

1 STATE OF ILLINOIS)

2)

3 COUNTY OF McHENRY)

4 IN THE TWENTY-SECOND JUDICIAL CIRCUIT

5 McHENRY COUNTY, ILLINOIS

6 PAUL DULBERG,)

7 Plaintiff,)

8 vs.) No. 17 LA 377

9 THE LAW OFFICES OF THOMAS J.)

10 POPOVICH, P.C., and HANS MAST,)

11 Defendants.)

12 ELECTRONICALLY RECORDED REPORT OF
13 PROCEEDINGS had in the above-entitled cause before
14 the Honorable THOMAS A. MEYER, Judge of said Court
15 of McHenry County, Illinois, on the 21st day of
16 December, 2022, at the McHenry County Government
17 Center, Woodstock, Illinois.

18

19 APPEARANCES:

20 LAW OFFICE OF ALPHONSE A. TALARICO, by
21 MR. ALPHONSE A. TALARICO (via Zoom),

22 On behalf of the Plaintiff,

23 KARBAL COHEN ECONOMOU SILK DUNNE, LLC, by
24 MR. GEORGE K. FLYNN (via Zoom),

On behalf of the Defendants.

1 THE COURT: For the record, this is on Dulberg
2 versus Mast.

3 Plaintiff's counsel, if you could identify
4 yourself.

5 MR. TALARICO: Yes, your Honor. My name is
6 Alphonse Talarico.

7 THE COURT: And defendant.

8 MR. FLYNN: Good morning, your Honor. George
9 Flynn for the defendants.

10 THE COURT: And for the record, I -- Mr. Dulberg
11 is in attendance, and once again, I hope we're not
12 being recorded. That being said, we'll move on to
13 the motion.

14 Plaintiff, you have a motion.

15 MR. TALARICO: Yes, Judge. I'd like to -- we
16 filed our motion -- we filed -- counsel filed a
17 response, we filed a reply. We'd like to rely on
18 that, with one additional presentation or request of
19 the Court.

20 THE COURT: Okay. What is that?

21 MR. TALARICO: I'd like to offer an informal
22 proof -- an offer of proof, which is the exact
23 and -- and -- what is the best way -- the audio
24 transmission of the deposition, in full, with all

1 the parties, which was sent to us through a
2 subpoena.

3 THE COURT: Okay. You mean from Mr. Mast's --
4 or Mast's -- deposition?

5 MR. TALARICO: Correct. Everything that -- that
6 would help the Court understand all of these
7 problems. Because you --

8 THE COURT: Well, we do have -- we have the
9 transcript.

10 MR. TALARICO: Yes, your Honor, but the
11 transcript is selective.

12 THE COURT: Okay. Mr. Flynn, comment.

13 MR. FLYNN: I would object, Judge. The
14 plaintiff has already filed a second amended motion
15 and response. He's had plenty of opportunity to
16 bring this to the Court's attention.

17 THE COURT: Okay. Mr. Talarico, final word.

18 MR. TALARICO: Judge, this is for the aid to --
19 for the Court -- this Honorable Court to understand
20 what's going on.

21 As to the second amended, I replied to
22 that, that -- the only difference between the
23 amended and the second amended, Judge, was the stamp
24 on Exhibit 17 didn't show up, so I re-filed it. But

1 it was filed timely. As soon as I realized the
2 stamp didn't show up on Exhibit 17, I re-filed it
3 with an emphasis on the Exhibit 17. Mr. Flynn
4 received it on time with notification that it's
5 Exhibit 17.

6 THE COURT: Well, that's not the issue, but the
7 issue is --

8 MR. FLYNN: It's not. And just for the record,
9 there was a typo in my response brief. I wasn't
10 taking issue with the timing of the filing of the
11 second amended, other than the fact that it's two
12 years after the deposition.

13 THE COURT: But that -- that's a different --

14 MR. FLYNN: But --

15 THE COURT: That's a different issue.

16 MR. FLYNN: Exactly.

17 THE COURT: The first issue is whether or not
18 to -- the Court will accept plaintiff's request to
19 submit the audio of the deposition at issue of
20 Mr. Mast that, I believe, was taken June 25th, 2020.

21 And, Mr. Talarico, anything else to say in
22 support of that oral motion?

23 MR. TALARICO: No, Judge. That -- that's -- if
24 you'll accept it, it's in the -- I believe

1 Mr. Dulberg is in the courtroom, and if he may
2 approach the bench, he will hand it to you.

3 THE COURT: No, he's on Zoom. In any event, I'm
4 going to deny the -- oh, are you -- Come on up.

5 MR. SCOTT DULBERG: Do you mind if I just hand
6 it here?

7 THE COURT: Well, no, you're going to come up.
8 I'm not going to accept that.

9 Your name, sir?

10 MR. SCOTT DULBERG: Scott Dulberg.

11 THE COURT: Okay. And you're here to deliver a
12 Zip drive of the audio; am I correct?

13 MR. SCOTT DULBERG: Yes.

14 THE COURT: All right. And I -- But I'm going
15 to rule on plaintiff's motion. I'm not going to
16 accept it. I'm not going to consider it for
17 purposes of the hearing on this motion. So you can
18 keep it, but thank you for -- for showing up and
19 bringing it.

20 MR. SCOTT DULBERG: Thank you.

21 THE COURT: Because -- I'm not going to accept
22 it because I don't think it adds, materially, to my
23 understanding of what transpired. I've got the
24 deposition transcript. I've read the parts that I

1 believe are relevant. I've read the motions. I've
2 heard this argument.

3 I don't think that the audio tran- -- the
4 audio recording is going to assist me in any way,
5 based upon my understanding of what the ultimate
6 issue is on this motion.

7 So that will be denied, and we'll
8 incorporate that into the motion -- or in the order.
9 I'm sorry.

10 Moving on to the motion, this is
11 plaintiff's motion to either re-depose or strike, or
12 both, the deposition of Mr. Mast taken June 25th,
13 2020; am I correct?

14 MR. TALARICO: Yes, your Honor.

15 THE COURT: And, further, am I correct that
16 the -- the reason for this is issues with respect to
17 what's identified as Exhibit 12?

18 MR. TALARICO: No, your Honor. That's just one
19 small part of it. The entire motion is based on
20 Supreme Court rules and on -- or in effect at the
21 time the deposition was taken.

22 THE COURT: No, no, no. Tell me the substance.
23 Don't tell me what the rules are. Because my
24 reading of your motion focused on Exhibit 12 and the

1 failure -- or the alleged failure to produce it
2 prior to the deposition or give an exhibit list.

3 So tell me, what is the reason why you want
4 to re-depose Mr. Mast? Because I think that's
5 ultimately your request.

6 MR. TALARICO: That's right. Judge, within our
7 motion and our reply, we've indicated that it's not
8 just Exhibit 12. Focusing on Exhibit 12 makes it
9 too easy. The entire deposition -- the Internet
10 went down almost the entire time. It's in the notes
11 that I highlighted. It's in the transcript. They
12 were not seeing Exhibits 1 through 15 at the same
13 time. They weren't seeing them. They weren't being
14 uploaded to the admin- -- the administer of -- of
15 oath. 12 wasn't even part of it. It was added, I
16 don't know, 14 days later.

17 THE COURT: But, ultimately --

18 MR. TALARICO: So we --

19 THE COURT: -- the exhibits were seen; am I
20 correct?

21 MR. TALARICO: No. They were not seen.

22 THE COURT: None of the exhibits were seen?

23 MR. TALARICO: They were not seen in accordance
24 with the rules, your Honor.

1 THE COURT: That's -- see, you --

2 MR. TALARICO: The rules --

3 THE COURT: You throw those phrases in, in
4 accordance with the rules.

5 Did the deponent see the exhibits, yes or
6 no?

7 MR. TALARICO: No.

8 THE COURT: Mr. Flynn, comment.

9 MR. FLYNN: Judge, to say that the Internet was
10 down for --

11 THE COURT: I don't want to go down there. Did
12 the -- did Mr. Mast see the exhibits?

13 MR. FLYNN: My recollection and understanding is
14 that Mr. Mast saw all of the exhibits. There may
15 have been an issue with a portion of Exhibit 12;
16 however, he was -- he was cross-examined at Page 49
17 through 52 regarding Exhibit 12, generally speaking,
18 and the case law that was contained in his file.

19 The bottom line is, it doesn't add
20 anything. He didn't recall the specific cases that
21 he discussed with --

22 THE COURT: Did he see the exhibits? That's all
23 I wanted to know.

24 MR. FLYNN: I don't know that he saw the full

1 exhibit in its entirety.

2 THE COURT: Okay.

3 MR. FLYNN: It -- But it wasn't necessarily
4 provided to him, so --

5 THE COURT: For purposes of this record,
6 Exhibit 12 is copies of case law; am I correct?

7 MR. FLYNN: Generally speaking, correct.

8 THE COURT: Mr. Talarico.

9 MR. TALARICO: That's correct, Judge. But,
10 again, we're not just focusing on Exhibit 12. We're
11 focusing on all the exhibits that were supposedly
12 shown to Mr. -- to Mr. Mast. He didn't see them.
13 He didn't see them.

14 THE COURT: Okay.

15 MR. TALARICO: There was confusion as to what
16 the numbers were.

17 THE COURT: Whose exhibits were they?

18 MR. TALARICO: They were the plaintiff's, but it
19 was the defendant's equipment that caused the
20 problem.

21 THE COURT: And the plaintiff conducted the
22 deposition; am I correct?

23 MR. TALARICO: That is correct.

24 THE COURT: And the plaintiff was aware of

1 any -- the plaintiff's attorney, at that time, was
2 aware of any glitches or difficulties with respect
3 to having the deponent view all of the exhibits; am
4 I correct?

5 MR. TALARICO: That's correct, your Honor.

6 THE COURT: And the plaintiff (sic) who was
7 representing Mr. Dulberg at the time, for whatever
8 reason, did not raise an objection at the time or
9 ever with respect to the manner in which the
10 deposition proceeded.

11 MR. TALARICO: No, your Honor. (Indiscernible)
12 she left it to me -- or to the following counsel.
13 She said to Mr. Dulberg, Mr. Dulberg, whatever those
14 objections are, your next counsel has to make them.

15 THE COURT: Okay. Well, that -- but the
16 handling attorney at the time who represented
17 Mr. Dulberg's interests proceeded with the
18 deposition and did not give notice to anyone of any
19 complaint with respect to the manner in which it was
20 conducted; am I correct?

21 MR. TALARICO: You are correct.

22 THE COURT: Okay. What else do you want me to
23 know?

24 MR. TALARICO: I want you to know, Judge, also,

1 that not only does the objection have to take place
2 at the time of the deposition itself. When the
3 evidence is being brought -- when the evidence is
4 being subject to admission, I can bring that -- I
5 can raise that now and object to it.

6 THE COURT: Okay. But the -- the exhibits were
7 always in control of the plaintiff's attorneys, and
8 you're asking to penalize the defendant for what
9 appears to be a -- an issue you have with the manner
10 in which prior counsel conducted the deposition.

11 MR. TALARICO: No, your Honor. It's -- as far
12 as the defendant, it's their electronic equipment
13 that failed.

14 THE COURT: And there were no objections made at
15 the time or subsequent, and this motion was brought
16 approximately two and a half years after the
17 deposition in question; am I correct?

18 MR. TALARICO: You are correct. But it's also
19 within the time of the ruling. I can do this now.

20 THE COURT: You can file any motion you like,
21 but I'm -- I'm going to deny your request. I don't
22 think that there's any reasonable basis under which
23 I can compel the defendant to appear for a second
24 deposition because of these issues. It appears that

1 prior counsel was satisfied with the -- her ability
2 to conduct the deposition, and she was always in
3 control of all of the exhibits, so I don't see a
4 problem there.

5 If anybody should have been raising an
6 objection about the problems, it should have been
7 defendant, not -- not the plaintiff two and a half
8 years after the deposition they proceeded with. So
9 I'm going to deny the request.

10 Anything else that we need to do
11 today?

12 MR. FLYNN: Judge, just that there was some
13 additional relief requested in the latest reply
14 brief filed, and that included a request that the
15 Court take judicial notice of -- what's really an
16 implication. I think this is on Page 17 of the
17 response.

18 I would just request that that specific
19 request for relief also be denied in connection with
20 the motion.

21 THE COURT: Okay. Let me just call it up. I'm
22 looking at Page 18. What is it?

23 MR. FLYNN: I believe it was on Page 17 of the
24 response -- I'm sorry -- the reply brief that was

1 just filed.

2 THE COURT: Okay. The notice of the
3 adjudicative facts?

4 MR. FLYNN: Correct. I think it says in
5 Paragraph 12(j), plaintiff requests that this
6 Honorable Court take judicial notice of the
7 adjudicative fact that the references to Restatement
8 (Second) of Torts Section 318 impliedly references
9 Tilschner versus Spangler.

10 THE COURT: That -- that's not really ultimately
11 the purpose of this motion, and it's not contained
12 in the prayer for relief. That strikes me as a new
13 motion. Wasn't going to consider it, and so I'm --
14 to the extent that I have to rule on it, on an
15 issue I don't even think that's in front of me
16 appropriately --

17 MR. FLYNN: It's just relief that was in -- in
18 this response that I didn't have any opportunity to
19 address.

20 THE COURT: I will -- I will deny all aspects of
21 plaintiff's motion.

22 MR. FLYNN: Okay.

23 THE COURT: I think that covers it.

24 Is there anything else?

1 MR. FLYNN: Thank you. That's it.

2 THE COURT: Okay. We have a future date, don't
3 we?

4 MR. FLYNN: We have a pending motion for summary
5 judgment, and plaintiff's response is due, I think,
6 next week.

7 THE COURT: Okay. All right.

8 MR. FLYNN: But I don't --

9 THE COURT: You're back February 1st, and I --
10 Mr. Flynn, could you draft the order and please get
11 it in as early as possible.

12 MR. FLYNN: I will. And, Judge, we spoke
13 last time about your continued handling of the
14 case. Do you have any information to share in that
15 regard?

16 THE COURT: Nope. Nope. I -- I'm in a
17 different division and, um, I can't take cases with
18 me.

19 MR. FLYNN: Okay.

20 THE COURT: That would be interesting, but no, I
21 can't take them. I can't take them with me. Too
22 many --

23 MR. FLYNN: Okay. So --

24 THE COURT: -- egos involved. Not -- I'm not

1 referring to Judge Berg.

2 MR. FLYNN: Sure.

3 THE COURT: But there -- Yeah, there's too many
4 hurdles to try --

5 MR. FLYNN: I understand. So the schedule
6 stands?

7 THE COURT: The schedule stands. If you wish to
8 have that addressed, you'll have to bring it in
9 front of Judge Berg.

10 MR. FLYNN: Okay.

11 THE COURT: I will warn you, he's got a small
12 claims call. I would -- I'm warned to avoid
13 Thursdays and Fridays for hearing because those,
14 apparently, are heavy days.

15 But you may find out the hard way. Who
16 knows?

17 MR. FLYNN: Okay.

18 THE COURT: All right.

19 MR. FLYNN: Thank you very much, your
20 Honor.

21 THE COURT: You can send in the order. I will
22 sign it when I see it.

23 MR. FLYNN: Thank you.

24 THE COURT: All right. Thank you. Have a good

1 day.

2 MR. FLYNN: You, too. Thank you.

3 (Which were all the proceedings
4 had in the above-entitled cause
5 this date.)
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1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF McHENRY)
4

5 I, KATHLEEN STROMBACH, an official
6 Court Reporter for the Circuit Court of McHenry
7 County, Twenty-Second Judicial Circuit of Illinois,
8 transcribed the electronic recording of the
9 proceeding in the above-entitled cause to the best
10 of my ability and based on the quality of the
11 recording, and I hereby certify the foregoing to be
12 a true and accurate transcript of said electronic
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1 STATE OF ILLINOIS)

2)

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4 IN THE TWENTY-SECOND JUDICIAL CIRCUIT

5 McHENRY COUNTY, ILLINOIS

6 PAUL DULBERG,)

7 Plaintiff,)

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9 THE LAW OFFICES OF THOMAS J.)

10 POPOVICH, P.C., and HANS MAST,)

11 Defendants.)

12 ELECTRONICALLY RECORDED REPORT OF
13 PROCEEDINGS had in the above-entitled cause before
14 the Honorable JOEL D. BERG, Judge of said Court of
15 McHenry County, Illinois, on the 1st day of
16 February, 2023, at the McHenry County Government
17 Center, Woodstock, Illinois.

18 APPEARANCES:

19 LAW OFFICE OF ALPHONSE TALARICO, by

20 MR. ALPHONSE TALARICO, (Via Zoom)

21 On behalf of the Plaintiff;

22 KARBAL COHEN ECONOMOU SILK & DUNNE, LLC, by

23 MR. GEORGE K. FLYNN,

24 On behalf of the Defendant.

1 THE COURT: You are here on Dulberg against
2 Mast?

3 MR. FLYNN: I am, Judge.

4 THE COURT: I have the other side here on that
5 as well. Well, no. I have Mr. Dulberg here. I
6 have Mr. Talarico as well. Mr. Talarico, are you
7 ready for a hearing if I call it early, sir? I'm
8 sorry, sir, you are muted. I'm not --

9 MR. TALARICO: Yes, your Honor.

10 THE COURT: Good morning. Are you ready for
11 hearing a couple minutes early, sir?

12 MR. TALARICO: Absolutely.

13 THE COURT: Thank you very much. This is
14 Dulberg against Mast, et al. I have Mr. Talarico
15 present via Zoom as is Mr. Dulberg. Counsel, would
16 you please state your name?

17 MR. FLYNN: Thank you, your Honor, George Flynn
18 on behalf of the defendants.

19 THE COURT: Thank you, Mr. Flynn. We are before
20 the Court for a hearing on pending motions. The one
21 most notable is the summary judgment. What else are
22 we hearing this morning, gentlemen?

23 MR. FLYNN: That's all we have, as far as I
24 know, Judge.

1 THE COURT: Good. Because that's all I read.

2 MR. TALARICO: That's all I know, Judge.

3 THE COURT: Now I feel way better. It just said
4 pending motions. All I could find was summary
5 judgment. I read the motion. I read the response.
6 I read the reply. I have read all the attachments,
7 as they were relevant. It's your motion.

8 MR. FLYNN: Thank you, Judge. And I wasn't sure
9 I -- with Judge Meyer's standing orders, with
10 respect to courtesy copies, I wasn't sure if the
11 Court had a chance to review the briefs, but since
12 your Honor has indicated that you have --

13 THE COURT: I have read everything. It's all
14 based on a two-year statute of limitations on a
15 lawsuit over a chain saw.

16 MR. FLYNN: That's exactly right. So I will be
17 brief. The only case cited by the plaintiff in its
18 response with respect to the accrual of the injury
19 was a Suburban Real Estate case which is a
20 transactional legal malpractice case, not a
21 litigated matter. I think the -- all of the cases
22 we have cited and including the dicta in that
23 Suburban Real Estate case indicates that the accrual
24 date in a litigated matter is the date of

1 settlement, judgment or dismissal.

2 Here, we had a January 14 settlement that
3 was consummated. There was a good faith finding and
4 dismissal at that time. Mast and Popovich continued
5 to represent Mr. Dulberg for another year or so and
6 prosecuting the case against the other defendant in
7 the case.

8 Dulberg became disillusioned with Mast,
9 admitted that he was looking for additional
10 counsel -- or substitute counsel even as early as
11 July of 2014. Ultimately, Mast and Popovich
12 withdrew in March of 2015. The case proceeded
13 against Gagnon. There was a mediation in December
14 of 2016 at which time he indicates now that he first
15 became aware of his legal malpractice case.

16 Mr. Dulberg had every opportunity in
17 discovery through interrogatories, production
18 requests, I took his deposition. I asked him over
19 and over again in several different ways how he
20 first became aware of his injury and that it was
21 wrongfully caused. The only response he could give
22 was that a lawyer told him that he had a case. He
23 couldn't provide any specifics. He has a burden of
24 proving the -- a late discovery. He cannot meet it.

1 He will never be able to meet it.

2 THE COURT: Do we know, by the way, how did he
3 come to me because the lawyer, if I recall, was
4 Mr. Gooch. So he was represented by I believe
5 Mr. Balke if I recall correctly followed by
6 Mr. Baudin.

7 MR. FLYNN: That's correct.

8 THE COURT: Where did Mr. Gooch come into this?
9 Who shipped him off to Mr. Gooch to even get
10 opinion, do we know?

11 MR. FLYNN: One of those two lawyers, I think,
12 recommended that he seek an opinion from a lawyer,
13 generally speaking, that handles legal malpractice
14 cases. Whether it was a direct referral, I don't
15 know if the evidence shows that. I think
16 Mr. Dulberg testified that I believe it was
17 Mr. Baudin recommended that he see a legal
18 malpractice attorney.

19 So Mr. Gooch met with him. Allegedly
20 provided an opinion that there was a case without
21 any reason and then almost a year later filed a
22 lawsuit. Again, first Mr. Dulberg raised privilege
23 when I asked him how -- how and what -- how you
24 became aware of this legal malpractice case, the

1 injury and the wrongful causation, he claimed
2 privilege. Finally, that was waived or otherwise
3 disposed of, and then, he admitted he couldn't -- I
4 said the legal opinion Dulberg received from Gooch
5 was verbal. Gooch simply stated you have a case
6 here. You have a valid case. When asked did he
7 tell you exactly what they did wrong in connection
8 with the representation, Dulberg said he probably
9 did. I'm not recalling it right now. I'm pulling a
10 blank. There are no specifics.

11 So again, the burden is his to prove a
12 later discovery. He's not able to do that. I'm
13 happy to answer any questions the Court has, but
14 again, I'll rest on the briefs.

15 THE COURT: Thank you very much. Mr. Talarico,
16 sir?

17 MR. TALARICO: Yes, sir. I'm -- what would you
18 like me to address first? I guess we could start
19 with the fact that defendant didn't follow the local
20 rules, and therefore, plaintiff could not properly
21 respond. And the local rule says that if they do
22 not follow the local rules, you can strike the
23 motion or deny it.

24 All I'm asking is deny the motion based on

1 the fact that they did not follow the local rules.

2 THE COURT: I respectfully decline to do so,
3 sir. A written motion could have been filed
4 expressly asking for that relief. A response was
5 filed that addressed it. I've read the response. I
6 understand your concerns that by not following the
7 local rules, they may have made it more difficult
8 for us to suss out what are the disputed issues of
9 material fact and what aren't. But I've been able
10 to pretty much get a grip on everything the way it's
11 been filed.

12 MR. TALARICO: All right. Thank you, Judge.
13 The second thing is, again, we didn't follow the
14 rules that (indiscernible) we didn't respond -- we
15 responded generally. So I would like that the
16 ruling you just made to extend to our response too.

17 THE COURT: Of course it does.

18 MR. TALARICO: Thank you, sir. Okay. Then, the
19 next issue is the Suburban case. Plaintiff --
20 defendant, I'm sorry, defendant seems to indicate --
21 well, he does indicate that the reason that Suburban
22 doesn't apply is that there is a difference between
23 a transactional case and a litigation case. Now, I
24 read the Suburban case many, many times over and the

1 Supreme Court does not distinguish that their ruling
2 is for one type of case or the other. What their
3 ruling is is that the statute of limitation and they
4 construed the exact specific statute does not begin
5 until there is a pec -- pecuniary loss.

6 Prior to that, Mr. Dulberg would have
7 brought an action, he would have had no damages. So
8 that -- what that does is because the general rule
9 and which has been voiced in -- by the Illinois
10 Supreme Court Justice Thomas in the Porter case is
11 that when the Supreme Court construes a statute,
12 that becomes part of the statute until the -- the --
13 I can't think of the word, legislation --
14 legislature decides to change it. So what we have
15 is the prior cases cited by Mr. Dulberg are not
16 effective because he's citing it to the rule and not
17 to the particular case we are talking about. The
18 Suburban case says no damages, the statute does not
19 begin to run. And that is part of the statute. It
20 hasn't been changed.

21 Now, as to the last thing, we have raised
22 many affirmative -- I mean, I'm sorry, many issues
23 of material fact that are in dispute. But most
24 important -- the clearest ones, Judge, are the

1 defendant's affirmative defenses. There are four
2 affirmative defenses which -- which plaintiff has
3 denied all four.

4 Now, there is a recent case, if you'll hold
5 on just one second, and I'll find it, but the
6 indication -- it's not that recent, but it's -- the
7 indication is that -- this is West Suburban Mass
8 Transit versus Consolidated Rail Corporation. It's
9 1-89-2916. If this was done the Appellate Court but
10 it was by the -- the opinion was by Justice
11 McMorrow, who of course became Supreme Court judge,
12 that summary judgment is not appropriate when there
13 is affirmative defenses in dispute.

14 I think that pretty much sums it all,
15 Judge. We have got many material facts in dispute,
16 including four affirmative defenses which were
17 denied specifically by plaintiff.

18 THE COURT: Respectfully, sir, merely saying
19 something is in dispute does not make it so though,
20 does it?

21 MR. TALARICO: Judge, I'm saying that the answer
22 filed was it was in dispute.

23 THE COURT: So by filing a response to their
24 affirmative defense denying the affirmative defense,

1 you're telling me that that in and of itself is
2 sufficient to defeat summary judgment.

3 MR. TALARICO: Yes, I am.

4 THE COURT: What if your client --

5 MR. TALARICO: I --

6 THE COURT: What if your client at subsequent
7 depositions testifies inconsistent with the answer?

8 MR. TALARICO: In the case that I cited, Judge,
9 the burden is upon the person, in effect, in this
10 case the defendant, to eliminate that dispute. The
11 dispute exists as he did not resolve that dispute.

12 THE COURT: So when did the cause of action
13 arise?

14 MR. TALARICO: December 12, 2016, I believe.

15 THE COURT: Why on that date?

16 MR. TALARICO: Because there was an arbitrary --
17 a mandatory arbitration hearing which I included
18 the -- the findings that showed that the judge --
19 the retired judge in that case evaluated it at
20 \$660,000, and Mr. Dulberg was not able to obtain
21 anything close to that.

22 THE COURT: And why not?

23 MR. TALARICO: Well, for two reasons, one,
24 because he settled first improperly for \$5,000 with

1 the landowner, and the second case is because he was
2 instructed improperly to -- to sign -- well, he
3 actually claims he never signed the agreement, but
4 that there was an agreement to do a binding
5 arbitration limited to the policy amount of 300,000.

6 THE COURT: Who entered into that agreement?

7 MR. TALARICO: That is a question of fact. I
8 don't know, but Dulberg says he did not sign it and
9 never wanted to.

10 THE COURT: When was the agreement entered into?

11 MR. TALARICO: I don't have the exact date,
12 Judge. A few months before that. I can only say
13 that that was -- that was during the time that
14 Mr. Dulberg was in bankruptcy, and that was also
15 part of the Baudin's instruction.

16 THE COURT: So the agreement to limit recovery
17 to 300,000 was signed well after the Popovich firm
18 was no longer representing Mr. Dulberg on this
19 matter?

20 MR. TALARICO: Yes, that's true.

21 THE COURT: So how is his change in strategy
22 somehow extend -- so in other words, what you're
23 saying -- well, I'm trying to wrap my head around
24 this. You are saying that that agreement your

1 client never wished to enter into, he didn't sign,
2 Popovich didn't sign, Mr. Mast didn't sign. His
3 actual third attorney signed it, Mr. Baudin, not
4 even Mr. Balke. But because that was somehow signed
5 and in effect, then the cause of action against Mast
6 and Popovich for legal malpractice is extended out
7 to the date of the final mediation hearing because
8 of an agreement and limitation on damages at the
9 mediation hearing over which they had zero control?

10 MR. TALARICO: What I am saying, Judge, is the
11 analysis in the Suburban case, the damages -- prior
12 to that, Mr. Dulberg had no actual damages,
13 therefore, he couldn't bring an action. He had
14 nothing to say that Mast cost him this much or this
15 much or Popovich cost him this much because that
16 would -- that would have been stricken for -- they
17 had no damages, so he had no cause of action.

18 The damages arrive -- arose on the days
19 that Mr. Dulberg found out through the binding
20 arbitration that the case was worth so much more
21 than what he's going to get, and therefore --
22 that -- that enumerates the damages.

23 THE COURT: But respectfully, Mr. Talarico, and
24 please correct me if I'm wrong because this is where

1 I'm getting the disconnect, the but-for portion of
2 this analysis but for the high-low agreement
3 limiting damages to the policy amount of \$300,000,
4 he would have had a judgment for the entire \$660,000
5 if Tom Popovich and Hans Mast had never even
6 existed.

7 MR. TALARICO: I'm not clear on what you are
8 asking, Judge. Could you --

9 THE COURT: What I'm asking is isn't the failure
10 to recover the \$660,000 as opposed to 300,000
11 attributable to the high-low agreement that was
12 entered into well over a year or if not two or more
13 years after Popovich and Mast were out of the case?

14 MR. TALARICO: Well, Judge, I -- first of all,
15 he didn't enter into it. He's claimed over and over
16 that that's not his signature. It was forged.
17 There is many issues about that in the bankruptcy.

18 THE COURT: But again, counsel -- but again, my
19 point being I don't really care if he signed it or
20 didn't sign it. My point being that it is that
21 agreement that limited his damages, and that
22 agreement was entered into way after Popovich and
23 Mast withdrew from this case, right?

24 MR. TALARICO: That's right, but --

1 THE COURT: He so would have got -- so he would
2 have gotten all 660,000 had that agreement not been
3 entered into.

4 MR. TALARICO: Judge, but at -- before the judge
5 ruled in that binding mediation, he had no idea how
6 much the case was worth. They had told him it was
7 worth \$5,000 and then some. That -- that date --
8 that's the date when he knows when there was a
9 factual pecuniary damage. He knows the case is
10 worth much more than they told him and he's got
11 numbers behind it. Before that, he had nothing to
12 plead.

13 THE COURT: Respectfully, the case is worth that
14 much against Mr. Gagnon, not necessarily against
15 Mr. Gagnon's -- I believe it was his parents, the
16 two people that settled out of it. The \$660,000 is
17 a finding of liability against Mr. Gagnon, isn't it?

18 MR. TALARICO: Yes, it is.

19 THE COURT: So how is it a finding of liability
20 against the two people that were settled with?

21 MR. TALARICO: Because those people were settled
22 with instructions by Mr. Mast that they could not
23 win any money against them. His instructions were
24 that they -- they would get out on summary judgment,

1 he would get nothing, take \$5,000 as a gift. He was
2 over and over that that -- that that argument was
3 made between Mast and between Dulberg, and some of
4 those documents are part of what we filed.

5 THE COURT: All right. Anything else,
6 Mr. Talarico?

7 MR. TALARICO: Not at the moment, Judge. Thank
8 you.

9 THE COURT: Thank you, sir. Final word, please.

10 MR. FLYNN: Thank you, Judge. Just briefly with
11 respect to the pecuniary loss, the loss or the
12 injury, which is the language used in the statute,
13 was in January of 2014 when the case against the
14 McGuires, Bill and Caroline McGuire. Caroline was
15 Gagnon's mother. Bill McGuire was the stepfather.
16 That case was foreclosed in January of 2014. No
17 recovery could have been had other than the \$5,000
18 at that point in time. That's when there was an
19 injury.

20 The question -- the second prong of the
21 analysis is when did he have a reasonable belief
22 that the injury was wrongfully caused. Dulberg had
23 every opportunity, he admitted that he had talked to
24 hundreds of lawyers. He could have asked Balke, he

1 could have asked Baudin. He didn't ask any of them,
2 allegedly.

3 Under Illinois law, he has a duty to
4 investigate if he thinks there is an issue. He
5 had -- he became disillusioned with Mast in 2014.
6 Mast withdrew in March of 2015. Again, the injury
7 is January 2014.

8 THE COURT: Thank you very much.

9 MR. TALARICO: Judge, may I say one thing?

10 THE COURT: You may.

11 MR. TALARICO: Thank you. The Supreme Court
12 case, the Suburban case makes it clear that being
13 alerted to a problem or alerted to malpractice is
14 not sufficient enough until -- they use the specific
15 word alerted and say that is not sufficient. There
16 has to be a pecuniary loss.

17 So whether he talked to a thousand
18 attorneys and whether they all told him all
19 different things, he's alerted but he had to face a
20 loss. That's all, Judge. Thank you.

21 THE COURT: Thank you. He was clearly alerted.
22 Let's cut to the chase. He was hesitant -- he was
23 hesitant to ever even sign the settlement agreement
24 to the point where it took him over two months to do

1 it. He clearly had his doubts. He clearly had his
2 lack of faith. He signed the settlement agreement
3 anyway. A year later, the attorneys withdrew. He
4 went to another attorney, still raised the issue.
5 Went to another attorney, still raised the issue.
6 Met with hundreds of attorneys. He was clearly
7 alerted.

8 When did the pecuniary loss occur? Here is
9 the amazing part, and this is what -- where the
10 disconnect comes on this case and it's why I'm
11 having so much trouble with it, I'm being urged that
12 the pecuniary loss occurred when the decision was
13 given on the binding mediation. But the reason I
14 believe that's a disconnect is because -- for two
15 reasons. The loss that occurred on the binding
16 mediation that is being urged upon the Court is a
17 loss of what appears to be \$360,000. The difference
18 between the \$660,000 that the mediator indicated
19 the -- were the appropriate measure of damages
20 against Mr. Gagnon and the \$300,000 insurance policy
21 limit, that \$360,000 difference and the amount that
22 was awarded and the amount that the mediator claimed
23 should have been awarded is based on an agreement
24 that somebody entered into. We don't know who that

1 somebody was, but we know for a fact that that
2 somebody was not Hans Mast or the Law Offices of Tom
3 Popovich because the agreement occurred well after
4 they were out of Dodge.

5 But didn't the pecuniary loss itself, in
6 fact, occur if there was a cause of action to which
7 you were alerted? The pecuniary loss occurred when
8 he only got \$5,000. I agree with defense counsel.
9 Statute of limitations lapsed. Merely denying the
10 statute of limitation without more in the
11 depositions and the sworn testimony does not itself
12 create an issue of material fact.

13 The motion for summary judgment is heard.
14 It is most respectfully allowed. Thank you very
15 much, gentlemen.

16 MR. FLYNN: Thank you.

17 THE COURT: Both of you, outstanding. Even
18 though they didn't comply with local rules, I will
19 say gentlemen, to both of you, outstanding
20 pleadings. Very thorough, very well written. I had
21 no issues going through them. I spent three days
22 going through all of them repeatedly, and you both
23 made my job -- well, I'm not going to say easy, but
24 you certainly did your jobs. And I very much

1 appreciate your time. Thank you, gentlemen.

2 MR. FLYNN: Thank you, Judge. And for what it's
3 worth, I apologize for not doing numbered paragraphs
4 on the statement of facts. I did follow that format
5 with Judge Meyer in another summary judgment motion
6 that was granted. This case was originally before
7 Judge Meyer. So --

8 THE COURT: I take no offense. I take no
9 offense by anybody. The pleadings were what they
10 were, and I had no issue reading them. Thank you
11 all very much for your time.

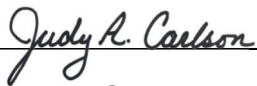
12 MR. TALARICO: Thank you, Judge.

13 THE COURT: Thank you, sir.

14 (Which were all the proceedings
15 had in the above-entitled cause
16 this date.)
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1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF McHENRY)
4

5 I, JUDY CARLSON, an official Court Reporter
6 for the Circuit Court of McHenry County,
7 Twenty-Second Judicial Circuit of Illinois,
8 transcribed the electronic recording of the
9 proceeding in the above-entitled cause to the best
10 of my ability and based on the quality of the
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12 a true and accurate transcript of said electronic
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