

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 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)
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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
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