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

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

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

7 THE COURT: And defendant.

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

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

14 Plaintiff, you have a motion.

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

20 THE COURT: Okay. What is that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. FLYNN: But --

15 THE COURT: That's a different issue.

16 MR. FLYNN: Exactly.

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

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

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

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

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

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

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

9 Your name, sir?

10 MR. SCOTT DULBERG: Scott Dulberg.

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

13 MR. SCOTT DULBERG: Yes.

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

20 MR. SCOTT DULBERG: Thank you.

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

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

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

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

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

14 MR. TALARICO: Yes, your Honor.

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

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

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

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

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

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

17 THE COURT: But, ultimately --

18 MR. TALARICO: So we --

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

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

22 THE COURT: None of the exhibits were seen?

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

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

2 MR. TALARICO: The rules --

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

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

7 MR. TALARICO: No.

8 THE COURT: Mr. Flynn, comment.

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

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

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

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

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

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

1 exhibit in its entirety.

2 THE COURT: Okay.

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

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

7 MR. FLYNN: Generally speaking, correct.

8 THE COURT: Mr. Talarico.

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

14 THE COURT: Okay.

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

17 THE COURT: Whose exhibits were they?

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

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

23 MR. TALARICO: That is correct.

24 THE COURT: And the plaintiff was aware of

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

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

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

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

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

21 MR. TALARICO: You are correct.

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

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

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

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

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

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

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

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

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

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

10 Anything else that we need to do
11 today?

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

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

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

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

1 just filed.

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

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

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

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

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

22 MR. FLYNN: Okay.

23 THE COURT: I think that covers it.

24 Is there anything else?

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

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

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

7 THE COURT: Okay. All right.

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

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

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

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

19 MR. FLYNN: Okay.

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

23 MR. FLYNN: Okay. So --

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

1 referring to Judge Berg.

2 MR. FLYNN: Sure.

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

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

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

10 MR. FLYNN: Okay.

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

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

17 MR. FLYNN: Okay.

18 THE COURT: All right.

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

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

23 MR. FLYNN: Thank you.

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

1 day.

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

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

5 I, KATHLEEN STROMBACH, an official
6 Court Reporter for the Circuit Court of McHenry
7 County, Twenty-Second Judicial Circuit of Illinois,
8 transcribed the electronic recording of the
9 proceeding in the above-entitled cause to the best
10 of my ability and based on the quality of the
11 recording, and I hereby certify the foregoing to be
12 a true and accurate transcript of said electronic
13 recording.
14

15 Kathleen Strombach
16 Kathleen Strombach
17 Official Court Reporter
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