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.

REPLY BRIEF OF APPELLANT

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This Court granted review to determine (1) the continued validity of the test the waters doctrine and (2) whether, if the doctrine remains valid, Palos tested the waters. In its opening brief, Palos showed that the text of Section 2-1001(a)(2) imposes only two timing restrictions — the substitution motion must be presented (a) "before trial or hearing begins" and (b) "before the judge to whom it is presented has ruled on any substantial issue in the case." 735 ILCS 5/2-1001(a)(2). There is no dispute that Palos presented its motion before either of the two statutory criteria had occurred; the only basis for the trial court's denial of the motion was its statement that Palos had tested the waters. Palos also showed that the statute's amendment history confirmed that the test the waters doctrine lacks any anchor in the current text and that, in any event, Palos had not tested the waters.

In its response, Humana contends that Palos has misread the statute; that it contains three timing criteria (not two); and that this third, catch-all criterion includes the test the waters doctrine.[1] Specifically, Humana contends that the statutory phrase "a party *timely* exercises his or her right to a substitution without cause *as provided in this paragraph (2)*" (emphases added) means that "timely" is a

[1] Humana goes so far as to contend that Palos *misquoted* the statute. Humana Br. 2 n.1. Palos accurately quoted the text in the question presented (Palos Br. 2) and accurately referred to the statute throughout (*see, e.g., id.* at 9, 14, 15, 33). To be sure, on page 3 of its opening brief, there is a typographical error ("or" for "and" between the criteria). This plainly was not a deliberate misquotation, nor did Palos at any time improperly apply the text. To the contrary, Palos consistently applied the text with the meaning that both requirements of the statute must be satisfied.

free-standing criterion that incorporates testing the waters. Humana does so even though the adverb "timely" is expressly defined by the conditions set out in paragraph 2 and even though those conditions are the two set forth above (commencement of the trial or hearing and ruling on a substantial issue). Indeed, Humana does so even though Section 2-1001(a)(2)(iii) separately provides that when the judge *has* ruled on a substantial issue in the case, a motion made by a party who had not appeared at the time of that ruling is still entitled to a substitution if the motion is "otherwise timely" (that is, before the trial or hearing begins). 735 ILCS 5/2-1001(a)(2)(iii). The test the waters doctrine is extra-textual and should be retired.

In its opening brief, Palos showed that the two short hearings that occurred before Palos brought its substitution motion did not involve testing the waters, even under the most elastic conception of the doctrine. At best, the trial court commented on the propriety of the appointment of a discovery master, a procedural issue that even courts embracing the test the waters doctrine reject as a testing of the waters. In its response, Humana contends that the context demonstrates that Palos successfully baited the trial court into revealing its true intentions concerning the discovery master's underlying recommendation, a baiting supposedly confirmed by later discovery sanctions and an adverse inference instruction at trial. But there is no need for the Court to resort to conspiracy theories or speculation — the two hearings were transcribed, the transcripts are short, and the trial court's comments show that no testing occurred.

It is well settled that an improper denial of a movant's request for substitution as of right results in the nullification of every order entered by the judge who should have granted the motion. In its response, Humana agrees that this is settled law. Nonetheless, Humana contends that if the Court retires the test the waters doctrine or if it keeps the doctrine but concludes that Palos did not test the waters, then the Court should radically transform existing law so that the improper denial of a substitution motion is reviewed under a hybrid, sliding scale "harmless error" analysis. Under Humana's proposal, the touchstone harm is harm to the appellee (here, Humana) not to the appellant and the appellant's entitlement to relief following an improper denial of a motion for substitution as of right is inversely proportional to that harm (so that an appellant seeking relief after an adverse jury verdict, like Palos, is essentially entitled to no relief at all). Nothing commends this path to the Court. Instead, Palos is entitled to have the post-April 2017 orders nullified and Humana (like any unsuccessful appellee) may urge on remand to the new judge any contention having a good faith basis in fact and law.

Argument

I. The Test the Waters Doctrine Is Extra-Textual and Invalid.

In its opening brief, Palos showed that the test the waters doctrine is inconsistent with 735 ILCS 5/2-1001(a)(2)'s plain text and that its continued application would be incongruent with the doctrine's historical development. *See* Palos Br. 15-19, 22-27. Specifically, Palos showed that the statute has only two

preconditions — the motion must be made (1) before "the trial or hearing begins" and (2) before the judge deciding the motion has ruled "on a substantial issue." *Id.* at 15-19.

Humana contends that the test the waters doctrine has a firm textual basis because there are *three* timing criteria, not two. Specifically, Humana contends that in addition to the trial/hearing commencement and ruling on a substantial issue criteria, there is a third: "timely." Humana Br. 15-18. Humana further contends that "timely" was added as a criterion in 1993 and that this adverb has substantive, operable force because it incorporates by reference the test the waters doctrine. *Id.*

Humana has misread the statute. Contrary to Humana's contention, the statute does not say that a substitution motion must be (1) "timely" *and* (2) brought before "trial or hearing begins" *and* (3) brought before ruling on a substantial issue. The statute instead says that the motion must be "timely . . . *as provided in this paragraph (2)*."[2] Humana never discusses the "as provided in" phrase, but the omission is lethal to its textual argument: "paragraph (2)" includes the two timing criteria that immediately follow. There simply is no free-standing "timely"

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[2] In Humana's preferred rubric of statutory interpretation (Humana Br. 17), its reading would rewrite the statute to provide the following:

> (2) When a party timely exercises his or her right to a substitution without cause ~~as provided in this paragraph (2).~~
> ~~(ii) An application for substitution of judge as of right shall be made by motion~~ and ~~shall be granted if~~ it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case, *then an application for substitution of judge as of right shall be granted*.

requirement, much less one that serves as a vessel into which Humana can pour the test the waters doctrine.

That "timely" is restricted to the trial/hearing commencement and ruling on a substantial issue criteria is also clear from a companion provision — the late-appearing party exception. Under Section 2-1001(a)(2)(iii), even when a judge *has* ruled on a substantial issue, a party that had not appeared at the time of the ruling is nonetheless entitled to a substitution of judge as of right without cause, provided its motion is "*otherwise timely*."[3] Humana overlooks this section — even though it is well settled that when the Legislature uses the same word or phrase in different parts of the same statute, it intends that word or phrase to have the same meaning. *Bowman v. Ottney*, 2015 IL 119000, ¶ 9, 48 N.E.3d 1080, 1083 ("When construing statutory language, [the Court] view[s] the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation.") (citing *In re Parentage of J.W.*, 2013 IL 114817, ¶ 37, 990 N.E.2d 698, 706).

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[3] *See* 735 ILCS 5/2-1001(a)(2)(iii):

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

(Emphasis added.)

Here, while Humana puts hydraulic pressure on "timely" as a free-standing requirement, the Legislature plainly intended something different: a judge presented with a substitution motion that is "otherwise timely" — that is, *after* the judge has ruled on a substantial issue, but *before* trial or hearing begins — must nonetheless grant the motion if a new party appears and moves for substitution *before* the *new party* has received a ruling on a substantial issue and before trial or hearing begins. *See In re Marriage of Paclik*, 371 Ill. App. 3d 890, 895, 864 N.E.2d 274, 278 (1st Dist. 2007) (Section 2-1001(a)(2)(iii) means that "a party who has not yet had an opportunity to participate in a case does not automatically lose his or her option to substitute one judge without stating a cause and as a matter of right simply because that judge has already ruled on a substantial issue in the case prior to that party's appearance."). If "timely" really incorporated the test the waters doctrine, then Section 2-1001(a)(2)(iii) would be read out of the statute.

Palos's textual analysis accordingly did not overlook the adverb "timely" in Section 2-1001(a)(2), but Humana's analysis overlooks the phrase "as provided for in this paragraph (2)" modifying that adverb. The modification confirms that the Legislature imposed only two requirements, not three. And if there are only two, Humana implicitly admits that testing the waters lacks any textual support.

Nor is the appearance of the word "timely" in the 1993 version of the statute of any moment. The 1971 version of the statute (a Legislative incorporation of this Court's previous decisions) included the two criteria controlling today. The 1971 statute provided that "a petition for change of venue *shall not be granted unless it is*

presented before" trial/hearing begins and or ruling on any substantial issue." *See* Pub. Act 77-1452, § 1 (emphasis added). The 1993 statute is virtually identical: "shall be granted if it is presented before." 735 ILCS 5/2-1001(a)(2)(ii). Rephrasing a negative conditional in 1971 as a positive statement in 1993 wrought no substantive change. Adding "timely" simply made the sentence scan and provided a cross-reference for "otherwise timely" in Section 2-1001(2)(a)(iii).

Nor does this Court's decision in *Bowman*, which Humana repeatedly invokes, support (much less compel) retaining the test the waters doctrine. The reason is simple — *Bowman* was a statutory interpretation decision, not a policy decision, one entirely consistent with fidelity to the text.

According to Humana, *Bowman* was fundamentally a policy decision. Specifically, Humana points to the Court's rejection of the plaintiff's proposed "bright-line rule" and its statement that its decision was driven by a desire to avoid "judge shopping." Humana Br. 21. Humana over-reads both comments.

Bowman did not categorically reject all bright-line rules, just the plaintiff's in that case. The Court in fact adopted a bright-line rule of its own: the phrase "any civil action" in 735 ILCS 5/2-1001(a) means the current action *or* a re-filed action before the same judge with the same parties. *See Bowman,* 2015 IL 119000, ¶21-22, 48 N.E.3d 1080, 1086. And that in turn meant that if — in the earlier part of the action — the judge had "ruled on any substantial issue in the case," then there would be no entitlement under Section 2-1001(a)(2) to a substitution "without cause as a matter of right" because it wouldn't be "timely."

Nor did *Bowman* rely on a supposed free-standing "anti-judge shopping" canon of statutory construction, enabling a party (like Humana) to invoke *Bowman* to contend that the Court "knows judge shopping when it sees it"[4] and that testing the waters remains an essential statutory gloss to prevent judge shopping. What the Court *said* in *Bowman* was that interpreting "any civil action" for purposes of Section 1001(a) as the plaintiff had urged — that is, that in every instance, a case dismissed and re-filed would be a new civil action and therefore subject to a fresh substitution without cause as a matter of right — would lead to judge shopping. *Id*.

And indeed it would. Properly understood, "judge shopping" *means* seeking to change the jurist in order to drive a particular desired litigation outcome. Accordingly, the Legislature in 1971 amended the statute to bar a party from seeking a change of judge after the judge had ruled on a substantial issue. It logically followed in *Bowman* that allowing a substitution motion in a re-filed action between the same parties before the same judge when there *had been* a ruling on a substantial issue in the earlier action would codify judge shopping, contrary to the statutory text.

But none of this means that *Bowman* vaulted a supposed public policy prohibition of "judge shopping" above the text of the statute. *Bowman* was faithful to the text by ensuring what the Legislature expressly intended — a party "shall

[4] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

be entitled" to a substitution without cause as a matter of right *before* a ruling on a substantial issue, but not after. "Anti-judge shopping" is not an extra-textual interpretive tool; it flows only *from* the text and so its contours are defined only *by* the text. After all, entitling a party to one substitution of judge as a matter of right without cause means that a party gets some say in the judge who will decide its case, a say constrained by the two statutory timing restrictions.

If the Legislature had intended to add a third restriction on the entitlement to a substitution without cause as a matter of right (beyond those two criteria), it would have done so. If, in the future, the Legislature wants to add a third restriction (including, testing the waters), it can do so. The current text, though, has only two restrictions, neither present here.

Bowman accordingly supports Palos's interpretation, not Humana's — the Court should enforce the statutory text as written, without embellishment.

II. The Test the Waters Doctrine Is Poor Policy.

In its opening brief, Palos showed why retiring the test the waters doctrine was consistent with ensuring meaningful, *de novo* appellate review of denials of substitution of judge motions. Palos Br. 19-21. In its response, Humana contends that the test the waters doctrine is compatible with *de novo* review. Specifically, Humana contends that "Illinois courts have applied the 'test the waters' doctrine for over a century, without difficulty," pointing to a dearth of test the waters reversals as support for the doctrine's supposed compatibility with *de novo* review. Humana Br. 26.

In reality, Humana has this backwards: the near-zero reversal rate confirms that the doctrine is so malleable and subjective that the Appellate Court is unable to conduct meaningful *de novo* review and that what purports to be *de novo* review is really review for abuse of discretion. While Humana suggests that Palos is imagining a problem with the test the waters doctrine that does not exist, judges in three of the five appellate districts (the Third, Fourth, and Fifth) have expressed concern that the doctrine is unworkable precisely because it makes *de novo* review nearly impossible.[5] The decision under review underscores the problem: rather than rely on primary source documents (hearing transcripts), the Appellate Court instead affirmed based on secondary sources: the trial court's post hoc, subjective characterization in two written orders concerning what those hearings meant. *See, e.g.*, A-9–A-10 ("as the [trial] court pointed out, Judge Shelley's *reluctance to strike* the discovery master *implied* that the court would accept his report[.]") (emphases

[5] *See Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶ 51, 996 N.E.2d 1131, 1141 ("Under a *de novo* review, we simply have no way of accounting for . . . potentially significant nonverbal factors," including "the Trial Court's posture and mannerisms."); *In re Estate of Gay*, 353 Ill. App. 3d 341, 345, 818 N.E.2d 860, 864 (3d Dist. 2004) (McDade, J., specially concurring) (Even with a hearing transcript, "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"; noting the lack of an "objective basis for making a meaningful judgment" and the court's total reliance on the trial court's "own subjective recollection and reconstruction in reviewing his decision."); *Bowman v. Ottney*, 2015 IL App (5th) 140215, ¶ 14 n.3, 25 N.E.3d 733, 737 n.3 ("Justice McDade's concurring opinion [in *Gay*] sets forth well-reasoned concerns with the subjectivity and elusiveness of the 'testing the waters' doctrine"), *rev'd on other grounds* 2015 IL 119000, 48 N.E.3d 1080.

added). Yet that characterization ultimately bore no predictive value regarding the trial court's views on the merits of either the parties' discovery dispute or anything else. Instead, consistent with the trial court's self-professed "open mind" (A-61) concerning the discovery master's appointment and contrary to any knowledge that Humana claims Palos gleaned from the trial court's comments on the record, the trial court *struck* the discovery master's appointment as unconstitutional.

Humana posits that subjectivity concerns are overstated because a reviewing court can rely upon "clear markers," including whether the movant "has engaged in procedural maneuvering to manufacture and exploit additional opportunities to elicit the judge's views" or had the opportunity to "discern the judge's views." Humana. Br. 27. The "markers" muddy, rather than clarify.

The procedural maneuvering marker requires a reviewing court to identify the movant's *intent* in seeking substitution, when the test the waters doctrine more narrowly asks whether the movant has information sufficient to understand the judge's view on the merits. The opportunity to discern marker would also broaden the test the waters doctrine by requiring affirmance even if the movant did not in fact discern anything about the merits, provided that it might have done so. Rather than providing for meaningful, *de novo* appellate review, Humana's "markers" reflect hostility to substitution generally and appear designed simply to force an affirmance. The test the waters doctrine is plainly unworkable.

III. Palos Did Not Test the Waters.

Should the Court elect to retain the test the waters doctrine, Palos showed in its opening brief that it did not test the waters. Palos Br. 28-33. At most, as the transcripts make clear, Palos learned the judge's view concerning the propriety of the appointment of a discovery master, not the judge's view of the ultimate merits (or even of the discovery dispute). In its response, Humana says that this was enough to test the waters because learning about the judge's view of the appointment *implied* something more. Humana Br. 32-33. This is incorrect.

At the threshold, Humana waffles concerning whether Palos would have been entitled to a substitution as of right had it filed after the first short hearing. *Compare* Humana Br. 29-30 (contending that Palos failed to move at the "earliest practical moment" because it did not move before the second hearing (the April 13, 2017 presentment hearing)) *with id.* at 30-31 (Palos "had the opportunity to discern" the trial court's opinion and therefore tested the waters at both the March 21 and April 13 hearings). This waffling underscores the squishiness of a doctrine that purports to limit a statutory right beyond the statute's plain text.[6]

[6] Contrary to Humana's contention, there is no free-standing "earliest practicable moment" requirement. The statute itself, again, imposes only two criteria. The cases that rely on an "earliest practicable moment" construction are best understood not as imposing a *fourth* criterion, but rather simply as attempting to enforce the test the waters doctrine — on this construction, the longer a movant waits, the more opportunity to test the waters. But while it makes practical sense that a party who seeks a substitution before the trial court has said anything will be unlikely to have tested the waters (though, perhaps not even then under Humana's proposed "intent" and "opportunity to discern" modifications discussed in Section I.B), it does not follow that a party who moves *after* the earliest

On the merits, Humana essentially skips the transcripts for what the trial court and the Appellate Court say about them. This is an inappropriate dodge. The transcripts *imply* nothing and no amount of context-filling makes them imply knowledge not apparent on their face. Instead, the trial court, the Appellate Court, and Humana fall into the very trap envisioned by Justice McDade's concurrence in *Gay* (no objective guidepost when a reviewing court is reliant on the trial court's "subjective recollection"), but worse. Justice McDade envisioned a scenario without transcripts. Here, we have them and they show that no testing occurred.

As Palos noted in its opening brief, the short transcripts make clear that the only discussion concerned the propriety of the discovery master's appointment, not Judge Shelley's views on the merits of the parties' underlying discovery dispute. Even for courts adopting the test the waters doctrine, this is insufficient.[7]

The transcripts are neither lengthy nor opaque. The court's comments total barely 1,000 words (725 in the first hearing (A-27–A-43); 292 in the second (A-56–

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practicable moment *has* tested. Indeed, even courts that embrace the test the waters doctrine reject this view. *See Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 1041, 762 N.E.2d 25, 29-30 (1st Dist. 2001) (eve-of-trial substitution motion—*not* brought at earliest practical moment—should have been granted because no ruling on substantial issue).

[7] *See Nasrallah,* 326 Ill. App. 3d at 1039-40, 762 N.E.2d at 29 (procedural ruling on interrogatory responses could lead to exclusion of critical evidence, but is not "substantial" and does not bar substitution motion); *Powell v. Dean Foods Co.*, 405 Ill. App. 3d 354, 360, 938 N.E.2d 170, 176 (1st Dist. 2010) (reconsideration of co-party's denial of substitution motion was procedural and therefore not "substantial," despite effect on case), *vacated on other grounds*, 2012 IL 111714, 965 N.E.2d 404.

A-61)), all dealing with procedural issues. It nonetheless took the court nearly 4,500 words in two orders to try to explain why Palos had somehow discerned the court's view on an issue bearing on the merits (A-69–A-77). If the court had made a comment about the merits — of the parties' claims, concerning the parties' ongoing discovery dispute, anything — it would have appeared in the transcript, not in the later orders seeking to explain the rejection of substitution as of right.

Humana's suggestion that Palos sought substitution for a nefarious *purpose* — to avoid having Judge Shelley reach the merits of the parties' discovery dispute — is speculation and inconsistent with the proper application of the test the waters doctrine. While Humana wants to ensure that the Court not forget that after denying the substitution motion, the trial court both issued discovery sanctions against Palos (Humana attached the order as an appendix) and gave an adverse inference instruction to the jury, neither has anything to do with the substitution motion. Palos strongly disagreed with the trial court's discretionary decisions to enter discovery sanctions and to give an adverse inference instruction since the documents in question still existed. C.17325-41; C.17352-54. If Humana is contending that a different judge might have exercised discretion differently — *rejecting* Humana's arguments concerning destruction of evidence and the propriety of an adverse inference instruction and accepting Palos's — that does not prove that the substitution motion was improper; it proves precisely the opposite.

Palos did not test the waters.

IV. Post-April 2017 Orders and the Judgment Should Be Nullified.

In its opening brief, Palos noted that it is well settled that the improper denial of a substitution motion nullifies the orders entered after that motion was presented. Palos Br. 28. Humana agrees that this is the current state of the law. Humana Br. 34. But Humana contends that the Court should chart a different path and apply what it calls a type of "harmless error" analysis (not to the appellant, as the doctrine is typically framed, but to the appellee) to determine whether orders entered by a judge whom the appellant had a statutory *right* to not preside remain valid after the reversal of a substitution denial. *Id*. at 34-44. And if Humana can persuade the Court to adopt this doctrine, it contends that it would be very harmful to Humana to nullify the trial court's post-April 2017 orders and to vacate the judgment. *Id*. at 42-43. Humana's multi-part argument has absolutely nothing to commend it — it is antithetical to proper appellate review, to due process, and to common sense. It would strip a party of a remedy for the violation of its statutory right by kicking the teeth out of the statute simply to create an outcome favorable to a single litigant. The Court should decline Humana's invitation.

Humana's argument begins with a slight of hand. It contends that the Court may "affirm the judgment on any basis supported in the record." Humana Br. 34 n.5. While true as an abstract proposition, the doctrine applies only when the "necessary factual basis for the determination of such a point is contained in the record." *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 508-509, 524 N.E.2d 561, 582 (1988). When "the record is devoid of a factual basis for

determining" an issue advanced by the appellee on appeal and when the appellant was not "put on notice that such proof was required," affirmance on the alternative ground is inappropriate. *See id*. Humana's entire harmless error argument starts from the predicate that Palos's failure to "assert any fear of prejudice by Judge Shelley in its motion for substitution" or to show or suggest "that Judge Shelley exhibited prejudice" (Humana Br. 39) precludes Palos's ability to obtain meaningful relief on appeal. But when Palos filed its motion, Humana's proposed predicate for relief did not exist because Palos operated under a statute that did *not* any longer require an allegation of prejudice, much less proof of it.

Beyond the threshold invalidity of Humana's argument, the Court should reject it on the merits for six separate reasons.

First, Humana's contention that when the Legislature *eliminated* a requirement that a party allege (but not prove) fear of prejudice in 1993, it simultaneously secretly smuggled that requirement in through the backdoor defies due process and common sense. It defies due process because the Legislature is not permitted to extend a right — here, substitution of judge without cause — but then deprive a party of that right through arbitrary action. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433-34 (1982) (state may not, consistent with due process, "destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement") (internal citation omitted). It defies common sense because no one would have guessed before Humana

proposed it in December 2020 that by *eliminating* a requirement, the Legislature *enshrined* that requirement.

Second, Humana's contention that its hybrid harmless error analysis applies unless a party has established the trial court's prejudice would read out Section 2-1001(a)(2) from the statute. Section 2-1001(a)(3) *already* provides for substitution for cause. It is plain that reversal of the denial of a motion for substitution for cause would entitle a party to have all orders entered after the motion vacated. Indeed, the entire thrust of Humana's attempt to place circumstances where there is proof of prejudice in one bucket (every subsequent order is vacated) and those without proof of prejudice in another (Humana's hybrid harmless error review) rests on this distinction. But if that is so, then the Legislature must have had something else in mind with Section (a)(2). As indeed it did — in contrast to Section (a)(3), Section (a)(2) provides for substitution as of right *without* cause, so it cannot be the case that to obtain relief from an improper (a)(2) denial, a party must *show* cause.

Third, Humana's hybrid harmless error review over-reads the import of this Court's decision in *LVNV Funding, LLC v. Trice*, 2015 IL 116129, 32 N.E.3d 553. According to Humana, *LVNV* means that it would be improper to consider orders entered after the improper denial of a substitution motion "void," because voidness is a characteristic of the trial court's jurisdiction and only the Illinois Constitution grants jurisdiction. Humana Br. 37. But *LVNV* did not speak to the propriety of a *statutory* remedy; the Court in fact recognized the Legislature's power to "create new justiciable matters by enacting legislation that creates rights

and duties." 2015 IL 116129, ¶ 37, 32 N.E.3d at 562. Humana has confused jurisdiction with the statutory remedy.

Certainly both parties agree that the Legislature writes laws with knowledge of this Court's decisions. And Humana acknowledges that this Court itself had previously recognized that the improper denial of a substitution motion renders subsequent decisions void. Humana Br. 34 (*citing In re Dominique F.*, 145 Ill. 2d 311, 324, 582 N.E.2d 555, 561 (1991)). Humana does not contend that the Legislature would have lacked the power when it "created" the right to a single substitution without cause to have prescribed a remedy for the improper denial of a substitution motion; again, *LVNV* affirms this power. But there was no need for the Legislature to create an explicit remedy when it amended the statute in 1993: it knew that *any* improper denial, whether under Section (a)(2) or (a)(3), would lead to the nullification of all orders entered after the substitution motion was brought. Humana is accordingly not asking the Court simply to address whether Section 2-1001 is or is not *jurisdictional*; it is asking the Court to hold both that it is not jurisdictional and that the statutory remedy remains unsettled. But the remedy is settled.

Fourth, Humana makes the remarkable assertion that the way its sliding scale harmless error analysis works is that the further along a case has proceeded, the less a party deprived of its right to have a different judge hear the case is entitled to relief. Humana Br. 44 ("in cases that have not proceeded all the way through trial, verdict, and appeal, the *harms* of vacating subsequent proceedings

will be correspondingly less severe") (emphasis added). Accordingly, a party like Palos who must wait until a final judgment following a jury verdict to obtain review will essentially lack any remedy under Humana's hybrid harmless error analysis. Humana makes this assertion even though a substitution denial is interlocutory, so Palos had to wait for final judgment to seek review.

In fact, Palos did try to seek review well before final judgment — in May 2017, it asked the trial court to certify the continued validity of the test the waters doctrine under Ill. S. Ct. R. 308 as part of its request for reconsideration, but the judge declined to do so. A-76-A-77. In June 2017, Palos asked this Court for leave to file a petition for mandamus and alternatively for a supervisory order, but the Court declined to grant relief. *See* July 10, 2017 order in *Palos Community Hosp. v. Shelley*, No. 122412.[8] And it is well settled that Illinois has refused to adopt the collateral order doctrine — which might otherwise allow a party shackled with Humana's hybrid harmless error review to avoid the proposal's effect that the longer a case proceeds, the less entitlement a party deprived of its request for substitution has for relief.[9] Depriving a party of an entitlement to relief the longer

[8] Humana's then co-defendant, Advocate, opposed interlocutory relief in this Court, asserting in part that "the appellate process provides Palos with an adequate remedy. Palos will have the opportunity to appeal the denial of its motion for substitution—just like all interlocutory orders in the case—after a final order is entered." June 30, 2017 Advocate Opp. at 13, No. 122412. Humana stood by silently, filing nothing in this Court, including not disputing Advocate's position.

[9] *See People v. Miller*, 35 Ill.2d 62, 67, 219 N.E.2d 475, 478 (1966) ("We have uniformly held, both in civil and criminal cases, that no appeal lies from an

the trial court proceedings last, while precluding that party even from seeking relief until those proceedings conclude, would be a bait-and-switch itself inconsistent with due process.

Fifth, were the Court otherwise inclined to scuttle decades of practice and apply Humana's "harmless error" review, this admittedly new standard should apply prospectively only. *See Tzakis v. Maine Township*, 2020 IL 125017, ¶ 34, --- N.E.3d ---- ("[A] decision overruling past precedent should be given only prospective application whenever injustice or hardship due to reliance on the overruled decision would be averted."). Palos lacked any notice that it would have to prove prejudice in order to obtain relief, much less that its prospects for relief would asymptotically approach zero the longer the case continued. Instead, Palos reasonably and appropriately relied on decades of decisions (including *Dominique F.*) nullifying all orders entered after the substitution motion, relief available following entry of final judgment.

Sixth, should the Court adopt a true (not Humana's appellee-focused) harmless error analysis and apply it to this case, it is plain from the record that the errors in denying the substitution motion were far from harmless. In contending

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interlocutory order in the absence of a statute or rule specifically authorizing such review."); *In re Estate of French*, 166 Ill. 2d 95, 104, 651 N.E.2d 1125, 1130 (1995) (declining to adopt federal collateral order doctrine; affirming holding of *Almon v. American Carloading Corp.* 380 Ill. 524, 531, 44 N.E.2d 592, 596 (1942), that order disqualifying counsel, while collateral, is non-final and subject to review following final judgment, but not appealable before then).

that "Palos cannot show" that an erroneous substitution denial "affected the outcome of the case" (Humana Br. 41), Humana directs the Court's attention to the jury's verdict and to the trial court and appellate court decisions concerning contract ambiguity (*id.* at 40-41 & nn.6-7). According to Humana, "[w]hichever circuit court judge was presiding, the evidence would have been no different—and would have *compelled* judgment for Humana." *Id*. at 41 (emphasis added). But Humana has never suggested that it was *entitled* to discovery sanctions or to an adverse inference instruction *as a matter of law*.

Palos forcefully argued that no material was destroyed intentionally and that indeed, everything was found on backup tapes. C.17325-41; C.17352-54. The trial court disagreed after denying the substitution motion. There is no reason to simply assume that a different trial judge would have accepted Humana's arguments over Palos's.

Nor is there any reason to assume that a different judge would have given an adverse inference instruction or that a different jury, one that was *not* instructed that Palos had destroyed evidence that would have disambiguated the parties' contract in a manner favorable to Humana, would have reached a defense verdict on liability. Juries are presumed to follow their instructions and there is no straight-faced way to contend that the poison of an adverse inference instruction had no effect. *See People v. Phillips*, 392 Ill. App. 3d 243, 270, 911 N.E.2d 462, 488 (1st Dist. 2009); *Wilkerson v. Pittsburgh Corning Corp.*, 276 Ill. App. 3d 1023, 1031,

659 N.E. 2d 979, 984 (4th Dist. 1995) (new trial following improper adverse inference instruction).

Both the discovery sanctions and the jury instructions were discretionary. That a different trial judge might exercise her discretion differently conclusively shows that the error in denying the substitution motion was not harmless.[10]

Palos does not seek a "do-over;" it seeks a "do-right" before a new judge, a right to which it is entitled under Section 2-1001.

Conclusion

For the foregoing reasons and those set forth in Palos's opening brief, the Court should vacate the judgment and nullify all orders entered after Palos's April 2017 motion for substitution of judge as of right.

Dated: January 26, 2021

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[10] Accordingly, a remand to the Appellate Court is also not warranted.

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 words contained in the Rule 341(d) cover, Rule 341(c) certificate of compliance, and the certificate of service, is 5,957 words.

/s/ Everett J. Cygal
Everett J. Cygal

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 January 26, 2021, there was electronically filed and served upon the Clerk of the above court the Reply Brief of Appellant. Service of the Reply 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 Reply 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