

6 PAUL DULBERG,)
7)
8 Plaintiff,)
9)
0 vs.) No. 17 LA 377
THE LAW OFFICES OF THOMAS J.)
POPOVICH, P.C., and HANS)
MAST,)
Defendants.)

ELECTRONICALLY RECORDED Report of
Proceedings in the above-entitled cause before the
Honorable THOMAS A. MEYER, Judge of said Court of
McHenry County, Illinois, on the 4th day of
January, 2022, in the McHenry County Government
Center, Woodstock, Illinois.

APPEARANCES:

LAW OFFICE OF ALPHONSE A. TALARICO
BY: MR. ALPHONSE A. TALARICO (Via Zoom)

On behalf of the Plaintiff;

KARBAL COHEN ECONOMOU SILK & DUNNE, LLC
BY: MR. GEORGE K. FLYNN

On behalf of the Defendants.

1 THE COURT: And it appears we are all here on
2 Dulberg versus Popovich.

3 For the record, here in court we
4 have?

5 MR. FLYNN: George Flynn on behalf of
6 defendants.

7 THE COURT: Plaintiff's counsel?

8 MR. TALARICO: Good morning, Judge. My name
9 is Alphonse Talarico for Mr. Dulberg.

10 THE COURT: Okay. Where are we because I
11 know there was a dispute over whether discovery had
12 been produced, and it seems to have been -- I think
13 I directed it be produced again and just get past
14 this.

15 So what is the current status of the
16 motion? I'll ask plaintiff.

17 MR. TALARICO: At this moment, Judge, there
18 has been a motion, a response, and reply filed.
19 There has been no determination by the Court
20 whether or not plaintiff's claims are justified, so
21 at this moment that's what the motion to compel is
22 before you.

23 THE COURT: Well, the issue as I -- the core
24 issue is, as I understood it, is you alleged that

1 they had not complied with discovery and defendant
2 said otherwise saying they had previously produced
3 it. It was my recollection I directed them to send
4 it again.

5 Is that a fair assessment?

6 MR. FLYNN: Not exactly, your Honor.

7 MR. TALARICO: No, Judge.

8 MR. FLYNN: If I could explain.

9 THE COURT: Yeah, go ahead. I'll ask defense
10 counsel.

11 MR. FLYNN: Mr. Talarico is the third lawyer
12 representing Mr. Dulberg in this case. The first
13 lawyer, Tom Gooch, propounded discovery -- written
14 discovery shortly before he withdrew from the case.

15 And Julia Williams from the Clinton
16 Law Firm came into the case, propounded
17 discovery -- written discovery, a separate set, and
18 we agreed that I would not be answering the written
19 discovery that Pop- -- I'm sorry -- Gooch had
20 propounded. We answered two and a half years ago.

21 Mr. Talarico came in the case. And
22 I've laid out an outline of all the pertinent dates
23 in our response, but I did have an agreement.
24 Ms. Williams has confirmed this just back in

1 December. I think it was December 3rd. She wrote
2 to me and confirmed all of my representations that
3 she had never intended for me to answer the first
4 set of discovery. We answered the second set of
5 discovery. Moved on. We reported to the Court
6 that discovery had been answered. We moved on to
7 depositions. I deposed the plaintiff. She then
8 deposed Hans Mast, one of the defendants I'm
9 representing, and then her firm later withdrew.

10 Mr. Talarico never raised an issue
11 until over 13 months after he was in the case, so
12 we've raised the timeliness issue. Moreover, I had
13 an agreement with counsel that we would not be
14 answering the first set. And, again, it's laid out
15 in detail.

16 THE COURT: There is also -- Ultimately did
17 you produce copies of the discovery you previously
18 answered?

19 MR. FLYNN: We've -- I'm not sure what the
20 issue is there. So Ms. Williams had issues with
21 some blank pages contained in our --

22 THE COURT: But there was -- you referred to
23 the first set of discovery. I think you called it
24 the Gooch discovery.

1 MR. FLYNN: We never answered the Gooch
2 discovery --

3 THE COURT: Okay.

4 MR. FLYNN: -- because by agreement we
5 weren't --

6 THE COURT: But you answered somebody's
7 discovery. Forgive me if I misunderstood.

8 MR. FLYNN: We answered Ms. Williams'
9 discovery --

10 THE COURT: All right.

11 MR. FLYNN: -- which included interrogatories
12 to both the Popovich firm and Hans Mast, request
13 for production to both, and 213 interrogatories, so
14 I laid out all of our witnesses. Went through
15 several rounds of 201(k) discussions with Ms.
16 Williams.

17 She thought that there were some
18 blank pages contained in our large production, and
19 this production included transcripts from
20 depositions of several doctors and other witnesses
21 we obtained at our expense and then produced to
22 her. She didn't take copies of everything, but we
23 gave her the opportunity to inspect the file live.

24 I met her at my client's office.

1 She went through it. And then as we represented
2 that these blank pages were actually just page
3 dividers in the original physical file, she was
4 satisfied and we moved on.

5 THE COURT: Okay. Mr. Talarico?

6 MR. TALARICO: There was a lot there, Judge.
7 Let me think. First of all, there was no -- there
8 was no Gooch responses. There was no documentation
9 of withdrawal of Gooch's discovery. The Court had
10 not been made aware of it. The client had not been
11 made aware of it.

12 The Gooch discovery question has
13 major questions which the Clinton discovery does
14 not have. It refers as to the standard of care in
15 a legal malpractice case and as to conflicts of
16 interest. Those types of questions have
17 disappeared.

18 Now, the questions that did go from
19 the Clinton's, a lot of the responses, and I
20 outlined them specifically, was See Document 1
21 through 1,455. Nothing more specific than that.

22 So in my -- my -- what I'm trying to
23 do is get the answers to the Gooch discovery. I'm
24 trying to get the answers to the Clinton discovery.

1 I have very little -- very little documentation
2 unless I'm -- you know, I've got 1400 pages I have
3 to search through, but nothing specific. And those
4 answers were over -- probably six or seven times
5 they answered that same way.

6 As to Julia Williams, I tried to
7 contact her when Mr. Flynn said, well, Julia
8 Williams agreed to that. I sent an email to her.
9 She has not yet responded. That was before
10 Mr. Flynn even talked to her. Then Mr. Flynn
11 talked to her, and his -- his letters, which are
12 included which I attached, are don't you remember,
13 don't you agree, don't you do this, don't --
14 he's -- he's giving her the answers. He's leading
15 her. And in her answers I specify it and show it
16 in my reply that she says, um, I'm not sure. I
17 think. I believe we did that. None of this was
18 absolute.

19 So what I have and the reason why I
20 didn't see this is because I see -- according to
21 201(m), Supreme Court Rule 201(m), I see file of
22 discovery, answer of discovery. I don't -- I
23 didn't -- when the Clinton discovery was filed,
24 they did not file a 201(m). They called it the

1 first set. It wasn't. It was the second set.
2 When Mr. Flynn answered, he called it the first
3 set. It wasn't. It was the second set.

4 When I got into the case, I saw this
5 and I saw your standing order about discovery. I
6 thought everything was -- everything was answered
7 and done.

8 Now, the Clintons turned over
9 information to me piecemeal by different attorneys.
10 They had different attorneys working the file, and
11 different attorneys sent me different documents.
12 I'm still not sure I have a complete set. So they
13 are --

14 THE COURT: So what is it ultimately --
15 Ultimately what are you looking for?

16 MR. TALARICO: Answers to the discovery.
17 Answers to the Clinton discovery.

18 THE COURT: Well, are any of these -- I'm
19 assuming some of these are duplicative. I can't
20 imagine that the Gooch discovery omitted or was
21 entirely radically different from what was filed by
22 Williams.

23 MR. TALARICO: With all due respect --

24 MR. FLYNN: Judge, many of them -- I'm sorry.

1 MR. TALARICO: I'm sorry.

2 THE COURT: Go ahead. Plaintiff.

3 MR. TALARICO: With all due respect, it was
4 because it did not talk about conflicts of
5 interest, which was a question that I believe
6 Mr. Gooch was trying to get to, and also standard
7 of care questions were not asked.

8 THE COURT: In the Williams' discovery?

9 MR. TALARICO: Yes.

10 THE COURT: Okay. Defense counsel?

11 MR. FLYNN: I disagree, Judge, not pointing
12 to any specific interrogatory or production
13 request. In any event, it's late. You know, we
14 are not -- I would request that the Court not
15 reopen written discovery at this late date. We
16 answered two and a half years ago, presented a
17 lawyer for his deposition.

18 THE COURT: Here is one of the problems I
19 have with that. I think technically you have a
20 very valid point, but I suspect that if I submitted
21 this or if this was submitted to the Appellate
22 Court, they would say give him another chance. And
23 they probably wouldn't like my saying that, but
24 that is a common complaint. At this level when we

1 attempt to strictly enforce the rules as we are
2 told, the frequent result is give them one more
3 chance. So we take that into consideration. So
4 that is why I fashioned my -- or tried to make sure
5 everybody gets what they want.

6 MR. FLYNN: I understand that and I
7 appreciate it, and that's why I laid out in the
8 response to the motion the extensive history and my
9 agreements with Ms. Williams.

10 Now, I did stand up here in front of
11 your Honor as I am doing today, and I understand
12 the Appellate Court issues and that's one reason I
13 am here right now because my -- my testimony is
14 part of this motion.

15 THE COURT: And what would happen if I
16 granted leave to issue supplemental discovery?

17 MR. FLYNN: You know, Judge, the expenses
18 that my clients have incurred because of the
19 third -- the third attorney coming in --

20 THE COURT: Realistically.

21 MR. FLYNN: I have to question whether
22 Mr. Dulberg and his current attorney have even had
23 an opportunity to review the correspondence between
24 me and Ms. Williams because there have been several

1 instances where it is apparent to me that they have
2 not either willing -- they are either unwilling or
3 unable to, and I don't know what the answer is.

4 And I can give you another example
5 of that when we get to the next motion that
6 Mr. Talarico has brought relative to the
7 affirmative defenses. I have the documentation.
8 He's made accusations in the motion that
9 Ms. Williams was somehow misled because of the
10 labeling and the content of my affirmative defense;
11 but as the Court will see, that is not the case at
12 all. So I have to question whether Mr. Dulberg and
13 his lawyer even have the communication between me
14 and Ms. Williams.

15 When we first appeared here back in
16 November and Mr. Talarico indicated that he may be
17 bringing a motion to compel, he didn't even know
18 what it was going to be. I had to write to him and
19 ask him what is this outstanding discovery that is
20 purportedly missing. He then wrote back to me and
21 said, well, you didn't sign the interrogatories and
22 the discovery and only one of your clients did.

23 Well, that wasn't true either. I
24 forwarded him the transmittal emails from my

1 secretary to Ms. Williams with all the signatures
2 from all three parties involved, me and my two
3 clients.

4 So, you know, we are ready to file a
5 summary judgment motion. There isn't anything
6 relative to the standard of care in the discovery
7 and that they haven't had a chance to already
8 explore with my client. He was deposed for --

9 THE COURT: Maybe you're right.

10 MR. FLYNN: -- two or three hours. He's a
11 lawyer. They had the chance.

12 THE COURT: I am sympathetic, but in the back
13 of my head I'm -- I suspect I know what would
14 happen at the next level. If we proceeded to
15 summary judgment and I granted it, there would
16 remain that issue, well, you should have given him
17 this discovery.

18 And my policy is when a summary
19 judgment is filed, I'll ask, typically the
20 plaintiff, is there anything you need before you
21 respond and I give it to them because I don't want
22 that to come haunting -- and haunt any decision I
23 made that, oh, you should have let this -- you
24 should have let them do this one little bit of

1 discovery. I want to be a hundred percent
2 satisfied that everything is done. And I know
3 that's not fair to you under the circumstances, but
4 I think in the long run that policy serves us all
5 well even if it means we may spend time and money
6 in some cases that's not necessary.

7 MR. FLYNN: I appreciate that. That is why I
8 laid the entire history out in the response. I
9 would just implore the Court to review that before
10 final ruling on --

11 THE COURT: Your -- your -- I think -- I
12 won't say that because the record may be reviewed,
13 but I'm very cautious about barring discovery. I
14 mean, we would have to be on the eve of trial for
15 me to feel comfortable doing that based on the
16 Appellate Court decisions I've read, and generally
17 the theme is give them one more chance. And so I'm
18 going to adhere to that, which is why I am focusing
19 on what it is we are looking for.

20 And so I'm now looking at
21 Mr. Talarico. What are you looking for?

22 MR. TALARICO: Judge, I'd like to respond to
23 Mr. Flynn's allegations against me.

24 THE COURT: No, no.

1 MR. TALARICO: I just want to say one --

2 THE COURT: No, no. You guys -- you guys
3 want to argue what you want to argue about. I want
4 to -- I want to cut to the chase because if you
5 start -- if you respond, he has to respond. So
6 anything he said that might have attacked your
7 character in any way, shape, or form is not
8 relevant to me and I didn't consider it. So let's
9 move on.

10 So what is it you are looking for?

11 MR. TALARICO: Judge, I'm looking for the
12 answers to the Gooch discovery and for the Clinton
13 discovery. Nothing new. Just answered this time.

14 THE COURT: Well, I think -- I think the
15 suggestion that they've avoided answering it is
16 probably inaccurate because until this moment it
17 had not been brought to my attention, meaning with
18 respect to this motion, that it was an issue. So
19 to -- and I'll ask counsel here in court, how much
20 overlap is there between the Clinton and the Gooch
21 discovery before we get to the Williams' discovery?

22 MR. FLYNN: Ballpark, 75 percent at least.

23 THE COURT: Okay. And if your answers can
24 say see this answer to --

1 MR. FLYNN: That's the problem because what
2 he's pointing to in the motion is my -- the issues
3 that I took --

4 THE COURT: How many interrogatories are
5 there?

6 MR. FLYNN: -- with respect to Dulberg's
7 answers and what I considered to be invasive
8 written and oral discovery answers because we were
9 trying to get to a specific point and that is the
10 statute of limitations in his discovery and his
11 incurred damages.

12 On the other hand, when I'm faced
13 with a production request, for example, that says
14 produce the client file from your representation of
15 Mr. Dulberg and I say, See Pages 1 through 1400,
16 that's the client file, that's the client file.

17 THE COURT: That's adequate.

18 MR. FLYNN: That's a different inquiry. So,
19 you know, if there had been something specific they
20 were looking for, I thought it would have come out
21 by now.

22 THE COURT: And a corollary concern is how
23 many interrogatories are we talking about?

24 MR. FLYNN: And that's a good question, your

1 Honor. With respect -- I'm not sure if we've
2 reached 30 with respect to --

3 THE COURT: I can't believe we haven't.

4 MR. FLYNN: Each -- each -- well, I think
5 there were about ten or fifteen Gooch, ten or
6 fifteen from -- from Ms. Williams, and then there
7 were the -- you know, I answered the 213 witness
8 interrogatories which I consider to be a separate
9 requirement whether they are propounded on the
10 party or not, so I answered the 213(f)(1), (2), and
11 (3) discovery as if someone had propounded it on
12 me. So have we reached the 30? It's probably not
13 too much greater than 30, to be honest.

14 THE COURT: All right. So, Mr. Talarico,
15 rather than just telling me you want answers to
16 everything because I got to believe that the
17 interrogatories are duplicative and the fact that
18 you've got three sets of interrogatories filed by
19 three different sets of attorneys doesn't mean you
20 get each one of them. There are --

21 MR. TALARICO: Correction.

22 THE COURT: -- two.

23 MR. TALARICO: There's only two sets.

24 THE COURT: I'm sorry.

1 MR. TALARICO: And those are the -- those are
2 the Gooch and the Clinton. I have not filed any.
3 I'm trying to get answers to the Gooch and (audio
4 distortion).

5 THE COURT: I don't know who that is.

6 MR. FLYNN: It couldn't be me. I'm live.

7 THE COURT: Okay. So why can't you identify
8 the specific Gooch interrogatories that you need
9 answered, and we can then omit the duplicative ones
10 because I've got to believe that are duplicative
11 ones.

12 MR. TALARICO: Judge, a review doesn't
13 show -- I don't remember any duplicative ones.
14 They went in different directions completely. Like
15 I said, the Gooch stuff involves conflicts of
16 interest and standard of care. Those were, you
17 know, the major issues. That's none of that in the
18 Clinton.

19 MR. FLYNN: If he could even identify by
20 interrogatory where the standard of care was posed
21 and not answered, I would -- that would be even
22 helpful to me.

23 I think one of the other issues
24 we'll run into, Judge, is that we've spent hours

1 and hours and hours on the document production
2 portion.

3 Now, Ms. Williams may not have taken
4 everything. I don't think she asked for copies of
5 all of the documents we had. But not only did we
6 produce them and copy them for them, I drove to
7 McHenry to my client's office and met with her at
8 his office where she went through the file and
9 decided what she wanted. So for my client to have
10 to go through the cost again --

11 THE COURT: It's all you've got to do.

12 MR. FLYNN: -- is -- All the interrogatories?

13 THE COURT: No. With respect to the
14 production request, you gave her the opportunity to
15 review. She took advantage of that.

16 MR. FLYNN: She did.

17 THE COURT: And whatever she took is whatever
18 she took, so I don't know that it's your burden to
19 fill in gaps if she left something undone.

20 Mr. Talarico, tell me your position
21 on that.

22 MR. TALARICO: Judge, what -- a lot of
23 Mr. Flynn's answers are, See Document 1
24 through 1405. Those answers, I believe, are

1 nonresponsive.

2 THE COURT: Okay. That's a different issue.
3 That's a different issue than what we were just
4 talking about, so --

5 MR. TALARICO: Judge, the issue he's
6 talking -- Mr. Flynn is talking about are 106 pages
7 that were blacked out in what I received,
8 completely blacked out, although they were counted
9 in the Popovich Bates stamp. I wanted to know what
10 those 106 blacked out pages were. That's what he's
11 talking about. He's talking about the Clintons, we
12 went -- they also wanted to know. And as far as
13 Mr. Flynn has represented to the Court, the
14 Clintons were satisfied. I don't know if they
15 were. All I know there is black -- there is 106
16 black pages -- blacked out pages.

17 THE COURT: Well, the fact that the Clintons
18 didn't push the issue suggests to me that they
19 didn't see it as an issue. It's incumbent on them
20 to bring it to my attention otherwise I assume they
21 are satisfied.

22 That being said, what about the 106
23 pages?

24 MR. FLYNN: I don't know that that's the

1 exact number, but there were a significant number
2 of blank pages in the document production. The
3 record is clear and I've attached some of the
4 commentary on that between myself and Ms. Williams,
5 but in any event, she raised the issue, said why
6 are these pages redacted. I checked with my
7 client. It turns out they were not redacted pages.
8 They were actually pink. I remember the color.
9 They were pages of pink paper -- construction paper
10 or, you know, 8 and a half by 11 paper that divided
11 certain sections of the file. So in order to
12 confirm that, Ms. Williams came to Mr. Popovich's
13 office, looked at it, saw those pink pieces of
14 paper dividing the files, and was satisfied. And
15 then we moved on. We came back into court,
16 reported the --

17 THE COURT: Do I have the production response
18 attached in --

19 MR. TALARICO: You have it all, your Honor.

20 THE COURT: What's it attached to?

21 MR. TALARICO: It's attached to my reply.

22 THE COURT: All right. Let me find it.

23 MR. FLYNN: So following these 201(k)
24 conferences, phone calls, emails, and meeting, we

1 reported that the parties had answered discovery
2 and moved on to depositions.

3 Now, had there been any outstanding
4 issues, I wouldn't have proceeded. I wouldn't have
5 presented my client for deposition, and I don't
6 think Ms. Williams would have taken the deposition.
7 But I don't want to --

8 THE COURT: I accept all that. I mean, it
9 all --

10 MR. FLYNN: Makes sense.

11 THE COURT: -- logically makes sense.

12 All right. Do we still have -- No,
13 we don't. Let me -- All right. I'm looking at
14 Page 39 of the reply. Okay. With respect to
15 Request Number 1, it's my assumption, and you can
16 correct me, but the nature of the question followed
17 by the answer tells me that Page 1 through 1455 is
18 all correspondence, communications, emails, or text
19 messages, and I -- I'm not sure how I can make him
20 break it down further. I'm assuming that that's
21 exactly what's in that 1400-some-odd pages.

22 Mr. Talarico?

23 MR. TALARICO: Correct, Judge, but there are
24 multiple times that same answer is given that can

1 be specific -- specifically answered.

2 THE COURT: All right. The fact that you
3 have the same answer to Number 2 with respect to
4 pleadings tells me Number 1 includes documents that
5 are not responsive to Number 1 because Number 1
6 doesn't ask for pleadings.

7 MR. FLYNN: I suppose Number 2 is over -- or,
8 well, I'm sorry, no, I guess Number 1 would be
9 overinclusive because the 1 through 1455 is --

10 THE COURT: There is overlap.

11 MR. FLYNN: -- was everything that we had.
12 That included pleadings.

13 THE COURT: So your response is, here is the
14 entire file.

15 MR. FLYNN: Right, these were not specific.
16 If they had been more specific, I would have broken
17 down Bates ranges for particular things, but I
18 think it's kind of silly. And 1400 pages is really
19 not that much in the grand scheme of things.

20 THE COURT: As a rule, I don't like it
21 when -- these are a little broader than I was
22 expecting, but if somebody says produce all letters
23 written on this date and you say look at --

24 MR. FLYNN: And I wouldn't have done that.

1 THE COURT: -- 1500 pages, that's
2 nonresponsive, and I see it quite a bit.

3 MR. FLYNN: I agree.

4 THE COURT: I think the solution -- Well,
5 Mr. Talarico, have you been given an opportunity to
6 review the file?

7 MR. TALARICO: No.

8 THE COURT: Okay. Can you make that
9 available for him?

10 MR. FLYNN: To review which file?

11 THE COURT: Your -- your client's file, the
12 file that Ms. Williams previously reviewed.

13 MR. FLYNN: He's never asked for it. Should
14 we be required to go through that again?

15 THE COURT: Well, yeah, I recognize the
16 operative word here is again, but the -- I don't
17 think it's reasonable to make you do again what
18 you've done if there have been no objections over
19 the past however long.

20 MR. FLYNN: I don't -- Yes, I don't think
21 there has ever been a request by Mr. Talarico to
22 review the file.

23 THE COURT: No.

24 MR. FLYNN: He should have the 1400 pages

1 which were transmitted and anything over and above
2 that --

3 THE COURT: You've produced all 1400 pages?

4 MR. FLYNN: Yes, I believe -- I can't recall
5 if it was a thumb drive or some other electronic
6 transmittal, but they have those pages. Now, if he
7 didn't receive them from prior counsel, again,
8 that's an issue between --

9 THE COURT: Have you, Mr. Talarico? I'm
10 sorry.

11 MR. TALARICO: I'm sorry, Judge?

12 THE COURT: Do you have them? Do you have
13 the pages, all 1400 pages?

14 MR. TALARICO: I believe I do in one of the
15 Julia Clinton files.

16 I would like to make a statement
17 about that type of response. When Mr. Flynn was
18 searching for information and I responded the same
19 as he's saying now, okay, I told this Court, the
20 Honorable Court that I believe Ms. Clinton --
21 Ms. Williams and Mr. Flynn reached an agreement.
22 They just had switched documents. She gave him
23 many thousands of documents. He gave her many --
24 or 1500 documents. When that was presented to the

1 judge, to yourself, you said that's not a good
2 answer.

3 THE COURT: No.

4 MR. TALARICO: In other words, I said the
5 same thing, Look at page something through
6 something. You said, no, you need a specific
7 answer, and you made me give specific answers to
8 those questions rather than the range of documents.

9 THE COURT: There is a little bit -- there is
10 one significant difference in here, at least as far
11 as I understand, and that's the fact that he's
12 previously answered these, and you are raising
13 objections to discovery that was submitted and
14 implicitly accepted by prior counsel. Now you are
15 trying to revisit the issue. Fine. I'm supportive
16 of getting you what you want, but I'm -- I'm
17 reluctant to dump on counsel to do again what
18 prior -- your prior plaintiff's attorney accepted.

19 So the end result is I want to get
20 you everything you think you need, and I also don't
21 want to unfairly burden one or the other of you.

22 MR. FLYNN: Judge, what I think he's saying
23 is what's good for the goose is good for the
24 gander. This is not a situation -- it's not

1 oranges and oranges here.

2 So when I sought -- when I
3 propounded discovery seeking production of
4 documents that supported Dulberg's claim that he
5 did not discover the malpractice and incur damages
6 until December of 2016, a very specific inquiry,
7 and they gave us very general answers. That was
8 when I brought the motion to compel. And I had
9 also taken his deposition and asked it about ten
10 different ways in cross-examination, and that was
11 when I brought the motion to compel. So to try to
12 compare that situation to these general answers to
13 general production requests is inaccurate.

14 THE COURT: So, Mr. Talarico, what is it
15 specifically you want because I want to get you
16 that, but I need to know what it is you are
17 wanting?

18 MR. TALARICO: Excuse me for
19 me (indiscernible). Judge, I would like answers to
20 the Gooch discovery and answers to the Clinton
21 discovery so I can pin someone down as to a
22 document or a response or a position. I just have
23 general statements.

24 THE COURT: Well, you have the production of

1 the client file effectively serving as the answer.
2 Now we are switching back to interrogatories, I'm
3 assuming. I'm talking about the production
4 request.

5 So are you switching to the
6 interrogatories now?

7 MR. TALARICO: I'm switching to discovery as
8 a whole because the answers go back and forth.
9 But, yes, the interrogatories are the same thing.

10 THE COURT: What page -- Well, I'll just
11 assume they are not responded to. So I can't
12 compel defendant to answer discovery that prior
13 counsel waived. And I can't resolve, short of a
14 deposition of Ms. Williams, I can't resolve whether
15 or not she waived the requirement for that
16 discovery.

17 So I think the solution here is that
18 I'm going to give you leave to issue ten
19 supplemental interrogatories, and we'll just move
20 forward from that because of all the problems
21 associated with what prior counsel may have agreed
22 to or may not have. And I think we can spend a lot
23 of time to figure that out to no avail, so it's not
24 going to advance the case at all. So I'm just

1 going to give you ten supplemental interrogatories.
2 You can ask whatever you like.

3 And with respect to the production
4 request, I -- the nature of your questions are
5 fairly broad, but I agree with you on some level
6 that the answers to your production request should
7 have been a little more detailed as to what pages
8 that's on.

9 So as far as production request is
10 concerned, what do you want to do?

11 MR. TALARICO: Judge, because it's so
12 encompassing, okay, again, I'd like to have
13 answers. I'd like to have any and all of those
14 that I noted in my -- in my -- in my motion what I
15 considered nonresponsive in my initial motion and
16 the reason why I considered it nonresponsive. I'd
17 like responses.

18 THE COURT: But this is on potentially waived
19 discovery, so, again, we are just going to start
20 fresh. I'll give you ten supplemental production
21 requests. You can ask what you want, the way you
22 want, and you'll get specific answers. And we
23 don't have to rely on other attorneys to tell us
24 what they did or did not agree on.

1 How quickly can you get those
2 issued?

3 MR. TALARICO: Judge, I'm going to be -- I'm
4 having a medical problem. I think the Court has
5 been made aware and Mr. Flynn has too. I'm facing
6 vision surgery for a detached retina, so I could
7 use a little time. I've been trying to get this
8 done.

9 THE COURT: Okay.

10 MR. TALARICO: With the COVID-19 situation
11 and the courts, the hospitals are backed up. I was
12 scheduled on 11/11 and they canceled. I was
13 scheduled on December, I think it was, 20 --
14 December 21st. I was scheduled for January 7th.
15 I've just been canceled again.

16 THE COURT: Yeah, the --

17 MR. TALARICO: My vision is -- is slacking.
18 I have to at least have cataract surgery, and the
19 ophthalmologist said it looks like you have a
20 detached retina. And my vision is becoming very
21 bad very quickly. This is not a secret. I let
22 Mr. Flynn know that.

23 THE COURT: And I suspect, based on what I'm
24 reading, that would be considered elective surgery

1 and you've got to wait. Is that a fair --

2 MR. TALARICO: That's what I'm guessing
3 although the thought of being nearly blind or blind
4 doesn't fit with elective surgery.

5 THE COURT: Oh, I agree, but from the medical
6 perspective, they might call it -- you might fall
7 into elective, so --

8 MR. TALARICO: They just canceled me again
9 before this court date. They just called.

10 THE COURT: All right.

11 MR. TALARICO: Can I have 60 days? I don't
12 know when I'm going to -- I've got to move fast.
13 If they open -- if something opens up, I have to
14 start calling more hospitals.

15 THE COURT: Okay. I'm going to enter and --
16 I'm going to give you 28 days. We are going to
17 enter and continue this 28 days to give you status.
18 And if you issued it, fine, then we've got a
19 schedule. If not, I'll give you more time. But
20 you are kind of in limbo right now, so I think a
21 shorter date makes sense.

22 MR. TALARICO: Thank you, Judge.

23 THE COURT: Formally I'm denying your motion
24 to compel, and the reason for that is because of

1 the questions of dealing with prior counsel's
2 representations and the fact that the objections to
3 the answers that have been filed are somewhat late
4 to put it mildly, but I'm going to still try and
5 address the issue. I'm giving you leave to issue
6 ten supplemental interrogatories and ten production
7 requests with the expectation they be issued in the
8 next 28 days, but we'll see about your medical
9 condition in 28 days.

10 If for some reason you are unable to
11 appear in 28 days, please notify Mr. Flynn and I'm
12 sure he'll be happy to tell me, and I'll give you
13 more time. But that -- I'm not granting leave for
14 depositions. I'm not granting leave for anything
15 else, just those specific discovery requests.

16 Is there anything else we need to
17 do?

18 MR. TALARICO: Yes, Judge, I have a second --

19 MR. FLYNN: Judge, I would just ask to --

20 MR. TALARICO: -- motion --

21 MR. FLYNN: -- before we get to the motion --

22 MR. TALARICO: Oh, I'm sorry. Excuse me.

23 MR. FLYNN: Sorry. To the extent that these
24 supplemental interrogatories and production

1 requests are being allowed, I would just request,
2 because I have to ask, that the cost and expenses
3 be borne by the plaintiff because of the
4 duplicative nature and the late nature of these
5 requests. We've been through all of this. My
6 client has incurred thousands and thousands of
7 dollars in responding to this discovery, so I
8 understand that the Court is giving latitude to the
9 plaintiff, but I would also ask that the cost be
10 borne by the plaintiff. It's not my client's fault
11 that they are on their third lawyer, and it's not
12 Mr. Talarico's fault either. But this is a problem
13 for Mr. Dulberg.

14 THE COURT: I suspect, and here's my -- my
15 logic is I suspect we save money by just reissuing
16 the discovery and my granting leave to do it than
17 we go through the process of deposing Ms. Williams
18 and have further hearings on this, so it is an
19 effort on my part to forestall further expense.
20 Whether or not it actually saves you anything, I
21 don't know, but it is my -- and I'm also saving
22 arguably a wasted appeal, so I'm -- I'm trying to
23 bear in mind your client's expenses and keep them
24 to a minimum, and I'm not going to grant your

1 request.

2 MR. FLYNN: Understood.

3 THE COURT: It's an unfortunate -- it's
4 unfortunate, but I don't think I could come up with
5 a better solution at this stage.

6 So that being said, the affirmative
7 defense issue?

8 MR. TALARICO: Yes, your Honor, as part of
9 the review of the discovery, I found, I noticed
10 that the Clintons did not respond to Mr. Flynn's
11 fourth affirmative defense which was filed and
12 served separately much later.

13 When the complaint was filed,
14 Mr. Flynn filed an answer and three affirmative
15 defenses. I think, and I don't have it in front of
16 me, quite a while later he filed a fourth
17 affirmative defense. The Clintons were still, you
18 know, in the case. The affirmative -- the fourth
19 affirmative defense was titled the judge -- the
20 attorney judgmental rule, but in reality, the first
21 two paragraphs were a restatement of the first
22 affirmative defense. So they are talking about I
23 think it was contributory negligence under the
24 guise of judge -- attorney judgmental rule. The

1 final one, Paragraph 3, dealt with what the
2 affirmative defense was titled.

3 Now, the Clintons didn't respond.
4 My only guess because she will not -- well, at this
5 time she hasn't had the opportunity to communicate,
6 although I've reached out --

7 THE COURT: Okay.

8 MR. TALARICO: -- is that when she read the
9 fourth affirmative defense, she just thought it was
10 a continuation or a restatement of the first one.
11 She never responded. I've attached the response
12 denying the first -- stating that the first two are
13 the exact same as the first one and then making a
14 statement as to the attorney judgmental rule.

15 THE COURT: So you are asking leave to
16 file -- late file a response to the fourth
17 affirmative defense?

18 MR. TALARICO: That is correct, your Honor.

19 THE COURT: Response?

20 MR. FLYNN: It's really the background that I
21 need to respond to, Judge. If you may allow me to
22 briefly. Again, this is a problem that would have
23 been solved had the plaintiff reviewed the
24 correspondence between me and Ms. Williams and the

1 court file.

2 So I have an email chain between me
3 and Ms. Williams, and, again, I have to ask whether
4 they even have access to it because this will --

5 THE COURT: Let's say everything you say is
6 right, what prevents me from granting leave to make
7 their late filing to the amended affirmative
8 defense?

9 MR. FLYNN: I'm actually not objecting to it,
10 Judge.

11 THE COURT: Okay. Then problem solved.

12 MR. FLYNN: If I could still talk for a
13 minute.

14 THE COURT: Okay. I'll let --

15 MR. FLYNN: And I just want to point out
16 because --

17 THE COURT: I cut him. I've got to cut you
18 off because it sounds like you are going into a
19 statement regarding opposing counsel. The only
20 thing that --

21 MR. FLYNN: I'm not. I'm not. But the
22 representation was made that somehow I misled
23 Ms. Williams and that's why she didn't answer it.
24 And I --

1 THE COURT: She's not here, and I don't
2 believe that. So it's not relevant to anything I'm
3 doing. So I'm going to grant leave to file the
4 answer to the amended affirmative defense, and I'll
5 give you seven days to do it. I know it's already
6 prepared, but I'll make it formal and you have
7 seven days.

8 MR. FLYNN: And just so we are clear, that
9 it's the fourth affirmative defense. So I filed a
10 motion, which is in the court file, seeking leave
11 to file an amended affirmative defense.
12 Ms. Williams told me in this email from
13 October 30th that she's not objecting and that she
14 was going to appear by CourtCall on Monday. That's
15 in an October 30 email. Then we got a November 4th
16 order, which I drafted, stated in Paragraph 1,
17 Popovich is granted leave to file an amended
18 affirmative defense. So what we did is we added
19 one to the first three.

20 THE COURT: Yeah, you have leave.

21 MR. FLYNN: And there is nothing confusing
22 about it.

23 THE COURT: If there is any question, you
24 have leave to --

1 MR. FLYNN: So they are answering Number 4?

2 THE COURT: You are answering Number 4,

3 Mr. Talarico?

4 MR. TALARICO: I am.

5 THE COURT: Okay. And I'll give you seven
6 days. Is there anything else that we need to do?

7 MR. FLYNN: And I wouldn't have objected to
8 that. It was not a request, by the way.

9 THE COURT: I'm sorry?

10 MR. FLYNN: I would not have objected to that
11 request. I was never asked.

12 THE COURT: Thank you.

13 MR. TALARICO: Judge, finally, the reply I
14 filed on -- which was filed timely because of the
15 problems that were going on, and I --

16 MR. FLYNN: No objection.

17 MR. TALARICO: -- again, I'm losing documents
18 from E-File Illinois about their failure. I filed
19 it on the proper date, 21st. They made me refile
20 it on the 22nd, and they gave me the date of the
21 22nd, therefore, I am technically one day late.

22 THE COURT: All right. I'll grant you leave.
23 I'll extend.

24 MR. TALARICO: Thank you.

1 THE COURT: Who is going to draft the order
2 for me?

3 MR. FLYNN: I'm here. I'll take a stab at
4 it.

5 THE COURT: Okay. Mr. Flynn says he'll do
6 it, so -- and we don't have a future date, so let's
7 come back in 30 days. 30 days is Thursday,
8 February 3rd.

9 Does that day work for both of you?

10 MR. FLYNN: I believe so.

11 MR. TALARICO: This will take a few seconds,
12 Judge. The ISBA has not issued their calendars for
13 this year, so I'm sorry, but they claim there is a
14 shortage of cardboard, so -- and I ordered my
15 calendar in the fall.

16 Okay. That's fine with me, Judge.

17 THE COURT: All right. February 3rd, 8:45
18 status of -- status of discovery. And if by some
19 miracle we are all done, I guess we'll move to your
20 summary judgment, but that's -- I'm assuming that's
21 what you're waiting for, and we'll get to that
22 eventually.

23 MR. FLYNN: Yes.

24 THE COURT: Anything else?

1 MR. FLYNN: No.

2 MR. TALARICO: No, Judge.

3 THE COURT: Okay. Mr. Flynn will draft the
4 order, and I'll sign it when I see it.

5 MR. TALARICO: Okay. Thank you, Judge, for
6 your time.

7 Thank you, Mr. Flynn, for your time.

8 THE COURT: Okay. Thank you.

9 MR. FLYNN: Thank you, Mr. Talarico.

10 Thanks, Judge.

11 (Which were all the proceedings
12 had in the above-entitled cause
13 this date.)
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1 STATE OF ILLINOIS)
2 COUNTY OF McHENRY) ss:
3

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

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-----*Kristine Ferru*-----
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