



daughter Sabrina. The circuit court dismissed the complaint for failure to state an actionable claim. We affirm most aspects of the circuit court's judgment, but we reverse in part and remand for further proceedings on two claims.

¶ 2 Plaintiffs' *pro se* complaint is lengthy and difficult to parse, but the gist of it is that plaintiffs believe that defendants, who are apparently Sabrina's roommates, are plying Sabrina with drugs and preventing her from interacting with plaintiffs. When confronted about the matter, defendants allegedly assaulted and physically battered Cooper, made false reports to the police that caused plaintiffs to be arrested, and made a series of threats and harassing phone calls. The complaint raises eight counts against defendants, all of which were dismissed by the circuit court in response to a motion to dismiss by defendants.

¶ 3 Plaintiffs have appealed that judgment, but they only challenge the ruling as it relates to two counts. We therefore need not address the remaining counts in the complaint. See Ill. S. Ct. R. 341(h) (7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.") Moreover, defendants have not filed a response brief on appeal, so we consider this case on plaintiffs' brief alone pursuant to the principles of *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 4 In Count IV, which raises claims of assault and battery, plaintiffs allege that on August 24, 2011, Cooper visited Sabrina's apartment and implored her to return home. Fichter, however, intervened and "put her fist next to [Cooper's] face and threatened to smack her face and throw her from the stairs." Fichter then "started

to pull [Cooper's] right leg," which caused bruising and turned her leg "red from [the] hip to the middle of the leg." Van Horn<sup>1</sup> then appeared behind Fichter, and Cooper fled. In Count V, plaintiffs claim intentional infliction of emotional distress due to defendants' alleged isolation of Sabrina from plaintiffs and for allegedly furnishing her with drugs. Additionally, plaintiffs allege that defendants telephoned Cooper on two different dates and called her names, such as "psychotic," "bad mother," and "crazy." Finally, plaintiffs contend that defendants made a series of harassing phone calls to Cooper in which the caller implied that Sabrina was dead by telling Cooper that "you need to come and identify your daughter[s] body."

¶ 5 We review dismissal of a complaint *de novo*. See *Performance Electric, Inc. v. CIB BackEyeglasses*, 371 Ill. App. 3d 1037, 1039 (2007). Initially, we note that the circuit court's order stated that it was dismissing the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). This appears to be a scrivener's error in the order, however. Dismissal under section 2-619 is appropriate when there is some affirmative matter that bars the claims raised in the complaint (see *Chander v. Illinois Central Railroad Co.*, 207 Ill. 2d 331, 340-41 (2003)), but the order does not identify any such matter. Defendants' motion to dismiss also does not identify any affirmative matter that would bar plaintiffs' claims, nor is it supported by any affidavits as required under section 2-619. The motion instead merely contends that plaintiffs have failed to state an actionable

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<sup>1</sup> The record shows that Van Horn's last name is actually "Van Hoorn," but the misnomer is immaterial. See 735 ILCS 5/2-401(b) (West 2010) (misnomer may be corrected at any time and is not grounds for dismissal of a complaint).

claim. Such a motion is properly analyzed under section 2-615 rather than section 2-619, so we review the complaint under that section of the Code instead.

¶ 6 When reviewing a dismissal under section 2-615, “we must determine whether the allegations in the complaint, viewed in a light most favorable to plaintiffs, are sufficient to state a cause of action upon which relief may be granted.” *Performance Electric*, 317 Ill. App. 3d at 1039. The standard is a forgiving one, and a cause of action should be dismissed “only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery. [Citation.] At this stage, the plaintiff is not required to prove his or her case; rather, the plaintiff need only alleged sufficient facts to state all of the elements of the cause of action.” *Fox v. Sieden*, 382 Ill. App. 3d 288, 294 (2008).

¶ 7 Count IV of the complaint alleges two separate causes of action: assault and battery.<sup>2</sup> The essence of a battery claim is that the defendant intentionally caused a harmful or offensive touching of the plaintiff without the plaintiff’s consent, even if the touching did not result in any physical harm. See *Cohen v. Smith*, 269 Ill. App. 3d 1087, 1090-91 (1995). The tort of assault is simply “a reasonable apprehension of an imminent battery.” *Rosenberg v. Packerland Packing Co.*, 55 Ill. App. 3d 959, 963 (1977). Both have been adequately alleged here, though only so far as they relate to Fichter’s actions against Cooper. The complaint alleges that Fichter raised her fist next to Cooper’s head and threatened to knock her down the

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<sup>2</sup> As a practical matter, section 2-603(b) (735 ILCS 5/2-603(b) (West 2010)) requires causes of action to be pled in separate counts, but the failure to do so is not fatal to a complaint so long as it sufficiently informs the defendants of the allegations against them. See 735 ILCS 5/2-612(b) (West 2010); see also 735 ILCS 5/2-603(c) (“Pleadings shall be liberally construed with a view to doing substantial justice between the parties.”).

nearby stairs. The complaint also notes the Fichter “looked like a madwoman” and “[h]er eyes were bulging” when she threatened Cooper. If proven, Fichter’s actions would constitute an assault. Similarly, the complaint alleges that Fichter grabbed Cooper’s leg without her consent, which is sufficient to support a claim of battery. There is, however, no basis in the complaint for similar claims against Van Horn. The complaint only states that he appeared behind Fichter, and although Cooper claims that she was afraid the Van Horn would harm her, the basis for her fear is not explained and the complaint does not allege that he ever touched her. There is therefore no basis for Cooper’s claims of assault and battery against Van Horn. Moreover, the complaint does not mention any similar actions by either Fichter or Van Horn against Kuper, so there is no basis for a battery or assault claim against them by Kuper.

¶ 8 Count V. alleges intentional infliction of emotional distress (IIED) based on four alleged actions by defendants: (1) preventing plaintiffs from interacting with Sabrina, (2) providing Sabrina with drugs, (3) making insulting phone calls, and (4) making phone calls implying that Sabrina had died. None of these actions, however, are a legitimate basis for an IIED claim in this case. To state a claim for IIED, the complaint must allege “(1) that the defendant’s conduct was extreme and outrageous; (2) that the defendant knew that there was a high probability that his conduct would cause severe emotional distress; and (3) that the conduct in fact caused severe emotional distress.” *Schroeder v. RGIS, Inc.*, 2013 IL App (1st) 122483, ¶ 27. However, “‘mere insults, indignities, threats, annoyances, petty

oppressions or trivialities' do not constitute extreme and outrageous conduct." *Id.* (quoting *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 89-90 (1976)). The phone calls in which defendants allegedly insulted Cooper therefore cannot support an IIED claim.

¶ 9 Moreover, liability for IIED can only arise "where the conduct complained of was atrocious, and utterly intolerable in a civilized community." *Pavlik v. Kornhaber*, 326 Ill. App. 3d 731, 744 (2001). Importantly, "[A] line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility." *Schiller v. Mitchell*, 357 Ill. App. 3d 435, 447 (2005) (quoting *Knierim v. Izzo*, 22 Ill. 2d 73, 87 (1961)). Although the complaint alleges that defendants' actions distressed plaintiffs, the complaint also claims that Sabrina is a drug addict, and it implies in several places that Sabrina herself has asked plaintiffs not to contact her. In fact, the complaint indicates that defendants were acting at Sabrina's behest when they prevented plaintiffs from visiting with her as well as by providing Sabrina with drugs.

¶ 10 Perhaps more importantly, there is no indication in the complaint that defendants took these actions in order to deliberately inflict emotional distress on plaintiffs. Defendants' alleged actions may well be emotionally harmful to plaintiffs, but the emotional harm is merely an incidental effect of defendants' behavior toward Sabrina herself and is therefore not something that a civil action by plaintiffs for IIED can adequately address. As the circuit court noted in its ruling

on the motion to dismiss, the proper remedy for this situation is to report defendants' allegedly unlawful behavior to the police, who can then take any action necessary to correct the problem.

¶ 11 The last issue is the alleged phone calls in which the caller claimed that Sabrina was dead. Leaving aside whether such a statement could be considered extreme or outrageous, the problem with this allegation is that the complaint offers no facts from which it could be reasonably inferred that the caller was either defendant. The complaint states that both callers were anonymous, and neither call came from an identifiable source. The first call came from an unknown number, and the only identifier for the second call was that it came from an 815 area code. The complaint claims that this was Van Horn's number, but that is merely speculation. The complaint offers no allegation beyond the area code that would reasonably tie Van Horn to the phone call. Illinois is a fact-pleading jurisdiction, which means that "[w]hile plaintiff is not required to set forth evidence in the complaint [citation], the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action [citation], not simply conclusions." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). Without some nonconclusory fact that would support the inference that the caller was in fact one of the defendants, there is no basis for an IIED claim for the phone calls.

¶ 12 The circuit court was therefore correct to dismiss the assault and battery claims against Van Horn as well as the IIED claims against both defendants. The complaint does, however, state claims against Fichter for the alleged assault and

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battery of Cooper. We therefore remand this case for further consideration of those claims only.

¶ 13 Affirmed in part and reversed in part; cause remanded.