2011 IL App (4th) 100988-U

Filed 10/05/2011

NO. 4-10-0988

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

MARY CHRISTINE MILLER, MAILYN HILL, and PATTY HALE,	)	Appeal from
	)	Circuit Court of
Plaintiffs-Appellants,	)	Morgan County
v.	)	No. 08L37
MacMURRAY COLLEGE,	)	
Defendant-Appellee.	)	Honorable
	)	Richard T. Mitchell,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justice Turner concurred in the judgment.
Justice Cook dissented.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding that (1) the trial court did not refuse to apply section 2 of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2 (West 2008)) to the defendant and (2) the plaintiffs failed to state a cause of action for breach of contract.

¶ 2 In February 2010, plaintiffs, Mary Christine Miller and Mailyn Hill, filed a third amended complaint, alleging that defendant, MacMurray College, (1) failed to fulfill its contractual obligation to provide the appropriate education and experiences associated with its Interpreter Training Program (ITP) and (2) engaged in unfair and deceptive practices in violation of section 2 of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2 (West 2008)). In June 2010, coplaintiff, Patty Hale, filed an amendment to the third amended complaint, adding herself as a party.

¶ 3 In September 2010, the college filed a motion to dismiss plaintiffs' third amended

complaint (as amended) pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), arguing that plaintiffs' suit was merely a veiled claim for "educational malpractice." Following a November 2010 hearing, the trial court granted the college's motion and dismissed plaintiffs' suit with prejudice.

¶ 4 Plaintiffs appeal, arguing that the trial court erred by (1) refusing to apply the Act to the college, (2) dismissing their respective contract claims, and (3) characterizing their complaint as a claim for educational malpractice. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 The following facts were gleaned from the parties' pleadings and supporting documents filed with the trial court.

¶ 7 A. The Procedural Background in this Case

¶ 8 Although the issues before this court concern only the trial court's dismissal of plaintiffs' third amended complaint (as amended), we briefly describe the pertinent proceedings that occurred prior to that dismissal to place the issues before us in their proper context.

¶ 9 In October 2008, Miller filed a complaint, claiming (1) a breach of contract, (2) negligence, and (3) consumer fraud. Miller alleged that in August 2002, she enrolled in the college's ITP curriculum, intending to become a certified sign language interpreter. Miller, however, was later unable to pass a test to obtain that certification, which she attributed to the college's failure to adhere to the representations the college made in its course catalog. Miller claimed that she suffered damages in excess of $50,000 because she needed to hire tutors and attend instructional seminars to pass the certification test, which caused her to lose wages she could have earned if she had been certified upon graduation. In February 2009, based on an

agreement by the parties, the trial court granted Miller leave to amend her complaint. (Although not clear form the record, Hill was later added as a party.)

¶ 10 Shortly thereafter, Miller and Hill filed a first amended complaint, each alleging (1) a breach of contract (counts I and IV), (2) negligence (counts II and V), and (3) consumer fraud in violation of the Act (counts III and VI). Essentially, Miller and Hill both claimed–as Miller did previously–that the college failed to provide them the proper training to become certified sign language interpreters under the college's ITP curriculum.

¶ 11 In March 2009, the college filed a motion to dismiss first amended complaint. Following a June 2009 hearing on that motion, the trial court (1) dismissed with prejudice the negligence and consumer-fraud claims and (2) granted Miller and Hill leave to amend their breach-of-contract claims.

¶ 12 In July 2009, Miller and Hill filed a (1) motion to reconsider and (2) second amended complaint. In their second amended complaint, Miller and Hill each alleged a breach-of-contract claim. Specifically, Miller and Hill claimed that the college failed to provide the 15-credit hour, 300-hour "practicum" as explained in the college's course catalog. In support of that claim, Miller and Hill appended (1) the pertinent portion of the college's course catalog and (2) a Fall 2006 syllabus for ITP course "275/475–Practicum." The "grading criteria" section of the syllabus informed enrolled students of the points required to achieve a certain grade. The 1,000 maximum available points was comprised, in part, of 600 points for "Observation and Interpreting Hours (300)."

¶ 13 Later that same month, the college filed a motion to dismiss the second amended complaint. Following a January 2010 hearing on the aforementioned filings, the trial court

entered, in part, the following written order:

> "Counts II, III, V and VI of the first amended complaint entitled 'consumer fraud' and 'negligence' were dismissed. The Court based the dismissal on the basis that [Miller and Hill] had failed to plead sufficient facts to state a recognizable cause of action. The Court found that the first amended complaint represented a veiled attempt at alleging a claim for 'educational malpractice.' The Court has not been presented with any additional facts that would support a reconsideration of its ruling. Therefore, the *** motion to reconsider is denied.
>
> *** [T]he Court agrees with [Miller and Hill] that a cause of action for a breach of contract can exist. However, the *** attempt to allege sufficient facts to state a cause of action for breach of contract falls short. [Miller and Hill] are asking the Court to substitute the Court's subjective judgment in place of the educator. This is nothing more than an attempt to disguise a claim for 'educational malpractice.' Therefore, the [college's] motion to dismiss Counts I and Counts II *** is granted."

¶ 14 B. The Circumstances Surrounding Plaintiffs' Third Amended Complaint (As Amended)

¶ 15 1. *The Third Amended Complaint Filed by Miller and Hill*

¶ 16 In February 2010, Miller and Hill filed a motion for leave to file third amended complaint. Appended to that motion was their third amended complaint in which they each

alleged (1) a breach of contract (counts I and III) and (2) unfair and deceptive practices in violation of the Act (counts II and IV).

¶ 17 a. Miller's Claims

¶ 18 In September 2002, Miller began attending classes in the college's ITP curriculum, which later required Miller to register for ITP courses 410 and 475 at a cost of $8,500. In count I, Miller alleged that with regard to ITP 410, the college agreed to provide one hour of instruction on Mondays, Wednesdays, and Fridays during the Fall 2005 semester but cancelled the Wednesday and Friday classes immediately after she paid her tuition. Miller also alleged that "[c]ontrary to its agreement, [the college] failed to provide the 300 hour practicum" offered by ITP 475 in that the college did not furnish (1) opportunities to apply her knowledge, skill, and expertise in a variety of interpreting settings in either education, business, public service agencies, or as a freelance interpreter; (2) opportunities to participate in supervised interpreting fieldwork; (3) training in linguistics or addressing ethical questions; and (4) adequate facilities and resources to perform course work.

¶ 19 Miller contended that as a direct result of the college's breach, her damages exceeded $50,000. In particular, Miller claimed that she was required to expend additional financial resources (1) for the opportunity to apply her interpreting knowledge, skills, and experience in a variety of interpretive settings; (2) "to hire at great expense supervised fieldwork and training in the linguistics and ethical questions arising during Practicum assignments"; and (3) to obtain the experience the college denied her by its "failure and refusal to deliver the experience promised by the Practicum." Miller also alleged damages for loss of earnings, tuition, fees, travel, child support, and related expenses she incurred in "endeavoring to be made

whole."

¶ 20 Under her second count, Miller also claimed the following violation of section 2 of the Act:

> "[C]ontrary to the Act and its prohibitions, *** [the college] knowingly engaged in unfair and deceptive practices in that it wholly failed and refused to deliver the educational services contracted to be provided *** as described, promised and represented in this description of Courses 410 and 475."

¶ 21 In addition to the damages claimed in count I, Miller also claimed attorney fees and "punitive and exemplary damages in an amount sufficient to punish [the college] and deter others similarly situated from engaging in like misconduct."

¶ 22 b. Hill's Claims

¶ 23 In March 2008, Hill enrolled in the college's ITP curriculum and later registered for ITP 475, which cost her "over $8,300" in tuition. Hill (1) alleged that the college failed to provide the 300 hour practicum" offered by ITP 475 (count III) for the same reasons Miller listed and (2) claimed damages in excess of $50,000. In addition, Hill's consumer-fraud claim (count IV) was essentially the same as Miller's corresponding claim.

¶ 24 2. *The College's Motions and Plaintiffs' Third Amended Complaint (As Amended)*

¶ 25 In March 2010, the college filed an objection to motion for leave to file third amended complaint or alternatively a motion to dismiss the contract counts of third amended complaint. The college also filed a separate motion to dismiss the consumer-fraud counts alleged under the Act. Following a May 2010 hearing on the motion for leave to file third

amended complaint and the college's motions, the trial court entered the following written order (1) granting Miller and Hill leave to file their respective breach-of-contract claims and (2) denying Miller and Hill leave to file their respective consumer-fraud claims because the court had previously dismissed those claims with prejudice and denied their subsequent motion to reconsider. The court then scheduled a hearing on the college's alternative motion to dismiss the contract claims of the third amended complaint.

¶ 26 Later that same month–while the college's dismissal motion was pending–Hale filed a motion for leave to file an amendment to the third amended complaint, seeking to add herself as a party to the suit. Appended to her motion was an amendment to third amended complaint in which Hale alleged (1) a breach of contract (count V) and (2) unfair and deceptive practices in violation of section 2 of the Act (count VI). With minor exceptions, Hale's claims were identical to the claims alleged by Miller and Hill in their third amended complaint.

¶ 27 Contemporaneous with Hale's filing, Miller and Hill filed a "motion to reconsider or clarify," essentially seeking leave to amend their consumer-fraud claims. In support of their motion, Miller and Hill paraphrased the following exchange that took place immediately following the trial court's earlier dismissal of those counts:

> "[COUNSEL]: Do I *** correctly understand that the Court is *** holding that, as a matter of law, no cause of action can be pleaded under the Act against an educational institution by a student ***?
>
> [THE COURT: The Court] did not intend to go that far.
>
> [COUNSEL]: I am trying to *** understand because the

dismissal of those counts with prejudice seemingly says that no cause of action can be pleaded under any circumstance.

[THE COURT: The Court] found that under the pleading before the Court, while an action could be filed, that the allegations made by [Miller and Hill] did not sufficiently plead such an action ***."

¶ 28 Following a June 2010 hearing on the aforementioned outstanding motions, the trial court entered a written order (1) granting Hale leave to file her breach-of-contract claim, (2) denying Hill leave to file a consumer-fraud claim for the same reasons the court denied the consumer-fraud claims Miller and Hill moved to include in their third amended complaint, (3) denying the motion to reconsider or clarify filed by Miller and Hill, and (4) denying the college's motion to dismiss plaintiffs' breach-of-contract claims. (At that hearing, the court also considered the college's motion to dismiss contract claims applicable to Hale's breach-of-contract claim.)

¶ 29 Later that same month, the college filed a motion to reconsider. At an August 2010 hearing on the college's motion, the trial court provided the following guidance to plaintiffs regarding how the court interpreted their respective breach-of-contract claims:

"[This Court does not] intend to have a Complaint stand for educational malpractice. [The Court is] not going to make subjective findings about classes. *** [W]hat this count for breach of contract says to [the Court] and whether *** it could be proven or not, that course 410 and 475[,] which was the 300 practicum,

> was it provided? [It is] not, was it good? Was it bad? How was it done? Was it provided? And that is the objective basis that [the Court determines] in allowing a breach of contract. Now, *ad damnum* on this has to be obviously modified and we need to know what *** damages *** you are claiming. *** [Y]ou are dealing with two courses that you are saying you didn't receive what the [college] said in the course, but to [this Court] that is objective not a subjective matter. [This Court is] not going to judge whether it was good or bad or that the instructor did it in an improper manner, that is not for [this Court] to decide."

Thereafter, the court entered a written order (1) denying the college's motion to reconsider and (2) granting plaintiffs 14 days to amend their respective prayers for relief.

¶ 30 Shortly thereafter, plaintiffs filed an "amendment to third amended complaint," modifying only their respective prayers for relief. Specifically, Miller, Hill, and Hale each alleged damages in excess of $50,000, which included but was not limited to the following: (1) expenses incurred in acquiring opportunities to apply knowledge, skills, and experience in a variety of interpretive settings; (2) expenses incurred to hire supervised fieldwork and training; (3) any and all other expenses incurred to acquire, hire, and obtain the experience the college promised but failed and refused to deliver; (4) loss of earning occasioned by the college's failure to perform its agreements; (5) a full refund of all tuition and fees paid; and (6) related travel expenses. In addition, Miller claimed child-care costs necessitated by the college's breach.

¶ 31 In September 2010, the college filed a motion to dismiss third amended complaint

(as amended). At a November 2010 hearing on the college's motion, the trial court addressed plaintiffs' counsel as follows:

> "THE COURT: *** [W]hen we were here in August[, the Court] made [it] very clear, *** first of all, it was a close question, but you felt that you had stated a[] *** breach of contract. But [the Court] also said that the *ad damnum* was wrong and you needed to correct it, because all these other things you've alleged are not recoverable *** on the contract. You have insisted to, again, allege damages which would probably only be recoverable if *** there were an educational malpractice, and we don't recognize that in Illinois. *** [The Court has] to agree with [the college. The Court thinks] you're just trying to get around the fact that the Court dismissed the educational malpractice.
>
> [PLAINTIFFS' COUNSEL]: *** [R]espectfully[,] I think we were pleading foreseeable damages from the breach of contract.
>
> THE COURT: [The Court] made it *** clear that the damages, refunds of all tuition and fees, *** all expenses related to travel, all expenses and costs of child care, goes way beyond *** contract damages, and [this Court is] going to dismiss the case. [The Court] gave you an opportunity over and over. [The Court] *** made it very clear in August *** and you continue to ignore

that directive, and have, again, gone way beyond what the Court had allowed you to do, so [the Court is] going to dismiss the case.

***

[THE COLLEGE]: Your honor, will that be with prejudice.

THE COURT: Yes ***."

¶ 32 This appeal followed.

¶ 33 II. THE TRIAL COURT'S DISMISSAL OF PLAINTIFFS' THIRD AMENDED COMPLAINT (AS AMENDED)

¶ 34 Plaintiffs argue that the trial court erred by (1) refusing to apply the Act to the college, (2) dismissing their contract counts, and (3) characterizing their complaint as a claim for educational malpractice instead of a breach of contract. We address plaintiffs' arguments in turn.

¶ 35 A. A Section 2-615 Motion To Dismiss and the Standard of Review

¶ 36 A motion to dismiss under section 2-615 of the Civil Code (735 ILCS 5/2-615 (West 2008)) "challenges the legal sufficiency of a complaint based on defects apparent on its face." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429, 856 N.E.2d 1048, 1053 (2006). When reviewing a trial court's dismissal of a complaint under section 2-615 of the Civil Code, we accept as true all well-pleaded facts contained within the complaint along with the reasonable inferences that may be drawn therefrom in the light most favorable to the plaintiff. *Napleton v. Village of Hinsdale*, 374 Ill. App. 3d 1098, 1101, 872 N.E.2d 23, 27 (2007). This court, however, will disregard mere conclusions of law or facts not supported by specific factual allegations. *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 282, 856 N.E.2d 542, 546

(2006). We review *de novo* a trial court's ruling under section 2-615 of the Civil Code. *Poruba v. Poruba*, 396 Ill. App. 3d 214, 215, 919 N.E.2d 1066, 1067 (2009).

¶ 37 B. Plaintiffs' Respective Claims Under the Act

¶ 38 Plaintiffs argue that the trial court erred by refusing to apply the Act to the college. Because the record before us shows that the court did not refuse to apply the Act to the college, we disagree.

¶ 39 In support of their contention, plaintiffs refer to the trial court's (1) June 2009 order, in which the trial court dismissed with prejudice the negligence and consumer-fraud claims alleged by Miller and Hill in their first amended complaint and (2) June 2010 order, denying (a) Hale leave to file a consumer-fraud claim and (b) the motion to reconsider or clarify, in which Miller and Hill sought leave to amend the consumer-fraud claims the court had denied in their motion for leave to file their third amended complaint. Relying on these orders, plaintiffs assert that "[t]he court apparently refused to apply the Act to the [college] as an educational institution as a matter of law. No other explanation is given." Contrary to plaintiffs' assertions, however, the record is devoid of any support for their position that the court dismissed their consumer-fraud claims because the college was not subject to the provisions of the Act.

¶ 40 In this case, the record clearly shows that in its June 2010 order, the trial court found that Hale's breach-of-contract and consumer-fraud claims were essentially identical to those pleaded by Miller and Hill in their third amended complaint. Having so found, the court denied Hale's consumer-fraud claim for the same reasons that the court denied Miller and Hill leave to file their consumer-fraud claims in their third amended complaint–namely, that the court

had previously dismissed the consumer-fraud counts Miller and Hill alleged in their first amended complaint with prejudice and denied their subsequent motion to reconsider because (1) they failed to plead sufficient facts to state a cognizable cause of action and (2) those counts represented a veiled attempt at alleging a claim for educational malpractice. In addition, we note that in their May 2010 motion to reconsider and clarify, Miller and Hill paraphrase an exchange in which the court expressly disabuses them of the notion that it denied leave to file their respective consumer-fraud claims because the court believed that, as a matter of law, a student could not bring a consumer-fraud action against an educational institution pursuant to the Act.

¶ 41 Accordingly, we reject plaintiffs' argument that the court erred by refusing to apply the Act to the college.

¶ 42 C. Plaintiffs' Respective Breach-of-Contract Claims

¶ 43 Plaintiffs also argue that the trial court erred by (1) dismissing their respective breach-of-contract claims and (2) characterizing their complaint as a claim for educational malpractice instead of a breach of contract. Because we disagree with plaintiffs' first claim, we need not address the merits of their second claim.

¶ 44 The elements of a breach-of-contract claim are "(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff." *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 823, 835 N.E.2d 61, 69 (2005).

¶ 45 We first note that in its brief to this court, the college, citing *Ross v. Creighton University*, 957 F.2d 410, 417 (7th Cir. 1992), concedes that if an educational institution makes an "identifiable contractual promise" that the institution failed to honor or takes a student's

money and then fails to provide any education or fails to deliver a set number of hours of education that it was contractually obligated to provide, a breach-of-contract action may be available to the affected student. In this regard, plaintiffs contend that in their breach-of-contract claim, "they each point to identifiable contractual promises" that the college failed to fulfill as described in their course catalog. To that end, we turn to plaintiffs' breach-of-contract claims in the context of the college's course description.

¶ 46 1. *Miller's Claim with Regard to ITP Course 410*

¶ 47 As previously noted, Miller claims in count I of her third amended complaint that with regard to ITP 410, the college agreed to provide one hour of instruction on Mondays, Wednesdays, and Fridays during the Fall 2005 semester but cancelled the Wednesday and Friday classes immediately after she paid her tuition.

¶ 48 The college's course catalog provides the following description of ITP 410:

> "ITP 410. Interpreting V. (3) Business aspects of interpreting: resumes, cover letters, business cards, portfolios and proper etiquette. Review of ethics in various situations. Prerequisite: ITP 310 or permission of instructor."

¶ 49 In this case, aside from the college's offer to provide (1) instruction on specific topics related to the business aspects of interpreting and (2) three credit hours upon successful course completion, the catalog description is devoid of any contractual offer from the college that it would schedule its classes in the manner Miller claims. Moreover, Miller failed to append to her complaint any documentation to substantiate her claim that the college contractually agreed to provide three hours of instruction per week during the Fall 2005 semester. See *Ross*,

957 F.2d at 416 ("The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract"). However, even if we accept as true Miller's allegation concerning the absence of one hour of instruction on Wednesdays and Fridays, Miller fails to specifically allege how she was injured by that omission. Our review of Miller's breach-of-contract claim reveals that her alleged damages relate exclusively to her breach-of-contract claim with regard to ITP 475. Thus, we conclude that Miller failed to state a cause of action for breach of contract with regard to ITP 410.

¶ 50 2. *Plaintiffs' Claim with Regards to ITP Course 475*

¶ 51 In their third amended complaint (as amended), plaintiffs make essentially the same breach-of-contract claim with regard to ITP course 475, as follows:

> "Contrary to its agreement, [the college] failed to provide the 300 hour practicum in that [the college]:
>
> (a) failed to provide [plaintiffs] opportunities to apply [their] knowledge, skill, and expertise in a variety of interpreting settings in either education, business, public service agencies, or as a freelance interpreter;
>
> (b) failed to provide [plaintiffs] with opportunities to participate in supervised interpreting field work[*sic*];
>
> (c) failed to provide training in linguistics or addressing ethical questions that may arise during

practicum assignments; [and]

(d) failed to provide adequate facilities and resources for the performance of course work as agreed."

¶ 52 The college's course catalog provides the following description of ITP 475:

"ITP 475. Practicum. (15) This course provides opportunities for students to apply their knowledge, skills, and experience in a variety of interpreting settings in education, business, public service agencies, and as free-lance interpreters. Students participate in supervised interpreting field work[*sic*] and receive training on linguistics and ethical questions that may arise during practicum assignments."

¶ 53 In this case, plaintiffs, relying on the course catalog, contend that the college breached its contractual obligation when it failed to provide the "300-hour practicum." We note, however, that as written, the course catalog does not mention any hourly commitment that the college was contractually obligated to provide nor have plaintiffs appended any other credible documentation that imposes such a commitment upon the college. As best we can tell, the 300-hour metric originated from a Fall 2006 syllabus for ITP course 275/475 appended to the second amended complaint filed by Miller and Hill, explaining that of the maximum 1,000 available points for the course, a student could acquire up to 600 points by performing 300 "observation and interpreting hours" to earn a certain grade. However, such documentation does not contractually obligate the college but instead, is a variable metric devised by the individual

course instructor commensurate with the overall goals of a course that imposes a requirement on the student and is subject to change based on an instructor's individual grading style or other extrinsic factors unrelated to an educational institution's contractual obligation to its students.

¶ 54 As we previously noted, plaintiffs' breach-of-contract claims are couched in the following terms: (1) failure to provide opportunities, (2) failure to provide training, and (3) failure to provide adequate facilities. We agree, however, with the trial court that absent an objective metric such as (1) failure to provide 30 of 40 contracted skills, (2) failure to provide any of the six training skills listed in the catalog, or (3) failure to provide the ITP facility as contractually obligated, our review of such a claim would require subjective qualitative judgments instead of the preferred objective quantitative measurements, which would lead to appropriate and definitive remedies.

¶ 55 Here, the inferences to be garnered from plaintiffs' respective breach-of-contract claim is that the college failed to provide an effective education, as evidenced by the manner in which plaintiffs chose to list their damages. If, for instance, plaintiffs had properly alleged that the college failed to provide ITP 475 *in toto* despite their full tuition payment–which we note ranged from $8,300 to $8,500 (Hale did not provide a monetary amount)–then plaintiffs would most likely have had a valid breach-of-contract claim in which they could recover their tuition payment. Here, plaintiffs alleged that in failing to provide opportunities, training, and adequate facilities for one course–ITP 475–they suffered damages in excess of $50,000 because they had to seek outside assistance to become certified sign language interpreters. In other words, because the college's ITP curriculum failed to meet plaintiffs' expectations, they sought other education and now are seeking to recoup those additional expenses. Such claims, as the trial

court recognized, are not the proper remedy for a breach-of-contract claim. Therefore, we conclude that plaintiffs failed to state a cause of action for breach of contract with regard to ITP 475.

¶ 56 In so concluding, we need not address plaintiffs remaining argument that the trial court erred by characterizing their complaint as a claim for educational malpractice instead of a breach of contract. See *Tilschner v. Spangler*, 409 Ill. App. 3d 988, 990, 949 N.E.2d 688, 690 (2011) (because a section 2-615 motion to dismiss does not require the court to weigh findings of fact or determine credibility, this court is not required to defer to the trial court's judgment).

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm the trial court's judgment.

¶ 59 Affirmed.

¶ 60 JUSTICE COOK, dissenting:

¶ 61 I respectfully dissent. I would reverse and remand with directions to allow the various counts to go forward.

¶ 62 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. *Canel v. Topinka*, 212 Ill. 2d 311, 318, 818 N.E.2d 311, 317 (2004). The allegations of the complaint must be viewed in a light most favorable to the plaintiff. *Canel*, 212 Ill. 2d at 317, 818 N.E.2d at 317. The plaintiff is not required to plead evidence, only ultimate facts. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348, 748 N.E.2d 724, 733 (2003). When ruling on a section 2-615 motion, the court may consider only the allegations in the pleadings; it is inappropriate for defendant to attempt to argue facts outside the pleadings. *Winters v. Wangler*, 386 Ill. App. 3d 788, 793, 796, 898 N.E.2d 776, 780, 782 (2008). A section 2-615 motion to dismiss is based solely on the pleadings instead of proof of the underlying facts. *Seitz-Partridge v. Loyola University*, 409 Ill. App. 3d 76, 89, 948 N.E.2d 219, 231 (2011) (reversing the dismissal of a student's count for defamation *per se* where defendants "simply relied on their assertion").

¶ 63 Despite counsel's amazing statement in oral argument that there was no contract between plaintiffs and the college, the basic legal relation between a student and a private university or college is clearly contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the student become a part of the contract. *Ross*, 957 F.2d at 416 (attempting to predict Illinois law). The contract may also be supplemented by prior course of dealings or trade usage. Illinois courts would probably not recognize the tort of

"educational malpractice," but surely would recognize the right to bring a breach-of-contract action. A student may bring an action against an educational institution for breach of contract if it is alleged that the educational institution failed to perform on specific promises it made to the student "and the claim would not involve an inquiry into the nuances of educational processes and theories." *Zinter v. University of Minnesota*, 799 N.W.2d 243, 245 (2011). "To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor." *Ross*, 957 F.2d at 416-17.

¶ 64 The three plaintiffs here alleged they were students at the college; that they enrolled in ITP courses 410 (Miller) and 475 (Miller, Hill, Hale); that course 410 was to be 3 hours on Monday, Wednesday, and Friday, but all Wednesday and Friday classes were cancelled; that course 475 was to be a 300-hour practicum with "supervised interpreting fieldwork," but the 300-hour practicum was not provided; causing plaintiffs to suffer delays in certification and career and requiring them to contract for replacement instruction; and resulting in damages. Plaintiffs also alleged a violation of the Consumer Fraud Act (815 ILCS 505/2 (West 208)). An amended complaint detailed the expenses sustained by plaintiffs, including obtaining the supervised fieldwork, loss of earnings, and tuition and fees paid. Plaintiffs accordingly have pointed to "identifiable contractual promises" that the college failed to honor, and their complaint should survive a section 2-615 motion to dismiss. The trial court stated that the damages plaintiffs were seeking were excessive, that some of them went beyond contract damages. However, if <u>any</u> damages could possibly be awarded under the complaint, it should not have been dismissed.

¶ 65 The majority affirms the dismissal of the ITP 410 claim because "the catalog description is devoid of any contractual offer from the college that it would schedule its classes in the manner" claimed. *Supra* ¶ 49. The majority complains that "Miller failed to append to her complaint any documentation to substantiate her claim" (*supra* ¶ 14) and fails to specifically allege how she was injured by the loss of the Wednesday and Friday instruction (*supra* ¶ 49). Miller, however, was not required to prove her claim at the pleadings stage. The court is not allowed to decide a case on the merits when a section 2-615 motion is filed. Instead, the allegations of the complaint must be viewed in the light most favorable to the plaintiff. Is it possible that Miller was harmed when her instruction was cut by two-thirds? That would certainly seem to be the case, and Miller should be given the opportunity to take discovery and present evidence.

¶ 66 The majority affirms dismissal of the ITP 475 claim because "the course catalog does not mention any hourly commitment that the college was contractually obligated to provide nor have plaintiffs appended any other credible documentation." *Supra* ¶ 53. There was a reference to 300 hours in a Fall 2006 syllabus, but that "does not contractually obligate the college but instead, is a variable metric devised by the individual course instructor." *Supra* ¶ 53. However, the contract between the parties here was not a single, comprehensive, written document. Not every obligation of the parties was set out in specific written terms. Again, it is improper to resolve a section 2-615 motion to dismiss by resolving factual issues and ruling on the merits of the case. A section 2-615 motion to dismiss is not a motion for summary judgment.

¶ 67 The majority affirms the dismissal of the consumer-fraud counts "because (1) they failed to plead sufficient facts to state a cognizable cause of action and (2) those counts

represented a veiled attempt at alleging a claim for educational malpractice." *Supra* ¶ 40. Educational institutions are subject to the Consumer Fraud Act. *Scott v. Association for Childbirth at Home*, 88 Ill. 2d 279, 284, 430 N.E.2d 1012, 1015 (1982). "[I]t is clear that purchasers of educational services may be as much in need of protection against unfair or deceptive practices in their advertising and sale as are purchasers of any other service." *Scott*, 88 Ill. 2d at 285, 430 N.E.2d at 1015.

¶ 68 The elements of a claim under the Consumer Fraud Act are as follows: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce. *Sheffler v. Commonwealth Edison Co.*, No. 110166, slip op at 21, 2011 WL 2410366 (June 16, 2011). "Recovery may be had for unfair as well as deceptive conduct." *Sheffler* at 21. The complaint here repeats the allegations of the breach-of-contract counts and alleges that, in performing the acts described, the college "knowingly engaged in unfair and deceptive practices." Plaintiffs cannot be expected to attach proof of the college's intent, its undisclosed state of mind, to their pleadings. The fact that Illinois courts would not recognize the tort of "educational malpractice" does not exempt educational institutions from any and all student lawsuits. Students may be as much in need of protection as anyone else. *Scott*, 88 Ill. 2d at 285, 430 N.E.2d at 1015.

¶ 69 If plaintiffs are able to prove the facts alleged in their complaint they could be awarded damages. It is not "clearly apparent that no set of facts can be proved that would entitle plaintiff[s] to recovery." The jury will have the opportunity to resolve the factual issues in this case after the parties have engaged in discovery and presentation of evidence. We should not attempt to resolve the facts at the pleadings stage.