2018 IL App (2d) 180033-U
Nos. 2-18-0033 & 2-18-0067 cons.
Order filed December 20, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

RICHARD EINSLE and JULIE SIEBERT-EINSLE, Plaintiffs-Appellants, v. ALLIANCE CLINICAL ASSOCIATES, S.C. and GENERATIONS FAMILY MEDICINE, Defendants-Appellees.	)	Appeal from the Circuit Court of Du Page County. No. 17-L-30 Honorable Brian R. McKillip, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiffs' claims of intentional infliction of emotional distress for failing to state a claim on which relief could be granted.

¶ 2 Plaintiffs, Richard Einsle and Julie Siebert-Einsle, appeal the judgment of the circuit court of Du Page County granting the motions to dismiss plaintiffs' second amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)) of defendants, Alliance Clinical Associates, S.C., and Generations Family Medicine. Plaintiffs alleged that defendants committed the tort of intentional infliction of emotional distress

when they failed to inform plaintiffs that their disabled adult daughter and ward, Kylie Siebert, sought counseling about a pregnancy and ultimately received an abortion. On appeal, plaintiffs contend that they properly stated claims for intentional infliction of emotional distress against each defendant. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We summarize the pertinent allegations appearing in the record. Plaintiffs are married; Richard is Kylie's stepfather and Julie is Kylie's mother. Kylie has been diagnosed with borderline personality disorder, bipolar disorder, premenstrual dysphoric disorder, and depression. In 2010, Kylie was adjudicated in the circuit court of Will County "a disabled person who is totally without understanding or capacity to make or communicate decisions regarding her person and totally unable to manage her estate or financial affairs." Plaintiffs were appointed as Kylie's legal guardians. Despite Kylie's disabled status, plaintiffs included no allegations suggesting that Kylie could not effectively communicate to others or that she appeared as anything other than an adult person.

¶ 5 Kylie received medical services from Generations, a family medicine clinic located in Naperville. She also received mental health services and psychological counseling from Alliance, located in Wheaton. At times, Kylie would meet her counselor from Alliance with plaintiffs in attendance; at other times, she would meet alone with her counselor from Alliance. We note that plaintiffs did not allege that, from the time Kylie knew of her pregnancy until she revealed her pregnancy and abortion to plaintiffs, plaintiffs and Kylie had any counseling sessions with Alliance in which both plaintiffs and Kylie were present. In addition, Julie received medical services from Generations, including treatment for multiple sclerosis, herniated disks, and other medical issues.

¶ 6 Plaintiffs communicated to defendants Kylie's disabled status and provided each defendant with a copy of the guardianship order for Kylie's file. Interestingly, plaintiffs alleged that each defendant provided exactly the same services, "mental and emotional therapy and treatment to persons with behavioral problems," even though Generations provided medical care and services and Alliance provided mental health care. Additionally, plaintiffs alleged that, at each of Kylie's visits to either Generations or Alliance, the unspecified provider would meet with Kylie and plaintiffs and thereafter, would meet with Kylie alone.

¶ 7 Plaintiffs alleged that Alliance's "chief recommendation" was for regular, open, and clear communication between the providers and Kylie and her family in order to assure that Kylie's stressors and symptoms were being adequately identified, monitored, and addressed. Plaintiffs did not make a similar allegation concerning Generations. However, plaintiffs alleged that, based on defendants' knowledge that plaintiffs were Kylie's guardians, each defendant had a duty to communicate fully with plaintiffs as Kylie's legal guardians.

¶ 8 Sometime in 2014, Kylie became pregnant. During November 2014, Kylie sought information and guidance regarding her options with respect to her pregnancy. She communicated with "Alliance" and with "Becky, an employee of Generations." On November 29, 2014, Kylie obtained an abortion from an unnamed provider who was not associated with either Alliance or Generations. On December 24, 2014, Kylie revealed to plaintiffs the facts of her pregnancy and her choice to terminate her pregnancy with an abortion. Neither defendant communicated to plaintiffs that Kylie was pregnant or was seeking advice about options including abortion.

¶ 9 Plaintiffs had strong religious objections to abortion. Julie had written academic papers on abortion and had "attempted to get others to value the lives of unborn children." Julie reacted

poorly to stress, and stress caused flare-ups of her multiple sclerosis. Both plaintiffs discussed Kylie and her emotional disorders with Generations and Kylie's impulsive decision-making leading to significant regrets over those decisions.

¶ 10 Julie experienced stress resulting from Kylie's decision, including sleep disturbances and muscular issues. About a month after Kylie's abortion, Julie underwent back surgery. Both plaintiffs experienced stress in their relationship with Kylie; Julie treated with a therapist regarding her grief over Kylie's abortion. Both plaintiffs aver that they will never fully recover from Kylie's abortion.

¶ 11 On December 23, 2016, plaintiffs initially attempted to file their original complaint in this matter. Plaintiffs' attorney inscribed an incorrect attorney identification number on the original complaint, and the complaint was rejected by the electronic filing system. On January 11, 2017, the electronic filing system accepted the filing of plaintiffs' original complaint; a correct attorney identification number had been inscribed. The original complaint consisted of two counts, both seeking recovery for intentional infliction of emotional distress. Count I was directed against Alliance, and count II was directed against Generations.

¶ 12 On May 8, 2017, Generations filed a motion to dismiss the complaint. On June 8, 2017, Alliance filed its motion to dismiss the complaint. Generations' motion to dismiss had been fully briefed, but no briefing on Alliance's motion to dismiss appears in the record. On June 29, 2017, the trial court granted in part Generations' motion to dismiss and allowed plaintiffs to file an amended complaint with regard to both defendants.

¶ 13 On July 27, 2017, plaintiffs filed their first amended complaint, again in two counts alleging intentional infliction of emotional distress, with count I directed against Alliance and count II directed against Generations. Plaintiffs alleged, relevantly, that defendants both knew of

the guardianship relationship between plaintiffs and Kylie, and they further alleged that each defendant was "under a duty to fully communicate with the legal guardian of Kylie," but neither defendant communicated to plaintiff about Kylie's pregnancy or the counseling she received. On August 23, 2017, each defendant filed its motion to dismiss the first amended complaint. Defendants argued that plaintiffs' complaint was untimely, as it was accepted for filing on January 11, 2017, which was more than two years after plaintiffs learned about Kylie's abortion. Defendants also argued that plaintiffs did not state a claim on which relief could be granted. In responding to defendants' motions, plaintiffs filed affidavits that fleshed out some of the details, such as the date Kylie received an abortion.

¶ 14 By letter, the trial court denied defendants' motions to dismiss with regard to the untimeliness contention but granted the motions with respect to the failure-to-state-a-claim contention. The court initially dwelt on plaintiffs' contention that defendants were under a duty to disclose the particulars of Kylie's treatments, concluding that the parties had failed to conclusively establish the presence or absence defendants' duty to affirmatively disclose the information.[1] More importantly, however, the trial court noted that plaintiffs did not allege that they made any requests concerning Kylie's treatments by defendants.

¶ 15 The trial court then moved on to an analysis of the tort of intentional infliction of emotional distress. The court emphasized the high bar presented by the need to allege extreme

[1] Here, the trial court referenced federal regulations and Illinois statutes that gave guardians the right of access to medical records, but only if the guardian requested the information from the provider. See 45 C.F.R. §§ 164.502(g), 164.524 (2017); 740 ILCS 110/4(a)(4) (West 2016).

and outrageous conduct, requiring that the conduct be so extreme in degree and outrageous in character as to go beyond all possible bounds of decency. The court held that the allegations were insufficient to establish the requisite extreme and outrageous conduct, finding that at most, plaintiffs alleged defendants failed to notify them about Kylie's pregnancy and the failed to notify them that they provided counseling for Kylie, which, as a matter of law could not rise to the necessary extreme and outrageous conduct. The trial court analogized the facts here to those in *Dymek v. Nyquist*, 128 Ill. App. 3d 859 (1984), characterizing *Dymek* as involving a psychiatrist who surreptitiously performed psychotherapy on a minor child at the request of the mother. The trial court noted that the *Dymek* court held that this conduct was not extreme and outrageous and held that, likewise in this case, the complained-of conduct could not be deemed extreme and outrageous.

¶ 16 Finally, the trial court expressed misgivings over how plaintiffs brought the action. According to the trial court, plaintiffs sued as guardians of Kylie, yet sought damages for personal injuries. The court concluded that it did not matter, however, given its conclusion that defendants' conduct was not sufficiently extreme and outrageous to support plaintiffs' claims of intentional infliction of emotional distress. The court then dismissed plaintiffs' complaint with prejudice and ordered Alliance to prepare an order consistent with its judgment expressed in its letter ruling.

¶ 17 On December 14, 2017, the trial court entered a written order expressly incorporating its November 29, 2017, letter of judgment to the parties. In addition, plaintiffs were "given leave to file a Second Amended Complaint at Law, solely for the purpose *** of incorporating into the allegations of the Second Amended Complaint the averments [each plaintiff] set forth in their respective affidavits attached to Plaintiffs' response to the Defendants' motions [to dismiss]" for

the express purpose of "clarify[ing] the record for any appeal." The order further provided that it would "operate as a dismissal with prejudice of the Second Amended Complaint *** immediately upon its filing." On January 2, 2018, plaintiffs filed their second amended complaint, which was modified from the first amended complaint by expressly incorporating the affidavits of each plaintiff as exhibits to the second amended complaint, and by pruning some allegations not strictly relevant to the cause of action.

¶ 18 On January 9, 2018, plaintiffs filed a notice of appeal. On January 18, 2018, the trial court entered an order expressly dismissing with prejudice the second amended complaint. On January 22, 2018, plaintiffs filed another notice of appeal. The cases on appeal were thereafter consolidated.

¶ 19 II. ANALYSIS

¶ 20 On appeal, plaintiffs contend that the trial court erred in dismissing the second amended complaint for failure to state a cause of action for intentional infliction of emotional distress. Plaintiffs argue that they adequately pleaded each of the elements necessary to state a claim for intentional infliction of emotional distress: defendants' conduct was truly extreme and outrageous, defendants either intended or knew or should have known that their conduct had a high probability of inflicting severe emotional distress, and defendants' conduct in fact caused severe emotional distress. We consider plaintiffs' arguments in turn.

¶ 21 A. Standard of Review and Pleading Requirements

¶ 22 As an initial matter, this case comes before us after the trial court granted defendants' motions to dismiss pursuant to section 2-615 of the Code. A section 2-615 motion to dismiss challenges only the legal sufficiency of the complaint. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 27. In resolving such a motion, all well-pleaded facts in the complaint are

taken as true, and the court considers whether the allegations of the complaint, in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id.* We review *de novo* the trial court's decision on a 2-615 motion to dismiss.

¶ 23 In order to state a claim for the tort of intentional infliction of emotional distress, the plaintiff must allege: (1) that the defendant engaged in extreme and outrageous conduct; (2) that the defendant acted with the intent that his or her conduct would inflict severe emotional distress or acted with the knowledge that there was at least a high probability that his or her conduct would inflict severe emotional distress and recklessly disregarded that probability; and (3) the plaintiff experienced severe emotional distress. *Gragg v. Calandra*, 297 Ill. App. 3d 639, 648 (1999). The conduct must be so outrageous in character and so extreme in degree as to go beyond the bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. *Schweihs*, 2016 IL 120041, ¶ 51. Likewise, the distress caused by the conduct must be so severe that no reasonable person could be expected to endure it. *Id.* With these principles in mind, we consider plaintiffs' second amended complaint.

¶ 24 B. Overview

¶ 25 Plaintiffs alleged claims for intentional infliction of emotional distress against each defendant. Plaintiffs also alleged their claims individually only; they did not allege any claims in their capacity as Kylie's guardians or on behalf of Kylie. Thus, plaintiffs were required to allege, with respect to each defendant, that each defendant's conduct was extreme and outrageous, was intentional or in reckless disregard of the substantial certainty that the conduct would cause severe emotional distress, and, in fact, caused severe emotional distress. *Gragg*, 297 Ill. App. 3d at 648.

¶ 26 Plaintiffs alleged that Alliance's conduct consisted of counseling Kylie about obtaining an abortion and not communicating that it had learned of Kylie's pregnancy, that Kylie was seeking counsel about her pregnancy and specifically an abortion, and that it had counseled Kylie on those topics. Plaintiffs also included allegations about Alliance's duty to communicate based on its knowledge that plaintiffs were Kylie's legal and personal guardians and its affirmative statement that there should be open and full communications between Alliance and Kylie's family regarding how Kylie was behaving.

¶ 27 Plaintiffs made similar allegations about Generations, with some important differences. Plaintiffs alleged that Generations, too, counseled Kylie about obtaining an abortion and did not communicate that it had learned that Kylie was pregnant, that she was seeking counseling, and that it had provided such counseling to Kylie. Plaintiffs also alleged that "Becky" had "secretly counseled" Kylie to seek an abortion. In the affidavits attached and incorporated into the second amended complaint, plaintiffs alleged that Becky helped Kylie "find" an abortion clinic. Plaintiffs also included similar duty allegations about Generations' duty to communicate based on its knowledge that plaintiffs were Kylie's legal and personal guardians.

¶ 28 Plaintiffs characterized the conduct of each defendant, the counseling and the failure to communicate the knowledge of Kylie's pregnancy and each defendant's counseling efforts as extreme and outrageous. Plaintiffs alleged in the affidavits and incorporated into the second amended complaint that Generations, through Becky, knew that both Julie and Kylie were susceptible to physical manifestations of emotional distress—Kylie because of her fragile mental state and Julie because of her multiple sclerosis and other physical ailments. Both plaintiffs also alleged that they were staunchly opposed to abortion on religious grounds. Significantly,

plaintiffs did not allege that they had communicated to defendants their views regarding abortion.

¶ 29 Plaintiffs' allegations were hazy regarding the precise injury they incurred. From our reading of the complaint and affidavits, the injury occurred when Kylie revealed to them the facts that she had become pregnant, had managed to keep that information secret from plaintiffs, had sought counseling about her medical options from defendants, and had obtained an abortion. Plaintiffs alleged that they experienced severe emotional distress following Kylie's revelations.

¶ 30 Plaintiffs entitled each count of the second amended complaint "intentional infliction of emotional distress." In reviewing plaintiffs' allegations, it is clear that plaintiffs attempted to include, as they were required, allegations concerning each element of the tort of intentional infliction of emotional distress. It also appears manifest that plaintiffs included allegations about each defendant's duty toward them and breach of that duty. These allegations are misplaced in a claim of intentional infliction of emotional distress, but they may be pertinent to claims of negligent infliction of emotional distress.[2] However, we note that neither in the trial court nor in this court did plaintiffs directly assert that they alleged or intended to allege claims for negligent infliction of emotional distress. Accordingly, we conclude that, to the extent plaintiffs' allegations touch on negligent infliction of emotional distress, they have forfeited those claims for failing to argue them. Ill. S. Ct. R. 341 (h)(7) (eff. Nov. 1, 2017).

¶ 31 C. Pleading Deficiencies

[2] To state a claim for negligent infliction of emotional distress, the plaintiff must allege the traditional elements of a negligence claim: duty, breach, causation, and damages. *Schweihs*, 2016 IL 120041, ¶ 31.

¶ 32 The question now becomes whether plaintiffs adequately alleged the elements of the tort of intentional infliction of emotional distress. We believe they did not.

¶ 33 As an initial consideration, even if we were to accept that plaintiffs had otherwise adequately pleaded the elements intentional infliction of emotional distress (extreme and outrageous conduct, defendants' intent or knowledge, actual injury), under plaintiffs' theory of the case, they are still missing a key allegation. Plaintiffs argued, in both their briefs and at oral argument, that the complained-of conduct was defendants' breach of the duty to inform plaintiffs regarding Kylie's medical condition and treatment and allow plaintiffs, as guardians, to make the necessary decisions on Kylie's behalf. Plaintiffs did not include allegations that defendants customarily informed them of what transpired when Kylie engaged in counseling or therapeutic sessions alone and they did not include any allegation that, from the time that Kylie learned of her pregnancy until Kylie revealed that she had been pregnant and had received an abortion, they attended any counseling or therapeutic sessions with Kylie. Thus, plaintiffs do not allege the circumstances for defendants to breach their alleged duty to inform ever arose. We do not, however, believe that plaintiffs adequately pleaded the elements of intentional infliction of emotional distress.

¶ 34 Looking at the first element, that the defendant's conduct was extreme and outrageous, plaintiffs alleged only that each defendant provided counseling to Kylie about her health-care options. Plaintiffs cite no authority suggesting that providing counseling for all legal health-care options, no matter how distasteful, can ever rise to the level of conduct that was " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.' " *Schweihs*, 2016 IL 120041, ¶ 51 (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). In the absence of such

authority, we are not prepared to hold that providing counseling regarding legal health-care options can constitute extreme and outrageous conduct.

¶ 35 Plaintiffs also alleged that the counseling was conducted secretly and in breach of each defendant's duty to disclose health-care information and decisions to plaintiffs. With respect to Alliance, plaintiffs alleged that Alliance's "chief recommendation" was that "any interventions with Kylie and her family be well-coordinated." To facilitate this, Alliance stated that there "should be regular, open and clear communication between Kylie's clinical providers and her family in order to assure that stressors and symptoms are being adequately identified, monitored and addressed." Plaintiffs suggest that this statement constitutes a voluntary undertaking to communicate about everything that occurred in Kylie's treatment with Alliance. Thus, plaintiffs allege that Alliance voluntarily undertook a duty to communicate, breached that duty, and the breach, failing to communicate, constituted extreme and outrageous conduct.

¶ 36 There are several problems with plaintiffs' argument. First and foremost, plaintiffs allege that they were the parties directly harmed by Alliance's wrongful conduct, but plaintiffs were not present when the wrongful conduct occurred. Plaintiffs do not cite any case in which a party claiming intentional infliction of emotional distress was not actually present during the wrongful conduct. Moreover, the cases cited by plaintiff involve extreme and outrageous conduct directed at the plaintiffs or witnessed by the plaintiffs.

¶ 37 In *Gragg*, the decedent, who was the plaintiff's father, underwent a cardiac procedure that went wrong, resulting in the decedent experiencing irreversible brain damage and the inability to survive without life support. *Gragg*, 297 Ill. App. 3d 642. The plaintiff alleged that the defendants refused to honor the decedent's living will specifying that he should not receive extraordinary life-sustaining measures (*id.*), and repeatedly verbally abused the plaintiff and her

mother by accusing them, publicly and in front of other, of trying to kill the decedent (*id.* at 648). All of the activities in *Gragg* alleged to constitute extreme and outrageous conduct were both committed in the plaintiff's presence and directed at the plaintiff (and her mother). *Id.* at 648-49. This stands in marked contrast to the allegation in this case that, not only did Alliance conduct some portion of the therapy sessions with Kylie alone, but the conduct complained of occurred outside of plaintiffs' presence. In turn, *Gragg* relied on several cases in which the complained-of conduct was either directed at the plaintiff or occurred within the plaintiff's presence or both. *Id.* at 649 (citing *Wall v. Pecaro*, 204 Ill. App. 3d 362, 368-69 (1990) (doctor deliberately misinformed the pregnant plaintiff that she had a cancerous tumor and demanded that the plaintiff undergo surgery to remove the tumor that would require the removal of half her face and the loss of the viable unborn child, and the doctor continued to pester the plaintiff to undergo the surgery after he was discharged); *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 22 (1992) (radio hosts disparaged the plaintiff's wife and son who were afflicted with "Elephant Man's" disease during a broadcast and suggested that the plaintiff was scamming them and the audience when the plaintiff was running a benefit for sufferers of the disease; held that the broadcast to the community at large (the Chicago metropolitan area and surrounding counties) rendered the conduct extreme and outrageous); *Cohen v. Smith*, 269 Ill. App. 3d 1087, 1095-96 (1995) (the plaintiff's religious beliefs forbade the viewing or touching of her body by a male; the defendant allowed a male nurse to view and touch the plaintiff while she was unconscious and undergoing a surgical procedure)). Likewise, our own research has not uncovered a case in which the conduct at issue was either not directed at the plaintiff or not committed within the plaintiff's presence.

¶ 38 Interestingly, plaintiffs attempt to distinguish *Dymek v. Nyquist*, 128 Ill. App. 3d 859 (1984), relied upon by the trial court. In that case, the father alleged intentional infliction of emotional distress against the psychiatrist when his ex-wife took their minor child for psychotherapy without the father's consent or knowledge. *Id.* at 860. Obviously, as the psychotherapy occurred without the father's knowledge, it was not conducted within his presence and it was not directed at the father. Thus, the factual posture of *Dymek*, which held that the father did not state a claim, is similar to that of the case before us.[3] While the *Dymek* court's rationale is not based on the factor that we identify, it is still telling that the complained-of conduct did not occur in the father's presence and was not directed at the father, but was directed at the minor. Here, Kylie stands in a similar position to the child in *Dymek*, with Alliance's conduct of counseling her directed at Kylie, but not her parents. *Dymek* also seems to suggest that the father was entitled to notice of the therapy, as plaintiffs here expressly claim. Nevertheless, the *Dymek* court determined that the father could not maintain his claim for intentional infliction of emotional distress.

¶ 39 This leads to the next problem. The conduct that plaintiffs witnessed and that caused them emotional distress was that of Kylie, when she revealed to plaintiffs on Christmas Eve that she had been pregnant and had terminated the pregnancy through an abortion. Thus, plaintiffs allege that the conduct that led to their severe emotional distress was performed by Kylie, not by defendants. Indeed, plaintiffs conceded at oral argument that, without Kylie's revelation, there would have been no injury.

[3] Plaintiffs further distinguish *Dymek*; we address the merits of their discussion below.

¶ 40 Additionally, we note that plaintiffs did not bring their action in any capacity but as individuals; they did not sue as guardians or on Kylie's behalf. In other words, plaintiffs are claiming a personal injury, but any injury they suffered was derivative and as a result of their status as Kylie's guardians and as a result of Alliance's purported failure to honor its voluntary undertaking to inform them as Kylie's guardians. Thus, plaintiffs improperly conflate their dual status as individuals and as guardians for purposes of their second amended complaint.

¶ 41 Turning to Generations, we note that plaintiffs do not repeat the allegation suggesting that Generations also undertook a voluntary obligation to communicate regarding Kylie's treatment. On the other hand, plaintiffs alleged that a Generations employee, Becky, "secretly counseled Kylie to seek an abortion." In addition, in their affidavits, plaintiffs averred that Becky gave Kylie the pregnancy test, knew that Kylie wanted to hide the pregnancy from plaintiffs, and "helped Kylie to find an abortion clinic without [plaintiffs'] knowledge."

¶ 42 The same problems obtain with Generations as with Alliance: (1) Kylie's revelation led to the severe emotional distress; and (2) plaintiffs allege an individual hurt, but the hurt occurred only in the context of plaintiffs' role as Kylie's guardians. As with Alliance, there is nothing alleged in the second amended complaint to bridge the gap from between plaintiffs as individuals and their role as guardians. For example, plaintiffs argue that Generations' conduct frustrated their ability to act in Kylie's best interests in their role as guardians and pursuant to the Probate Act of 1975 (see 755 ILCS 5/11a-17(e) (West 2014) (setting forth criteria for a guardian to consider when making a decision in the best interests of the ward)). However, plaintiffs only allege that they, personally, were harmed by Generations' (and Alliance's) conduct.

¶ 43 Thought of differently, any unspecified tort generally alleged by plaintiffs here (*i.e.*, duty, breach, damages) is not aligned with intentional infliction of emotional distress, because any

duty (in the normative sense of an intentional tort) could only arise in relation to plaintiffs-as-guardians, but plaintiffs-as-guardians claim no damages. Plaintiffs-as-individuals claim damages, but plaintiffs alleged no duty (if any duty were properly alleged) to plaintiffs-as-individuals, only to plaintiffs-as-guardians. Therefore, plaintiffs-as-individuals do not and cannot allege damages caused by a breach of a duty to plaintiffs-as-guardians.

¶ 44 The problems identified above are fatal to plaintiffs' claims. First, because the conduct identified was directed at a third party and second, because plaintiffs-as-individuals cannot claim damages occurring only to plaintiffs-as-guardians where plaintiffs have sued only as individuals. Accordingly, we hold that the trial court properly dismissed plaintiffs' claims.

¶ 45 D. Plaintiffs' Remaining Contentions

¶ 46 While our determination above resolves this appeal, we will also consider, alternatively, plaintiffs' remaining arguments on appeal. Plaintiffs argue that defendants' conduct, as alleged, was extreme and outrageous. As an initial matter, we note that extreme and outrageous conduct is measured by an objective standard. *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 90 (1976) (conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency;" the conduct and its effect is assessed against the objective reasonable person standard). Thus, plaintiffs must demonstrate, objectively, that defendants' alleged conduct was "extreme and outrageous."

¶ 47 Initially, plaintiffs contend that they were deprived of their right, as Kylie's guardian and pursuant to section 11a-17 of the Probate Act of 1975 (755 ILCS 5/11a-17 (West Supp. 2017)), to make decisions on Kylie's behalf as she had been adjudicated incompetent to make them herself. This argument fails for the reasons noted above: plaintiffs are suing individually to enforce rights that they do not individually possess, but only possess as guardians. Additionally,

any injury in depriving plaintiffs-as-guardians of their right to act and decide on Kylie's behalf would impact Kylie, who is not a party to this action.

¶ 48 Setting aside these defects, plaintiffs also appear to suggest that the decision to obtain an abortion might not have been in Kylie's best interests, because they, as guardians, were not allowed to make the determination due to defendants' actions in secretly counseling Kylie about an abortion. Plaintiffs' use of authority gives us the best understanding of what they hoped their allegations and averments would set forth.

¶ 49 First, plaintiffs contend that the facts here are analogous to those in *Gragg*. In *Gragg*, the plaintiff's allegations pertaining to intentional infliction of emotional distress were that the defendants " 'verbally abused' and 'repeatedly insult[ed] and injure[d]' and 'willfully and wantonly inflict[ed]' severe emotional distress on" the plaintiff and her mother "by repeatedly accusing them in a public area in the presence of others of trying to kill" the plaintiff's father, of continuing the father's life support against his wishes expressed in a living will and expressed by the plaintiff and her mother, and of refusing to perform relevant testing that would likely have shown that the father had no brain activity to justify continuing the extraordinary measures to sustain his life. *Gragg*, 297 Ill. App. 3d at 648-49 (brackets in the original). The plaintiff also alleged that the defendants, without consent, performed open heart surgery on the father after he had experienced a cardiac arrest during another procedure, and the plaintiff attempted to state claims under the Family Expense Act, for violating the Consumer Fraud Act, and for intentional infliction of emotional distress. *Id.* at 642-43.

¶ 50 We held that the conduct of repeatedly and publicly "accusing [the] plaintiff and her mother of trying to kill [the father] could be considered so mortifying and callous as to amount to outrageous conduct." *Id.* at 650. In our analysis, we discounted the defendants' claim that

prolonging the father's life was a legitimate objective, noting that, even though the objective may have been proper, the defendants were not free "to pursue that objective by outrageous means." *Id.* We also focused on the statements to the plaintiff and her mother, not on the procedures performed by the medical defendants. *Id.* at 649-50. Thus, in *Gragg*, the only conduct that qualified as extreme and outrageous was the verbal conduct of the defendants, in which they berated and accused the plaintiff and her mother of trying to hasten or cause the death of her father. *Id.* at 650.

¶ 51 It is informative, then, to compare what we actually held in *Gragg* with plaintiffs' interpretation of the facts of the case and its holding. Plaintiffs focus on the father's living will in *Gragg*, more or less equating it with the court order bestowing them with the guardianship of Kylie. According to plaintiffs, both the living will in *Gragg* and the order of guardianship here "concerned decision making." Plaintiffs contend that, in *Gragg*, over the plaintiff's protests, the defendants refused to honor the living will (*id.* at 643), and here, "defendants acted as though [the guardianship order] did not exist." Plaintiffs also note that both in *Gragg* (*id.* at 642) and in this case, the person receiving medical care was unable to make decisions for him- or herself. Thus, plaintiffs focus on the violation of the order as the extreme and outrageous conduct, ignoring the conduct in *Gragg* that was actually held to be capable of being "deemed outrageous by a jury," namely, the publicly verbal abuse repeatedly accusing the plaintiff of trying to kill her father. *Id.* at 650. Nowhere in *Gragg* did we consider the unconsented-to medical procedures (including the procedures performed to prolong and sustain the father's life) as conduct that could have potentially satisfied the conduct element of a claim for intentional infliction of emotional distress, yet plaintiffs contend only that their rights to consent as Kylie's guardians were frustrated by defendants' conduct.

¶ 52 Thus, while plaintiffs' interpretation of *Gragg* helps to illuminate their argument, *Gragg* nevertheless does not support the view ascribed by plaintiffs. Rather, *Gragg* supports only that a defendant's conduct directed at and experienced by the plaintiff may be held to be extreme and outrageous. Moreover, while the defendants' violation of the father's living will in *Gragg* may have been relevant to the plaintiff's medical battery claim, it was not considered in any way in the evaluation of the claim of intentional infliction of emotional distress. In our view, then, *Gragg* does not support plaintiffs' contention that defendants' conduct could be deemed to be extreme and outrageous.

¶ 53 Plaintiffs posit that defendants were under a duty to respect plaintiffs' position as Kylie's guardians by informing them of important developments in Kylie's medical condition (such as her pregnancy) and the results of any consultations between them. Plaintiffs further suggest that the breach of this duty constituted extreme and outrageous conduct simply by committing the breach of duty.[4] Plaintiffs' specific argument appears to be grounded in the idea that abortion is

[4] Plaintiffs seem to interject two separate strands into their discussion of duty. The first is an affirmative duty on defendants' parts to disclose medical information to them as Kylie's guardians. This is rebutted in the relevant statutory authority. See 740 ILCS 110/4(a)(4) (West 2016) (the guardian of an adult ward is entitled to inspect medical records upon request to the provider). Here, plaintiffs did not make the necessary requests.

Second, plaintiffs suggest that the duty at issue is simply their right, as guardians, to make decisions on Kylie's behalf. We have rejected above the interjection of duty into an intentional tort claim (beyond the general normative duty not to commit the tortious conduct). We note that, in this portion of our disposition, we are responding to plaintiffs' arguments in the

such a personal decision, that any interference with the decision maker in such a circumstance must be outrageous, especially where the subject contemplating an abortion is incompetent. This argument appears to commingle the idea of a breach of duty with plaintiffs' avowed revulsion towards abortion in characterizing defendants' alleged interference with their rights as guardians as extreme and outrageous. Illinois law, however, does not run, at least at this point in time, against abortion. See *In re Estate of D.W.*, 134 Ill. App. 3d 788, 791 (1985) (per curiam) (holding that a guardian's rights under the Probate Act of 1975 is viewed expansively so that where there was no evidence that a guardian seeking an abortion for the ward was not acting in the best interests of the ward, there did not have to be a showing of medical necessity before the court would sanction the request for an abortion); see also *Reilly v. Wieth*, 377 Ill. App. 3d 20, 38 (2007) (compliance with law meant that the complained-of conduct could not rise to the level of extreme and outrageous conduct). Because abortion remains a legally viable option, counseling regarding abortion is not outrageous conduct. Plaintiffs' allegations go no further than defendants offered counseling; plaintiffs' averments state that Generations (but not Alliance) helped Kylie "find an abortion clinic," but the allegations and averments do not state that either defendant directly facilitated the abortion procedure. "Finding" an abortion clinic is a far cry from performing an abortion procedure. In view of the legality of the procedure and the paucity of the allegations and averments, we cannot say that defendants' conduct constituted extreme and outrageous conduct.

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terms that plaintiffs have chosen to use and we do not accept that there is ever a specific duty (beyond the duty to avoid extreme and outrageous conduct) imposed in a claim of intentional infliction of emotional distress.

¶ 54 Next, plaintiffs attempt to solidify the alleged breach of duty by arguing, for the very first time on appeal, that Alliance voluntarily assumed a duty to inform plaintiffs about the details of Kylie's counseling, especially regarding Kylie's symptoms and causes of stress. Plaintiffs base this argument on Alliance's statement to Kylie and plaintiffs that it was "imperative that any interventions with Kylie and her family be well-coordinated," and that there "should be regular, open and clear communication between Kylie's clinical providers and her family in order to assure that stressors and symptoms are being adequately identified, monitored and addressed." Plaintiffs, however, did not raise this argument below and have therefore forfeited it before this court. *Department of Transportation v. Dalzell*, 2018 IL App (2d) 160911, ¶ 113.

¶ 55 Regardless of whether plaintiffs adequately alleged a voluntary undertaking, they allege only that Alliance counseled Kylie regarding her options in dealing with her pregnancy. Thus, at most, plaintiffs alleged that Alliance simply breached the voluntary duty it had undertaken. There is nothing further in plaintiffs' allegations to transform that simple breach into extreme and outrageous conduct (beyond plaintiffs' revulsion over abortion). We also note that there is no parallel allegation that Generations voluntarily assumed a duty to inform plaintiffs. Thus, Alliance's duty cannot be engrafted onto Generations' conduct. Even if it could, plaintiffs' allegations demonstrate the same infirmity of showing nothing but a simple breach of a duty.

¶ 56 Plaintiffs also seek to distinguish *Dymek*. As noted above, the plaintiff sought to state a claim for intentional infliction of emotional distress based on the allegations that his child's mother, who was the noncustodial parent, had the child undergo a one-year period of psychiatric treatment without the plaintiff's knowledge or consent. *Dymek*, 128 Ill. App. 3d at 860. The court held, with little explanation, that "the psychiatrist's conduct, performed at the request of [the child's] mother, cannot be characterized as so outrageous, so atrocious and so utterly

intolerable that a person of ordinary sensibilities could not reasonably be expected to endure it." *Id.* at 862. The court apparently based its conclusion on the facts that there were no allegations that the treatment was unnecessary or that it was detrimental to the child's mental or physical health. *Id.*

¶ 57 Plaintiffs properly viewed the *Dymek* court's holding as centering on whether the medical provider's conduct was extreme and outrageous. Plaintiffs argue that *Dymek* is distinguishable because in this case, Kylie was upset and stressed by her pregnancy, whereas there were no allegations that the child in *Dymek* suffered ill effects from the psychiatric treatment. This contention misses the point. In *Dymek*, it was important that the treatment did not harm the child. Here, plaintiffs argue that Kylie's medical condition, not defendants' interventions with her, was causing her stress. In fact, plaintiffs do not allege that, following defendants' interventions, Kylie was harmed physically or mentally. Rather, they allege that, because of Kylie's psychological problems, it is likely that she may come to regret having an abortion, but there are no allegations that defendants undertook the procedure or caused the abortion, only that they provided counseling to Kylie about it. As in *Dymek*, then, there are no allegations that defendants' conduct caused Kylie any mental or physical health problems; the only allegations are that Kylie was stressed by the pregnancy and that neither defendant disclosed the pregnancy or the stress arising from it to plaintiffs. Moreover, plaintiffs hired defendants on Kylie's behalf precisely to provide counseling and other medical and psychological services to Kylie. Thus, while defendants are perhaps blameworthy for concealing Kylie's pregnancy, they nevertheless provided her with counseling as they were retained to do. *Dymek*, then, cannot be distinguished as suggested by plaintiffs.

¶ 58 Plaintiffs also contend that *Dymek* is distinguishable because, while the court dismissed the count of intentional infliction of emotional distress in that case, there were other counts that it allowed to proceed, thereby allowing the plaintiff the opportunity to recoup for his injuries at the hands of the defendants. We do not believe that this is a valid ground to distinguish *Dymek*. If plaintiffs believed that other theories of recovery were present within the facts they alleged, they were entirely free to state those claims along with the claim of intentional infliction of emotional distress. Because plaintiffs chose to place all of their eggs in one basket does not mean that this court must strain to find that the allegations state a cause of action where they do not. We reject this ground to distinguish *Dymek* as well.

¶ 59 Finally, in their arguments regarding the first element, plaintiffs suggest that, even if we cannot agree with them that defendants' conduct was extreme and outrageous, we should nonetheless craft a new cause of action from the allegations of the second amended complaint. We decline plaintiffs' invitation, noting that we are primarily an error-correcting court while our supreme court is more concerned with elucidating policy, into whose realm the creation of a new cause of action would more comfortably be placed. See *In re Estate of Boyar*, 2013 IL 113655, ¶¶ 53-54 (Burke, J., dissenting) (the appellate court's role is primarily error correction while the supreme court's role is more concerned with making definitive policy statements).

¶ 60 Because plaintiffs did not sufficiently allege that defendants' conduct was extreme and outrageous, they cannot maintain a claim for intentional infliction of emotional distress. Accordingly, the trial court properly dismissed their second amended complaint. In light of this alternative determination, we need not consider the remaining elements of the cause of action or plaintiffs arguments about them. We likewise need not address defendants' strenuously pressed argument that plaintiffs' original complaint was untimely due to the electronic filing system's

refusal to accept the complaint due to the erroneous attorney's number affixed to the original complaint in light of our analysis concerning the sufficiency of plaintiffs' second amended complaint.[5]

¶ 61 III. CONCLUSION

¶ 62 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 63 Affirmed.

[5] While perhaps analytically backward, the fact that we have declined to take up defendants' untimeliness contention implies our view of its ultimate merits without requiring that we undertake a comprehensive and definitive review, as it would not affect the overall outcome in this case. Moreover, we note the local rules appear to give the trial court discretion to accept an otherwise late filing as of the date of the attempt to file "upon satisfactory proof." 18th Judicial Cir. Ct. R. 5.14(b) (eff. Jan. 1, 2013). Additionally, *Peraino v. County of Winnebago*, 2018 IL App (2d) 170368, is distinguishable as that case dealt with the perfection of appellate jurisdiction while this case involves the general statute of limitations initiating a case. Thus, in any event, defendants' untimeliness contention fails.