



No. 2-23-0072

SC

IN THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT

PAUL R. DULBERG,)	
)	
<i>Plaintiff-Appellant,</i>)	Appeal from
)	The Circuit Court of the 22nd Judicial Circuit
)	McHenry County, Illinois
v.)	Honorable Joel D. Berg, Judge Presiding
)	Circuit Court No. 2017LA000377
HANS MAST and THE LAW OFFICES)	
OF THOMAS J. POPOVICH, P.C.,)	Notice of Appeal Filed: March 3, 2023
)	
<i>Defendant-Appellees.</i>)	

DEFENDANTS/APPELLEES HANS MAST AND THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.'S RESPONSE TO PLAINTIFF/APPELLANT PAUL R. DULBERG'S AMENDED MOTION FOR 3RD EXTENSION OF TIME TO FILE APPELLANT'S BRIEF, TO ALLOW APPELLANT TO AMEND HIS DOCKETING STATEMENT TO INCLUDE RELATED CASES, TO ORDER THE CLERK OF THE 22nd JUDICIAL CIRCUIT TO AMEND HER REPORT ON APPEAL TO INCLUDE ALL MISSING DOCUMENTS AND HYPERLINKS AT NO ADDITIONAL COST TO APPELLANT AND TO INCLUDE AN AFFIDAVIT OF COMPLETENESS & CERTIFICATION, TO ALLOW APPELLANT TO REQUEST THE RECORD ON APPEAL FOR ALL RELATED CASES, AND TO FILE A BRIEF IN EXCESS OF THE PAGE LIMIT

Defendants/Appellees Hans Mast and The Law Offices of Thomas J. Popovich, P.C. (collectively "the Firm"), by and through their attorneys, pursuant to Illinois Supreme Court Rule 361(b)(3), hereby respond to Plaintiff/Appellant Paul R. Dulberg's ("Dulberg's") motion that he has titled "Amended Third Motion for Extension of Time to File Appellant's Brief and Motion to Allow Appellant to Amend His Docketing Statement to Include Related Cases / to Order the Clerk of the 22nd Judicial Circuit to Amend Her Report on Appeal to Include All Missing Documents and Hyperlinks at No Additional Cost to Appellant and to Include an Affidavit of Completeness & Certification / Allow Appellant to Request the Record on Appeal for All Related Cases / to File a Brief in Excess of the Prescribed Page Limits All Pursuant to Supreme

Court Rules 323(b), 329, 341(b), 343(c), 361, 366(a)(3) and (a)(5), 608 (“Motion”). In response, the Firm states as follows:

INTRODUCTION

This is an appeal of a grant of a summary judgment motion in favor of the Firm in a legal malpractice action based on the statute of limitations. C2139-C2144 (notice of appeal); R493-R511 (hearing on summary judgment motion); C856-C870, C2060-C2072, C2134-C2137 (summary judgment briefs), C2138 (summary judgment order). The former client Dulberg brought this action alleging that the Firm was negligent in recommending Dulberg accept an inadequate settlement in an underlying personal injury case arising out of a chain saw accident. C269-C277 (second amended complaint). The trial court found that the instant legal malpractice case is time-barred by the two-year attorney statute of limitations of 735 ILCS 5/13-214.3(b). C2138.

Dulberg filed his notice of appeal back on March 3, 2023, and minimal activity has occurred in this appeal since that time. C2139-C2144. Dulberg has already been granted 120 days of extensions for his opening brief, and now makes an 11th hour request for (i) an additional 90 day extension for his opening brief, (ii) for leave to amend his docketing statement to identify cases that he claims are “related cases,” (iii) for the clerk of the circuit court to start over in preparing a new or supplemental record on appeal, (iv) for an order to require the courts in other cases to prepare documents for a supplement to the record in this case, and (v) for leave to file an oversize brief. Dulberg’s requests are unsubstantiated, fail to comply with the Illinois Supreme Court Rules, and show a lack of focus. This Court should deny all relief requested in Dulberg’s Motion, other than that the Firm does not object to Dulberg receiving a third and final extension of time of 21 days for his Appellant’s Brief. Mtn. ¶1 & Mtn. Ex. A. The Firm hereby

responds with its objections to Dulberg's various requests for relief.

ARGUMENT

I. The Firm does not oppose Dulberg being allowed a third and final extension of 21 days to file his opening brief, but a lengthier additional extension should be disallowed.

The Firm has no objection to Dulberg receiving a final 21 day extension of time to file his opening brief on appeal. Mtn ¶1 & Mtn. Ex. A. However, in light of the length of the extensions already granted, a longer extension is not warranted. Mtn. ¶¶8-9. The Firm did not object to Dulberg's prior requests for two extensions of time of 60 days each, which Dulberg's counsel requested due to his workload on other matters and personal issues, such that there have already been 120 days of extensions. Mtn. ¶¶8-9; May 24, 2023 Dulberg's First Mtn. for Extension of Time to File Appellant's Brief ¶1a; Jul. 24, 2023 Dulberg's 2nd Mtn. for Extension of Time to File Appellant's Brief ¶¶1-2. For Dulberg to now request an even longer extension of an additional 90 days is excessive. *York v. Mulryan*, 2015 IL App (1st) 132830, ¶25 (denying motion for extension of time to file appellee's brief where the party had "caused unnecessary delay in the disposition of this case on appeal"); *Premier Elec. Constr. Co. v. Morse/Diesel, Inc.*, 257 Ill. App. 3d 445, 454-56 (1st Dist. 1993) (trial court properly acted within its discretion in denying a third motion for extension of time to file a brief, where two extensions had already been allowed). The time has arrived for Dulberg to prioritize this case and fulfill his obligation as appellant to prosecute this appeal.

II. The Court should deny Dulberg's request to amend his docketing statement, as there are no other cases that fall under the definition of "related cases."

There is no reason for Dulberg to amend his docketing statement to refer to purported "related cases," as the cases that Dulberg refers to in his Motion do not fall under the definition of "related cases" in Illinois Appellate Court Second District Rule 113 ("Local Rule 113").

Local Rule 113 states in relevant part:

Rule 113 Related-case statements

- (a) If an appeal is related to any case in the Court, or in any other court, the appellant shall file and serve, with his or her docketing statement, an additional statement that includes the name, docket number, and status of all such related cases....
 - (b) For purposes of this Local Rule, a “related case” is (1) any prior or pending case involving substantially the same parties and the same or similar issues or (2) any prior or pending criminal case involving a codefendant of the defendant in the present appeal.
 - (c) For purposes of this Local Rule, “any other court” means the Illinois Supreme Court, any other district of the Illinois Appellate Court, or any circuit court in the second appellate district.
- [Emphasis added.]

None of the cases referenced in Dulberg’s Motion fall within this definition of “related case.”

Mtn. pg. 6-7. The five other cases that Dulberg references are as follows:

Mark McDonald, Individually and as Special Administrator of the Estate of Julie McDonald, and as Father of Ian McDonald, Quinlin McDonald, and Chloe McDonald, minor children v. Law Offices of Thomas J. Popovich, P.C., James P. Tutaj, and Thomas J. Popovich, Circuit Court of the 22nd Judicial Circuit, McHenry County, Illinois no. 2012LA000326 (transferred from Circuit Court of Cook County no. 2012 L 000196)- It does not appear that this case is referenced anywhere in the record, as a search on the record on the term “McDonald” does not return any results. Nor does Dulberg provide any explanation of this case in his current Motion. Based on the caption, Dulberg was not a party to this case, and thus it does not involve “substantially the same parties” as required by Local Rule 113(b)(1). See *Northbrook Prop. & Cas. Ins. Co. v. GEO Int’l. Corp.*, 317 Ill. App. 3d 78, 81 (1st Dist. 2000) (finding the requirement of the parties being “sufficiently similar” for purposes of 735 ILCS 5/2-619(a)(3) was not satisfied when only one of the parties was the same in the two suits).¹

¹ Furthermore, the fact that Local Rule 113(b)(2) contains a separate prong for “any prior or pending criminal case involving a codefendant of the defendant in the present appeal” shows that civil cases are not “related cases” for purposes of this rule when only one of the parties is the same.

Paul Dulberg v. David Gagnon, Bill McGuire, and Caroline McGuire, Circuit Court of the 22nd Judicial Circuit, McHenry County, Illinois no. 2012LA000178- This is the underlying personal injury suit in which the Firm represented Dulberg, which gave rise to the instant legal malpractice case. C272, ¶32; C279-C285. The Law Offices of Thomas J. Popovich, P.C. and Hans Mast were not parties to the underlying suit, and thus the parties are not “substantially the same.” C279-C285; see *Northbrook*, 317 Ill. App. 3d at 81. Further, the issues are different, because any question of legal malpractice (and the statute of limitations for filing a claim for legal malpractice) cannot be resolved in the underlying case. See *Roberts v. Heilgeist*, 124 Ill. App. 3d 1082, 1087 (2nd Dist. 1984) (the injury alleged in a legal malpractice action is different from the injury alleged in an underlying tort claim).

Paul R. Dulberg, et al. v. Kelly N. Baudin a/k/a Baudin & Baudin, et al., Circuit Court of Cook County, State of Illinois no. 2022 L 010905, with an appeal pending as Illinois Appellate Court First District no. 1-23-1142- It does not appear that this case is referenced anywhere in the record, as searches on the record on the terms “010905” and “10905” do not return any results. A review of the caption shows that The Law Offices of Thomas J. Popovich, P.C. and Hans Mast were not parties, and thus the parties are not “substantially the same.” See *Northbrook*, 317 Ill. App. 3d at 81. Dulberg does not provide any explanation of the facts of this case.

In re Paul R. Dulberg, Debtor, N.D. Ill. Bankr. no. 14-83578- This is Dulberg’s bankruptcy case. C862, C954, C962, C964, C966, C968-C969, C973, C989. The bankruptcy case cannot be a “related case” for purposes of Local Rule 113 because it was not brought before the Illinois Supreme Court, any district of the Illinois Appellate Court, or any circuit court in the second appellate district.

Paul R. Dulberg v. Acting Commissioner Carolyn W. Colvin, N.D. Ill. no. 3:15-cv-50219-

It does not appear that this case is referenced anywhere in the record, as a search on the record on the term “Colvin” does not return any results. Nor does Dulberg provide any explanation of this case in his current Motion. Based on the caption, The Law Offices of Thomas J. Popovich, P.C. and Hans Mast were not parties, and thus the parties are not “substantially the same.” See *Northbrook*, 317 Ill. App. 3d at 81. Furthermore, this is not a “related case” for purposes of Local Rule 113 because it was not brought before the Illinois Supreme Court, any district of the Illinois Appellate Court, or any circuit court in the second appellate district.

In sum, none of the aforementioned cases constitute “related cases” under the definition of Local Rule 113, and thus there is no reason for Dulberg to amend his docketing statement to refer to these other cases.

III. The Court should deny Dulberg’s request for leave to supplement the record on appeal due to Dulberg’s failure to follow proper procedures.

This Court should reject Dulberg’s request for the Clerk of the 22nd Judicial Circuit Court, State of Illinois to start from scratch in preparing a new or supplemental record on appeal. Mtn. pg. 8. The Clerk already prepared and filed the record on April 24, 2023, which consists of 2148 pages of the common law record and 512 pages of reports of proceedings. The Clerk has also already executed a Certification of Record in the form required by Ill. S. Ct. Rule 324 and the Article III Forms Appendix, which certificate appears at the front of the record.

It is Dulberg’s burden as the appellant to present a complete record on appeal, in order to support any arguments that he may raise as to why the trial court’s ruling was in error. *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984). If the record is incomplete, then Dulberg should have followed the procedures in Ill. S. Ct. Rule 329 for seeking leave to supplement the record. *McCarty v. Weatherford*, 362 Ill. App. 3d 308, 312 (4th Dist. 2005). Ill. S. Ct. Rule 329 states:

The record on appeal shall be taken as true and correct unless shown to be otherwise and

corrected in a manner permitted by this rule. Material omissions or inaccuracies or improper authentication may be corrected by stipulation of the parties or by the trial court, either before or after the record is transmitted to the reviewing court, or by the reviewing court or a judge thereof. Any controversy as to whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by that court and the record made to conform to the truth. If the record is insufficient to present fully and fairly the questions involved, the requisite portions may be supplied at the cost of the appellant. If necessary, a supplement to the record may be certified and transmitted. The clerk of the circuit court shall prepare a certified supplement to the record which shall be filed in the reviewing court upon order issued pursuant to motion.

Dulberg's blanket request for this Court to order the Clerk of the 22nd Judicial Circuit Court to start over in preparing the record does not comply with Ill. S. Ct. Rule 329. Dulberg's argument that the Clerk has failed to include unidentified documents in the record does not satisfy his duty to ensure that the record is complete. See *McCarty*, 362 Ill. App. 3d at 312-13 (while "the clerk of the circuit court failed to file many of the documents that were before the trial court[,]. . . the clerk's failure [did] not excuse the [plaintiffs], who, as appellants, clearly had the burden to present this court with a sufficiently complete record on appeal"); *Swift Agricultural Chemicals Corp. v. Marten*, 4 Ill. App. 3d 60, 61 (5th Dist. 1972) ("[w]hile . . . Supreme Court Rule 326 places the obligation of filing the record upon the clerk of the trial court[,], it is nevertheless incumbent upon the appellant to see to the preparation and forwarding of the record in the course of his appeal"). Dulberg's Motion is ineffective because he fails to identify any particular documents that are missing from the record. His requested approach deviates from Ill. S. Ct. Rule 329, which specifies that only the "requisite portions" should be included in a supplemental record, not that the Clerk should file the entire record all over again. Dulberg's counsel complains that he "neither has the hours or resources to produce a complete rendering of . . . errors" with the record, but the law puts this burden on appellants, as it is not unduly burdensome to require the appellant to ensure the record is adequate in an appeal he chooses to pursue. Mtn. pg. 8; *McCarty*, 362 Ill. App. 3d at 313-14; *Lorts v. Illinois T.*

Railroad, 80 Ill. App. 3d 974, 977 (5th Dist. 1980).

Furthermore, Dulberg fails to meet the requirements for supplementing the record since he is not willing to make any further payments to the court for preparation of a supplemental record. Mtn. pg. 8-9. Ill. S. Ct. Rule 329 requires the appellant to pay for the cost of supplementing the record on appeal, as the rule states, “If the record is insufficient to present fully and fairly the questions involved, the requisite portions may be supplied at the cost of the appellant.” See also Ill. S. Ct. Rule 325 (requiring payment for the preparation of the record on appeal to be made before the clerk files the record with the reviewing court). Dulberg’s unwillingness to pay for necessary costs is another reason that his unsupported request to supplement the record should be denied. Ill. S. Ct. Rule 325 & 329.

Of note, Dulberg asserts that unidentified transcripts are missing, but such is another example of his failure to satisfy Ill. S. Ct. Rule 329, along with the specific requirements of Ill. S. Ct. Rule 323 for transcripts. Mtn. pg. 8. Ill. S. Ct. Rule 323(a) puts the burden on the appellant to make a written request to court reporting personnel by the date his docketing statement is due for preparation of any transcripts that the appellant wishes to include in the record. Thus, Dulberg was required to request court reporting personnel prepare any necessary transcripts by March 17, 2023 (the date his docketing statement was due, which was 14 days after the notice of appeal was filed on March 3, 2023). C2139-C2144; Ill. S. Ct. Rules 312 & 323(a). The court reporting personnel were then required to file any requested transcripts within 49 days of the date of the filing of the notice of appeal, meaning by April 21, 2023. C2139-C2144; Ill. S. Ct. Rule 323(b). Here, 512 pages of transcripts have been filed. R1-R512. If the court reporting personnel did not timely file some of the transcripts, then Dulberg should have followed the procedures in Ill. S. Ct. Rules 323(b),(e) and 329 for supplementing the record with any such

missing transcripts. Dulberg was required to file any motion for extension of time to file any necessary transcripts by the expiration of the original due date or any extension thereto (meaning by April 21, 2023), or within 35 days after the due date, if he could provide a reasonable excuse for failure to file such a motion earlier. Ill. S. Ct. Rule 323(e). Far more than 35 days have now passed since the April 21, 2023 deadline for filing transcripts, and thus it is too late for Dulberg to arrange for the filing of any additional transcripts at this point. Ill. S. Ct. Rule 323(e); *Hall v. Turney*, 56 Ill. App. 3d 644, 648 (1st Dist. 1977) (rejecting appellant's untimely request for an extension of time to file reports of proceedings that was disguised as a request for an extension of time to file the entire record).

In sum, Dulberg has failed to follow the appropriate procedures under Ill. S. Ct. Rules 329 and 323 for arranging for any supplement to the record on appeal. His vague and blanket request for the court to correct the record should be denied. See *McCarty*, 362 Ill. App. 3d at 312-13.

IV. Dulberg cannot supplement the record with documents that were not before the Trial Court in this action.

Dulberg cites no authority to support his vague request for this Court to order other courts to cooperate in submitting documents from other cases to supplement the record on appeal in this case. Mtn. pg. 9. A party generally cannot supplement the record with documents that were not actually filed in the trial court or considered by the trial court. *Johnson v. Matviuw*, 176 Ill. App. 3d 907, 912 (1st Dist. 1988). And even if any of the other cases cited by Dulberg were “related cases” under Local Rule 113, which they are not for reasons discussed in Section II, *supra*, Local Rule 113 regardless does not provide a mechanism for supplementing the record on appeal. To the extent that Dulberg wishes to discuss his underlying personal injury case or his bankruptcy case, he can cite the documents in the record that refer to those matters. C279-C285 (Dulberg's

underlying personal injury complaint); C954, C962, C964, C966, C968-C969, C973 (Dulberg deposition testimony regarding his bankruptcy); C989 (Dulberg interrogatory answer regarding his bankruptcy).

V. The Court should deny Dulberg’s request to file an excess page brief.

Finally, this Court should deny Dulberg’s unsupported request to file an excess page brief. Dulberg’s request falls short of the requirements of Ill. S. Ct. Rule 341(b)(2) for multiple reasons. Ill. S. Ct. Rule 341(b) states as follows in relevant part:

(b) Length of Briefs.

(1) Length Limitation. The brief of appellant and brief of appellee shall each be limited to 50 pages....Alternatively, the brief of appellant and brief of appellee shall each be limited to no more than 15,000 words....

(2) Motions. Motions to file a brief in excess of the length limitation of this rule are not favored. Such a motion shall be filed not less than 10 days before the brief is due...and shall state the excess number of pages or words requested and the specific grounds establishing the necessity for excess pages or words. The motion shall be supported by affidavit or verification by certification under Section 1-109 of the Code of Civil Procedure of the attorney or self-represented litigant....

The page limitations in Rule 341(b)(2) are “not an inconsequential matter.” *Lundy v. Farmers Group*, 322 Ill. App. 3d 214, 218 (2nd Dist. 2001); *Kerger v. Bd. of Trustees*, 295 Ill. App. 3d 272, 275 (2nd Dist. 1977). “On the contrary, Rule 341 represents the Illinois Supreme Court’s considered opinion of the format that best facilitates the clear and orderly presentation of arguments.” *Kerger*, 295 Ill. App. 3d at 275. “Page limitations are important, not merely to regulate the Court’s workload...but also to encourage litigants to hone their arguments and to eliminate excessive verbiage.” *Fleming v. County of Kane*, 855 F.2d 496, 497 (7th Cir. 1988). “Overly long briefs...may actually hurt a party’s case, making it far more likely that meritorious arguments will be lost amid the mass of detail.” *Id.*

Dulberg fails to identify any specific grounds for seeking leave to file an excess page brief, thus failing to satisfy Rule 341(b)(2). The main issue in this appeal is whether the trial

court erred in granting summary judgment for the Firm on the statute of limitations, which is a matter on which Dulberg's response brief in the trial court was only 13 pages long (not including exhibits). C2141; C2060-C0272. Further, Dulberg failed to file his motion for additional pages 10 days before the September 29, 2023 extended due date, as required by Rule 341(b)(2). Nor does he identify the number of additional pages requested, which is also required by Rule 341(b)(2). Due to these multiple failings, Dulberg's request for additional pages should be denied. *Benz v. Dept. of Children & Family Servs.*, 2015 IL App (1st) 130414, ¶27 (motion for leave to file excess page appellants' brief denied).

WHEREFORE, Defendants/Appellees Hans Mast and The Law Offices of Thomas J. Popovich, P.C. respectfully request that this Court deny the aforementioned motion of Plaintiff-Appellant Paul R. Dulberg (except that appellees have no objection to Dulberg receiving a final 21 day extension for filing his appellant's brief), and grant any other appropriate relief.

Respectfully submitted,

By: /s/ George K. Flynn

*One of the Attorneys for Defendants-Appellees
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)	Appeal from
<i>Plaintiff-Appellant,</i>)	The Circuit Court of the 22nd Judicial Circuit
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HANS MAST and THE LAW OFFICES)	
OF THOMAS J. POPOVICH, P.C.,)	Notice of Appeal Filed: March 3, 2023
)	
<i>Defendant-Appellees.</i>)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on the 6th day of October, 2023, we filed with The Clerk of the Appellate Court of Illinois, Second District, **Defendants/Appellees Hans Mast and The Law Offices of Thomas J. Popovich, P.C.'s Response to Plaintiff/Appellant Paul R. Dulberg's Amended Motion for 3rd Extension of Time to File Appellant's Brief, to Allow Appellant to Amend His Docketing Statement to Include Related Cases, to Order the Clerk of the 22nd Judicial Circuit to Amend Her Report on Appeal to Include All Missing Documents and Hyperlinks at No Additional Cost to Appellant and to Include an Affidavit of Completeness & Certification, to Allow Appellant to Request the Record on Appeal for All Related Cases, and to File a Brief in Excess of the Page Limit**, a copy of which is attached hereto and served upon you.

/s/ George K. Flynn
*One of the Attorneys for Defendants/Appellees
Hans Mast and The Law Offices of Thomas J.
Popovich, P.C.*

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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, certify that I filed the foregoing Defendants/Appellees Hans Mast and The Law Offices of Thomas J. Popovich, P.C's Response to Plaintiff/Appellant Paul R. Dulberg's Amended Motion for 3rd Extension of Time to File Appellant's Brief, to Allow Appellant to Amend His Docketing Statement to Include Related Cases, to Order the Clerk of the 22nd Judicial Circuit to Amend Her Report on Appeal to Include All Missing Documents and Hyperlinks at No Additional Cost to Appellant and to Include an Affidavit of Completeness & Certification, to Allow Appellant to Request the Record on Appeal for All Related Cases, and to File a Brief in Excess of the Page Limit and Notice of Filing through Odyssey eFileIL and served each party by emailing a copy to each party listed below on October 6, 2023.

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[X] Under penalties as provided by law pursuant to
735 ILCS 5/1-109, I certify that the
statements set forth herein are true and correct.

/s/ Michelle Blum
Michelle Blum