

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - LAW DIVISION

PAUL R. DULBERG and THE PAUL )  
R. DULBERG REVOCABLE TRUST, )

Plaintiff, )

vs. )

KELLY N. BAUDIN, et al, )

Defendants. )

No. 2022 L 010905

Zoom video conference of the Hearing  
held before the HONORABLE MICHAEL F. OTTO,  
Courtroom 1407, taken pursuant to notice, commencing  
at 11:15 a.m., Thursday, September 21, 2023.

Reported by: Connie L. James, CSR  
License No. 084.002510

A P P E A R A N C E S :

ALL PARTIES APPEARING VIA ZOOM VIDEO CONFERENCE:

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FOR DEFENDANTS OLSEN, WILLETTE & YALDEN:

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I N D E X

HEARING ON MOTION FOR SUMMARY JUDGMENT:

Arguments:

By Ms. Tinajero.....Pg. 5

By Mr. Talarico.....Pg. 7

By Ms. Tinajero.....Pg. 14

By Mr. Talarico.....Pg. 16

Court's Ruling on the Motion.....Pg. 16

1 THE COURT: Good morning. Would everyone please  
2 identify themselves for the record?

3 MR. TALARICO: Good morning, Your Honor.  
4 Alphonse Talarico. I represent the Plaintiffs.

5 MS. TINAJERO: Good morning, Judge Otto. My name  
6 is Michelle Tinajero. I represent Allstate Property  
7 and Casualty Insurance Company.

8 THE COURT: Thank you.

9 Mr. is it Mr. Jochum?

10 MR. JOCHUM: Jochum, Your Honor. Sorry.

11 THE COURT: All right. Good morning.

12 MR. JOCHUM: Jason Jochum representing what we  
13 refer to as the Olsen Defendants, Joseph Olsen, Craig  
14 Willette and Raphael Yalden. They were dismissed  
15 earlier, but I'm just observing because we're still on  
16 appeal.

17 THE COURT: Thank you. I see we are also joined  
18 by Mr. Dulberg, individually, as well as Thomas Kost,  
19 K O S T, who is identified in his Zoom window as, the  
20 quote, full trustee of Paul R. Dulberg Revocable Trust,  
21 unquote.

22 We're up today for hearing on Allstate's  
23 Motion For Summary Judgment, which has been fully  
24 briefed. Anything to discuss before we move forward

1 with that hearing?

2 Mr. Talarico for the Plaintiff?

3 MR. TALARICO: Judge, no, nothing.

4 THE COURT: Ms. Tinajero, ready?

5 MS. TINAJERO: Yes, Your Honor.

6 THE COURT: Okay. You'll have the first and last  
7 word.

8 I will say for the record I have read the  
9 briefs, I have, of course, reviewed the exhibits as  
10 well as the authority that the parties have cited. So  
11 no within should feel that they need to read their  
12 brief to me, but I will, of course, give both sides an  
13 opportunity to be heard.

14 Ms. Tinajero, it's your motion, you'll have  
15 the first and last word.

16 MS. TINAJERO: Thank you, Your Honor. I will  
17 keep it brief this morning since you have gone through  
18 the briefs.

19 ARGUMENT BY

20 MS. TINAJERO:

21 The arguments set forth in our Motion For  
22 Summary Judgment are very straight forward. You know,  
23 as to the unsigned agreement, the position Plaintiffs  
24 have taken that a party is bound by and, therefore, can

1 breach an unsigned, undated agreement is a legally  
2 flawed position. Simply put, Allstate cannot be bound  
3 by an unsigned agreement.

4 As to the binding mediation agreement, which  
5 is the only executed valid agreement between the  
6 parties, which is undisputed, to the extent terms were  
7 modified and/or admitted between the unsigned agreement  
8 and the executed binding mediation agreement, it is not  
9 alleged Allstate does not maintain that it played any  
10 role in drafting anything about the mediation  
11 agreement. And, importantly, such amendments were made  
12 before the binding mediation was executed.

13 Additionally, the monetary parameters set  
14 forth in the agreement remains the same in both the  
15 unsigned agreement and the executed binding mediation  
16 agreement.

17 The damage that Dulberg identifies in the  
18 complaint, you know, in an amount in excess of \$261,000  
19 do not flow from any breach complained of as against  
20 Allstate. And it's our position that there are no set  
21 of facts under which Dulberg can prove a breach of an  
22 unsigned agreement or the executed binding mediation  
23 agreement.

24

1 Further, Dulberg executed a release, which is  
2 attached to our Motion For Summary Judgment. The terms  
3 of the release are clear, certain, free from doubt and  
4 Dulberg admits to signing the release in his reply to  
5 Allstate's affirmative defenses. That's all I have,  
6 Your Honor.

7 THE COURT: Thank you, Tinajero.

8 Mr. Talarico?

9 ARGUMENT BY

10 MR. TALARICO:

11 I think I would like to start in reverse  
12 order. I would like to address, Judge, the release.

13 Mr. Dulberg -- I filed on behalf of  
14 Mr. Dulberg, he signed a counter-affidavit, which was  
15 sent to the Court and I believe it's actually been  
16 delivered personally to your courtroom today. It was  
17 filed yesterday. Mr. Dulberg had been sick for a few  
18 days and he couldn't cooperate or give me any of his  
19 time, but I filed it yesterday and it's in opposite to  
20 the release, the reasons why the release is not  
21 effective. His reasoning is that he was forced to do  
22 this against his will.

23 In his counter-affidavit he indicated, and I  
24 think copied transcripts of e-mails that he received

1 from his own attorney forcing -- telling him that if he  
2 didn't sign the release, the Judge would hold him in  
3 contempt and he would be jailed, different than the  
4 general terms of contract by signing a release, which  
5 is a contract, under those terms cannot be enforced  
6 against the person that's being threatened with jail,  
7 and/or being held in contempt. Plus, that particular  
8 release makes no sense, Judge.

9 If you really think about all of the things  
10 they talk about in their motion and affidavit,  
11 especially the affidavit.

12 I would like to bring up the fact that the  
13 statement, the affiant says the money was paid and then  
14 the releases were sent out to be signed. Judge, I  
15 would ask you to take judicial notice that insurance  
16 companies do not pay first and then send out releases.

17 Furthermore, since this matter was already  
18 adjudicated and an order was entered by the arbitration  
19 judge, there was no need for a release; that Allstate  
20 had paid, according to their own affidavit, and now  
21 they're trying to enforce and ask for and force  
22 Mr. Dulberg to sign a release. I think that brings up  
23 a considerable amount of questionable contrary facts  
24 just on its own, Judge.



1           So I would hope that you would contemplate  
2     what I'm saying and see that summary judgment is so  
3     inappropriate, that's just one of hundreds of things  
4     that we are at different ends of the spectrum on. And  
5     I think that's all been supplied to Your Honor, but,  
6     most importantly, this release issue, it is contrary to  
7     the logic that the money was paid first and released.  
8     In my practice, Judge, but I've never settled with an  
9     insurance company that would pay first and then ask for  
10    a release. That's all I have to say today, Judge.  
11    Thank you.

12           THE COURT: Okay. Mr. Talarico, the only  
13    argument you want to make today is a brand new argument  
14    based on, I believe, duress that did not appear  
15    anywhere in your response brief. It is based  
16    exclusively on an affidavit that was filed yesterday  
17    and hand delivered to the Court minutes before this  
18    proceeding began.

19           That's the only argument you want to make?  
20    You don't want to address anything that Ms. Tinajero  
21    spelled out in the motion or the reply regarding the  
22    enforceability of an unsigned agreement, which is the  
23    entire basis of Count 5? I just want to make sure that  
24    you have a full opportunity to make whatever arguments

1 you wish.

2 FURTHER ARGUMENT

3 BY MR. TALARICO:

4 First, I would like to get back to the  
5 release. The release was filed yesterday, Your Honor.  
6 It was filed and it was accepted. I sent it out to  
7 Your Honor this morning at about 6:00 a.m. with the  
8 attached exhibits and all the other counsel of record.  
9 What response I got was please send a hard copy from  
10 your support staff. So I had a hard copy delivered to  
11 the courtroom today, but this was filed yesterday.

12 Judge, this was filed pursuant to, and I  
13 think it's clear there, Subsection C of the Motion For  
14 Summary Judgment. I'm allowed to do that, Your Honor.  
15 And I just complied with the statute, 735 5 -- Well,  
16 you know, Judge, better than I know. But 105  
17 Subsection C says I can file counter-affidavits up to  
18 the time of hearing and I did that.

19 So I don't think I violated anyone and I  
20 tried -- I sent a message to everybody that if anybody  
21 objects, they want more time to review, they want more  
22 time to respond, we have no objection. And I also --  
23 counsel suggested the reason why Mr. Dulberg is here  
24 because if the Court wants to examine him as to the

1 affidavit, he's more than willing to answer questions  
2 of the Court.

3 THE COURT: This is not an evidentiary hearing.

4 MR. TALARICO: You're right, Your Honor. I just  
5 made that option.

6 THE COURT: The other question I asked you, and,  
7 again, you focused exclusively on this 11th hour  
8 affidavit, which only addresses the effectiveness of  
9 the release, I want to make sure that you've had the  
10 opportunity to address today, if you choose, because I  
11 didn't see anything really in your brief that addresses  
12 why the draft agreement attached as Exhibit 6B to the  
13 complaint would be enforceable?

14 MR. TALARICO: Why it wouldn't be enforceable?  
15 Is that what you said? I'm sorry.

16 THE COURT: Why it would be enforceable because  
17 that's your claim. Count 5 is for breach of contract.

18 MR. TALARICO: Yes, Judge.

19 THE COURT: The breach that you claim in  
20 Paragraph 106 is that Defendant breached the contract  
21 by not following the terms regarding amending the  
22 contract, but the only amendments that you cite are the  
23 changes between Exhibit 6B and Exhibit 11. So for  
24 there to possibly be a breach of contract, Exhibit 6B

1 must have been enforceable, otherwise you can't  
2 possibly have a claim for its breach. And Ms. Tinajero  
3 on behalf of Allstate has argued in the motion and the  
4 reply that because Exhibit B was unsigned it was not  
5 enforceable.

6 THE COURT: Judge, Exhibit B was the only exhibit  
7 permitted by the bankruptcy court. It was presented to  
8 the bankruptcy judge as unsigned and the bankruptcy  
9 judge, Judge Lynch, said to the trustee "sign the  
10 contract and you can go forward." Trustee never signed  
11 it. They refused to sign -- They didn't actually  
12 refuse to sign it, but he didn't. Then another  
13 contract appeared.

14 One of the things we said, Judge, is that  
15 this matter -- this binding mediation agreement had  
16 been already presented to the trial court judge maybe  
17 6 months before. So there's all of these issues of  
18 what's the valid contract, names are changing from the  
19 Defendant being liable, the contract now says a  
20 relative of the Dulbergs is liable to Paul, but there's  
21 a person, David Dulberg, he exists.

22 Again, the bankruptcy judge saw an unsigned  
23 contract and told and instructed his trustee to sign  
24 it.

1           We have an enforceable contract, I believe.  
2   And I think that the fact that all of these things were  
3   done -- and forgive me, Judge, because I don't practice  
4   bankruptcy -- but in violation of the stay that had  
5   been in effect that whole time. I think that with all  
6   of those issues I should be allowed as representative  
7   of the Plaintiff to do some discovery upon to see  
8   really what the truth of the matter is, we've had  
9   allegations back and forth.

10           THE COURT: You said that the bankruptcy court  
11   directed the trustee to sign the agreement. So what  
12   possible relevance can any prior alleged violations of  
13   the stay have to do with Allstate's liability under any  
14   contract?

15           MR. TALARICO: Judge, the terms of the contract,  
16   we say that the signed contract is a contract. The  
17   terms of the contract as accepted and signed by all the  
18   parties were -- when I say parties I mean Dulberg  
19   denies he signed it, but, anyway, the terms of the  
20   contract are sufficient, they say that the breach is  
21   that they changed the terms of the contract from the  
22   contract they presented to the Court; that the plain  
23   language of the contract says if you do this you have  
24   to do it, you have to submit hard copies, you have to

1 do it in advance, I think it's 2 weeks, you have to get  
2 permission by the ADR. None of that was done. And  
3 both Baudin and the attorney for Allstate were  
4 participants in that. So I believe that's a breach of  
5 contract.

6 THE COURT: Mr. Talarico, that assumes that the  
7 unsigned contract was enforceable. What factual or  
8 legal support do you have for that proposition because  
9 I saw not a single case cited in your brief at all?  
10 And the extensive factual recitation appears completely  
11 irrelevant. So what did you point me to that I  
12 overlooked in your brief that provides factual or legal  
13 support for the proposition that the unsigned contract  
14 is enforceable?

15 MR. TALARICO: Judge, I will rest now. I said  
16 what I have to say. What I pointed you to was the fact  
17 that the only contract empowered was the unsigned one.  
18 So I'm going to stay on that and I'm finished talking.  
19 Thank you, Judge.

20 THE COURT: Thank you, Mr. Talarico.

21 Ms. Tinajero, if you wish?

22 FURTHER ARGUMENT

23 BY MS. TINAJERO:

24 Judge, just briefly. I will say as to the

1 counter-affidavit that was filed this morning, or at  
2 least a courtesy copy of which we only received this  
3 morning, it's Allstate's position it should be  
4 stricken.

5 A briefing schedule was entered in this case.  
6 Dulberg, Plaintiff's counsel received an extension of  
7 time to file his response. But, more importantly,  
8 procedural matters aside, all the information contained  
9 in the counter-affidavit it doesn't create a genuine  
10 issue of material fact as to Allstate's breach of an  
11 unsigned agreement:

12 Any representations that the Baudin  
13 Defendants made or the Olsen Defendants made to Dulberg  
14 in the course of the binding mediation proceedings, any  
15 execution of the binding mediation agreement or in  
16 Dulberg's execution of the release have no bearing on  
17 the specific claim against Allstate here, which is  
18 breach of an unsigned contract. That's all, Your  
19 Honor.

20 MR. TALARICO: Your Honor, may I respond?

21 THE COURT: You had a full opportunity to argue,  
22 Mr. Talarico, but in the interest of making a complete  
23 record, what did you wish to say, bearing in mind that  
24 Ms. Tinajero will have the last word?

1 FURTHER ARGUMENT

2 BY MR. TALARICO:

3 Yes. I'm repeating myself but --

4 THE COURT: Then why are you taking everybody's  
5 time if all you're going to do is repeat yourself?

6 MR. TALARICO: One sentence, Judge, will be all I  
7 want.

8 I'm allowed to do that pursuant to 735 ILCS  
9 5/2-1005(c). Thank you, Judge.

10 THE COURT: All right. You did, indeed, repeat  
11 yourself, but I suppose if you wanted to say that a  
12 second time for the record, fine.

13 COURT'S RULING

14 ON THE MOTION:

15 Plaintiff's counsel is correct, Section 2  
16 1005 of the Illinois Code of Civil Procedure, 735 ILCS  
17 5/2-1005, Subparagraph (c), does permit an opposing  
18 party to, quote, prior to or at the time of the hearing  
19 on the motion file counter-affidavits, unquote.

20 I remain unconvinced of the wisdom of that  
21 provision of the Illinois Code of Civil Procedure, but  
22 there's nothing unconstitutional about it and judges  
23 don't ignore or overlook a statute simply because they  
24 can't understand why in the world that would be the



1 law. So, yes, there is nothing procedurally improper  
2 about launching an affidavit at the opposing parties  
3 and the Court hours before a hearing on a fully briefed  
4 Motion For Summary Judgment. So I have received the  
5 affidavit.

6 The affidavit, as I said, essentially seeks  
7 to lay ground work for a claim of duress in executing  
8 the release. I don't see anything about duress by  
9 Allstate and I don't see anything in the affidavit, nor  
10 have I heard anything in counsel's argument today, that  
11 would suggest that Allstate was not entitled to rely on  
12 the release, but the release issue is only one of the  
13 arguments that Allstate makes in support of its Motion  
14 For Summary Judgment.

15 Even if I were to find that there were an  
16 issue of material fact as to the enforceability of the  
17 release, Allstate is entitled to summary judgment on  
18 Count 5 of the complaint as pled because the only  
19 breach of contract that the Plaintiff alleges is  
20 failure to follow, quote, the terms regarding amending  
21 the contract. But the only amendments of the contract  
22 that the Plaintiff identifies are changes from an  
23 unsigned version of the contract to the final signed  
24 version of the contract.

1           The Plaintiff provides no authority to  
2 support the proposition that the unsigned contract was  
3 binding on Allstate or anyone else. And if the  
4 contract, itself, was not binding, definitionally the  
5 terms regarding amending the contract, quote, unquote,  
6 cannot have been bind. There is no other breach pled.  
7 So Allstate ask entitled to summary judgment.

8           In addition, even if hypothetically, because  
9 I understand Mr. Talarico's point, that the unsigned  
10 version of the contract was the version presented to  
11 the bankruptcy judge in advance, even if theoretically  
12 there might be some potential claim for hoodwinking the  
13 bankruptcy judge, or something like that, I don't know  
14 what it would be, even if hoodwinking the bankruptcy  
15 judge, quote, unquote, were a basis for finding a  
16 contract enforceable, even so the breaches that the  
17 Plaintiff claims did not cause any injury.

18           Mr. Talarico notes that there were a few  
19 changes and one does appear to have introduced a  
20 typographical error in terms of the individual who  
21 would be responsible to the Plaintiff, but both  
22 contracts, the unsigned and the signed, were identical  
23 as far as Allstate's obligation and there is no  
24 suggestion, there is not even any suggestion, let alone

1 an issue of material fact that Allstate paid the full  
2 amount that it was obligated to pay under either  
3 version of the contract.

4 So Allstate is entitled to summary judgment  
5 not only on the grounds that there was no breach, but,  
6 even if there were a breach, there was no injury.

7 The motion for summary judgment is granted in  
8 its entirety.

9 And the parties will have to remind me, I  
10 don't believe there are any other parties remaining,  
11 but, perhaps, I'm overlooking someone.

12 Mr. Talarico, to your knowledge are there any  
13 other party defendants remaining in the case?

14 MR. TALARICO: Not at this moment, Your Honor.  
15 There are no more, you've already released everyone.

16 THE COURT: Okay. So then today's order will be  
17 final and appealable.

18 Ms. Tinajero, I'll ask you to draft a short  
19 written order. It doesn't need to say anything more  
20 than that the parties appearing on Allstate's Motion  
21 For Summary Judgment, Court having heard argument of  
22 both sides, having considered all briefs and all  
23 exhibits, including the recent affidavit by Plaintiff  
24 Paul Dulberg grants summary judgment for the reasons

1     stated on the record. This is a final and appealable  
2     order.

3             Thank you, everybody. Have a good day.  
4     We're in recess.

5             MS. TINAJERO: Thank you, Judge.

6             MR. TALARICO: Thank you, Your Honor.

7             (Whereupon the hearing concluded at 11:40 a.m.)  
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REPORTER'S CERTIFICATE

I, CONNIE L. JAMES, CSR No. 084.002510,  
Certified Shorthand Reporter, certify:


That the foregoing proceedings were taken before  
me at the time and place therein set forth;

That all statements made at the time of the  
hearing were recorded stenographically by me and were  
thereafter transcribed;

That the foregoing is a true and correct  
transcript of my shorthand notes so taken;

I further certify that I am not a relative  
or employee of any attorney of the parties, nor  
financially interested in the action.

I declare under penalty of perjury under the Laws  
of Illinois that the foregoing is true and correct.

Dated this 2<sup>nd</sup> 

CONNIE L. JAMES, CSR No. 084.002510

<b>&amp;</b>	<b>5</b>	<b>addition</b> 18:8	<b>alleges</b> 17:19
<b>&amp;</b> 2:12,13	<b>5</b> 3:6 9:23	<b>additionally</b>	<b>allowed</b> 10:14
<b>0</b>	10:15 11:17	6:13	13:6 16:8
<b>010905</b> 1:7	17:18	<b>address</b> 7:12	<b>allstate</b> 2:8 4:6
<b>084.002510</b>	<b>5/2-1005</b> 16:9	9:20 11:10	6:2,9,20 8:19
1:23 21:3,20	16:17	<b>addresses</b> 11:8	12:3 14:3
<b>1</b>	<b>550</b> 2:14	11:11	15:17 17:9,11
<b>1005</b> 16:16	<b>6</b>	<b>adjudicated</b>	17:13,17 18:3
<b>105</b> 10:16	<b>6</b> 12:17	8:18	18:7 19:1,4
<b>106</b> 11:20	<b>600</b> 2:6	<b>admits</b> 7:4	<b>allstate's</b> 4:22
<b>11</b> 11:23	<b>60062</b> 2:6	<b>admitted</b> 6:7	7:5 13:13 15:3
<b>11:15</b> 1:14	<b>60601</b> 2:10	<b>adr</b> 14:2	15:10 18:23
<b>11:40</b> 20:7	<b>60661</b> 2:14	<b>advance</b> 14:1	19:20
<b>11th</b> 11:7	<b>6:00</b> 10:7	18:11	<b>alphonse</b> 2:5,5
<b>14</b> 3:7	<b>6b</b> 11:12,23,24	<b>affiant</b> 8:13	4:4
<b>1407</b> 1:13	<b>7</b>	<b>affidavit</b> 7:14	<b>amending</b>
<b>150</b> 2:10	<b>7</b> 3:6	7:23 8:10,11	11:21 17:20
<b>16</b> 3:7,9	<b>707</b> 2:6	8:20 9:16 11:1	18:5
<b>2</b>	<b>735</b> 10:15 16:8	11:8 15:1,9	<b>amendments</b>
<b>2</b> 14:1 16:15	16:16	17:2,5,6,9	6:11 11:22
<b>2022</b> 1:7	<b>8</b>	19:23	17:21
<b>2023</b> 1:14	<b>808-1410</b> 2:7	<b>affidavits</b> 10:17	<b>amount</b> 6:18
21:18	<b>894-3200</b> 2:11	16:19	8:23 19:2
<b>21</b> 1:14	<b>a</b>	<b>affirmative</b> 7:5	<b>amundsen</b> 2:9
<b>25th</b> 21:18	<b>a.m.</b> 1:14 10:7	<b>agreement</b> 5:23	<b>answer</b> 11:1
<b>261,000</b> 6:18	20:7	6:1,3,4,5,7,8,11	<b>anybody</b> 10:20
<b>27558</b> 21:19	<b>accepted</b> 10:6	6:14,15,16,22	<b>anyway</b> 13:19
<b>3</b>	13:17	6:23 9:22	<b>appeal</b> 4:16
<b>300</b> 2:14	<b>action</b> 21:15	11:12 12:15	<b>appealable</b>
<b>312</b> 2:7,11,15	<b>actually</b> 7:15	13:11 15:11,15	19:17 20:1
<b>3300</b> 2:10	12:11	<b>al</b> 1:8	<b>appear</b> 9:14
<b>345-1718</b> 2:15	<b>adams</b> 2:14	<b>allegations</b>	18:19
		13:9	<b>appeared</b> 12:13
		<b>alleged</b> 6:9	<b>appearing</b> 2:2
		13:12	19:20

<b>appears</b> 14:10 <b>arbitration</b> 8:18 <b>argue</b> 15:21 <b>argued</b> 12:3 <b>argument</b> 5:19 7:9 9:13,13,19 10:2 14:22 16:1 17:10 19:21 <b>arguments</b> 3:5 5:21 9:24 17:13 <b>aside</b> 15:8 <b>asked</b> 11:6 <b>assumes</b> 14:6 <b>attached</b> 7:2 10:8 11:12 <b>attorney</b> 8:1 14:3 21:14 <b>authority</b> 5:10 18:1 <b>avenue</b> 2:10	<b>bearing</b> 15:16 15:23 <b>began</b> 9:18 <b>behalf</b> 7:13 12:3 <b>believe</b> 7:15 9:14 13:1 14:4 19:10 <b>better</b> 10:16 <b>bind</b> 18:6 <b>binding</b> 6:4,8 6:12,15,22 12:15 15:14,15 18:3,4 <b>bisgaard</b> 2:13 <b>boulevard</b> 2:6 <b>bound</b> 5:24 6:2 <b>brand</b> 9:13 <b>breach</b> 6:1,19 6:21 11:17,19 11:24 12:2 13:20 14:4 15:10,18 17:19 18:6 19:5,6 <b>breached</b> 11:20 <b>breaches</b> 18:16 <b>brief</b> 5:12,17 9:15 11:11 14:9,12 <b>briefed</b> 4:24 17:3 <b>briefing</b> 15:5 <b>briefly</b> 14:24 <b>briefs</b> 5:9,18 19:22	<b>bring</b> 8:12 <b>brings</b> 8:22 <b>brisbois</b> 2:13 <b>c</b> <b>c</b> 2:1 10:13,17 16:9,17 <b>case</b> 14:9 15:5 19:13 <b>casualty</b> 4:7 <b>cause</b> 18:17 <b>certain</b> 7:3 <b>certificate</b> 21:1 <b>certified</b> 21:4 <b>certify</b> 21:4,13 <b>changed</b> 13:21 <b>changes</b> 11:23 17:22 18:19 <b>changing</b> 12:18 <b>chicago</b> 2:10,14 <b>choose</b> 11:10 <b>circuit</b> 1:1 <b>cite</b> 11:22 <b>cited</b> 5:10 14:9 <b>civil</b> 16:16,21 <b>claim</b> 11:17,19 12:2 15:17 17:7 18:12 <b>claims</b> 18:17 <b>clear</b> 7:3 10:13 <b>code</b> 16:16,21 <b>commencing</b> 1:13 <b>companies</b> 8:16 <b>company</b> 4:7 9:9	<b>complained</b> 6:19 <b>complaint</b> 6:18 11:13 17:18 <b>complete</b> 15:22 <b>completely</b> 14:10 <b>complied</b> 10:15 <b>concluded</b> 20:7 <b>conference</b> 1:11 2:2 <b>connie</b> 1:22 21:3,20 <b>considerable</b> 8:23 <b>considered</b> 19:22 <b>contained</b> 15:8 <b>contemplate</b> 9:1 <b>contempt</b> 8:3,7 <b>contract</b> 8:4,5 11:17,20,22,24 12:10,13,18,19 12:23 13:1,14 13:15,16,16,17 13:20,21,22,23 14:5,7,13,17 15:18 17:19,21 17:21,23,24 18:2,4,5,10,16 19:3 <b>contracts</b> 18:22 <b>contrary</b> 8:23 9:6
<b>b</b>			
<b>b</b> 12:4,6 <b>back</b> 10:4 13:9 <b>bankruptcy</b> 12:7,8,8,22 13:4,10 18:11 18:13,14 <b>based</b> 9:14,15 <b>basis</b> 9:23 18:15 <b>baudin</b> 1:8 14:3 15:12			

<b>cook</b> 1:1 <b>cooperate</b> 7:18 <b>copied</b> 7:24 <b>copies</b> 13:24 <b>copy</b> 10:9,10 15:2 <b>correct</b> 16:15 21:11,17 <b>counsel</b> 10:8,23 15:6 16:15 <b>counsel's</b> 17:10 <b>count</b> 9:23 11:17 17:18 <b>counter</b> 7:14,23 10:17 15:1,9 16:19 <b>county</b> 1:1,2 <b>course</b> 5:9,12 15:14 <b>court</b> 1:1 4:1,8 4:11,17 5:4,6 7:7,15 9:12,17 10:24 11:2,3,6 11:16,19 12:6 12:7,16 13:10 13:10,22 14:6 14:20 15:21 16:4,10 17:3 19:16,21 <b>court's</b> 3:9 16:13 <b>courtesy</b> 15:2 <b>courtroom</b> 1:13 7:16 10:11	<b>craig</b> 4:13 <b>create</b> 15:9 <b>csr</b> 1:22 21:3 21:20 <b>d</b> <b>d</b> 3:1 <b>damage</b> 6:17 <b>dated</b> 21:18 <b>david</b> 12:21 <b>davis</b> 2:9 <b>day</b> 20:3 21:18 <b>days</b> 7:18 <b>declare</b> 21:16 <b>defendant</b> 2:8 11:20 12:19 <b>defendants</b> 1:9 2:12 4:13 15:13,13 19:13 <b>defenses</b> 7:5 <b>definitionally</b> 18:4 <b>delivered</b> 7:16 9:17 10:10 <b>denies</b> 13:19 <b>department</b> 1:2 <b>different</b> 8:3 9:4 <b>directed</b> 13:11 <b>discovery</b> 13:7 <b>discuss</b> 4:24 <b>dismissed</b> 4:14 <b>division</b> 1:2 <b>doubt</b> 7:3 <b>draft</b> 11:12 19:18	<b>drafting</b> 6:10 <b>dulberg</b> 1:4,5 4:18,20 6:17 6:21 7:1,4,13 7:14,17 8:22 10:23 12:21 13:18 15:6,13 19:24 <b>dulberg's</b> 15:16 <b>dulbergs</b> 12:20 <b>duress</b> 9:14 17:7,8 <b>e</b> <b>e</b> 2:1,1 3:1 7:24 <b>earlier</b> 4:15 <b>effect</b> 13:5 <b>effective</b> 7:21 <b>effectiveness</b> 11:8 <b>either</b> 19:2 <b>employee</b> 21:14 <b>empowered</b> 14:17 <b>ends</b> 9:4 <b>enforce</b> 8:21 <b>enforceability</b> 9:22 17:16 <b>enforceable</b> 11:13,14,16 12:1,5 13:1 14:7,14 18:16 <b>enforced</b> 8:5 <b>entered</b> 8:18 15:5	<b>entire</b> 9:23 <b>entirety</b> 19:8 <b>entitled</b> 17:11 17:17 18:7 19:4 <b>error</b> 18:20 <b>especially</b> 8:11 <b>essentially</b> 17:6 <b>et</b> 1:8 <b>everybody</b> 10:20 20:3 <b>everybody's</b> 16:4 <b>evidentiary</b> 11:3 <b>examine</b> 10:24 <b>excess</b> 6:18 <b>exclusively</b> 9:16 11:7 <b>executed</b> 6:5,8 6:12,15,22 7:1 <b>executing</b> 17:7 <b>execution</b> 15:15,16 <b>exhibit</b> 11:12 11:23,23,24 12:4,6,6 <b>exhibits</b> 5:9 10:8 19:23 <b>exists</b> 12:21 <b>extension</b> 15:6 <b>extensive</b> 14:10 <b>extent</b> 6:6
--	--	--	---



<p><b>f</b></p> <p><b>f</b> 1:12</p> <p><b>fact</b> 8:12 13:2 14:16 15:10 17:16 19:1</p> <p><b>facts</b> 6:21 8:23</p> <p><b>factual</b> 14:7,10 14:12</p> <p><b>failure</b> 17:20</p> <p><b>far</b> 18:23</p> <p><b>feel</b> 5:11</p> <p><b>file</b> 10:17 15:7 16:19</p> <p><b>filed</b> 7:13,17,19 9:16 10:5,6,11 10:12 15:1</p> <p><b>final</b> 17:23 19:17 20:1</p> <p><b>financially</b> 21:15</p> <p><b>find</b> 17:15</p> <p><b>finding</b> 18:15</p> <p><b>fine</b> 16:12</p> <p><b>finished</b> 14:18</p> <p><b>first</b> 5:6,15 8:16 9:7,9 10:4</p> <p><b>flawed</b> 6:2</p> <p><b>flow</b> 6:19</p> <p><b>focused</b> 11:7</p> <p><b>follow</b> 17:20</p> <p><b>following</b> 11:21</p> <p><b>force</b> 8:21</p> <p><b>forced</b> 7:21</p> <p><b>forcing</b> 8:1</p>	<p><b>foregoing</b> 21:6 21:11,17</p> <p><b>forgive</b> 13:3</p> <p><b>forth</b> 5:21 6:14 13:9 21:7</p> <p><b>forward</b> 4:24 5:22 12:10</p> <p><b>free</b> 7:3</p> <p><b>full</b> 4:20 9:24 15:21 19:1</p> <p><b>fully</b> 4:23 17:3</p> <p><b>further</b> 7:1 10:2 14:22 16:1 21:13</p> <p><b>furthermore</b> 8:17</p> <p><b>g</b></p> <p><b>general</b> 8:4</p> <p><b>genuine</b> 15:9</p> <p><b>give</b> 5:12 7:18</p> <p><b>go</b> 12:10</p> <p><b>going</b> 14:18 16:5</p> <p><b>good</b> 4:1,3,5,11 20:3</p> <p><b>granted</b> 19:7</p> <p><b>grants</b> 19:24</p> <p><b>ground</b> 17:7</p> <p><b>grounds</b> 19:5</p> <p><b>h</b></p> <p><b>hand</b> 9:17</p> <p><b>hard</b> 10:9,10 13:24</p>	<p><b>heard</b> 5:13 17:10 19:21</p> <p><b>hearing</b> 1:11 3:3 4:22 5:1 10:18 11:3 16:18 17:3 20:7 21:9</p> <p><b>held</b> 1:12 8:7</p> <p><b>hold</b> 8:2</p> <p><b>honor</b> 4:3,10 5:5,16 7:6 9:5 10:5,7,14 11:4 15:19,20 19:14 20:6</p> <p><b>honorable</b> 1:12</p> <p><b>hoodwinking</b> 18:12,14</p> <p><b>hope</b> 9:1</p> <p><b>hour</b> 11:7</p> <p><b>hours</b> 17:3</p> <p><b>hundreds</b> 9:3</p> <p><b>hypothetically</b> 18:8</p> <p><b>i</b></p> <p><b>identical</b> 18:22</p> <p><b>identified</b> 4:19</p> <p><b>identifies</b> 6:17 17:22</p> <p><b>identify</b> 4:2</p> <p><b>ignore</b> 16:23</p> <p><b>ilcs</b> 16:8,16</p> <p><b>illinois</b> 1:1 2:6 2:10,14 16:16 16:21 21:17</p>	<p><b>importantly</b> 6:11 9:6 15:7</p> <p><b>improper</b> 17:1</p> <p><b>inappropriate</b> 9:3</p> <p><b>including</b> 19:23</p> <p><b>indicated</b> 7:23</p> <p><b>individual</b> 18:20</p> <p><b>individually</b> 4:18</p> <p><b>information</b> 15:8</p> <p><b>injury</b> 18:17 19:6</p> <p><b>instructed</b> 12:23</p> <p><b>insurance</b> 4:7 8:15 9:9</p> <p><b>interest</b> 15:22</p> <p><b>interested</b> 21:15</p> <p><b>introduced</b> 18:19</p> <p><b>irrelevant</b> 14:11</p> <p><b>issue</b> 9:6 15:10 17:12,16 19:1</p> <p><b>issues</b> 12:17 13:6</p> <p><b>j</b></p> <p><b>jail</b> 8:6</p> <p><b>jailed</b> 8:3</p> <p><b>james</b> 1:22 21:3 21:20</p>
--	---	---	--

888-391-3376

<b>parameters</b> 6:13 <b>participants</b> 14:4 <b>particular</b> 8:7 <b>parties</b> 2:2 5:10 6:6 13:18,18 17:2 19:9,10 19:20 21:14 <b>party</b> 5:24 16:18 19:13 <b>paul</b> 1:4,4 4:20 12:20 19:24 <b>pay</b> 8:16 9:9 19:2 <b>penalty</b> 21:16 <b>perjury</b> 21:16 <b>permission</b> 14:2 <b>permit</b> 16:17 <b>permitted</b> 12:7 <b>person</b> 8:6 12:21 <b>personally</b> 7:16 <b>pg</b> 3:6,6,7,7,9 <b>place</b> 21:7 <b>plain</b> 13:22 <b>plaintiff</b> 1:6 2:4 5:2 13:7 17:19 17:22 18:1,17 18:21 19:23 <b>plaintiff's</b> 15:6 16:15 <b>plaintiffs</b> 4:4 5:23	<b>played</b> 6:9 <b>please</b> 4:1 10:9 <b>pled</b> 17:18 18:6 <b>plus</b> 8:7 <b>point</b> 14:11 18:9 <b>pointed</b> 14:16 <b>position</b> 5:23 6:2,20 15:3 <b>possible</b> 13:12 <b>possibly</b> 11:24 12:2 <b>potential</b> 18:12 <b>practice</b> 9:8 13:3 <b>presented</b> 12:7 12:16 13:22 18:10 <b>prior</b> 13:12 16:18 <b>procedural</b> 15:8 <b>procedurally</b> 17:1 <b>procedure</b> 16:16,21 <b>proceeding</b> 9:18 <b>proceedings</b> 15:14 21:6 <b>property</b> 4:6 <b>proposition</b> 14:8,13 18:2 <b>prove</b> 6:21	<b>provides</b> 14:12 18:1 <b>provision</b> 16:21 <b>pursuant</b> 1:13 10:12 16:8 <b>put</b> 6:2 <b>q</b> <b>question</b> 11:6 <b>questionable</b> 8:23 <b>questions</b> 11:1 <b>quote</b> 4:20 16:18 17:20 18:5,15 <b>r</b> <b>r</b> 1:4,5 2:1 4:20 <b>raphael</b> 4:14 <b>read</b> 5:8,11 <b>ready</b> 5:4 <b>really</b> 8:9 11:11 13:8 <b>reason</b> 10:23 <b>reasoning</b> 7:21 <b>reasons</b> 7:20 19:24 <b>received</b> 7:24 15:2,6 17:4 <b>recent</b> 19:23 <b>recess</b> 20:4 <b>recitation</b> 14:10 <b>record</b> 4:2 5:8 10:8 15:23 16:12 20:1	<b>recorded</b> 21:9 <b>refer</b> 4:13 <b>refuse</b> 12:12 <b>refused</b> 12:11 <b>regarding</b> 9:21 11:21 17:20 18:5 <b>relative</b> 12:20 21:13 <b>release</b> 7:1,3,4 7:12,20,20 8:2 8:4,8,19,22 9:6 9:10 10:5,5 11:9 15:16 17:8,12,12,17 <b>released</b> 9:7 19:15 <b>releases</b> 8:14 8:16 <b>relevance</b> 13:12 <b>rely</b> 17:11 <b>remain</b> 16:20 <b>remaining</b> 19:10,13 <b>remains</b> 6:14 <b>remind</b> 19:9 <b>repeat</b> 16:5,10 <b>repeating</b> 16:3 <b>reply</b> 7:4 9:21 12:4 <b>reported</b> 1:22 <b>reporter</b> 21:4 <b>reporter's</b> 21:1
--	---	--	--

<b>represent</b> 4:4,6 <b>representations</b> 15:12 <b>representative</b> 13:6 <b>representing</b> 4:12 <b>respond</b> 10:22 15:20 <b>response</b> 9:15 10:9 15:7 <b>responsible</b> 18:21 <b>rest</b> 14:15 <b>reverse</b> 7:11 <b>review</b> 10:21 <b>reviewed</b> 5:9 <b>revocable</b> 1:5 4:20 <b>right</b> 4:11 11:4 16:10 <b>role</b> 6:10 <b>ruling</b> 3:9 16:13	17:8,9 <b>seeks</b> 17:6 <b>send</b> 8:16 10:9 <b>sense</b> 8:8 <b>sent</b> 7:15 8:14 10:6,20 <b>sentence</b> 16:6 <b>september</b> 1:14 21:18 <b>set</b> 5:21 6:13,20 21:7 <b>settled</b> 9:8 <b>short</b> 19:18 <b>shorthand</b> 21:4 21:12 <b>sick</b> 7:17 <b>sides</b> 5:12 19:22 <b>sign</b> 8:2,22 12:9 12:11,12,23 13:11 <b>signature</b> 21:19 <b>signed</b> 7:14 8:14 12:10 13:16,17,19 17:23 18:22 <b>signing</b> 7:4 8:4 <b>simply</b> 6:2 16:23 <b>single</b> 14:9 <b>skokie</b> 2:6 <b>smith</b> 2:13 <b>sorry</b> 4:10 11:15	<b>specific</b> 15:17 <b>spectrum</b> 9:4 <b>spelled</b> 9:21 <b>staff</b> 10:10 <b>start</b> 7:11 <b>stated</b> 20:1 <b>statement</b> 8:13 <b>statements</b> 21:8 <b>statute</b> 10:15 16:23 <b>stay</b> 13:4,13 14:18 <b>stenographic...</b> 21:9 <b>straight</b> 5:22 <b>street</b> 2:14 <b>stricken</b> 15:4 <b>submit</b> 13:24 <b>subparagraph</b> 16:17 <b>subsection</b> 10:13,17 <b>sufficient</b> 13:20 <b>suggest</b> 17:11 <b>suggested</b> 10:23 <b>suggestion</b> 18:24,24 <b>suite</b> 2:6,10,14 <b>summary</b> 3:3 4:23 5:22 7:2 9:2 10:14 17:4 17:14,17 18:7 19:4,7,21,24	<b>supplied</b> 9:5 <b>support</b> 10:10 14:8,13 17:13 18:2 <b>suppose</b> 16:11 <b>sure</b> 9:23 11:9
<b>s</b>			<b>t</b>
<b>s</b> 2:1 4:19 <b>saw</b> 12:22 14:9 <b>saying</b> 9:2 <b>says</b> 8:13 10:17 12:19 13:23 <b>schedule</b> 15:5 <b>second</b> 16:12 <b>section</b> 16:15 <b>see</b> 4:17 9:2 11:11 13:7			<b>t</b> 4:19 <b>take</b> 8:15 <b>taken</b> 1:13 5:24 21:6,12 <b>talarico</b> 2:5,5 3:6,7 4:3,4 5:2 5:3 7:8,10 9:12 10:3 11:4,14 11:18 13:15 14:6,15,20 15:20,22 16:2 16:6 18:18 19:12,14 20:6 <b>talarico's</b> 18:9 <b>talk</b> 8:10 <b>talking</b> 14:18 <b>telling</b> 8:1 <b>terms</b> 6:6 7:2 8:4,5 11:21 13:15,17,19,21 17:20 18:5,20 <b>thank</b> 4:8,17 5:16 7:7 9:11 14:19,20 16:9 20:3,5,6 <b>theoretically</b> 18:11

<b>things</b> 8:9 9:3 12:14 13:2 <b>think</b> 7:11,24 8:9,22 9:5 10:13,19 13:2 13:5 14:1 <b>thomas</b> 4:18 <b>threatened</b> 8:6 <b>thursday</b> 1:14 <b>time</b> 7:19 10:18 10:21,22 13:5 15:7 16:5,12 16:18 21:7,8 <b>tinajero</b> 2:9 3:6 3:7 4:5,6 5:4,5 5:14,16,20 7:7 9:20 12:2 14:21,23 15:24 19:18 20:5 <b>today</b> 4:22 7:16 9:10,13 10:11 11:10 17:10 <b>today's</b> 19:16 <b>told</b> 12:23 <b>transcribed</b> 21:10 <b>transcript</b> 21:12 <b>transcripts</b> 7:24 <b>trial</b> 12:16 <b>tried</b> 10:20 <b>true</b> 21:11,17 <b>trust</b> 1:5 4:20	<b>trustee</b> 4:20 12:9,10,23 13:11 <b>truth</b> 13:8 <b>trying</b> 8:21 <b>typographical</b> 18:20	<b>violated</b> 10:19 <b>violation</b> 13:4 <b>violations</b> 13:12 <b>vs</b> 1:7	10:11
	<b>u</b>	<b>w</b>	<b>z</b>
	<b>unconstitutio...</b> 16:22 <b>unconvinced</b> 16:20 <b>undated</b> 6:1 <b>under</b> 6:21 8:5 13:13 19:2 21:16,16 <b>understand</b> 16:24 18:9 <b>undisputed</b> 6:6 <b>unquote</b> 4:21 16:19 18:5,15 <b>unsigned</b> 5:23 6:1,3,7,15,22 9:22 12:4,8,22 14:7,13,17 15:11,18 17:23 18:2,9,22	<b>w</b> 2:14 <b>want</b> 9:13,19 9:20,23 10:21 10:21 11:9 16:7 <b>wanted</b> 16:11 <b>wants</b> 10:24 <b>we've</b> 13:8 <b>weeks</b> 14:1 <b>willette</b> 2:12 4:14 <b>willing</b> 11:1 <b>window</b> 4:19 <b>wisdom</b> 16:20 <b>wish</b> 10:1 14:21 15:23 <b>word</b> 5:7,15 15:24 <b>work</b> 17:7 <b>world</b> 16:24 <b>written</b> 19:19	<b>zoom</b> 1:11 2:2 4:19
	<b>v</b>	<b>x</b>	
	<b>valid</b> 6:5 12:18 <b>version</b> 17:23 17:24 18:10,10 19:3 <b>video</b> 1:11 2:2	<b>x</b> 3:1	
		<b>y</b>	
		<b>yalden</b> 2:12 4:14 <b>yesterday</b> 7:17 7:19 9:16 10:5	