NO. 5-09-0089

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SHARON PRICE and MICHAEL FRUTH, Individually and on Behalf of Others Similarly Situated,	)	Appeal from the Circuit Court of Madison County.
Plaintiffs-Appellants,	)	
v.	)	No. 00-L-112
PHILIP MORRIS, INC.,	)	Honorable Dennis R. Ruth,
Defendant-Appellee.	)	Judge, presiding.

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court.
Justices Stewart and Wexstten concurred in the judgment.

R U L E 2 3 O R D E R

Held: The two-year time limit for filing a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure began to run when the trial court entered its final order on remand from the Illinois Supreme Court.

The plaintiffs in this class action appeal an order dismissing their petition for relief from judgment (735 ILCS 5/2-1401 (West 2006)). They filed their petition under an unusual set of procedural circumstances. They sought relief from a judgment entered after the Illinois Supreme Court reversed a trial court judgment in their favor. At issue is when the two-year time limit for filing petitions for relief from judgment began to run: when the supreme court issued its decision or when the trial court dismissed the plaintiffs' suit pursuant to the supreme court's direction. The trial court agreed with the defendant that the two-year period began to run when the supreme court issued its decision, which made the plaintiffs' petition untimely. The court accordingly dismissed the plaintiffs' petition. We reverse and remand.

The plaintiffs brought a class action lawsuit against the defendant, Philip Morris, Inc.,

(Philip Morris) under the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (West 2000)). They alleged that Philip Morris violated the Consumer Fraud Act by engaging in deceptive advertising practices related to the marketing of light or low tar or nicotine cigarettes. The defendant filed motions to dismiss and for a summary judgment, in which it raised 27 affirmative defenses. In relevant part, the defendant argued that the plaintiffs' action was excluded under section 10b of the Consumer Fraud Act (815 ILCS 505/10b (West 2000)). That section provides that the Consumer Fraud Act does not apply to actions that are "specifically authorized" by any federal or state regulatory body. 815 ILCS 505/10b(1) (West 2000); see also *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 235, 848 N.E.2d 1, 33 (2005). The defendant argued that its use of the terms "light" and "low tar" had been authorized by the Federal Trade Commission (FTC). In support of this argument, the defendant pointed to two consent decrees entered in enforcement actions the FTC had brought against other cigarette manufacturers. A 1971 consent order allowed American Brands to use terms such as "low," "lower," or "reduced" to describe the levels of tar and nicotine in its cigarettes as long as it also provided actual measurements of the tar and nicotine levels. A 1995 consent order allowed the American Tobacco Company to use these terms but prohibited the company from representing the levels of tar and nicotine in its cigarettes as a fraction or multiple of the tar and nicotine in other brands. At the trial in this matter, the defendant presented testimony that cigarette manufacturers looked to consent orders such as these for guidance on " 'how far they can go and how far they can't go' " in marketing their cigarettes as having low or reduced tar. *Price*, 219 Ill. 2d at 226, 848 N.E.2d at 28.

The trial court reserved its ruling on many of these affirmative defenses until the trial. The court noted that during discovery, the defendant had disclosed expert witnesses whose opinions were relevant to many of the affirmative defenses raised. A bench trial in this

matter took place between January and March 2003. As previously noted, a defense expert testified that cigarette manufacturers looked to consent decrees for guidance in determining how far they could go in advertising their cigarettes as lower in tar or nicotine.

On March 21, 2003, the trial court entered a detailed written order. In addition to ruling on the substantive issues necessary to resolve the plaintiffs' underlying claims, the court addressed the remaining affirmative defenses. In addressing the defendant's claim that its use of the terms "light" or "low tar low nicotine" was specifically authorized by the FTC, the court found as follows: "No regulatory body has ever required (or even specifically approved) the use of these terms by Philip Morris." The court therefore rejected the defendant's contention that section 10b of the Consumer Fraud Act barred the plaintiffs' claims. The court made detailed findings of fact related to the plaintiffs' claim that the defendant's advertising of its "light" cigarettes was deceptive and findings related to the appropriate amount of damages. The court entered a judgment in the amount of $10.1 billion in favor of the plaintiffs.

The defendant appealed directly to the Illinois Supreme Court under Supreme Court Rule 302(b) (eff. Feb. 1, 1984). The supreme court reversed, finding that the plaintiffs' claims fell within the exclusion provided by section 10b of the Consumer Fraud Act. *Price*, 219 Ill. 2d at 185, 848 N.E.2d at 6. The court remanded the cause to the trial court with directions to dismiss the plaintiffs' case. The supreme court's decision was issued on December 15, 2005. The plaintiffs filed a petition for a writ of *certiorari* to the United States Supreme Court, which was denied. The mandate from the Illinois Supreme Court was issued on December 5, 2006. In accordance with that mandate, the trial court dismissed the plaintiffs' action on December 18, 2006.

On December 15, 2008, the United States Supreme Court filed an opinion in *Altria Group, Inc. v. Good*, 555 U.S. 70, 172 L. Ed. 2d 398, 129 S. Ct. 538 (2008). In that case, the

Court rejected an affirmative defense similar to the one raised by Philip Morris here. Especially significant for our purposes, the Court, citing an *amicus* brief, noted, "The [FTC] itself disavows any policy authorizing the use of 'light' and 'low tar' descriptors." *Good*, 555 U.S. at ___, 172 L. Ed. 2d at 412, 120 S. Ct. at 549. Three days later, on December 18, 2008, the plaintiffs filed the section 2-1401 petition at issue in this appeal. In it, they asserted that the United States Supreme Court's decision in *Good* showed that the FTC itself had denied authorizing Philip Morris's use of the terms "light" and "low tar," which undermined the entire basis for the Illinois Supreme Court's holding in *Price*.

The defendant filed a motion to dismiss the petition on the grounds that (1) it was not timely filed within two years of the supreme court's ruling and (2) the allegations in the plaintiffs' petition did not provide a basis for relief under section 2-1401. In support of its timeliness argument, the defendant argued that although the plaintiffs identified the trial court's December 2006 order dismissing their case as the judgment from which they sought relief, they were actually seeking relief from the supreme court's December 2005 ruling. This was so, according to the defendant, because (1) the December 2006 order did not decide any factual matter or legal issue against the plaintiffs, (2) the plaintiffs could point to no error or mistake in that order, and (3) the trial court was merely following directions from the supreme court, so it could not have entered a different order had the facts alleged been known to it at the time. The trial court agreed with these contentions and dismissed the petition on the grounds that it was not timely filed. The court did not reach the defendant's argument that the plaintiffs failed to allege a basis for relief. The plaintiffs then filed the instant appeal.

The plaintiffs argue that the court erred in finding that the two-year time limit began to run on December 15, 2005, the date on which the supreme court filed its opinion. They contend that the two years began to run on December 18, 2006, when the court entered a final

order dismissing their case as directed by the supreme court. They argue that either (1) the trial court erroneously concluded that the trial court's dismissal order was not a final order or (2) the trial court erred by treating their petition as if it were directed at the supreme court's ruling when they had chosen to direct it at the trial court's dismissal order. The defendant argues on appeal, as it did before the trial court, that in substance the plaintiffs' petition is a challenge to the supreme court's December 2005 decision rather than the trial court's December 2006 order entered in compliance with that decision. The defendant also argues that we may affirm the trial court's ruling on the alternative basis that the plaintiffs' petition does not provide a basis for relief under section 2-1401. See *Atanus v. American Airlines, Inc.*, 403 Ill. App. 3d 549, 554, 932 N.E.2d 1044, 1048 (2010) (explaining that an appellate court may affirm a trial court's ruling on any basis appearing in the record). Because the trial court did not reach this issue, however, we will limit our consideration to the timeliness of the petition. Although we agree with the plaintiffs that the two-year time limit began running when the trial court dismissed their case in December 2006, we reach this conclusion for different reasons than those advanced by the plaintiffs. Before addressing the merits of the issue, a brief overview of the nature and purpose of a section 2-1401 petition will be useful.

The purpose of a section 2-1401 petition is to allow a litigant to bring to the attention of a trial court factual matters that would have prevented the court from entering the judgment had they been brought to the court's attention prior to the judgment. *Juszczyk v. Flores*, 334 Ill. App. 3d 122, 126, 777 N.E.2d 454, 458 (2002). With very limited exceptions that are not applicable here, the petition must be filed within two years after the judgment at issue is entered. 735 ILCS 5/2-1401 (West 2006). In order to demonstrate a basis for relief from the judgment, the petitioner must show by a preponderance of evidence that (1) a meritorious claim or defense exists, (2) the petitioner exercised due diligence in attempting to present that claim or defense in the original action, and (3) the petitioner exercised due

diligence in bringing the section 2-1401 petition as soon as possible. *Juszczyk*, 334 Ill. App. 3d at 126-27, 777 N.E.2d at 458.

As we noted at the outset, this case comes to us with an unusual procedural history. Ordinarily, petitions for relief from judgment are aimed at adverse trial court judgments. We are aware of only one case involving a petition for relief from judgment filed after an appellate decision overturned a favorable trial judgment. See *Klose v. Mende*, 378 Ill. App. 3d 942, 882 N.E.2d 703 (2008). As we will explain more fully later in this decision, the *Klose* court did not address the precise issue we face in this case even though that case did involve the timeliness of a section 2-1401 petition. However, the procedural history of the *Klose* case is similar enough to that of the instant case that it provides a useful illustration of why the procedural context of this case makes the rules governing the time for filing section 2-1401 petitions particularly difficult to apply.

In *Klose*, a township notified property owners that it planned to widen a road. *Klose*, 378 Ill. App. 3d at 943, 882 N.E.2d at 706. Property owners objected and filed a declaratory judgment action, contending that they owned in fee simple the strip of land needed for the project. *Klose*, 378 Ill. App. 3d at 943, 882 N.E.2d at 707. At the trial, the township presented only township ledger entries as evidence that the subject strip of land had been dedicated for use as a public roadway. *Klose*, 378 Ill. App. 3d at 944, 882 N.E.2d at 707. The trial court found in favor of the township and dismissed the declaratory judgment complaint. The property owners appealed. *Klose*, 378 Ill. App. 3d at 943, 882 N.E.2d at 707.

On direct appeal, the Third District reversed, explaining that to establish a valid dedication of a roadway requires evidence of the original petition for permission to dedicate the roadway, surveyors' reports, and the road commissioner's order granting permission to dedicate the road. Thus, the appellate court vacated the trial court's dismissal order and

remanded with directions to enter an order declaring the property owners' ownership of the subject land in fee simple. *Klose*, 378 Ill. App. 3d at 944, 882 N.E.2d at 707.

Subsequently, the township discovered additional documents related to the road dedication and filed a section 2-1401 petition. *Klose*, 378 Ill. App. 3d at 944, 882 N.E.2d at 707. That petition was dismissed on the grounds that the township failed to allege facts showing that it had exercised due diligence in discovering the documents. Two years later, the township filed an amended section 2-1401 petition. *Klose*, 378 Ill. App. 3d at 944, 882 N.E.2d at 707. It is the timeliness of that amended petition that was at issue in the appellate decision cited by the defendant here. *Klose*, 378 Ill. App. 3d at 944-45, 882 N.E.2d at 707-08. As the defendant correctly points out, the *Klose* court assumed that the time limit began to run when it filed its opinion in the direct appeal. *Klose*, 378 Ill. App. 3d at 952, 882 N.E.2d at 713. However, the resolution of the timeliness issue depended not on when the time limit began to run but on whether the amended petition related back to the date when the first petition was filed. *Klose*, 378 Ill. App. 3d at 951-52, 882 N.E.2d at 713-14. It is for this reason that we do not find *Klose* dispositive. Nevertheless, as previously mentioned, we believe that the procedural history we have just outlined is useful for purposes of illustrating the nature of a section 2-1401 petition brought under similar circumstances.

In *Klose*, in essence, the township's section 2-1401 petition alleged that there was evidence which, if brought to the attention of the trial court during the original trial in the matter, would have led to a different result in the appellate court. In this case, what the plaintiffs are alleging is essentially that there are facts which, if brought to the trial court's attention during the original trial in this matter, would have caused the supreme court to rule differently in its December 2005 decision–which in turn would have led to a different result from the trial court after the mandate issued in December 2006. That is, the plaintiffs are arguing that (1) they were unable to present evidence during the original trial that FTC

officials specifically denied authorizing use of the terms "light" and "low tar," (2) had they been able to present that evidence, the supreme court likely would have agreed with the trial court's conclusion that the defendant's actions were not specifically authorized by a federal regulatory agency, and (3) had the supreme court ruled differently, the trial court would not have entered a final order dismissing their case in December 2006. We emphasize that the plaintiffs could only make this factual record in the trial court during the original trial, not at the appellate level. For this reason, the section 2-1401 petition necessarily alleges a flaw in the original proceedings even though those proceedings did not result in an adverse ruling.

Although a petition for relief from judgment under these circumstances necessarily addresses a flaw in the original trial proceedings, it is clear why the usual rule that the two-year deadline begins to run when the trial court enters its final judgment prior to any appeal is inapplicable. Because the trial court's order was not adverse to the plaintiffs, they had no reason to file a petition for relief from judgment until after the supreme court ruled. What is much less clear is whether the time begins to run when an appeals court rules or when a trial court enters an order pursuant to the direction of the appeals court.

We find little guidance in answering the question before us. As previously mentioned, *Klose* is the only case we have found to address the timeliness of a section 2-1401 petition after the reversal of an order on appeal, and the *Klose* court did not address the question before us because the only issue there was the relation back of an amended section 2-1401 petition. Although the court used the date of the adverse appellate ruling, it did not explain its basis for doing so. We also note that this court is not obliged to follow the decisions of other districts of the appellate court (see *Loftis v. Vesta Cos.*, 292 Ill. App. 3d 772, 775, 686 N.E.2d 383, 385 (1997)), and we are certainly not required to follow *dicta* in the decisions of other districts. Thus, we do not believe that *Klose* requires us to measure the timeliness of the plaintiffs' petition from the date of the supreme court's order in the original case.

In determining which order triggers the two-year time period, we emphasize that a party seeking relief from a judgment must request that relief from a trial court, not an appeals court. See 735 ILCS 5/2-1401(b) (West 2006) (providing that the "petition must be filed in the same proceeding in which the order or judgment was entered"). Although this is stating the obvious, this simple fact defines the limits of what relief the trial court has the authority to provide. The trial court obviously has no authority to vacate or set aside the supreme court's ruling in the case. Thus, if it is to grant relief at all, it must grant relief from its own order–assuming that it finds a basis for granting that relief.

The relief from judgment allowed by section 2-1401 is an equitable remedy meant to prevent injustice. *Juszczyk*, 334 Ill. App. 3d at 126, 777 N.E.2d at 458. Although the equitable considerations underpinning section 2-1401 petitions must be balanced against the interest in the finality of judgments (see *Klose*, 378 Ill. App. 3d at 951, 882 N.E.2d at 713 (noting that this is the purpose for the two-year limit)), we do not believe that the ends of justice would be served if trial courts were unable to grant relief under the unusual circumstances presented here. To be clear, the defendant is not arguing that the trial court is–or should be–precluded from granting relief from a judgment after an order is reversed on appeal. However, the defendant's argument overlooks a key consideration. Because the trial court can grant relief only from its own order, the December 2006 order dismissing the plaintiffs' complaint is as crucial a part of the proceedings challenged as the supreme court's December 2005 decision. Just as the plaintiffs cannot challenge the dismissal order without also challenging the supreme court ruling, they cannot challenge the supreme court ruling without challenging the trial court's dismissal order. Their challenge is necessarily one to all three stages of the proceedings. For this reason, we believe that the appropriate starting point for the two-year limit is the entry of the trial court order dismissing the plaintiffs' complaint.

We also find that the nature and effect of the supreme court's mandate supports our conclusion that the trial court's dismissal order on remand triggered the start of the two-year limit. Although the supreme court's December 2005 opinion was a final and appealable order, it did not become enforceable until the mandate issued in December 2006. See Ill. S. Ct. R. 369(b) (eff. July 1, 1982). Moreover, the supreme court chose to remand to the trial court with directions to dismiss rather than simply reversing outright and dismissing the action itself. *Price*, 219 Ill. 2d at 274, 848 N.E.2d at 55. Thus, the plaintiffs' action was not effectively dismissed until the trial court dismissed the case on December 18, 2006. See *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 304-05, 427 N.E.2d 563, 569 (1981) (specifically pointing out that an appellate court opinion dissolved a receivership itself rather than remanding the case to the trial court with directions to enter the dissolution order, before concluding that the effective date of the appellate court judgment was the date it was filed). The trial court did not have jurisdiction to dismiss the plaintiffs' lawsuit until the mandate issued. See *Bank of Viola v. Nestrick*, 94 Ill. App. 3d 511, 514, 418 N.E.2d 515, 518 (1981); Ill. S. Ct. R. 369(c) (eff. July 1, 1982). For all of these reasons, we find that the time limit began to run when the trial court dismissed the plaintiffs' suit on remand. Thus, the petition for relief from judgment was timely filed within two years after that order was entered.

The defendant raises two additional arguments. First, the defendant points out that had the plaintiffs not appealed to the United States Supreme Court, the mandate would have issued within weeks of the Illinois Supreme Court's decision, the trial court's dismissal order would have been entered shortly thereafter, and the plaintiffs' petition would have been untimely regardless of which order triggered the two-year limitations period. The defendant contends that, thus, our holding means the deadline depends on whether a party files an appeal. We acknowledge that this is the case. We likewise acknowledge that in the more typical context of a litigant seeking relief from an adverse trial court judgment prior to an

appeal, the pendency of a direct appeal does not impact the time for filing a petition for relief from judgment. See *Sidwell v. Sidwell*, 127 Ill. App. 3d 169, 174, 468 N.E.2d 200, 203 (1984). However, we do not believe that these considerations outweigh our conclusion that a litigant simply cannot seek relief in the trial court until that court has entered a final order consistent with the reviewing court's mandate. Finally, the defendant argues that the order entered by the trial court dismissing its petition was a mere ministerial act because the court did not have the discretion to enter any other order. Again, because the trial court can grant relief only from its own order dismissing the plaintiffs' case after the appeal, we disagree with this assessment of the significance of the court's entry of the order.

For the reasons stated, we conclude that the two-year time limit for filing a petition for relief from judgment under section 2-1401 began to run when the trial court dismissed the plaintiffs' lawsuit in December 2006. Thus, the petition was timely. We therefore reverse the order of the trial court and remand for further proceedings.

Reversed; cause remanded.