

**NOTICE**  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 110886-U

Filed 5/16/12

NO. 4-11-0886

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KERRY BUTLER,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Champaign County
SHEILA ZACHOLSKI,	)	No. 06L198
Defendant-Appellee,	)	
and	)	
KAYLA ZACHOLSKI, RAYMOND ZACHOLSKI,	)	Honorable
and JEFFREY (JEFF) KENYON,	)	Michael Q. Jones,
Defendants.	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Justices Steigmann and Appleton concurred in the judgment.

**ORDER**

¶ 1     *Held:* The trial court correctly dismissed count IV of plaintiff's fifth amended complaint because it failed to allege a cause of action upon which relief could be granted.

¶ 2     In August 2005, defendant Kayla Zacholski, purchased a 1993 Mitsubishi Eclipse from Jeffrey Kenyon. Kayla, in turn, sold the Eclipse to plaintiff, Kerry Butler, in November 2005. Kayla represented the mileage on the Eclipse to be 30,066 when it was actually about 139,000 miles. Defendant Sheila Zacholski, Kayla's mother, paid for the carsoup.com advertisement in which Kayla offered the car for sale. Plaintiff contends in count IV of his fifth amended complaint Sheila knew the representations in the advertisement were false and, therefore, is liable to him for fraud. Upon Sheila's motion to dismiss, the trial court dismissed count IV with prejudice. We affirm.

¶ 3

## I. BACKGROUND

¶ 4 In August 2005, defendant Kayla Zacholski, purchased a 1993 Mitsubishi Eclipse from Jeffrey Kenyon. Kayla, in turn, sold the Eclipse to plaintiff, Kerry Butler, on November 28, 2005. Kayla represented the mileage on the Eclipse to be 30,066 when it was actually about 139,000 miles. On September 18, 2006, plaintiff filed a complaint for common-law fraud, state and federal odometer fraud, negligent misrepresentation, and two counts of conspiracy to defraud against Kayla, as well as Raymond Zacholski and Sheila. On July 2, 2007, plaintiff added counts VII and VIII for state and federal odometer fraud against Kenyon in his third amended complaint.

¶ 5 After several rounds of motions to dismiss and amendments, on June 1, 2009, the trial court dismissed the counts against Kenyon with prejudice. He appealed and this court affirmed, issuing its mandate on April 15, 2010. *Butler v. Zacholski*, No. 4-09-0513 (Apr. 15, 2010) (unpublished order under Supreme Court Rule 23).

¶ 6 On September 30, 2010, plaintiff filed his fourth amended complaint which included count IV against Sheila for common law fraud. On February 8, 2011, Sheila filed a motion to dismiss as to count IV. On March 30, 2011, count IV was dismissed without prejudice.

¶ 7 On April 20, 2011, plaintiff filed his fifth amended complaint which included count IV against Sheila. On May 10, 2011, Sheila filed a motion to dismiss count IV under section 2-615(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615(a) (West 2010)). On July 29, 2011, the trial court dismissed count IV with prejudice finding a lack of personal relationship between Sheila and plaintiff; there was no allegation she had profited from the advertisement and the court did not believe plaintiff would be able to plead facts entitling him to

relief. In September 2011, the parties settled the case between plaintiff and Kayla, and the claim with regard to Kayla was dismissed with prejudice, closing the case. On October 4, 2011, this appeal was filed.

¶ 8

## II. ANALYSIS

¶ 9 Plaintiff argues the trial court erred in dismissing count IV of his fifth amended complaint alleging Sheila was liable for fraud because either Kayla acted as a proxy for Sheila, or Sheila ratified Kayla's fraudulent actions, or Sheila participated in Kayla's scheme to defraud plaintiff.

¶ 10 In deciding a motion to dismiss under section 2-615(a) of the Code, the trial court must determine whether the allegations, taken in the light most favorable to the plaintiff, sufficiently state a cause of action upon which relief may be granted. Review of an order dismissing a complaint is *de novo*. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 86, 773 N.E.2d 641, 644-45 (2002). A dismissal will be affirmed when, upon considering the allegations in the light most favorable to the nonmovant, no set of facts can be proved to entitle the nonmovant to relief. *Malcome v. Toledo, Peoria & Western Ry. Corp.*, 349 Ill. App. 3d 1005, 1006, 811 N.E.2d 1199, 1201 (2004).

¶ 11 Plaintiff purports to allege a cause of action against Sheila for common law fraud in the sale of the Eclipse to him. However, he did not allege Sheila had any ownership interest in the vehicle or that Sheila made any statements about the vehicle to him or otherwise communicated with him. The elements of common law fraud are: (1) a false statement of a material fact; (2) known or believed to be false by the party making it; (3) an intent to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; and (5) damages to the

other party as a result of the reliance. *Ciampi v. Ogden Chrysler Plymouth, Inc.*, 262 Ill. App. 3d 94, 103, 634 N.E.2d 448, 455 (1994). Plaintiff failed to allege Sheila made any statements to plaintiff about the vehicle or otherwise communicated with him. Instead, plaintiff alleges Sheila knew certain representations made by Kayla were false and Sheila paid for the advertisement placed by Kayla allegedly misrepresenting the mileage on the vehicle.

¶ 12 Sheila had no duty to notify plaintiff about alleged misrepresentations by Kayla or to take any action with respect to the sale of the vehicle. To prove fraud by intentional concealment of a material fact, it is necessary to show the existence of a special or fiduciary relationship which would raise a duty to speak. *Lidecker v. Kendall College*, 194 Ill. App. 3d 309, 317, 550 N.E.2d 1121, 1126 (1990). Plaintiff failed to allege any facts establishing any relationship between himself and Sheila, let alone a fiduciary relationship, which would require her to tell him of any misleading representations on the part of Kayla. As the trial court noted, Sheila's alleged behavior in failing to inform plaintiff Kayla's mileage representations were not true might be less than admirable but not tortious.

¶ 13 Plaintiff also argues Sheila is responsible for Kayla's misrepresentations in the carsoup.com advertisement because Kayla was acting as Sheila's proxy. Plaintiff cites no authority for his proposition there is a recognized cause of action in Illinois where a party may be held responsible for fraudulent statements made by another party acting by proxy. Failure to cite legal authority in the argument section of a party's brief forfeits the issue for review. *In re Marriage of Wassom*, 352 Ill. App. 3d 327, 332-33, 815 N.E.2d 1251, 1256 (2004). Were we to address the merits, plaintiff made no allegations in count IV Kayla was acting as Sheila's proxy. Instead, he claims Sheila herself placed the advertisement and thereby made representations to

plaintiff. These allegations are contradicted by the allegations in count IV Kayla set up the advertisement and its contents.

¶ 14 Plaintiff argues Sheila knowingly participated in a fraud by ratifying Kayla's actions and receiving benefits from the fraud. The only affirmative act by Sheila was to pay for the carsoup.com advertisement placed by Kayla. Sheila was reimbursed by Kayla for the cost of the advertisement from the proceeds of the sale of the vehicle. Paying for the carsoup.com advertisement did not ratify Kayla's alleged fraudulent misrepresentations to plaintiff. There were no allegations Sheila profited from the fraud. She was only made whole for her outlay of the cost of the advertisement.

¶ 15 Plaintiff has failed to set forth allegations which sufficiently state a cause of action upon which relief may be granted.

¶ 16 **III. CONCLUSION**

¶ 17 We affirm the trial court's judgment dismissing count IV of plaintiff's fifth amended complaint.

¶ 18 Affirmed.