2017 IL App (2d) 160738-U
No. 2-16-0738
Order filed March 13, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re THE MARRIAGE OF	)	Appeal from the Circuit Court
	)	of Kane County.
STEVEN BUSH,	)	
	)	
Petitioner-Appellant	)	
	)	No. 09 D 988
and	)	
	)	Honorable
GRETCHEN VANDY f/k/a GRETCHEN BUSH,	)	
	)	Rene Cruz
	)	Judge, Presiding.
Respondent-Appellee.	)	

JUSTICE BIRKETT delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting Gretchen's motion to dismiss Steven's emergency petitions for a modification of child custody pursuant to section 610.5 of the Illinois Marriage and Dissolution of Marriage Act. 750 ILCS 5/610.5 (West 2016). Although the trial court incorrectly characterized the allegations in Steven's pleadings as all subject to *res judicata*, we need not rely on the trial court's reasoning in order to affirm a correct ruling. Also, although Gretchen incorrectly styled her motion as one pursuant to section 2-619 of the Code instead of section 2-619.1 of the Code, her motion to dismiss was not defeated when Steven was not prejudiced by the incorrect label on the motion. 735 ILCS 5/2-619, 619.1 (West 2016). Finally, the trial court properly dismissed Steven's pleadings because he did not state a claim for serious endangerment under the Act when a majority of the allegations in the petitions and in his affidavits were

> conclusory and based upon hearsay, and the allegations raised in the one affidavit that was not based upon hearsay were insufficient to constitute serious endangerment under the Act. 750 ILCS 5/610.5 (West 2016). We therefore affirmed the judgment of the trial court.

¶ 2 Appellant Steven Bush appeals from the trial court's order granting a motion filed by appellee Gretchen Vandy, Steven's ex-wife, to strike and dismiss his emergency petitions for temporary and permanent modification of parental responsibilities and other relief. On appeal, Steven argues that the trial court erred when it granted Gretchen's motion on *res judicata* grounds. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reflects that a judgment of dissolution was entered in April 2011 dissolving the parties' marriage. At that time the parties were awarded joint custody of their two sons, J.B. and T.B., and Gretchen was designated as their primary residential parent. Currently, J.B. is 15 years old and T.B. is 11 years old.

¶ 5 Several years later, Steven moved from Illinois to Prairie du Chien, Wisconsin, where he works as an obstetrician/gynecologist and chief medical officer of a hospital. In August 2014, after more negotiation between the parties, another order was entered to continue to jointly parent the children.

¶ 6 In May 2015, Steven petitioned the trial court to modify custody. In the petition Steven requested that he be granted sole legal and residential custody of the children, and that they be permanently removed to the state of Wisconsin. As support for that petition Steven alleged that Gretchen: (1) continued to attempt to undermine his relationship with the children; (2) refused to provide him with the children's extracurricular activity schedules; (3) required J.B., then 13 years old, to babysit his brother T.B.; (4) had an unstable home; (5) failed to schedule or coordinate J.B.'s therapy appointments; (6) failed to schedule tutoring for J.B; (7) did not timely

enter the children's medical appointments into Our Family Wizard so that Steven could attend them; (8) did not follow J.B.'s therapist's recommendations regarding academic accommodations that J.B. needed; (9) did not confer with Steven about strategies that she should use in her home; (10) failed to ensure that J.B.'s homework sheet was signed by his teachers; and (11) did not adequately supervise the children's homework completion.

¶ 7 In June 2015, Gretchen moved to terminate joint custody and requested sole custody of the children. In her motion, she stipulated that the parties did not cooperate effectively with one another in sharing joint custody pursuant to section 602.1 of the Illinois Marriage and Dissolution of Marriage Act (Act). 750 ILCS 5/602.1 (West 2014). Gretchen denied the allegations in Steven's petition and alleged her own reasons why joint custody should be terminated: (1) Steven created a hostile environment that pitted Gretchen against Steven's current wife, Rebecca; (2) the parties were unable to communicate without hostility and negative comments; (3) Steven created resentment between the parties by moving for sole custody and trying to remove the children to Wisconsin; (4) Steven celebrated Catholic holidays with the parties' Jewish children; (5) Steven signed up one of the children for summer school without telling Gretchen; (6) the children would be adversely affected by moving to a small rural school in Wisconsin from academically superior schools in St. Charles; (7) Steven had refused to have one of the children tested for ADHD despite teacher and doctor suggestions; (8) the school that the child with suspected ADHD attended had extensive resources for children with ADHD; (9) the distance to Steven's house in Wisconsin had negatively affected the communication between the parties; (10) Steven had resorted to name-calling of Gretchen, and in the pleadings he alleged that she was in need of "medication(s) to treat her [mental] illness;" (11) Steven had refused to explain to Gretchen the facts surrounding him being kicked out of his

home by Rebecca during the children's last two visitation periods; and (12) Steven refused to allow the children to see doctors in Illinois. Hearings on the parties' petitions were heard from September 29 through October 5, 2015.

¶ 8 In its ruling, the trial court first noted that when the parties finalized their divorce in 2011 they both committed to parenting their children jointly and that Steven was living in Illinois at that time. In 2014, the parties came back into court again and made the decision to continue trying to jointly parent the children. The court believed that joint parenting was still possible, however, since both parties had now requested sole custody of the children it had no choice but to give one parent sole custody. The court said that there was no reason for it to find a substantial change in circumstances and that it believed the best interest standard applied to those proceedings.

¶ 9 The court then went through the statutory factors used to determine whether there was clear and convincing evidence that it was in the children's best interests to modify custody, taking into consideration several statutory factors. With regard to the wishes of the child as to his custodian, the court noted that J.B. had expressed a desire to live with his father, both when Steven lived in Illinois and now that he resided in Wisconsin.

¶ 10 The court said that the children had lived almost their entire lives in the same area, went to the same schools and lived in the same neighborhood. It referred to the GAL's opinion that it would be difficult for the children to leave their mother, but that at the same time, the children would thrive in Wisconsin. Other than the issues that were addressed about medication, J.B.'s poor grades and his desire to live with his father, the court could not say that the children were not thriving in all other aspects of their lives presently in Illinois with Gretchen. When the children were in Wisconsin they enjoyed their time there and their step-mother participated in

their activities. They did well in summer school in Wisconsin. However, the court noted that since the children now took their medication at school in Illinois and all of J.B.'s teachers were signing off on his work, it was easier for Gretchen to help J.B. with his schoolwork.

¶ 11 The court referred to Gretchen's anger toward Steven, but said it did not believe that she had any mental or physical health issues. With regard to the parties' willingness and ability to facilitate and encourage a close relationship between the other parent and the child, the court noted that Steven and his new wife had filed an unfounded DCFS report against Gretchen. Also, Rebecca had filed an appearance as Steven's counsel in this case, which would not facilitate a closer relationship between the parties. The court noted that Gretchen gave Steven an extra week of vacation with the children over the summer.

¶ 12 The court found that very little attention in this matter had been given to the parties' younger son, T.B. The testimony that it heard, though, was that T.B. was thriving. The court said that the GAL could not recommend removing the children to Wisconsin. It believed this was a very close call for the GAL because she did say that the children would thrive in Wisconsin. However, the GAL also said that the change would be more difficult for the children because they had been with their mother their entire lives. Finally, the court noted that in these types of cases stability and continuity were major considerations, and there was a presumption in favor the present custodian. The court found that Steven had not overcome that presumption and that it did not hear clear, convincing evidence to change custody. Therefore, it awarded Gretchen sole custody of the children. Steven filed a notice of appeal from this order, but later voluntarily dismissed it.

¶ 13 Less than three months later, on January 4, 2016, Gretchen obtained an emergency *ex parte* order of protection requiring the children's return to her when Steven did not bring them

back to Illinois after the children visited him in Wisconsin over part of their winter break. On January 5, 2016, Steven filed a verified emergency petition for temporary and permanent modification of parental responsibilities, for relocation of the children to Wisconsin, for leave to enroll the children in school in Wisconsin, and for other specified relief. That petition sought temporary and permanent restriction of Gretchen's parental responsibilities, an *in camera* interview between J.B. and the court, and the appointment of a GAL.

¶ 14 In his petition Steven alleged that he had scheduled parenting time with the children in Wisconsin from December 24, 2015 until January 1, 2016. As soon as the children arrived for that visitation J.B. told Steven that he would not return to his mother's house. During that visit Steven also learned new details about the children's living situation in Gretchen's house. Specifically, Steven alleged that: (1) Gretchen had become increasingly hostile and angry toward the children; (2) Gretchen had become "paranoid," forcing J.B. to take an at home drug test (as she was convinced that J.B.'s behavior was indicative of drug use); (3) Gretchen frequently left the children home alone; (4) J.B. frequently left the home "as a coping mechanism to deal with the emotional distress that he [felt] at home" and just a few weeks prior he. was detained by the St. Charles police department for a curfew violation at 5:30 a.m.; (5) J.B. received emails from Walgreens on his phone reflecting that Gretchen has filled numerous prescriptions for Ativan, Lexapro and Wellbutrin; (6) the prescription drug "cocktail" that Gretchen continued to consume would lead to erratic and irrational behavior, "often combined with feelings of grandiosity;" (7) J.B. told Steven that Gretchen was consuming large amounts of alcohol on a regular basis; (8) J.B.'s grades were slipping as a result of his treatment at home; and (6) the children were threatening to run away if they were returned to Gretchen. Steven only attached his affidavit to this pleading.

¶ 15 In that pleading Steven also alleged that Gretchen received prior in-patient mental health treatment for an addiction to Ativan during their marriage, and during that inpatient treatment Gretchen was diagnosed with bi-polar disorder. He also opined that he was "highly educated as to the risks and side effects of the prescription drug cocktail that Gretchen is taking and how dangerous the combination can be." Steven also claimed that while she was addicted to Ativan Gretchen would often "disappear" and leave the children home unsupervised.

¶ 16 The next day, Steven filed a verified *ex parte* emergency motion for temporary custody in Wisconsin, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. (UCCJEA) (750 ILCS 36/101 *et seq*. (West 2014)). He obtained an order granting him temporary sole custody of the children on an emergency basis until further order of the Illinois court. That same day, the Wisconsin trial court conferred with the instant trial court for a UCCJEA conference.

¶ 17 On January 7, 2016, Steven appeared in court in Illinois on the emergency petition that he filed on January 5, 2016. The trial court asked if the children were back in Illinois. When Steven replied that they were not, the court informed Steven that it would not entertain his emergency petition until the children were back in Gretchen's custody. It ordered that either the children be returned by midnight or be brought to court the following morning. The trial court specifically held that its order superseded the Wisconsin order. In the order the court also noted that it had conferred with the Wisconsin judge, and that judge agreed that the Illinois trial court was the appropriate jurisdiction for all further proceedings.

¶ 18 There is no report of proceedings for January 8, 2016; however, the common law record indicates that there was a status hearing on all pending pleadings and the return of the children to Illinois pursuant to court order on that date. The order from that hearing reflects that both parties

appeared in court and Steven appeared with the children. The court ordered that J.B. be enrolled in and attend bi-weekly therapy sessions within seven days. A status on the selection of a therapist and all pending matters was continued to January 21, 2016 for setting of a hearing and briefing schedule. There is no report of proceedings or common law record for January 21, 2016.

¶ 19 On January 22, 2016, Steven filed another emergency pleading, this one for a mental health examination of Gretchen and the children, the temporary restriction of Gretchen's parental responsibilities, appointment of a GAL and for other relief. In addition to the allegations contained in his earlier emergency petition in this one Steven alleged: (1) J.B. had been running away from home and leaving T.B. unattended; (2) Gretchen was posting statements on social media which, according to Steven, indicated that she was seriously depressed and possibly suicidal; (3) Gretchen had imposed restrictions on the boys' phones making it impossible for them to call or text Steven or their stepmother; (4) Gretchen refused to cooperate with Steven in getting J.B. into therapy pursuant to court order. Again, Steven only attached his affidavit to this pleading.

¶ 20 On January 25, 2016, Steven presented his second emergency petition to the trial court. Again, the record contains no report of proceedings for this date. The common law record reflects that the cause came before the court on Steven's emergency petition and, after oral argument, the court found that the allegations in Steven's petition again did not constitute an emergency. Therefore, Gretchen was granted 21 days to respond to Steven's first and second emergency petitions. The court also ordered that Steven should have the right to communicate with the children via text, Skype, telephone, et cetera, from 5 to 7 p.m. or for any other 2 hour window, depending upon his availability, and the children were likewise allowed to contact

Steven at reasonable times. A hearing on Steven's request for a mental health examination and for a GAL appointment was set for February 25, 2016.

¶ 21 On February 16, 2016, Gretchen filed a verified petition for an order of protection on behalf of the children against Steven. In the petition, Gretchen alleged that the children had visitation with Steven over the previous weekend. When it was time to pick up the children at their meeting point in Janesville, Wisconsin, the children, who were driven there by Steven's wife Rebecca, would not get out of Rebecca's car. Gretchen asked them what was going on, and J.B. said that he and his brother were not getting out of the car. Gretchen told the children that they needed to get out of the car. Gretchen then asked Rebecca to tell the children to get out of the car, and she said that she would not tell the children to leave the car. Gretchen told Rebecca that she would then have to call the police, which she did. When a police officer arrived, he attempted to get the children out of the car to no avail. Gretchen, with the officer and Rebecca's permission, then forcibly removed T.B. from the car. J.B. was unable to be removed. After several unsuccessful attempts by the officer to remove J.B. from the car, Gretchen went back to Illinois with T.B. only. Gretchen alleged that a similar type of incident also occurred in January 2016. Among other remedies, Gretchen requested that: (1) she be granted physical care and condition of the children; (2) Steven be ordered to return J.B. to her physical care; (3) T.B. not be removed from her physical care; and (4) Steven be prohibited from removing the children from the state of Illinois. That same day the trial court denied Gretchen's emergency order of protection. Specifically, the trial court held that Gretchen's allegations did not rise to the level of an emergency order of protection and that this matter had been addressed in its previous January 7, 2016 order.

¶ 22 On February 17, 2016, Gretchen filed a verified petition for a rule to show cause. In it,

Gretchen realleged the allegations she made in the order of protection that was denied the day before. In addition, Gretchen alleged that on the Thursday prior to the weekend visitation with Steven, the children had dinner with her and their extended family. At that time, the children were in good spirits and showed affection to Gretchen. Gretchen alleged that the trial court was aware of previous instances where Steven had failed to return the children to Gretchen, and that extensive litigation has ensued with the trial court because of this issue. Gretchen alleged that Steven's failure to comply with the October 2015 order was willful, contemptuous and without reasonable justification. Therefore, Gretchen requested that: (1) an order be issued against Steven requiring him to appear before the trial court and show cause as to why he should not be held in indirect civil contempt of court; (2) Steven be ordered to immediately return J.B. to Gretchen; (3) Steven's visitation with the children in Wisconsin be eliminated; and (4) the trial court order Steven to engage in supervised visitation with the children in Illinois. The next day, the trial court entered an order issuing the rule to show cause with a return date of February 25, 2016. The court also ordered that Steven was to appear on that date with J.B. if J.B. was not returned to Gretchen prior to February 25, 2016.

¶ 23 On February 25, 2016, Steven's counsel filed a third emergency pleading, entitled "Emergency Motion to Reconsider Finding of Non-Emergency Pursuant to the Order Entered January 25, 2016, for Immediate Appointment of a 604.10(B) Evaluator, and for Other Relief." In that pleading Steven alleged that this matter was now an emergency in light of a series of new incidents that had occurred after the January 25, 2016 order was entered. Specifically, Steven alleged that J.B. and T.B. had made two additional attempts to run away from Gretchen's home and that the children refused to voluntarily return to Gretchen. Steven also referred to a "horrible and extremely traumatic incident on February 15, 2016, in which the children spent in excess of

four (4) hours in a parking lot in Janesville, Wisconsin, refusing to go with Gretchen at the conclusion of Steven's scheduled parenting time" which ended with Gretchen physically dragging T.B. out of Rebecca's car and forcing him into her car. Attached to that pleading were affidavits signed by Steven, a Dr. E. Rackley Ivey, a psychiatrist, and his current wife, Rebecca. In Rebecca's affidavit she recounted her version of events as they occurred on February 15, 2016, when the children would not get out of her car to go home with Gretchen and the police had to be called. In Dr. Ivey's affidavit, he attested that in his opinion, the children were at serious emotional and physical risk. He based this opinion on Steven's emergency pleadings, various emails, texts and social media postings made by Gretchen, and other documents. Steven's affidavits attested to the truth of the matters that he raised in the third emergency pleading.

¶ 24 That same day there was a hearing on the return of the rule to show cause. Steven and J.B. did not show up in court. Steven's counsel told the court that Steven was not present because he "could not facilitate bringing [J.B.] into court." Counsel acknowledged that the trial court had earlier told Steven that if it was necessary, he should use physical restraint to bring J.B. into court. Counsel told the court that Steven did not believe that using physical restraint was a "safe situation" and he was not willing to do that.

¶ 25 Counsel also said he was present in court that day on an emergency motion to reconsider the court's earlier ruling that Steven's pleadings were not emergencies. Therefore, counsel continued, if the trial court reconsidered its earlier decision, the new decision would "trump" the return of the rule because if the court granted Steven's emergency motion, J.B. would be in Steven's possession anyway. This matter was also before the court on Steven's request for the appointment of a GAL and a mental health evaluation of Gretchen and the children. Finally,

counsel said that Steven was not in court that day because the court had earlier informed him that if he did not bring J.B. to court today then the court would hold Steven in custody, and, according to counsel, that could only be more harmful to J.B. Counsel said, "for Dr. Bush to be locked up solves nothing, just creates that many more problems."

¶ 26 Gretchen's counsel argued that J.B. had now missed 15 days of school, that he needed to come back to Illinois, and that Steven needed to be held accountable. Also, since Steven was not present in court there should not be a hearing on the rule to show cause, and instead the court should issue a body writ. The trial court agreed that a hearing should not be held in Steven's absence and issued a body writ for Steven with a bond set at $10,000 cash. The court also suspended any future visitation in Wisconsin and ordered that the Wisconsin authorities be used to remove J.B. from Wisconsin and return him to Illinois. The matter was then set for status on April 21, 2016.

¶ 27 On March 11, 2016, Steven filed a petition for leave to appeal the trial court's February 25, 2016 order pursuant to Supreme Court Rule 306(a)(5) (eff. March 8, 2016). That appeal was denied. On March 22, 2016, Steven filed a motion to vacate the body attachment entered against him on February 25, 2016. In his motion Steven alleged that since the filing of Gretchen's petition for rule to show cause and the entry of the order of body attachment, J.B. had been returned to Gretchen's custody and was currently residing with her. On April 14, 2016, the court entered an order vacating Steven's body attachment. The restriction to Steven's parenting time, as ordered on February 25, 2016, was set for a hearing on May 24, 2016. Also, the hearing date set for April 18, 2016, was struck and rescheduled to May 24, 2016.

¶ 28 On May 23, 2016, Gretchen filed a motion to strike and dismiss Steven's verified petition for temporary and permanent modification of parental responsibilities pursuant to section 5/2-

619 of the Code of Civil Procedure (Code). 735 ILCS 5/2-619 (West 2014). In her motion Gretchen alleged that since the filing of Steven's first emergency petition on January 5, 2016: (1) Steven had willfully and voluntarily withheld the children from her; (2) he had filed pleadings in Illinois and Wisconsin relentlessly seeking to prove his allegations against her; (3) a body attachment was issued against Steven for refusing to return the children to Gretchen; and (4) all of the issues that Steven alleged had occurred in his petition had been previously litigated during the October 2015 trial. Therefore, Gretchen argued that Steven's petition was barred on *res judicata* grounds.

¶ 29 Gretchen also alleged that since the January 5, 2016, filing, Steven had continued to file pleadings pertaining to custody, such as his emergency motion for a mental health examination, for temporary restrictions of Gretchen's parental responsibilities, and for the appointment of a GAL. Steven had also filed an emergency motion to reconsider the trial court's finding that these pleadings did not constitute an emergency and for other relief. Gretchen claimed that Steven's latest emergency petition sought to re-litigate the emergency petition that he filed on January 5, 2016, and was therefore barred on *res judicata* grounds. Finally, Gretchen argued that in none of Steven's emergency pleadings did he allege that a significant change in circumstances existed to warrant a modification of custody.

¶ 30 On August 1, 2016, a hearing was held on Gretchen's motion to dismiss. Gretchen's counsel argued that Steven did not sufficiently allege any facts that constituted serious endangerment in his pleadings. Specifically, counsel said that DCFS had not made any allegations against Gretchen. Also, there were no police reports in this case, except for the one generated when Rebecca called the police to do a well-being check of Gretchen's home when no one answered the phone. Counsel also argued that Steven was attempting to relitigate the case

from October 2015. Steven's counsel argued that each pleading that he had filed supplemented all prior pleadings and they must all be read together. Steven also claimed that Gretchen's motion did not address the pleading it purported to address. Also, Gretchen's motion, brought pursuant to section 2-619 of the Code on *res judicata* grounds, had no merit because all of the allegations in his pleading related to conduct which arose, or of which Steven became aware of, after the trial court's October 28, 2015 order was entered.

¶ 31 The trial court then stated that it remembered allegations of drug abuse, alcohol consumption, and Gretchen behaving angrily and arguing with the children from the 2015 hearings. It also remembered Gretchen's arguments from that hearing that she did not leave the children at home by themselves and unsupervised for periods of time. In response, Steven argued that no allegations were made about Gretchen's drug or alcohol abuse or about the children running away at the 2015 hearings. Also, the only question before the court at the hearing on the motion to dismiss was whether he had alleged sufficient facts to avoid dismissal, not whether they were true or not, because the court had to assume that they were true. Steven requested that the court review the trial transcripts from the 2015 hearings before ruling on Gretchen's motion, but the court declined. Specifically, the court said:

> "I think [counsel for Gretchen] is characterizing it as a second bite. Whatever was alleged that was occurring behavior-wise with the children, with the investigation of the [GAL] I think your client had an opportunity to investigate everything that could have been investigated. I believe the GAL gave the report. I believe that all the conduct is very similar to what's alleged here. There is nothing different in there that would tell me that this new allegation has any bearing on what my decision would have been or new evidence for me, to be honest.

The only new thing is [J.B.'s] unwillingness to go back. I think I've already made it clear I characterize that as [J.B.] not being happy with what he may have been led to believe would be the ultimate outcome and it didn't work out that way."

¶ 32 Therefore, the court granted Gretchen's motion to dismiss.

¶ 33 We initially note that this appeal was accelerated under Supreme Court Rule 311(a) (eff. Mar. 8, 2016). Pursuant to that rule, the appellate court must, except for good cause shown, issue its decision in an accelerated case within 150 days of the filing of the notice of appeal. Ill. S. Ct. R. 311(a)(5) (eff. Mar. 8, 2016). Here, Steven filed his notice of appeal on September 20, 2016, and this case was due to be filed on February 3, 2017. However, the record in this case was over 3,000 pages, and 1,000 of those pages accounted for the hearings in September and October 2015 that had to be carefully reviewed in order to determine whether Steven's emergency pleadings in this case were barred by *res judicata*. We find these reasons to constitute good cause for this decision to be issued after the time frame mandated in Supreme Court Rule 311(a) (eff. Feb. 26, 2010).

¶ 34 II. ANALYSIS

¶ 35 On appeal, Steven raises three issues as to why the trial court erred in granting Gretchen's motion to dismiss: (1) the motion was deficient on its face and should have been summarily dismissed on that basis alone; (2) taking his allegations as true for purposes of the motion to dismiss, all of his allegations regarded conduct that arose after the October 2015 order granting Gretchen sole custody was entered, and *res judicata* therefore did not apply; and (3) pursuant to Illinois law, he was only required to show that the parenting time modifications he sought were in the children's best interest and not that the children's environment was being seriously endangered by Gretchen.

¶ 36 In response, Gretchen first argues Steven brief repeatedly violates Supreme Court Rule 341(h)(6) (eff. Jan. 1, 2016) because his facts contain argument and comment and he fails to cite the record. Therefore, she requests that his statement of facts be stricken. In the alternative, Gretchen requests that this court only consider the facts that comply with this rule.

¶ 37 Illinois Supreme Court Rule 341(h) (eff. Jan. 1, 2016) governs the contents of an appellant's brief. Illinois Supreme Court Rule 341(h)(6) provides that the appellant's statement of facts shall state the facts of the case accurately and fairly without commentary and with appropriate references to the pages of the record on appeal. "The rules of procedure concerning appellate briefs are rules and not mere suggestions." *Hall v. Naper Gold Hospital, LLC*, 2012 IL App (2d) 111151, ¶ 7 (quoting *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999)). The failure to comply with the rules regarding appellate briefs is not an inconsequential matter. *Hall*, ¶ 7. A brief that lacks any substantial conformity to the pertinent supreme court rules may justifiably be stricken. *Id.* (citing *Tannenbaum v. Lincoln National Bank*, 143 Ill. App. 3d 572, 574, (1986)).

¶ 38 We agree with Gretchen that in several parts of Steven's statement of facts he violated rule 341(h)(6) by including commentary and unnecessary argument at points. In addition, Steven recites facts outside of the record to which no appropriate cite can be made. However, we find that a majority of his facts do comply with our supreme court rules. For that reason, we will ignore any inappropriate facts in Steven's brief, and we strongly caution counsel to strictly adhere with all supreme court rules in the future when filing a brief in this court.

¶ 39 A. Proper Standard for Modification of Custody

¶ 40 On appeal, Steven argues that pursuant to section 610.5 of the Act he was only required to show in his emergency pleadings that the parenting time modifications he sought were in the children's best interests, and not that they were being severely endangered by their present

environment. See 750 ILCS 5/610.5(a) (West 2016). However, he contends, even if the appropriate standard here is serious endangerment, he has pled sufficient facts to show that the children's present environment with Gretchen is severely endangering the children.

¶ 41 The allocation of parental decision-making responsibilities with respect to a minor child is governed by section 602.5 of the Act (750 ILCS 5/602.5 (West 2016)). That section provides that decision-making responsibilities must be allocated "according to the child's best interests," although the parties may agree on that allocation. *Id.* Once decision-making responsibilities have been allocated, the modification of that allocation is governed by section 610.5 of the Act. 750 ILCS 5/610.5 (West 2016). Under that provision, a court may modify the allocation if it finds, on the basis of facts that have arisen since the entry of the current parenting plan or allocation order that a substantial change has occurred in the circumstances of the child or the parents and that modification is necessary to serve the child's best interests. 750 ILCS 5/610.5(c) (West 2016). However, neither parent may seek to modify an existing allocation within two years of the date on which it was made unless the parent seeking modification presents affidavits showing that "there is reason to believe the child's present environment may endanger seriously his or her mental, moral, or physical health or significantly impair the child's emotional development." 750 ILCS 5/610.5(a) (West 2016).

¶ 42 As support for his argument that the "best interests" standard applies here, Steven references a "clarification" to section 610.5(a) of the Act, which states, "[p]arenting time may be modified at any time, without a showing of serious endangerment, upon a showing of changed circumstances that necessitate a modification to serve the best interest of the child." Pub. Act 90-076 (eff. Jan. 1, 2017) (750 ILCS 5/610.5(a) (West 2016)).

¶ 43 We are not persuaded by Steven's argument that the proper standard here is the best

interests of the children instead of whether their present environment is seriously endangering them. It is clear that the amendment to section 610.5 of the Act does not "clarify" that section, but explicitly modifies it to provide that the serious endangerment standard is not necessary if a party can show changed circumstances that require a modification that is in the children's best interests. See 750 ILCS 5/610.5(a) (West Supp. 2017). Here, Steven's emergency pleadings were all filed in 2016. Accordingly, the version of the Act in place at that time controls these proceedings. 750 ILCS 5/610.5(a) (West 2016). Therefore, we need to determine whether Steven's pleadings properly alleged that a modification in child custody was warranted because the children's present environment may seriously endanger their mental, moral, or physical health, or significantly impair their emotional development, and that Steven supplied affidavits to support those allegations.

¶ 44 B. Deficiency of the Motion to Dismiss on its Face

¶ 45 We now turn to the merits of this appeal. Steven first argues that the trial court erred in not dismissing Gretchen's motion to dismiss because it was deficient on its face. Specifically, Steven claims that in her motion Gretchen failed to correctly identify which of Steven's petitions it purported to attack, or to identify the prior order that gave rise to her claim of *res judicata*.

¶ 46 In response, Gretchen argues that in her motion she identified the October 2015 order that granted her sole custody of the children. She also referred to Steven's January 5, 2016 emergency petition for temporary and permanent modification of parental responsibilities, for relocation of the children, and for leave to enroll them in school in Wisconsin. She additionally referenced Steven's January 25, 2016 emergency motion for a mental health examination and the emergency motion to reconsider that he filed on February 25, 2016. Gretchen also points out that throughout the hearings before the trial court Steven referred to the second emergency

petition as a supplement to the first emergency petition, and admitted that the second petition requested the same relief as the first petition. Steven also told the court that the third emergency pleading supplemented the prior pleadings with additional facts. Also, on August 1, 2016, Steven specifically told the trial court, "[w]e're really talking about three pleadings that have merged together, Judge, just so we're clear." Finally, Gretchen contends that she set forth the reasons and supporting case law to support her claim that Steven's pleadings should be dismissed on *res judicata* grounds.

¶ 47 A party moving to dismiss a cause of action must specifically point out why the pleading is thought to be deficient. See *Parrillo v. 1300 Lake Shore Drive Condominium*, 103 Ill. App. 3d 810, 814 (1981).

¶ 48 Here, it is clear from a reading of Gretchen's motion that she is moving to dismiss *all* of the pleadings that Steven filed in 2016. In addition, although Gretchen may not have correctly identified the pleading to which *res judicata* may have applied, she did raise the affirmative defense of *res judicata* in her motion. Therefore, we reject Steven's argument that Gretchen's motion is deficient on its face.

¶ 49 C. The Merits of Gretchen's Motion to Dismiss

¶ 50 Next, Steven argues that Gretchen's motion to dismiss should have been denied where all the allegations in his pleadings were regarding conduct and circumstances that arose after the October 28, 2015 order was entered, and therefore *res judicata* did not apply.

¶ 51 In response, Gretchen contends: (1) the trial judge properly found that *res judicata* applied to the allegations in Steven's petition; and (2) Steven's assumption that the allegations in his pleadings were well pled is unfounded.

¶ 52 A section 2-169 motion to dismiss admits the legal sufficiency of the pleading it attacks

but alleges other matter defeating the claim. *Severino v. Freedom Woods, Inc.,* 407 Ill. App. 3d 238, 243 (2010). This motion also admits as true all well-pled facts and reasonable inferences therefrom. *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 325 (1995). A reviewing court must interpret all pleadings and supporting documents in the light most favorable to the non-moving party. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). We review a dismissal pursuant to section 2-619 of the Code on a *de novo* basis. 735 ILCS 5/2-619 (West 2016); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003).

¶ 53 A motion to dismiss under section 2-615 of the Code, however, challenges only the legal sufficiency of the complaint. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. The critical inquiry is whether the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id*. All well-pled facts in the complaint must be taken as true, but conclusions of law will not be taken as true unless supported by specific factual allegations. *Id*. Review of the dismissal of a complaint under section 2-615 of the Code is *de novo*. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47.

¶ 54 The doctrine of *res judicata* has three requirements: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of causes of action; and (3) an identity of the parties or privies. *U.S. Bank National Association v. Johnston*, 2016 IL App (2d) 150128, ¶ 25. If any requirement is not met, *res judicata* will not apply. *Id.* The burden of showing that *res judicata* applies is on the party invoking the doctrine. *Hernandez v. Pritikin*, 2012 IL 113054, ¶ 41. However, "once established, *res judicata* bars all matters that were offered to sustain or defeat the claim, *as well as to any and all other matters which may have or could have been offered for that purpose*." (Emphasis added.) *Dookeran v. County of Cook*, 2013 IL App (1st) 111095, ¶ 15.

¶ 55 Generally, *res judicata* extends only to the facts and conditions as they were at the time a judgment was rendered. Therefore, when new facts occur before a second action that establish a new basis for the claims and defenses of the parties, the issues are not the same and the former judgment cannot be pleaded as a bar in a subsequent action. *Hayashi v. Illinois Department of Financial and Professional Regulation*, 2014 IL 116023, ¶ 46.

¶ 56 In reviewing Steven's three pleadings—the January 5, 2016 emergency petition for temporary and permanent modification of parental responsibility, his January 22, 2016 emergency motion for a mental health examination and restriction of Gretchen's parental responsibilities, and his February 25, 2016 motion to reconsider—we find that several, but not all, of the allegations that Steven raised are subject to *res judicata* because that particular issue was raised or it could have been raised in the 2015 proceedings.

¶ 57 1. Issues Barred by *Res Judicata*

¶ 58 In the emergency petitions Steven filed on January 5 and January 22, 2016, he alleged that Gretchen was currently taking the drug Ativan, and she should not be taking that drug because she was addicted to it during the end of their marriage and she stayed at an in-patient treatment center for that addiction. He also alleged that Gretchen's prior addiction would cause her to "disappear" and leave the children alone and unsupervised. Finally, he noted that during her in-patient stay he learned that Gretchen suffered from bi-polar disorder.

¶ 59 Here, it is very clear that any allegations about Gretchen's use of Ativan in the past, as well as her prior in-patient stay for any alleged addiction, are barred by *res judicata.* Steven could have brought up Gretchen's prior addiction and in-patient treatment at the 2015 hearings and he did not do so. For the same reason, Steven's allegation that Gretchen would leave the children unsupervised when she was allegedly abusing Ativan during their marriage is barred by

res judicata as well.

¶ 60 The emergency motion that Steven filed on January 22, 2016, contains the same allegations that he raised in his earlier pleading that we have already determined are barred by *res judicata*, and we will not address them again. We have also reviewed the emergency pleading that Steven filed on February 22, 2016, and find that those allegations are not subject to *res judicata*.

¶ 61 2. Remaining Issues in Steven's Emergency Pleadings

¶ 62 We now turn to the allegations raised in Steven's pleadings that were not subject to *res judicata* in order to determine whether the trial court erred in granting Gretchen's motion to dismiss his emergency pleadings.

¶ 63 A defendant's motion to dismiss is not defeated merely by choosing the wrong statutory mechanism where the plaintiff suffered no prejudice from the improper label. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 21 (citing *Wallace v. Smyth*, 203 Ill.2d 441, 447 (2002)). In addition, "[a] reviewing court is not bound to accept the reasons given by the trial court for its judgment and the judgment may be sustained upon any ground warranted, regardless of whether it was relied on by the trial court and regardless of whether the reason given by the trial court was correct." *King v. Chicago*, 324 Ill. App. 3d 856, 859 (2001).

¶ 64 The issue of *res judicata* aside, Gretchen's counsel argued to the trial court that Steven did not sufficiently allege any facts that constituted serious endangerment in his pleadings. Specifically, counsel noted that DCFS had not made any allegations against Gretchen. Also, no police reports had been filed except for the one generated when Rebecca called the police to do a well-being check of Gretchen's home when no one was answering the phone. For these reasons, Steven was on notice that Gretchen was also moving to dismiss his emergency pleadings based

upon his failure to properly plead a claim for serious endangerment pursuant to section 610.5(a) of the Act. 750 ILCS 5/610.5(a) (Wes 2016). Therefore, Steven suffered no prejudice when Gretchen improperly labeled her motion to dismiss as pursuant to section 2-619 of the Code instead of section 2-619.1 of the Code, the latter of which permits a party to file a motion to dismiss that combines a motion under section 2–615 and a motion under section 2–619 of the Code. 735 ILCS 5/2–615, 619, 619.1 (West 2016).

¶ 65 Again, pursuant to section 610.5(a) of the Act, neither parent may seek to modify an existing allocation within two years of the date on which it was made unless the parent seeking modification *presents affidavits showing* that "there is reason to believe the child's present environment may endanger seriously his or her mental, moral, or physical health or significantly impair the child's emotional development." (Emphasis added.) 750 ILCS 5/610.5(a) (West 2016). Since Steven filed his first emergency petition only three months after the trial court awarded Gretchen sole custody of the children, this is the standard that applies in this case.

¶ 66 A court interpreting the language of a statute will assume that the legislature did not intend to produce an absurd or unjust result and will avoid a construction leading to an absurd result if possible. *Hubble v. Bi-State Development Agency of Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 283 (2010).

¶ 67 Here, the only affidavits attached to the emergency pleadings filed on January 5 and 22, 2016 were Steven's own. Even taking the allegations in those petitions and affidavits as true, a majority of those allegations are purely conclusory and do not rise to the level of serious endangerment. For example, Steven alleges that Gretchen was "paranoid" because she "forced J.B. to take an at home drug trust (as she was convinced that J.B.'s behavior at home was indicative of drug use)***." First, the word "paranoid" is conclusory. Second, many parents

make their children take at home drug tests for behavior that they consider strange or out of the ordinary for that child based upon a concern that they may be taking illegal drugs.

¶ 68 The allegations regarding information on J.B.'s phone about Gretchen's prescriptions at Walgreens are also conclusory and do not make a case for serious endangerment. Since Steven does not allege that Gretchen is taking illegal prescriptions, we can assume that the prescriptions are being given to her by licensed physicians. Also, simply because Steven is a physician, several of his statements such as "[t]he prescription drug cocktail that Gretchen continues to consume, leads to erratic and irrational behavior often combined with feelings of grandiosity" are completely conclusory. In addition, his statement that he is "highly educated as to the risks and side effects of the prescription drug cocktail that Gretchen is taking and how dangerous the combination can be" is not reliable. Although Steven is trained as an obstetrician/gynecologist and currently a chief medical officer of a hospital, Steven is not one of Gretchen's treating physicians.

¶ 69 We also find the allegations that Steven raised in his second emergency pleading did not state a claim for serious endangerment under the Act. For example, Steven is not qualified to make the conclusory assertion that Gretchen was "severely depressed and possibly suicidal" based upon her social media posts. Also, having reviewed those posts, we find Steven's assertions to be grossly exaggerated. In addition, two of the allegations Steven raised in this pleading were already cured by the trial court—Gretchen's restrictions on the children's phones, and her failure to get J.B. into therapy. The remaining allegation in this petition, that J.B. ran away from home, will be addressed subsequently along with Steven's other allegations regarding both children's attempts to run away from home.

¶ 70 Even more important, though, is the fact that Steven's own affidavits that he attached to

all three of his emergency pleadings *do not contain any first-hand knowledge* of any allegations that would constitute a claim for serious endangerment under the Act. See 750 ILCS 5/610.5(a) (West 2016). Instead, his only source of information to make those allegations comes from his son, J.B. For example, Steven alleged that J.B. told him that Gretchen was taking a dangerous "cocktail" of prescription drugs" while also consuming "large amounts of alcohol." However, that claim is vague and lacks any evidentiary support. We do not believe that the legislature would create a mechanism for a parent to go into court and attempt to modify custody within two years of a previous custody order based upon only the affidavits signed by the moving parent *when that moving parent had no direct knowledge* of the events in support of the petition. If that were the case, there would be no finality to custody orders, and parents could easily open up custody proceedings by making serious allegations about the custodial parent and supporting those allegations with an affidavit containing solely hearsay statements. We assume that the legislature did not intend such an absurd result. *Hubble*, 238 Ill. 2d at 283.

¶ 71 In addition to the allegation about J.B. running away from home that Steven raised in his second emergency pleading, in his last emergency pleading he alleged that both boys had attempted to run away on two separate occasions and that they refused to voluntarily return to Gretchen. He also referred to "a horrible and extremely traumatic event on February 15, 2016, in which the children spent in excess of four (4) hours in a parking lot in Janesville, Wisconsin, refusing to go with Gretchen at the conclusion of Steven's scheduled parenting time***." Attached to that pleading were affidavits signed by Steven, a Dr. E. Rackley Ivey, a psychiatrist, and his current wife, Rebecca.

¶ 72 After a careful review of the allegations in the February 22, 2016 petition and the affidavits attached to it, we also find that the Steven failed to state a claim for serious

endangerment pursuant to section 610.5(a) of the Act.

¶ 73 Like his other emergency pleadings, Steven's final emergency pleading contains several conclusory statements, *i.e,*, "J.B. will clearly just run away again if he is forced to return [to Gretchen]", "[T.B.] is also terrified of Gretchen", and "[t]he toxic environment in which the children reside with Gretchen has clearly proven to be unbearable to the children***." Again, Steven's affidavit contains only hearsay statements.

¶ 74 In his affidavit, Dr. Ivey attested that in forming an opinion that the children were at serious emotional and physical risk, he relied upon Steven's emergency pleadings, various emails, texts and social media postings made by Gretchen, as well as other documents. However, Dr. Ivey also attested that his opinion was based upon a review of the listed documents *and his stated assumption that the allegations in those documents were true*. Dr. Ivey did not attest that he had ever spoken to Gretchen or that he had ever even spoken to the children. Finally, attached to this pleading was an affidavit filed by Rebecca Bush. Rebecca's affidavit is the only affidavit that contains first-hand knowledge about the events to which she attested. In her affidavit, Rebecca recounts her version of the events that took place on February 15, 2016, when the Wisconsin police were called because the children would not get out of her car and into Gretchen's car after Steven's visitation had ended. However, an objective reading of Rebecca's affidavit simply shows that Rebecca, like Steven and Gretchen, refused to work together for the good of the children, and not that the children's present environment with Gretchen was seriously endangering them.

¶ 75 Finally, the allegations in the third emergency pleading and in Steven's affidavit, along with his other allegations about the children's attempts to run away, contain total hearsay. Like his other allegations, Steven attached no affidavits from any individuals who had first-hand

knowledge of the children's attempts to run away from Gretchen's home. Steven could have attached an affidavit from the St. Charles police officer who cited J.B. for a curfew violation at 5:30 a.m., as Steven alleged in his emergency pleadings. Or, he could have included the police report that was generated from that curfew violation. Although not an affidavit, the report would reasonably show what facts the officer would testify to if subpoenaed. Without any such evidence to support these allegations, however, they were insufficient to state a claim for serious endangerment under the Act. 750 ILCS 5/610.5 (West 2016).

¶ 76 For all these reasons, we find that the trial court did not err in granting Gretchen's motion to dismiss when Steven's emergency pleadings did not state a claim for a custody modification based upon serious endangerment under the Act. 750 ILCS 5/610.5(a) (West 2016). In fact, even if we used the best interest standard that the trial court employed, we still would have found that dismissal was warranted under the facts of this case.

¶ 77 III. CONCLUSION

¶ 78 In sum, the trial court did not err in granting Gretchen's motion to dismiss Steven's emergency petitions for a modification of child custody pursuant to section 610.5(a) of the Act. 750 ILCS 5/610.5(a) (West 2016). Although the trial court incorrectly characterized the allegations in Steven's pleadings as all subject to *res judicata*, we need not rely on the trial court's reasoning in order to affirm a correct ruling. *King v.Chicago*, 324 Ill. App. 3d at 859. Also, although Gretchen incorrectly styled her motion as one pursuant to section 2-619 of the Code instead of section 2-619.1, we are not bound by the headings of the parties' motions. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 21; 735 ILCS 5/2-619, 619.1 (West 2016). Finally, the trial court properly dismissed the emergency pleadings here because Steven did not state a claim for serious endangerment under the Act when a majority of the allegations in the petitions

and in his affidavits were conclusory and based upon hearsay, and the allegations raised in the one affidavit that was not based upon hearsay was insufficient to constitute serious endangerment under the Act. 750 ILCS 5/610.5 (West 2016).

¶ 79 Accordingly, the judgment of the circuit court of Kane County is affirmed.

¶ 80 Affirmed.