2019 IL App (1st) 182690-U

SIXTH DIVISION
August 30, 2019

No. 1-18-2690

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALYSSA MOGUL and JOEY MOGUL, as Co-Executors of the Estate of HONOR B. MOGUL, deceased, ALYSSA MOGUL, individually, JOEY MOGUL, individually, and STEVEN MOGUL, individually, Plaintiffs (Alyssa Mogul, individually, Joey Mogul, individually, and Steven Mogul, individually, Plaintiffs-Appellants,) v. SCI ILLINOIS SERVICES, INC., an Illinois corporation d/b/a MEMORIAL PARK CEMETERY, and SCI INTERNATIONAL CORPORATION, a foreign corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 L 5069 Honorable James E. Snyder, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's dismissal of plaintiffs' claim for intentional infliction of emotional distress was proper because plaintiffs failed to allege extreme and outrageous conduct; dismissal with prejudice was proper where plaintiffs had numerous opportunities to allege sufficient facts and each version of their complaint did not vary substantially from the others; affirmed.

¶ 2 Plaintiffs, Alyssa Mogul, Joey Mogul, and Steven Mogul, in their individual capacities, appeal from the trial court's order granting the motion to dismiss brought by defendants, SCI Illinois Services, Inc., d/b/a Memorial Park Cemetery, and SCI International Corporation, for failure to state a claim for intentional infliction of emotional distress (IIED). Plaintiffs argue that the trial court erred because their fourth amended complaint alleged sufficient facts to state a claim for IIED. Specifically, plaintiffs assert that they sufficiently alleged extreme and outrageous conduct based on defendants' intentional resale of burial plots that were selected, purchased, and paid for by plaintiffs' mother over 10 years prior to her passing. For the following reasons, we affirm the trial court's decision.

¶ 3 BACKGROUND[1]

¶ 4 Plaintiffs filed their original complaint in the circuit court on May 18, 2015, asserting claims for breach of contract, fraud in the inducement, IIED, and seeking class certification. On June 26, 2015, defendants filed a motion to compel arbitration. On November 12, 2015, the court granted defendants' motion to compel arbitration on the breach of contract and fraud in the inducement counts. The court also stayed the arbitration on those counts. Defendants' motion to compel arbitration on the IIED count was denied.

¶ 5 After subsequent motion practice, plaintiffs filed their fourth amended complaint on September 19, 2016. Plaintiffs' fourth amended complaint (also referred to as "complaint") contained the following respectively-numbered counts[2]: (I) breach of contract on behalf of the estate, (II) fraud in the inducement on behalf of the estate, (III) IIED on behalf of plaintiffs

[1] This is the third time this case has appeared before this court and a good portion of the following facts have already been stated in previous decisions by this court. Still, we restate many those facts here for the sake of completeness.

[2] Plaintiffs' counts for (I) breach of contract, (II) fraud in the inducement, and (V) injunctive relief were previously dismissed but were "re-pled for purposes of preserving Plaintiffs' appellate rights."

individually, (IV) negligent infliction of emotional distress on behalf of plaintiffs individually, (V) injunctive relief, and (VI) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2012)). This appeal only concerns plaintiffs' count III for IIED.

¶ 6 Plaintiffs' fourth amended complaint contained the following allegations general to all counts.

¶ 7 On September 29, 1999, Honor Mogul entered into an agreement with defendants for the purchase of eight interment rights, or burial plots. The two documents constituting this agreement (contract) were attached to plaintiffs' fourth amended complaint. Both documents were titled "Retail Installment Contract Cemetery Interment Rights, Merchandise and services Purchase/Security Agree." One agreement was numbered as "005761" and the other was numbered as "005815." In the section labeled "Description of Interment Rights," agreement No. 005761 stated: "Gan M'Nucha ***[3] 33-50 or 443 ***." In that same description section, agreement No. 005815 stated: "(33-50-443) exact location to be pick [*sic*] after discussion with park supt [*sic*] ***." Both agreements reflected that Honor had chosen a desert rose-colored headstone. The eight plots were purchased for use by Honor and her family, including plaintiffs, and were purchased in advance so that plaintiffs did not have go through the hardship of making funeral arrangements and choosing burial sites after Honor's passing. Defendants were aware that Honor purchased the eight plots so that she and her family could be in the same resting place. Defendants were also aware that Honor purchased plots within Gan M'Nucha because of its location at the front of the cemetery and "overall natural beauty of that location within the

[3] The handwriting in the description sections of the agreements is somewhat illegible and thus we quote only those portions that we are able to read.

cemetery." Gan M'Nucha was restricted to only people of the Jewish faith. It was important to Honor and plaintiffs that they were buried with others of the Jewish faith.

¶ 8 Subsequent to entering into the contract with Honor, defendant resold the same plots to other customers, knowing that the sale of the eight plots to other individuals would result in Honor and her next of kin being displaced from their desired resting places. Defendants intentionally oversold the burial plots already purchased by Honor. Defendants knew that Honor and plaintiffs were members of the Jewish faith, which requires its followers to be buried within a set time period, and that by displacing Honor from her desired resting place, plaintiffs "would be in the untenable position of choosing a new resting place within days of their mother's death."

¶ 9 Honor passed away on June 5, 2013. On June 6, 2013, Alyssa and Joey went to Memorial Park Cemetery to make the final arrangements for interment of Honor in one of the eight plots she had previously purchased, but were informed that the eight plots were not available. Initially, defendants did not admit that they had oversold the plots and "attempted to blame" Honor, which was "intentional and a false statement." Defendants subsequently admitted that they oversold the Gan M'Nucha section. Defendants' initial representations that Honor made a mistake in designating a burial space coupled with the fact that there was no plot available for Honor "caused Alyssa to break down to the point that she was having trouble breathing." In addition to attempting to lay blame with Honor, defendants suggested that Alyssa and Joey select "alternative plots that were of inferior quality and condition to those found in Gan M'Nucha and would result in the family members not being interred together as planned." Defendants then drove Alyssa and Joey around the cemetery attempting to convince them to choose a burial location for Honor outside of Gan M'Nucha. During this drive, defendants acknowledged that the suggested locations were less expensive than those already paid for.

Additionally, the alternative plots suggested by defendants' agents "were inferior to the plots [Honor] contracted for, would require the disparate placement of the remainder of the family, and could not accommodate the rose colored headstone their mother had carefully chosen to mark her final resting place." Upon learning this, Alyssa and Joey became extremely distraught, knowing that Honor's wishes would not be carried out and that she may need to be buried in a section of the cemetery not reserved for those of the Jewish faith.

¶ 10 Defendants' acts not only caused plaintiffs the anguish of having to choose a new resting place for their mother, but their initial deception also caused "significant anxiety." At this time, Alyssa and Joey were communicating with Steven regarding the unavailability of the previously-chosen plots. Defendants then offered eight burial plots at the rear of the cemetery in a location that was not properly maintained and did not match the natural beauty of Gan M'Nucha. Because the plaintiffs' Jewish faith required Honor to be buried shortly after her death, they "reluctantly agreed to have their mother buried in a burial plot located in another section of the cemetery ***." Defendants knew or should have known that the Jewish faith requires burial shortly after death, that plaintiffs would not have time to find another cemetery, and that they would therefore be forced to bury their mother in "a less desirable and potentially a portion of the cemetery that was not only for those of the Jewish faith." The alternate spot was not one wherein other family members could be interred nearby, nor could the headstone Honor chose be used because the cemetery rules prevented those types of headstones from being used in that section of the cemetery. Further, "[p]laintiffs expressly disclaimed that the eight family plots in the other section of the cemetery were given in satisfaction for [d]efendants' breach of contract or any other claim [p]laintiffs may have."

¶ 11 As to plaintiffs' count III for IIED, the fourth amended complaint contained the following allegations.

¶ 12 Defendants were aware that the purchase of the eight plots were not only for Honor's direct benefit, but also the benefit of her family, including plaintiffs. Defendants' conduct—intentionally overselling the originally purchased burial plots—was extreme and outrageous because defendants knew that not all of plaintiffs would be able to be buried in the planned location. Although Honor had already paid for the plots, defendants resold them anyway. Defendants knew that intentionally overselling the plots in Gan M'Nucha would cause severe emotional distress to Honor's next of kin because they could not be buried there. Honor and her family's faith required a time-sensitive burial. Due to defendants' overselling of the plots, plaintiffs were placed in a position where they were forced to locate an alternate plot while simultaneously dealing with their grief. Defendants knew or should have known that failing to provide the final resting place had a high likelihood of causing severe emotional distress to plaintiffs "because of the emotional and psychological significance of and the sanctity of such a location." Defendants knew or should have known that plaintiffs would be placed in a time-sensitive position of choosing an alternative burial plot for Honor shortly after her passing so that she could be buried in accordance with the Jewish faith. Defendants knew that plaintiffs would have to bury Honor at Memorial Park Cemetery due to the time constraints.

¶ 13 Further, defendants knew or should have known that it was foreseeable that plaintiffs would be particularly susceptible to emotional distress "because of the emotional significance of a family member's passing, the importance of meeting their loved one's final interment requests, and the grief and shock that accompanies such a life event." As a proximate and direct result of defendants' conduct, plaintiffs suffered extreme emotional and mental distress when they learned

that Honor would not be buried in her chosen burial location. This extreme emotional and mental distress was made worse when defendants offered a replacement burial location that was contrary to Honor's wishes and of inferior quality to the chosen burial plot. Due to their Jewish faith, plaintiffs were required to make a "hurried" decision regarding Honor's final resting place, even though Honor had contracted for the purchase of eight burial plots over a decade earlier. Plaintiffs suffered additional emotional distress when defendants informed them that the headstone that Honor chose could not be used "because of the inferior quality of the substitute burial plot," and thus plaintiffs were denied the peace of mind that their mother's final wishes be carried out.

¶ 14 Plaintiffs alleged that they suffered damages in the following respects:

> "a. Plaintiffs suffered extreme anxiety in the days after the [d]efendants informed them that their mother's wishes would not be carried out;
>
> b. Plaintiffs suffered from depression, anger and sleeplessness as a result of the [d]efendants conduct, knowing that there [*sic*] mother is not in her chosen resting place and knowing that they could not carry out her last wishes;
>
> c. Plaintiffs have had to seek professional assistance to cope with the initial trauma of the [d]efendants failure to respect [Honor's] last wishes;
>
> d. Plaintiffs continue to suffer from emotional problems and continue to seek professional help knowing that their mother is not in her believed final resting place."

Additionally, plaintiffs continue to suffer emotional distress because they have lost trust in defendants as the keeper of Honor's remains. Due to defendants' actions, plaintiffs are uncertain whether their own plots will be available after their deaths. When plaintiffs visit their mother's

burial site, they "have concern and anxiety that she still rests where she was buried." At the time of the complaint, there was still no headstone for Honor.

¶ 15 On October 11, 2016, defendants filed a motion to dismiss, strike, and/or compel arbitration of plaintiffs' fourth amended complaint, alleging that plaintiffs' complaint was still deficient. Relevant to this appeal, defendants moved to dismiss plaintiffs' IIED count pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), arguing that the complaint failed to state a claim upon which relief could be granted because plaintiffs failed to allege facts demonstrating, *inter alia*, extreme and outrageous conduct by defendants, that plaintiffs suffered severe emotional distress as a result of such alleged conduct, that the alleged conduct was directed at plaintiffs, or that plaintiffs fall within legally cognizable categories of plaintiffs under Illinois law. The crux of defendants' argument was that defendants' conduct was not extreme and outrageous and that "this is nothing more than a breach-of-contract case." Further, defendants pointed out that the fourth amended complaint's allegations that "[p]laintiffs 'may' have been required to bury their mother in a location of the [c]emetery 'potentially' not reserved for those of the Jewish faith are insufficient to demonstrate 'extreme and outrageous' conduct because [p]laintiffs do not allege that the decedent was in fact buried in such a location." Defendants also argued that plaintiffs failed to allege that defendants intended to cause them severe emotional distress or that defendants' conduct was even directed toward plaintiffs. Defendants further contended that plaintiffs' allegations of emotional distress were vague and insufficient.

¶ 16 On November 22, 2016, plaintiffs filed their response, asserting that their IIED claim was sufficiently pled. Specifically, plaintiffs argued that they alleged extreme and outrageous conduct because the "post-humous [*sic*] humiliation of a person's deceased parent rises to that

level because of the religious and personal nature of the proceedings" and is "precisely the type of conduct that a 'civilized community' would abhor." Plaintiffs asserted that this was not just a breach of contract case, such as "an oversold airline seat or the failed purchase of a condominium." Plaintiffs also contend that defendants' actions were certainly directed at them where they would be the ones planning Honor's funeral and burial. Further, their allegations of severe emotional distress were sufficient because they were not merely grief, annoyance, or other petty triviality.

¶ 17 On February 6, 2017, the trial court granted in part and denied in part defendants' motion to dismiss, strike, or compel arbitration of plaintiffs' fourth amended complaint. The court dismissed plaintiffs' count III for IIED and count IV for negligent infliction of emotional distress, struck plaintiffs' class certification, and ordered defendants to answer plaintiffs' count VI for violation of the Consumer Fraud Act by February 27, 2017.

¶ 18 On March 8, 2017, defendants filed a motion for reconsideration and/or clarification of the order entered on February 6, 2017, requesting that the court reconsider and/or clarify whether plaintiffs' Consumer Fraud Act count was subject to the arbitration clause because the court's February 6, 2017, order was silent on that issue. On March 23, 2017, the court granted defendants' motion to reconsider and/or clarify, and dismissed plaintiffs' Consumer Fraud Act claim to arbitration without prejudice and over plaintiffs' objection. On April 21, 2017, plaintiffs filed a motion to reconsider the March 23, 2017, order, arguing that the Consumer Fraud Act count was distinct from the arbitrable claims that were previously dismissed by the trial court.

¶ 19 On June 1, 2017, the court granted plaintiffs' motion to reconsider, allowing the Consumer Fraud Act claim to remain in circuit court and extending the time for defendants to

answer that count until June 29, 2017. Defendants then filed their timely notice of interlocutory appeal on June 30, 2017, stating that they sought to appeal "the June 1, 2017 Order ***, granting Plaintiffs' Motion for Reconsideration of the Circuit Court's March 23, 2017 Order compelling arbitration of Plaintiff's Claim under the [Consumer Fraud Act]." This court issued its decision in appeal No. 1-17-1570 on September 8, 2017, which reversed the circuit court's decision that allowed plaintiffs' Consumer Fraud Act count to remain in the circuit court. See *Mogul v. SCI Illinois Services, Inc.*, 2017 IL App (1st) 171570-U, ¶ 24.

¶ 20 On September 22, 2017, the circuit court entered an order continuing the matter to October 26, 2017, for a case management conference. On October 26, 2017, the circuit court entered an order stating, "This matter, coming before the court for status, the court being fully advised, it is hereby ordered: This matter is dismissed without prejudice." Plaintiffs filed their notice of appeal on November 20, 2017, seeking to appeal the portion of the circuit court's February 6, 2017, order that dismissed plaintiffs' count III for IIED and count IV for negligent infliction of emotional distress, and the October 26, 2017, order dismissing the matter. On August 24, 2018, this court issued its decision in appeal No. 1-17-2929, finding that we lacked jurisdiction to determine the merits of plaintiffs' appeal "where the two orders appealed from were not final and appealable because the first order did not dispose of all claims and the subsequent order contained the words 'without prejudice.' " See *Mogul v. SCI Illinois Services, Inc.*, 2018 IL App (1st) 172929-U, ¶ 1.

¶ 21 On November 27, 2018, the trial court entered an order stating as follows:

> "1. Counts I, II, and V of plaintiffs' fourth amended complaint have previously been ordered to arbitration and therefore dismissed;

2. Count VI was previously dismissed on October 26, 2017; the court clarifies that said dismissal was for purposes of sending count VI to arbitration for arbitrability of count VI to be determined by an arbitrator; and

3. Counts III and IV are hereby dismissed with prejudice for reasons stated in the court's February 6, 2017 order."

¶ 22 Plaintiffs filed their notice of appeal on December 19, 2018.

¶ 23 ANALYSIS

¶ 24 Jurisdiction

¶ 25 Plaintiffs assert that we have jurisdiction pursuant to Supreme Court Rule 303 (eff. July 1, 2017), which provides that, "[t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from." Plaintiffs appeal from the February 6, 2017, order dismissing counts III and IV, the October 26, 2017, order dismissing the matter, and the November 27, 2018, order clarifying that the dismissal of counts III and IV was with prejudice.

¶ 26 In its response brief, defendants asserts:

"To the extent [p]laintiffs have waived any and all rights to arbitrate the claims previously ordered to arbitration by the [c]ircuit [c]ourt by failing to timely initiate arbitration proceedings, [d]efendants agree that the November 27, 2018 [o]rder is final and appealable and this [c]ourt has jurisdiction over the appeal. However, if [p]laintiffs contend they have not waived the right to arbitrate those claims, then the November 27, 2018 [o]rder is not final and appealable and this [c]ourt lacks jurisdiction over the appeal because neither the November 27, 2018 [o]rder nor the other two [o]rders from which [p]laintiffs appeal were final and appealable under Rule 303 ***."

¶ 27 In their reply, plaintiffs point out that the November 27, 2018, order disposed of all of their claims. That order did not stay any of their claims pending the outcome of arbitration; rather, that order dismissed the claims in their entirety. Further, plaintiffs argue that merely because certain claims that are not subject to this appeal were dismissed to arbitration does not divest this court with jurisdiction to review the IIED count, which was dismissed with prejudice. We agree with plaintiffs' position and reject defendants' contention that plaintiffs must waive any possible arbitration rights in order for this court to have jurisdiction.

¶ 28 When this case was previously before this court, we found that we lacked jurisdiction under Rule 303 because the February 6, 2017, order was entered well in advance of 30 days of plaintiffs' November 20, 2017, notice of appeal and was not instantly appealable anyway because it did not dispose of all of plaintiffs' claims. *Mogul*, 2018 IL App (1st) 172929-U, ¶ 12, 14. Additionally, we lacked jurisdiction over the October 26, 2017, order because it merely stated "[t]his matter is dismissed without prejudice," without any explanation as to what "matter" was referring. *Id.* We explained that "[i]f the [circuit] court intended the 'matter' to include the entirety of the case, and further intended that the dismissal be final and appealable, then there was no reason for the October 26, 2017, order to include 'without prejudice language.' " *Id.* ¶ 14. This finding was based on our supreme court's recognition that "the language 'without prejudice' in a dismissal order 'clearly manifests the intent of the court that the order not be considered final and appealable.' " *Id.* ¶ 11 (citing *O'Hara v. State Farm Mutual Automobile Insurance Co.*, 137 Ill. App. 3d 131, 134 (1985) (quoting *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982))).

¶ 29 Conversely, " '[a] dismissal with prejudice is usually considered a final judgment' [citation] as it indicates that the plaintiff will not be allowed to amend his complaint, thereby

terminating the litigation [citation]." *Fabian v. BGC Holdings, LP*, 2014 IL App (1st) 141576, ¶ 12. Here, the trial court's November 27, 2018, order expressly dismissed counts III (IIED) and IV (negligent infliction of emotional distress) with prejudice. Thus, unlike its October 26, 2017, order that generically dismissed the "matter" "without prejudice," the court's November 27, 2018, order left no doubt that plaintiffs no longer had the right to replead. "A judgment or order is 'final' if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy." *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997).

¶ 30 The November 27, 2018, order further clarified that counts I, II, and V were previously dismissed and ordered to arbitration, that count VI was also dismissed to arbitration (specifically so that an arbitrator could determine arbitrability of that count), and most significantly, that counts III and IV were dismissed with prejudice for the reasons stated in the February 6, 2017, order. This order made clear that none of plaintiffs' claims remained pending in the circuit court. As such, the November 27, 2018, order was a final and appealable order and we have jurisdiction to address the merits of this appeal. We also have jurisdiction to review the court's February 6, 2017, order[4] because it was subsumed into the final, appealable order entered on November 27, 2018. See *Weiss v. Waterhouse Securities, Inc.*, 335 Ill. App. 3d 875, 881-82 (2002) (recognizing that case law has established that "a non-appealable order may be reviewed where it is subsumed in an final, appealable ruling").

¶ 31 Dismissal of Count III for IIED

[4] We note that the court's reasoning for dismissal is ultimately of little consequence here, where our review is *de novo*. See *Chang Hyun Moon v. Kang Jun Liu*, 2015 IL App (1st) 143606, ¶ 11 (recognizing that upon review of a section 2-615 motion, "we may affirm the trial court's dismissal for any reason supported by the record, regardless of the trial court's reasoning").

¶ 32 The sole issue before this court is whether the circuit court erred in dismissing with prejudice plaintiffs' count III for IIED pursuant to section 2-615 of the Code of Civil Procedure. 720 ILCS 5/2-615 (West 2018).

¶ 33 When ruling on a section 2-615 motion to dismiss, the court must accept as true all well-pled facts in the complaint and all reasonable inferences that can be drawn therefrom. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 267 (2003). A motion to dismiss based on failure to state a claim presents the question of whether sufficient facts are contained in the complaint which, if established, could entitle the plaintiff to relief. *Id.* In making such a determination, the court is required to view the allegations in the complaint in the light most favorable to the plaintiff. *Id.* We review *de novo* a 2-615 dismissal. *Id.* at 266-67.

¶ 34 Our supreme court has set forth the elements necessary to bring an IIED claim as follows:

> "First, the conduct involved must be truly extreme and outrageous. Second, the actor must either intend that his conduct inflict emotional distress or know that there is at least a high probability that his conduct will cause severe emotional distress. Third, the conduct must in fact cause severe emotional distress." *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 50.

¶ 35 "If the complaint fails to make a sufficient showing of any one of the three elements, it fails as a matter of law." *Chang Hyun Moon*, 2015 IL App (1st) 143606, ¶ 23. Additionally, because claims of IIED can be easily made, we have recognized that "such claims must be 'specific, and detailed beyond what is normally considered permissible in pleading a tort action.' " *Id.* ¶ 24.

¶ 36 In its February 6, 2017, order, the circuit court rejected plaintiffs' allegation that the overselling of the plots was extreme and outrageous conduct because defendants knew that

Honor's family would not be able to be buried as planned based on its previous determination that "a mere breach of the burial plot contract does not rise to the level of extreme and outrageous behavior." The court also determined that "the fact [p]laintiffs were required to hastily bury their mother in a portion of the [c]emetery not reserved for those of the Jewish faith does not constitute extreme and outrageous conduct." The court further pointed out that although plaintiffs alleged that defendants were aware of their religious beliefs, "[p]laintiffs have not alleged any spiritual requirement the [d]efendants' actions violated." Specifically, "there is nothing alleged to show [d]efendants[']actions caused Honor to be buried in a sacrilegious manner or in an unsanctified location." The court concluded that although it did not doubt that plaintiffs were "distressed by this situation," simply suffering emotional distress did not make defendants' actions extreme and outrageous.

¶ 37 Plaintiffs assert that the trial court erred because the circumstances and context of this case, *i.e.*, defendants' position of power and authority, defendants' lack of legitimate objective, plaintiffs' religious beliefs, and plaintiffs' susceptibility to emotional distress the day after their mother's death, are sufficient to allege extreme and outrageous conduct. Defendants respond that plaintiffs' allegations are insufficient because plaintiffs have not alleged any facts establishing that defendants did, in fact, intentionally oversell or re-sell the burial plots. Defendants contend that "[a]t best, [p]laintiffs allege nothing more than an error that resulted in the unintentional reselling of one or more of the burial plots purchased by the decedent."

¶ 38 Our supreme court has recognized that the tort of IIED "does not extend to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' " *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988) (citing Restatement (Second) of Torts § 46, comment *d*, at 73 (1965)). Defendant's conduct must be extreme and outrageous, which has been explained as "only

aris[ing] in circumstances where the defendant's conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." (Internal quotation marks omitted.) *Chang Hyun Moon*, 2015 IL App (1st) 143606, ¶ 26. Whether conduct is extreme and outrageous is analyzed pursuant to an objective standard based on all the facts and circumstances. *Id.* ¶ 25.

¶ 39 A close review of the allegations of plaintiffs' fourth amended complaint makes clear to this court that defendants' alleged actions do not rise to the level of extreme and outrageous conduct. We find support for our conclusion in various cases from both our supreme court and this court, which we set forth below. Although the parties cite to many federal cases in their briefs, we find no need to address those cases because "as a general rule, the decisions of federal district or circuit courts are not binding on Illinois courts" (*Podromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 175 (2009)), especially when analyzing a tort claim, such as IIED, for which there is an abundance of Illinois case law.

¶ 40 Our supreme court has recognized that the outrageousness requirement is "necessarily difficult due to its vagueness," but has specifically looked to Illinois case law and the Restatement (Second) of Torts (1965) for guidance. *McGrath*, 126 Ill. 2d at 86. In *McGrath*, the court recognized that the degree of power or authority that a defendant has over the plaintiff can impact whether that defendant's conduct is outrageous—"[t]he more control which a defendant has over the plaintiff, the more likely that defendant's conduct will be deemed outrageous, particularly when the alleged conduct involves either a veiled or explicit threat to exercise such authority or power to a plaintiff's detriment." *Id.* at 86-87. Some examples of those who occupy positions of power are police officers, school authorities, landlords, and creditors. *Id.* at 87.

¶ 41 Plaintiffs assert that defendants held a position of power over them because defendants knew that plaintiffs needed to bury Honor immediately and did not have any other options available to them. Defendants point out that plaintiffs' fourth amended complaint does not allege that they held a position of power over plaintiffs and that this is an argument raised for the first time on appeal. Indeed, a review of plaintiffs' complaint and their response to the motion to dismiss indicate that plaintiffs have not raised this issue previously, and as such, it is forfeited. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 (recognizing that "arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal").

¶ 42 Forfeiture aside, we do not find plaintiffs' argument convincing. Plaintiffs argue that defendants held a position of power over them because while they were in an emotionally-distraught state, defendants told them that their mother had made a mistake and then pressured them to accept alternative plots that were of inferior quality. To support their assertion that defendants attempted to pressure or coerce them, plaintiffs allege that defendants "drove [Alyssa and Joey] around the cemetery attempting to convince them to choose a burial spot for Honor Mogul outside of Gan M'Nucha." However, such an allegation does not contain facts showing coercion—just that because there was no space in Gan M'Nucha, plaintiffs were required to look elsewhere. Plaintiffs do not allege any facts regarding actions that defendants took to "convince" them. Unlike *McGrath*, there are no allegations of veiled or explicit threats. Although plaintiffs were certainly under a time constraint, this not does automatically place defendants in a position of power over them. Plaintiffs were free to choose another cemetery or refuse defendants' offer of alternative plot locations.

¶ 43 Plaintiffs also argue that defendants' conduct was extreme and outrageous because they knew plaintiffs were particularly susceptible to emotional distress, as they had just suffered the

loss of their mother and defendants were aware of their Jewish faith and accompanying need for immediate burial. Plaintiffs rely on *Cohen v. Smith*, 269 Ill. App. 3d 1087 (1995), as support. In *Cohen*, a female patient and her husband brought suit against a hospital for battery, intentional infliction of emotional distress, and violation of the Right of Conscience Act. *Id.* at 1089. The patient was admitted to the hospital to deliver her baby and was informed she need a cesarean section, so she and her husband allegedly informed her physician, who then told the hospital staff, that the couple's religious beliefs prohibited the patient from being seen unclothed by a man. *Id.* at 1088. The patient's doctor informed her that their religious convictions would be respected. *Id.* However, during the patient's surgery, a male nurse allegedly observed and touched her naked body. *Id.* at 1089. On appeal, the court concluded that "[a]ccepting as true the plaintiffs' allegations that they informed defendant of their religious beliefs and that defendants persisted in treating [the patient] as they would have treated a patient without those beliefs, we conclude that the trial court erred in dismissing both the battery and the [IIED] counts." *Id.* at 1095-96.

¶ 44 The court in *Cohen* reached its conclusion by acknowledging the importance of the fact that both the male nurse and the hospital were informed in advance of the plaintiffs' religious convictions, as those convictions might not be similar to most people who enter the hospital to give birth. *Id.* at 1094. Counsel for the plaintiffs had admitted that if the patient was admitted to the hospital in an emergency situation and had not had the opportunity to indicate her religious beliefs, then a battery claim would not exist. *Id.* Further, because the plaintiffs' religious views were not widely held in the community, they could state a claim against the defendants "only if the plaintiffs pled that the defendants had knowledge of those beliefs." *Id.* The plaintiffs asserted that they had satisfied such a pleading requirement because their amended complaint

alleged that the male nurse "requested the presence of the Murphysboro City Police at the [h]ospital to prevent [the patient's husband] from objecting to [the male nurse's] presence in the operating room while [the patient] was naked, and to physically restrain [the patient's husband] if necessary." *Id.*

¶ 45 We believe the *Cohen* plaintiffs' allegations differ dramatically from what plaintiffs have alleged here. There, the plaintiffs alleged that the defendants' actions were intentional because the male nurse knew their religious beliefs, yet went so far as to have the police on standby, ready to restrain the patient's husband should he object. This is undoubtedly intentional conduct. Further, it shows a complete disregard and lack of respect for the plaintiffs' religion-based wishes. The plaintiffs' allegations contained facts showing that the male nurse was aware of their religious views, intentionally ignored those views, and took the extreme step of having police nearby in case the patient's husband found out the male nurse was viewing and touching the patient's naked body. There are simply no comparable allegations of intent or extreme conduct present here that mirror the *Cohen* defendants' awareness of the plaintiffs' peculiar susceptibility to emotional distress.

¶ 46 Instead, we find this court's decision in *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, to be more analogous. There, the plaintiff brought an IIED claim against her condominium association based on the association's insistence that she move out of her unit prior to the start of repair work that was necessary due to improper settlement of the soil beneath and her around her unit that caused the walls to fail. *Id.* ¶ 9. The association had informed the plaintiff that it would cover the cost of repairs. *Id.* The plaintiff's fourth amended complaint further alleged that the plaintiff moved all of her belongings out of her unit, but the association failed to take proper action to make repairs after stripping her unit of carpeting,

utilities, cabinets, and other furnishings, which rendered her unit uninhabitable. *Id.* ¶ 10. The work on the plaintiff's unit did not begin until one year after the date she was told it would begin. *Id.* The circuit court granted the association's section 2-615 motion to dismiss. *Id.* ¶ 12, 45.

¶ 47 On appeal, the plaintiff argued that she had sufficiently alleged extreme and outrageous conduct because the association had abused its position of power similar to if the parties were in a landlord-tenant relationship. *Id.* ¶ 40. In affirming the dismissal, the court noted that "[p]olice officers, school authorities, landlords, and collecting creditors are included in a nonexclusive list of individuals who, while exercising their authority, can become liable for IIED where there are extreme abuses of their positions." *Id.* The court also recognized that other cases in which IIED has been sufficiently alleged include "abuses of power by employers, creditors, or financial institutions." *Id.* The court concluded that it did not find the fiduciary relationship before it—between unit owner and condominium association (and its board members)—was abused by the association in such a manner as to constitute extreme and outrageous conduct. *Id.* ¶ 41. The court explained that although the association's conduct was "aggravating and confounding," the documents attached to the plaintiff's complaint showed that its actions were undertaken with legal objectives in mind, such as informing the plaintiff that the association would pay for the repairs and receiving bids for the repairs. *Id.* Further, the court found that although the plaintiff had a claim for breach of fiduciary duty, she failed to allege facts demonstrating that the association did not have a legal objective when attempting to remedy the cause of the damage. *Id.*

¶ 48 Like the plaintiff in *Duffy*, plaintiffs here have failed to allege extreme and outrageous conduct through an abuse of a position of authority. We find that the relationship between plaintiffs and defendants—one which stems entirely from a contract—is more akin to the

relationship between a unit owner and a condominium association, than that of a police officer and sexual assault victim (*Doe v. Calumet City*, 161 Ill. 2d 374 (1994)), a major financial institution and an unsavvy investor (*McGrath*, 126 Ill. 2d 78), or an employer and an employee (*Pavilon v. Kaferly*, 204 Ill. App. 3d 235 (1990) and *Milton v. Illinois Bell Telephone Co.*, 101 Ill. App. 3d 75 (1981)). Also like the defendants in *Duffy*, defendants in this case attempted to remedy the situation. Plaintiffs allege that defendants offered plots of inferior quality; however, we do not find such action to be an extreme abuse of their position that rises to the level of extreme and outrageous conduct.

¶ 49 The decision in *Duffy* also hinged on the fact that the plaintiff did not allege that the association was "aware she was particularly susceptible to emotional distress due to physical or mental impairment." *Id.* ¶ 42. Rather, the plaintiff merely alleged that the association knew with a high probability that its conduct would cause such distress. *Id.* Here, plaintiffs have not alleged that they suffer from a physical or mental impairment. Instead, they assert that defendants were aware of their particular susceptibility due to the fact that their mother had recently passed away. We find that this does not mirror the typical situation in which a plaintiff sufficiently establishes that he is particularly susceptible to emotional distress. Defendants are engaged in a facet of the funeral business and undoubtedly encounter people who are in varying forms of grief on a regular basis. Plaintiffs' allegations that defendants knew or should have known that it was reasonably foreseeable that they would be particularly susceptible to emotional distress because of Honor's passing are insufficient where plaintiffs have failed to sufficiently allege that defendants' conduct was intentional.

¶ 50 The crux of plaintiffs' allegations that defendants' conduct was extreme and outrageous is that defendants "intentionally" oversold or resold the plots originally purchased by Honor.

Plaintiffs repeatedly allege that defendants' actions were intentional. However, as defendants point out, plaintiffs' allegations are conclusory and do not contain sufficient facts to support such a conclusion. For example, plaintiffs' brief asserts that defendants "lied to cover their tracks" and cites to a page of the record containing general allegations of its complaint. Specifically, that page of the complaint stated, "Initially, the [d]efendants did not admit that they had oversold the burial plots but attempted to blame Honor Mogul. This was intentional and a false statement. Defendants later admitted that they oversold the Gan M'Nucha." However, these allegations do not contain any facts supporting the conclusion that defendants acted intentionally, in contrast to the specific facts alleged in *Cohen*. Plaintiffs do not allege specific statements or misrepresentations that support the conclusion that defendants intentionally oversold the plots. Plaintiffs' theory of this case is that defendants intentionally oversold the plots that they originally sold to Honor in order to make a profit. However, the facts alleged do not substantiate this conclusion. Plaintiffs assert a nefarious intent existed, but do not set forth facts in support of that assertion.

¶ 51 Plaintiffs also rely on *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 1, where the issue before the court was "whether a plaintiff bringing a cause of action for tortious interference with the right to possess a corpse must allege facts showing that such interference resulted from the defendant security company's willful and wanton misconduct." Plaintiffs assert that *Cochran* provides instruction because it shows the importance of protecting the right of a decedent's next of kin to make an appropriate burial. Even if plaintiffs had alleged that they were unable to bury their mother in an appropriate manner, which they have not done, we disagree that *Cochran* applies here.

¶ 52 In *Cochran*, the plaintiff sought emotional distress damages based on allegations of tortious interference with the right to possess a corpse (*id.* ¶ 5), which is an entirely distinct cause of action (*id.* ¶ 24) and does not contain any of the same elements as a claim for IIED. The cause of action in *Cochran* "rests upon the principle that 'while in the ordinary sense, there is no property right in a dead body, a right of possession of a decedent's remains devolves upon the next of kin in order to make appropriate disposition thereof, where by burial or otherwise.' " *Id.* ¶ 12. In this case, there are no allegations that plaintiffs were denied the right to possess or bury Honor's body, as was the basis of the claim there. Thus, the court's reasoning and analysis of the tort at issue there does not impact our analysis of plaintiffs' claim for IIED.

¶ 53 As a final point, we emphasize that plaintiffs do not allege that their mother was not, in fact, buried in a manner consistent with the Jewish faith. Instead, plaintiffs allege that she was not able to be buried in accordance with the terms of the contract she entered into with defendants and that plaintiffs suffered more grief than they were already experiencing due to her passing. While this is undoubtedly frustrating and possibly deserving of some form of restitution, it does not rise to the heightened level of conduct necessary to sufficiently allege extreme and outrageous behavior in an IIED claim.

¶ 54 Ultimately, we conclude that plaintiffs have failed to allege extreme and outrageous conduct. Although plaintiffs consistently refer to defendants' conduct as intentional, even when viewing the fourth amended complaint in a light most favorable to plaintiffs, they have not alleged facts to support the conclusion that defendants' actions were intentional. Similarly, plaintiffs have failed to allege that defendants engaged in extreme and outrageous conduct. Plaintiffs have not convinced this court that defendants knew they were particularly susceptible to emotional distress or that defendants were in a position of power that rendered their conduct

"beyond all possible bounds of decency." *Schweihs*, 2016 IL 120041, ¶ 51. Having found that plaintiffs have failed to allege a necessary element—*i.e.*, extreme and outrageous conduct—their IIED claim fails as a matter of law, rendering dismissal proper. See *Chang Hyun Moon*, 2015 IL App (1st) 143606, ¶ 23 ("If the complaint fails to make a sufficient showing of any one of the three elements, it fails as a matter of law.").

¶ 55 Dismissal with Prejudice

¶ 56 As alternative relief, plaintiffs argue that the trial court could have dismissed their IIED claim without prejudice and with leave to plead more specific facts. We find that the trial court's dismissal with prejudice was proper in this case. In reviewing the sufficiency of a complaint, we accept as true all well-pled facts, draw all reasonable inferences therefrom, and construe the allegations in a light most favorable to the plaintiff. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "Thus, a cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Id.* Although plaintiffs are not required to present evidence in the complaint, they must allege facts sufficient to bring a claim within a legally cognizable cause of action, not simply conclusions. (Internal citations omitted.) *Id.* at 429-30.

¶ 57 Here, we have already determined that the crux of plaintiffs' allegations do not rise to the level of extreme and outrageous conduct and thus no cause of action could have been stated based on the circumstances of this case. Plaintiffs' complaint contained numerous conclusions without factual allegations in support, which was fatal to their claim. We further find the trial court's dismissal with prejudice was proper where plaintiffs had already been given numerous opportunities to amend their complaint to include sufficient facts. See *Ahmed v. Pickwick Place Owners' Ass'n*, 385 Ill. App. 3d 874, 882 (2008). The allegations contained in each iteration of

plaintiffs' complaint have not been substantially different (*Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1061 (2002)), and as such, dismissal with prejudice was proper.

¶ 58 CONCLUSION

¶ 59 Based on the foregoing, we affirm the trial court's dismissal with prejudice of plaintiffs' count III for IIED for failure to state a claim.

¶ 60 Affirmed.