


**From:** Paul Dulberg Paul\_Dulberg@comcast.net   
**Subject:** Re: Flynn's Response to Appellant's Motion to Reconsider  
**Date:** November 28, 2023 at 1:53 PM  
**To:** Law Office Of Alphonse Talarico contact@lawofficeofalphonsetalarico.com  
**Cc:** Tom Kost tkost999@gmail.com

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PD

Dear Mr Talarico and Tom,

When researching Flynn's response I noticed that the selectable text in the document was filled with "placeholder text" or "gibberish".

Flynn does this to every document he produces and makes it impossible to copy and paste anything written in the document.

To make it easier on us, I took the time to completely rework the selectable text in "Defendants-Appellees Mast and Popovich Response to Appellants Motion to Reconsider 3387576\_1.pdf" and renamed the new file "2023-11-28\_Defendants-Appellees Mast and Popovich Response to Appellants Motion to Reconsider 3387576\_1\_OCR.pdf" attached.

If you need to copy and paste any part of Mr Flynn's document you may find it easier to use the attached document rather than retyping every word of Flynn's original document.

Paul

2023-11-28\_Def  
endant...CR.pdf

On Nov 28, 2023, at 7:13 AM, Alphonse Talarico <contact@lawofficeofalphonsetalarico.com> wrote:

Gentlemen,

Please see the attached/

Sincerely,

Alphonse A. Talarico

<Defendants-Appellees Mast and Popovich Response to Appellants Motion to Reconsider 3387576\_1.pdf>

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IN THE APPELLATE COURT OF ILLINOIS  
SECOND JUDICIAL DISTRICT

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PAUL R. DULBERG,	)	
	)	Appeal from
<i>Plaintiff-Appellant,</i>	)	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
	)	
<u><i>Defendants-Appellees.</i></u>	)	

**DEFENDANTS/APPELLEES HANS MAST AND THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.'S RESPONSE TO PLAINTIFF/APPELLANT PAUL R. DULBERG'S MOTION TO RECONSIDER THE NOVEMBER 9, 2023 ORDER**

Defendants/Appellees Hans Mast and The Law Offices of Thomas J. Popovich, P.C. (collectively "the Firm"), by and through their attorneys, pursuant to Ill. S. Ct. Rule 361(b)(3), hereby respond to Plaintiff/Appellant Paul R. Dulberg's ("Dulberg's") motion to reconsider the November 9, 2023 order ("Mtn. to Reconsider"). In response, the Firm states:

**INTRODUCTION**

Dulberg's motion to reconsider is a transparent delay tactic that seeks to evade the firm and final deadline that this Court set for his appellant's brief. This Court already allowed Dulberg 174 days of extensions and set a final deadline of November 22, 2023 for Dulberg's opening brief. Mtn. to Reconsider at its Ex. 3 (Nov. 9, 2023 Order). Dulberg has ignored this Court's admonition that such was an *absolute final* extension, and instead continues to raise misguided, vague, and irrelevant arguments about the record on appeal. This Court should deny Dulberg's motion to reconsider and dismiss this appeal for Dulberg's failure to file a brief.

## **BACKGROUND**

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. Resp. to Emergency Mtn. at its Ex. 1 (Notice of Appeal (C2139-C2144)) & its Ex. 2 (Feb. 1, 2023 MSJ Order (C2138)); Emergency Mtn. at its Ex. D (Feb. 1, 2023 Transcript (R493-R512)).<sup>1</sup> 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 chainsaw accident. Resp. to Emergency Mtn. at its Ex. 3 (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). Resp. to Emergency Mtn. at its Ex. 2 (Feb. 1, 2023 Order (C2138)); Emergency Mtn. at its Ex. D (Feb. 1, 2023 Transcript (R493-R512)).

Dulberg filed his notice of appeal on March 3, 2023, and minimal activity has occurred since that time, other than Dulberg's requests for multiple extensions. Resp. to Emergency Mtn. at its Ex. 1 (Notice of Appeal (C2139-C2144)). The Firm did not object to Dulberg's requests for his first two extensions of 60 days each. Resp. to Emergency Mtn. at its Ex. 6 (May 24, 2023 Dulberg Mtn. 1st Extension, ¶1a) & its Ex. 14 (Jul. 24, 2023 Dulberg Mtn. 2nd Extension, ¶2). Thereafter, Dulberg requested a 90-day third extension, to which the Firm agreed to an additional 21 days. Resp. to Emergency Mtn. at its Ex. 4 (Oct. 2, 2023 Dulberg Mtn. 3rd Extension, ¶1). The Court denied Dulberg's request for a 90-day third extension but allowed Dulberg a 35-day third and final extension until November 3, 2023 for his opening brief, cautioning that "Absent extraordinarily compelling circumstances, this date will not be further extended." Resp. to Emergency Mtn. at its Ex. 5 (Oct. 10, 2023 Order). The October 10, 2023 order also denied

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<sup>1</sup> Dulberg's emergency motion for a fourth extension and other relief, filed on November 3, 2023, is exhibit 1 to Dulberg's motion to reconsider, and The Firm's November 6, 2023 response to Dulberg's emergency motion is exhibit 2 to Dulberg's motion to reconsider.

Dulberg's requests to order the Circuit Court to redo the entire record, to place the burden on the Circuit Court to search for missing documents, to supplement the record with documents from other cases, and for leave to amend his docketing statement to refer to other cases. *Id.*; Resp. to Emergency Mtn. at its Ex. 4 (Oct. 2, 2023 Dulberg Mtn. 3rd Extension & Other Relief).

On the date that this Court previously set as Dulberg's final date for filing his opening brief, Friday, November 3, 2023 around 5pm, Dulberg served an "emergency" motion 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) leave to supplement the record on appeal, (iii) leave to amend the docketing statement (which may have been a typographical error, as such was only referenced in the "wherefore" clause), (iv) leave to request the record on appeal for "related cases" (which might have been another typographical error, as such was only referenced in the "wherefore" clause), and (v) for a fourth extension to file his appellant's brief. This Court entered a November 9, 2023 order, denying Dulberg's "Emergency" Motion. Mtn. to Reconsider at its Ex. 3 (Nov. 9, 2023 Order). At that time, the Court allowed Dulberg a fourth and final extension of an additional 19 days to November 22, 2023 to file his opening brief, and warned, "This date is absolutely final and will not be extended under any circumstances." *Id.*

Dulberg failed to heed this Court's warning and on November 21, 2023, instead of filing his appellant's brief, he filed a motion to reconsider the November 9, 2023 order. This motion to reconsider should be denied for a number of reasons discussed below. Further, this Court should dismiss the appeal due to Dulberg's failure to file his brief by his final deadline.

## **ARGUMENT**

### **I. Dulberg fails to meet the standard for a motion to reconsider.**

For an initial matter, Dulberg's motion should be denied outright for failure to meet the



standard for a motion to reconsider. Motions to reconsider are disfavored, and are limited to arguments based on (1) newly discovered evidence which was not previously available, (2) changes in the law, or (3) errors in the court's application of existing law. *River Village I, LLC v. Central Ins. Cos.*, 396 Ill.App.3d 480, 492 (1st Dist. 2009). A motion to reconsider should be denied if it merely rehashes the same arguments that were previously presented. *Chesrow v. Du Page Auto Brokers, Inc.*, 200 Ill. App. 3d 72, 78 (2nd Dist. 1990). Nor should a motion to reconsider raise new arguments that could have been raised earlier. *Delgatto v. Brandon Assoc., Ltd.*, 131 Ill. 2d 183, 195 (1989). A court should deny a motion to reconsider that merely raises facts, law, or arguments that were previously considered and denied or that could have been previously raised. *Id.*; *Woolums v. Huss*, 323 Ill. App. 3d 628, 640-41 (4th Dist. 2001).

Dulberg's motion to reconsider fails to meet the requisite standard. He does not argue there have been any changes in the law. He does not present any previously unavailable material evidence. While Dulberg submits some new exhibits, consisting of two transcripts from early 2018 (Mtn. to Reconsider Exs. 4 & 5), an attorney registration profile on Judge Thomas A. Meyer (Mtn. to Reconsider Ex. 6), and a few pre-existing court documents from other cases (Mtn. to Reconsider Exs. 7-10), such do not justify reconsideration for reasons discussed herein. And Dulberg fails to identify any error by this Court in applying the law, as discussed below. Further, the instant motion is also an improper second motion to reconsider to some extent, as some of Dulberg's arguments were not only rejected in this Court's denial of his November 3, 2023 emergency motion for a fourth extension and other relief, but also were denied in his October 2, 2023 motion for a third extension and other relief. Resp. to Emergency Mtn. at its Exs. 4 & 5; Mtn. to Reconsider at its Ex. 3; *Rose v. Centralia Township High Sch. Dist.*, 59 Ill. App. 3d 606, 607 (5th Dist. 1978). The motion to reconsider should be denied in its entirety.

**II. This Court properly set a final deadline of November 22, 2023 for Dulberg's appellant brief and should deny any further extensions.**

This Court properly set an absolute final deadline of November 22, 2023 for Dulberg's appellant's brief, as lengthy extensions had already been granted and Dulberg had already missed one final deadline. Resp. to Emergency Mtn. Ex. 5 (Oct. 10, 2023 Order); Mtn. to Reconsider Ex. 3 (Nov. 9, 2023 Order). Dulberg now argues that the personal issues of Dulberg and his counsel that had arisen prior to the initial two extensions warranted a lengthier extension beyond his final deadline. But the Firm did not oppose Dulberg's initial requests for two extensions of 60 days each, which Dulberg's counsel requested due to his workload on other matters, personal issues, and issues with the record. Resp. to Emergency Mtn. at its Ex. 6 (May 24, 2023 Dulberg's Mtn. 1st Extension ¶1a) & its Ex. 14 (Jul. 24, 2023 Dulberg's Mtn. 2nd Extension ¶¶1-2).<sup>2</sup> Dulberg thereafter requested a third extension of 90 days, to which the Firm did not oppose an additional 21-day final extension. Resp. to Emergency Mtn. at its Ex. 4 (Oct. 2, 2023 Mtn. 3rd Extension, ¶1). This Court allowed Dulberg a third extension of 35 days to November 3, 2023, but warned Dulberg that "[a]bsent extraordinarily compelling circumstances, this date will not be further extended." Resp. to Emergency Mtn. at its Ex. 5 (Oct. 10, 2023 Order). Dulberg failed to comply with the November 3, 2023 final deadline, and instead filed an "emergency" motion for an even longer open-ended extension of 35 days after any future unknown date that his proposed auditor might complete work.<sup>3</sup> Emergency Mtn. pg. 1-2. Such a request was excessive and could potentially delay this appeal indefinitely. The Court properly

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<sup>2</sup> Dulberg now states that one of the reasons that he requested the first extension was due to the death of Dulberg's lifelong friend and caretaker, but no death was specifically mentioned in any of Dulberg's prior motions for extension. Mtn. to Reconsider pg. 2.

<sup>3</sup> Dulberg's November 3, 2023 motion failed to identify any new extenuating circumstances and thus should not have been brought on an emergency basis. Ill. S. Ct Rule 361(g) ("Except in the most extreme and compelling circumstances, a motion for an extension of time will not be considered an emergency"); Ill. App. Court 2nd Dist. Rule Local Rule 109(a); *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").

denied an unlimited extension and set a firm and final deadline of November 22, 2023 for the appellant's brief. Mtn. to Reconsider at Ex. 3 (Nov. 9, 2023 Order). The Court warned Dulberg that "[t]his date is absolutely final and will not be extended under any circumstances." *Id.*

Dulberg failed to heed this Court's warning and failed to file his opening brief, and has instead filed a motion to reconsider that continues to raise vague and immaterial arguments about the record. Dulberg continues to attempt to use the alleged incompleteness of the record as an excuse for his failure to file a brief, but Dulberg has been on notice of possible issues with the record from at least the time that he filed his initial motion for extension on May 24, 2023. Resp. to Emergency Mtn. at its Ex. 6 (May 24, 2023 Dulberg Mtn. 1st Extension). Dulberg's May 24, 2023 motion requested a first extension for his opening brief due to, among other issues, "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. Dulberg's failure to timely arrange for any supplement to the record under the procedures in Ill. S. Ct. 329 (discussed in § III, *infra*) and delay in preparing his brief do not justify unlimited extensions. This Court should reject Dulberg's delay tactics, enforce the existing order, and decline to grant any further extensions. *York v. Mulryan*, 2015 IL App (1st) 132830, ¶25 (denying motion for extension for appellee's brief where the party had caused unnecessary delay); *Premier Elec. Constr. Co. v. Morse/Diesel, Inc.*, 257 Ill. App. 3d 445, 454-56 (1st Dist. 1993) (trial court properly exercised its discretion in denying a third motion for extension for a brief, where two extensions had already been allowed).

### **III. The Court properly denied Dulberg's requests for leave to supplement the record.**

This Court properly denied Dulberg's requests to supplement the record where Dulberg's requests were non-compliant with Ill. S. Ct. Rules 323 and 329 and otherwise improper. It is Dulberg's burden as the appellant to present a complete record on appeal and to have followed the requisite procedures for arranging for any necessary supplement to 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 were properly denied.

#### **A. This Court properly denied any blanket requests by Dulberg for this Court to order the Circuit Court to re-prepare the record on appeal or to supplement the record with unidentified documents.**

This Court properly denied Dulberg's request in his October 2, 2023 motion to order the Circuit Court to start over in preparing a new or substitute record on appeal, and to the extent Dulberg re-raised this blanket request in his emergency motion, such was properly denied again. Resp. to Emergency Mtn. at its Ex. 4 (Dulberg Mtn. 3rd Extension pg. 8) & its Ex. 5 (Oct. 10, 2023 Order); Emergency Mtn. pg. 6. Rule 329 states that only the "requisite portions" of the circuit court documents that are missing from the clerk's initial filing of the record should be included in a supplemental record, not that the clerk should file the entire record all over again.

Likewise, this Court properly denied Dulberg's vague requests to supplement the record

with unidentified documents that were “missing,” “inaccurate,” or “altered.” Resp. to Emergency Mtn. Exs. 4 & 5; Emergency Mtn. pg. 6. 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. *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”). Thus, Dulberg’s arguments that unidentified documents are missing or inaccurate was not an excuse for his failure to file his brief.

**B. This Court properly denied Dulberg’s request to supplement the record on appeal with other reports of proceedings.**

This Court properly denied Dulberg’s untimely request to supplement the record on appeal with any additional reports of proceedings. Emergency Mtn. pg. 5-6. 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 due date for his docketing statement, which was 14 days after the notice of appeal was filed). Resp. to Emergency Mtn. at its Ex. 1 (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 after the date the notice of appeal was filed, meaning by April 21, 2023. Resp. to Emergency Mtn. at its Ex. 1 (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 requested transcripts, then Dulberg should have followed the procedures in Ill. S. Ct. Rules 323(b),(e) and 329 for supplementing the record. In this regard, 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). When Dulberg eventually filed his emergency motion on November 3, 2023, far more than 35 days had passed since the April 21, 2023 deadline for filing reports of proceedings, and thus it was too late for Dulberg to arrange for the filing of any additional reports of proceedings at that 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 to file reports of proceedings that was disguised as a request for an extension to file the entire record).

Further, when Dulberg filed his emergency motion, he was uncertain as to whether transcripts were available for other court dates. Dulberg's emergency motion noted that the record did not contain any transcripts from the January 10, 2018 and February 27, 2018 court conferences, but he was uncertain as to whether a court reporter had been present at those two court conferences. Emergency Mtn. pg. 5-6 & its Ex. E (Pasha Affidavit ¶¶17-26). The court reporters recently filed the transcripts for the January 10 and February 27, 2018 proceedings in the circuit court on November 9, 2023. Mtn. to Reconsider Exs. 4 & 5. It is now too late for such to be added to the record on appeal. Ill. S. Ct. Rule 323(e); *Hall*, 56 Ill. App. 3d at 648.

Moreover, Dulberg has not provided any explanation as to how the January 10 and February 27, 2018 transcripts could be material to this appeal. Dulberg fails to understand that Rule 323 does not contemplate that the record will include every potentially available transcript. Rather, Rule 323(a) instructs an appellant to order transcripts that are "pertinent to the issues on appeal," and 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. 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 date. Resp. to Emergency Mtn. at its Ex. 12 (Jan. 10, 2018 Order (C47)). At the February 27, 2018 court conference, the court set an agreed briefing schedule on the Firm's motion to dismiss. Resp. to Emergency Mtn. at its Ex. 13 (Feb. 27, 2018 Order (C93)). The transcripts do not provide any additional material information. Mtn. to Reconsider Exs. 4 & 5. There is no reason that Dulberg would need to cite the January 10 and February 27, 2018 transcripts in his brief, and thus any obstacles to obtaining those transcripts are not an excuse for his failure to file his brief.

Likewise, this Court properly rejected Dulberg's request to supplement the record with a different version of a September 16, 2022 transcript from a different court reporter. Emergency Mtn at its Ex. E (Pasha Affidavit ¶¶6-16). The only version of the September 16, 2022 transcript in the record is at R389-R401 (Resp. to Emergency Mtn. at its Ex. 11). 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. 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, even if this Court could consider any dispute over the controlling version of the September 16, 2022 transcript, which this Court cannot per Ill. S. Ct. Rules 323 and 329, Dulberg fails to present any evidence that would suggest that the court should add the other version of the transcript to the record. This Court cannot consider Dulberg’s auditor’s affidavit since she fails to attach the documents referenced, such as the two September 16, 2022 transcripts being compared and the court reporter’s emails attaching the transcripts. Emergency Mtn. at its Ex. E (Pasha Aff. ¶¶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. Even in his motion to reconsider, Dulberg does not present a copy of the alternative version of the September 16, 2022 transcript. Regardless, Dulberg fails to point to any inaccuracy in the version of the September 16, 2022 transcript that is in the record. Resp. to Emergency Mtn. Ex. 11 (Sept. 16, 2022 Tr. R389-R401). Dulberg alleges that the other version of the transcript states that expert discovery had closed, but the version of the September 16, 2022 transcript that is in the record reflects that there was 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. Resp. to Emergency Mtn. Ex. 11 (Sept. 16, 2022 Tr. R393:8-15); Emergency Mtn Ex. E (Pasha Aff. ¶¶6-16).

**C. This Court properly denied Dulberg’s request to supplement the record on appeal with an audio recording of the deposition of Hans Mast.**

This Court properly denied Dulberg’s emergency 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 had displayed at the deposition. Emergency



Mtn. at its Ex. D (Dec. 21, 2022 Transcript (R476-R488)); Resp. to Emergency Mtn. at its Ex. 7 (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 Resp. to Emergency Mtn. at its Ex. 8-10 (briefs of said motion (C1770-C1839, C1968- C2004, C2033–C2055)). At the December 21, 2022 hearing, 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. Emergency Mtn. Ex. D (Dec. 21, 2022 Transcript (R476-R488)); Resp. to Emergency Mtn at its Ex. 7 (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. Emergency Mtn Ex. D (Dec. 21, 2022 Tr. (R479:17 - R481:9)); Resp. to Emergency Mtn. at its Ex. 7 (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); *Hartgraves v. Don Cartage Co.*, 63 Ill. 2d 425, 429 (1976) (record on appeal could not be supplemented with contents of an off-the-record discussion between counsel and the judge that was never intended to become part of the record); *Nika v. Danz*, 199 Ill. App. 3d 296, 308-10 (4th Dist. 1990) (denying motion to supplement the

record where the proposed supplement was not certified by the trial court).

**D. This Court properly denied Dulberg’s request for leave to supplement the record on appeal with documents from other cases.**

This Court properly denied Dulberg’s October 2, 2023 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, and to the extent that Dulberg renewed that request in his emergency motion, it was again properly denied. Resp. to Mtn. to Reconsider at its Ex. 4 (Oct. 2, 2023 Mtn. for 3rd Extension & Other Relief pg. 9) & its Ex. 5 (Oct. 10, 2023 Order); Emergency Mtn. pg. 6 “wherefore” clause. Dulberg’s motion to reconsider does not discuss this issue. This request was properly denied, as a party generally cannot supplement the record with documents that were not before the trial court. *Johnson v. Matviuw*, 176 Ill. App. 3d 907, 912 (1st Dist. 1988).

**E. This Court should reject Dulberg’s argument that it would have been futile for him to have followed the requirements for supplementing the record.**

This Court should disregard Dulberg’s new argument that it would have been futile for him to comply with Rule 329, as new arguments cannot be raised for the first time in a motion to reconsider. *Delgatto*, 131 Ill. 2d at 195. It is the appellant’s duty to comply with Rule 329 in arranging for any supplement to the record, and thus if Dulberg wished to be excused from those procedures, he should have argued such at the outset. See *People v. Tinsley*, 16 Ill. App. 3d 360, 361 (4th Dist. 1973) (motion to supplement the record denied for noncompliance with Rule 329).

Regardless, the futility argument fails on the merits. The cases that Dulberg cites on futility did not involve the supplementation of the record. Mtn. to Reconsider pg. 5-6. The instant situation is not one of futility, but rather of Dulberg’s failure to identify any supplement that should be made to the record and failure to follow the requirements of Ill. S. Ct. Rules 323 and 329 in the event that any supplement were necessary. To the extent that Dulberg identified a

few documents that he wanted to include in a supplemental record, the Firm has objected on the grounds set forth above. To the extent that Dulberg wished to supplement the record with unidentified documents, Dulberg could not expect the Firm to stipulate to the inclusion of such without knowing which documents that Dulberg wished to include. See Ill. S. Ct. Rule 329.

As for Dulberg’s argument that it would have been futile for him to have attempted to follow the requirement in Ill. S. Ct. Rule 329 for the trial court to resolve any controversy as to whether the record accurately discloses what occurred in the trial court, the only possible “controversy” that Dulberg identifies is his argument about a different version of a September 16, 2022 transcript from a court conference that is not in the record (and has not been shown to this Court in a motion).<sup>4</sup> This Court properly declined Dulberg’s emergency request for leave to add such to the record for reasons discussed in § III.B, *supra*. Dulberg also notes that Judge Meyer, who presided over the September 16, 2022 court conference, retired in September 2023, but such was months after the April 21, 2023 deadline for filing reports of proceedings. Mtn. to Reconsider pg. 7; Ill. S. Ct. Rule 323; Resp. to Emergency Mtn. Ex. 11 (Sept. 16, 2022 Tr., R389-R401). Further, the retirement of a trial court judge cannot be used as an excuse by the appellant and does not alter the rules. *Midwest Builder Distrib. v. Lord & Essex*, 383 Ill. App. 3d 645, 654-56 (1st Dist. 2007) (declining to accept proposed bystanders’ reports that were not certified by the trial court, and finding the fact that the trial court judge had retired did not alter the appellant’s duty to provide a complete record on appeal).

This Court should disregard Dulberg’s reliance on documents from other cases outside the record in his belated challenge to the ability of Judge Thomas Meyer and Judge Joel Berg to have resolved any controversy with the record and to having presided over this case in general.

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<sup>4</sup> It is undisputed that the Circuit Court never reviewed or took possession of the audio recording of the deposition of Hans Mast, as discussed in § III.C, *supra*. Emergency Mtn Ex. D (Dec. 21, 2022 Transcript (R479:17 - R481:9)); Resp. to Emergency Mtn. at its Ex. 7 (Dec. 21, 2022 Order (C2056)); Mtn. to Reconsider pg. 7 ¶F2.

Dulberg's emergency motion improperly attached an order from the unrelated case *McDonald v. Law Offices of Thomas J. Popovich, P.C., et al.*, McHenry County no. 12 LA 326. Emergency Mtn. Ex. A. The *McDonald* Case is not referenced anywhere in the record, and Dulberg provides no explanation for it. Dulberg's motion to reconsider relies on other irrelevant documents outside the record from even more unrelated cases. Mtn. to Reconsider Exs. 7, 9, 10. Dulberg newly cites a February 7, 2023 order from *Interrante v. Law Offices of Thomas J. Popovich, P.C., et al.*, McHenry County no. 18 LA 370, in which Judge Berg ordered that a motion to reconsider would be heard by Judge Meyer, but Dulberg provides no context for this order or the *Interrante* case. Mtn. to Reconsider Ex. 7. Dulberg also newly cites a May 17, 2017 order from *State v. Popovich*, McHenry County no. 16 CV 265, which shows that Judge Meyer presided over a case against Thomas Popovich individually, who is not a party to this legal malpractice case. Mtn. to Reconsider Ex. 9. Dulberg newly presents a September 15, 2015 order in which Judge Berg recused himself from *Kimberly Popovich v. Zukowski, Rogers, Flood and McArdle, et al.*, McHenry County no. 15 LA 78, without the court identifying any reason or the party with whom the judge had a conflict. Mtn. to Reconsider Ex. 10. These orders fail to show that the trial court would have been unable to rule on issues with the record in this case.

Furthermore, Dulberg cannot raise any new arguments in this appeal about possible bias by the trial court. *Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 454, 456 (1st Dist. 2007) (an appellant cannot raise new arguments on appeal). Dulberg's emergency motion suggests that he wishes to make a new argument in this appeal as to whether Judge Meyer should have recused himself, and the motion to reconsider suggests that Dulberg may also wish to make that argument about Judge Berg. Emergency Mtn. pg. 4-5; Mtn. to Reconsider pg. 7-8. But Dulberg has forfeited any issue with Judge Meyer or Judge Berg having

presided over 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).<sup>5</sup> Further, a party cannot seek relief on a question of whether a judge should have recused himself on the judge's 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.

**IV. This Court properly denied Dulberg's request for leave to retain an auditor to audit the records of the Circuit Court and of this Court.**

This Court properly denied Dulberg's unprecedented emergency request for leave to retain an auditor to audit the records of the Circuit Court and of this Court. Emergency Mtn. pg. 5-6. Dulberg's emergency motion cited no authority that would warrant the extraordinary relief of retention of an auditor for the court records. 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. Further, Dulberg's request to retain an auditor was 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.<sup>6</sup> Dulberg's request to audit the court's records had no support and was simply a delay tactic.

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<sup>5</sup> Dulberg newly cites a January 22, 2014 transcript from the underlying personal injury case, which shows that Judge Meyer was presiding, which transcript is not in the record for this case. Mtn. to Reconsider Ex. 8. This transcript adds nothing new, as Dulberg already made an argument in his emergency motion about Judge Meyer having presided over the underlying case, which is a fact the court disclosed, and no motion for substitution of judge was filed. Emergency Mtn. pg. 5 & its Ex. B (Feb. 3, 2020 Tr., R66-R67) & its Ex. C (May 10, 2018 Tr., R4).

<sup>6</sup> While Dulberg reached 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.

**V. This Court properly denied Dulberg leave to amend his docketing statement.**

This Court properly denied Dulberg’s October 2, 2023 request to amend his docketing statement to refer to “related cases”, and to the extent that Dulberg re-raised such request in his emergency motion, such was again properly denied. Resp. to Emergency Mtn. at its Ex. 4 (Dulberg Mtn. for 3rd Extension & Other Relief, pg. 6-7, 9) & its Ex. 5 (Oct. 10, 2023 Order); Emergency Mtn. pg. 6 “wherefore clause.” Dulberg did not identify any other cases that should be referenced in his docketing statement as “related cases.” 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 did not identify any other cases that involved substantially the same parties (i.e. both Dulberg and the Firm) and the same or similar issues. See *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); Resp. to Emergency Mtn. pg. 12-14. Since Dulberg did not identify any other case that constitutes a “related case” under Local Rule 113, this Court properly denied Dulberg’s requests to amend his docketing statement to refer to other cases.

**VI. This Court should dismiss this appeal due to Dulberg’s failure to file his appellant’s brief by his final deadline.**

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 already warned Dulberg that no further extensions for his appellant's brief would be allowed under any circumstances. Mtn. to Reconsider at its Ex. 3, Nov. 9, 2023 Order. Dulberg's rehash of vague and immaterial arguments regarding the record on appeal is not an excuse for his failure to file his appellant's brief. This Court should now dismiss this appeal for Dulberg's failure to file his appellant's brief. *Universal Underwriters Ins. Co. v. LKQ Smart Parts, Inc.*, 2011 IL App (1st) 101723, ¶10 (dismissing appeal where the appellant failed to file an opening brief). Such a dismissal should be entered as a final order, considering that this Court already warned Dulberg that the November 22, 2023 deadline was absolutely final. Mtn. to Reconsider at its Ex. 3, Nov. 9, 2023 Order; *Woodson v. Chicago Bd. of Educ.*, 154 Ill. 2d 391, 397 (1993) (dismissal of appeal for failure to prosecute was a final order); *City of Chicago v. Pudlo*, 271 Ill. App. 3d 107, 109-10 (1st Dist. 1995) (same); see also *Hartney v. Bevis*, 2018 IL App (2d) 170165, ¶¶5-6, 16.

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

Respectfully submitted,

By: /s/ George K. Flynn

*One of the Attorneys for Defendants-Appellees  
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No. 2-23-0072

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IN THE APPELLATE COURT OF ILLINOIS  
SECOND JUDICIAL DISTRICT

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PAUL R. DULBERG,	)	
	)	Appeal from
<i>Plaintiff-Appellant,</i>	)	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
	)	
<u><i>Defendant-Appellees.</i></u>	)	

**NOTICE OF FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on the 27th day of November, 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 Motion to Reconsider the November 9, 2023 Order**, 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.  
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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 Motion to Reconsider the November 9, 2023 Order and Notice of Filing through Odyssey eFileIL and served each party by emailing a copy to each party listed below on November 27, 2023.

**Attorneys for Plaintiff/Appellant**

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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