NO. 126008

**IN THE SUPREME COURT OF ILLINOIS**

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| PALOS COMMUNITY HOSPITAL, a not-for-profit community hospital,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>HUMANA INSURANCE COMPANY,<br><br>Defendant-Appellee. | On Petition for Leave to Appeal from the Illinois Appellate Court, First Judicial District, No. 1-19-0633.<br><br>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. |

# DEFENDANT-APPELLEE HUMANA INSURANCE COMPANY'S RESPONSE BRIEF

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## POINTS AND AUTHORITIES

## NATURE OF THE CASE

For nearly fifteen years before the period in dispute, Palos Community Hospital ("Palos") treated patients who were PPO members of Humana Insurance Company ("Humana"), submitted claims to Humana for reimbursement, and accepted payment from Humana at its PPO rates. Those PPO rates were set forth in a written agreement between Palos and Humana (the "Direct Contract"). After years of accepting Direct Contract rates, Palos suddenly claimed that Humana should have been paying higher rates under a different contract, the "ChoiceCare Agreement." It was undisputed that the higher ChoiceCare rates would not apply if there was a Direct Contract between Palos and Humana, so Palos tried to persuade a jury that its written commitments and the parties' decades-long course of conduct under the Direct Contract meant nothing. To maintain this position, Palos sought to avoid discovery of records showing that Palos had always understood the Direct Contract to govern. On the eve of trial, Humana learned that Palos had violated discovery rules by intentionally concealing such materials and then ordering their destruction even while a discovery request was pending—giving rise to a finding by the circuit court of spoliation and an order of sanctions. During two hearings before Palos's discovery misconduct came to light, Palos argued to Judge Shelley that she should not accept the recommendation of the discovery master to order Palos to produce these very documents. After taking the opportunity to elicit Judge Shelley's views with respect to the discovery master's recommendation, Palos moved for substitution of judge under 735 ILCS 5/2-1001(a)(2). Judge Shelley denied the motion as untimely because Palos had tested the waters. A jury unanimously found that Humana had not breached any contractual obligation to Palos, and the Illinois Appellate Court, First District, unanimously affirmed the judgment in full.

## ISSUES PRESENTED FOR REVIEW

1. Whether the "test the waters" doctrine, which has been part of Illinois law for more than a century and which was kept in place in § 2-1001(a)(2)'s requirement that the right to substitute be "timely" exercised, remains valid.

2. Whether Palos's motion for substitution of judge was properly denied as untimely because Palos tested the waters.

3. Whether, even if substitution was improperly denied, the judgment should be affirmed because orders following improper denial of substitution are not "void," and because any error was harmless.

## STATUTE INVOLVED

Section 2-1001(a)(2) provides:

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

735 ILCS 5/2-1001(a)(2)(ii).[1]

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[1] Humana reproduces the statute here because Palos quotes the statute inaccurately. *See* Br. 2–3. Palos quotes the statute as providing that an application "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," Br. 3 (emphasis added), but the statute requires that a motion be presented "before trial or hearing begins ***and*** before the judge … has ruled on any substantial issue." 735 ILCS 5/2-1001(a)(2)(ii) (emphasis added).

## STATEMENT OF FACTS

### I. Relevant Circuit Court Proceedings.

#### A. Discovery Related To Reimbursement Rates Palos Expected To Receive.

This case centered on the proper reimbursement rates for Palos's care of individuals insured by Humana: Direct Contract rates or ChoiceCare rates. A-3–4 ¶ 9; A-11 ¶ 32. The answer to that question turned on whether the Direct Contract governed the parties' relationship. To investigate that issue, Humana sought to determine what rates Palos had *expected* to be paid—that is, whether Palos operated at the time as if the Direct Contract governed its relationship with Humana. A-13 ¶ 39; C 10500 V4; C 11637–45 V5. Among other things, Humana on March 11, 2015 requested information and documents from Palos identifying "anyone providing professional consulting services, claim auditing, billing services, and/or verification of eligibility or benefits relevant to the lawsuit." A-13 ¶ 39; C 11625–26 V5. Humana later learned that Palos contracted with a consultant, JDA eHealth Systems, Inc. ("JDA"), to compute Palos's reimbursements, but Palos failed to disclose JDA's existence in response to Humana's discovery requests. A-13–14 ¶ 39.

Confronted with intractable discovery disputes—including as to what records Palos was required to produce demonstrating whether Palos understood the Direct Contract to govern its reimbursement rates from Humana—then-presiding Judge Tailor on October 14, 2016 entered an order appointing retired Judge Sullivan as a discovery master. A-5 ¶ 13; A-14 ¶ 40; Sup R 2395. Judge Tailor ordered Judge Sullivan first to attempt to mediate the parties' discovery disputes and then, if the parties could not agree, to submit a recommendation to the court. A-5 ¶ 13.

The next day, on October 15, 2016, Palos instructed JDA *to permanently delete all of Palos's data*. A-5–6 ¶ 16; C 11575 V5. Palos continued to conceal its contractual arrangement with JDA from Humana.

Neither party objected to Judge Sullivan's appointment, and the parties worked with Judge Sullivan to mediate their disputes for five months, but the mediation was unsuccessful. On March 20, 2017, Judge Sullivan tendered to the court his recommendation 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." A-5 ¶ 14 (quoting C 10240 V3).

**B. Hearings On The Discovery Master's Recommendation.**

At a hearing the next day concerning the discovery master's recommendation, the parties learned that the case was reassigned to Judge Shelley. A-5 ¶ 15; A-27–31. Palos did not at the time seek substitution of Judge Shelley, but instead argued to her that Judge Sullivan's recommendation should be rejected on the grounds that: (a) the recommendation was wrong because it was a "reconsideration" of prior discovery orders issued by Judge Tailor, and (b) Judge Sullivan's appointment was not authorized by law. A-8 ¶ 24; A-32–34. Judge Sullivan, who was also at the hearing, disputed Palos's objection that the recommendation was a reconsideration of what Judge Tailor had done. A-35–36. In response to these contentions, Judge Shelley indicated her "understanding" that "there is precedent that says that a trial—a judge has that discretion" to appoint a special master to "assist the Court in trying to . . . get through this discovery process," and she stated "it's my position right now that I would like for him to remain involved in these proceedings." A-8 ¶ 25; A-35–36. Judge Shelley set a briefing schedule for Palos's

objections to Judge Sullivan's recommendation and scheduled a hearing on those objections for May 12. C 10176 V3.

At that point, again, Palos could have moved to substitute Judge Shelley. It did not. Instead, Palos proceeded on the merits while employing a tactic designed to elicit the judge's interim views on the merits: it filed *both* written objections that would be heard at the May 12 hearing (C 10264 V4) *and* a motion to strike Judge Sullivan's appointment (C 10243 V3) that was noticed for presentment on April 13 before Judge Shelley. C 10241 V3. Palos thereby obtained another opportunity—the April 13 presentment hearing—at which to elicit Judge Shelley's views on the critical question of discovery into its expected reimbursement rates. And because briefing on Palos's objections to Judge Sullivan's recommendation was not yet complete, there was no risk that Judge Shelley would enter an order compelling Palos to produce the records it sought to conceal before the April 13 hearing.

At the presentment hearing, Palos continued to argue both its objections to Judge Sullivan's recommendation and that Judge Sullivan's appointment was invalid, asserting that these issues were "intimately tied" together. A-56. Further, "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 objection to the contents of Judge Sullivan's recommendation letter." A-10–11 ¶ 30. And Palos directly asked Judge Shelley to identify the precedent that informed her thinking as to the validity of Judge Sullivan's appointment. A-60 ("[I]f there is something that you think we should be looking at, we would certainly take it under advisement."). Judge Shelley responded frankly, stating that she was "not shocked by the position that" Judge Tailor had taken in appointing Judge

Sullivan, and that "there is some precedent for a judicial officer to seek assistance in matters of this nature." A-58; A-61.

Judge Shelley's evident "reluctance to strike the discovery master implied that the court would accept his report" and order production of the documents Palos sought to conceal. A-10 ¶ 29. Judge Shelley did indeed order Palos to provide the missing information shortly thereafter. C 10770 V4. That order later brought to light Palos's intentional spoliation of the JDA records. A-14 ¶ 41. In the same order, Judge Shelley concluded that the Constitution's "fee officer" provision did not permit the appointment of Judge Sullivan as a special discovery master, and thus modified Judge Tailor's order appointing Judge Sullivan to limit his role to mediation. C 10769–70 V4. Having also ruled on the discovery issue to which Judge Sullivan's recommendation had been addressed, Judge Shelley ruled that "[a]ny issues surrounding his recommendations are moot." C 10769 V4.

**C. Ruling Denying Substitution.**

One week after eliciting Judge Shelley's views at the April 13 hearing, Palos moved to substitute Judge Shelley as a matter of right under 735 Ill. Comp. Stat. 5/2-1001(a)(2). C 10638–39 V4. Judge Shelley denied the motion as untimely because Palos had elicited her views on the critical question of whether the court would adopt the discovery master's recommendation that Palos be compelled to produce records showing what rates it expected to be paid. A-69–70. There was no doubt that Palos's objection to Judge Sullivan's appointment had everything to do with the content of his recommendation. *See* Supp R 2554 ("There is no question in my mind that had the recommendations gone the other way, plaintiff would probably not be as vocal on this issue."). After the court had "unequivocally expressed [its] opinions" on the topic, Judge

Shelley stated, the motion was untimely: "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." A-70.

Palos moved the court to reconsider. *See* A-71. Judge Shelley denied that motion on the same ground: "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." A-75. "[T]he 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." *Id.*

**D. Spoliation Ruling.**

As foreshadowed by her remarks at those two hearings, Judge Shelley went on to order Palos to produce evidence related to the rates it expected to receive. C 10770 V4. As a result, Humana learned for the first time that Palos had both concealed JDA's existence throughout the discovery process and ordered the destruction of all of JDA's records concerning Palos. A-5–6 ¶ 16; A-14 ¶¶ 40–41.

Humana moved for sanctions under Illinois Supreme Court Rule 219. A-14 ¶ 42. The court found 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 Humana's discovery requests and Palos's obligations under Illinois Supreme Court Rules. *Id.*; *see* SA-003. The court further found, based on its review of the record evidence, that it was "clearly establishe[d] that Palos plainly and deliberately destroyed the information." SA-004. The court ruled that an adverse inference instruction was appropriate, and ordered Palos to pay Humana "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 [certain] motions.'" A-14–15 ¶ 42.

**E. Jury Verdict.**

Following a 10-day trial on liability and damages, the jury unanimously ruled in favor of Humana. C 17952–53 V9. The jury found that Palos had failed to prove that Humana was required to reimburse Palos using ChoiceCare rates. C 17953 V9.

## II. Appellate Court Decision.

On appeal, Palos argued that the circuit court had committed a host of purported errors, including its denial of substitution and its order awarding sanctions for Palos's undisputed spoliation. A-1–2 ¶ 1. In a unanimous opinion, the Appellate Court rejected each of these arguments.

First, the Appellate Court concluded that "the trial court properly denied Palos's motion for substitution of judge." A-10 ¶ 29. "[I]n 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 the appointment of Judge Sullivan as a discovery master, and her "reluctance to strike the discovery master implied that the court would accept his report, which 'recommended that certain contentious documents be produced.'" *Id.* Therefore, the Appellate Court agreed that "Palos had tested the waters because it could discern Judge Shelley's position on the production of documents 'at the heart of this controversy.'" *Id.* The Appellate Court also rejected Palos's claim that Judge Shelley had *sua sponte* volunteered her opinion at these hearings. A-10–11 ¶ 30.

The Appellate Court also rejected Palos's challenge to the circuit court's spoliation ruling. The Appellate Court affirmed the trial court's findings that "Palos failed to produce JDA's documents when [Humana] first requested such information on March 11, 2015, and instead ordered JDA to permanently delete the data." A-18 ¶ 50. It also affirmed the award of monetary sanctions to Humana. A-16 ¶ 45. The Appellate Court likewise rejected all of Palos's other arguments, affirming the judgment in full.

## ARGUMENT

After litigating its contract claim against Humana for almost a decade and losing at every level, Palos wants a "do-over." Br. 21. To obtain this extraordinary relief, Palos asks the Court to throw out more than a century of case law applying the "test the waters" doctrine. As this Court and the Appellate Court have held time and again, the "test the waters" doctrine is a necessary limitation on the right to substitute judge, because—without the doctrine—a party would be free to delay seeking substitution in order to exploit every available opportunity to discern the judge's views, and "judge shop" if those views are not to the party's liking. Allowing litigants to judge shop is fundamentally unacceptable, as it "would spell the immediate demise of the adversary system." *Bowman v. Ottney*, 2015 IL 119000, ¶ 18 (citations and internal quotation marks omitted).

The text, purposes, and legislative history of the current § 2-1001(a)(2), as adopted in 1993, confirm the continuing validity of the "test the waters" doctrine. First, when the legislature revised the prior change-of-venue statute, it retained two specific timing requirements—namely, that a substitution request be submitted "before trial or hearing begins" and before the judge issues "a ruling on any substantial issue." And it added a new requirement that had not appeared in the earlier statutory text: that the

substitution right be "timely" exercised. The General Assembly thus did not do away with the long history of case law requiring that a substitution request be timely brought, "at the earliest practical moment," so as "to prohibit a litigant from seeking a substitution only after she is able to discern the judge's position." *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (3d Dist. 2004). To the contrary, it incorporated that case law into the statute with its new express "timeliness" requirement. Palos's contrary reading renders the statutory term "timely" surplusage, and is therefore invalid.

Second, application of the "test the waters" doctrine furthers the purpose of the statute, identified by this Court in *Bowman*, to prevent judge-shopping. 2015 IL 119000 ¶¶ 15–16. Indeed, the "test the waters" doctrine arose under the prior statute precisely to fulfill that purpose, because courts recognized that the Venue Act did "not contemplate that a litigant be permitted first to form an opinion that the trial court might be unfavorably disposed toward his cause, and then charge the court with prejudice as a basis for a change of venue." *Templeton v. First Nat'l Bank of Nashville*, 47 Ill. App. 3d 443, 446 (5th Dist. 1977). Palos does not dispute that one of the purposes of § 2-1001(a)(2) is to prevent judge-shopping, or that the "test the waters" doctrine furthers that purpose. Instead, Palos takes the position that it is preferable to interpret the statute as imposing a bright-line rule that a substitution motion can be denied only after the court has entered a ruling on a substantial issue—even though this bright-line rule will necessarily enable some amount of judge-shopping. This Court rejected an almost identical argument in *Bowman*, when it held that a proposed "'bright line' rule" that would permit some instances of judge-shopping was invalid because it would "allow[] the purpose of the statute to be defeated." 2015 IL 119000, ¶¶ 11, 20–21.

Third, the legislative history of § 2-1001(a)(2) further confirms the validity of the "test the waters" doctrine. The only substantive change made in 1993 was to remove the requirement that parties seeking substitution assert fear of judicial prejudice. The statute's express requirements that a motion be filed "before trial or hearing" and before a "ruling on a substantial issue" were retained, and the timeliness requirement adopted through case law—including the "test the waters" doctrine—was maintained through the addition of the "timely" requirement to the text. Palos contends that doing away with the prejudice standard of the Venue Act "eliminated the rationale" for the "test the waters" doctrine, but that assertion is unfounded. From its inception, the "test the waters" doctrine was intended to prevent judge-shopping—and as *Bowman* makes clear, preventing judge-shopping remains a purpose of the statute since its amendment. 2015 IL 119000, ¶¶ 15–16. The rationale of the "test the waters" doctrine remains squarely aligned with the statute after the 1993 amendment.

Fourth, there is no merit to Palos's argument that the "test the waters" doctrine should be rejected as a policy matter, because of supposed problems with its administrability. Illinois courts have applied "test the waters" for more than a century without difficulty, and Palos can identify no reason for them to stop now. The Court should join the four Districts of the Appellate Court to have held that the "test the waters" doctrine remains valid.

Applying that doctrine to this case, the record amply supports the conclusions of the circuit court and the Appellate Court that Palos's motion for substitution was untimely because Palos had tested the waters. Palos did not seek Judge Shelley's substitution at the earliest practical moment. Instead, it engaged in procedural

maneuvering to obtain an additional opportunity (a presentment hearing) at which to elicit Judge Shelley's views. Thus, over the course of two hearings, Palos had the opportunity to discern Judge Shelley's views on a critical issue: whether the court would accept the discovery master's recommendation that Palos be compelled to produce records showing what reimbursement rates it expected to be paid by Humana—including the records that Palos had concealed and ordered destroyed. Judge Shelley's comments responding to the arguments of Palos's counsel's at the hearings implied that she was inclined to accept the recommendation, and Palos moved for substitution only after discerning those views. The motion was, by then, untimely.

Because the "test the waters" doctrine remains valid and the record demonstrates that Palos tested the waters, the Court should affirm the judgment. If, however, the Court concludes that denial of substitution was improper, the judgment should still be affirmed. Although the Appellate Court has held that rulings entered after an improper denial of substitution under § 2-1001(a)(2) are "void," that conclusion is not supported by current law. The "void" rule arose under the Venue Act, when each application to replace a judge was supported by an affidavit indicating fear of judicial prejudice. The rule was justified as a way to avoid forcing a party to litigate before a judge who was (or was feared to be) prejudiced against it. In the absence of any prejudice requirement in the current statute, that reasoning no longer applies. In addition, this Court has recently clarified that judicial rulings are not "void" unless the issuing court lacks jurisdiction—but an improper ruling on substitution does not divest the circuit court of jurisdiction, and subsequent orders therefore are not "void." Instead, where a reviewing court concludes that substitution was improperly denied, the court should treat the error as it does other trial court errors, and

examine whether the ruling substantially prejudiced the moving party. Here, where the record conclusively demonstrates that Palos's contract claim lacked merit—as twelve jurors and three Appellate Court Justices unanimously agreed—the outcome would have been the same before any circuit judge, and Palos was not substantially prejudiced. At the same time, vacating the judgment and all rulings following the denial of substitution would impose severe harms on Humana and the judicial system. The judgment should therefore be affirmed.

## I. The "Test The Waters" Doctrine Is Valid.

For decades—even as the statute's terms underwent amendment—Illinois courts have with near perfect unanimity recognized that a party's motion to substitute judge is "untimely if the parties have had an opportunity to discern the court's disposition toward the merits of the case." *Williams by Williams v. Leonard*, 2017 IL App (1st) 172045, ¶ 12. That is because the "law is clear that a party should not be allowed to 'judge shop.'" *Hader v. St. Louis Sw. Ry. Co.*, 207 Ill. App. 3d 1001, 1007 (5th Dist. 1991). "Keeping parties from testing the waters maintains the integrity of the court, prevents the waste of judicial resources, and obstructs dilatory tactics." *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 39. Any rule that would enable a party to "'judge shop' until he finds one in total sympathy to his cause … would spell the immediate demise of the adversary system." *Am. State Bank v. Cty. of Woodford*, 55 Ill. App. 3d 123, 128 (4th Dist. 1977).

This Court, too, has consistently confirmed the legal imperative that a party may not learn a judge's views of its case, and only thereafter move to substitute if the judge's views are not to the party's liking. Almost eighty years ago, the Court wrote:

> 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 a change of venue must be allowed.

*Comm'rs of Drainage Dist. No. 1 v. Goembel*, 383 Ill. 323, 328 (1943). And just five years ago, the Court reiterated in *Bowman* that it "will not construe section 2-1001(a)(2) in a manner that facilitates or encourages 'judge shopping.'" 2015 IL 119000 ¶ 20.

Putting these fundamental tenets into practice, all Districts of the Appellate Court save the Fourth have held that a motion to substitute under § 2-1001(a)(2) is untimely if the movant "had an opportunity to test the waters and form an opinion as to the court's disposition toward his claim." *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 246 (1st Dist. 2006); *see also In re Estate of Gay*, 353 Ill. App. 3d at 343; *City of Granite City v. House of Prayers, Inc.*, 333 Ill. App. 3d 452, 461 (5th Dist. 2002); *Galvan v. Allied Ins.*, 2013 IL App (2d) 120525-U, ¶ 26. "A petition for substitution of judge must be brought at the *earliest practical moment* to prohibit a litigant from seeking a substitution only after she is able to discern the judge's position." *Gay*, 353 Ill. App. 3d at 343 (emphasis added). This reading of the current statute—requiring timely action to prevent judge-shopping—extends the unbroken thread stitched through Illinois law.

Palos asserts, however, that every court to have applied the "test the waters" doctrine since 1993 is wrong. Palos misreads the statute's text, ignores the statute's purposes, and misunderstands the statute's history. Far from eliminating the "test the waters" doctrine, the currently operative § 2-1001(a)(2) leaves no doubt as to that doctrine's validity.

### A. The Statutory Text Confirms The Validity Of The "Test The Waters" Doctrine.

Section 2-1001(a)(2) provides a litigant one substitution of judge "as a matter of right," but a party cannot be excused "from complying with the statute's explicit requirements." *Bowman*, 2015 IL 119000, ¶ 17. The text of the statute imposes three explicit requirements on a first motion for substitution of judge: "(1) the party seeking a substitution ***timely*** exercises the right, (2) the party seeking a substitution files a motion to substitute judge ***before trial or hearing begins***, and (3) the trial judge has not ***ruled on any substantial issue in the case***." *Williams*, 2017 IL App (1st) 172045, ¶ 11 (emphasis added to highlight statutory terms).

Significantly, the first requirement—that the substitution right be "timely" exercised—was introduced in 1993, when the statute was amended to permit substitution as of right, regardless of judicial bias. Prior to 1993, the statute required that a petition for change of venue be filed "before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case," Ill. Rev. Stat., ch. 110, 2-1001(c), as the current statute does. But the pre-1993 statute did not impose any separate "timeliness" requirement on applications to change venue.

Illinois courts, however, consistently read the statute to require one. For example, this Court in *People v. Lawrence* applied the "test the waters" doctrine (without using the term "test the waters") to affirm denial of a petition for change of venue as untimely. 29 Ill. 2d 426 (1963). The Court first explained the importance of timeliness to avoid the harms of judge-shopping:

> [W]e have consistently held that a petition for a change of venue must be filed at the earliest practical moment, and have found that petitions delayed until after the trial judge has by his rulings passed upon substantive issues, *and*

> *indicated his views on the merits of the cause*, come too late. As was pointed out in *People v. Chambers*, 9 Ill. 2d 83, 89 (1956), the requirement of "earliest practical" filing is designed to preclude counsel from first *ascertaining the attitude of the court* on a hearing relating to some of the issues of the case, and then, if the court is not in harmony with counsel's theory, to assert the prejudice of the court as ground for a change of venue.

*Id.* at 427–28 (emphasis added). The Court went on to affirm denial of the petition because the petitioning party had previously sought a conference with the judge so as "to elicit the judge's views with respect thereto" what sentence the judge was likely to impose. *Id.* at 428. Although the judge had not entered any substantive rulings, the petitioning party had succeeded in "ascertain[ing] what punishment he might receive if he pleaded guilty." *Id.* "Having sought and obtained those views, the petition came too late." *Id.*; *see also, e.g.*, *Chambers*, 9 Ill. 2d at 89 (petition for change of venue must "be filed at the earliest practical moment" so as "to preclude counsel from first ascertaining the attitude of the trial judge"); *Hader*, 207 Ill. App. 3d at 1009 (request to substitute judge properly denied as untimely where the party had been "clearly testing the temperament of the trial court" at a prior hearing).

When the legislature amended the statute in 1993, it retained the prior statutory language directing that a motion for substitution be filed "before trial or hearing begins" and before the judge "ruled on any substantial issue." And it *added* to these the requirement that the right to substitution be "timely" exercised—a provision that had not been explicitly written into prior versions of the statute, but that had long appeared in this Court's precedents. *See, e.g.*, *Lawrence*, 29 Ill. 2d at 427–28; *Chambers*, 9 Ill. 2d at 89.

As Palos agrees, this Court infers that "when the Legislature acts, it is fully aware of this Court's decisions." Br. 16 (citing *United States v. Glispie*, 2020 IL 125483, ¶ 10).

Indeed, even legislative "silence … in the face of decisions consistent with those previous decisions indicates its acquiescence to them." *Glispie*, 2020 IL 125483, ¶ 10. Here, the Legislature was not silent: It expressly adopted the "timely" requirement found in this Court's decisions. And by *adding* the "timely" requirement to the "before trial or hearing" and "ruling on a substantial issue" provisions already present, the Legislature left no doubt that the statute maintains the longstanding mandate from case law that requests for substitution be filed at the "earliest practical moment," and not after a party has tested the waters.

Palos's contrary reading of the statute erases the Legislature's "timely" requirement from the text. According to Palos, there are only "two specific textual constraints" on the right to substitution: the "before hearing or trial" and "substantial ruling" provisions in § 2-1001(a)(2)(ii). Br. 10; *see also id.* 12, 15, 33. But this reading renders the statutory term "timely" surplusage—it is either entirely redundant in light of the "before hearing or trial" and "substantial ruling" provisions, or it has no effect whatsoever. Indeed, if Palos were correct that a substitution motion can be denied only if trial or hearing has begun or the judge has ruled on a substantial issue, then the statute would function *exactly the same* as if "timely" had been removed: Substitution as of right could be had whenever "a party [~~timely~~] exercises his or her right," so long as it is "presented before trial or hearing begins and before the judge … has ruled on a substantial issue." Because it effectively excises a term from the statute, Palos's reading is impermissible. *Hirschfield v. Barrett*, 40 Ill. 2d 224, 230 (1968) (it is a "fundamental rule that each word, clause or sentence must, if possible, be given some reasonable meaning") (internal citations omitted); *accord Yang v. City of Chicago*, 195 Ill. 2d 96,

106 (2001) (court must "construe a statute so that no term is rendered superfluous or meaningless").

If the Legislature had intended for the 1993 substitution statute to exclude the timeliness requirement adopted by this Court, the Legislature could easily have written the statute that way. It could, for example, have followed the model of the voluntary dismissal statute, which states that "[t]he plaintiff may, at any time before trial or hearing begins, … dismiss his or her action or any part thereof as to any defendant." 735 ILCS 5/2-1009(a). That statute, with its strict language ("at any time before trial or hearing begins"), was strictly interpreted by this Court less than ten years before the Legislature amended the substitution statute. *See Kahle v. John Deere Co.*, 104 Ill. 2d 302, 310 (1984) (holding that voluntary dismissal was properly granted where, although plaintiff had "tested the waters" and received several adverse rulings on motions in limine on the eve of trial, "neither trial nor hearing had begun"). But the Legislature did not take that path. Instead, the substitution statute requires more generally that the right to substitution be "timely exercised," incorporating the broader timeliness requirement long recognized by this Court.

Indeed, even Palos must acknowledge that the "before trial or hearing" and "substantial ruling" provisions are not the only constraints on exercise of the substitution right. As Palos concedes, "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.'" Br. 13 n.6 (quoting *Bowman*, 2015 IL 119000, ¶ 15). As explained in *Bowman*, "though not expressly included in the statute, this court has long recognized that courts may take into consideration the circumstances surrounding a motion for

substitution of judge and may deny the motion if it is apparent that the request has been made as a delay tactic." 2015 IL 119000, ¶ 18. In other words, this Court has already rejected the notion, central to Palos's textual argument, that "the *only* conditions on a party's statutory entitlement to a change of judge 'as a matter of right' are … whether the trial court has ruled on a substantial issue in the case and whether the trial or hearing has begun." Br. 33 (emphasis added). Contrary to Palos's Brief, the "test the waters" doctrine fits comfortably within the statutory text.

**B. The "Test The Waters" Doctrine Furthers The Statute's Purposes.**

The validity of the "test the waters" doctrine is all the more clear in light of the statute's purposes. *See Bowman*, 2015 IL 119000, ¶ 13. In this Court's words, "we are constrained to give statutory language meaning that advances, rather than defeats, its purpose. Therefore, regardless of what has been said in other contexts, we will not construe section 2-1001(a)(2) in a manner that facilitates or encourages 'judge shopping,'" because among the "purposes of the statute" is the "prevention of 'judge shopping.'" *Id.* ¶¶ 12, 20.

The "test the waters" doctrine was adopted by courts specifically to further that purpose. This Court and the Appellate Court recognized that permitting a party freely to replace a judge *after* the party had the opportunity to discern the judge's views would in practice encourage judge-shopping. *See, e.g.*, *Lawrence*, 29 Ill. 2d at 427. (a "petition for a change of venue must be filed at the earliest practical moment," and not "delayed until" the judge has "indicated his views"); *Colagrossi*, 2016 IL App (1st) 142216, ¶ 39. Because avoiding judge-shopping remains the purpose of the current statute, *Bowman*, 2015 IL 119000, ¶¶ 15–16, the "test the waters" doctrine remains vital. That is why, even though *Bowman* did not address the "test the waters" doctrine directly, the Appellate

Court has understood the *Bowman* Court's articulation of the statute's purposes to support the continued validity of the "test the waters" doctrine. *See Simpson v. Knoblauch*, 2020 IL App (5th) 190439, ¶ 27; *Colagrossi*, 2016 IL App (1st) 142216, ¶¶ 35, 38–39.

Palos does not dispute, and in light of *Bowman* cannot dispute, that among the purposes of the current substitution statute is the avoidance of judge-shopping. *See* Br. 10. Instead, Palos contends that this purpose is sufficiently advanced by the "ruling on a substantial issue" provision of § 2-1001(a)(2)(ii). *Id*. It makes no difference, in Palos's view, that eliminating the "test the waters" doctrine would indisputably enable some additional instances of judge-shopping. *Id.* at 10, 18. In advancing this argument, Palos explicitly adopts the reasoning of the Fourth District in *Schnepf*. *See id.* (citing *Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶¶ 50, 53–54).

But the analysis set forth by Palos and *Schnepf* is inconsistent with this Court's decision in *Bowman*. Although the cases presented different factual circumstances, it is impossible to reconcile the Fourth District's categorical approach in *Schnepf* and this Court's purpose-driven analysis in *Bowman*. The *Schnepf* court held that "a movant's right to substitution of judge as of right is absolute, and the trial court does not have discretion to consider whether the movant had an opportunity to 'test the waters.'" 2013 IL App (4th) 121142, ¶ 48 (quoting *Ill. Licensed Beverage Ass'n v. Advanta Leasing Servs.*, 333 Ill. App. 3d 927, 933 (4th Dist. 2002)) (internal quotation marks omitted). *Bowman*, by contrast, explained that "though not expressly included in the statute, this court has long recognized that courts may take into consideration the circumstances surrounding a motion for substitution of judge," and held that the circuit court in *Bowman*

had "discretion to deny the motion for substitution of judge under the circumstances of [that] case." 2015 IL 119000, ¶¶ 18, 25.

The Fourth District in *Schnepf* further held that "the legislature has drawn a bright line with section 2-1001(a)(2)(ii)"—which requires that a motion for substitution as of right be filed "before the judge to whom it is presented has ruled on any substantial issue in the case"—and that provision alone addresses any "concern over 'judge shopping.'" 2013 IL App (4th) 121142, ¶ 54. The Fourth District "[g]ranted" that "section 2-1001(a)(2)(ii) cannot prevent all instances of judge shopping," but deemed some number of instances of judge-shopping acceptable so as to avoid "obscur[ing] an otherwise bright line." *Id.* This Court, by contrast, rejected the *Bowman* plaintiff's proposed "'bright line' rule" because it was a "narrow and literal interpretation" of the statute that would "create[] a loophole that allows the purpose of the statute to be defeated." 2015 IL 119000, ¶¶ 11, 21. Contrary to the plaintiff's argument, this Court expressly declined to "construe section 2-1001(a)(2) in a manner that facilitates or encourages 'judge shopping.'" *Id.* ¶ 20. By sanctioning judge-shopping that it acknowledged would occur under its narrow reading of the statute, the Fourth District adopted an interpretation fundamentally at odds with the statute's purpose as articulated by this Court in *Bowman*.

Indeed, if the narrow interpretation of § 2-1001(a)(2) put forward in *Schnepf* and now advocated by Palos were adopted, it would mark a substantial departure not only from the purposes of the statute that this Court identified in *Bowman,* but also from Illinois's harmonious approach to the consistent treatment of judicial substitution in other states. Only a handful of other states *ever* permit litigants to substitute the judge without cause. *See* Robert I. Berger & Jin Yan, *Substitution of Judge as of Right Is in Need of a*

*Time Restriction*, 61 Ill. State Bar Ass'n Trial Briefs No. 2, at 1 & n.8 (Sept. 2015) (noting that only six other states "have a similar substitution of judge statute"; collecting statutory citations). Each of these states imposes protective measures that constrain testing the waters—and that, if applied in this case, would have required denial of Palos's substitution motion. For example, some impose short, explicit time limits. *See, e.g.*, Alaska Stat. Ann. § 22.20.022(c) (West) (motion must be filed within five days after case is assigned to a new judge); N.M. Stat. Ann. § 38-3-10 (West) (ten days after assignment); Minn. R. Civ. P. 63.03 (ten days after assignment); Wis. Stat. Ann. § 801.58(1) (ten days after assignment). And several expressly bar substitution after the judge "has presided at a motion or any other proceeding," whether or not a substantive ruling has been made. Minn. R. Civ. P. 63.03; *see also* Wis. Stat. § 801.58(1) (similar); N.M. Rules Ann. 1-088.1(A) (similar). These states' laws reflect the fundamental principle, similarly expressed by this Court in *Bowman*, that "a litigant who does not like the way a judge is handling a matter should not be able to substitute a second judge simply because the litigant believes things are going badly before the first judge and hopes to obtain a more favorable tribunal." *State ex rel. Tarney v. McCormack*, 298 N.W.2d 552, 559 (Wis. 1980).

The Illinois General Assembly likewise imposed the requirement that a substitution may occur when the party "*timely* exercises his or her right to a substitution without cause," 735 ILCS 5/2-1001(a)(2) (emphasis added). And in *Bowman* this Court clarified that the statute will not be interpreted to allow a movant to use tactical gamesmanship (in that case, dismissing and refiling the suit) to make his motion timely. 2015 IL 119000, ¶ 4 (noting defendant's objection that plaintiff's motion was not

"timely" because of the judge's earlier rulings, including those on "disclosure of certain materials in discovery," *id*. ¶ 3). This Court's reasoning in *Bowman* therefore further harmonizes Illinois law with the commonsense, uniform position in other jurisdictions that even if without-cause substitution is permitted, judge-shopping must be prevented. Palos's position would undermine this Court's opinion in *Bowman* and the reasoning upon which it relies.

### C. The Legislative History Of § 2-1001(a)(2) Supports The "Test The Waters" Doctrine.

The legislative history of § 2-1001(a)(2) likewise compels the conclusion that the "test the waters" doctrine remains valid. Although the statute was revised in 1993, "[t]he 'testing the waters' doctrine has been good law in Illinois for the past hundred years, and nothing in the 1993 statutory amendments to the substitution statute indicates otherwise." Alex S. Moe, *Waters Dark and Deep: The Continuing Validity of the "Testing the Waters" Doctrine in Illinois*, 47 Loy. U. Chi. L.J. 1193, 1236–37 (2016).

Before the 1993 amendment, the statute enabled a party to obtain one substitution of judge (then called "change of venue") if the "party or his or her attorney fears that he or she will not receive a fair trial in the court in which the action is pending, because . . . the judge is prejudiced against him or her, or his or her attorney . . . ." Ill. Rev. Stat. 1983, ch. 110, par. 2-1001(a)(2); *see also Bowman*, 2015 IL 119000, ¶ 14. The single substantive change made when the General Assembly rewrote the statute in 1993 was to do away with the requirement that the party state a fear of prejudice. *Bowman*, 2015 IL 119000, ¶ 15. In the words of sponsoring Senator Dunn, "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." 87th Ill. Gen. Assem., Senate Proceedings, May 19, 1992, at 114–15.

Otherwise, the new law retained the requirement from the prior statute that the request for substitution be submitted "before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case," and incorporated the requirement from case law that the right be "timely" exercised. 735 ILCS 5/2-1001(a)(2)(ii).

Palos contends that the removal of the prejudice requirement also "eliminated the rationale" for the "test the waters" doctrine, because it was "the alleged-but-not-proven prejudice standard that . . . led the Court to develop the 'judge shopping' prohibition in the first place." Br. at 17, 26. Palos is wrong. "[T]he means and mechanisms of abuse remain the same under both the Venue Act and the substitution statute," and the 1993 amendment's change to "the statutory text is largely irrelevant." Moe, *supra*, 47 Loyola U. Chi. L J. at 1231 n.225. Judge-shopping poses equally grave concerns no matter what form of substitution request a party must submit. Any rule that would permit a party to replace the presiding judge upon discerning that the judge does not agree with the party's positions "'would spell the immediate demise of the adversary system,'" *Bowman*, 2015 IL 119000, ¶ 18 (quoting *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 30), whether or not the party must state a fear of prejudice in the substitution request.

Again, this Court's opinion in *Bowman* belies Palos's argument. Far from intimating that judge-shopping concerns were resolved by the elimination of the prejudice standard, the Court reiterated that "the purpose of the statute remains the same." *Bowman*, 2015 IL 1931000, ¶ 16. And among the purposes of the post-1993 statute is to prevent parties from engaging in judge-shopping. *Id.* ¶ 18. That is the

"rationale" for the "test the waters" doctrine—and *Bowman* confirms that it is still integral to the statute.

If anything, the 1993 amendment made the "test the waters" doctrine all the more necessary. A party submitting a petition for change of venue under the prior statute was required not only to "allege" a fear of judicial prejudice, as Palos says (Br. 22), but also to verify the petition "by the affidavit of the applicant," Ill. Rev. Stat. 1983, ch. 110, par. 2-1001(a)(2), (c). To be sure, the petitioning party's affidavit was not subjected to evidentiary challenge or fact-finding, but submitting sworn evidence of a fear of judicial prejudice is no mere triviality. Each petition, therefore, implicated the "principle," fundamental to an impartial justice system, "that one should not be compelled to plead his cause before a judge who is prejudiced, whether actually or only by suspicion." *Becker v. R.E. Cooper Corp.*, 193 Ill. App. 3d 459, 462 (3d Dist. 1990). Still, courts concluded that a petition for change of venue—even one supported by an affidavit stating fear of prejudice—was not properly granted if the petitioning party had tested the waters, because the judge-shopping concerns were too grave to abide. The current § 2-1001(a)(2) does not require an allegation or evidence of prejudice in a substitution motion, and therefore it removed the counterbalance to the concern of judge-shopping. The same judge-shopping concerns that supported the "test the waters" doctrine under the prior change-of-venue statute tip the scales even more decisively in favor of the "test the waters" doctrine now.

### D. Palos's Further Criticisms Of The "Test The Waters" Doctrine Are Misplaced And Without Merit.

Finally, Palos offers up a series of "policy reasons" for its requested rewrite of Illinois law. Br. 19–21. What Palos asserts as flaws of the "test the waters" doctrine are

wholly unsubstantiated. And Palos's policy preferences for how substitution motions should be adjudicated lack persuasive force, and have in any event been rejected by this Court.

First, Palos contends that the "test the waters" doctrine is too difficult to administer—supposedly leading "courts down endless rabbit holes." Br. 19–20. This concern is speculative. Illinois courts have applied the "test the waters" doctrine for over a century, without difficulty. Indeed, Palos claims that the "test the waters" doctrine "frequently" leads to "inconsistent trial and appellate court answers," Br. 11, but it fails to identify even one case in which the Appellate Court disagreed with a trial court's determination that a party moving for substitution had tested the waters.[2] For their part, counsel for Humana have found *only one* such Appellate Court decision in the nearly 30-year history of the substitution statute—and that an unpublished Rule 23 order arising from what the court deemed "unique circumstances." *City of Chicago v. Schachter*, 2020 IL App (1st) 190393-U, ¶ 24 (motion to substitute not untimely where *pro se* litigant filed it "at what he believed was the earliest practicable time," immediately after his motion to quash service was resolved and he was personally served). Having failed to materialize so far, Palos's fear that courts will suddenly face intractable difficulties in applying the "test the waters" doctrine need not concern this Court.

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[2] The Fourth District in *Schnepf* reversed denial of a substitution motion on the ground that the "test the waters" doctrine was invalid, but it did not question the circuit court's determination that the movant had in fact tested the waters. *See* 2013 IL App (4th) 121142, ¶ 58.

Palos also questions whether appellate courts have sufficient knowledge of the trial court proceedings to adequately review a "test the waters" decision. Br. 21 (citing *Gay*, 353 Ill. App. 3d at 345–46 (McDade, J., concurring)). This concern is likewise unfounded. In the long history of the "test the waters" doctrine, courts have identified clear markers in determining that a party seeking substitution has tested the waters. The first question is: did the party seek substitution "at the earliest practical moment"? *See, e.g.*, *Gay*, 353 Ill. App. 3d at 343. The trial record shows unambiguously when the judge was assigned, and when the movant sought substitution. Where the record reveals that a party has delayed filing a substitution motion, or has engaged in procedural maneuvering to manufacture and exploit additional opportunities to elicit the judge's views before seeking substitution, then the motion is untimely. *See, e.g.*, *id.* at 344 (substitution motion untimely where "this case had been before Judge Banich for several months" and movant had indisputably attended multiple pretrial conferences at which she "had an opportunity to form an opinion as to the judge's reaction"); Moe, *supra*, 47 Loy. U. Chi. L.J. at 1231 ("test the waters" doctrine is "highly effective" for "curtail[ing] unconventional abuses, where the waters have been effectively tested *on behalf of* the party seeking substitution"). A party can avoid any concern that its substitution motion will be denied by simply filing the motion "at the earliest practical moment," as the case law requires.

The second question is: does the record reflect that the party seeking substitution had an opportunity to discern the judge's views? *See, e.g.*, *In re Marriage of Abma*, 308 Ill. App. 3d 605, 612 (1st Dist. 1999) (court must analyze "the circumstances" to determine whether "the parties had an opportunity to discern the court's disposition toward the merits of the case"). This, too, is clear from the record of the hearings that

occurred before the motion to substitute was filed.[3] For example, the transcript in this case leaves no doubt that Palos not only had the opportunity to, but also did in fact, elicit the trial court's views on a substantial issue in this case. The record further reflects that Palos's opportunity was not a matter of happenstance but rather a result of its deliberate effort to ascertain the judge's views. *See* Part II, *infra*. Palos's concerns about the inability of appellate courts to say whether a party tested the waters does not rise above the hypothetical.

Finally, Palos argues that the "test the waters" doctrine should be abolished to promote "clarity," because it says determining whether the circuit court has issued a substantial ruling is more "clear" than determining whether a party has tested the waters. Br. 20–21. In other words, Palos advocates for a bright-line rule, instead of one that considers the circumstances surrounding a party's substitution motion. This Court rejected a similar argument in *Bowman*. The plaintiff there "advocate[d] for a 'bright line' rule allowing a substitution as of right," while the defendant argued that "section 2-1001(a)(2)(ii) must be construed to allow a court to consider the overall controversy between the parties. According to [the defendant], this interpretation is the only way to give effect to the purposes of the statute, which include prevention of 'judge shopping.'"

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[3] As in all cases, it is the appellant's burden to establish that the trial court's ruling was erroneous, including by providing a sufficient record. *See Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92 (1984)). If the appellant fails to provide the necessary record, denial of substitution is properly affirmed. *See Abma*, 308 Ill. App. 3d at 612–13 (affirming denial of substitution where movant attended "seven status hearings and a pretrial conference" before filing substitution motion and failed to provide a transcript or bystander's report to substantiate her claim that she had no opportunity to discern the judge's views at any of these hearings).

2015 IL 119000 ¶¶ 11–12. The Court rejected the proposed bright-line rule, reiterating that "courts may take into consideration the circumstances surrounding a motion for substitution of judge," and affirming the circuit court's "discretion to deny the motion for substitution of judge under the circumstances of [that] case." *Id.* ¶¶ 18, 25. The principles articulated in *Bowman* compel rejection of Palos's arguments here.

## II. Palos's Substitution Motion Was Untimely Because Palos Tested The Waters.

Palos's substitution motion presents an archetypal example of testing the waters. The record shows that Palos did not move to substitute at the earliest practical moment, and as a result it had ample opportunity to discern Judge Shelley's views on a major issue in the case. *Compare Gay*, 353 Ill. App. 3d at 343 ("A petition for substitution of judge must be brought at the earliest practical moment to prohibit a litigant from seeking a substitution only after she is able to discern the judge's position."). As both the circuit court and the Appellate Court unanimously held, Palos's motion for substitution was properly denied as untimely.

### A. Palos Did Not Seek Substitution At The Earliest Practical Moment.

Instead of moving for substitution at its first opportunity, Palos engaged in procedural maneuvering to obtain an additional opportunity to elicit Judge Shelley's views on the discovery master's recommendation. *See Bowman*, 2015 IL 119000, ¶ 25 (Section 2-1001 "is designed to prevent" "procedural maneuvering" that enables a party to seek substitution after it discerns the judge's views on a case). The parties first learned that Judge Shelley had been assigned to the case on March 21, 2017. Judge Sullivan had previously been appointed as a discovery master, and that day the court held a hearing on his recommendation that Palos be ordered to produce evidence about its expected

reimbursement rates from Humana. Palos "had the opportunity to present a motion for substitution of judge as of right" at or promptly after that hearing, *id.*—but it did not.

At the conclusion of the March 21 hearing, Judge Shelley entered a schedule for briefing of objections to Judge Sullivan's recommendation, including a hearing on May 12. Palos advised at the March 21 hearing that it intended to object in the briefing both to Judge Sullivan's appointment (as invalid) and his recommendations (as wrong). A-33. However, instead of briefing these objections on the schedule set by the court, Palos filed *both* written objections *and* a separate written motion to strike Judge Sullivan's appointment. A-8 ¶ 26; C 10243 V3. Because Palos filed a separate motion to strike, the parties appeared before Judge Shelley again for a presentment hearing on the motion on April 13. Palos could have moved for substitution before the presentment hearing, but instead its counsel attended the hearing and further discussed the discovery recommendation with Judge Shelley. Through this procedural maneuvering, Palos obtained an additional opportunity to discern Judge Shelley's views on the recommendation to compel production of the disputed records. When Palos finally moved to substitute Judge Shelley after participating in both the March 21 and April 13 hearings, its motion came too late.

**B. Palos Discerned Judge Shelley's Views On A Critical Issue.**

At the two hearings Palos attended before Judge Shelley, it had the opportunity to discern her "opinion on a substantive matter which goes to the heart of the case"—namely the discovery master's recommendation that Palos be required to produce materials showing "whether the plaintiff and defendant operated as if only the new agreement controlled." A-75. At the first hearing, after Palos's counsel detailed Palos's objections to the recommendation and to Judge Sullivan's appointment, A-33, Judge

Shelley observed (1) that she would likely follow Judge Tailor's procedure of relying on the special master, A-34; (2) that it was her "position right now that I would like for [Judge Sullivan] to remain involved in these proceedings," A-35; and (3) that "there is precedent" for a circuit court to use a special master for discovery issues, A-36. Similarly, at the April 13 hearing, after Palos's counsel further detailed its objections, Judge Shelley reiterated her view that "there is some precedent for a judicial officer to seek assistance in matters of this nature," A-58, and that she had already done a "preliminary review" of the issue and "was not shocked by the position that" Judge Tailor had taken in appointing Judge Sullivan, A-61. At both hearings, Palos initiated a colloquy on Judge Sullivan's appointment and recommendation, and at both hearings, Judge Shelley indicated her views on the issues in response. "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-10 ¶ 29 (quoting C 10649 V4).

Palos does not dispute that it failed to seek substitution at the earliest practical moment, or that it could discern Judge Shelley's views at the two hearings. Instead, Palos argues that it did not test the waters because it "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," which it characterizes as a "purely procedural" issue. Br. 29–31. This argument is factually and legally incorrect.

Factually, Palos *did* explicitly state its objections to the content of Judge Sullivan's recommendation, arguing that the recommendation was wrong because it was

"effectively . . . an order of reconsideration on Judge Tailor's ruling of September 1st."[4] A-33. Judge Sullivan responded that he was not "reconsidering any Judge's order," but was "making a recommendation based on the transcripts and the other things." A-35. Responding to Judge Sullivan, Judge Shelley again acknowledged that "there is precedent" for a trial court to appoint a discovery master to make such recommendations. A-36.

Palos is also wrong to suggest that Judge Shelley's statements implying she would accept the appointment of Judge Sullivan went to "a purely procedural discovery issue," Br. 32, and not to the substance of the recommendation. Palos itself represented during the April 17 hearing that the validity of Judge Sullivan's appointment and Palos's objections to the substance of Judge Sullivan's recommendation were "intimately tied" to one another, A-56—and Judge Shelley cited this representation in her later order denying reconsideration of the substitution order, A-73. In addition, "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 objection to the contents of Judge Sullivan's recommendation letter." A-10–11 ¶ 30. Patently, Palos sought to strike Judge Sullivan's *appointment* in order to prevent Judge Sullivan's *recommendation* from being accepted. *See* Sup R 2554 (statement of Judge Shelley: "There is no question in my mind that had the recommendations gone the other way, plaintiff would probably not be as vocal on this

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[4] This is exactly what Palos argued in its written objections to Judge Sullivan's recommendation—*not* in its motion to strike Judge Sullivan's appointment as unconstitutional. *See* C 10273 V4 (heading of first argument: "Judge Sullivan's Recommendation Calls for Reconsideration of the Court's Order").

issue."). When Palos discerned at the hearings that Judge Shelley was "reluctan[t] to strike the discovery master," that "implied that the court would accept his report.'" A-10 ¶ 29. Indeed, in the end, although Judge Shelley concluded that Judge Sullivan's appointment was invalid, she did agree with the substance of his recommendation, and ordered Palos to disclose the critical information shortly thereafter. C 10770 V4.

This case is therefore completely unlike *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036 (1st Dist. 2001), on which Palos relies (Br. 30–31). In *Nasrallah*, the circuit court concluded that its order setting a physician's testifying fee was a ruling on a "substantial issue" because the amount of the fee was large in comparison to the damages sought in the case. 326 Ill. App. 3d at 1039. The Appellate Court reversed because the order setting the fee "did not relate to the merits of the case." *Id.* In contrast to *Nasrallah*, the colloquy regarding Judge Sullivan's appointment and recommendation allowed Palos to discern Judge Shelley's inclination with respect to a "discovery ruling" that would "decide what is relevant to the case"—namely, evidence demonstrating that Palos had always understood the Direct Contract to control its relationship with Humana. *Safeway Ins. Co. v. Ebijimi*, 2018 IL App (1st) 170862, ¶¶ 33, 35. Illinois law—as indicated most notably by this Court in *Bowman*—makes clear that this is a "substantial issue[s]" for purposes of the substitution-of-judge statute. *Id.*; *see also Bowman*, 2015 IL 119000, ¶¶ 3, 25 (ruling on "disclosure of certain materials in discovery" constituted a "substantial issue"). By eliciting Judge Shelley's views on Judge Sullivan's recommendation at the two hearings, Palos tested the waters, and its motion for substitution was properly denied as untimely.

## III. Even If The Court Concludes That Substitution Should Have Been Granted, It Should Affirm The Judgment.

For the reasons set forth above, the Court should reaffirm the validity of the "test the waters" doctrine and affirm the judgment for that reason. But the Court should affirm even if it concludes that substitution should have been granted. An erroneous denial of the substitution motion here should not invalidate the circuit court's subsequent orders or the final judgment.[5]

Palos argues that every order following the substitution denial is "void," so that Palos gets a complete "do-over" of the summary judgment ruling, the spoliation finding, the sanctions award, the trial, the appeal to the First District, and every other order and proceeding in between. Br. 21. Palos is correct that the Appellate Court has held that all trial court orders following an improper denial of substitution under § 2-1001(a)(2) are "void." Br. 28 (citing cases). Under the prior statute, which required that petitioners submit an affidavit demonstrating fear of judicial prejudice, this Court also held that orders following an improper denial of change of venue were void. *See In re Dominique F.*, 145 Ill. 2d 311, 324 (1991). But this Court has yet to address the question under the current statute authorizing without-cause substitution. The 1993 amendment removing the prejudice requirement, as well as this Court's recent statements regarding "voidness," compel a different conclusion now.

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[5] This Court may, of course, affirm the judgment on any basis supported in the record. *See* Ill. S. Ct. R. 318(a); *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 74; *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 258 (2006).

Under current law, this Court should hold that orders following an improper denial of substitution are not void, and are instead to be reviewed to determine whether any error substantially prejudiced the party seeking substitution. The judgment should be permitted to stand where—as here—the record decisively supports a conclusion that the denial of substitution did not affect the outcome, and vacatur of subsequent orders would be highly prejudicial to the non-moving party.

### A. Under Current Law, Orders Following Improper Denial Of Substitution Of Judge Are Not "Void."

In the change of venue statute that existed before the 1993 amendment, Illinois litigants could seek a substitution of judge only for cause—that is, with an affidavit attesting that the party petitioning for a change of venue had a fear that the presiding judge was prejudiced against the litigant or his or her attorney. *See* Ill. Rev. Stat., ch. 110, ¶ 2-1001 (1991). "The salutary principle" behind the law was "that one should not be compelled to plead his cause before a judge who is prejudiced, whether actually or only by suspicion, and the right of removal [was] mandatory if made in apt time and from a single judge in a civil suit." *Am. State Bank*, 55 Ill. App. 3d at 128.

In those circumstances—where the petition for change of venue was premised on a fear of judicial prejudice—courts concluded that orders were void if issued after an improper denial of a request to change venue. *See, e.g.*, *Talbot v. Stanton*, 327 Ill. App. 491, 496–97 (1st Dist. 1946). The reason was that the judge who incorrectly denied the petition was feared to be prejudiced, casting all subsequent orders in doubt. As the Appellate Court explained, every litigant

> has the right to be tried by a judge that is fair and impartial, and when he has good reason to believe, supported by facts, that he will not afford him such trial, he should not be compelled to take chances of a trial before that judge in

> order that the truth of the matter may be developed, because there are many ways that a partial or prejudiced judge may knife a party that he is trying without it appearing from the record or without his being able to ascertain the fact.

*Id.* (reversing denial of petition for change of venue and ordering that subsequent orders be rescinded) (quoting *Massie v. Commonwealth*, 20 S.W. 704 (Ct. App. Ky. 1892)). For these reasons, there was no requirement to demonstrate "error in the subsequent proceeding." *Id.* at 496. Instead, to avoid the risk that unfair judicial prejudice would infect the proceedings, all subsequent orders were deemed void.

When the statute was amended in 1993 to permit substitution of judge *without* an assertion of prejudice, this justification for declaring subsequent orders void was eliminated. And nothing in the current statute speaks to the treatment that subsequent orders, issued after an improper denial of substitution, should receive. Nonetheless, the Appellate Court has continued to apply the "void" rule in cases under the new substitution statute—without discussing this change in the law. *See, e.g.*, *In re Marriage of Crecos*, 2015 IL App (1st) 132756, ¶ 29 (citing *Dominique F.*, 145 Ill. 2d at 324, a case decided under the prior change of venue statute, for the proposition that "all orders filed after [the improper denial of a] motion for substitution are void"); *Rodisch v. Commacho-Esparza*, 309 Ill. App. 3d 346, 351 (2d Dist. 1999) (similar).

A second development undermining the "void" rule in substitution cases is this Court's clarification of the limited circumstances in which orders are properly deemed "void," rather than merely "voidable." "[W]hether a judgment is void or voidable presents a question of jurisdiction. If jurisdiction is lacking, any subsequent judgment of the court is rendered void and may be attacked collaterally. A voidable judgment, on the other hand, is an erroneous judgment entered by a court that possesses jurisdiction."

*LVNV Funding, LLC v. Trice*, 2015 IL 116129 ¶ 27 (quoting *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174 (1998)) (internal quotation marks and citations omitted). This Court has explained that, since the Illinois Constitution was amended in 1964, "circuit court jurisdiction is granted by the constitution," not by statute, and therefore "failure to satisfy a certain statutory requirement or prerequisite can[not] deprive the circuit court of its 'power' or jurisdiction to hear a cause of action." *Id.* ¶ 30 (citing *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 529–32 (2001)). In short, orders that do not satisfy statutory requirements may be erroneous, but they do not deprive the circuit court of jurisdiction—and thus do not render the court's subsequent judgment "void."

Applying these principles here, a circuit court's failure to satisfy the statutory requirements of § 2-1001(a)(2) does not deprive the court of jurisdiction—and orders following an improper denial of substitution are therefore not "void." Indeed, this Court suggested "support for this view" in *In re Estate of Wilson*, 238 Ill. 2d 519, 568 n.14 (2010). In that case, which addressed substitution for cause under § 2-1001(a)(3), the Court wrote that "[a]n argument could be made . . . that the erroneous denial of a motion for substitution should render subsequent orders voidable rather than void." *Id.* (citing *Musolino v. Checker Taxi Co.*, 110 Ill. App. 2d 42, 46-47 (1st Dist. 1969)). But resolution of the voidness question was not necessary to the case, and so the Court did not resolve it. *Id.*; *see also Vill. of E. Dundee v. Vill. of Carpentersville*, 2016 IL App (2d) 151084, ¶ 18 (stating that "the voidness of such orders" issued after improper denial of substitution "is called into question by *LVNV Funding, LLC v. Trice*," but vacating subsequent orders on the circumstances presented) (citations omitted).

Because motions for substitution under the current § 2-1001(a)(2) do not raise concerns of judicial prejudice, and because improper denials of substitution under § 2-1001(a)(2) do not deprive the circuit court of jurisdiction, the decisions of the Appellate Court declaring "void" all orders and judgments entered after an improper denial of substitution under § 2-1001(a)(2) lack support in the law. To the extent it becomes necessary to reach this question, the Court should retire the "void" rule.

**B. The Judgment In This Case Should Not Be Vacated.**

Because orders issued after an erroneous denial of substitution are not per se void, the reviewing court must determine if the denial of substitution constitutes reversible error. "It is not every error, of course, that will require a reversal. Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment or decree will not be disturbed." *J.L. Simmons Co., Inc. ex rel. Hartford Ins. Grp. v. Firestone Tire & Rubber Co.*, 108 Ill. 2d 106, 115 (1985) (internal quotation marks and citation omitted); *accord Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 364 (2002). "The burden is on the party seeking reversal to establish prejudice." *Fellows v. Barajas*, 2020 IL App (3d) 190388, ¶ 16.

A review of the record in this case confirms that the denial of substitution did not affect the outcome, as judgment would have been entered in favor of Humana without regard to which judge was presiding. Moreover, vacating the judgment and all orders following the substitution ruling would effect substantial prejudice against Humana and impose unnecessary costs on the judicial system.

**1. Any Error Was Harmless.**

First, Palos cannot establish prejudice from the fact that Judge Shelley, rather than another circuit court judge, presided over the case below. Palos did not assert any fear of prejudice by Judge Shelley in its motion for substitution, C 10638-39 V4, nor has Palos shown or even suggested in the many years of litigation since that Judge Shelley exhibited prejudice. And the Appellate Court has already rejected Palos's arguments that Judge Shelley erred. Palos's sole argument here is that the judgment should be invalidated because a different individual should have adjudicated the case—not because of any alleged flaw in Judge Shelley's conduct or rulings.

In comparable cases in the criminal context, this Court has held that having the wrong individual adjudicate the case is—in the absence of any showing of bias—harmless error. In *People v. Rivera,* for example, the Court held that a judge's improper denial of the defendant's peremptory challenge to a juror was harmless. 227 Ill. 2d 1, 20 (2007), *aff'd sub nom, Rivera v. Illinois*, 556 U.S. 148 (2009). The Court explained: "While trial before a biased tribunal *would* deprive a defendant of a substantial right and constitute structural error, there is no evidence that defendant was tried before a biased jury, or even *one* biased juror. He does not suggest that Gomez [the juror in question] was subject to excusal for cause." *Id.*. The Court rejected the defendant's argument "that harmless-error analysis cannot apply here because 'Gomez's presence on the jury cannot be qualitatively assessed for harm.'" *Id.* To the contrary, the Court opined, if the evidence shows that "no rational jury—or juror—would have acquitted defendant of the offense then Gomez's presence on the jury cannot be said to have prejudiced him." *Id.* at 22. The Court's review of the record confirmed that the error was harmless, and the conviction was affirmed. *Id.* at 26.

Likewise, in *People v. Thurow*, the Court held that it was harmless error for the judge rather than the jury to find the facts necessary to impose a sentencing enhancement. 203 Ill. 2d 352 (2003). The Court acknowledged that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the defendant was entitled to have a jury find all facts necessary for an enhanced sentence. *Thurow*, 203 Ill. 2d at 360–61. But there was no suggestion that the judge was biased, and the record evidence strongly supported the judge's finding. *Id.* at 365–69. In these circumstances, having the wrong adjudicator make the finding was harmless error. *Id.* at 369.

So too here. The record overwhelmingly confirms that judgment on Palos's contract claim was properly entered in favor of Humana, and any error in the denial of substitution was harmless. For example, the contractual history between the parties demonstrates that Palos consistently and repeatedly agreed to enter into the Direct Contract with Humana, and to accept payment for care of Humana PPO members under the terms of that Direct Contract.[6] The evidence from Palos's own documents and

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[6] *See, e.g.*, Sup E 3375 (Palos consenting in 1991 to assignment of its Direct Contract with the Michael Reese Health Plan, Inc. to "Humana Health Plan, Inc. or its affiliates (collectively referred to as 'Humana')); Sup E 3376 (Palos agreeing in 1991 to expand the Direct Contract "to provide covered medical services . . . to members enrolled in Humana Health Care Plans Preferred Provider Organization ('PPO')"); Sup E 3381 (2004 amendment signed by Palos agreeing that the Direct Contract was between Palos and "Humana Health Plan, Inc. or its affiliates (collectively referred to as 'Humana'); Sup E 3384 (2005 amendment agreeing that the Direct Contract was between Palos and HUMANA Health Plan, INC., HUMANA Health Chicago, INC., HUMANA Insurance Company and HUMANA Health Chicago Insurance Company and their affiliates (collectively referred to herein as 'HUMANA')"); Sup E 3390 (2008 amendment listing Humana Insurance Company as a party to the Direct Contract, with Palos agreeing to bill and accept as payment in full from HUMANA the lesser of the rates as set out below or [Palos's] usual and customary charges" for medical services "provided to all HUMANA Members"); Sup E 3395 (same in 2009).

witnesses further confirmed that throughout the period at issue, Palos understood that the Direct Contract—not the ChoiceCare Agreement—controlled the reimbursement rates it would receive for treatment of Humana PPO members, and Palos therefore accepted Direct Contract rates for treatment of Humana PPO patients.[7] Whichever circuit court judge was presiding, the evidence would have been no different—and would have compelled judgment for Humana.

Indeed, this is clear from the agreement of both the jury and the Appellate Court that Palos's claim failed. After reviewing the overwhelming evidence in favor of Humana, twelve jurors unanimously found that Palos failed to prove liability on its contract claim. C 17952–53 V9. And three Appellate Court Justices unanimously affirmed—ruling on *de novo* review that Palos had failed to identify any error in the circuit court's ruling with respect to interpretation of the Direct Contract. *See* A-12–13 ¶¶ 34–35. Each of these decisions reflects an independent assessment—separate from Judge Shelley—that Palos's contract claim lacked merit. Even if the denial of substitution was erroneous, Palos cannot show that it affected the outcome of the case.

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[7] *See, e.g.*, Sup E 3423 (Palos internal billing guide showing that it used discounts based on Humana Direct Contract—not ChoiceCare discounts—in billing for care of Humana PPO patients); R4008 (testimony from Palos's Director of Financial Services that Palos recognized that reimbursement rates for Humana PPO patients came "from a different contract" from the ChoiceCare rates); R 4478 (internal email between Palos employees recognizing that Humana PPO patients were to be billed under the Direct Contract, not the ChoiceCare contract, because the Humana Direct Contract "would always override unless ChoiceCare is on the card solely").

### 2. Vacating The Judgment Would Impose Substantial Harms On Humana And The Judicial System.

While Judge Shelley's role in the case had no prejudicial effect on Palos, vacatur of the judgment would impose substantial harms on Humana—well beyond the cost and burden of relitigating Palos's meritless claim—and waste judicial resources. For this reason as well, the judgment should be affirmed.

First, among the orders that Palos seeks to nullify is the circuit court's order imposing monetary sanctions on Palos. *See* SA-001–05. In that order, after concluding that Palos had intentionally withheld and spoliated material evidence in violation of its discovery obligations, Judge Shelley ordered Palos to reimburse Humana for "the time and effort it has spent in obtaining the involuntary disclosure of JDA's consulting services, and the destruction 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." SA-004. This amounted to $309,622.83 in fees and costs, C 20292 V10, which award the Appellate Court affirmed, A-16 ¶ 45. Significantly, this was not the typical cost of litigation, but expenses that Humana incurred *only* because Palos engaged in sanctionable discovery misconduct. Palos should not be permitted a "do-over" of the order requiring it to make Humana whole for the harms imposed by Palos's unlawful concealment and destruction of relevant evidence.

Second, forcing Humana to relitigate Palos's meritless claim now—nearly three years after the first jury trial and more than 15 years after the conduct at issue—risks prejudicing Humana because material evidence may no longer be available due to the passage of time. *See, e.g.*, *United States v. Mohawk*, 20 F.3d 1480, 1486 (9th Cir. 1994)

(prejudice may include "impairment of [a party's] legal position" due to delay, including where witness testimony has become unavailable). Indeed, it is already known that Palos ordered the destruction of relevant records addressing the central issue in the case: Palos's reimbursement rates for treatment of Humana PPO members. Other records or witnesses have almost certainly become unavailable as well. The "do-over" Palos asks for will necessarily be tried on a less clear, less complete record.

Third, requiring that Palos's contract claim be relitigated would impose immense burdens on the judicial system. Judge Shelley presided over this case for more than two years, during which she issued countless orders, held dozens of hearings, and oversaw a complicated jury trial. The jurors stepped away from their private lives for two weeks, performed their civic duty, and rendered a unanimous verdict on the evidence presented. The Appellate Court reviewed a record of more than 20,000 pages and affirmed the judgment in a 24-page published opinion. Moreover, the rulings below were correct applications of the binding law of the First District at the time they were entered. Requiring the courts to hear and Humana to defend Palos's meritless contract claim anew, and requiring Humana to seek again to be made whole from Palos's past discovery misconduct, would impose far more cost than can be justified by a ruling on substitution that did not affect the outcome and was correct under then-governing law. *Cf. Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶¶ 67–68 (where taxpayer relied on a then-governing regulation in withholding tax payment, but this Court held the regulation invalid, the Court declared the regulation invalid prospectively, and ordered the taxpayer's penalties and past tax liability abated).

To be clear, eliminating the legally unsupported "void" rule does not mean that the right to substitution under § 2-1001(a)(2) will go unenforced. This Court can be "confident" that "judges will undertake their review of substitution petitions conscientiously and in accordance with the law." *Wilson*, 238 Ill. 2d at 568. Thus, where a party timely exercises its right and satisfies the other requirements of § 2-1001(a)(2), substitution will be granted. In the rare event that a judge erroneously denies substitution under § 2-1001(a)(2), then the party who sought substitution may still obtain a "do-over" when it can show a likelihood that the denial of substitution influenced the outcome. This will be an easier showing to make in a case with a less extensive record than the one presented here—or in a case, unlike this one, where the outcome has not been separately ratified by twelve jurors and three Appellate Court Justices. Moreover, 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.

Palos acknowledges that the "consequences" of its requested relief are "extreme." Br. 13. But, Palos says, "given the statutory right, they must be." *Id.* Not so. The statute confers a right to seek substitution of judge without cause—but it says nothing of how reviewing courts should address an improper denial of substitution. In a case like this one, where the record demonstrates that the denial of substitution did not affect the outcome, and where vacatur of the judgment would impose substantial hardship on the parties and the judicial system, neither the statute nor this Court's prior rulings support disturbing the judgment.

## CONCLUSION

For the reasons set forth above, the Court should affirm the judgment because the longstanding "test the waters" doctrine remains valid, and Palos's motion for substitution

was untimely after Palos had tested the waters. If the Court concludes that substitution was improperly denied, it should affirm the judgment because any error was harmless. If the Court does not affirm, it should at a minimum remand to the Appellate Court with instructions to determine in the first instance whether Palos can establish substantial prejudice from the denial of substitution.

Dated: December 23, 2020

Respectfully submitted,

HUMANA INSURANCE COMPANY,

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NO. 126008

**IN THE SUPREME COURT OF ILLINOIS**

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|---|---|
| PALOS COMMUNITY HOSPITAL, a not-for-profit community hospital,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>HUMANA INSURANCE COMPANY,<br><br>Defendant-Appellee. | On Petition for Leave to Appeal from the Illinois Appellate Court, First Judicial District, No. 1-19-0633.<br><br>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. |

**SEPARATE SUPPLEMENTARY APPENDIX OF DEFENDANT-APPELLEE**

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SUPREME COURT CLERK

## TABLE OF CONTENTS TO DEFENDANT-APPELLEE'S SUPPLEMENTARY APPENDIX

**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., and ADVOCATE HEALTH CARE.** | ) | |
| **Defendants** | ) | |

**ORDER ON HUMANA'S AND ADVOCATE'S MOTION FOR DISCOVERY SANCTIONS AGAINST PALOS**

**THIS MATTER** having come on to be heard on defendants Humana, Inc., Humana Insurance Company, Inc., Humana Health Plan, Inc., and Advocate Health Care's ("defendants") motions for discovery sanctions and spoliation against plaintiff Palos Community Hospital ("Plaintiff" or "Palos");

And the parties having appeared through their respective attorneys, and having presented memorandums in support of and in opposition of said motions, along with supporting affidavits;

And Attorney Corby Bell, Chief Operating Officer and General Counsel for JDA, having testified in open court;

And the court having heard argument and received additional documents, and being fully advised in the matter;

And the court having made oral pronouncements and findings which are incorporated into and made part of this order;

**THE COURT HEREBY FINDS THAT:**

A. Around 1990 Palos contracted with the Michael Reese Health Plan/HMO (Michael

Reese HMO). Palos was entitled to receive reimbursement for patient services at HMO rates. Subsequent modifications to the agreement were made, Michael Reese ceased operation and Humana assumed Michael Reese's HMO contract.

B. Around 2002 the Choice Care Network PPO was created by Humana. Humana negotiated with Palos reduced rates for its clients being serviced under this new PPO plan. Advocate negotiated directly with Humana for its employees' coverage under the same plan. The PPO rates were higher than the rates for patients grandfathered in under the old Michael Reese HMO. Palos serviced patients under the HMO and PPO plan. In dispute is whether Humana and Advocate reimbursed Palos for patient services at a lesser rate than agreed upon.

C. During the course of this litigation protracted and heated disputes have arisen regarding the production of information. In 2015 Palos was requested to identify anyone providing professional consulting services, claim auditing, billing services, verification of eligibility or benefits relevant to the lawsuit, including all ESI databases, SQL databases, Excel files, text files, word documents and log files concerning or in any way relating to the facts or circumstances pertinent to this matter or to the litigation. On October 14, 2016 Judge Sanjay Tailor became so frustrated with the parties that he sua sponte entered an order appointing the Honorable James Sullivan (Ret.) to oversee all pending discovery and charged the parties with his cost.

D. JDA is a third-party auditor hired by Palos to create databases which allowed for the production of daily reports so that Palos could verify reimbursements based on Palos' payors' contracts, including Humana from August 2005 to August 2016. JDA utilized a proprietary system or software referred to as Parathon. Downloaded into Parathon were the various actual contract reimbursement terms, including the pricing amounts. A data file was created for every payor contract. Parathon could distinguish between a Choice Care Rate and a Michael Reese rate of payment.

E. It is undisputed that around August 4, 2016 Palos met with JDA and advised JDA for whatever reason that it would no longer use Parathon for contract billing management. Around October 15, 2016 Palos instructed JDA to "permanently delete our date and provide certificate verifying that this has been completed." On February 24, 2017 Palos asked JDA if the data had been removed. On April 7, 2017 Palos asked for confirmation that all of its data had

been deleted. On April 24, 2017 JDA advised Palos that they had started the deletion process, and on April 28, 2017 JDA issued a Certificate of Data Destruction.

F. 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. At no time did Palos reveal that it was directing an undisclosed consultant to destroy data during the pendency of discovery motions to compel production of information.

G. The court finds that this information should have been disclosed in response to earlier discovery and is relevant and probative as to the issues in controversy in this litigation.

H. Spoliation of evidence is the intentional, reckless, or negligent withholding, hiding, altering, or destroying of evidence relevant to a legal proceeding.

I. Illinois Supreme Court Rule 219 (c) grants the trial court the discretion to impose a sanction, including dismissal of the cause of action after weighing the factors set forth in *Shimanovsky v. GMC*, 181 Ill. 2d 112, 120 (1998).

1. As to the first factor, the court finds that Humana and Advocate were caught by surprise after more than four years of litigation to discover that the JDA consultants were auditing payments.
2. As to the diligence in seeking the discovery, the court finds that Humana and Advocate were diligent in their discovery efforts.
3. As to the timeliness of bringing the matter to the court's attention, the court finds that Advocate and Humana were timely in bringing the issue to the court's attention.
4. As to the good faith factor the court considered whether Palos plainly and deliberately destroyed the evidence, or whether it should simply be inferred as a deliberate destruction because of the circumstances, or was Palos simply negligent in destroying the documents by accident. Obviously Palos, and not just the attorneys, knew of the litigation because Palos initiated the lawsuit. There is evidence that a Ms. Henderson of JDA provided payor summaries in October 2013 in connection with the lawsuit. Advocate's Exhibit No. 12. The referenced sequence of events with JDA, coupled with the fact that the attorneys were having Palos' officers sign affidavits as to the accuracy and completeness of discovery responses during the same period of time that it

was demanding that JDA destroy data, clearly establishes that Palos plainly and deliberately destroyed the information. Also relevant, is that after being ordered to produce JDA data, Palos did not disclose until months later that the data had been destroyed at its direction.

5. As to the nature of the information and prejudicial effect, this court cannot find that the prejudicial effect of the deleted data is so prejudicial to Humana and Advocate that the dismissal of Palos' cause of action in total is warranted. Dismissal of a law suit under Rule 219(c) is a sanction to be applied rarely. However, the court finds that the nature of the destroyed evidence included certain notes and communication that arguably could have gone to Palos' state of mind during the payment period, and cannot be recreated.

J. In accordance with Illinois Supreme Court Rule 219(c), the court finds that Advocate and Humana are entitled to be compensated for the time and effort it has spent in obtaining the involuntary disclosure of JDA's consulting services, and the destruction 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.

K. Advocate and Humana have established that the data was under the control of Palos and could and should have been produced, but was not equally available to Humana and Advocate; and 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. The giving of an adverse inference instruction as found in Ill. Pattern Jury Instructions Civ. 5.01 is appropriate under the facts of this case. The exact wording of the instruction is reserved for further ruling.

**WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED:**

**I.** Humana, Inc., Humana Insurance Company, Inc., Humana Health Plan, Inc., and Advocate Health Care's ("defendants") motions for discovery sanctions and spoliation against plaintiff Palos Community Hospital ("Plaintiff" or "Palos") is **GRANTED.**

4296
9269
4251

4251-D

**II.** Defendants are awarded their attorneys' fees and costs as detailed above upon presentation and approval of their fee petitions. The fee petitions shall be filed on or before the scheduled April 30, 2018 trial conference. 4253-D

**III.** The defendants shall submit to the court on or before the trial conference a proposed 5.01 instruction.

**IV.** Motions for Summary Judgment shall be filed on or before April 27, 2018. 4231 P+D P+D

**V.** Responses to Motions for Summary Judgment shall be filed on or before May 18, 2018. 4231 P+D

**VI.** Replies in support of Motions for Summary Judgment shall be filed on or before May 30, 2018. 4231

**VII.** The **TRIAL CONFERENCE** date of **April 30, 2018** and the **TRIAL DATE of JUNE 4, 2018** stand. 4335

**Judge Diane M. Shelley**

SAP. APR 09 2018

**Circuit Court – 1925**

**ENTERED:**
**Judge Diane M. Shelley #1925**
**April 9, 2018**

## 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, 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 12,902 words.

*/s/ Tacy F. Flint*
Tacy F. Flint

NO. 126008

**IN THE SUPREME COURT OF ILLINOIS**

| | |
|---|---|
| PALOS COMMUNITY HOSPITAL, a not-for-profit community hospital,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>HUMANA INSURANCE COMPANY,<br><br>Defendant-Appellee. | ) On Petition for Leave to Appeal from<br>) the Illinois Appellate Court, First<br>) Judicial District, No. 1-19-0633.<br>)<br>) There Heard on Appeal from the<br>) Circuit Court of Cook County,<br>) Illinois, County Department, Law<br>) Division, No. 13 L 7185. The<br>) Honorable Diane M. Shelley, Judge<br>) Presiding. |

**NOTICE OF FILING AND PROOF OF SERVICE**

I, Tacy F. Flint, an attorney, hereby certify that on December 23, 2020, I caused the foregoing Defendant-Appellee Humana Insurance Company's Response Brief and Separate Supplementary Appendix of Defendant-Appellee to be electronically filed and served upon the Clerk of the Supreme Court of Illinois. I further certify that on December 23, 2020, I caused a true and correct copy of the foregoing to be served via e-mail upon counsel for the Plaintiff-Appellant listed below.

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

*/s/ Tacy F. Flint*
Tacy F. Flint

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/ Tacy F. Flint*
Tacy F. Flint