SECOND DIVISION
June 3, 2014

No. 1-13-3339

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LESLEY MARTINEZ,	)	
	)	Appeal from the
Petitioner-Appellant,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 09 L 10053
NORFOLK SOUTHERN RAILWAY COMPANY,	)	
a/k/a NORFOLK SOUTHERN CORPORATION,	)	Honorable
	)	Lynn M. Egan,
Respondent-Appellee,	)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

O R D E R

¶ 1 *HELD*: Circuit court's denial of section 2-1401 petition based on petitioner's claim that she was denied her right to an impartial jury is affirmed, where petitioner failed to set forth a meritorious claim and to demonstrate due diligence in bringing the claim.

¶ 2 Petitioner, Lesley Martinez, appeals from an order of the circuit court of Cook County denying her petition for relief from judgment pursuant to section 2-1401 of the Code of Civil

Procedure (735 ILCS 5/2-1401 (West 2012)). She contends that the court erred in denying her petition where she set forth a meritorious claim that her constitutional right to an impartial jury was violated and exercised due diligence in bringing that claim. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In February 2009, petitioner was injured in the course of her employment as a conductor for respondent Norfolk Southern Railway Company (Norfolk). She subsequently brought suit against Norfolk under the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 *et seq.* (2000)), and was granted partial summary judgment on the issue of liability. The petitioner's FELA case proceeded to a jury trial solely on the issue of damages, and a verdict was returned awarding petitioner $242,000. This amount represented the jury's award of $92,000 for "pain and suffering experienced and reasonably certain to be experienced in the future," and $150,000 for "[t]he value of earnings and benefits lost." The jury did not award petitioner any damages for "[t]he present cash value of the earnings and benefits reasonably certain to be lost in the future."

¶ 5 Petitioner appealed the verdict, arguing that: (1) the jury was erroneously instructed on the issue of mitigation of damages; (2) the jury's failure to award any damages for income certain to be lost in the future was against the manifest weight of the evidence; and (3) the court erred in refusing a proposed instruction regarding "loss of a normal life." *Martinez v. Norfolk Southern Railway Co.*, 2013 IL App (1st) 121958-U, ¶ 4. On April 16, 2013, this court issued a Rule 23 order rejecting petitioner's claims and affirming the judgment of the circuit court. *Id.* ¶ 41.

¶ 6 On April 5, 2013, petitioner filed the instant section 2-1401 petition alleging a violation of her right to an impartial jury. Petitioner alleged that the jury foreperson, Richard O'Brien, a partner at Sidley Austin, LLP (Sidley), concealed during *voir dire* that Norfolk is a "major

client" of his firm. She additionally alleged that counsel for Norfolk falsely advised the court that Norfolk was not represented by Sidley in FELA cases.

¶ 7 The record shows that, during *voir dire*, the court asked the *venire* whether anyone recognized the names of the attorneys, the parties, or any potential witnesses. O'Brien did not give a response. O'Brien subsequently informed the court that he was an attorney and a partner at Sidley, but explained that his "practice is not personal injury. It's litigation but it's presently *** property, patent, trademarks, copyrights." When the court asked, "Anything else that you think the lawyers should know about you?" O'Brien responded, "No." Counsel for petitioner then asked O'Brien the following questions, to which he gave the following answers:

> "Q. Mr. O'Brien, you're also a member of the bar. You represent corporations[']property cases?
>
> A. Correct. I represented the Tribune for many years as well.
>
> Q. In your practice do you represent plaintiffs, defendants or both?
>
> A. Both.
>
> Q. You said before that you were in a business practice before?
>
> A. I had a general commercial litigation practice at the same firm.
>
> Q. What kind of cases were you involved in?
>
> A. Trades secrets cases, FDIC work once upon a time.
>
> Q. Have you ever represented a railroad?

A. No.

Q. Have you been involved in FELA cases?

A. No.

Q. Is there anything about your practice and the type of cases and lawsuits that you prosecute that would influence you one way or another in this case?

A. I don't see any relationship.

Q. Are both the railroad and Ms. Martinez in the same position?

A. Correct.

MR. LUNDBLAD [counsel for petitioner]: Thank you."

¶ 8 On the following day, before opening statements, counsel for Norfolk informed both the court and counsel for petitioner that Norfolk was a client of O'Brien's law firm. As the following colloquy reveals, petitioner's counsel did not take issue with O'Brien's participation on the panel even after this disclosure:

"MR. GROBLE [counsel for Norfolk]: Judge, last night when I reported on the jury selection proceedings yesterday to my client, I was advised that Sidley & Austin represents Norfolk Southern in non-FELA matters. My recollection is that Mr. O'Brien works for Sidley & Austin, but said that he had no involvement in any FELA matters, but I felt it would be appropriate to bring it to the Court's attention right now.

> THE COURT: Okay. Counsel, what's your feeling about it? I think he described his practice as commercial litigation copyright infringement, that sort of thing.
>
> MR. LUNDBLAD [counsel for petitioner]: Right. He did deny having any involvement in representing any railroad if I recall.
>
> MR. GROBLE: I think that's correct.
>
> MR. LUNDBLAD: Sidley & Austin is a big place, so I'm comfortable with leaving him on at this point.
>
> THE COURT: Okay.
>
> MR. GROBLE: Great. I just wanted to bring it to everyone's attention ***."

¶ 9 According to petitioner's section 2-1401 petition, counsel for petitioner was researching issues related to his client's appeal in the damages trial when he came across the case of *Sutherland v. Norfolk Southern Ry. Co.*, 356 Ill. App. 3d 620 (2005), and discovered that Norfolk's counsel and Sidley had, at one time, jointly represented Norfolk in a FELA case. Petitioner noted that attorneys of Sidley have argued three FELA cases to the United States Supreme Court (*Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158 (2007)); *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003)); *Norfolk & Western Ry. Co. v. Hiles*, 516 U.S. 400 (1996)), and that the firm was representing Norfolk at the time Mr. Groble made his disclosure (*Strickland v. Norfolk Southern Ry. Co.*, 692 F.3d 1151 (11th Cir. 2012)). Petitioner claimed that "the pervasiveness of the relationship between Norfolk and Sidley was a recent serendipitous discovery" and that "the delay in raising [this] issue was due to lack of candor on the part of Mr.

O'Brien, [counsel for Norfolk] and Norfolk and not the lack of diligence on the part of the petitioner."

¶ 10 On September 25, 2013, the circuit court denied petitioner's section 2-1401 petition without stating its reasoning. Petitioner timely appealed, and we have jurisdiction to pursuant to Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010).

¶ 11 ANALYSIS

¶ 12 Section 2-1401 of the Code establishes a comprehensive procedure by which final orders and judgments may be vacated or modified more than 30 days after their entry. *Paul v. Gerald Adelman & Associates*, 223 Ill. 2d 85, 94 (2006). "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007).

¶ 13 On appeal, our "typical section 2-1401 analysis is two-tiered: (1) the issue of a meritorious [claim or] defense is a question of law and subject to *de novo* review; and (2) if a meritorious [claim or] defense exists, then the issue of due diligence is subject to abuse of discretion review." *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, ¶ 10 (citing *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 327 (2010)).

¶ 14 Petitioner maintains that the circuit court erred in denying her section 2-1401 petition where she set forth a meritorious claim that her constitutional right to an impartial jury was violated. She argues that an impartial jury resulted because: (1) O'Brien "did not disclose that his law firm represented Norfolk"; (2) respondent's counsel failed to disclose his professional relationship with one of O'Brien's partners; and (3) respondent's counsel misrepresented that Sidley did not represent Norfolk in FELA cases.

¶ 15 It is axiomatic that both plaintiffs and defendants have the right to an impartial jury. *Barton v. Chicago and North Western Transportation Co.*, 325 Ill. App. 3d 1005, 1026 (2001). *"Voir dire* protects the right to an impartial jury by exposing possible biases of potential jurors." *Id.* (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984)). "A new trial is required where the movant establishes that: (1) a juror answered falsely on *voir dire*; and (2) prejudice resulted therefrom." *Id.* (citing *Pekelder v. Edgewater Automotive Co.*, 68 Ill. 2d 136, 139 (1977)).

¶ 16 Here, we find that petitioner has failed to set forth a meritorious claim that her right to an impartial jury was violated. Petitioner has not identified, nor have we found, a single false answer given by O'Brien during *voir dire*. Petitioner even admits that "[t]he trial judge and Martinez's counsel did not ask foreperson O'Brien 'point blank' whether Sidley provided legal services to Norfolk." Petitioner, nonetheless, argues that O'Brien should have disclosed the attorney-client relationship between Sidley and Norfolk when the court asked the venire whether anyone recognized the names of the parties and also when it asked O'Brien whether there was anything he thought the attorneys should know. However, there is absolutely no evidence showing that O'Brien was aware that Norfolk was a client of Sidley, and, consequently, no evidence that O'Brien falsely answered these questions, attempted to mislead the court, or harbored any juror bias. Even assuming, *arguendo*, that O'Brien was aware that Norfolk was a client of his firm, petitioner has not established any error or prejudice associated with O'Brien's actions during *voir dire*. Norfolk's counsel disclosed the attorney-client relationship between Sidley and Norfolk the very next morning, before the parties gave their opening statements. At that time, petitioner's counsel could have requested leave to conduct additional *voir dire* concerning the relationship between O'Brien, Sidley, and Norfolk. Counsel elected not to make

further inquiry, and, indeed, expressed that he had no concern regarding O'Brien's role as a juror, noting, "Sidley & Austin is a big place, so I'm comfortable with leaving him on at this point."

¶ 17 Petitioner attempts to compare the instant case t*o Cantrell v. Crews*, 259 Va. 47 (2000). I*n Cantrell*, the trial court denied the defendants' motion to strike for cause a juror who was, at the time, a client of the law firm representing the plaintiff. *Id.* at 49-50. The supreme court of Virginia held this to be reversible error, noting: "Public confidence in the integrity of the process is at stake. It cannot be promoted when a sitting juror is, at the time of trial, a client of the law firm representing one of the parties to the litigation as a result of a similar occurrence." *Id.* at 51-52. *Cantrell* is factually distinguishable from the case at bar. Here, O'Brien was not a client of Norfolk's law firm and, further, petitioner never objected to O'Brien's presence on the jury even when she learned that his firm represented Norfolk.

¶ 18 Petitioner claims that the trial court should have *sua sponte* excused O'Brien for cause, citing *Marcin v. Kipfer*, 117 Ill. App. 3d 1065 (1983). In *Marcin*, plaintiff unsuccessfully challenged two prospective jurors for cause after they revealed that they were patients of the defendant, a doctor. *Id.* at 1067. On appeal, the reviewing court found that "the very close relationship shown in regard to the two jurors required their exclusion" and that denying the challenges deprived plaintiff of a fair trial. *Id.* at 1068. The court noted that its "decision [wa]s consistent with the following statement of an experienced authority on Illinois trial procedure:

> 'The trend of authority is to exclude from juries all persons who by reason of their business or social relations, past or present, with either of those parties, could be suspected of possible bias ***.' " *Id.* (quoting Hunter, Trial Handbook for Illinois Lawyers § 15.14 (5th ed. 1983)).

Contrary to petitioner's claim, *Marcin* does not stand for the proposition that a court has a duty, *sua sponte,* to excuse a juror for cause when it is revealed that one of the parties is a client of his firm, let alone that it should do so even though counsel for both parties have no objection to the juror's remaining on the jury.

¶ 19 Petitioner additionally takes issue with the fact that respondent's counsel did not disclose his one-time professional relationship with a colleague of O'Brien. The only case she cites that comes close to imposing such a duty to disclose on counsel is *Edwall v. Chicago, Rock Island & Pacific Railway Co.*, 208 Ill. App. 489, 503 (1917), where the court stated that counsel for defendant should have advised plaintiff's attorneys that a juror was the brother-in-law of an attorney who worked at counsel for defendant's firm. We find *Edwall* to be factually distinguishable from the case at bar. Additionally, we note that *Edwall* is not binding authority on this court. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 95 (1996) (noting that "[a]ppellate court decisions issued prior to 1935 ha[ve] no binding authority"). Even more importantly, however, there is no evidence in the record that petitioner, after being informed of Norfolk's relationship with O'Brien's law firm, believed there was any basis for further inquiry.

¶ 20 Petitioner lastly argues that respondent's counsel misrepresented Norfolk's relationship with O'Brien's firm. Specifically, she claims that counsel "advised the trial judge and [petitioner's] counsel that Sidley did not represent Norfolk in FELA cases." Petitioner asserts that "[t]his statement was blatantly false in that Sidley had argued three FELA cases on behalf of Norfolk to the United States Supreme Court." We find that petitioner has misstated what respondent's counsel actually said. Counsel stated that he "was advised that Sidley & Austin represents Norfolk Southern in non-FELA matters"; he did not say that Sidley did not represent Norfolk in FELA cases. The record does not support petitioner's claim that respondent's counsel

made any misrepresentations to the court. Furthermore, petitioner has not explained why it makes any difference whether Sidley represented Norfolk in FELA or non-FELA matters. Since O'Brien has no experience in FELA matters and has never represented a railroad, the only important fact appears to be that Norfolk was a client of O'Brien's firm, which counsel for petitioner ostensibly did not believe was a potential source of bias.

¶ 21 Ultimately, we find that there was no material issue of fact in this case which would warrant the evidentiary hearing petitioner requests. See *Vincent,* 226 Ill. 2d at 9 (noting that an evidentiary hearing is only required where there is a material issue of fact). Since petitioner has failed to establish a meritorious claim that her right to an impartial jury was violated, we conclude that the circuit court properly denied her section 2-1401 petition. See *Vincent,* 226 Ill. 2d at 7.

¶ 22 For the reasons stated, we affirm the order of the circuit court of Cook County denying petitioner's section 2-1401 petition.

¶ 23 Affirmed.