

1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF MCHENRY)

3 IN THE TWENTY-SECOND JUDICIAL CIRCUIT
4 MCHENRY COUNTY, ILLINOIS

5 PAUL DULBERG,)

6 Plaintiff,)

7 vs.)

No. 17 LA 377

8 THE LAW OFFICES OF THOMAS)

9 J. POPOVICH, P.C., and)

HANS MAST,)

10 Defendants.)

11 ELECTRONICALLY RECORDED Report of
12 Proceedings had in the above-entitled cause before
13 The Honorable Thomas A. Meyer, Judge of the Circuit
14 Court of McHenry County, Illinois, on the 10th day of
15 February, 2020, in the Michel J. Sullivan Judicial
16 Center, Woodstock, Illinois.

17 APPEARANCES:

18 LAW OFFICE OF ALPHONSE A. TALARICO, by:
19 MR. ALPHONSE A. TALARICO,
Appearing via videoconference,

20 on behalf of the Plaintiff,

21 KARBAL COHEN ECONOMOU SILK & DUNNE, LLC, by:
22 MR. GEORGE K. FLYNN,
Appearing via videoconference,

23 on behalf of the Defendants.
24

1 THE COURT: Do we have everybody on Dulberg?

2 A VOICE: (Inaudible), Your Honor.

3 MR. FLYNN: I think we do, Your Honor. George Flynn
4 for the defendants, moving.

5 THE COURT: Okay. And for the plaintiff?

6 MR. TALARICO: Alphonse Talarico, Your Honor. Good
7 morning. Good morning, Mr. Flynn.

8 MR. FLYNN: Good morning, counsel.

9 THE COURT: And here in court we've got --

10 MR. DULBERG: Mr. Dulberg.

11 THE COURT: Mr. Dulberg's here.

12 And we're here on defendants' motion; am I
13 correct?

14 MR. FLYNN: That's correct, Your Honor.

15 THE COURT: All right. In a nutshell, defense
16 counsel, can you explain your position.

17 MR. FLYNN: Sure. Thank you, Your Honor.

18 Mr. Dulberg has placed his communications with
19 his prior lawyer, Thomas Gooch, at issue in this case.
20 Plaintiff has admitted that it filed its complaint --
21 I'm sorry, plaintiff has filed its complaint more than
22 two years after my clients, his former lawyers, the
23 Popovich firm, withdrew or were terminated from his
24 representation. That's not at issue.

1 He has placed the discovery rule at issue in
2 his complaint and his amended complaints. However, he
3 has failed to answer initial discovery, he has failed to
4 respond -- or answer properly questions at his
5 deposition regarding discovery of his malpractice and
6 his understanding of damages related to the Popovich's
7 alleged malpractice. We served supplemental discovery,
8 which is somewhat duplicative of what was previously
9 served, and that was on July 2nd after his deposition.
10 He hasn't even answered it.

11 The response does nothing to address those
12 issues or object to the discovery that's been
13 propounded, so I would request that he be forced at a
14 minimum to answer this discovery, that any objection be
15 overruled, and essentially that the communications
16 between Dulberg and Mr. Gooch be produced in whatever
17 form. And to the extent that a subpoena to The Gooch
18 Firm would be necessary at a later date, I would rather
19 take it one step at a time and analyze whatever it is
20 that Mr. Dulberg produce. So, in a nutshell, that's the
21 motion.

22 I didn't know that we'd have to have a hearing.
23 I thought that these would be responded to or at least
24 objected to, but here we are.

1 THE COURT: Okay. Plaintiff's counsel?

2 MR. TALARICO: Let's see, Your Honor,
3 (indiscernible) to start with, I think this is a
4 two-step analysis. I hope the court sees it the same
5 way. I think it should be looked upon as a 2-619 motion
6 and at the same time a -- the question of whether there
7 was a waiver of the attorney-client privilege under Rule
8 of Evidence 502.

9 I believe that if the 2-619 is decided -- I'm
10 sorry. Yeah, the 2-619 motion is dismissed and decided
11 against the defendants, then the matter -- the second
12 step would be the waiver of attorney-client privilege
13 which I think my client did not do under either 502(a)
14 or 502(b).

15 THE COURT: When you -- are you saying that their
16 statute of limitations motion, if I deny that, only in
17 that instance do we get to the issue of the -- of the
18 letter?

19 MR. TALARICO: No. I think what we're -- what I'm
20 saying is that that clarifies part of the 502(a) section
21 of the argument, what I perceive as 502(a).

22 THE COURT: Okay. Defense counsel?

23 MR. TALARICO: If I might --

24 THE COURT: Go ahead, plaintiff.

1 MR. TALARICO: -- expound a little bit. I wasn't
2 aware that a 2-619 motion had been up. It was denied by
3 this court, but denied with the ability to get -- to
4 bring it again. All I've seen when I came into the case
5 was a decision saying, you know, denied, so at that
6 point in time I did not, let's say, approach the issues
7 of the statute of limitations or the statute of repose.
8 I think those two issues help clarify the 502 argument.

9 The 502 argument is what -- what information
10 can be gathered, and I think my responses to that would
11 simply be 502(b) and 502(a) have been complied with.

12 THE COURT: Defense counsel?

13 MR. FLYNN: I'm a little confused, Judge. There is
14 no pending 619 motion. That was ruled upon years ago.
15 This is simply a motion to compel and, you know, again,
16 looking back, I didn't attach every discovery answer
17 that Mr. Dulberg provided because there were many and
18 there were issues with signature pages throughout
19 written discovery. But here, the overarching
20 supplemental request, Exhibit E, I believe it is, that
21 was served on July 2 has not been answered. It's not
22 been objected to. It's untimely at this point, and,
23 again, it's clear that the discovery of the malpractice
24 and damages has been placed at issue. So we're entitled

1 to explore that discovery.

2 The testimony of Mr. Dulberg at his deposition
3 makes it clear that the only basis to toll any statute
4 of limitations was the December 2016 communications with
5 Tom Gooch and if he's not going to produce those, he has
6 no other basis to toll the statute and, as such, the
7 case should be dismissed. We'll bring the appropriate
8 motion. But you can't have it both ways using the
9 privilege as a sword and a shield.

10 THE COURT: Plaintiff's counsel, with respect to the
11 latter, your comment?

12 MR. TALARICO: I guess I'm not clear on what counsel
13 was saying. I respectfully say that we have complied
14 with the -- the 502(b) was inadvertent within the
15 deposition and the attorney at the time, who was -- I
16 think her name was Williams, Julia Williams, objected
17 and objected on a continuing basis for any of the
18 questions regarding that information. Counsel has not
19 brought a motion to have this court decide whether or
20 not that was appropriate, but he had answered under the
21 continuing objection by Miss Williams that this was a
22 protected attorney-client discussion.

23 As to the 502(a), the intentional disclosure,
24 that was, in my estimation -- and I hope the court

1 agrees -- that was done in the pleadings, in the
2 complaint, but it was done in the -- I wouldn't say in
3 the alternative. I would say it's additional
4 information.

5 THE COURT: What specifically are you referring to
6 when you say it's additional information? What was
7 additional information?

8 MR. TALARICO: The continued comments about when --
9 when he was aware of -- and when the statute would begin
10 to run, the two-year statute of limitations, as to the
11 filing of a complaint for malpractice. Within that
12 section, I have each one numbered, but at first the
13 comments -- the situation was when the arbitration, the
14 binding arbitration, matter was decided, and it was
15 decided in such a way that my client lost close to over
16 \$200,000 because the only other person that was in the
17 lawsuit had a maximum insurance policy of \$300,000. At
18 that point in time -- And he alleged that in the
19 complaint, in the first amended complaint, and the
20 second amended complaint, all of which I wasn't party
21 to, but the words are in there, the allegations are in
22 there. I believe that's when the statute of limitations
23 begins to run. Further --

24 THE COURT: He references -- he references in his

1 complaint -- I assume we're talking about the
2 allegations in the complaint.

3 MR. TALARICO: Yes.

4 THE COURT: And he references in the complaint
5 learning information from the expert, if I've read this
6 correctly. Is that a fair statement?

7 MR. TALARICO: That is one of the allegations, yes.

8 THE COURT: So why can't -- why isn't that report or
9 communication going to be turned over?

10 MR. DULBERG: It is. It already is.

11 MR. TALARICO: Judge, it's my position that that is
12 not relevant to the question. The question is, when did
13 -- when did he become aware, when does the statute start
14 running. And the answer I believe under Illinois law is
15 it begins running when he knows of his injury, and the
16 injury took place with the binding arbitration award;
17 not before, not after. So I'm saying --

18 THE COURT: And I guess I -- you're losing me
19 because I -- I don't understand how a binding
20 arbitration award is going to disclose to anybody
21 whether or not malpractice had been -- had taken place.

22 The -- your client -- I don't know if you can
23 see him. He keeps raising his hand. I'm ignoring him
24 because he has an attorney. I'm going to -- I'm going

1 to focus on you.

2 But whether or not there was an award for X
3 dollars or no dollars, that doesn't tell me anything
4 about whether -- whether he knew or should have known at
5 that point. That just told him what those people --

6 MR. DULBERG: May I clarify on the record.

7 THE COURT: Mr. Dulberg, you have an attorney.
8 You've elected to have your attorney speak for you.

9 MR. DULBERG: He's not not lead attorney
10 (indiscernible).

11 THE COURT: I'm going to limit it to it. I
12 recommend that you limit your conversation or comments
13 to him out of fear that you may say something that could
14 be harmful to your case.

15 MR. DULBERG: I understand.

16 THE COURT: In any event, the complaint identified
17 something the expert said as establishing knowledge on
18 behalf of Mr. Dulberg for the first time of the alleged
19 malpractice. So the complaint by its very language
20 tells me that that communication is relevant to the
21 issue of the discovery rule. I don't have a problem
22 with doing an in camera inspection of that particular
23 communication, but I don't see how we avoid it being
24 relevant.

1 MR. TALARICO: Judge, I think in all three -- the
2 original complaint, the first amended complaint and the
3 second amended complaint, all three plead the injury
4 happening with the -- I can't think of the word -- but
5 with the binding arbitration statement.

6 It thereafter talks about other matters and
7 each time the drafter of that complaint, the first --
8 I'm sorry, the original, the first and the second, adds
9 in different aspects which I believe are really
10 irrelevant. I think the focus is on when the injury
11 occurred. The injury I believe occurred when the
12 binding arbitration award was granted and I think that's
13 when the statute of limitations should run.

14 THE COURT: But he's entitled to discovery on that.
15 If you're claiming a particular communication
16 established knowledge for the first time, he gets to --
17 defense gets to see that, because you've linked it to a
18 unique event and he gets to challenge whether that's
19 plausible, so you don't get -- you don't get to make
20 that decision for him.

21 MR. DULBERG: If I may, I'm going -- I'm going to
22 clarify here.

23 THE COURT: Mr. Dulberg, you have an attorney.

24 MR. DULBERG: Yes, I do. And I'm going to clarify.

1 THE COURT: I'm not asking you to clarify.

2 MR. DULBERG: The event -- the event, okay, was a
3 series of events --

4 THE COURT: Counsel, --

5 MR. FLYNN: Judge, I'm going to object to this as
6 well.

7 MR. DULBERG: -- (continuing) prior to meeting
8 Mr. Gooch.

9 THE COURT: I'm ignoring what's being said.

10 Mr. Talarico, do you have a comment?

11 MR. TALARICO: Yes, we -- Mr. Dulberg, I believe,
12 and our position is, the statute of limitations begins
13 to run on the date of the arbitration -- the binding
14 arbitration, award.

15 THE COURT: And you could be right, but the
16 discovery rule involves facts and the issue becomes
17 whether you knew or should have known. You, by the
18 complaint you've inherited, established that knowledge
19 came as a result of a particular event and I think it --
20 by virtue of that allegation, you've made the facts
21 surrounding that event relevant to the investigation of
22 your claim of the discovery rule, its application, that
23 I can't separate that out. If you say that
24 communication gave you knowledge for the first time,

1 then the defendant gets to explore that.

2 MR. DULBERG: That's not what it said.

3 THE COURT: Your subjective interpretations aren't
4 going to be controlling.

5 MR. TALARICO: Judge, I'm not relying on that. All
6 I'm saying is that, with all due respect, that is when
7 he had the knowledge, that is when the statute of
8 limitations begins to run, and that information has been
9 part of the court file long before it became part of
10 this matter.

11 THE COURT: My reading of the complaint referenced
12 something regarding an expert report and perhaps a
13 letter from former counsel.

14 MR. FLYNN: Judge, may I clarify that.

15 THE COURT: Go ahead. Yeah.

16 MR. FLYNN: Thank you.

17 You know, the plaintiff has attempted I think
18 to use both, a report that he received from a chainsaw
19 -- so-called chainsaw expert, so a liability expert,
20 relative to the underlying case. There's been some
21 confusion with respect to his pleading and reliance on
22 that report. However, what I clarified at his
23 deposition is that he relied on a legal opinion to toll
24 the statute of limitations in this case. It's that

1 legal opinion in December of 2016 which informed him of
2 the malpractice.

3 Again, he wasn't very specific. I tried to
4 question him about each and every violation of the
5 standard of care, breach of the standard of care, and
6 when he found out about it; and you can read the whole
7 deposition, but his answers are evasive. They've been
8 evasive in his original interrogatory answers. We've
9 covered the waterfront with every possible question and
10 interrogatory and production request we could, but it's
11 clear that he is relying on a legal opinion.

12 Now, he's not very specific about what that
13 legal opinion is, and maybe there isn't anything in
14 Gooch's records or in the emails and whatnot to and from
15 Gooch and Dulberg, but, in any event, that's what he
16 testified to, and so it's our position we should be
17 entitled to those legal opinions, whatever they are.

18 THE COURT: I thought -- and obviously I didn't read
19 the entire deposition. I thought there was one letter
20 that really covered it, based on what I read. Is that a
21 fair statement?

22 MR. FLYNN: I'm not sure if that's accurate, Judge.
23 I think that -- I think he's pinpointed the time period
24 to December of 2016, but I think he also testified that

1 there was regular email communication between Dulberg
2 and Gooch, you know, --

3 THE COURT: In any event, I am going to direct
4 production of all those communications on which the
5 plaintiff is basing his claim of the applicability of
6 the discovery rule; and that's a little broader than I
7 first intended, but given the nature of this discussion,
8 it sounds like it's more than just a couple of
9 documents. It might be several of them.

10 I will also have those items produced to me for
11 an in camera inspection so that I can determine to what
12 extent that they are disclosing information relevant to
13 our investigation into the discovery rule, because while
14 I agree the defendant should be allowed to investigate
15 that issue, that doesn't mean he gets the benefit of
16 prior counsel's work product outside of the discovery
17 rule issue.

18 Does that make sense?

19 MR. FLYNN: So I do understand your ruling. I would
20 just ask that it be specified also, though, to the
21 communications with Mr. Gooch because in anticipation of
22 how this may be produced to Your Honor, if all they
23 produce is this chainsaw expert report, then we haven't
24 made any progress.

1 THE COURT: There is definitely something from
2 Mr. Gooch, and if I'm not given something from
3 Mr. Gooch, that will be a red flag.

4 MR. TALARICO: Judge, if I might.

5 THE COURT: I'm sorry?

6 MR. TALARICO: If I might speak.

7 THE COURT: Yeah.

8 MR. TALARICO: Judge, my position is that the
9 binding arbitration award document which has been part
10 of the court file, we believe long before I was in this
11 case, is the day that my client knew that he had an
12 action and, before that, it was premature by Illinois
13 law. At the time when the award was given, and the --

14 THE COURT: I'm not buying that. The arbitrator's
15 award gave you insight as to the value. Where you lose
16 me is -- Well, let me rephrase that. It gave you their
17 insight as to what they perceived the value of the case
18 to be. It did not tell you whether or not you could
19 have known that there was a viable cause of action
20 against another defendant --

21 MR. DULBERG: (Indiscernible) that.

22 THE COURT: -- because, again, it's you knew or
23 should have known whether --

24 MR. TALARICO: Of the injury, --

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THE COURT: -- there was another cause of action against that --

MR. TALARICO: -- a financial injury.

THE COURT: And I fail to understand how an arbitrator's award would explain that because I can't imagine -- I certainly don't -- I'm not an arbitrator, I don't know what they put in their decisions, but I would be surprised if they spend a lot of time telling you about people you could have sued but for malpractice, so the issue for me is knew or should have known, and I am going to direct production of those documents.

MR. TALARICO: Judge, my one comment?

THE COURT: Yeah.

MR. TALARICO: So it's Illinois law on that matter and a very recent case talked about specifically when the statute begins to run, but I will -- It's called Suburban Real Estate Services, Inc., versus Barus -- I'm sorry, and Barus versus William Carlson. The cite --

THE COURT: But that's a different argument. That's a rule -- that's an argument related to the applicability of -- or, in my analysis, of how the rule applies to the circumstances that we have. It doesn't address the issue of whether you should have known of

1 the existence of the cause of action, and the
2 information I have is that you did not and could not
3 have known about the cause of action until the
4 disclosure from the expert or from Mr. Gooch, and if
5 we're going to explore that issue, you've got to produce
6 that. You've put those items into evidence or at issue,
7 so defense has a right to see them.

8 MR. DULBERG: May I.

9 THE COURT: Anything else?

10 MR. DULBERG: Yeah, yeah. I'd like to comment.
11 You're not going to let me comment?

12 THE COURT: Mr. Dulberg is attempting to speak. I'm
13 not -- I'm neither listening nor inviting him to speak.

14 MR. DULBERG: I will speak on the record.

15 THE COURT: So I will --

16 MR. DULBERG: It's not about when we knew or should
17 have known of the cause of action.

18 THE COURT: Sir, --

19 MR. DULBERG: We certainly knew or should have
20 known --

21 THE COURT: Sir, --

22 MR. DULBERG: -- of the injury.

23 THE COURT: Mr. Dulberg, do not presume to tell me
24 what the law is. All right? You understand your place.

1 MR. DULBERG: Yes.

2 THE COURT: Do not tell me what the law is. I will
3 make that decision. I've instructed you numerous times
4 not to talk, and yet you feel the need to express
5 yourself. You have an attorney. Your attorney has ably
6 represented you, but I get to make a decision regardless
7 of what your personal thoughts are. So we will go back
8 to my discussion. Forgive the outburst, but I have
9 invited him not to speak and that wasn't acceptable to
10 him.

11 So, in any event, how long, Mr. Talarico, do
12 you need to produce this information?

13 MR. TALARICO: Judge, I'm not absolutely sure.
14 Whatever the court says I produce I'll produce within
15 28 days.

16 THE COURT: Okay. Twenty-eight days is fine with
17 me.

18 Mr. Flynn?

19 MR. FLYNN: Twenty-eight days is fine, Your Honor.
20 I would also request that, in addition to the documents
21 being produced, that the actual discovery request be
22 responded to and any interrogatories be amended --

23 THE COURT: You need a privilege log certainly as to
24 the documents, and so I'm going to direct that you be

1 given a privilege log because they are claiming
2 privilege as to these items. I assume there hasn't
3 previously been one. Is that true?

4 MR. FLYNN: That is true.

5 THE COURT: All right. So you're entitled to the
6 privilege log.

7 As far as the other interrogatories are
8 concerned, Mr. Talarico -- How many interrogatories do
9 we have outstanding?

10 MR. FLYNN: The -- I think what we have is some
11 interrogatories that weren't completely answered in the
12 first place. It's probably a handful, Judge, but then
13 there are seven or eight requests for production that
14 simply weren't responded to. Those are the subject of
15 this motion.

16 THE COURT: And are they covered by the privilege
17 log, do you think?

18 MR. FLYNN: Well, I think that first we need to know
19 whether there are responsive documents. They haven't
20 even answered that, and then if they are withholding any
21 and submitting them to the court, then the privilege log
22 comes next, I guess, would be my request.

23 THE COURT: Okay. Mr. Talarico, can you provide a
24 response in 28 days?

1 MR. TALARICO: Yes, Your Honor. I will respond.

2 THE COURT: All right. And if you don't have
3 documents, you don't have documents. Just tell him. If
4 you're claiming a privilege, identify -- provide some
5 sort of an identification of the document and the
6 privilege you're claiming.

7 With respect to the interrogatories, which
8 ones?

9 MR. FLYNN: These were the interrogatories
10 propounded by Hans Mast, my other client, and that was
11 Exhibit D, I believe, to the motion. I did not attach
12 his answers, but Hans Mast's interrogatories which were
13 propounded back on March 22 of 2019 -- one, two,
14 three -- just four interrogatories.

15 I do believe that we have a response, but it's
16 incomplete. It doesn't -- it doesn't identify these
17 communications with Mr. Gooch or the legal opinion that
18 has been alleged in the complaint and placed at issue.

19 THE COURT: Yeah, and I -- my concern is -- and the
20 answer, direct answer, to those is going to require my
21 review of the documents, so I'm going to enter and
22 continue that part of the motion until I make a decision
23 with respect to the documents.

24 Is there anything else?

1 MR. FLYNN: I think that covers it, Your Honor.

2 THE COURT: Okay. All right. So, Mr. Flynn, I'm
3 going to direct you to send me an order -- Do you have
4 our email address? You can take a picture if you like.

5 MR. FLYNN: I believe so. Okay.

6 THE COURT: Okay? And the order -- we'll pick a new
7 date in a moment. The order will provide that the
8 plaintiff will provide you with a privilege log for
9 those -- provide you answers to the production request
10 as well as a privilege log with respect to any documents
11 that are withheld, and I'm entering and continuing your
12 motion with respect to the interrogatories.

13 Plaintiff will provide me with the documents
14 withheld and identified in the privilege log within
15 28 days and then we'll come back perhaps two weeks after
16 that. Twenty-eight days is March 10th; two weeks after
17 that would be around March 24th, and I can provide you
18 with my ruling then. So how's March 24th at 1:30?

19 MR. FLYNN: Judge, I actually have a deposition at
20 1:00 o'clock that day.

21 THE COURT: How about the 25th? Thursday.

22 MR. FLYNN: 25th works. 25th at 1:00 o'clock?

23 THE COURT: Yeah.

24 Mr. Talarico?

1 MR. TALARICO: One second, Your Honor.

2 THE COURT: Okay.

3 MR. TALARICO: Fine.

4 THE COURT: Do we have agreement on the date or are
5 we waiting?

6 MR. TALARICO: I said it was fine, Your Honor.

7 THE COURT: Oh, okay. I'm sorry, I missed that. So
8 1:30. Is there anything else we need covered in the
9 order?

10 MR. FLYNN: Just may I be clear that the motion is
11 granted in part as stated on the record.

12 THE COURT: Yes.

13 MR. FLYNN: And I would like to just include
14 Mr. Gooch's name in the written order, that those be
15 included in the production if they exist.

16 THE COURT: Yeah, I don't -- I don't want -- What I
17 want to -- I guess -- And thank you for bringing that
18 up.

19 My impression from reading the motion was it
20 boiled down to -- I got the idea that it was a single
21 document or a single communication that conveyed the
22 information at issue. And you're indicating that it was
23 more, it was a number of emails. Are you able to put a
24 timeframe on it?

1 MR. FLYNN: Well, I think, again, the allegations in
2 the various complaints, complaint and amended
3 complaints, and the testimony, (indiscernible) to
4 December of 2016, so --

5 THE COURT: Yeah. Say the communications of
6 December of 2016, because I don't want it read as
7 requiring that all communications from Mr. Gooch be
8 produced.

9 MR. FLYNN: Okay.

10 THE COURT: Mr. Talarico, any questions or comments
11 about that?

12 MR. TALARICO: No, Your Honor. I'll follow the
13 court's order.

14 THE COURT: All right. Anything else then?

15 MR. FLYNN: No, Your Honor. I will send a draft of
16 that order to Mr. Talarico for his review and then we
17 will send it to your email address, Your Honor.

18 THE COURT: Okay. I'll wait to see that. I'll sign
19 it as soon as it's in. Thank you.

20 MR. FLYNN: Thank you.

21 THE COURT: See you in March.

MR. FLYNN: Thank you, counsel.

22 THE COURT: All right. Bye.

MR. TALARICO: Thank you, Judge. Thank you,
23 counsel.

24 (Which was and is all of the evidence
offered at the hearing of said cause
this date.)

1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF MCHENRY)

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I, Stacey A. Collins, an Official Court Reporter of the 22nd Judicial Circuit of Illinois, do hereby certify the foregoing to be a true and accurate transcription to the best of my ability and based on the quality of the recording of all the proceedings heard on the electronic recording system in the above-entitled cause.



Stacey A. Collins, CSR
Official Court Reporter