.

C. The Doctrine's Evolution Is Consistent with its Extinction.

Since 1819, civil litigants in Illinois have been entitled to a single change of judge. *See* 1819 Ill. Laws 1819, p. 46-47 (§ 1). For the first nearly 175 years, the predicate for seeking the change was "fear" — fear of judicial prejudice, fear that a litigant would not receive a fair trial before the assigned judge. The movant was required to allege this fear through an affidavit, but not to prove it — wholly unsubstantiated fear was sufficient. Indeed, when presented with an affidavit alleging this fear, the trial judge was directed to ("shall") "award a change of venue." *Id.* While from time to time the Legislature imposed time limits on exercising the right (for example, within a term of court), the "fear" language persisted well into the 1990s. *See, e.g., id.*; 1827 Ill. Laws 381-82 (§1), § 1; Ill. Rev. Stat. 1874, ch. 146, ¶ 1, § 1; 1933 Ill. Laws 1118-19 (§ 1); Pub. Act 77-1452, § 1 (1971); Pub. Act. 82-280 § 2-1001 (eff. July 1, 1982).

To prevent perceived abuse, this Court and the Appellate Court developed an interpretive counterweight, requiring that motions seeking a substitution of judge be made with "the earliest and speediest notice." *Moss v. Johnson*, 22 Ill. 633, 734 (1859). As the Court stated in *Moss*, "[w]e know too well" that when made toward the end of a term of court, substitution motions "are made, for the most part, for a sinister purpose, and it should be the endeavor of the courts to frustrate their accomplishment." *Id.*; *see also Hudson v. Hanson*, 75 Ill. 198, 199-200 (1874) (It has been "uniformly held by this court that a motion for a change of venue must be made at the earliest practicable moment, and not put off just before the cause is

to be called for trial."); *Ossey v. Retail Clerks' Union*, 326 Ill. 405, 412, 158 N.E. 162, 165 (1927) (same).

Over time, the Court articulated the unstated, sinister purpose hinted at in *Moss* and reaffirmed in *Ossey*: litigants were not in good faith seeking a substitution because of actual prejudice that they were not required to prove, but rather because experience with the judge in the case had shown that things were not going well.

> A petition for a change of venue must be made at the earliest practical moment. An application made after the hearing started comes too late. The reason that supports the rule is *obvious*. It would be highly improper to permit an attorney representing parties to a suit *to try out the attitude of the trial judge* on a hearing as to part of the questions presented and, if his judgment on such questions was not in harmony with counsel's view, to *then* permit counsel to assert that the court was prejudiced and a change of venue must be allowed.

Commissioners of Drainage Dist. No. 1 v. Goembel, 383 Ill. 323, 328, 50 N.E.2d 444, 447 (1943) (emphases added, internal citations omitted, citing *Ossey*). The requirement to allege "prejudice" imposed no constraint without an obligation to prove it.

Thirteen years later, in *People v. Chambers*, 9 Ill. 2d 83, 88-91, 136 N.E.2d 812, 814-16 (1956), the Court expanded on its rationale in *Goembel*, holding that not simply the start of a trial or hearing, but instead, the trial court's consideration of "a substantive issue" cut off a party's right to a substitution of judge. The Court concluded that when the trial court ruled on a motion to suppress evidence in *Chambers*, "[i]t was incumbent upon the trial court . . . to determine whose evidence was more credible." *Id*. at 91. Contrasting a prior decision in which the

trial court had simply considered the propriety of a motion for continuance, this Court concluded that the trial court in *Chambers* had "considered a substantive issue and part of the merits of the cause." *Id*. At that point, a change had come too late:

> After the court ruled adversely to defendant on [the suppression] issue, no motion for change of venue could properly be allowed. *To hold otherwise would be to permit defendant to ascertain the attitude of the court as to part of his case and then claim prejudice after the court rejected his theory or his evidence. Such an interpretation would convert the right to a change of venue into a right to a second chance to present a case.*

Id. (emphasis added).[10]

In *People v. Lawrence*, 29 Ill. 2d 426, 428, 194 N.E.2d 337, 338 (1963), the Court went a step further, calling this ascertainment of the trial court's views before filing a substitution motion "judge shopping." Reiterating its prior, "consistent" holdings "that a petition for a change of venue must be filed at the earliest practical moment" and that "petitions delayed until the trial judge has by his rulings passed upon substantive issues, and indicated his views on the merits of the cause, come too late" (*id.* at 427-28), the Court held that a substitution motion made after a defendant had sought a preview of the sentence that he would receive if he pleaded guilty was also too late:

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[10] Under this rationale, it is perfectly acceptable for a litigant to seek a substitution from a judge with an expressed or perceived aversion to polka dots when the movant wears lots of polka dots, but unacceptable to seek a substitution from a judge who had done something within the case to convince the movant that the case will go badly on the merits.

> In the present case the petition for a change of venue came only after the conclusion of the conference sought by defendant for the obvious purpose of obtaining a lenient disposition of the charges without the necessity of a trial, and only after defendant ascertained what punishment he might receive if he pleaded guilty. We concur with the trial court that the request for a conference was in the nature of a preliminary motion treating to a degree on the merits of the case and *designed to elicit the judge's views* with respect thereto. *Having sought and obtained those views, the petition came too late. Were we to hold otherwise, a petition for a change of venue could, in effect, be used as a vehicle to permit a defendant to 'shop' among the judges* of a court for the one most leniently disposed to a plea of guilty.

Id. at 428 (internal citation omitted; emphases added).

In 1971, the Legislature amended the substitution of judge statute, taking account of this Court's jurisprudence. Specifically, the statute for the first time included a time limitation based on the trial court's ruling on matters of substance. In Pub. Act 77-1452, § 1 the Legislature provided that "[a] petition for change of venue *shall not be granted* unless 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[.]"[11] (Emphasis added.)

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[11] Because transcripts of General Assembly sessions became available only after October 1971 (and therefore after the 1971 amendment), Palos was unable to find any legislative history drawing an express causal connection. But since it is well settled that the Legislature acts with knowledge of this Court's decisions (*see Glispie,* 2020 IL 125483, ¶ 10), the chronology strongly suggests legislative adoption of previously articulated common law standards and Palos has found nothing to counter the inference. At least one court has suggested that the 1971 amendment was intended to do the work previously done by this Court's common law decisions and for the same reasons. *See People ex rel. Village of Northbrook v. City of Highland Park*, 35 Ill. App. 3d 435, 443-44, 342 N.E.2d 196, 202 (1st Dist. 1976). In *Northbrook*, the First District cited *Goembel* and *Chambers*, before noting that "[t]he basis for this commonsense *statutory* requirement is to prevent parties and their attorneys from first ascertaining the attitude of the trial court and then requesting

The 1971 amendment, however, retained the "fear" of not receiving a fair trial rule first enacted in 1819, a fear to be articulated simply by an application supported by an affidavit, but with no inquiry into the assertion's validity. So while the Legislature plainly picked up the trend (substantive/substantial) from the preceding three decades of jurisprudence from this Court's judicially created exception to the right to a substitution of judge, the 1971 amendment did not eliminate the alleged-but-not-proven-prejudice standard that had led the Court to develop the "judge shopping" prohibition in the first place.

As discussed above and expressly recognized in *Bowman*, this changed in 1993. The 1993 amendment retained the "ruling on a substantial issue" limitation, while eliminating any requirement to allege bias. The amendment also expressly confirmed that a single change of judge made before a ruling on a substantial issue or before the trial or hearing begins is not a matter of judicial grace, but of express legislative grant.

With the Legislative elimination of the *rationale for* the judicially created judge shopping/ascertain the judge's views/testing the waters limitation on the substitution of judge statute by converting the need to allege prejudice into an entitlement to a single substitution of judge "as a matter of right" with no need to

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a change of venue in the event that such attitude does not conform to their own ideas." *Id.* (emphasis added). What did the statutory requirement prevent? Judge shopping. "The salutary rules for change of venue should not be used as a vehicle for delay or for *shopping about from one courtroom to another until a favorable judge is found*." *Id*. at 444 (emphasis added).

allege prejudice (through the 1993 amendment) and having 22 years earlier captured the Court's articulation of the standard to be used in determining *whether* a party had ascertained a judge's views and was therefore impermissibly judge shopping (through the 1971 amendment), there is — and since 1993 has been — no further need for the testing the waters doctrine in order to constrain a litigant's exercise of its statutory right.

Fidelity to a legislatively created "right," including the limitations imposed on that right, does no violence to the system of justice; it instead reinforces the Court's role to interpret constitutional legislative enactments as written. Treating the "ruling on a substantial issue" criterion as a circle wholly within the larger Venn diagram circle of testing the waters does not protect against "judge shopping;" it redefines judge shopping in a way that impedes on the statutory right, undermines legislative authority, and effectively empties the statutory limitations of meaning.

To the extent that the testing the waters doctrine served a salutary purpose historically, legislative changes have rendered it obsolete. Even if the Court believed that it was appropriate in certain circumstances to impose additional, judicially created exceptions in light of the 1993 amendments, re-affirming the validity of the testing the waters doctrine would undermine the Legislature's choices, not reinforce them. Accordingly, if the Court believes that there is a role for interpretation in light of the 1993 amendments, then it should expressly retire the testing the waters doctrine.

II. If the "Test the Waters" Doctrine Has Continued Validity, Palos Did not Test the Waters.

For the reasons set forth above, there is no dispute that if this Court rejects the test the waters doctrine, all orders entered after the April 20, 2017 filing of Palos's motion must be vacated.[12] *See, e.g., Becker v. R.E. Cooper Corp.*, 193 Ill. App. 3d 459, 466-67, 550 N.E.2d 236, 241 (1st Dist. 1990) (vacating "all orders entered subsequent" to erroneous denial of substitution motion (using pre-1993 statute's "venue" terminology)); *In re Marriage of Crecos*, 2015 IL App (1st) 132756, ¶ 29, 38 N.E.3d 80 ("Because all orders filed after [erroneous denial of the] motion for substitution [of judge] are void, we do not reach the remaining issues on appeal because they are based on a void order."). For the reasons set forth below, if the Court concludes that the testing the waters doctrine is valid, Palos did not test the waters.

On the merits, the transcripts of the March 21 and April 13, 2017 proceedings make clear that if Judge Shelley "tipped her hand" on anything, it was only whether to allow Judge Sullivan to submit a recommendation to the court to

[12] The record is clear that at every opportunity (including seeking reconsideration as soon as it learned that Judge Shelley had denied its motion for substitution under the test the waters doctrine; seeking Rule 308 certification of the issue; seeking mandamus relief from this Court; and seeking reconsideration following entry of final judgment) Palos sought to enforce its absolute right to a substitution of judge. The consequences of an improper denial of its request are baked into the statutory scheme — Palos asked for a different judge to preside over pre-trial disputes, anticipated summary judgment motions, and any eventual trial. And because of the interlocutory nature of the order denying its motion, Palos had no choice but to wait until final judgment to seek appellate review.

resolve the parties' discovery dispute, but even here she pledged to keep an open mind and ultimately ruled in favor of Palos on this issue. As the Appellate Court stated in its opinion affirming the denial of Palos's motion under the test the waters doctrine:

> We find the trial court properly denied Palos's motion for substitution of judge. Palos filed a motion to strike Judge Sullivan's appointment, and in response to Palos's arguments on the issue at the March 21 and April 13 hearings, Judge Shelley stated that she believed there was precedent for such an appointment. The court may deny the motion if the movant had an opportunity to form an opinion on the judge's reaction to his or her claim. *Safeway Insurance Co. v. Ebijimi*, 2018 IL App (1st) 170862, ¶ 33. Also, as the court pointed out, Judge Shelley's reluctance to strike the discovery master *implied that the court would accept his report*, which "recommended that certain contentious documents be produced." Thus, Palos had tested the waters because it could discern Judge Shelley's position on the production of documents "at the heart of this controversy."

A-010 ¶ 29 (emphasis added).

Whatever testing the waters may have been or could be, it cannot support denial of a motion for substitution of judge based simply on a judge's view of a party's view of the judge's inclination toward an issue having no direct bearing on the merits. This inquiry risks undermining the very right that the Legislature granted.

The Appellate Court did not rest its conclusion on a proper application of the test the waters doctrine, as that doctrine has developed. Instead, the Appellate Court's application of the doctrine in this case is so expansive that it essentially eviscerates a party's right to a substitution of judge.

To its adherents, the test the waters doctrine at its core must mean

something different from a ruling on a substantial issue, specifically commentary on a pending motion on a *substantial issue*. In turn, "[a] ruling is considered substantial when it is directly related to the merits of the case." *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 1039, 762 N.E.2d 25, 28 (1st Dist. 2001) (citation omitted). Whether there has been a ruling on a substantial issue is a question of law and, as discussed above, is subject to *de novo* review. *Id*.

Under the test the waters doctrine, a party should not lose its substitution right unless the trial court has tipped its hand on a *substantial issue* before ruling on the issue, or when the trial court has otherwise shown its disposition concerning the merits. *See, e.g., Gay*, 353 Ill. App. 3d at 344 (affirming substitution denial because trial court "had discussed the merits of the action during pretrial conferences and had suggested that the burden of proof would be significant"); *Bowman*, 2015 IL App (5th) 140215, ¶¶ 17-19 (affirming substitution denial because trial judge had ruled on substantial issues in earlier action between the same parties), *aff'd on other grounds*, 2015 IL 119000*; Colagrossi*, 2016 IL App (1st) 142216, ¶¶ 29-40 (affirming substitution denial because plaintiff sought substitution in case 2 only after learning of adverse ruling by the same judge on a related issue in case 1).

As the First District has itself explained, rulings on purely procedural issues do not implicate the test the waters doctrine. The reason is straightforward: if a *ruling on* a procedural issue is not a ruling on a "substantial issue" (that is, one going to the merits), then *comments about* that procedural issue before a ruling

cannot "test the waters" on a substantial issue. *Nasrallah* is illustrative. There, the trial court denied a substitution motion, concluding that its ruling setting the treating physician's testifying fee was a ruling on a substantial issue. *Nasrallah*, 326 Ill. App. 3d at 1039. The Appellate Court disagreed: "The ruling setting the evidence deposition fee did not go to any question of evidence to be admitted or indicate any inclination of the judge toward the merits or disposition of the case. The ruling in no way implicated the rights of the parties at trial." *Id.* at 1040. The court accordingly reversed the judgment and remanded the case for a new trial before a different judge. *Id.* at 1041.

Judge Sullivan's appointment as a discovery master was purely procedural. Concerning that appointment, Palos did nothing more during its March 21 and April 13, 2017 appearances before Judge Shelley than indicate that it planned to challenge the appointment on constitutional grounds. Judge Shelley certainly indicated during the hearings that there may be precedent for a trial court to seek outside assistance in discovery disputes, but it would require quite a leap for any party to have discerned that the court's brief comments concerning the validity of a special master submitting recommended rulings indicated that the court would accept the recommendation on the merits. (As noted above, not only did Judge Shelley say that she was keeping an open mind concerning the propriety of Judge Sullivan submitting a recommendation, but she later held that the recommendation was unconstitutional under the Constitution's "fee officer" prohibition.)

Indeed, all that Judge Tailor had previously done was *to appoint* Judge Sullivan to mediate discovery disputes and to provide that he could make a recommendation if mediation failed. And far from suggesting that he would reflexively accept whatever recommendation Judge Sullivan might submit, Judge Tailor expressly told the parties that he would give them an opportunity to object to any eventual recommendation. So did Judge Shelley.

The Appellate Court's suggestion that by indicating that she was leaning in favor of accepting Judge Sullivan's *appointment*, Judge Shelley was further indicating that she was leaning in favor of accepting his *discovery recommendation*, and that Palos had therefore tested the waters concerning Judge Shelley's view of the merits, has no support either in the record before this Court or in the test the waters doctrine jurisprudence. Comments on a purely procedural discovery issue cannot be sufficient to invoke the test the waters doctrine concerning the substance of a discovery dispute, even when that dispute goes to the merits. That would be like saying that if the judge at an initial hearing indicated that she was unlikely to grant exceptions to the three-hour default rule for depositions under Rule 206(d), then she was also indicating in a case with anticipated issues concerning the scope of the attorney-client privilege that she intended to overrule any privilege objections that the parties might raise in those depositions. One does not follow from the other.

If the test the waters doctrine applies under the circumstances of this case, it has breached its banks and wiped out the right to a substitution of judge. Should

the Court conclude that the test the waters doctrine remains valid under the current version of the substitution of judge statute, then the Court should hold that Palos did not test the waters. Since that was the only basis for the denial of the substitution motion, the judgment should be reversed.

Conclusion

For the foregoing reasons, Palos respectfully requests that the Court retire the "testing the waters" doctrine, holding that it is no longer valid and that the only conditions on a party's statutory entitlement to a change of judge "as a matter of right" are the two conditions specified in the statute: whether the trial court has ruled on a substantial issue in the case and whether the trial or hearing has begun. Because there is no dispute that the trial court had not ruled on a substantial issue in the case and the trial had not begun, the Court should vacate the Appellate Court's opinion to the extent that it affirmed any order and judgment entered after April 20, 2017, and remand the case for further proceedings.

To the extent that the Court determines that the "testing the waters" doctrine remains valid, Palos respectfully requests that the Court reverse the Appellate Court's opinion because Palos did not test the waters.

(SIGNATURE PAGE FOLLOWS)

Respectfully submitted,

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Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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 34 pages.

/s/ Everett J. Cygal
Everett J. Cygal

APPENDIX

E-FILED
11/4/2020 6:07 PM
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Appendix Table of Contents

2020 IL App (1st) 190633

FIRST DISTRICT
SIXTH DIVISION
April 17, 2020

No. 1-19-0633

PALOS COMMUNITY HOSPITAL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
HUMANA, INC.; HUMANA INSURANCE COMPANY, INC.; HUMANA HEALTH PLAN, INC.; ADVOCATE HEALTH CARE; and MOTOROLA SOLUTIONS, f/k/a MOTOROLA, INC.,	)	No. 13 L 7185
	)	
Defendants	)	
	)	Honorable
(Humana Insurance Company, Inc., Defendant-Appellee).	)	Diane M. Shelley, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justices Cunningham and Connors concurred with the judgment and opinion.

OPINION

¶ 1 Plaintiff, Palos Community Hospital (Palos), appeals the order of the circuit court of Cook County entered on the jury's verdict finding defendant Humana Insurance Company (HIC) not liable on Palos's breach of contract claims. On appeal, Palos contends the trial court erred in (1) denying Palos's motion for substitution of judge as of right where the judge made no ruling on any substantive issue; (2) determining that a facially unambiguous contract had a latent ambiguity that the jury should interpret; (3) imposing monetary, evidentiary, and instructional sanctions against Palos for spoliation where the electronic records containing sensitive information were discarded in good faith and duplicates of the discarded records existed; (4) dismissing its fraud

claim as untimely; and (5) barring Palos from presenting certain evidence to quantify its contract damages claim. For the following reasons, we affirm.

¶ 2 I. JURISDICTION

¶ 3 The trial court entered judgment on the jury verdict on June 18, 2018. The court denied Palos's posttrial motion on March 20, 2019, and Palos filed its notice of appeal on March 28, 2019. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. July 1, 2017), governing appeals from final judgments entered below.

¶ 4 II. BACKGROUND

¶ 5 Palos has been a provider of health care since 1973. As a provider, Palos contracts with many different insurers who have managed-care plans, such as health maintenance organizations (HMOs) and preferred provider organizations (PPOs). Through HMOs and PPOs, insurers promise patient volume, or steerage, in exchange for discounted medical fees.

¶ 6 In 1985, Palos contracted with Michael Reese Health Plan, Inc. (MRHP), an HMO, to provide services to MRHP members at agreed-upon rates. In 1991, the assets of MRHP were sold and assigned to Humana Health Plan, Inc. (HHP), a Kentucky corporation. On February 15, 1991, Palos signed a form consenting to the assignment of its contract with MRHP to "Humana Health Plan, Inc. or its affiliates." In July 1991, Palos's contract with MRHP, now assigned to and assumed by HHP, was amended to reflect that Palos agreed to provide medical services as set forth in the agreement to "Humana Health Care Plans Preferred Provider Organization" under "the same terms and conditions specified" for members of MRHP's HMO. The contract was amended again in 2004, 2005, and 2008, but none of the subsequent changes affected the terms of the July 1991 amendment.

¶ 7 In January 1998, Palos entered into a provider agreement with Private Healthcare Systems, Inc. (PHCS). PHCS was a consortium of insurers who agreed on a common set of PPO terms under which Palos would be reimbursed for services provided to their members. One of the insurers in the consortium was Employers Health Insurance Company, a Humana entity.

¶ 8 On June 14, 1999, Humana sent a letter to Palos with "important information" regarding the "Employers Health Insurance/Humana PPO provider network currently managed by [PHCS]." The letter stated that effective August 1, 1999, "EHI/Humana will assume the management and operation of its provider network and rename it ChoiceCare." Instead of paying PHCS to provide network administration services, EHI/Humana would perform these duties.

¶ 9 On April 29, 2002, ChoiceCare sent a letter inviting Palos to join the network and to review the enclosed agreement. The letter identified ChoiceCare Network as "a wholly owned subsidiary of Humana, Inc.; therefore, the proposed rate structure would be at parity with the rate structure currently in place for the Humana PPO product lines." Since Humana PPO enrollees were already part of the ChoiceCare Network, the agreement served to "formalize" the network's relationship with Palos and other hospitals. On June 6, 2002, Palos signed a "Hospital Participation Agreement" with ChoiceCare. The agreement provided that "Hospital shall accept payment from Payors for Covered Services provided to Members in accordance with the reimbursement terms in Attachment B." These PPO reimbursement rates were higher than the rates applicable pursuant to the 1991 amendment to the MRHP agreement. The ChoiceCare agreement also provided that

> "Nothing in this Agreement shall limit or prohibit a Payor from contracting directly with or maintaining a direct agreement with Hospital and utilizing such direct agreements for payment for Covered Services to Members. In the event that Payor elects to apply discounts

> from their direct agreement with Hospital, the Payor shall not apply the discount from this Agreement so long as its direct agreement with Hospital remains in effect."

The "Payor" is identified in the Payor Agreement as Humana Insurance Company (HIC).

¶ 10 On July 1, 2004, Andrew Stefo, the chief financial officer of Palos, sent a letter to Humana stating that "Choice Care is accessing Humana's PPO discounts" applicable to the agreement with the former MRHP, when the "separate agreement with Choice Care *** should govern the payments received for services rendered to its members." Stefo requested that Humana "[e]nsure" reimbursements are made according to the proper agreement, and "[c]oordinate the proper, additional reimbursement due to Palos." The record contains no response to Stefo's letter.

¶ 11 In May 2008, Palos hired a contract compliance auditor, HealthCheck, to audit insurers' payments under their managed-care contracts. Palos subsequently filed a complaint with the Illinois Department of Insurance and on February 12, 2010, made a formal demand against Humana "for the immediate payment of $21,964,243." According to the demand letter, Palos spoke with Humana representatives who informed Palos that "only a very limited number of out-of-state Humana members have been—and continue to be—covered under the ChoiceCare contract." The Department of Insurance ultimately declined to intervene, suggesting that the matter was one for "a court of law."

¶ 12 On June 21, 2013, Palos filed a complaint for fraud and breach of contract against Humana, Inc., HIC, HHP, Advocate Health Care, and Motorola Solutions. The case was assigned to Judge Sanjay Tailor, who dismissed the fraud claims as time-barred. The court found that "no later than July 1st, 2004, [Palos] knew of its injury and its wrongful cause, as evidenced by Stefo's letter." Therefore, the cause of action accrued "no later than that date."

¶ 13 The breach of contract claims proceeded to discovery. HIC requested Palos's billing and collection records to ascertain what reimbursement rates Palos believed applied to the disputed claims. Discovery disputes ensued, and since the court did not "anticipate the number of discovery disputes to abate or decrease," it appointed James Sullivan, a retired judge, as "discovery master" to mediate at the parties' expense. Neither party objected to Judge Sullivan's appointment. Although the court expected the parties to come to a resolution, it stated that Judge Sullivan could submit a recommendation if the parties could not agree, and the parties would have an opportunity to file objections.

¶ 14 The parties worked with Judge Sullivan for five months but could not come to an agreement. Judge Sullivan drafted a letter to Judge Tailor, dated March 20, 2017, recommending that "[Palos] shall respond to Humana's Request for Production Nos. 1, 24, 31 and 34" and "to Humana's Interrogatories Nos. 13, 19 and 22." He also recommended that "the Court order Palos to produce the documents and data that reflect the rates that Palos expected to be paid by Humana," specifying documents Palos "shall include" in the production.

¶ 15 At a hearing the next day, the parties learned that the case was reassigned to Judge Diane Shelley because Judge Tailor had moved to the chancery division. Judge Sullivan attended the hearing and tendered his recommendation letter to the court. After Judge Shelley held two hearings, Palos filed a motion for substitution of judge as a matter of right. Judge Shelley denied the motion, finding that Palos had "discern[ed] the court's disposition toward a very important issue in the case, the production of certain documents which are at the heart of this controversy."

¶ 16 Discovery proceeded, and HIC learned that Palos had instructed JDA eHealth Systems, Inc. (JDA), which provided Palos with daily reports regarding proper reimbursement for claims,

to permanently delete all of Palos's data. HIC moved for discovery sanctions due to Palos's destruction of evidence. The court granted the motion and ordered Palos to pay HIC's attorney fees and costs. It also found that "an adverse instruction as found in Ill. Pattern Jury Instructions Civ. 5.01 is appropriate under the facts of this case." The court subsequently denied Palos's motion to reconsider. We set forth the facts concerning this issue and the substitution of judge issue in more detail when we address Palos's claims below.

¶ 17 In April 2018, the parties filed cross-motions for summary judgment. HIC alleged that, through the July 1991 amendment, Palos unambiguously contracted to provide care for Humana PPO members in accordance with rates specified in Palos's direct contract with MRHP. Alternatively, HIC argued that Palos's acceptance of reimbursement at the direct contract rates established the existence of an implied contract. Palos argued in its motion for summary judgment that the direct contract terms unambiguously show it applied only to a PPO operated by HHP. Palos alleged that the direct contract did not cover HIC and that HIC was obligated under the ChoiceCare agreement to pay ChoiceCare rates for Humana PPO members.

¶ 18 The trial court denied both motions. The court found that the July 1991 amendment was "determinative" but that "the terms of the amendment are ambiguous despite the parties' contentions to the contrary." It noted that, while HHP was named in the amendment, it could not operate a PPO because it was not an insurance company. Also, while HIC was an insurance company, it was not identified in the amendment. After reviewing the parties' respective submissions of extrinsic evidence in support of their motions, the trial court ruled that the evidence did not "resolve the ambiguity." Therefore, the ambiguous 1991 amendment "must be construed by the jury."

¶ 19 After a 10-day trial on liability and damages, the jury found HIC not liable on Palos's breach of contract claim. Specifically, the jury found Palos failed to "prove [HIC] was required to reimburse it, as a Preferred Provider, according to the Reimbursement Amounts specified in the ChoiceCare Agreement." The trial court denied all posttrial motions and Palos filed this timely appeal.

¶ 20 III. ANALYSIS

¶ 21 A. Substitution of Judge as a Matter of Right

¶ 22 Palos contends that the trial court erred in denying its motion for substitution of judge as a matter of right. Section 2-1001(a)(2)(i) of the Code of Civil Procedure (Code), provides that "[w]hen a party timely exercises his or her right to a substitution without cause" the party "shall be entitled to one substitution of judge without cause as a matter of right." 735 ILCS 5/2-1001(a)(2)(i) (West 2016). If properly made, the right is absolute, and the trial court has no discretion to deny a motion for substitution of judge as of right. *Cincinnati Insurance Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 23.

¶ 23 However, to discourage "judge shopping," a motion for substitution of judge "must be filed at the earliest practical moment before commencement of trial or hearing and before the trial judge considering the motion rules upon a substantial issue in the case." *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 245-46 (2006). Rulings on substantial issues include rulings on motions to dismiss, pretrial rulings of law, or where the moving party "has discussed issues with the trial judge, who then indicated a position on a particular point." *Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 398 (2002). Even if the judge did not rule on a substantive issue, the substitution motion may be denied if the party has tested the waters and formed an opinion as to the judge's reaction to his or her

claim. *Id.* at 398-99. Whether the trial judge made a ruling on a substantial issue in the case is a question of law we review *de novo*. *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 1039 (2001).

¶ 24 As noted above, the parties learned at a March 21, 2017, hearing that their case had been reassigned to Judge Shelley. Judge Sullivan also tendered his recommendation letter regarding the parties' discovery disputes to the court. Palos argued that Judge Sullivan's recommendation effectively was a reconsideration of a prior court order and that there was no authority for Judge Tailor to appoint a special master of discovery. Palos informed Judge Shelley that it wished to file an objection following the procedure Judge Tailor had set forth. Judge Shelley saw no need "to deviate from the procedure that Judge Tailor has already established in this case, and I will continue to follow it unless, and I have a very open mind, unless something new is presented to the Court."

¶ 25 At the hearing, Judge Sullivan responded to Palos's argument and stated to the court that "I don't believe that I was reconsidering any Judge's order. I was making a recommendation based on the transcripts and the other things." Judge Shelley replied that she understood Judge Sullivan was appointed to assist the court in the highly disputed discovery process and that "there is precedent that says that a trial—a judge has that discretion." The parties agreed on a briefing schedule regarding Palos's objection.

¶ 26 On April 4, 2017, Palos filed its objections to the content of Judge Sullivan's recommendation letter. Palos also filed a motion to strike the special master, Judge Sullivan. On April 13, 2017, Judge Shelley held a hearing regarding these filings. At the hearing, Palos argued that Judge Sullivan's appointment was prohibited by the Illinois Constitution and there was no basis for him as a mediator to provide recommendations to the court if the parties were unable to

resolve their discovery dispute. Palos contended that, if Judge Shelley agreed with Palos on this point, she would not have to consider the objections.

¶ 27 Judge Shelley reiterated that her predecessor determined Judge Sullivan's assistance was required to help resolve the discovery dispute. She stated, "I'm not making an announcement at this juncture, but there is some precedent for a judicial officer to seek assistance in matters of this nature." HIC requested an opportunity to respond to Palos's motion to strike, and the parties amended the previous briefing schedule to incorporate Palos's motion to strike. At the end of the hearing, Palos told the court that "we've spent a lot of time researching [the motion to strike] issue, so we think we have found all the pertinent authority out there. But if there is something that you think we should be looking at, we would certainly take it under advisement." Judge Shelley responded, "again, I'm not making any type of an announcement at this point. But when I inherited this call, I did notice this case, and *** I was not shocked by the position that my predecessor took." She would "keep an open mind" and would review Palos's cases and follow its argument.

¶ 28 A week later, on April 20, 2017, Palos filed a motion for substitution of judge as of right. Judge Shelley denied the motion as untimely, reasoning that

> "This is clearly a case where the movant tested the waters and determined that the court may be reluctant to strike the discovery master and his report which recommended that the certain contentious documents be produced. This court unequivocally expressed opinions at the March 21, 2017 appearance as to setting aside the appointment, and again on April 13th. The parties have had an opportunity to discern the court's disposition toward a very important issue in the case, the production of certain documents which are at the heart of this controversy."

Palos filed a motion to reconsider, which the trial court denied. The court also denied Palos's request for Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016) certification.

¶ 29 We find the trial court properly denied Palos's motion for substitution of judge. Palos filed a motion to strike Judge Sullivan's appointment, and in response to Palos's arguments on the issue at the March 21 and April 13 hearings, Judge Shelley stated that she believed there was precedent for such an appointment. The court may deny the motion if the movant had an opportunity to form an opinion on the judge's reaction to his or her claim. *Safeway Insurance Co. v. Ebijimi*, 2018 IL App (1st) 170862, ¶ 33. Also, as the court pointed out, Judge Shelley's reluctance to strike the discovery master implied that the court would accept his report, which "recommended that certain contentious documents be produced." Thus, Palos had tested the waters because it could discern Judge Shelley's position on the production of documents "at the heart of this controversy."[1]

¶ 30 Palos argues that Judge Shelley volunteered her views on her own initiative and, therefore, its motion should not have been denied based on the testing of the waters. A motion for substitution of judge as of right should not be denied if the judge herself voluntarily brought the issue to counsel's attention. See *Cincinnati Insurance Co.*, 2012 IL App (1st) 111792, ¶ 25. The record shows, however, that at the first hearing Palos initially raised its argument that there was no precedent for Judge Sullivan's appointment and that the court subsequently stated that it believed such precedent did exist. At the second hearing, Palos invited Judge Shelley to respond by stating that, if she agreed with Palos's position, the court would not have to reach the merits of Palos's

[1]Palos argued in its brief that the testing of the waters exception is not a valid exception to section 2-1001. We disagree. While there may be a conflict with other appellate districts, " 'testing of the waters' remains a viable objection to substitution of judge motions as of right in the First District." *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 36.

objection to the contents of Judge Sullivan's recommendation letter. Counsel for Palos also told the court that "we've spent a lot of time researching [the motion to strike] issue, so we think we have found all the pertinent authority out there. But if there is something that you think we should be looking at, we would certainly take it under advisement." Judge Shelley then responded, "again, I'm not making any type of an announcement at this point. But when I inherited this call *** I was not shocked by the position that my predecessor took." We disagree that Judge Shelley volunteered her opinion on her own initiative and affirm the denial of Palos's motion for substitution of judge as of right.

¶ 31 B. Denial of Summary Judgment on Liability Claim

¶ 32 Palos alleged that HIC breached its agreement with Palos because it made payments based on rates set forth in the July 1991 amendment to the MRHP agreement, when it was obligated to pay the rates in the ChoiceCare agreement. Pursuant to the amendment, Palos agreed to provide services to Humana Health Care Plan PPO members "under the same terms and conditions specified in the hospital agreement for members of Humana-Michael Reese Health Maintenance Organization." Palos argues that since HIC is not identified in the amendment, it is clear on its face that HIC was not a party to the agreement. Palos contends it was entitled to judgment on its liability claim as a matter of law because the facially unambiguous terms of the July 1991 amendment show that the amendment did not apply to HIC.

¶ 33 Palos made essentially the same argument in its motion for summary judgment. The trial court denied the motion, and the case went to trial with a jury verdict. In general, when a case proceeds to trial after the denial of a motion for summary judgment, the order denying the motion "merges with the judgment entered and is not appealable." *Young v. Alden Gardens of Waterford,*

LLC, 2015 IL App (1st) 131887, ¶ 42. There is an exception to this general rule. If the issue raised in the summary judgment motion is one of law that a jury would not decide, the denial of the motion does not merge with the final judgment, and it is subject to *de novo* review. *Id.*

¶ 34 Courts must interpret, as a matter of law, the meaning of a facially unambiguous contract from the contract itself, without resort to extrinsic evidence. *Morningside North Apartments I, LLC v. 1000 N. LaSalle, LLC*, 2017 IL App (1st) 162274, ¶ 15. It is clear that HIC was not expressly identified in the July 1991 amendment. However, this fact in itself does not render the amendment unambiguous on the issue of whether the amendment applied to HIC, as the trial court found. The amendment modified a prior agreement between Palos and MRHP. MRHP assigned the agreement to HHP. A contract must be interpreted as a whole, and when multiple contracts exist or when amendments are made, courts must consider all parts of the agreement to determine the parties' intent. *Downers Grove Associates v. Red Robin International, Inc.*, 151 Ill. App. 3d 310, 318 (1986).

¶ 35 The amendment refers to the agreement between MRHP and Palos, which was assigned to "Humana Health Plans, Inc.," and Palos consented to the assignment "to Humana Health Plan, Inc. or its affiliates (collectively referred to as 'Humana')." The identity of the "Humana Health Care Plan PPO members" is unclear, nor is it clear whether HIC is an affiliate of HHP for purposes of the assignment. Where the agreement in question contains an ambiguity that requires admission of extrinsic evidence to resolve, a disputed question of fact exists, precluding summary judgment. *William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005). Since there were questions of fact for the jury to resolve, the trial court's ruling denying summary judgment merged into the final judgment. *Direct Auto Insurance Co. v. Koziol*, 2018 IL App (1st) 171931, ¶ 19.

Accordingly, we cannot consider Palos's contention that it was entitled to judgment on the liability claim as a matter of law. See *id.*

¶ 36 C. Imposition of Sanctions for Spoliation

¶ 37 Palos contends the trial court erroneously imposed sanctions against Palos, pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), for the destruction of electronic records. Rule 219(c) provides that, for any party who fails to comply with discovery rules, the trial court "may impose upon the offending party *** an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee." *Id.* The purpose of granting sanctions is to effectuate the goals of discovery rather than to punish a noncompliant party. *New v. Pace Suburban Bus Service*, 398 Ill. App. 3d 371, 384 (2010). Thus, "[a] just order of sanctions under Rule 219(c) is one which, to the degree possible, ensures both discovery and a trial on the merits." *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998). Reversal of the trial court's imposition of sanctions is proper only where the record shows a clear abuse of discretion. *Id.*

¶ 38 Palos's complaint alleged that HIC reimbursed Palos for patient services at rates less than those it agreed to pay. As already noted, the parties were involved in heated and protracted discovery disputes prior to trial. The following facts are taken from the trial court's detailed and thorough orders, granting HIC's motion for sanctions and denying Palos's motion to reconsider.

¶ 39 On March 11, 2015, HIC requested information and documents from Palos (1) identifying "anyone providing professional consulting services, claim auditing, billing services, and/or verification of eligibility or benefits relevant to the lawsuit" and (2) databases, files, documents and logs concerning "facts pertinent to this litigation." Palos had contracted with JDA in 2005 to

provide database management and computation of reimbursement services. However, Palos did not disclose JDA's existence in response to HIC's discovery request.

¶ 40 Judge Tailor entered an order on October 14, 2016, appointing Judge Sullivan to oversee and mediate all pending discovery. On October 15, 2016, Palos's vice president of finance, Roger Russell, instructed JDA "to permanently delete our data" and to send "a certificate verifying this has been completed." On February 24, 2017, and April 17, 2017, Russell asked JDA whether Palos's data had been deleted. On April 28, 2017, JDA informed Russell that all the data had been permanently deleted, and it issued a certificate of data destruction to Palos.

¶ 41 Pursuant to an order to produce an affidavit from a corporate representative, Palos submitted the declarations of Phyllis Marrazzo, a director of revenue cycle operations. On July 20, 2017, Marrazzo stated that JDA's documents were used to make inquiries to insurers about whether accounts were correctly paid. On August 14, 2017, she disclosed that JDA was involved in day-to-day operations for Palos and that JDA provided daily reports that specified the appropriate contract from which Palos expected reimbursement. As a result of these disclosures, HIC served a subpoena on JDA for relevant documents. HIC subsequently learned that JDA had permanently deleted all of Palos's data.

¶ 42 On March 7, 2018, HIC filed a motion for Rule 219 sanctions against Palos for the deletion of the JDA data and for failure to disclose JDA's existence until after the deletion. The trial court granted the motion, finding that "Palos did not disclose the existence of the consulting contract with JDA, the nature of its services or its request that JDA destroy all of its records," despite HIC's discovery requests. The court determined that HIC should be compensated for the time and effort "spent in obtaining the disclosure of JDA's consulting services, of JDA's data, including all of the

time spent in uncovering the wrongdoing, evaluating the nature and extent of the loss of such data, including the preparation and presentation in connection with the pending motions." The court ruled that an adverse instruction was also appropriate.

¶ 43 On April 30, 2018, Corby Bell of JDA informed counsel of record that he found the "ghost archive" in which JDA kept all Palos-related data older than one year. The archive was created by an unnamed engineer. After importing the data into JDA's software, Bell determined that he had "located all Humana contracts" and "all case notes." On May 15, 2018, 20 days before trial, JDA gave HIC access to its system in order to examine the data. HIC, however, had difficulty accessing and examining the data. Bell appeared in court to testify on May 30, 2018, eight days before trial. At the conclusion of his testimony, the trial court determined that Bell did not conclusively testify that the ghost archive was a complete archive. Also, the court could not determine whether the ghost archive was a "*bona fide*" backup of the data JDA destroyed in 2017.

¶ 44 Palos filed a motion to reconsider the sanctions, which the trial court denied. The court addressed Palos's argument that spoliation did not occur because there was no actual loss. The court emphasized that a Rule 219 proceeding is not the same as the tort of spoliation and that its sanctions order "was predicated on violations of discovery rules and a litigant's obligation to preserve evidence in ongoing litigation." In ruling on a motion for Rule 219 sanctions, "the court need only determine that some sanctionable conduct occurred—failure to preserve or otherwise." The trial court found that sanctionable conduct occurred where Palos "conceal[ed] JDA's existence until it was too late for [HIC] to adequately evaluate the JDA data." The court also was "not persuaded the Ghost Archive was complete." Even if it was "a complete archive of the data, it was

produced too late, and [HIC] was prejudiced" because it "did not have a reasonable opportunity to inspect the data in advance of trial."

¶ 45 On appeal, Palos again raises the argument that it was error for the trial court to impose a monetary sanction for the destruction of evidence where no records were actually lost. The trial court thoroughly and carefully set forth the reasons for imposing sanctions, and we find no abuse of discretion. When the sanction includes reasonable expenses and attorney fees, as here, the only restriction imposed by Rule 219(c) is that the award of fees "must be related to misconduct arising from failure to comply with" the discovery rules. *Jordan v. Bangloria*, 2011 IL App (1st) 103506, ¶ 19. Palos makes no contention that the monetary sanction ordered by the court did not comply with this restriction.

¶ 46 The trial court also did not abuse its discretion in giving a jury instruction based on Illinois Pattern Jury Instructions, Civil, No. 5.01 (2011) (hereinafter IPI Civil (2011)). The court noted that before using the instruction, it must find that "in all likelihood a party would have produced *** the document under the existing facts and circumstances, except for the fact that the contents would be unfavorable." The court stated that it was "making that finding today." The trial court further found that Palos's failure to produce the evidence created a presumption that the evidence was adverse to Palos. The court stated that it "heard nothing to rebut that presumption." The instruction given to the jury stated:

> "Palos Community Hospital hired JDA to monitor and report whether insurance companies were paying to Palos the correct rates under the contracts between Palos and other insurance companies. After this lawsuit was filed, Palos ended its contract with JDA and instructed JDA to destroy all data relating to its work for Palos. The data that was destroyed

> should have been preserved by Palos and produced to [HIC] in this case. [HIC] was deprived of information relevant and probative to issues in this case. You may infer that the information that was destroyed would be adverse to Palos."

¶ 47 Whether to give IPI Civil (2011) No. 5.01 is within the sound discretion of the trial court. *Simmons v. Garces*, 198 Ill. 2d 541, 573 (2002). Jury instructions must "fairly, fully, and comprehensively apprise[ ] the jury of the relevant legal principles." *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273-74 (2002). A reviewing court will not reverse the trial court for giving erroneous instructions "unless they clearly misled the jury and resulted in prejudice to the appellant." *Id.* at 274.

¶ 48 Palos first argues that the court erred in giving an adverse inference instruction where Palos had a reasonable excuse for the destruction of the evidence: Palos requested that JDA destroy the evidence in order to protect the privacy of its patients. Giving IPI Civil (2011) No. 5.01 is unwarranted if a reasonable excuse exists for a party's failure to produce the evidence. *Simmons*, 198 Ill. 2d at 573. However, while Palos provided an explanation for why it asked JDA to destroy all of Palos's data, nothing in the record supports that the complete destruction of the data was reasonable or that it was the only way to protect patient privacy. Even if Palos had ordered the destruction of the evidence in good faith, there is no reason why it did not inform HIC of its contract with JDA in response to discovery requests. The trial court found that Palos should have disclosed this information. The court concluded that "a reasonably prudent person under the same or similar circumstances would have offered the evidence if it believed the evidence was in its favor" and found that giving the adverse inference instruction was "appropriate under the facts of this case."

¶ 49 Palos also raises a number of conclusory arguments, including that no data was lost, it had already produced the data under protective order, JDA's "case notes" have no bearing on Palos's claim, and the trial court barred Palos from presenting "exculpatory or rebuttal evidence." Palos's brief provides no specifics on each of these claims with few citations to the record. On the issue of whether data had been lost, Palos for the first time argues in its reply brief that the trial court improperly discounted the testimony of Ruth Chinski and erroneously gave weight to HIC's witness who "had no personal knowledge or expertise of the JDA system and only speculated that data could be missing." "Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 50 Furthermore, our standard of review is abuse of discretion, and as such, we do not substitute our judgment for that of the trial court. *Miranda v. The Walsh Group, Ltd.*, 2013 IL App (1st) 122674, ¶ 16. The trial court's findings are an abuse of discretion only if they are arbitrary, exceed the bounds of reason, or are contrary to recognized principles of law. *Id.* The trial court found that Palos failed to produce JDA's documents when HIC first requested such information on March 11, 2015, and instead ordered JDA to permanently delete the data. HIC did not discover the existence of JDA or the data until Palos produced the statements of Marrazzo, pursuant to the court's order, in 2017. The court also was "not persuaded the Ghost Archive was complete." The court further found that even if it accepted that the ghost archive contained the complete collection of deleted data, HIC was prejudiced because it "did not have a reasonable opportunity to inspect the data in advance of trial." HIC was first informed of the archive a little over a month before trial was set to begin, JDA gave HIC access to their system only 20 days prior to trial, and HIC had an opportunity to question JDA in court about the archive 8 days before trial. The trial court found

the adverse inference instruction "appropriate under the facts of this case." We find no abuse of discretion here.

¶ 51 D. Dismissal of Fraud Claim; Denial of Motion to Amend Complaint

¶ 52 Palos contends the trial court erred when it dismissed the fraud claim in Palos's complaint as untimely. Fraud claims are subject to a five-year statute of limitations pursuant to section 13-205 of the Code (735 ILCS 5/13-205 (West 2016)). *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 19. The trial court found that "no later than July 1st, 2004, [Palos] knew of its injury and its wrongful cause, as evidenced by Stefo's letter." Therefore, the cause of action accrued "no later than that date." Since Palos filed its claim alleging fraud on June 21, 2013, the court found the claim barred by the statute of limitations. Palos argues, however, that subsequent discovery showed Palos learned of HIC's wrongdoing only in 2009 and, in any event, it was error for the trial court to make such a determination when the jury should have decided the issue.

¶ 53 The discovery rule, which applies to fraud claims, effectively "postpone[s] the start of the period of limitations until the injured party knows or reasonably should know of the injury and knows or reasonably should know that the injury was wrongfully caused." *Id.* ¶ 20. The term "wrongfully caused" does not mean the party has "knowledge of negligent conduct or knowledge of the existence of a cause of action." *Id.* ¶ 22. Rather, it means the party "possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct had occurred." *Janousek v. Katten Muchin Rosenman LLP*, 2015 IL App (1st) 142989, ¶ 13. At that point, the injured party bears the burden to inquire further as to the existence of a cause of action. *Khan*, 2012 IL 112219, ¶ 20. When a party knows that an injury

was wrongfully caused is a question of fact, "unless the facts are undisputed and only one conclusion may be drawn from them." (Internal quotation marks omitted.) *Id.* ¶ 21.

¶ 54 Palos alleged in its complaint that HIC fraudulently induced Palos to enter into the ChoiceCare agreement in 2002, intending to reimburse Palos "at rates materially lower than the discounted PPO rates in the 2002 ChoiceCare Agreement." Palos further alleged that HIC, through its fraudulent scheme, concealed the fact that it had reimbursed Palos "at rates materially lower than the agreed-upon ChoiceCare PPO Rates." On July 1, 2004, Stefo, the chief financial officer of Palos, sent a letter to Humana stating that "Choice Care is accessing Humana's PPO discounts" applicable to the agreement with the former MRHP, when the "separate agreement with Choice Care *** should govern the payments received for services rendered to its members." Stefo understood that Palos was not receiving the correct reimbursement rate from HIC and requested HIC to pay the "proper, additional reimbursement due to Palos." There is no question that Palos knew of the underpayment, at the latest, on July 1, 2004. The statute of limitations began to run, however, when Palos not only knew of the injury but also knew or reasonably should have known it was wrongfully caused. *Id.* ¶ 20.

¶ 55 On this point, Palos argues that Stefo in his letter viewed the underpayment as a mistake and that Palos did not follow-up on the letter because it had assumed HIC corrected the error. Since Palos did not know of HIC's "systemic, fraudulent underpayment" until 2009, Palos did not know its injury was wrongfully caused until that date.

¶ 56 The standard, however, is not whether Palos knew of the existence of a cause of action. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981). Rather, a party has knowledge that an injury was wrongfully caused when "the injured party possesses information sufficient to put a

reasonable person on inquiry to determine whether actionable conduct is involved." *Melko v. Dionisio*, 219 Ill. App. 3d 1048, 1058 (1991). Even if we accept Palos's argument that it did not know HIC's underpayment was wrongfully caused in 2004, it is evident that at some point before May 2008, Palos possessed sufficient information concerning the cause of its injury to inquire whether actionable conduct had occurred. Palos undisputedly hired HealthCheck in May 2008 as a contract compliance auditor. In 2009, after HealthCheck reported its findings to Palos, Palos filed a complaint with the Illinois Department of Insurance. In November 2009, HealthCheck also complained on Palos's behalf.

¶ 57 Although Palos may have believed in 2004 that HIC's underpayment was just a mistake, Palos clearly obtained information between 2004 and May 2008 that caused it to inquire further into whether HIC's practice of underpayment was actionable conduct. This is the point at which the limitations period began to run. See *Hoffman v. Orthopedic Systems, Inc.*, 327 Ill. App. 3d 1004, 1010-11 (2002). The question of when Palos obtained that information is generally one of fact. *Khan*, 2012 IL 112219, ¶ 21. However, it is undisputed that Palos filed its complaint on June 21, 2013, more than five years after May 2008, the date Palos hired HealthCheck to audit compliance with its contracts. Most likely, Palos had sufficient knowledge that its injury was wrongfully caused before May 2008. When Palos knew or reasonably should have known its injury was wrongfully caused may be decided as a matter of law if only one conclusion can be drawn from undisputed facts. *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 169 (1981). We agree with the trial court's determination that Palos's fraud claim was time-barred as a matter of law.

¶ 58 Palos also contends that the trial court should have granted its motion to amend the complaint to add a new fraud claim. In its brief, however, Palos mentions only "a new fraud claim

based on the new information regarding Humana's fraudulent misrepresentations" concerning HIC's use of "Humana Health Care Plans as an undisclosed and unregistered d/b/a name." Exactly what the new claim alleged is not specifically set forth. Nor can we find a copy of the proposed amended complaint in the record. "[A] reviewing court is not simply a depository into which a party may dump the burden of argument and research." *People ex rel. Illinois Department of Labor v. E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 56. Furthermore, Palos's brief contains no analysis on the issue and cites only general law that courts should liberally construe section 2-616(a) of the Code (735 ILCS 5/2-616(a) (West 2018)) to allow amendments. "A point not argued or supported by citation to relevant authority fails to satisfy the requirements of" Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018). *E.R.H. Enterprises, Inc.*, 2013 IL 115106, ¶ 56. Palos's failure to comply with Rule 341(h)(7) results in forfeiture of this issue on appeal. *Id.*

¶ 59 E. Barring Evidence of Damages.

¶ 60 Palos's final contention is that the trial court erred in barring Palos from presenting any evidence to quantify damages claimed under its legal theories. Palos argues that the ruling prejudiced it because liability and damages were intertwined in this case. We disagree. Palos's breach of contract claim alleged that HIC improperly reimbursed Palos for services pursuant to the rates in the MRHP direct contract, when it should have applied the rates in the ChoiceCare agreement instead. Whether HIC was liable for breach of contract depended on which contract applied, and the actual amounts due under each agreement had no bearing on that core issue. Furthermore, the jury ultimately found HIC not liable for breach of contract because Palos failed to show that the ChoiceCare agreement rates applied to HIC. We have found no reason to reverse the jury's determination. Since HIC did not breach the agreement, we need not address Palos's

damages argument. *Adams v. The Lockformer Co.*, 167 Ill. App. 3d 93, 104 (1988); see also *Hagerty, Lockenvitz, Ginzkey & Associates v. Ginzkey*, 85 Ill. App. 3d 640, 642 (1980) (court did not address measure of damages claim where there was no breach of the agreement).

¶ 61 IV. CONCLUSION

¶ 62 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 63 Affirmed.

No. 1-19-0633

Cite as:	*Palos Community Hospital v. Humana Insurance Co.*, 2020 IL App (1st) 190633
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 13-L-7185; the Hon. Diane M. Shelley, Judge, presiding.
Attorneys for Appellant:	Everett J. Cygal, Catherine M. Masters, Neil Lloyd, David Y. Pi, and Christopher A. Nelson, of Schiff Hardin LLP, of Chicago, for appellant.
Attorneys for Appellee:	Tacy F. Flint, Suzanne B. Notton, and Emily Scholtes, of Sidley Austin LLP, and Scott C. Solberg and James W. Joseph, of Eimer Stahl LLP, both of Chicago, for appellee.

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-LAW DIVISION

PALOS COMMUNITY HOSPITAL, a not-for-profit community hospital,	)	
Plaintiff,	)	
vs.	)	No. 13 L 7185
HUMANA, INC., HUMANA INSURANCE COMPANY, INC.; HUMANA HEALTH PLAN, INC.; ADVOCATE HEALTH CARE; and MOTOROLA SOLUTIONS, f/k/a MOTOROLA, INC.,	)	
Defendants.	)	

REPORT OF PROCEEDINGS at the hearing of the above-entitled case before the HONORABLE DIANE M. SHELLEY, Judge of said Court, on the 21st day of March, 2017, at 9:00 a.m.

PRESENT:
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appeared on behalf of the defendant Advocate Health Care;

ALSO PRESENT:
Judge James Sullivan.

MS. STEGMAIER: Good morning, your Honor.
THE COURT: Good morning.
MS. STEGMAIER: Jennifer Stegmaier on behalf of Humana defendants.
MR. PERCONTE: Good morning, Judge. Jeff Perconte on behalf of Advocate.
JUDGE SULLIVAN: James Sullivan, mediator in discovery. Good morning, your Honor.
THE COURT: It's a pleasure.
MR. CYGAL: Good morning, your Honor. Everett Cygal and David Pi on behalf of the plaintiffs.
MR. PI: Good morning, your Honor.
THE COURT: Good morning.
MR. CYGAL: Your Honor, we're here on status. I can give you an order --
THE COURT: I have a copy of the last order.
MR. CYGAL: Yes. And we're here on, I think in part on status relating to Judge Sullivan's work that Judge Tailor had asked him to do.
THE COURT: Yes.
MR. CYGAL: I have a copy of that order if your Honor would like to see it.

THE COURT: I was just tendered your report.

JUDGE SULLIVAN: Yes.

THE COURT: So, counsel, I'm not clear on what counts remain and what parties are still involved. And again, it's just because I'm trying to come up to speed.

I did look at the file last night. So if you could just give me a quick overview, that would be very helpful.

MR. CYGAL: Sure. Yes, this case has been around with Judge Tailor since 2013, and it has had kind of an interesting procedural history up until this point.

We have, I believe, a single count against the Humana defendants, who are the main defendants in the case, and that is for breach of contract. We have some alternative counts seeking equitable relief, which we voluntarily dismissed. So those counts are out of the case.

There was a defendant Motorola which settled, so they're out of the case. The other remaining defendant is defendant Advocate Health Care, who is represented by Mr. Perconte. And we

have an unjust enrichment claim against that defendant Advocate.

We had been -- Judge Tailor in June of last year heard a very lengthy motion to compel that was filed by the Humana defendants. He ruled in September. After that ruling we had filed our own motion to compel in October relating to some request to admits that we had filed against the Humana defendants.

At that point Judge Tailor suggested that we -- or ordered that we take this process with Judge Sullivan, who is retired, to see if we can mediate our discovery disputes. We were unable to reach a consensus, so that has generated the letter that you have today.

So the case has been kind of on hiatus for five months while we have been dealing with Judge Sullivan. Judge Sullivan never dealt with our motion to compel with respect to the request to admit. He dealt with Humana's motion.

So what I would suggest is Judge Tailor had set up a provision for a party to object to the report and recommendation.

THE COURT: Of Judge Sullivan?

MR. CYGAL: Of Judge Sullivan, yes.

THE COURT: Okay. Counsel, do you mind if I hear from Judge Sullivan for just one second?

MR. CYGAL: Correct. Sure.

THE COURT: Let me understand what his position is at this point.

JUDGE SULLIVAN: Well, my position basically is what's reflected in the letter that I wrote to you.

THE COURT: And everyone has a copy?

MR. CYGAL: Yes, I do, Judge.

MS. STEGMAIER: Yes.

JUDGE SULLIVAN: Yes. Counsel is correct that that is one of the issues, that the motion to compel that was also filed has not been worked out yet.

My role initially was working with the issue concerning other records and other things that are the subject of what I wrote to you.

The motion to compel is still pending. I'm trying to work through that as well. But I felt this preliminarily or at least initially would be something that should be brought to the Court's attention, and the other issues we can deal with

later if the Court so chooses.

THE COURT: Thank you so much. Anything to add to that?

MS. STEGMAIER: Yes, your Honor. So just to correct some representations. Humana defendants and Motorola defendant, who is no longer in the case, had filed a joint motion to compel, and then Judge Tailor had mentioned that he was going to refer this to Judge Sullivan to essentially resolve or provide recommendations.

On the night before -- or the day before Judge Sullivan was appointed, Palos did file their motion to compel, and it was at that time that Judge Tailor said that both Humana's motion to compel as well as Palos' motion to compel would be referred over to Judge Sullivan for mediation.

During this time Judge Sullivan has worked with the parties at length and provided his recommendation. I just want to point out that Palos was ordered to provide a corporate representative for deposition. We had two days of hearings before Judge Tailor on Humana's motion to compel, and he ordered on several topics that Palos produce a corporate representative.

Palos at that time had said that the representative that they thought they would call was out of the country or not available, and that was in September of last year, and then by October we had moved into the mediation.

So I just wanted to point out that we would like to move forward with that as well. It was not on this recommendation, but I believe that that was because it was not in dispute. And I just didn't want that to go unnoticed.

THE COURT: Okay. Thank you so much, counsel. And please don't let us leave here today without addressing that.

However, first I would need for everyone to look at Judge Sullivan's recommendation. Does anyone have a problem with the recommendation? Even though, of course, I'm going to be very differential to the work that Judge Tailor has already done on this case.

So the report has been presented to the Court. Do you have any comments on the report?

MR. CYGAL: Judge, Palos does object. And Judge Tailor had set up a procedure where there could be a written brief filed after the report had

been presented. It's both in this order, and Judge Tailor had said it on the record several times.

So we would like to avail ourselves of that situation. I think, and not to burden the Court with too much paper, given the context of what was ruled on by Judge Tailor back in September, and what Judge Sullivan has done, I think the only way really for your Honor to be able to see the dispute in its full light would be to have it in paper.

I will tell you briefly, we have a number of objections to this, not the least of which is what Judge Sullivan has done is effectively issued an order of reconsideration on Judge Tailor's ruling of September 1st. We think that's far beyond his authority.

We don't believe there is any authority under the Civil Practice Act or any case law for a procedure to have a special master or a magistrate or a mediator with respect to discovery.

So this really is an issue at this point and, you know, I'm not clear on the intricacies of practice on this particular point, but really what we're talking about is effectively a reconsideration of Judge Tailor's order.

I don't even know if it's appropriate for him to decide that issue still or if it's fully before your Honor. But, you know, that's in heart the essence of what we're going to file in terms of an objection.

And the only way that could really be resolved by your Honor is to have that in writing and the transcripts. Because ultimately what Judge Tailor did when he ruled is rather than issuing a detailed written order, he incorporated his rulings on the record that were transcribed.

THE COURT: Okay. Counsel, I will give you an opportunity to present that to the Court.

As I said earlier, I don't see any need to deviate from the procedure that Judge Tailor has already established in this case, and I will continue to follow it unless, and I have a very open mind, unless something new is presented to the Court.

How quickly can you get your objection to the report on file?

MR. CYGAL: I was going to ask for 14 days, your Honor. It's my spring break, my kids' spring break actually next week.

THE COURT: For your children I'll give you 14 days.

MR. CYGAL: Thank you, Judge, I appreciate that. And then --

MS. STEGMAIER: And, your Honor, may I have 14 days to respond?

THE COURT: Sure.

MR. CYGAL: And then, Judge, if we need a reply, can we have 7 days for that?

THE COURT: Yes, that's fine with the Court.

Now, as far as Judge Tailor's position -- I'm sorry. Judge Sullivan's position. I'm so sorry, Judge. I would hope that you will -- it's my position right now that I would like for him to remain involved in these proceedings if his time permits.

JUDGE SULLIVAN: I do have one just very short statement. I know you have got a lot of people waiting here.

With respect to, I don't believe that I was reconsidering any Judge's order. I was making a recommendation based on the transcripts and the other things.

I'm not working or reconsidering anyone else's, mine is original, if you will, with respect to my findings and recommendations.

THE COURT: And my understanding is that your involvement was to assist the Court in trying to, you know, get through this discovery process.

And there is precedent that says that a trial -- a judge has that discretion.

MR. CYGAL: Your Honor, there are two other issues that I think, or actually there are three other issues, because I do want to talk about the deposition issue, too.

Our motion to compel with respect to the request to admit has been pending since October 13th. We would ask that your Honor just set a briefing schedule and have it decided in the ordinary course before your Honor.

It's very straightforward. You know, there are certain requests to admit that we believe should be deemed admitted. And that really is not something that's even -- and while we thank Judge Sullivan for his time and are very grateful for what he's done, I don't even think that's an issue you can mediate, it's whether these requests are

admitted or not. So we would ask that we have a briefing schedule on that.

THE COURT: Okay. Any problem with that? Judge, I don't believe you addressed that.

JUDGE SULLIVAN: Well, actually, Judge Tailor did ask me to work on that issue as well, in which I would be happy to do.

And perhaps something could be worked out without the necessity of a briefing schedule, because I really haven't made any recommendations with respect to that, and we had some discussions about it previously.

THE COURT: Okay. Very good. What I'll do is I'll give you an opportunity to respond to Judge Sullivan's report. I'll keep your motion to compel on hold, but I like the fact that we're talking 14, 14, 7.

So basically I can see you back here in 35, 40 days, and we can actually have a hearing on the report, which will dovetail into the other issue of whether or not we proceed briefing your motion to compel or defer that also to Judge Sullivan.

MR. CYGAL: Okay.

THE COURT: Now, as far as the scheduling

of the deposition of this corporate --

MS. STEGMAIER: Representative.

THE COURT: -- representative.

MR. CYGAL: Your Honor --

THE COURT: Can you work that out?

MR. CYGAL: We can. And I just want to state for the record that there was no order compelling us to produce a corporate rep, so that's just simply not correct.

What we have done and we've tried to resolve this for close to a year now, we even tried to do it before Judge Sullivan is we're anxious to take depositions. This is a '13 case, it's got to get moving. The plaintiff has an entitlement to get this heard.

But it's a very complicated case, and we have been trying to reach an agreement with the defendants as to whether or not to deviate from the Supreme Court rules in terms of length of depositions. And what we would like to do is have an agreement on the front end that applies to everyone.

We suggest that what we thought was a pretty workable solution of seven hours on the

record, and we cannot get a response from the Humana defendants. We raised that, I think Judge Sullivan will concur that we raised that with him, and that issue kind of died in the last five months of mediation over these issues.

So, you know, we are -- we have never received a notice for a deposition, and we'll certainly respond to that if we ever do receive one. But I think it's appropriate that we have some ground rules set before we start this, and that's all we've been asking for.

THE COURT: Okay. Attorneys, I'm not -- I don't want to cut you off, but I see that we're not going to resolve all of this today, and I'll probably hear more of this argument later.

So I think if I can kind of focus everyone on Judge Sullivan's report right now, and then when we come back, we can address the other issues.

In between you may want to reduce your positions to writing in the form of some type of motion. I don't know, but it may memorialize your position and may be a better approach to this since you can't work it out.

But Judge Sullivan is still available even

on this issue, take advantage of him. I wish I could take advantage of him in all of my cases. So see if he can help you in trying to schedule this.

You know, seven hours, I did read something about that, a little background about the case, and I know now that you're down to one count basically. You probably can tighten that up a little bit.

MR. CYGAL: Judge, and then --

MS. STEGMAIER: Your Honor, if I may just respond to that. Judge Tailor did order Palos to provide a corporate representative. It's on the record, it's in the transcript.

And he wanted us to proceed with Judge Sullivan to avoid additional motion process, that was the whole purpose of him providing us with Judge Sullivan. So I agree that we can work this out.

Judge Tailor ordered the deposition, he set forth exactly that Palos was supposed to provide a representative. And we can certainly send over a notice, if that's what they're waiting for.

THE COURT: Why don't you do that. If they want that formality, then please issue a notice.

At this time what I would like for you to do is prepare an order, and in the order reflect

that Judge Sullivan has submitted a report to the Court, and that he would like an opportunity to respond to it, plaintiff 14 days, 14 days to the other side, and 7 days to reply.

We'll get a hearing, I'll call it a hearing date. I don't know if we'll actually have a hearing, but I'll hear any further argument probably about 40 days out. 40 days out? And my coordinator will give you the exact date.

MR. CYGAL: Your Honor, one final issue from the plaintiff, if it's okay with the Court.

I did mention that we have these answers to the request to admit. Based on the answers that we do have, we would like to file a motion for partial summary judgment with respect to the issue of liability.

So if it's okay with your Honor, we would like leave to file that motion.

MR. PERCONTE: Well, Judge --

MR. CYGAL: And this is only with respect to Humana, not to Advocate.

MR. PERCONTE: Right. On behalf of Advocate, we're not a part of any of this discovery stuff, so we will not be filing any briefs.

We have been talking settlement with Palos, we're hoping that that will be fruitful, and we hope to have that kind of resolved in the next, I would say, couple weeks.

That said, I think that in terms of summary judgment, if the plaintiff is going to be allowed to do that, then I think all parties aught to be allowed to file motions for summary judgment.

THE COURT: I'm going to get a handle on this whole discovery issue where we are as far as the report, because I want to move forward and I don't want to -- want you to be distracted in comparing summary judgment motions at this time.

So what I'm going to do, I'm going to -- I'm not saying that you will not be allowed to do so in the future, but at this juncture let's focus on the recommendations of Judge Sullivan so we can get through this discovery.

And your motion to compel I understand would be the next thing that's on the table. Okay?

So I'll see everyone back in approximately 40 days.

MS. STEGMAIER: Thank you, your Honor.

MR. CYGAL: Thank you, your Honor.

MR. PERCONTE: Thank you, your Honor.

JUDGE SULLIVAN: Thank you, your Honor.

(Which were all the proceedings had or offered at said hearing of the above-entitled cause.)

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

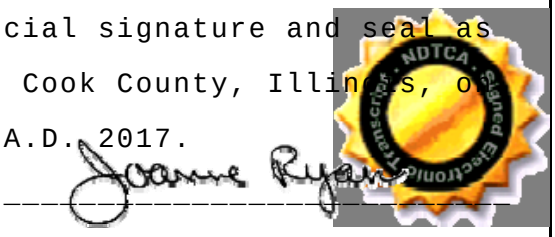
JOANNE RYAN, being first duly sworn, deposes and says that she is a Certified Shorthand Reporter in Cook County, Illinois, and reporting proceedings in the Courts in said County.

That she reported in shorthand and thereafter transcribed the foregoing proceedings.

That the within and foregoing transcript is true, accurate and complete and contains all the evidence which was received and the proceedings had upon the within cause.

The undersigned is not interested in the within case, nor of kin or counsel to any of the parties.

Witness my official signature and seal as Notary Public in and for Cook County, Illinois, on this 23rd day of March, A.D. 2017.



Joanne Ryan
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DTI LEGAL SOLUTIONS
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March 22, 2017

SCHIFF HARDIN, LLP
MR. EVERETT CYGAL.
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
CASE: Palos vs. Humana
CASE NO: 13 L 7185
DATE TAKEN: March 21, 2017

Dear Mr. Cygal:

Pursuant to Illinois Supreme Court Rule 323(b), this letter will serve as notice to you that proceedings taken in the above-entitled matter have been transcribed and are ready for filing.

Very truly yours,
DTI COURT REPORTERS
(Job#112859)(JR)

cc: All attorneys of record.

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9:00
1:17

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-LAW DIVISION

PALOS COMMUNITY HOSPITAL, a not-for-profit community hospital,	)	
Plaintiff,	)	
vs.	)	No. 13 L 7185
HUMANA, INC., HUMANA INSURANCE COMPANY, INC., HUMANA HEALTH PLAN, INC., ADVOCATE HEALTH CARE; and MOTOROLA SOLUTIONS, f/k/a MOTOROLA, INC.,	)	
Defendants.	)	

REPORT OF PROCEEDINGS at the hearing of the above-entitled case before the HONORABLE DIANE M. SHELLEY, Judge of said Court, on the 13th day of April, 2017, at 9:00 a.m.

PRESENT:

SCHIFF HARDIN, LLP
BY MR. EVERETT CYGAL and
MR. DAVID PI
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
(312) 258-5500
ecygal@schiffhardin.com
dpi@schiffhardin.com

appeared on behalf of the plaintiff;

CHITTENDEN, MURDAY & NOVOTNY, LLC
BY MS. JENNIFER STEGMAIER and
MR. STUART PRIMACK
303 West Madison Street, Suite 1400
Chicago, Illinois 60606
(312) 281-3600
jstegmaier@cmn-law.com
sprimack@cmn-law.com

appeared on behalf of the defendants Humana Insurance Company, Inc., Humana Health Plan, Inc.;

DRINKER BIDDLE & RUTH
BY MR. JEFF PERCONTE
191 North Wacker Drive, Suite 3700
Chicago, Illinois 60606
(312) 369-1332
jeff.perconte@dbr.com

appeared on behalf of the defendant Advocate Health Care.

THE COURT: Good morning, counsel.
MS. STEGMAIER: Good morning, your Honor.
MR. CYGAL: Good morning, your Honor. Oh, I'm sorry.
MS. STEGMAIER: Jennifer Stegmaier on behalf of Humana defendants.
MR. PERCONTE: Good morning, Judge, Jeff Perconte on behalf of Advocate Health Care.
MR. PRIMACK: Good morning, Judge, Stuart Primack also on behalf of the Human defendants.
MR. CYGAL: Good morning, your Honor, Everett Cygal and David Pi on behalf of the plaintiff.
THE COURT: Good morning. This is plaintiff's motion to strike the special master, Judge Sullivan.
MR. CYGAL: That's correct, your Honor.
THE COURT: Okay. I thought that we were making progress.
MR. CYGAL: I think we are. I think this goes -- it's intimately tied in with Palos' objection to his report that he submitted to the Court.
I don't know if you have had an opportunity

to review the motion, your Honor --

THE COURT: Yes, I have.

MR. CYGAL: -- but I think there are some very serious issues with how this has played out, including the fact that the report and recommendation of Judge Sullivan would effectively be making him act as a fee master, which has been prohibited by the Illinois Constitution.

If on the other hand he was acting as a mediator, there's no basis for a mediator to provide a report or recommendation to your Honor, other than to say that there was -- he was unable to resolve the dispute during mediation.

So I think this really goes to a fundamental jurisdictional issue with the appointment of Judge Sullivan, which of course was not by you, but by your predecessor.

So it's in many ways if the Court agrees with the analysis here, the merits of the other briefing don't even really need to be addressed, because obviously the appointment would be in degradation of the Illinois Constitution.

THE COURT: Okay. Thank up, so much. And I want the record to reflect that my predecessor

made a determination that he needed the assistance of Judge Sullivan in trying to resolve the discovery issues in this case.

I believe that -- and I'm not making an announcement at this juncture, but there is some precedent for a judicial officer to seek assistance in matters of this nature.

Counsel, what is your position?

MS. STEGMAIER: Your Honor, defendants object to the plaintiff's motion, and we would like an opportunity to respond.

If your Honor would allow perhaps two and a half weeks to respond, or by May 1st.

THE COURT: Well, I see that we have a 5-12 hearing date on the objection to Judge Sullivan's report.

MS. STEGMAIER: Yes. I was thinking we could piggyback on that.

THE COURT: Definitely. It's the same issue with a different side of the same coin.

MR. CYGAL: And, your Honor --

MS. STEGMAIER: Plaintiff's counsel incorporated by reference the arguments that they asserted in the motion into their response, so we

would like the opportunity to do the same.

Our current schedule for a response to their objection to Judge Sullivan's recommendation is set for next week. However, if your Honor would allow us two and a half weeks to respond to the motion, we could file our response to the objection on the same day and incorporate in the same fashion.

It permits plaintiff's counsel one week to file a reply by May 8th, and then we can keep the hearing that is currently set for May 12th.

MR. CYGAL: Your Honor, if four days is sufficient for yourself to review the briefs, I would have no objection to that.

THE COURT: That's fine with the Court. What I would ask as a courtesy, because I will only have four days, if you could deliver your responses as you file them, and then I can begin reading them.

MS. STEGMAIER: Yes, your Honor.

THE COURT: So I'll see everyone back on May 12th for hearing.

Did you have a clerk status date on this case?

MR. CYGAL: No, judge, I think we went straight to a hearing as opposed to a clerk status.

THE COURT: Okay. That's fine.

MS. STEGMAIER: And just for the record's sake. We're striking the previous briefing schedule that your Honor set on the plaintiff's objection to Judge Sullivan's motion, and instead setting the briefing schedule as May 1st for Humana defendant's response to the motion and response to plaintiff's objection to Judge Sullivan's recommendation. Then the reply for May 8th, and then the hearing on May 12th.

THE COURT: That's fine. Okay. If you will prepare the order.

Once again, just deliver your -- as you file your pleadings, please deliver those immediately so I can start reviewing them.

MR. CYGAL: Yes. And, your Honor, I will say, we've spent a lot of time researching this issue, so we think we have found all the pertinent authority out there. But if there is something that you think we should be looking at, we would certainly take it under advisement.

But I will say that, you know, collectively at Schiff Hardin we've spent a significant amount of time researching this.

THE COURT: Well, thank you, counsel. And again, I'm not making any type of an announcement at this point. But when I inherited this call, I did notice this case, and I did some, just some preliminary review of it. I was not shocked by the position that my predecessor took.

But again, I keep an open mind, I review every case that you provide and even follow your argument, and I'm interested in seeing your response to it.

MR. CYGAL: Thank you, your Honor.

MS. STEGMAIER: Thank you, your Honor.

(Which were all the proceedings had or offered at the said hearing of the above-entitled cause.)

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

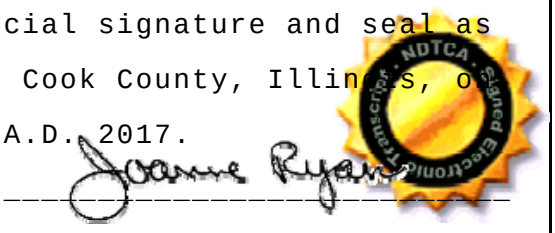
JOANNE RYAN, being first duly sworn, deposes and says that she is a Certified Shorthand Reporter in Cook County, Illinois, and reporting proceedings in the Courts in said County.

That she reported in shorthand and thereafter transcribed the foregoing proceedings.

That the within and foregoing transcript is true, accurate and complete and contains all the evidence which was received and the proceedings had upon the within cause.

The undersigned is not interested in the within case, nor of kin or counsel to any of the parties.

Witness my official signature and seal as Notary Public in and for Cook County, Illinois, on this 14th day of April, A.D. 2017.



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DTI COURT REPORTERS
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April 14, 2017

Schiff Hardin, LLP,
Mr. Everett Cygal
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606

CASE: Palos vs. Humana
CASE NO: 13 L 7185
DATE TAKEN: April 13, 2017

Dear Mr. Cygal:

Pursuant to Illinois Supreme Court Rule 323(b), this letter will serve as notice to you that proceedings taken in the above-entitled matter have been transcribed and are ready for filing.

Very truly yours,
DTI COURT REPORTERS
(Job#122299)(JR)

cc: (All attorneys of record.)

#10

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PALOS COMMUNITY HOSPITAL	)	
Plaintiff,	)	
vs.	)	No. 13 L 007185
	)	
HUMANA, INC. ET. AL.,	)	
Defendants.	)	

ORDER ON MOTION FOR SUBSTITUTION OF JUDGE AS OF RIGHT

This matter having come on to be heard on Plaintiff Palos Community Hospital Motion for Substitution of Judge as of Right;

And the parties having appeared through their respective counsel;

THE COURT FINDS THAT:

A. The parties to this action initially appeared before this court on March 21, 2017 along with Judge James Sullivan (Ret.) who was appointed as a "discovery master" by Judge Sanjay Tailor, the former assigned judge. At that appearance the case was discussed and the discovery master provided a written report. Plaintiff expressed concern as to whether the appointment was proper, and this court responded that it was not inclined to set aside Judge Tailor's appointment.

B. Judge Sullivan's (Ret.) written report recommended that Plaintiff be required to respond and produce certain documents. The plaintiff requested time to respond to the recommendation. A briefing schedule was given.

C. On April 13, 2017 plaintiff presented its Motion to Strike Special Master Appointment. Once again the court stated that it believed there was precedence for such an appointment. The parties were given a corresponding briefing schedule on this motion.

D. On April 21, 2017 plaintiff file its motion for substitution.

E. The substitution of judge may be had when a party ***timely*** exercises the right to a substitution. The motion must be brought at the earliest practical moment and is considered untimely if the parties have had an opportunity to discern the court's

disposition toward the merits of the case, *In re Marriage of Roach*, 245 Ill. App. 3d 742, 746, (1993), and can be denied when the moving party moving for a substitution of judge has discussed issues with the judge, who has indicated a position on a particular point. The motion can be denied, even if there was no actual ruling when the party "had an opportunity to test the waters and form an opinion as to the court's disposition" of an issue. *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 246 (1st Dist. 2006). "Testing the waters" remains an exception to substitution of judge motions as of right in the First District. *Id.*

F. This is clearly a case where the movant tested the waters and determined that the court may be reluctant to strike the discovery master and his report which recommended that the certain contentious documents be produced. This court unequivocally expressed opinions at the March 21, 2017 appearance as to setting aside the appointment, and again on April 13th. The parties have had an opportunity to discern the court's disposition toward a very important issue in the case, the production of certain documents which are at the heart of this controversy.

G. The plaintiff's motion is not timely.

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED:

5338 Plaintiff's Motion for Substitution of Judge as of Right is DENIED.

Dated: May 4, 2017

ENTERED: _____
Judge Diane M. Shelley #1925

Judge Diane M. Shelley

MAY 04 2017

Circuit Court – 1925

C 10649 V4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PALOS COMMUNITY HOSPITAL	)	
Plaintiffs,	)	
	)	**Cause No. 13 L 007185**
v.	)	
	)	
HUMANA, INC.; HUMANA INSURANCE COMPANY, INC.; HUMANA HEALTH PLAN, INC.; ADVOCATE HEALTH CARE; And MOTOROLA SOLUTIONS f/k/a MOTOROLA, INC.,	)	
Defendants	)	

MEMORANDUM AND JUDGMENT ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION OF MOTION FOR SUBSTITUTION OF JUDGE AS A MATTER OF RIGHT OR RULE 308 CERTIFICATION

Plaintiff Palos Community Hospital ("Plaintiff" or "Palos") sued Defendants Humana, Inc.; Humana Insurance Company, Inc.; Humana Health Plan, Inc.; Advocate Health Care; and Motorola Solutions F/K/A Motorola, Inc., ("defendants" or "Humana") alleging that twenty million dollars of patient care cost was diverted by defendants. A dispute arose regarding Humana's request for production of certain documents reflecting the rates that the plaintiff expected to be paid. Judge Sanjay Tailor appointed Judge James Sullivan (ret.) as a special master to make recommendations to the court regarding the production request. Neither party objected to the appointment. Judge Tailor was transferred and the matter was assigned to this court. After two court appearances during which this court indicated its opinion on the removal of Judge Sullivan, plaintiff moved for substitution of judge as a matter of right. The motion was denied and the plaintiff is seeking reconsideration or a Rule 308 certification. The motion for reconsideration is denied, and the request for 308 certification is also denied.

BACKGROUND

Around 1987 Plaintiff entered into a HMO agreement with Michael Reese Health Plan ("Michael Reese"), which was purchased by defendant Humana Health Plan in 1991. In 2002 plaintiff and defendant Human Insurance Company's subsidiary Health Value Management, Inc. d/b/a ChoiceCare Network entered into another agreement ("ChoiceCare Agreement") to provide medical services at a different rate. Plaintiff claims that it was substantially underpaid because the rates applied were not consistent with the ChoiceCare agreement. Defendants claim that the billing rates were consistent with the Michael Reese agreement and/or the parties' otherwise custom and practice, and that the ChoiceCare agreement applied only to a limited set of patients. Defendant requested the production of certain rate sheets claiming that they would establish that plaintiff used different rates and not ChoiceCare rates when processing patient care cost.

On October 14, 2016 after ongoing discovery disputes and a two day hearing regarding production, Judge Sanjay Tailor appointed Judge Sullivan (ret.) to serve as a discovery master to attempt to mediate all pending discovery issues, and if not successful submit a report and recommendation to the court. Parties were given seven days to file objections to his recommendation. The parties did not object to Judge Sullivan's appointment, and met with and communicated with Judge Sullivan. Approximately five months later Judge Sullivan issued his recommendations to the court.

The parties appeared before this court for the first time on March 21, 2007 and Judge Sullivan submitted his written recommendation that plaintiff should produce the documents and data that reflect the rates that it expected to be paid, including rate sheets from 1989 through

2004 and other related documents and data from 1989 through 2010. The parties were given time to respond to the recommendation.

At the March 21st court appearance the plaintiff stated that "we don't believe there is any authority under the Civil Practice Act or any case law for a special master or a magistrate or a mediator with respect to discovery." Counsel went on to state that the recommendation constituted a reconsideration of Judge Tailor's earlier ruling on the issue, and objected to the court relying on the recommendations.The court responded more than once that it saw no need to deviate from the procedure that Judge Tailor had established in the case regarding the special master making discovery recommendations to the court.

Plaintiff filed a motion to remove Judge Sullivan and presented it to the court on April 13, 2017. A May 12, 2017 hearing date had already been set for ruling on the objections to the discovery recommendations. Plaintiff counsel stated that the new motion was intimately tied in with his objection to the recommendation and suggested that they be heard together. The court stated again that it believed that there was some precedent for a judicial officer to seek assistance in matters of this nature. On April 21, 2017 plaintiff filed a motion for substitution of judge as a matter of right. A written order denying the motion was entered on May 4, 2017, and on May 16, 2017 plaintiff filed its motion for reconsideration or 308 certification.

ANALYSIS

Section 2-1001 (a)(2) of the Code provides for the substitution of a judge as a matter of right. *735 ILCS 5/2-1001(a)(2)*. The right is absolute when properly made except when substantive rulings have been made or when the movant "had an opportunity to test the waters and form an opinion as to the court's disposition" even when there has not been a substantive ruling. *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 246 (1st Dist. 2006). If the movant had an

opportunity to test the waters as to the court's opinion on an important issue, there is no right to substitution. Parties cannot "judge shop" until they find a judge who is favorably disposed to their position. *Partipilo v. Partipilo,* 331 Ill. App. 3d 394 (1st Dist. 2002). Once the court indicated its position on Judge Sullivan's appointment, the right to substitution as of right was no longer timely. *Colagrossi v. Royal Bank of Scotland,* 2016 IL App (1st) 142216. The plaintiff had a clear indication that the court was inclined to rule in favor of continuing with Judge Sullivan. The indication was a substantive ruling key to the merits of the case.

Plaintiff cites *Bowman v Ottney,* 2015 Il 119000, which has little relevancy to the present fact situation other than substantiating that the "test the waters" doctrine is valid in Illinois. The Supreme Court specifically declined to rule otherwise, *Id.* ¶ 27 , admittedly in part because it was not at issue in the case. At issue was whether a bright line rule should be created that would allow the substitution of judge when a refiled case is assigned to the previous judge who had decided substantive issues. The Supreme Court analyzed the right to substitution in the context of the voluntary dismissal and re-filing provisions of sections 2-1009(a) and 13-217. The Court explained that there was not a right to substitution under the circumstances, and 'judge shopping'" should not be encouraged. *Id.* ¶¶ 18, 21.

Also plaintiff cites the case of *Cincinnati Ins. Co. v. Chapman,* 2012 IL App (1st) 111792 which also does not support its position. In *Cincinnati Insurance* at issue was whether the parties should be barred from exercising their right to substitution when it was the judge that voluntarily brought up a prior ruling. The First District Appellate Court stated that it would be unfair to the litigants to bar them from exercising their right because they had not initiated the testing of the waters, which is not the present situation.

This court did not sua sponte bring up whether it would strike the special master appointed by Judge Tailor. Plaintiff raised the issue of Judge Sullivan's appointment at the March 21st initial appearance before this court after receiving the report recommending that plaintiff produce documents that it had fought hard against producing. Plaintiff's counsel stated without any prompting that there was no authority under the Civil Practice Act or case law to

have a "special master or a magistrate or a mediator with respect to discovery," and further stated that they were going to file something in terms of his appointment. The court responded that it would give plaintiff an opportunity to file an objection to the recommendation, and stated that "I don't see any need to deviate from the procedure that Judge Tailor has already established in this case, and I will continue to follow it unless, and I have a very open mind, unless something new is presented to the court." The court then asked Judge Sullivan if he was willing to remain involved in the proceedings.

Discovery of the rates plaintiff was expecting to pay during this period of time is arguably of substantial strategic importance because this may or may not establish the intent of the parties as to whether the plaintiff and defendant operated as if only the new agreement controlled. The court indicated its opinion on a substantive matter which goes to the heart of the case.

On April 13th plaintiff appeared with a written motion to strike the special master, and to reschedule the hearing on its objection to the recommendation. The court reiterated that on its face it had no problem with Judge Sullivan's appointment, but agreed to review everything presented by the parties on the issue. It is only after these appearances and the court's statements that plaintiff filed a motion for substitution of judge as a matter of right.

The court indicated how it would rule on a substantive matter, and the plaintiff tested the waters by raising the issue and discussing it with the court. Plaintiff waived its right to substitution of judge as a matter of right.

Rule 308 Certification

Supreme Court Rule 308(a) provides for a permissive interlocutory appeal when an order involves a question of law to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation subject to acceptance by the appellate court. *Ill. Sup. Ct. R. 308(a).* Certified questions have to be questions of law regarding perceived differences in the state of the law, and must be dispositive.

Plaintiff's first proposed question does not address a conflict in the law. It simply seeks to affirm the clearly stated existing law in Illinois that there is no exception to the right to substitution of a judge when substantive rulings have not been made unless the parties have had an opportunity to test the water. There is no need to put this question before the appellate because there is no difference of opinion as to this issue. Plaintiff simply alleges that factually it has not tested the waters.

The second proposed certified question as to whether there is still a "testing the waters exception" does not address any conflict in the law. The Illinois Supreme Court in *Bowman v Ottney*, 2015 Il 119000, gave no indication that it was in disagreement with the First District's adherence to the rule, and the First District has stood steadfast in its application. *Colagrossi v. Royal Bank of Scot.*, 2016 IL App (1st) 142216.

The third group of proposed question assumes in the alternative, that if the testing the water rule is still good law, should it be applied when no opinion has been stated, or when the opinion was voluntarily given without any prompting or when the court uses the language "keeping an open mind". Again, these are not proper 308 questions because they are questions of fact and not questions of law, and are not dispositive of the case.

The plaintiff simply disagreed when the court indicated it was not likely to remove Judge Sullivan who had recommended the production of documents which goes directly to the merits of the claim. Therefore the proposed certified questions are not appropriate for review by the appellate court.

CONCLUSION

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED:

A. Plaintiff's motion for reconsideration of the denial of the substitution of judge as a matter of right is denied, and

5285

B. The request for Rule 308 certification is denied.

5246

ENTERED:

Judge Diane M. Shelley #1925
June 5, 2017

Judge Diane M. Shelley
JUN 05 2017
Circuit Court – 1925

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[1] The Record on Appeal (Volumes 1-14) includes the Common Law Record (numbered with a "C" prefix), certain trial exhibits (numbered with an "E" prefix), the Report of Proceedings (numbered with an "R" prefix), and items filed in the Appellate Court under seal (numbered with a "SEC C" prefix). The Supplemental Record on Appeal (Supplemental Volumes 1-2) (adding materials that were missing from the Record as originally prepared by the Clerk) includes the Supplemental Common Law Record (numbered with a "SUP C" prefix), Supplemental Report of Proceedings (numbered with a "SUP R" prefix), and trial exhibits (numbered with a "SUP E" prefix). Note: The Record includes, in addition to PDF files, certain Excel spreadsheets (Palos Trial Exhibits 91-100 and 102) in their native format, on discs.

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

PALOS COMMUNITY HOSPITAL.	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 126008
	)	
HUMANA INSURANCE COMPANY,	)	
	)	
Defendant-Appellees.	)	

The undersigned certifies that on November 4, 2020, there was electronically filed and served upon the Clerk of the above court the Brief and Appendix of Appellant. Service of the Brief will be accomplished by email as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Everett J. Cygal
Everett J. Cygal

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Everett J. Cygal
Everett J. Cygal