No. 2—10—0200
Order filed March 25, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CARL SMITH,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 06—L—833
	)	
PATRICIA FISCHER,	)	Honorable
	)	Joseph A. Bongiorno,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Where plaintiff's personal-injury complaint was dismissed for want of prosecution and plaintiff delayed filing his petition under section 2—1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2—1401 (West 2008)) for almost two years in order to allow his treatment to progress so he could better determine the extent of his injuries, the trial court did not err in denying the section 2—1401 petition.

Plaintiff appeals from the trial court's denial of his petition under section 2—1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2—1401 (West 2008)). The petition sought to vacate the dismissal for want of prosecution of plaintiff's complaint for personal injury. For the following reasons, we affirm the denial of the petition.

BACKGROUND

In August 2004, plaintiff and defendant were in a car accident. On August 16, 2006, plaintiff filed a complaint alleging that he was injured due to defendant's negligent driving when her vehicle struck plaintiff's vehicle from behind. Defendant filed an answer and an affirmative defense and the parties began discovery. Plaintiff's counsel failed to appear for a status hearing on March 8, 2007, and for a case management conference on May 2, 2007. The trial court entered an order on May 2, 2007, continuing the matter for further case management until May 10, and stating, "Plaintiff's counsel to appear on this date or the matter shall be dismissed for want of prosecution." Plaintiff's counsel appeared at the May 10, 2007, case management conference, and the court set additional discovery deadlines.

On July 30, 2007, in an ex parte proceeding held with plaintiff's consent, the trial court heard and granted defendant's motion to extend the deadline for party discovery depositions. The court set October 18, 2007, for case management. Prior to the October 18 case management conference, date, plaintiff's counsel told defendant's counsel that he would be unable to appear because of a scheduling conflict. Defense counsel agreed to advise the court of such and to inform the court that the parties had reached an agreement on all remaining discovery. On October 18, 2007, defendant's attorney appeared and, despite his explanation to the court, the court entered an order dismissing plaintiff's complaint for want of prosecution.

Plaintiff asserts in his brief that, within 30 days of the dismissal, his attorney forwarded to the circuit court clerk a motion to vacate the October 18, 2007, order, but that it was returned to the attorney unfiled because he had not included the required filing fee. On December 19, 2007, plaintiff's counsel forwarded to the circuit court clerk a "new" petition to vacate, which was filed on January 2, 2008. The petition was set for hearing on January 17, 2008. In his opening brief, plaintiff asserts that, on that date, due to defense counsel's objection to notice, the matter was

"continued generally, with no order entered." In her brief, defendant responds that her attorney objected to the petition because it should have been treated as filed under section 2—1401 since more than 30 days had passed from the entry of the dismissal order, and because defendant had not been personally served with the petition as required. Defendant asserts that plaintiff's attorney "ultimately withdrew the petition." Plaintiff provides no report of proceedings from January 17, 2008, and the common-law record contains no order from that date.

Nothing further occurred until some 21 months later, on October 15, 2009, when plaintiff filed a petition under section 2—1401 seeking to vacate the trial court's October 18, 2007, dismissal order. Following the filing of defendant's response and plaintiff's reply, the court heard argument on the petition on January 27, 2010. The court denied the petition stating, "The plaintiff has failed to establish any exercise of due diligence whatsoever in this case. And I can't think of a more classic set of facts to support the denial of a motion [*sic*] to vacate under 214-01 [*sic*]." Plaintiff timely appealed.

ANALYSIS

Plaintiff argues that the trial court erred in denying his section 2—1401 petition because (1) his filing the petition three days prior to the running of the statute of limitations under section 2—1401 did not, in and of itself, constitute a lack of due diligence, and (2) the court ignored the "current trend" of relaxing the due diligence requirements in favor of considering equitable factors.[1]

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[1]In support of the existence of this trend, plaintiff cites several cases, including *Elfman v. Evanston Bus Co.*, 27 Ill. 2d 609 (1963). We will not assume that plaintiff chose to deliberately mislead this court, but caution plaintiff to exercise care in his citations in the future as *Elfman* was abrogated by *People v. Vincent*, 226 Ill. 2d 1, 15-16 (2007). See *Mills v. McDuffa*, 393 Ill. App. 3d 940, 947 (2009) (noting abrogation).

As a threshold matter, the parties dispute our standard of review. Plaintiff argues in his opening brief that, generally, we review the trial court's ruling on a section 2—1401 petition for an abuse of discretion (citing *In re County Treasurer*, 347 Ill. App. 3d 769 (2004), and *Sunderland v. Portes*, 324 Ill. App. 3d 105 (2001)), but that to the extent the trial court denied the petition without consideration of equitable factors, our review should be *de novo* because it involves an interpretation of section 2—1401 (citing *In re Application of County Collector for Judgment*, 278 Ill. App. 3d 168 (1996)). Defendant responds in a footnote that, pursuant to our recent decisions in *In re Haley D.*, 403 Ill. App. 3d 370 (2010), *petition for leave to appeal pending*, No. 110886 (Oct. 29, 2010), and *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321 (2010), our review is solely for an abuse of discretion. In his reply brief, plaintiff asserts that, pursuant to *People v. Vincent*, 226 Ill. 2d 1 (2007), and our decision in *Mills v. McDuffa*, 393 Ill. App. 3d 940 (2009), his section 2—1401 petition and defendant's response were functionally equivalent to cross-motions for summary judgment, and our standard of review is *de novo*. However, according to plaintiff, to the extent that we address equitable considerations, our review would be for an abuse of discretion.

Contending that this argument in plaintiff's reply brief violates Supreme Court Rules 341(h)(7) and (j) (eff. Sept. 1, 2006), defendant filed a motion to strike plaintiff's reply brief. We ordered the motion taken with the case and address it now. Defendant argues that plaintiff raised for the first time in his reply brief his argument that the standard of review is *de novo* under *Vincent* and therefore, violates Rules 341(h)(7) and (j). We agree that Rule 341 prohibits new arguments being raised in reply briefs. However, we are not convinced that plaintiff's argument is new. Instead, plaintiff seems to be responding to defendant's argument that, despite our supreme court's decision in *Vincent*, the standard of review under *Haley D.* and *Rockford Financial Systems* is abuse of discretion. We agree that plaintiff's opening brief inexplicably failed to address *Vincent*.

Nonetheless, plaintiff did include a discussion of the standard of review in his opening brief, and in any event, the standard of review is not subject to waiver. See *Zurich Insurance Co. v. Raymark Industries, Inc.*, 213 Ill. App. 3d 591, 594 (1991) (noting that no Illinois case had held that a party waived the standard of review for failure to include it in its brief). Accordingly, defendant's motion to strike plaintiff's reply brief is denied.

We now consider the case law relevant to our determination of the standard of review. In *Vincent*, our supreme court stated, "We therefore hold that when a court enters either a judgment on the pleadings or a dismissal in a section 2—1401 proceeding, that order will be reviewed, on appeal, *de novo*." *Vincent*, 226 Ill. 2d at 18. The court in *Vincent* expressly noted that it was not reaching the issue of the standard of review in cases in which a section 2—1401 petition was granted or denied after an evidentiary hearing. *Vincent*, 226 Ill. 2d at 16-17. However, the court added, in *dicta*, "that the abuse of discretion standard does not match up with any other of the types of dispositions possible in section 2—1401 proceedings." *Vincent*, 226 Ill. 2d at 17, n.5.

Thereafter, in *Mills*, this court reasoned that, under *Vincent*, to determine the standard of review, it was necessary to characterize the manner in which the trial court disposed of the section 2—1401 petition. *Mills*, 393 Ill. App. 3d at 947-48. Because the trial court granted the petition without holding an evidentiary hearing, this court held that the standard of review was *de novo*. *Mills*, 393 Ill. App. 3d at 948.

Subsequently, in *Rockford Financial Systems* and *Haley D.*, this court (as plaintiff described it) "blurred the lines" and applied an abuse-of-discretion standard of review. *Rockford Financial Systems*, 403 Ill. App. 3d at 328; *Haley D.*, 403 Ill. App. 3d at 374. In *Rockford Financial Systems*, this court factually distinguished *Vincent* and said that *Vincent* was limited in scope to cases involving voidness allegations. *Rockford Financial Systems*, 403 Ill. App. 3d at 326-27. This court

said that *Vincent* did not address the issue of due diligence or the standard for reviewing a trial court's decision regarding due diligence, and decided that review should be for an abuse of discretion. *Rockford Financial Systems*, 403 Ill. App. 3d at 327-28. This court determined that the issue of whether the petitioner exercised due diligence in the original action was questionable. *Rockford Financial Systems*, 403 Ill. App. 3d at 329. This court held that principles of equity required affirming the trial court's grant of the section 2—1401 petition because the petitioner was subject to an order for $44,000, but held only $500 of the judgment-debtor's assets. *Rockford Financial Systems*, 403 Ill. App. 3d at 330. In *Haley D.*, this court reversed the trial court's denial of the section 2—1401 petition for purely equitable reasons where the petitioner's parental rights were terminated when he had not received notice of the termination proceedings. *Haley D.*, 403 Ill. App. 3d at 378.

We determine that we need not decide which standard of review applies because under either standard, on the facts here, we must affirm the trial court's denial of plaintiff's section 2—1401 petition. See *Domingo v. Guarino*, 402 Ill. App. 3d 690, 699 (2010) (considering the trial court's denial of a section 2—1401 petition following an evidentiary hearing and noting that the trial court's denial of the section 2—1401 petition was proper under either an abuse-of-discretion or a manifest-weight-of-the-evidence standard).

Section 2—1401 creates a statutory procedure for vacating a final judgment entered more than 30 days, but less than 2 years, prior. *Vincent*, 226 Ill. 2d at 7; *Haley D.*, 403 Ill. App. 3d at 373. Although the petition is filed in the same proceeding as the final judgment, it is not a continuation of that original action, but rather is a new cause of action. *Vincent*, 226 Ill. 2d at 7; *Mills*, 393 Ill. App. 3d at 946. A petitioner is entitled to relief upon a showing, by a preponderance of the evidence, of (1) a meritorious claim or defense in the original action; (2) the exercise of due diligence in

presenting the claim or defense to the trial court in the original action; and (3) the exercise of due diligence in filing the petition for relief. *Vincent*, 226 Ill. 2d at 7-8; *Haley D.*, 403 Ill. App. 3d at 373. The "petitioner must affirmatively set forth specific factual allegations" in support of each of these elements. *Rockford Financial Systems*, 403 Ill. App. 3d at 323-24.

Here, an examination of only the following factual allegations pertaining to due diligence in filing the section 2—1401 petition asserted by plaintiff therein demonstrates that plaintiff failed to meet his burden in the trial court. See *JP Morgan Chase Bank v. Fankhauser*, 383 Ill. App. 3d 254, 261 (2008) (stating that the petitioner must set forth specific factual allegations supporting each of the three elements and affirming the trial court's denial of the section 2—1401 petition based on failure to establish due diligence in the original action). Within 30 days of the dismissal, plaintiff sent the circuit court clerk a motion to vacate the dismissal, which was returned to him unfiled for lack of the filing fee. On December 19, 2007, plaintiff's counsel sent another petition to vacate, which was filed January 2, 2008. On January 17, 2008, the parties appeared in court on the petition, but the matter was generally continued because defendant had not received personal service as required by section 2—1401. Rather than immediately serving defendant with the petition, plaintiff decided to "hold off so that the parties could proceed to immediately complete discovery upon the reinstatement of the case." Although prior to the dismissal of the case, plaintiff had "completed written discovery and sat for his deposition on October 2, 2007," because plaintiff's physical and mental injuries were ongoing and he was still receiving treatment from various doctors, plaintiff "felt that the discovery and evaluation process would be better served by a delay in the proceedings to determine the nature, extent and duration of Plaintiff's injuries." Plaintiff's delay was "within his rights, not to prejudice the Defendant but, in fact, to allow both Plaintiff and Defendant an

opportunity to accurately assess the nature, extent and duration of the injuries." The October 15, 2009, petition was filed within two years of the dismissal order.

"Due diligence requires a section 2—1401 petitioner to have a reasonable excuse for failing to act within the appropriate time." *Domingo*, 402 Ill. App. 3d at 700. A determination of the reasonableness of the petitioner's excuse requires an examination of all of the circumstances surrounding entry of the judgment, including the litigants' conduct as well as that of their attorneys. *Klose v. Mende*, 378 Ill. App. 3d 942, 948 (2008). The purpose of proceedings under section 2—1401 is to call to the attention of the trial court factual matters not appearing in the record that would have prevented the court from entering the judgment had it been aware of them. *Klose*, 378 Ill. App. 3d at 947. A petitioner "may not obtain relief from orders that were entered as a result of its own negligence and disregard of the proceedings." *JP Morgan Chase Bank*, 383 Ill. App. 3d at 263.

Plaintiff's excuse for waiting 21 months to file his section 2—1401 petition was that he wanted to wait until his treatment progressed further or was completed in order to fully determine the extent of his injuries. Plaintiff's desire to wait did not constitute a factual matter not appearing in the record that would have prevented the court from entering the judgment had it been so aware. Furthermore, plaintiff characterized his period of inattention as a "delay in the proceedings." Plaintiff misapprehends the nature of the 21-month time lapse. It did not constitute a "delay in the proceedings," but rather a gap between the time the original action was dismissed and the beginning of the new action—commenced with the filing of the section 2—1401 petition. See *Mills*, 393 Ill. App. 3d at 946 (section 2—1401 petition is filed in the same proceeding as the final judgment, but is a new cause of action, not a continuation of the original action). "Relief pursuant to a section 2—1401 petition is only available to litigants who diligently pursue their legal defenses and remedies

in court." *Klose*, 378 Ill. App. 3d at 951. Plaintiff does not allege that anything prevented him from initiating proceedings under section 2—1401, but offers only his purposeful delay in doing so as an excuse. See *Domingo*, 402 Ill. App. 3d at 701 (the burden is on the petitioner to establish due diligence). Choosing to delay does not equate with diligence. During the gap in time, plaintiff did absolutely nothing to pursue his remedies in court. Accordingly, whether we apply a *de novo* or an abuse-of-discretion standard of review, plaintiff failed to meet his burden of establishing due diligence in filing his petition, and the trial court did not err in denying it. See *Domingo*, 402 Ill. App. 3d at 702 (concluding that, under either a manifest-weight-of-the-evidence of an abuse-of-discretion standard, petitioner failed to offer any explanation for his five-month delay in filing his petition).

Plaintiff argues that the trial court improperly ruled that the 21-month delay in filing the petition was a *per se* lack of due diligence. Plaintiff points to nothing in the record indicating that this was the basis for the trial court's ruling. When denying the petition, the trial court did not mention the 21-month delay, but merely concluded, "The plaintiff has failed to establish any exercise of due diligence whatsoever in this case. And I can't think of a more classic set of facts to support the denial of a motion [*sic*] to vacate under 214-01 [*sic*]." We decline to speculate as to any further reasoning of the trial court. Moreover, even assuming that plaintiff's assertion were true, we may affirm for any basis supported by the record, regardless of the trial court's reasoning. *Forsberg v. Edward Hospital & Health Services*, 389 Ill. App. 3d 434, 440 (2009).

Plaintiff next argues that the "current trend" is to relax the due diligence standard and that the trial court abused its discretion because it did not consider the equities. A trial court abuses its discretion when it acts arbitrarily or when its decision " 'exceeds the bounds of reason and ignores established principles of law resulting in substantial prejudice.' " *In re County Treasurer*, 347 Ill. App. 3d at 775 (quoting *Sunderland*, 324 Ill. App. 3d at 110). Other than asserting that the trial court

failed to consider the equities, plaintiff does not explain what particular equities should have been considered.[2] Moreover, plaintiff's reliance on *In re County Treasurer* is unavailing. The court there did not hold, as plaintiff maintains, that the trial court's failure to refer to the equities on the record required reversal. The court observed that the trial court had not mentioned any equitable factors and should have considered the petitioner's lack of fluency in English. *In re County Treasurer*, 347 Ill. App. 3d at 779. The court determined that the trial court "held [the petitioner] to a standard of diligence that did not comport with the demands of equity" and that the petitioner's failure to file a petition for 18 months was a reasonable exercise of diligence under the circumstances. *In re County Treasurer*, 347 Ill. App. 3d at 780.

Here, plaintiff suggests only that, because he and defense counsel had agreed to his absence from the October 18, 2007, case management conference, it was unfair for the trial court to *sua sponte* dismiss his complaint for want of prosecution. This argument has no relevance to plaintiff's due diligence in filing his section 2—1401 petition or to any supposed inequity in the trial court's denial of the petition. Moreover, we observe that the trial court's *sua sponte* dismissal was entered only after plaintiff twice failed to appear at scheduled status hearings or case management conferences and after he was warned on the record that failure to appear would result in dismissal. Whether his absence was agreed to by opposing counsel has no bearing on counsel's obligation. See 18th Judicial Cir. Ct. R. 6.01(f) (Oct. 1, 1991) ("Failure of the parties or their counsel to appear on the automatic

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[2]We need not address whether consideration of the equities in section 2—1401 cases is permissible post-*Vincent* because, even assuming *arguendo* that such discussion is appropriate, plaintiff has failed to demonstrate that denial of his petition was fundamentally unfair. See *Domingo*, 402 Ill. App. 3d at 703 (noting the flux in case law and determining that the petitioner failed to show that the denial of his petition was "unjust or fundamentally unfair").

status date or any other date set by the Court may result in dismissal for want of prosecution or default, on the Court's motion.").

We note that other cases in which courts have considered equitable considerations typically involve unconscionable situations. See *Haley D.*, 403 Ill. App. 3d at 376 (reversing the trial court's denial of the section 2—1401 petition where the biological father's parental rights were terminated when he was not provided notice of the termination hearing); *Rockford Financial Systems*, 403 Ill. App. 3d at 330 (affirming the trial court's grant of the section 2—1401 petition where the petitioner bank held only $500 of the judgment-debtor's assets and the judgment against the bank was for $44,000). Here, plaintiff has not established that the trial court acted arbitrarily. Neither has plaintiff provided any applicable authority to support the proposition that the trial court was required to recite any equitable considerations on the record. More important, plaintiff does not offer any particular reason why it was inequitable for the trial court to deny his petition. That plaintiff is without recourse in the courts for his personal injury claim is not unjust, unfair, or unconscionable because it was his own decision to avoid pursuing a remedy in the courts for 21 months. See *JP Morgan Chase Bank*, 383 Ill. App. 3d at 261 (stating that "[s]ection 2—1401 does not relieve the consequences of a litigant's own mistake or negligence"); *Klose*, 378 Ill. App. 3d at 951 ("Relief pursuant to a section 2—1401 petition is only available to litigants who diligently pursue their legal defenses and remedies in court.").

Based on the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

Affirmed.