



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 EMERGENCY MOTION FOR 4TH EXTENSION TO FILE APPELLANT'S BRIEF, TO CONDUCT AN AUDIT OF THE RECORD ON APPEAL TO DISCOVER CHANGED OR MISSING DOCUMENTS, AND TO SUPPLEMENT THE RECORD ON APPEAL**

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),(g), hereby respond to Plaintiff/Appellant Paul R. Dulberg's ("Dulberg's") motion that he has titled "Emergency Motion and Fourth Motion to Extend Time to File Appellant's Brief (Civil) Emergency Motion to Conduct an Audit of the Record on Appeal to Discover Changed or Missing Documents; Supplement the Record on Appeal and, if Granted, For 35 Days Extension of Time After the Trial Court Clerk Has Supplemented and/or Corrected the Record on Appeal to File Appellant's Brief" ("Motion" or "Mtn."). 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. Ex. 1 hereto, Notice of Appeal (C2139-

C2144); Ex. 2 hereto, Feb. 1, 2023 Summary Judgment Order (C2138); Mtn. Ex. D, Feb. 1, 2023 Transcript (R493-R512). 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. Ex. 3 hereto, 2nd Amd. Legal Malpractice Compl. (C269-C293). The Circuit 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). Ex. 2 hereto, Feb. 1, 2023 Order (C2138); Mtn. Ex. D, Feb. 1, 2023 Transcript (R493-R512).

Dulberg filed his notice of appeal back on March 3, 2023, and minimal activity has occurred in this appeal since that time. Ex. 1 hereto, Notice of Appeal (C2139-C2144). Dulberg has already been granted 155 days of extensions for his opening brief. Mtn. ¶3. On his final deadline for filing his opening brief, Friday, November 3, 2023 around 5pm, Dulberg served a motion that he titled as an “emergency” request for (i) leave to retain an auditor to conduct an audit and forensic investigation of the records of the Circuit Court and of this Court, (ii) to supplement the record on appeal, (iii) for leave to amend the docketing statement (which may be a typographical error, as such is only referenced in the “wherefore” clause), (iv) for leave to request the record on appeal for “related cases” (which might be another typographical error, as such is only referenced in the “wherefore” clause), and (v) for a further extension of time to file his appellant’s brief. Similarly as with Dulberg’s prior motion for miscellaneous relief that he filed on October 2, 2023, which was denied other than allowing a third and final extension, Dulberg’s arguments are unsubstantiated and fail to comply with the Illinois Supreme Court Rules. Ex. 4 hereto, Dulberg Amd. Mtn. for 3rd Extension & Other Relief; Ex. 5 hereto, Oct. 10, 2023 Appellate Order. This Court should deny all relief requested in Dulberg’s Motion.

### **ARGUMENT**

**I. This Court should deny Dulberg's Motion as it does not present an emergency.**

Dulberg's Motion should be denied outright as it does not present a genuine emergency. See Ill. App. Court 2nd Dist. Rule Local Rule 109(a). The primary basis for Dulberg's various requests for relief is the alleged incompleteness of the record on appeal, but Dulberg has been on notice of such possible issues from at least the time that he filed his initial motion for extension back on May 24, 2023. Ex. 6, May 24, 2023 Dulberg's 1st Mtn. for Extension for Appellant's Brief. In this regard, Dulberg's May 24, 2023 motion for an initial extension of time for his opening brief stated the extension was sought due to, among other reasons, "various problems within the Record on Appeal" and "errors by the Clerk of the Circuit Court in preparation of the Record on Appeal," including "missing report of proceedings, mismatched sections, documents with only one of the Defendants' names where it should be all, Memorandums of Law where the body of the motions should be, [and] violations of the Supreme Court of Illinois Standards and Requirements for Electronic Filing the Record on Appeal." *Id.* at ¶¶1, 8.b. and Wherefore Clause. If there are any issues with the record on appeal, then Dulberg should have followed the procedures for supplementing the record in Ill. S. Ct. Rule 329. He failed to do so, as further discussed below. Dulberg's failure to timely arrange for any supplement to the record and delay in preparing his brief is not a basis for emergency relief. See *In re Marriage of Larocque*, 2018 IL App (2d) 160973, ¶¶94-95 (emergency motion was properly denied as "litigants do not have an absolute right to a continuance"). Ill. S. Ct Rule 361(g) states, "Except in the most extreme and compelling circumstances, a motion for an extension of time will not be considered an emergency." No extraordinary circumstances are present here, and there is no emergency.

**II. The Court should deny Dulberg's request for leave to retain an auditor to audit the records of the Circuit Court and of this Court.**

This Court should deny Dulberg's unprecedented request for leave to retain an auditor to

audit the records of the Circuit Court and of this Court. Dulberg cites no authority that would warrant such extraordinary relief. On the contrary, the requisite procedures for correcting any issues with the record on appeal are set forth in Ill. S. Ct. Rule 329, which do not allow retention of an auditor. As discussed below, Dulberg failed to follow those procedures. Further, Dulberg's request to retain an auditor is misguided because he fails to understand that the purpose of arranging for any supplement to the record on appeal is to ensure the record is sufficient "to present fully and fairly the questions involved," not to incur extraordinary time and resources in scrutinizing every conceivable minutiae of detail in documents that are irrelevant to this appeal. See Ill. S. Ct. Rule 329. While Dulberg reaches far afield in requesting a forensic investigation of the court's records, it should be kept in mind that a request for a forensic investigation of a party's records is not even ordinarily permitted at the trial court level. *Carlson v. Jerousek*, 2016 IL App (2d) 151248, ¶69 (trial court abused its discretion in compelling the forensic imaging of the plaintiff's computers during the discovery process). Further, certain categories of electronically stored information, such as online access data, data in metadata fields that are frequently updated automatically, and forms of ESI that would require extraordinary efforts for production, are presumptively not discoverable even between parties. *Id.* at ¶¶48-49. Dulberg's request to audit the court's records has no support and is simply a delay tactic.

**III. The Court should again deny Dulberg's request for leave to supplement the record on appeal due to Dulberg's delay and failure to follow proper procedures.**

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 various requests to supplement the record on appeal should be denied, as they do not comply with Ill. S. Ct. Rule 329.

**A. Dulberg's renewed blanket request for this Court to order the Circuit Court to re-prepare the record on appeal should again be denied.**

To the extent that Dulberg renews his request for this Court to order the Circuit Court to start over in preparing a new or substitute record on appeal, that request should again be denied. Mtn. pg. 6 "wherefore" clause. This Court previously denied such a request that Dulberg made in a motion he filed on October 2, 2023. Ex. 4, Dulberg Amd. Mtn. for 3rd Extension & Other Relief pg. 8; Ex. 5, Oct. 10, 2023 Order. 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 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 the burden of Dulberg, not the Court, to identify any documents that may be missing from the record and to arrange for any necessary supplement to the record. 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 blanket request for a re-do of the record 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. It is not unduly burdensome to require the appellant to ensure the record is adequate in an appeal he chooses to pursue. *McCarty*, 362 Ill. App. 3d at 313-14; *Lorts v. Illinois T. Railroad*, 80 Ill. App. 3d 974, 977 (5th Dist. 1980).

**B. This Court should deny Dulberg’s request to supplement the record on appeal with a document from the unrelated *McDonald* case, which was not before the Circuit Court in this matter.**

This Court should deny Dulberg’s request to supplement the record on appeal to add an order from the unrelated case *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) (the “*McDonald* Case”). Mtn. Ex. A, *McDonald* Case Order. It does not appear that the *McDonald* 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 the *McDonald* Case in his current Motion. It would be improper to supplement the record with a copy of an order from the *McDonald* Case, as such is from a different case and the document was never before the Circuit Court in this matter. *Johnson v. Matviuw*, 176 Ill. App. 3d 907, 912 (1st Dist. 1988).

In any event, Dulberg cannot raise a new argument in this appeal about the order in the

*McDonald* Case. It appears that Dulberg may wish to make a new argument based on the apparent fact that Judge Thomas A. Meyer entered an order on October 19, 2012 in which he recused himself from the unrelated *McDonald* Case that had been filed against The Law Offices of Thomas J. Popovich, P.C. Mtn. Ex. A. But Dulberg has forfeited any issue with Judge Meyer having presided over part of the instant legal malpractice case because he never filed a motion for substitution of judge. *People v. Cavin*, 28 Ill. App. 3d 863, 868 (1st Dist. 1975); *People v. Fitzgerald*, 55 Ill. App. 3d 626, 632 (1st Dist. 1977). Judge Meyer disclosed in this case that he knew the parties and that he had presided over the underlying personal injury case, and Dulberg did not file a motion for substitution of judge. Mtn. Ex. B, Feb. 3, 2020 Transcript (R66:22-R67:7); Mtn. Ex. C, May 10, 2018 Transcript (R4:8-10). Dulberg as appellant cannot raise new issues for the first time on appeal. *Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 454, 456 (1st Dist. 2007). Since Dulberg never filed a motion for substitution of judge, the issue is forfeited. *Cavin*, 28 Ill. App. 3d at 868; *Fitzgerald*, 55 Ill. App. 3d at 632. Further, a party cannot seek relief on a question of whether a judge should have recused himself on his own initiative, but rather a party needs to file a motion for substitution of judge if he were to believe that a judge should not preside over a case, which Dulberg failed to do here. *In re Marriage of O'Brien*, 2011 IL 109039, ¶45.

**C. This Court should deny Dulberg's request to supplement the record on appeal with an audio recording of the deposition of Hans Mast.**

This Court should deny Dulberg's request to supplement the record on appeal with an audio recording of the deposition of appellee/defendant Hans Mast. The issue Dulberg references is that 2.5 years after his former counsel took the remote deposition of defendant Mast, Dulberg argued that there were technical issues with the deponent Mast's ability to view Dulberg's exhibits that Dulberg's counsel displayed at the deposition. Mtn. Ex. D, Dec. 21,

2022 Transcript (R476-R488); Ex. 7 hereto, Dec. 21, 2022 Order (C2056) (denying Dulberg's second amended motion to exclude the deposition of Hans Mast and to re-take the deposition of Hans Mast, and denying Dulberg's oral motion to supplement the record with an audio recording of the Mast deposition); see also Ex. 8 hereto, Dulberg's second amended motion to exclude the deposition of defendant Mast and to grant leave to re-depose Mast (C1770 - C1839); Ex. 9, the Firm's response thereto (C1968 - C2004), and Ex. 10, Dulberg's reply (C2033 - C2055). The court denied Dulberg's second amended motion to exclude the deposition of Mast and declined to allow Dulberg leave to re-take the deposition, and explained that since Dulberg's counsel conducted the deposition, controlled the exhibits, did not make any objections at the time, and did not raise any concerns with the deposition until 2.5 years later, the court would not strike the deposition of Mast and would not allow Dulberg leave to re-take the deposition. Mtn. Ex. D, Dec. 21, 2022 Transcript (R476-R488); Ex. 7 hereto, Dec. 21, 2022 Order (C2056). At that hearing, Dulberg offered to tender an audio recording of Mast's deposition to the Circuit Court, but the Circuit Court declined to accept or review such, finding it would be irrelevant to the court's ruling. Mtn Ex. D, Dec. 21, 2022 Transcript (R479:17 - R481:9); Ex. 7 hereto, Dec. 21, 2022 Order (C2056). Since the audio recording was never reviewed by the Circuit Court, it should not be included in the record on appeal. See *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st)110115, ¶¶25-27 (finding that privilege logs that the defendant had tendered to the plaintiff in court, but which the trial court did not review, should not be included in the record on appeal).

**D. This Court should deny Dulberg's request to supplement the record on appeal with other possible reports of proceedings.**

This Court should deny Dulberg's request to supplement the record on appeal with any additional reports of proceedings at this point. 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). Ex. 1 hereto, Notice of Appeal (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. Ex. 1 hereto, Notice of Appeal (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 reports of proceedings, and thus it is too late for Dulberg to arrange for the filing of any additional reports of proceedings 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).

Accordingly, it is now too late for Dulberg to supplement the record with a different version of the September 16, 2022 transcript that was transcribed by a different court reporter. Mtn. Ex. E, ¶¶6-16. The only version of the September 16, 2022 transcript in the record is at R389-R401 (Ex. 11 hereto). This Court cannot make any ruling that would allow Dulberg to

substitute a different transcript instead, as Ill. S. Ct. Rule 329 states, “Any controversy as to whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by that court.” Thus, any question over the precise words that were spoken should have been timely addressed by the Circuit Court, not by this court on an emergency motion filed on the appellant’s final deadline for his brief. Ill. S. Ct. Rule 329. In *Lawrence*, the appellate court denied such an appellant’s motion to supplement the record on appeal where there was a controversy as to whether the supplemental material accurately disclosed what had occurred in the trial court. *In re Marriage of Lawrence*, 146 Ill. App. 3d 307, 310-11 (3rd Dist. 1986). The *Lawrence* court found the appellant had failed to follow the requirements of Ill. S. Ct. Rule 329 for supplementing the record on appeal and had displayed an “utter disregard of clearly define[d] rules [that] disrupt[ed] the orderly disposition of an appeal.” *Id.* Likewise, here this Court should not “reward appellant’s inattentiveness to supreme court rules.” *Id.* Furthermore, this Court cannot consider Dulberg’s auditor’s affidavit since she fails to attach the documents referenced, such as the two different September 16, 2022 transcripts being compared and the court reporter’s emails containing the transcripts. Mtn. Ex. E, Pasha Affidavit ¶¶4, 8; Ill. S. Ct. Rule 191(a); *Robidoux v. Oliphant*, 201 Ill. 2d 324, 343-44 (2002); *Lucasey v. Plattner*, 2015 IL App (4th) 140512, ¶¶19-20, 23. Thus, even if this issue could be considered, which it cannot per Ill. S. Ct. Rules 323 and 329, Dulberg fails to present adequate information for this Court to resolve any controversy over the transcript. *Robidoux*, 201 Ill. 2d at 343-44. Regardless, Dulberg fails to point to any inaccuracy in the record, as the version of the September 16, 2022 transcript that is in the record reflects that there had been no deadline for expert discovery, which is consistent with the fact that there is no order in the record suggesting that expert discovery had closed. Ex. 11, Sept. 16, 2022 Transcript at R393:12-15.

Dulberg also notes that the record does not contain any transcripts from the January 10, 2018 and February 27, 2018 court conferences, 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 reports of proceedings. Mtn. pg. 5-6; Mtn. Ex. E, Pasha Affidavit ¶¶17-26. Dulberg and his auditor are uncertain as to whether a court reporter was even present at the January 10, 2018 and February 27, 2018 court conferences in the first place. Mtn. Ex. E, Pasha Affidavit ¶¶17-26. At the January 10, 2018 court conference, the court simply granted the Firm's motion to answer or otherwise plead through February 7, 2018 and set a further status conference for February 27, 2018. Ex. 12, Jan. 10, 2018 Order (C47). At the February 27, 2018 court conference, the court simply set an agreed briefing schedule on the Firm's motion to dismiss. Ex. 13, Feb. 27, 2018 Order (C93). Dulberg provides no explanation as to whether such two transcripts, if they even exist, could be material to this appeal. See Mtn. Ex. E, Pasha Affidavit ¶¶17-26. Nor did Dulberg make any effort to timely arrange for a bystander's report under Ill. S. Ct. Rule 323(c). Dulberg fails to understand that Ill. S. Ct. Rule 323 does not contemplate that the record on appeal will include every potentially available report of proceedings. Rather, Rule 323(a) provides that "the appellant shall make a written request to the court reporting personnel...to prepare a transcript of the proceedings that appellant wishes included in the report of proceedings," which "shall include all the evidence pertinent to the issues on appeal." The rule warns that a party who orders unnecessary transcripts may be assessed "[t]he entire expense of incorporating unnecessary and immaterial matter in the report of proceedings" as costs against that party. Ill. S. Ct. Rule 323(a). If Dulberg were to believe that the January 10, 2018 and February 27, 2018 proceedings were somehow "pertinent to the issues on appeal," he should have arranged for such reports of proceedings to be incorporated into the record prior to his

deadline. Ill. S. Ct. Rule 323(a),(e).

**E. Dulberg's reference to metadata in the PDFs for the record on appeal is not a basis to supplement the record.**

Without developing any argument on the point, Dulberg notes that common law volume 1 has a PDF creation date of April 24, 2023 at 9:31am and a filing date of April 24, 2023 at 10:00am, that common law volume 2 has a PDF creation date of April 24, 2023 at 9:28am and a filing date of April 24, 2023 at 10:03am, and that the reports of proceedings have a PDF creation date of April 25, 2023 at 8:06am and a filing date of April 24, 2023 at 10:03am. Mtn. pg. 2-3 & Mtn. Exs. G & H. This Court notified the parties on April 25, 2023 at 8:48am that the record had been filed. Mtn. Ex. F. Such does not show that anything unusual occurred, but rather simply suggests that sometimes the record is saved as a new PDF once it is received by the appellate court.

In sum, Dulberg has failed to follow the appropriate procedures under Rules 329 and 323 for arranging for any necessary supplement to the record. His vague and untimely requests for leave to supplement the record should be denied. *McCarty*, 362 Ill. App. 3d at 312-13.

**IV. This Court should again deny Dulberg leave to amend his docketing statement.**

To the extent the request is re-raised, this Court should again deny Dulberg's request for leave to amend his docketing statement to include "related cases." Mtn. pg. 6 "wherefore" clause. This Court previously denied Dulberg's request to amend his docketing statement in the motion he filed on October 2, 2023. Ex. 4, Dulberg Amd. Mtn. for 3rd Extension & Other Relief, pg. 6-7, 9; Ex. 5, Oct. 10, 2023 Order. As before, Dulberg has not identified any cases that would fall under the definition of "related cases" in Local Rule 113, and thus there are no other matters that should be referenced in the docketing statement. Local Rule 113 states:

**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.]

Dulberg referenced the *McDonald* Case in his October 2, 2023 motion, and this Court rejected Dulberg’s request to amend his docketing statement to refer to same. Ex. 4, Dulberg Amd. Mtn. for 3rd Extension & Other Relief, pg. 7; Ex. 5, Oct. 10, 2023 Order. Based on the caption, Dulberg was not a party to the *McDonald* Case, and thus it does not involve “substantially the same parties” as required by Local Rule 113(b)(1). Mtn. Ex. A, *McDonald* Order; *Northbrook Prop. & Cas. Ins. Co. v. GEO Int’l. Corp.*, 317 Ill. App. 3d 78, 81 (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).<sup>1</sup>

This Court likewise previously rejected Dulberg’s request to amend his docketing statement to refer to the underlying personal injury suit in which the Firm represented Dulberg, which gave rise to this legal malpractice case, *Paul Dulberg v. David Gagnon, Bill McGuire, and Caroline McGuire*, Circuit Court of the 22nd Judicial Circuit, McHenry County, Illinois no. 2012LA000178. Ex. 4, Dulberg Amd. Mtn. for 3rd Extension & Other Relief, pg. 7; Ex. 5, Oct. 10, 2023 Order; Ex. 3 hereto, 2nd Amd. Compl. (C269-C293) at ¶32. 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.” Ex. 3 hereto at C279-C285 (the underlying personal

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<sup>1</sup> 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.

injury complaint is Ex. B to the legal malpractice complaint); 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).

In sum, Dulberg has not identified any case that constitutes a “related case” under the definition of Local Rule 113, and thus there is no reason for Dulberg to amend his docketing statement to refer to any other cases.

**V. This Court should again deny Dulberg’s request for leave to request the record on appeal for “related cases.”**

This Court previously denied Dulberg’s 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. Ex. 4, Oct. 2, 2023 Amd. Mtn. for 3rd Extension & Other Relief pg. 9; Ex. 5, Oct. 10, 2023 Order. To the extent that Dulberg renews that request (Mtn. pg. 6 “wherefore” clause), it should again be denied. 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 while Dulberg does not identify any “related cases” under Local Rule 113, even if he were to identify such a case, Local Rule 113 regardless does not provide a mechanism for supplementing the record on appeal.

**VI. Dulberg should be denied an additional extension of time for the appellant’s brief past his final deadline.**

This Court should deny Dulberg’s request for yet another extension of time, as lengthy extensions have already been granted and the Court previously set a final deadline. Mtn. pg. 2-3. The Firm did not object to Dulberg’s initial requests for two extensions of time of 60 days each,

which Dulberg's counsel requested due to his workload on other matters, personal issues, and issues with the record. Mtn. pg. 3; Ex. 6 hereto, May 24, 2023 Dulberg's 1st Mtn. for Extension for Appellant's Brief ¶1a; Ex. 14 hereto, Jul. 24, 2023 Dulberg's 2nd Mtn. for Extension for Appellant's Brief ¶¶1-2. Dulberg thereafter requested a third extension of 90 days, to which the Firm did not oppose an additional 21-day final extension. Ex. 4, Oct. 2, 2023 Amd. Mtn. for 3rd Extension & Other Relief, ¶1. This Court, in ruling on Dulberg's third motion for an extension, allowed an additional 35 day extension to November 3, 2023, but warned Dulberg that "[a]bsent extraordinarily compelling circumstances, this date will not be further extended." Ex. 5, Oct. 10, 2023 Order. The November 3, 2023 final deadline has now passed, with no appellant's brief filed. *Id.* For Dulberg to now request an even longer open-ended extension of 35 days after any future unknown date that his auditor might complete work is excessive and could potentially delay this appeal indefinitely. *York v. Mulryan*, 2015 IL App (1st) 132830, ¶25 (denying motion for extension 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 to file a brief, where two extensions had already been allowed). Dulberg's failure to understand the meaning of a final deadline and failure to prioritize this case amounts to a failure to prosecute. This Court has discretion to dismiss an appeal where the appellant fails to file an opening brief on time. *Universal Underwriters Ins. Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723, ¶10.

WHEREFORE, Defendants/Appellees Hans Mast and The Law Offices of Thomas J. Popovich, P.C. request that this Court deny the aforementioned motion of Plaintiff-Appellant Paul R. Dulberg and grant any other appropriate relief, including dismissal of this appeal.

Respectfully submitted,

By: /s/ George K. Flynn

*One of the Attorneys for Defendants-Appellees  
Hans Mast and The Law Offices of Thomas J.  
Popovich, P.C.*

George K. Flynn  
Michelle M. Blum  
KARBAL COHEN ECONOMOU SILK DUNNE, LLC  
200 S. Wacker Drive, Suite 2550  
Chicago, IL 60606  
Tel: (312) 431-3700  
Fax: (312) 431-3670  
gflynn@karballaw.com  
mblum@karballaw.com