2016 IL App (2d) 141258-U
No. 2-14-1258
Order filed February 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF KENNETH GLASSMAN, Petitioner-Appellant, and MARY L. McCUE, Respondent-Appellee.	)))))))))	Appeal from the Circuit Court of Du Page County. No. 08-D-166 Honorable Brian R. McKillip, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly granted motion for directed finding. Affirmed.

¶ 2 Appellant, Kenneth Glassman, and appellee, Mary McCue, divorced in 2012. Prior thereto, Glassman had filed a petition for declaration of the invalidity of the parties' marriage, which the trial court denied in 2009. In 2013, Glassman filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), seeking to vacate, on the basis of newly-discovered information, the trial court's 2009 denial of his petition

to invalidate the marriage. In 2014, after a hearing on the section 2-1401 petition, McCue moved for a directed verdict, which the court granted. Glassman appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Petition to Invalidate and Dissolution Judgments

¶ 5 The parties married in 2005. On January 18, 2007, their daughter was born. One year later, on January 24, 2008, Glassman petitioned pursuant to section 301 of the Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/301 (West 2006)) to have the marriage declared invalid. He alleged that McCue induced him to enter into the marriage by fraud involving an essential condition of the marriage. 750 ILCS 5/301(1) (West 2006). Specifically, Glassman alleged that an essential condition of the marriage was McCue's promise to raise any children born to the marriage in the Jewish faith and that, "as of January 23, 2008, [Glassman] was advised by [McCue] that she refuses to honor this promise in that the child would not be raised in the Jewish faith."

¶ 6 At trial before Judge Robert Anderson, Glassman essentially argued that McCue's actions after their child was born reflected that there was no truth or substance to the premarital promise she made. However, on June 23, 2009, following the hearing, the trial court denied with prejudice the petition to invalidate the marriage. The court determined that Glassman had proved that his religious convictions were sincere and that McCue's promise to raise any children born to the marriage in the Jewish faith was essential to his agreement to marry such that, but for the promise, the marriage would not have taken place. However, the court found Glassman had not proved the element of fraudulent inducement.

> "Was the statement fraudulent *when it was made*? You know hindsight is 20/20 and sort of you can look back in time and [say] well, this meant X then. But that isn't

> necessarily true. The burden that Mr. Glassman[,] that you have, *** is was it fraudulent *when it was made*. Not did somebody later think, you know, wonder if that was really the right thing to say or do. But was it something that was deliberately said that was untrue or fraudulent *at the time that it was said*. That's I think the hardest part of this case from your perspective. That's what has to be proven by clear and convincing evidence, and frankly I don't think that's been proven in this case that *at the time that it was said* it was intended to be fraudulent. Did later, were there doubts? I think that's clearly the case, and later were there issues. *** But the bottom line is I don't believe that it's been proven by the clear and convincing evidence standard that it was fraudulent *when it was said*." (Emphasis added.)

¶ 7 Subsequently, McCue petitioned for dissolution of the parties' marriage, alleging irreconcilable differences. On February 21, 2012, the court entered a dissolution judgment, incorporating therein the parties' parenting agreement, which gives McCue sole decisionmaking authority over the child's religious needs and expressly provides that the child will be raised in the Catholic faith.

¶ 8 B. Section 2-1401 Petition

¶ 9 On September 26, 2013, Glassman filed a section 2-1401 petition seeking to vacate the court's June 23, 2009, order denying the petition to invalidate (*i.e.*, more than four years after that petition was denied). Glassman alleged that he exercised diligence in pursuing the petition because he had recently learned that McCue fraudulently concealed information during the petition to invalidate hearing. Specifically, despite the topic of baptism having arisen in prior proceedings, McCue did not reveal that, on May 6, 2007, before the petition to invalidate proceedings had even commenced, she had already baptized their daughter in the Catholic faith.

Glassman discovered the concealed information on June 10, 2013, after obtaining from the child's Catholic school a copy of her baptismal certificate. Glassman asserted that, if he had known about the baptism, he would have materially changed his trial strategy. The trial court, Glassman alleged, therefore rendered its previous judgment on an incomplete set of facts, and, if the baptism had been disclosed, it would have illustrated to the court that McCue committed fraud against Glassman.

¶ 10 Judge Brian McKillip presided over a hearing on the section 2-1401 petition. Testimony from Father Jerry Leake, pastor at St. Joseph's in Aurora, confirmed that he is familiar with McCue's family and that, on May 6, 2007, he baptized the child in the Catholic faith. Leake did not recall whether Glassman was present for the baptism, but it would be unusual for a father to be absent. According to Leake, baptism takes away original sin and introduces the child into the family of God and the Catholic faith. Further, according to Leake, once baptized Catholic, one is always Catholic.

¶ 11 McCue's mother, brother, and father testified that they were present at the child's baptism, along with McCue's sister-in-law and two nieces, but that Glassman was not present. McCue's father testified that, prior to the baptism, he expressed his opinion that Glassman should not be present for the ceremony. He did not recall McCue ever saying that her child would be raised Jewish or that Jews do not baptize children, but, rather, he recalled McCue saying that she would expose the child to both faiths and let the child decide. McCue's mother did not recall ever discussing with McCue whether her child would be raised Jewish or the fact that Glassman did not want the child baptized.

¶ 12 Rabbi Andrea Cosnowsky testified that she is an assistant rabbi with the Etz Chaim congregation in Lombard. She recalled meeting with McCue in the Fall of 2007, to discuss a

baby naming ceremony for the child (which never took place). A baby naming ceremony welcomes a child into the covenant of Judaism and expresses an intention by the parents to raise the child Jewish. McCue did not tell Cosnowsky that she had already baptized the child Catholic. Cosnowsky testified that the information would have required her to consult with a senior rabbi before performing the ceremony. According to Cosnowsky, after the child was baptized, it could not become Jewish without undergoing a conversion. However, Cosnowsky testified that the fact that the child was baptized would not prevent her from being "religiously raised Jewish" at the synagogue.

¶ 13 Glassman testified that, if he had known that McCue would not raise their child Jewish, he never would have married her. He further testified that, in both her deposition and trial testimonies, McCue concealed the baptism from the initial proceedings. For example, Glassman recalled that, at her deposition, McCue testified that she told her father that the child would not be baptized because Judaism does not perform baptisms.[1] Nonetheless, McCue did not disclose that, by the time of the deposition, the child had already been baptized. Glassman further testified that, shortly after the child was born and again in November 2007 (after the baptism had taken place), McCue told him that her father was pressuring her to baptize the child and Glassman replied "absolutely not, that cannot happen" because they had agreed their children would be Jewish. Glassman testified that he never specifically asked McCue during

[1] Glassman attached to his section 2-1401 petition copies of the referenced deposition testimony. In the deposition, McCue explained that her parents had asked if the child would be baptized because they believed that baptism erases original sin. McCue was then asked if she essentially told her father that the child would not be baptized, and she replied "yes," because "in Judaism they don't baptize their children."

prior proceedings whether she had baptized the child because, whenever the subject of baptism came up, such as in her deposition, the implication was that the child would not be baptized. Accordingly, he did not have any reason to further inquire if McCue had, in fact, baptized the child without his knowledge. Glassman learned of the baptism when he realized that the child's Catholic school required baptism for admission. He asked McCue if she had been baptized and McCue did not respond to that point, instead replying that the conditions of admission had been satisfied. Glassman then contacted and obtained, on June 10, 2013, a copy of the baptism certificate from the school. Three months later, he filed his section 2-1401 petition.

¶ 14 McCue testified that she never told Glassman that she was going to have the child baptized, nor did she tell him after the ceremony was performed. McCue agreed that she did not disclose to anyone at the time of trial that she had already baptized the child. She further agreed that she told her father that, in Judaism, they do not baptize children. McCue testified that she answered the questions asked of her.

¶ 15 In addition, McCue testified that it was "not at all" her intent to make the child Catholic when baptizing her, for she understood that, although baptism could be a first step in becoming Catholic, "[p]eople can be baptized and never become Catholic." Moreover, McCue testified that she was not thinking about Glassman when she decided to baptize the child but, rather, her decision to baptize was based on feelings she had after her daughter was born.

> "Well, I think after you have a baby, you know, it kind of changes your feelings about just life in general. And having [my daughter] and having my parents ask me about baptism and all my friends and colleagues, and it made me start to think about the original sin and how it was hard for me not to acknowledge that."

¶ 16 After Glassman presented his case, McCue moved for a directed finding. On November 5, 2014, the trial court granted McCue's motion. The court found that Glassman failed to establish a *prima facie* case on his section 2-1401 petition. The court found first that Glassman did not establish due diligence in presenting his petition because he did not establish the fraudulent concealment required to meet the exception for filing the petition within two years of the judgment. 735 ILCS 5/2-1401(c) (West 2012). Specifically, the court found that Glassman failed to identify an intentional misstatement of a material fact by McCue and, although questions were raised about baptism, McCue was never specifically asked if the child had been baptized. Therefore, Glassman could not point to an instance in which McCue failed to answer a question correctly or answered it falsely but, rather, his theory seemed to be that McCue should have voluntarily disclosed the baptism. The court held that silence alone does not constitute fraudulent concealment. In addition, it noted that Glassman complained that McCue did not voluntarily disclose information, but, at the petition to invalidate hearing, he had, at times, objected when McCue's testimony went beyond a "yes" or "no" answer.

¶ 17 The court further found that the hearing testimony was equivocal concerning the significance of the baptism as it related to the child being able to be raised Jewish and, therefore, it was unclear whether baptism was even an impediment to raising the child Jewish. "If baptism of the child were a true impediment to raising the child Jewish, the failure to pursue that question is a lack of diligence by [Glassman] in presenting his [petition for declaration of invalidity of marriage]. If baptism is not a fatal impediment, [it] is irrelevant to the discussion of the original action or this motion to vacate."

¶ 18 Finally, the court found that "it is clear from Judge Anderson's decision that neither Ms. McCue's conduct in having the child baptized nor in failing to disclose that fact to Mr. Glassman

or the court" would have been relevant to the ultimate decision rendered. Further, the court stated that it had come to the same conclusion as Judge Anderson, namely, that both parties were sincere and acted in good faith. "As noted by Ms. McCue, *** it was hard for her not to acknowledge original sin. 'Having a child changes things.' " The court determined that McCue's actions were not fraudulent under the law, nor would knowledge of the baptism have created a meritorious claim before Judge Anderson. As such, the court granted the motion for a directed finding and dismissed Glassman's section 2-1401 petition. Glassman appeals.

¶ 19 II. ANALYSIS

¶ 20 A. Propriety of Appeal

¶ 21 Prior to briefing, McCue moved to dismiss this appeal, arguing that Glassman did not request recognized or cognizable relief in the trial court and, therefore, that his appeal is now improper. Specifically, McCue argued, Glassman's section 2-1401 petition sought to vacate *only* the 2009 judgment denying his petition to invalidate the marriage. However, even if this relief were granted, McCue asserts, Glassman could not ultimately obtain relief because the subsequent dissolution judgment not only required Glassman to admit to the existence of a valid marriage (that had broken down), but it also resulted in there being no marriage left to invalidate. Accordingly, McCue reasons, Glassman must first move to vacate the dissolution judgment before he can attack the 2009 judgment. Therefore, she concludes, Glassman did not seek proper relief under section 2-1401 and cannot appeal under Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010) (allowing for appeal of a judgment denying the "relief" prayed for under section 2-1401).[2]

[2] McCue also asserts that the section 2-1401 petition was untimely because section 302(a) of the Act requires that a petition to invalidate on the grounds of fraud be brought within 90 days of

¶ 22 On August 12, 2015, a panel of this court denied McCue's motion to dismiss, but did not foreclose the possibility of McCue raising the argument on appeal. She has done so. We, however, again reject it.

¶ 23 Although not styled as such, we read McCue's argument as raising a mootness question. Namely, her argument suggests that, because Glassman's section 2-1401 petition did not attack the dissolution judgment, there would be no relief available to him if the 2009 judgment were vacated and, therefore, this appeal is moot. While we should dismiss moot appeals, we reject McCue's argument here because we do not necessarily agree that Glassman's section 2-1401 petition does not also attack the dissolution judgment. To be clear, it is true that, strictly speaking, the section 2-1401 petition does not name the dissolution judgment as the judgment being attacked. However, Glassman's petition attacks the dissolution judgment indirectly by virtue of a domino effect; his theory is that, if the petition to invalidate the marriage was decided incorrectly, then the basis for the dissolution (*i.e.*, that there was a valid marriage to dissolve) is undermined and the dissolution judgment voidable. In contrast, if the petition to invalidate was decided correctly, then Glassman has no reason or basis for attacking the dissolution judgment itself. Accordingly, without definitively deciding, we will assume *arguendo* that this appeal is not moot. Nevertheless, for the following reasons, we reject the appeal on its merits.

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learning those grounds (750 ILCS 5/302(a)(1) (West 2010)), and Glassman brought his section 2-1401 petition more than 90 days after learning of the child's baptism. McCue is confusing statutory requirements. The section 2-1401 petition is not governed by the time limitations for filing a petition to invalidate under section 302; rather, section 2-1401(c) simply provides that the petition must be filed within two years of the judgment being attacked, not including time during which the ground for relief is fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2012).

¶ 24 B. Directed Finding

¶ 25 Glassman argues first that the trial court erred in granting McCue's motion for a directed finding and dismissing his section 2-1401 petition. He argues that McCue fraudulently concealed the baptism and that his trial strategy would have differed, had he known that his child was already baptized in the Catholic faith. For the following reasons, we disagree.

¶ 26 Section 2-1401 allows a petitioner to request relief from a final judgment or order more than 30 days after entry of the judgment or order. 735 ILCS 5/2-1401(a) (West 2012). As previously mentioned, the petition must be filed not later than two years after the date of the order or judgment, but the period during which the basis for the attacking the judgment was fraudulently concealed is not considered in the two-year calculation. 735 ILCS 5/2-1401(c) (West 2012). To obtain relief under section 2-1401, the petitioner must set forth specific facts showing: (1) the existence of a meritorious defense; (2) due diligence in presenting the defense to the trial court; and (3) due diligence in filing the section 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). Each of the aforementioned factors must be established by a preponderance of the evidence. *Id.* We remain mindful that the purpose of a section 2-1401 petition is to bring to the court's attention facts that were not only unknown at the time of judgment, but which would have affected or altered that judgment. *In re Marriage of Lindjord*, 234 Ill. App. 3d 319, 325 (1992).

¶ 27 Here, the trial court granted McCue's motion for a directed finding, dismissing the section 2-1401 petition as having failed to establish, by a preponderance of the evidence, either due diligence in filing the section 2-1401 petition (specifically, the court found no fraudulent concealment that would satisfy an exception to the requirement that the petition be filed within two years of the entry of judgment) or a meritorious defense. When ruling on a motion for a

directed finding, the trial court must employ a two-step analysis, considering: (1) whether as a matter of law, the petitioner presented a *prima facie* case by presenting some evidence on each element essential to the cause of action; and (2) if so, whether, weighing the totality of the evidence, that *prima facie* case survives. *Hatchett v. W2X, Inc.*, 2013 IL App (1st) 121758, ¶ 35. If the trial court determines that petitioner failed to establish a *prima facie* case as a matter of law, our review is *de novo*. *Id.* However, if, as here, the trial court moved on to consider the weight and quality of evidence and found that no *prima facie* case remains, our review applies the manifest-weight-of-the-evidence standard. *Id.*

¶ 28 Setting aside the due diligence requirement, we cannot find contrary to the manifest weight of the evidence the court's determination that Glassman's *prima facie* case on his section 2-1401 petition failed because the evidence did not show the existence of a meritorious defense. The question here is, assuming due diligence and a timely section 2-1401 petition, did the evidence reflect that McCue committed a fraud which, if known, would have rendered Glassman meritorious on his petition to invalidate, *i.e.*, would it have changed or altered Judge Anderson's 2009 decision.

¶ 29 Glassman wishes us to focus on the evidence showing that McCue concealed the baptism from him and the court. Glassman contends that the trial court incorrectly accepted McCue's response that she simply answered the questions asked of her at the deposition and petition-to-invalidate hearing. He argues that, although mere silence may not amount to fraud, caselaw (specifically, *Deahl v. Deahl*, 13 Ill. App. 3d 150 (1973)), reflects that there exist occasions when it becomes one's duty to speak so that the opposing party may be placed on equal footing. Glassman contends that McCue's concealment of the baptism illustrates that

"she did not *keep* her promise" (emphasis added.) to him. He argues that the promise was an affirmative falsehood that reflects the essence of fraudulent concealment. We disagree.

¶ 30 Clearly, McCue did not voluntarily disclose the baptism. It is evident that she did not want Glassman to know about it. At this juncture, however, we are not tasked with judging the morality of that decision, nor are we considering either a direct appeal of the 2009 judgment or whether McCue failed to "keep" her promise to Glassman. Rather, even if we assume only *arguendo* that McCue's silence about the baptism constitutes fraudulent concealment, we are considering whether that concealment was material or relevant in that, if the baptism had been disclosed during the petition to invalidate proceedings, Glassman's petition to invalidate would have succeeded. We agree with the trial court that none of the evidence presented at the section 2-1401 hearing reflects that disclosure of the baptism would have altered Judge Anderson's decision, which was based on Glassman failure to prove that McCue's promise to raise any children in the Jewish faith was fraudulent *when it was made*. Again, Judge Anderson found:

> "Was the statement fraudulent *when it was made*? You know hindsight is 20/20 and sort of you can look back in time and [say] well, this meant X then. But that isn't necessarily true. The burden that Mr. Glassman[,] that you have, *** is was it fraudulent *when it was made*. Not did somebody later think, you know, wonder if that was really the right thing to say or do. But was it something that was deliberately said that was untrue or fraudulent *at the time that it was said*. That's I think the hardest part of this case from your perspective. That's what has to be proven by clear and convincing evidence, and frankly I don't think that's been proven in this case that *at the time that it was said* it was intended to be fraudulent. Did later, were there doubts? I think that's clearly the case, and later were there issues. *** But the bottom line is I

> don't believe that it's been proven by the clear and convincing evidence standard that it was fraudulent *when it was said*." (Emphasis added.)

¶ 31 The foregoing passage reflects Judge Anderson's finding that McCue clearly had doubts or issues about the promise *after* the parties married. Nevertheless, he found that the promise she made was credible when it was made. As such, to the extent that knowledge of the baptism would have diminished McCue's credibility, it would have done so only slightly, given that the court already found her to have struggled with the promise after the marriage. Glassman contends that the concealed baptism shows that McCue had a plan even before the marriage to not follow through on her promise. We disagree. Not only is this theory lacking in evidentiary support to link the baptism to a premarital plan to defraud, the baptism would only have been further evidence of the already-acknowledged struggle Judge Anderson found occurred after the child was born. Put another way, it would only have been additional information to support Glassman's argument that McCue failed to "keep" her promise, not evidence that the promise was fraudulent when it was made. We note that Judge McKillip also found McCue credible and that she acted in good faith. He further found credible McCue's explanation that, after the child was born, she felt differently and that having a child "changes things." Accordingly, the baptism evidence, which concerned McCue's actions *after* the marriage, would not have affected Judge Anderson's decision, which correctly focused on the truth and intention behind the promise *when it was made*. See, *e.g.*, *Wolfe v. Wolfe*, 62 Ill. App. 3d 498, 502 (1978) (reciting rule developed in other cases that "fraud sufficient to establish grounds for annulment must be as to some existing fact, not a mere promise made with an affirmative intent not to perform at some future time."). Finally, Glassman contends his trial strategy would have differed, had he known about the baptism. This may very well be true, but

we fail to see how it would have altered Judge Anderson's decision that Glassman's failure of proof concerned McCue's intentions at the time she made the promise.

¶ 32 Accordingly, the trial court's finding that Glassman's evidence at the section 2-1401 hearing did not show, at a minimum, the existence of a meritorious defense, was not contrary to the manifest weight of the evidence. The court's directed finding on Glassman's section 2-1401 petition is affirmed.

¶ 33 C. Stricken Testimony

¶ 34 Glassman next argues that the trial court improperly struck a portion of his testimony. Specifically, at the section 2-1401 hearing, Glassman testified that, in January 2008, he and McCue were in a counselor's office. They discussed how, in 2002, they had broken off their relationship, but then McCue called Glassman, crying, and said that she wanted to resume their relationship and that she would do whatever necessary for their children to become Jewish. According to Glassman, McCue said in the counselor's office that, based upon the fact that she was crying in the 2002 conversation, Glassman should have known that she would not be able to keep her word. McCue's attorney objected that Glassman's testimony was irrelevant to the issue at hand, namely whether the piece of information not previously known, *i.e.*, the baptism, would have had any effect on the 2009 judgment. The court sustained the objection.

¶ 35 A trial court's decision to admit or exclude evidence rests in its sound discretion, and we will only disturb the court's decision where no reasonable person would take the view adopted by the trial court. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 848 (2010).

¶ 36 Here, the trial court did not abuse its discretion by striking Glassman's testimony concerning a 2008 conversation about a 2002 conversation. The issue before the court on the section 2-1401 petition involved the effect the newly-discovered information, the baptism, would

have had on the petition to invalidate hearing. It was *not* a hearing on the merits of the petition to invalidate itself. As the point of the section 2-1401 hearing was *not* to re-hash the original hearing, we cannot find the court's decision to strike the testimony constitutes an abuse of discretion.[3]

¶ 37 D. Limited Deposition Testimony

¶ 38 Glassman's final argument is that, in March 2014, the trial court improperly granted McCue's motion to limit discovery such that questions at her deposition would concern only the period subsequent to the parties' 2005 marriage. He contends that this ruling was in error because it prohibited him from linking together the concealment of the baptism with statements made prior to the wedding. Again, we disagree.

¶ 39 As Glassman concedes, "[t]rial courts are afforded wide latitude in determining the permissible scope of discovery, and their rulings on discovery matters are generally reviewed for an abuse of discretion." *Payne v. Hall*, 2013 IL App (1st) 113519, ¶ 13. The section 2-1401 claim before the trial court concerned McCue's baptism of the child two years after the parties

[3] Glassman also argues that the trial court improperly relied on stricken testimony from the original trial. Namely, the trial court's order granting the directed finding notes a contradiction in that Glassman criticizes McCue for not disclosing the baptism but, at some points at the hearing on the petition to invalidate, McCue offered testimony beyond a "yes" or "no" answer and Glassman's counsel requested that everything after "no" be stricken. Glassman argues that his reference constitutes improper consideration of stricken testimony. This argument also fails. Glassman misreads the court's reference to the testimony as reliance on McCue's substantive testimony, which it clearly was not. Rather, the court simply used the exchange to illustrate a point.

married. The trial court's decision to limit McCue's deposition to only the period subsequent to the marriage, and to not permit a re-trial of the annulment case, was clearly not an abuse of discretion.

¶ 40 III. CONCLUSION

¶ 41 The judgment of the circuit court of Du Page County is affirmed.

¶ 42 Affirmed.