2014 IL App (2d) 130524-U
No. 2-13-0524
Order filed May 20, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DAVID JOHN,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-L-995
	)	
WHEATON COLLEGE, GARTH	)	
BOLINDER, DIXIE BOLINDER, MEGAN	)	Honorable
MARIE BOLINDER, and THOMAS PRATT,	)	Hollis L. Webster,
	)	Kenneth L. Popejoy,
Defendants-Appellees.	)	Judges, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justice Schostok concurred in the judgment.
Justice Birkett concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court properly dismissed count III of plaintiff's second amended verified complaint for failure to state a cause of action for tortious interference with an existing business relationship because plaintiff failed to establish a contractual relationship. The trial court should not have considered the factual matters contained in the affidavits from the defendants. Further, the trial court erred in dismissing count II as plaintiff alleged facts in count II sufficient to withstand a section 2-615 dismissal. We conclude it is reasonable for the State of Illinois to exert personal jurisdiction over all of the nonresident defendants, who were allegedly part of a conspiracy to publicly disclose the private facts of plaintiff. Thus, the trial court erred when it granted defendants' motion to dismiss count I of plaintiff's second amended verified complaint for lack of jurisdiction.

¶ 2 In this appeal, we consider whether, as part of an alleged conspiracy, the nonresident defendants should have reasonably anticipated that their conduct in setting out to "destroy" plaintiff's relationships in Illinois and to uncover private and potentially damaging information from plaintiff's protected student file at Wheaton College in Illinois would lead to litigation and subject them to jurisdiction in Illinois. We also consider the sufficiency of counts II and III of plaintiff's second amended verified complaint to determine whether the pleadings stated a cause of action upon which relief could be granted. We affirm in part (count III), reverse in part (counts I and II), and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Because our review involves a dismissal based on sections 2-615 and 2-619 of the Code, we accept all well-pleaded facts as true as well as all reasonable inferences that arise from them. See *Diotallevi v. Diotallevi*, 2013 IL App (2d) 111297, ¶ 26 (citing *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31). However, in setting out the facts, we will disregard all legal and factual conclusions from plaintiff's complaint that were not supported by specific factual allegations. *Id.*

¶ 5 In August 2011, plaintiff, David John, filed a three-count verified complaint against defendants, Thomas Pratt, Garth Bolinder, Dixie Bolinder, Megan Bolinder, and Wheaton College. As amended on October 3, 2012, count I alleged a cause of action of public disclosure of private facts against Pratt and the Bolinder defendants. Count II purported to state a cause of action of public disclosure of private facts against Wheaton College. Count III purported to state a cause of action of tortious interference with business relationship against all defendants.

¶ 6 As relevant to this appeal, plaintiff alleged the following facts in his second amended verified complaint. Plaintiff is a resident of Illinois. Defendant Megan Bolinder lived in Illinois

from 2003 through 2008; she was enrolled at University of Illinois at Chicago from 2003 through 2010; she graduated from the university in May 2010. Plaintiff and defendant Megan Bolinder were in a relationship and are the parents of a child, born in March 2010. Defendant Megan Bolinder ended the relationship in May 2010 and moved to Arkansas with their child in June 2010.

¶ 7 Defendants Garth and Dixie Bolinder are residents of Arkansas and are the parents of Megan Bolinder. Defendant Garth Bolinder is a graduate of Wheaton College in Wheaton and a graduate of North Park Theological Seminary in Chicago. Defendant Garth Bolinder is affiliated with the Evangelical Covenant Church and is a Superintendent, Midsouth Conference; the headquarters of the Evangelical Covenant Church are located in Chicago. Defendant Dixie Bolinder had attended Wheaton College in the past as a student. Defendants Garth and Dixie Bolinder travel "frequently" to Illinois, and Garth Bolinder travels to Chicago at least once per month.

¶ 8 Defendant Thomas Pratt is a resident of Michigan. Defendant Pratt and defendants Garth and Dixie Bolinder have been friends for approximately 40 years. Defendant Pratt had been a member of the Board of Trustees of Wheaton College from 1991 through June 2010, when he became a Trustee Emeritus. Defendant Pratt was named interim president of Prison Fellowship Ministries in 2010. At that time, the Prison Fellowship Ministries was controlled by Chuck Colson, who had a close working relationship with Wheaton College; the college has a scholarship named the "Colson Scholarship." Defendant Pratt has continued his working relationship with Wheaton College and has been involved with the Colson scholarship program on the campus of Wheaton College. Defendant Pratt was named the "co-head" of the search

committee to select the new president of Wheaton College. Phillip Ryken became the new president of Wheaton College.

¶ 9 On Thursday, May 27, 2010, plaintiff received a telephone call at his home in Illinois from defendants Megan and Dixie Bolinder. During the telephone call, defendants Megan and Dixie Bolinder informed plaintiff that they would "destroy his relationship with Dennis Hastert, Wheaton College, and all the people you believe support you now."

¶ 10 On June 7, 2010, plaintiff filed a petition in the Michigan state court for joint custody of his child with defendant Megan Bolinder. Plaintiff also filed a petition in the Arkansas state court for partial custody of their child. During the custody proceedings, unflattering character traits were revealed with respect to defendant Megan Bolinder.

¶ 11 Thereafter, the Bolinder defendants contacted defendant Pratt and asked him "to use his association with Wheaton College to obtain damaging information regarding [plaintiff] that might be located in [plaintiff's] Wheaton College student files in Illinois." The Bolinder defendants also asked defendant Pratt to remove plaintiff from his volunteer position with the wrestling team and as director of the Pete Willson Wheaton Invitational wrestling tournament. Some of the discussions between the Bolinder defendants and Pratt took place during an Evangelical Covenant Church business trip to Chicago. In a sworn deposition, defendant Garth Bolinder admitted that he had spoken with defendant Pratt regarding plaintiff.

¶ 12 On November 6, 2010, defendant Megan Bolinder informed Ed Ericson Jr. that she and her family were going to get plaintiff "kicked off" the Wheaton College campus.

¶ 13 Defendant Pratt agreed to assist the Bolinder defendants, and he agreed to obtain information through his association with Wheaton College President Ryken and Paul Chelsen, the Vice President for student development at Wheaton College. The Bolinder defendants also

asked defendant Pratt to contact Pete Willson, Richard Gieser, and Robert Oury to obtain damaging information on plaintiff, and Pratt did so. Willson, Gieser, and Oury were residents of Illinois and associated with the wrestling program at Wheaton College. Defendant Pratt also contacted Ryken and Chelsen, who were in Illinois at the time of the contact.

¶ 14 At defendant Pratt's request, Ryken obtained information from plaintiff's Wheaton College student file. The information reflected that, while plaintiff was a student at Wheaton College, (1) a Wheaton College student falsely accused plaintiff of fathering a child with her out of wedlock, and (2) the same Wheaton College student falsely accused plaintiff of counseling her to abort the child he had allegedly fathered with her. The Wheaton College student revealed this information to a counselor at Wheaton College. Plaintiff considered this information private, and only plaintiff, the student, the counselor, and Wheaton College had this information. Plaintiff alleged this information was also protected by the Family Educational Rights and Privacy Act (12 U.S.C. § 1232(g)).

¶ 15 Ryken transmitted and tendered this information to defendant Pratt. Defendant Pratt transferred the information to the Bolinder defendants and to Megan Bolinder's attorney. Defendant Megan Bolinder "then utilized [this information] against [plaintiff] during his custody case in Arkansas." In a sworn deposition taken on January 6, 2011, defendant Megan Bolinder admitted that she spoke to her father, defendant Garth Bolinder, about contacting defendant Pratt to obtain information on plaintiff from Wheaton College and admitted that her father had done so.

¶ 16 On January 5, 2011, Chelsen contacted plaintiff from his office at Wheaton College and informed plaintiff he was no longer welcome on the Wheaton College campus. Chelsen also informed plaintiff that Ryken had received information from defendant Pratt and "was very upset

because [plaintiff] had fathered a child out of wedlock." Chelsen informed plaintiff that he had spoken with defendant Pratt and that Pratt and the Bolinder defendants wanted plaintiff "removed from all contact" with Wheaton College, the Wheaton College wrestling team and the Pete Willson Wheaton Invitational wrestling tournament. According to Chelsen, defendant Pratt told him that plaintiff was a "man of poor moral character." Chelson told plaintiff that he and Ryken decided to remove him from the wrestling invitational and any work with the wrestling team.

¶ 17 On January 6, 2011, plaintiff telephoned Chelsen. Chelson admitted that defendant Pratt had tendered the information from plaintiff's Wheaton College student file to the Bolinders; Pratt had not followed the proper procedures to obtain the information; and Pratt had received the information from Ryken.

¶ 18 On January 6, 2011, plaintiff also spoke with Thomas Jarman, an alumnus of Wheaton College and a current member of the board of the J. Dennis Hastert Center for Economics, Policy, and Government located on the campus of Wheaton College (the Hastert Center). Jarman spoke with William Pollard, a former trustee, an active advisory life trustee to Wheaton College, and a member of the advisory board of the Hastert Center. Pollard told Jarman that Wheaton College "was culpable in the release of [plaintiff's] private information to the Bolinders." On January 26, 2011, plaintiff met with Pollard, who told plaintiff that Wheaton College improperly released plaintiff's private information to Pratt. Pollard told plaintiff that he and Pratt attended Wheaton College together and were close friends. During this meeting, Pollard inquired into plaintiff's business relationship with J. Dennis Hastert. Pollard indicated that he would be contacting Hastert within the next few days.

¶ 19 Plaintiff further alleged that in 2008, he entered into a business relationship with J. Dennis Hastert, former Speaker for the United States House of Representatives. As part of this business relationship, Hastert would provide consulting and other services for plaintiff's business projects, and plaintiff would provide to Hastert a 7 to 10% interest in founder's equity of each project undertaken. The relationship extended to projects in Illinois, California, the Middle East, and other locations, and contemplated future projects. Plaintiff and Hastert remained in this business relationship from 2008 through January 2011.

¶ 20 On approximately January 26, 2011, Pollard contacted Hastert and asked him to cut off all telephone contact with plaintiff; to terminate all future meetings with plaintiff; and to avoid being seen with plaintiff. Thereafter, Hastert contacted Jarman and indicated that, based on his conversation with Pollard, he was going to terminate his business relationship with plaintiff.

¶ 21 Hastert terminated his business relationship with plaintiff. Following Hastert's departure from the business relationship, plaintiff was dropped from consideration in a $150 million venture located in Riverside County, California. Plaintiff was also dropped from other events, including a Middle East project, events in Singapore and Qatar, and a software project in the United States.

¶ 22 Count I of plaintiff's second amended verified complaint purported to allege a civil conspiracy of the public disclosure of private facts and was directed at defendants Megan Bolinder, Dixie Bolinder, Garth Bolinder, and Pratt. Plaintiff alleged that, despite their lack of Illinois residency, the defendants have significant contacts with Illinois and have purposely directed their conduct toward Illinois to harm plaintiff. As part of the civil conspiracy, plaintiff alleged that the Bolinder defendants entered into an agreement with defendant Pratt, whereby Pratt would use his influence with Wheaton College president Ryken and vice-president Chelsen

to obtain plaintiff's private facts from Wheaton College. Pratt obtained the private facts from plaintiff's Wheaton College Student file from Ryken. Pratt disclosed the private facts to defendant Garth Bolinder. Garth Bolinder disclosed the private facts to Megan Bolinder and Dixie Bolinder. Megan Bolinder disclosed the private facts to her attorney and others. Megan Bolinder and her attorney publicized the private facts by using them in the Arkansas child custody litigation.

¶ 23 Plaintiff further alleged that the individual defendants published plaintiff's private facts and information when they used it in the Arkansas child custody litigation. Plaintiff alleged that the facts were private and contained in his "federally protected Wheaton College student file in Illinois." Plaintiff alleged that the facts were highly offensive and were disclosed to persons who had a "special relationship" with plaintiff. Plaintiff alleged that the Bolinders sought to use the information to their advantage and against him in the Arkansas child custody litigation. Plaintiff alleged that he suffered damage to his reputation and suffered pecuniary injuries.

¶ 24 Count II of plaintiff's second amended verified complaint purported to allege a cause of action against Wheaton College for the public disclosure of private facts. Plaintiff alleged that Wheaton College, through its president Ryken, disclosed plaintiff's private and protected information when Ryken tendered it to Pratt. Wheaton College, through Pollard, admitted that it had improperly released plaintiff's private and protected information to Pratt. Pollard admitted that Wheaton College was culpable in the release of plaintiff's information to Pratt. Plaintiff alleged that Wheaton College's disclosure of plaintiff's private and protected facts to Pratt, and then to the Bolinders, was even more harmful had they been disclosed to the public at large because the information was used against him in the Arkansas child custody litigation. Plaintiff alleged that the disclosure to the Bolinders constituted the special relationship exception to the

tort of public disclosure of private information. Plaintiff alleged that, as a proximate result of Wheaton College's conduct, he suffered injuries to his reputation and suffered pecuniary injuries.

¶ 25 Count III of plaintiff's second amended verified complaint purported to allege a cause of action against all of the defendants for their tortious interference with an existing business relationship. Plaintiff alleged that he and J. Dennis Hastert created and had an existing business contract in Illinois, which was "an extremely valuable business association." Plaintiff alleged that he had a reasonable expectation of continuing in a valid business contract or prospective economic advantage with Hastert, as they had been actively working on many projects. Plaintiff alleged that all of the defendants were aware of plaintiff's contractual relationship with Hastert. Defendants intended to interfere with the existing business contract between him and Hastert, and as such, purposefully directed their conduct toward doing so. Plaintiff alleged that the purpose for the interference was to harm his relationship with Hastert. Plaintiff alleged that all of the defendants and Pollard purposefully interfered, which caused Hastert to terminate the business contract with plaintiff. Plaintiff alleged that all of the defendants' and Pollard's actions and interference were willful, wanton, and knowing. Plaintiff further alleged that he has been damaged financially as a result of the defendants' actions of interfering with his business contract with Hastert.

¶ 26 Plaintiff attached the deposition transcript of defendant Garth Bolinder, who testified, inter alia, that he and Pratt discussed matters concerning plaintiff and the child custody litigation. Garth testified that the "face to face" conversation took place "at the end of November, and I was going to Chicago for a meeting, and I stopped off to see my parents in Grand Rapids, and we were talking about our family life."

¶ 27 Plaintiff also attached the deposition transcript of defendant Megan Bolinder, who testified, inter alia, that she knew that Pratt and Garth Bolinder had discussed plaintiff and discussed her relationship with plaintiff. Megan testified that Garth called Pratt "to find out more information about [plaintiff]." Megan testified that plaintiff was very involved with Wheaton College and that he made monetary donations to the wrestling program. Megan testified that she knew plaintiff had not been allowed on Wheaton college's campus, and she relayed that information to Garth prior to Garth's conversation with Pratt. Megan testified that Garth told her he had contacted Pratt and that Pratt "was going to make some phone calls."

¶ 28 Plaintiff also attached exhibits reflecting communications with Hastert, business prospects from the United Arab Emirates, and business prospects from Saudi Arabia. The attachments were all incorporated into the pleadings by reference.

¶ 29 On October 11, 2012, defendant Wheaton College filed a motion to dismiss plaintiff's second amended verified complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). Wheaton College asked the trial court to dismiss counts II and III for plaintiff's failure to state a cause of action. With respect to count II, public disclosure of private facts, Wheaton College alleged that plaintiff failed to allege (1) a disclosure by the college to the "public at large"; (2) a disclosure by the college to anyone with whom plaintiff had a "special relationship"; or (3) a disclosure of intimate, true facts that would be highly offensive to the reasonable person. With respect to count III, tortious interference with an existing business relationship, Wheaton College alleged that plaintiff failed to allege (1) the existence of a valid and enforceable contract with Hastert; (2) that the college knew of plaintiff's alleged contract with Hastert; (3) that the college took any action at all, much less an intentional and unjustified action, to induce Hastert to breach his contract with plaintiff; (4) that any action by

the college in fact caused Hastert to breach his contract with plaintiff; (5) any damages that were proximately caused by any such action by the college; and (6) any basis on which the college could be vicariously liable for the alleged intentional tort of Pollard, one of its volunteer advisory life trustees, who is alleged to have acted to serve the interests of the individual defendants (not the college) in the Arkansas child custody litigation.

¶ 30 On October 12, 2012, defendant Pratt filed a motion to dismiss plaintiff's second amended verified complaint pursuant to sections 2-301 and 2-619 of the Code (735 ILCS 5/2-301, 2-619 (West 2012)). Pratt alleged that he was a resident of Michigan. Pratt alleged that plaintiff failed to specify where the complained-of events took place and that plaintiff failed to allege tortious conduct on Pratt's part that took place in Illinois. Pratt further alleged that there was no nexus between him and Illinois; he is not subject to the jurisdiction of Illinois; and "as indicated in his affidavit," he has not "engaged in any conduct, tortious or otherwise, which would subject him to the jurisdiction of this Court." Pratt further alleged that plaintiff failed to establish the necessary minimum contacts for the court to exercise personal jurisdiction over him. Pratt alleged that plaintiff failed to cite to any continuous and systematic contacts by him with Illinois sufficient to establish general or specific jurisdiction. Pratt alleged that plaintiff's allegations of conspiracy were insufficient to impose personal jurisdiction upon him, and alleges in bold font, "In this case, no purported conspirator was present in the jurisdiction."

¶ 31 Defendant Pratt attached two of his own affidavits to his dismissal motion. The first affidavit, dated June 6, 2012, reflects that he is a resident of Michigan. Pratt also avers that he "served on the Wheaton College Board of Trustees from May 23, 1992 until October 16, 2010. During those years I came to the State of Illinois for board meetings three times per year. I conducted no business of any kind in Illinois." The second affidavit, dated August 13, 2012,

contains the same averment regarding his service on the Wheaton College Board of Trustees. However, the affidavit also provides that Pratt "did not enter into an agreement with Garth Bolinder, Megan Marie Bolinder, Dixie Bolinder or any other person or entity to obtain and disclose private facts concerning [plaintiff]"; "did not obtain or disclose to any person or entity concerning allegations made by 'Jane Doe' against [plaintiff], or any other private facts concerning [plaintiff]"; and he has "no knowledge of or connection with any conspiracy to publicly disclose private facts concerning [plaintiff]."

¶ 32 On October 22, 2012, defendants Garth Bolinder, Dixie Bolinder, and Megan Bolinder filed a motion to dismiss plaintiff's second amended verified complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)). The Bolinder defendants alleged they were all residents of Arkansas. The Bolinder defendants alleged that plaintiff had pleaded a "patently false fact" that Garth and Dixie were employees of the Evangelical Covenant Church, and attached an affidavit from Donn Engebretson reflecting that neither of them were employees of the church. The Bolinder defendants alleged that Garth's visits to Illinois on business had no bearing on the court's jurisdiction. The Bolinder defendants also alleged that the telephone call alleged "[a]t worst, it alleges harsh words between parents involved in a custody dispute," and not conduct of a conspiracy. The Bolinder defendants alleged that plaintiff's allegations regarding a conspiracy were not "factual in nature," but "mere suppositions" and that nothing from the depositions "confirms a conspiracy." The Bolinder defendants alleged that the acts alleged do not specify where the events complained of took place.

¶ 33 The Bolinder defendants further alleged that there was no nexus between them and Illinois, and therefore, pursuant to section 2-301 of the Code (735 ILCS 5/2-301 (West 2012)) are not subject to the general or specific jurisdiction of Illinois. The Bolinder defendants also

alleged that plaintiff failed to establish the necessary sufficient minimum contacts for the court to exercise personal jurisdiction over them.

¶ 34 Defendant Garth Bolinder attached his own affidavit, dated October 19, 2012, to the dismissal motion. Garth averred, inter alia, that he has only been periodically in Illinois for religious conferences, has not traveled to Illinois for any purpose, has not resided in Illinois, has not done business in Illinois, nor owned any property in Illinois. Garth further averred that he has "not engaged in any tortious activity of any kind in the State of Illinois" and has "not committed any tort in the State of Illinois;" "[a]t no time did [he] ever engage in any conspiracy with any person with regard to [plaintiff] in any fashion"; and "did not participate in any telephone call with [plaintiff] where [he] threatened him in any manner."

¶ 35 Defendant Dixie Bolinder attached her own affidavit, dated October 19, 2012, to the dismissal motion. The substance was similar to that of Garth's affidavit reflecting her physical presence in Illinois. Dixie similarly averred that she has "not engaged in any tortious activity of any kind in the State of Illinois" and has "not committed any tort in the State of Illinois." Dixie further averred that she "did not, during any conversation, telephonic or otherwise, threaten [plaintiff], either by indicating I would destroy him, or in any other fashion"; and that she "never engaged in any conspiracy of any kind regarding [plaintiff]."

¶ 36 Defendant Megan Bolinder attached her own affidavit, dated October 19, 2012, to the dismissal motion. The substance was similar to that of Garth and Dixie's affidavits reflecting her physical presence in Illinois. Megan similarly averred that she has "not engaged in any tortious activity of any kind in the State of Illinois" and has "not committed any tort in the State of Illinois." Megan added that the "Arkansas court has designated me as the custodial parent for [the child]. The Plaintiff is currently appealing that decision in the State of Arkansas." Megan

continued, "[w]e have had no telephone conversations where I indicated that I would oppose his efforts in that custody action, and since May 2010 I have not conversed with [plaintiff] regarding that issue other than through my attorney." Megan further averred that "[a]t no time did I threaten to destroy him with Dennis Hastert or with any other individual," and "I did not engage in any conspiracy with any individual in regard to [plaintiff]."

¶ 37 Defendants also attached the affidavit of Donn Engebretson, who averred, *inter alia*, that Garth and Dixie were not employed by The Evangelical Covenant Church.

¶ 38 On November 14, 2012, plaintiff filed a motion to strike the affidavits of defendant Pratt and all of the Bolinder defendants. Plaintiff argued that, although the bases for the defendants' section 2-619 dismissal motion were jurisdictional, the supporting affidavits refuted the ultimate factual issues in the case. Plaintiff argued that, because the statements controverted the allegations of ultimate facts in the complaint, they were improper and should be stricken.

¶ 39 The parties filed memoranda in support of their respective motions and briefed the issues. On November 30, 2012, plaintiff filed a response to the motions to dismiss and attached his own supporting affidavit. With respect to Count II against defendant Wheaton College, plaintiff responded that he had "alleged that Wheaton disclosed private information that as a student he had been accused of fathering a child out of wedlock and had counseled abortion of that child."

¶ 40 On December 13, 2012, the trial court conducted a hearing on defendant Wheaton College's section 2-615 dismissal motion; defendant Pratt's motion to dismiss pursuant to sections 2-301 and 2-619(a)(9) of the Code; and the Bolinder defendants' motion to dismiss pursuant to section 2-619 of the Code. Following arguments of the parties, the trial court granted the three motions to dismiss, with prejudice, and entered judgment in the defendants' favor.

¶ 41 At the hearing, the trial court did not separately rule or enter an order on plaintiff's motion to strike the affidavits. Rather, the trial court stated that it would "take those as part of the overall ruling on the motions" and that it would "not consider any conclusions in affidavits or any statements in affidavits that are not based upon facts that are personally known to the affiant." The trial court reasoned, "to parse through each paragraph would not be a beneficial use of time." Plaintiff asked the trial court, if it was not willing to strike the affidavits, to allow depositions pursuant to Rule 191 (Ill. S. Ct. R. 191 (eff. Jan. 4, 2013)) to address the allegations in the affidavits. The trial court denied plaintiff's request, stating that "that time has come and gone, and you have a responsibility before filing a complaint to do a good faith investigation into the facts."

¶ 42 The hearing continued, with the trial court considering defendant Wheaton College's section 2-615 motion to dismiss counts II and III. With respect to count II, the trial court found that plaintiff failed to allege ultimate facts to support the elements of the cause of action. The trial court recognized plaintiff's desire to take depositions; however, the trial court responded that it was "plaintiff's duty when filing a complaint to do the investigation and set forth the ultimate facts in the complaint." The trial court stated that the "disclosure" went only to Pratt and not to the small group of people with whom he had a special relationship. The trial court further stated that, because the disclosure was a "false accusation," it was not a disclosure of true facts. For those reasons, the trial court granted Wheaton College's motion to dismiss count II, with prejudice.

¶ 43 With respect to defendant Wheaton College's section 2-615 motion to dismiss count III, the trial court determined plaintiff failed to plead facts to establish an enforceable contract with Hastert. Moreover, the trial court noted that the statute of frauds prohibited the enforcement of

an oral contract with terms that extend beyond one year if the contract has a value in excess of $500. Thus, the trial court granted Wheaton College's motion to dismiss count III, with prejudice.

¶ 44 The trial court next heard arguments on the Bolinder defendants' motion to dismiss based upon a lack of jurisdiction. The trial court found that there was no minimum contacts to establish personal jurisdiction. The trial court continued, "[t]he affidavits stand unrebutted and this suit against the Bolinders offends the traditional notions of fair play and substantial justice that are the bedrock of personal jurisdiction." As such, the trial court granted the Bolinder defendants' motion to dismiss, with prejudice.

¶ 45 The trial court then heard arguments on defendant Pratt's motion to dismiss based upon a lack of jurisdiction. The trial court found there were no minimum contacts that would subject Pratt to jurisdiction in Illinois. The trial court further stated, "I cannot find from the pleadings that there was a commission of a tort under 209 by *** Pratt in the State of Illinois and I simply find no allegations in the complaint that would justify this Court taking jurisdiction over this gentleman." For these reasons, the trial court granted defendant Pratt's motion to dismiss, with prejudice.

¶ 46 On January 14, 2013, plaintiff filed a motion to reconsider and an alternative motion for leave to file a third amended complaint. Following a hearing on April 25, 2013, the trial court denied plaintiff's motion to reconsider and denied plaintiff leave to file a third amended complaint. Plaintiff filed a timely notice of appeal.

¶ 47 II. ANALYSIS

¶ 48 A. Open Motion

¶ 49 Prior to reaching the merits, we must dispose of an open motion to strike filed November 5, 2013, by defendant Pratt. Pratt argues that the "Nature of the Case" section of plaintiff's opening brief is argumentative and violates Rule 341(h)(2) (Ill. Sup. Ct. R. 341 (h)(2) (eff. July 1, 2008)). Pratt asks this court to strike the entire section, except the first sentence.

¶ 50 Illinois Supreme Court Rule 341(h)(2) (eff. July 1, 2008) requires an introductory paragraph stating (1) the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury, and (2) whether any question is raised on the pleadings and, if so, the nature of the question. In plaintiff's brief, the section labeled "Nature of the Case" consists of a seven-paragraph recitation of some general factual allegations, including the trial court's decisions. The general factual allegations were unnecessary, and we consider it a violation of Rule 341(h)(2). We decline to strike the entire section; however, we will disregard any inappropriate or unsupported material and any argument contained in the section.

¶ 51 Our review of this case has also been hampered by plaintiff's failure to reference the specific pages of his cited legal authority in the argument section. See Illinois Supreme Court Rule 6 (eff. July 1, 2011); Illinois Supreme Court Rule 341(g) (eff. July 1, 2008). Failure to abide by our supreme court rules may result in waiver of an issue on appeal (see *Putnam v. Village of Bensenville*, 337 Ill. App. 3d 197, 201-02 (2003)) or even dismissal of the appeal itself (*Fender v. Town of Cicero*, 347 Ill. App. 3d 46, 51-52 (2004)). Although we opt not to take such drastic action in this case, we nevertheless remind counsel for plaintiff that our supreme court's rules are not advisory. Having been admonished, we trust that counsel will comply with all such rules in the future.

¶ 52 B. Plaintiff's Motion to Strike Affidavits

¶ 53 Plaintiff filed a motion to strike the affidavits of defendant Pratt and all of the Bolinder defendants. At the December 13, 2012, hearing, the trial court did not expressly grant or deny the motion or enter an order granting or denying the motion. Rather, it decided to "take those as part of the overall ruling on the motions" and that it would "not consider any conclusions in affidavits or any statements in affidavits that are not based upon facts that are personally known to the affiant." Plaintiff also requested the trial court to allow depositions pursuant to Rule 191 if it denied his motion to strike. The trial court denied plaintiff's request to allow depositions.

¶ 54 The Bolinder defendants argue that the trial court properly denied plaintiff's motion to strike the affidavits. Defendant Pratt argues that plaintiff never procured a ruling and thus, has failed to preserve the issue for review. We recognize that the failure to obtain a ruling on a motion to strike an affidavit operates as a waiver of the objections to the affidavit. See *Independent Trust Corp. v. Hurwick*, 351 Ill. App. 3d 941, 950 (2004). Despite the lack of a written order or a clear expression granting or denying plaintiff's motion, we believe the trial court did issue a ruling. The report of proceedings clearly reflect that it considered the affidavits. The trial court stated its refusal to "parse through each paragraph," and later that "[t]he affidavits stand unrebutted." And it is on these statements that we will not consider plaintiff's contention waived, and we will review the court's ruling.

¶ 55 As it pertains to a section 2-619 motion to dismiss, a defendant may attach affidavits which assert other affirmative matter. *Barber-Colman Co. v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (1992). These affidavits, however, may not attack the factual basis of the plaintiff's claim. *Id.* Aside from properly raised affirmative matter, "[i]f a defendant wishes to challenge the factual sufficiency of a plaintiff's claim, the summary judgment motion is the proper vehicle." *Id.* "The affidavits filed by a defendant in support of a summary judgment

motion, which contest the allegations in plaintiff's complaint, are specifically challenging the truth of these charges." *Id.* "A section 2-619 motion and its accompanying affidavits, however, are not attacking the factual basis of the plaintiff's claim; they are asserting 'other affirmative matter avoiding the legal effect of or defeating the claim.' " *Id.* (quoting Ill. Rev. Stat. 1991, ch. 110, par. 2-619(a)(9)).

¶ 56 In this case, the affidavits filed by defendant Pratt and the Bolinder defendants in support of their section 2-619(a)(9) motion to dismiss, specifically challenge the truth of plaintiff's factual charges. The affidavits specifically counter the allegations plaintiff sets out as a basis for the lawsuit: Megan and Dixie did not inform plaintiff they were going to "destroy" him; Pratt and Garth did not agree to obtain and disclose private facts of plaintiff; none of the defendants engaged in a conspiracy; and none of the defendants engaged in any tortious activity or committed a tort; and so on. Substantively, the defendants are essentially representing that what plaintiff claims and alleges is not true, and their affidavits establish the real truth and the lack of truth to plaintiff's claims.

¶ 57 "It is only in the context of the plaintiff's *claim* that it is proper to state that a defendant in a section 2-619 motion admits all well-pleaded facts. The defendant does not admit the truth of any allegations in plaintiff's complaint that may touch on the affirmative matters raised in the 2-619 motion." (Emphasis in original.) *Barber-Colman Co.*, 236 Ill. App. 3d at 1073. Likewise here, at this procedural posture of the litigation, we recognize defendants are not admitting the truth of any of plaintiff's allegations; thus, defendants had no legitimate purpose in presenting their affidavits as a factual matter upon which to defeat plaintiff's *claims*. Because the factual averments of the defendants did not raise an affirmative matter pertaining to the *claim*, the trial court should have granted plaintiff's motion to strike and disregarded them. In this case, the trial

court abused its discretion when it considered the entirety of defendants' affidavits for jurisdictional and factual purposes rather than allowing discovery to learn the narrow issue of whether defendants had truly availed themselves to the jurisdiction of Illinois. See Contra *Rokeby-Johnson v. Derek Bryant Insurance Brokers, Ltd.*, 230 Ill. App. 3d 308 (1992) (affidavits submitted by nonresident insurance brokerage contained sufficient information to rebut allegations of personal jurisdiction in breach of contract action and did not avoid facts material to disposition of case). An affidavit containing self-serving recitations of purported facts and other extraneous factual matter is not a proper substitution for an interrogatory propounded from an opposing party or a deposition, wherein an opposing party may probe further than what was averred. Moreover, to the extent that such conflicts do exist in affidavits, they must be resolved in plaintiff's favor. See *Alpert v. Bertsch*, 235 Ill. App. 3d 452, 459 (1992).

¶ 58 Having determined that the trial court should not have considered portions of the defendants' affidavits, we believe that we can and should review the remainder of plaintiff's contentions of error in the interest of judicial economy, and because our review is *de novo*. See *Haubner v. Abercrombie & Kent International, Inc.*, 351 Ill. App. 3d 112 (2004) (where the trial court's determination of jurisdiction is based solely upon documentary evidence, the standard of our review is *de novo*).

¶ 59 C. Trial Court's Section 2-615 Dismissal

¶ 60 We next review the trial court's ruling on defendant Wheaton College's motion to dismiss counts II and III pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). On a section 2-615 motion to dismiss, a court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise therefrom. See *DeHart v. DeHart*, 2013 IL 114137, ¶ 18 (citing *Doe ex rel. Ortega-Piron v. Chicago Board of Education*,

213 Ill. 2d 19, 28 (2004)). The merits of the case, at this point, are not yet considered. See *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶ 19. A party moving for a section 2-615(e) judgment on the pleadings concedes the truth of the well-pleaded facts in the nonmovant's pleadings. *McCall v. Devine*, 334 Ill. App. 3d 192, 198 (2002). The court is to construe the complaint liberally and should not dismiss it unless it is clearly apparent from the pleadings that "no set of facts can be proved which would entitle [ ] plaintiff[s] to recover." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008); see also *DeHart*, 2013 IL 114137, ¶ 18; *Kilburg*, 2013 IL App (1st) 113408, ¶ 20. Our inquiry upon review, then, is whether the allegations of the complaint, when construed in the light most favorable to plaintiffs, were sufficient to establish a cause of action upon which relief may be granted. See *DeHart*, 2013 IL 114137, ¶ 18; *Napleton*, 229 Ill. 2d at 305. We perform this review *de novo*. See *DeHart*, 2013 IL 114137, ¶ 18; *Napleton*, 229 Ill. 2d at 305.

¶ 61 The purpose of pleadings is to present, define and narrow the issues and limit the proof needed at trial. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 307 (1981). Pleadings are not intended to erect barriers to a trial on the merits but instead to remove them and facilitate trial. *Id.* The object of pleadings is to produce an issue asserted by one side and denied by the other so that a trial may determine the actual truth. *Id.* At 308 (citing *Fleshner v. Copeland*, 13 Ill. 2d 72, 77 (1958)). In determining whether a cause of action has been stated, the whole complaint must be considered, rather than taking a myopic view of a disconnected part. *Stenwall v. Bergstrom*, 398 Ill. 377, 383 (1947).

¶ 62 Illinois is a fact-pleading State. *Time Savers, Inc. v. LaSalle Bank, N.A.*, 371 Ill. App. 3d 759, 767 (2007). This means that, although pleadings are to be liberally construed and formal or technical allegations are not necessary, a complaint must, nevertheless, contain facts to state a

cause of action. *Purmal v. Robert N. Wadington & Associates*, 354 Ill. App. 3d 715, 720 (2004). The complaint is deficient when it fails to allege the facts necessary for a plaintiff to recover. See *Doe v. Chicago Board of Education*, 339 Ill. App. 3d 848, 853 (2003). "But it is a rule of pleading long established, that a pleader is not required to set out his evidence. To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." *Board of Education v. Kankakee Federation of Teachers Local No. 886*, 46 Ill. 2d 439, 446-47 (1970).

¶ 63 With these principles in mind, we will review the trial court's section 2-615 dismissal as to plaintiff's count II and count III of his second amended verified complaint. With respect to count I, we note that the Bolinder defendants and defendant Pratt brought their motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)). A motion to dismiss under section 2-619 admits the legal sufficiency of the plaintiff's complaint but asserts an affirmative matter that defeats the claim. See *Farwell v. Senior Services Associates, Inc.*, 2012 IL App (2d) 110669, ¶¶ 10, 22 (reviewing a trial court's section 2-619 dismissal of a conspiracy claim). Accordingly, we recognize that the Bolinder defendants and defendant Pratt have admitted to the legal sufficiency of the allegations pertaining to the claims of civil conspiracy and public disclosure of private facts, and we thus, review the sufficiency of the complaint only as it pertains to Wheaton College.

¶ 64 1. Count II - Civil Conspiracy Against Wheaton College in Connection With the Public Private Facts

¶ 65 The complaint here charged a conspiracy to publicly disclose the private facts of plaintiff. Civil conspiracy is a recognized cause of action in Illinois. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 64 (1995). The underlying tort of public disclosure of private facts is a recognized cause of

action in Illinois. See *Leopold v. Levin*, 45 Ill. 2d 434, 440 (1970) (recognizing a right of privacy); *Miller v. Motorola*, 202 Ill. App. 3d 976 (1990); Restatement (Second) of Torts, sec. 652D (at 378-94 (1977)). Accordingly, there can be no question of its legal sufficiency.

¶ 66 As for factual sufficiency, the ultimate facts required to be pleaded for a civil conspiracy include: (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties; and (4) the overt act was done pursuant to and in furtherance of the common scheme. *Canel and Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 920 (1999). A cause of action for the public disclosure of private facts requires a plaintiff to plead that: (1) publicity was given to the disclosure of private facts; (2) the facts were private and not public facts; and (3) the matter made public would be highly offensive to a reasonable person. *Johnson v. Kmart Corp.*, 311 Ill. App. 3d 573, 579 (2000) (citing *Miller*, 202 Ill. App. 3d at 978).

¶ 67 With respect to the cause of action for civil conspiracy, plaintiff alleged that the Bolinder defendants entered into an agreement with defendant Pratt, whereby Pratt would use his influence with Wheaton College president Ryken and vice-president Chelsen to obtain confidential information from plaintiff's school records from Wheaton College. We conclude that plaintiff sufficiently alleged the element of an agreement. With respect to the second element, plaintiff needed to plead facts to establish a participation in an unlawful act, or a lawful act in an unlawful manner. In this case, plaintiff alleged that Pratt obtained the confidential information from Ryken, who obtained the information from plaintiff's school records kept at Wheaton College. The Federal Educational Records and Privacy Act of 1974 (FERPA) prohibits the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons. 20 U.S.C.A. § 1232g (2009). The relevant provision

of FERPA states that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records ***." 20 U.S.C. § 1232g(b)(1) (2009). On the record, Congress stated, "There has been clear evidence of frequent, even systematic violations of the privacy of students and parents by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations." 121 Cong. Rec. 13991 (1975). FERPA's purpose is clear: to protect students and parents from a school's unauthorized release of a student's record. FERPA was enacted under Congress's spending power and directs the Secretary of Education to withhold federal funds from any educational institution that fails to comply with certain conditions. One condition is that the institution not release a student's records without written consent. See 20 U.S.C. § 1232g(b)(1).

¶ 68 Pursuant to section 2-615 of the Code, we may reasonably infer that the Bolinder defendants, Pratt, Ryken, Chelsen, or Wheaton College did not have plaintiff's consent, written or otherwise, to release his student records that had been kept at Wheaton College. See *DeHart*, 2013 IL 114137, ¶ 18 (stating that a court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise therefrom) (citing *Doe ex rel. Ortega-Piron*, 213 Ill. 2d at 28). Without plaintiff's consent, any release of plaintiff's records, even from the president of Wheaton College, would have been an unauthorized release of confidential information. From the allegations set forth in plaintiff's complaint and the reasonable inferences therefrom, Ryken's conduct of accessing, procuring, and releasing plaintiff's confidential information from his student file at Wheaton College at the behest of Pratt and the Bolinder defendants was prohibited by FERPA and violated FERPA. We conclude that

plaintiff sufficiently pleaded the element that the Bolinder defendants and Wheaton College participated in a lawful act in an unlawful manner.

¶ 69 We also conclude that plaintiff sufficiently pleaded the third and fourth elements of a civil conspiracy: an injury caused by an unlawful overt act performed by one of the parties; and the overt act was done pursuant to and in furtherance of the common scheme. See *Canel and Hale, Ltd.*, 304 Ill. App. 3d at 920. The allegations reflect that, after Ryken released plaintiff's confidential information to Pratt, Pratt disclosed and transmitted the information to defendant Garth Bolinder. Garth Bolinder disclosed the confidential information to Megan Bolinder and Dixie Bolinder. Megan Bolinder disclosed the confidential information to her attorney and others. Megan Bolinder and her attorney thereafter utilized the confidential information in the Arkansas child custody litigation, all of which injured plaintiff's reputation and his legal rights and ability to parent the child conceived with Megan Bolinder.

¶ 70 We conclude that, with respect to count II, plaintiff has sufficiently pleaded a cause of action for civil conspiracy against Wheaton College. However, conspiracy, standing alone, is not a separate and distinct tort in Illinois. *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, ¶ 109. Liability for civil conspiracy depends on performance of some underlying tortious act; it is a means for establishing vicarious liability for the underlying tort. See *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 49 (citing *Indeck North American Power Fund, L.P. v. Norweb PLC*, 316 Ill. App. 3d 416, 432 (2000)). In this case, the complaint charged a conspiracy to publicly disclose the private facts of plaintiff.

¶ 71 "Illinois courts recognize four ways to state a cause of action for invasion of privacy: '(1) intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) public disclosure of private facts; and (4) publicity placing another in a false light.' " *Cooney v.*

Chicago Public Schools, 407 Ill. App. 3d 358, 366 (2010) (quoting *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 71 (2004)). As stated earlier, plaintiff was required to sufficiently plead that: (1) publicity was given to the disclosure of private facts; (2) the facts were private and not public facts; and (3) the matter made public would be highly offensive to a reasonable person. *Johnson*, 311 Ill. App. 3d at 579 (citing *Miller*, 202 Ill. App. 3d at 978). An action for public disclosure of private facts provides a remedy for the dissemination of true, but highly offensive or embarrassing, private facts. *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill. App. 3d 731, 739 (2000).

¶ 72 Examples of private facts include "family problems, romantic interests, sex lives, health problems, future work plans and criticism of [an employer]." *Busse*, 351 Ill. App. 3d at 72 (citing *Johnson*, 311 Ill. App. 3d at 578-79). In the present case, the information taken from plaintiff's student files was clearly private, as it contained intimate and detailed information between plaintiff and another individual with whom he had had a sexual relationship. Plaintiff was not a public figure (see *Leopold v. Levin*, 45 Ill. 2d 434, 441 (1970), he did not consent to have his student files accessed and transmitted to others, and there was no legitimate interest in the information (see *Eick v. Perk Dog Food Co.*, 347 Ill. App. 293 (1952)).

¶ 73 We next consider whether plaintiff sufficiently alleged that the confidential and private information taken from his student files would be highly offensive to a reasonable person. See *Johnson*, 311 Ill. App. 3d at 579 (citing *Miller*, 202 Ill. App. 3d at 978). This element is met, according to a test articulated by the Restatement, when " 'a reasonable man[,] would be justified in the eyes of the community in feeling seriously offended and aggrieved[.]' " *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 418 (1989) (analyzing a claim for false light invasion of privacy) (quoting Restatement (Second) of Torts, § 652E (1977)). Again,

the information that Wheaton College president Ryken took from plaintiff's student file reflected that, while plaintiff was a student at Wheaton College, (1) a Wheaton College student falsely accused plaintiff of fathering a child with her out of wedlock, and (2) the same Wheaton College student falsely accused plaintiff of counseling her to abort the child.

¶ 74 Comment b of the Restatement provides guidance:

> "For every individual, there are some phases of one's life and activities and some facts about oneself that one does not expose to the public eye, but keeps entirely to oneself or at most reveals only to one's family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a person's life in one's home, and some of one's past history that one would rather forget. When these intimate details of a person's life are spread before the public gaze in a manner highly offensive to the ordinary reasonable person, there is an actionable invasion of privacy, unless the matter is one of legitimate public interest." Restatement (Second) of Torts, § 652D, comment b (1977)).

¶ 75 Pursuant to section 2-615 of the Code, we conclude that plaintiff sufficiently alleged that the contents of the confidential and private information taken from his student files would be highly offensive to a reasonable person. Plaintiff's private sexual relations and intimate details were acquired through a deception and then reported to defendant Pratt, who then distributed the information to defendant Garth Bolinder, who in turn, passed the information to defendants Dixie and Megan Bolinder, and finally reaching Megan Bolinder's family law attorney in Arkansas. At this stage of the proceedings, we need not declare as a matter of law that the personal matter from plaintiff's student file was highly offensive; however, we can decide at the

very least that an issue of fact exists regarding whether a reasonable person would find it highly offensive. See, *e.g.*, *Johnson*, 311 Ill. App. 3d at 579-80 (finding that summary judgment should not have been granted when genuine issues of material fact existed regarding whether a reasonable person would find it highly offensive that plaintiff's personal matters were made public to his employer).

¶ 76 We reject defendant Wheaton College's argument with respect to the veracity of the information itself. Defendant argues that the information reflected a "false accusation," and therefore, plaintiff failed to "allege the disclosure of intimate, true facts." Plaintiff's complaint alleged that, while plaintiff was a student at Wheaton College, (1) a Wheaton College student falsely accused him of fathering a child with her out of wedlock, and (2) the same Wheaton College student falsely accused him of counseling her to abort the child he had allegedly fathered with her. However, in plaintiff's response to Wheaton College's section 2-615 motion to dismiss, plaintiff provided that he had "alleged that Wheaton disclosed private information that as a student he had been accused of fathering a child out of wedlock and had counseled abortion of that child." Contrary to defendant's argument, we decline to focus our analysis on one word, "false," and its variations, out of context. Although the dissent questions how "an allegation that plaintiff was *falsely* accused of certain deeds, *i.e.*, fathering a child out of wedlock and counseling a woman to abort her child," can be considered "an allegation of *true* facts concerning plaintiff's private sexual life," plaintiff's simple response to the dismissal motion explains precisely what his allegations meant. Contrary to the dissent's position, we decline to focus on the one interpretation of the word "false," *e.g.*, "untrue," from the many others also available. See *Black's Law Dictionary* 635-37 (8th ed. 2004). Rather, our review encompasses all facts apparent from the pleadings, including the exhibits attached thereto. See *Napleton v.*

Village of Hinsdale, 229 Ill. 2d 296, 321 (2008) (citing *Haddick v. Valor Insurance*, 198 Ill. 2d 409, 414 (2001); 735 ILCS 5/2-606 (West 2004). We have reviewed plaintiff's allegations, and it appears to be more an issue of inartful drafting as opposed to a deficiency of the requisite facts upon which to base a cause of action.

¶ 77 Defendant Wheaton College cites *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993); however, *Haynes* was decided following a grant of summary judgment and not at the initial pleading stage. Wheaton College also cites *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (9th Cir. 1988); however, the appeals court determined that the statements at issue contained in the defendant's magazine article were constitutionally protected opinion, and the plaintiff failed to allege that the matters of opinion were truthful facts about her. *Id.* at 894-95. On our review of the pleadings and responses, we believe the private facts were "truthfully alleged" and sufficient to sustain this cause of action. See *Griffin v. Goldenhersh*, 323 Ill. App. 3d 398, 406 (2001).

¶ 78 The final element, and the element upon which the parties focus their argument, is that of publicity. The parties seem to agree that plaintiff's complaint did not allege a disclosure by defendant Wheaton College to the public at large. However, they disagree as to whether plaintiff pleaded facts sufficient to invoke the special relationship exception. Wheaton College argues that it disclosed the information only to defendant Pratt, whom plaintiff has never met, and therefore, dismissal was proper because plaintiff could not establish a special relationship and satisfy the publicity element.

¶ 79 "The publicity element in an action for public disclosure of private facts has been generally defined as communication of a private fact 'to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.' " *Poulos*, 312 Ill. App. 3d at 740 (quoting Restatement (Second) of Torts § 652D

(1977)). " 'Thus it is not an invasion of the right of privacy ***, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.' " *Miller*, 202 Ill. App. 3d at 980 (quoting Restatement (Second) of Torts § 652D, comment a, at 384-85 (1977)). The publicity requirement may also be satisfied by establishing that the defendant disclosed highly offensive private facts to a person or persons with whom the plaintiff has a special relationship. *Poulos*, 312 Ill. App. 3d at 740. "An invasion of a plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. Such a public might be the general public, if the plaintiff were a public figure, or a particular public such as fellow employees, club members, family, or neighbors, if the person were not a public figure." *Miller*, 202 Ill. App. 3d at 980-81. This exception "is both justified and appropriate in that a disclosure to a limited number of persons may be just as devastating to a plaintiff as a disclosure to the general public." *Poulos*, 312 Ill. App. 3d at 740.

¶ 80 With respect to the publication requirement, comment a to the Restatement (Second) of Torts provides:

> "[Public disclosure] *** means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. ***. Restatement (Second) of Torts § 652D, comment a, at 384-85 (1977).

The questions for us to consider are whether Wheaton College's conduct of communication constituted a communication to "so many persons that the matter must be regarded as substantially certain to become one of public knowledge," such that plaintiff should be allowed the "special relationship" exception, and if so, whether he has pleaded facts sufficient to

withstand a section 2-615 motion to dismiss. On our review, we answer the questions in the affirmative because we determine the circumstances warrant adoption of the exception.

¶ 81 In *Miller*, the reviewing court noted that some courts recognized the need for flexibility in the application of the Restatement's theory to permit recovery for egregious conduct. *Miller*, 202 Ill. App. 3d at 980 (citing *McSurely v. McClellan*, 753 F. 2d 88 (D.C. Cir. 1985)). This court has recognized the special relationship exception in the past. See *Beverly v. Reinert*, 239 Ill. App. 3d 91 (1992). In *McSurely*, the Court of Appeals for the D.C. Circuit ruled that the coercive disclosure of highly sensitive and personal matters to an audience of a single person was actionable. *McSurely*, 753 F. 2d 88. There, the plaintiffs, husband and wife Alan and Margaret McSurely, sued various Kentucky and Federal officials on several grounds, one being invasion of the wife's privacy. *Id.* Federal investigators seized the wife's personal papers, including love letters from before her marriage from columnist Drew Pearson. *Id.* These letters revealed intimate details of the romance between Pearson and the woman Pearson called "Dearest Cucumber." *Id.* The Federal investigator then stood next to Alan McSurely, forcing him to read these letters and other of his wife's personal papers of which he had previously been unaware. *Id.* The revelations embarrassed both plaintiffs and eventually helped to undermine their marriage. *Id.* The Court of Appeals noted that the disclosure at issue was particularly cruel and coercive, involved extraordinarily intimate aspects of the wife's past, and served no legitimate purpose. *Id.* The Court of Appeals considered the conduct so egregious that the publication of the private fact even to one individual was actionable. *Id.*

¶ 82 In this case, we conclude that under the facts of this case, the publication element of the privacy tort was sufficiently pleaded to withstand a section 2-615 motion to dismiss. Plaintiff pleaded that Wheaton College President Ryken obtained information from plaintiff's student file

kept at Wheaton College; Ryken communicated this private information to defendant Pratt, with the knowledge that he was then going to communicate the information to the Bolinder defendants. Plaintiff further pleaded that the Bolinder defendants then utilized the private facts against him in the Arkansas child custody litigation. Through the actions of its president, Wheaton College's communication to Pratt was "substantially certain to become one of public knowledge." See Restatement (Second) of Torts § 652D, comment a, at 384-85 (1977). Similar to the circumstances set out in *McSurely*, the methods by which all of the defendants used to obtain this information was particularly deceptive and under a veil of secrecy. As in *McSurely*, this publication of plaintiff's private facts should be actionable. Accordingly, the trial court erred when it dismissed count II for plaintiff's failure to state a cause of action.

¶ 83 2. Count III - Civil Conspiracy Against All Defendants for the Tortious Interference With an Existing Business Relationship

¶ 84 In the present case, plaintiff's complaint purported to state a cause of action for the tortious interference with an existing business relationship. The trial court noted that plaintiff "may have had a budding business relationship, but not an enforceable contract." The elements of the tort of intentional interference with existing contract or business relationship are: "(1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of this contractual relation; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) a subsequent breach by the other, caused by the defendant's wrongful conduct; and (5) damages. [Citation.]" (Internal quotation marks omitted.) *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 15455 (1989). We need go no further in our analysis than noting the same element the trial court found that defendant lacked: the existence of a valid and enforceable contract. We note that plaintiff

attached emails and other correspondence to his complaint; however, a valid and enforceable contract consists of an offer and acceptance, definite and certain terms, and consideration, and plaintiff's pleadings and documents provided none of those. See *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1027 (2007). The trial court properly dismissed count III of plaintiff's second amended verified complaint, with prejudice.

¶ 85 D. Trial Court's Section 2-619 Dismissal for Lack of Personal Jurisdiction

¶ 86 As we stated earlier, with respect to count I, the Bolinder defendants and defendant Pratt brought their motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)). Despite the dissent's review and proposed disposition of the claim in Count I, the Bolinder defendants and defendant Pratt have admitted to the legal sufficiency of the allegations pertaining to the claims of civil conspiracy and public disclosure of private facts. Accordingly, our review of this issue encompasses whether the trial court erred when it granted defendant Pratt and the Bolinder defendants' motions to dismiss based on a lack of personal jurisdiction. Plaintiff argues that his allegations, taken as true, satisfied the "minimum contacts" requirements for jurisdiction, as set forth in *Innovative Garage Door Co. v. High Ranking Domains, LLC*, 2012 IL App (2d) 120117. Plaintiff asserts that he pleaded facts that the individual defendants intentionally sought information, located in Illinois, for the purpose of hurting him in Illinois, which was sufficient to establish the minimum contacts requirements for jurisdiction.

¶ 87 A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of a plaintiff's complaint but raises defects, defenses, or other affirmative matters appearing on the face of the complaint or which are established by external submissions acting to defeat the complaint's allegations. 735 ILCS 5/2-619 (West 2012); *Kedzie & 103rd Currency Exchange,*

Inc. v. Hodge, 156 Ill. 2d 112, 115 (1993); *Russell v. Kinney Contractors, Inc.*, 342 Ill. App. 3d 666, 670 (2003). A motion pursuant to section 2-619(a)(9) of the Code asserts the claim is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). Our supreme court has explained the phrase " 'affirmative matter' encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." *Hodge*, 156 Ill. 2d at 115.

¶ 88 We address this court's standard of review of the grant of a section 2-301 motion to dismiss based on personal jurisdiction. Section 2-301(a) states that prior to filing any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person, either on the ground that the party is not amenable to process of an Illinois court, or on the ground of insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding, or by filing a motion to quash service of process. 735 ILCS 5/-301(a) (West 2012). Section 2-301(b) provides that in disposing of a motion objecting to the court's jurisdiction over the person, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon contested issues of fact. 735 ILCS 5/2-301(b) (West 2012). No determination of any issue of fact in connection with the objection is a determination of the merits of the case or any aspect thereof. *Id.*

¶ 89 When seeking jurisdiction over a nonresident defendant, a plaintiff has the burden of establishing a *prima facie* case for jurisdiction. *Pace Communications Services Corp. v. Express Products, Inc.*, 408 Ill. App. 3d 970 (2011) (citing *MacNeil v. Trambert*, 401 Ill. App. 3d 1077, 1080 (2010)). The burden then shifts to the defendant to show that the assertion of jurisdiction is unreasonable. *Pace Communications Services Corp.*, 408 Ill. App. 3d at 970 (citing *Bell v. Don*

Prudhomme Racing, Inc., 405 Ill. App. 3d 223, 228 (2010)). Where, as in this case, the trial court determined the issue of personal jurisdiction based solely on documentary evidence, we review its ruling *de novo*. *Pace Communications Services Corp.*, 408 Ill. App. 3d at 970 (citing *MacNeil*, 401 Ill. App. 3d at 1080.

¶ 90 In *Elsener v. Brown*, 2013 IL App (2d) 120209, ¶¶ 36-37, this court provided the general rules of law pertaining to personal jurisdiction:

> "Personal jurisdiction is 'the authority of the court to litigate in reference to a particular defendant and to determine the rights and duties of that defendant.' [Citation].
>
> ***
>
> There are two types of personal jurisdiction: general and specific. *Aasonn, LLC v. Delaney*, 2011 IL App (2d) 101125, ¶ 14. General jurisdiction rests on the defendant's 'continuous and systematic contacts with the state' and can be exercised even where the cause of action does not arise out of those contacts. *Id.* Specific jurisdiction does not require such extensive contacts, but the contacts that do exist must be the basis for the cause of action. *Id.* Section 2-209 of the Code of Civil Procedure (735 ILCS 5/2-209 (West 2012)) is known as the Illinois long-arm statute. Subsection (a) of section 2-209 'describes 14 grounds under which specific jurisdiction arises,' while subsection (b) 'describes 4 grounds under which general jurisdiction arises.' *Sabados v. Planned Parenthood of Greater Indiana*, 378 Ill. App. 3d 243, 246 (2007). Jurisdiction lies under subsection (a) only with respect to 'causes of action arising from [the] acts enumerated [in subsection (a)].' 735 ILCS 5/2–209(f) (West 2012)."

¶ 91 In the present case, the trial court did not identify the specific authority upon which it relied, other than to find that there was no "commission of a tort under 209" by defendant Pratt.

This would reflect a finding under section 209(a)(2) of the Code. See 735 ILCS 5/2-209(a)(2) (West 2012) ("The commission of a tortious act within this State"). With respect to the Bolinder defendants, the trial court considered the affidavits and found that there were no minimum contacts.

¶ 92 To establish personal jurisdiction over a defendant, a plaintiff must demonstrate that the defendant committed one of the acts enumerated in Illinois long-arm statute, that the cause of action arose from the act, and that personal jurisdiction is consistent with due process. *Alpert*, 235 Ill. App. 3d at 458-49. In *Innovative Garage Co.*, this court set out what constituted "minimum contacts" to establish personal jurisdiction:

> " 'In order for personal jurisdiction to comport with federal due process requirements, the defendant must have certain minimum contacts with the forum state such that maintaining the suit there does not offend traditional notions of fair play and substantial justice.' " *Wiggen*, 2011 IL App (2d) 100982, ¶ 24 (quoting *Bolger v. Nautica International, Inc.*, 369 Ill. App. 3d 947, 951 (2007)). "At a minimum, the court must find an act by which the defendant purposefully avails him or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* ¶ 29. "The focus is on the defendant's activities within the forum State, not on those of the plaintiff." (Internal quotation marks omitted.) *Id.* "The purposeful-availment requirement exists so that an out-of-state defendant will not be forced to litigate in a distant or inconvenient forum solely as a result of random, fortuitous, or attenuated contacts or the unilateral act of a consumer or some other third person." *Id.* ¶ 24. This connection does not require physical contacts with the forum state. Rather, "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of

another State," that state may exercise personal jurisdiction over a nonresident defendant. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774-75 (1984)). Once a plaintiff has established a defendant's minimum contacts with Illinois, we must then consider those contacts in light of certain other factors to determine whether the exercise of personal jurisdiction comports with " 'fair play and substantial justice.' " *Id.* (quoting *International Shoe Co. v. State of Washington, Office of Unemployment Compensation & Placement*, 326 U.S. 310, 320 (1945))."

¶ 93 Here, the allegations reflect that plaintiff and defendant Megan Bolinder are the parents of a minor child, and they are involved in child custody litigation in Arkansas. In May 2010, defendants Megan and Dixie Bolinder telephoned plaintiff and informed him that they would "destroy his relationship with Dennis Hastert, Wheaton College, and all the people you believe support you now." Thereafter, the Bolinder defendants contacted defendant Pratt and asked him "to use his association with Wheaton College to obtain damaging information regarding [plaintiff] that might be located in [plaintiff's] Wheaton College student files in Illinois." Defendant Pratt agreed to help the Bolinder defendants. At Pratt's request, Wheaton College President Ryken obtained information from plaintiff's student file located at Wheaton College in Illinois. Ryken transmitted the information on plaintiff to defendant Pratt, who in turn, transmitted the information to the Bolinder defendants and to Megan Bolinder's attorney. This information was then used against plaintiff during the Arkansas child custody litigation. Pratt also had contact with Illinois residents Pete Willson, Richard Gieser, and Robert Oury regarding plaintiff's association with the Wheaton College wrestling program. Megan Bolinder was also alleged to have contacted with Ed Ericson Jr. that she had her family were going to get plaintiff

"kicked off" the campus of Wheaton College. Although defendant Pratt and the Bolinder defendants may never have physically placed themselves in the State of Illinois, their conduct by way of communication to others inside Illinois, namely individuals associated with or formerly associated with Wheaton College, enabled the performance of the acts that gave rise to plaintiff's injury. The law of Illinois will govern the substantive rights and duties stemming from this incident. Witnesses to the events that occurred at Wheaton College, *i.e.*, Ryken, Chelsen, Jarman, Pollard, and Hastert, among others, are likely to be found here, and not in Arkansas or Michigan. In the present circumstances, it is not unreasonable to require Megan Bolinder, Dixie Bolinder, Garth Bolinder, and Thomas Pratt to make their defense here.

¶ 94 Conspiracies by their very nature do not permit plaintiff to allege all the details of the defendants' conduct. Such actions are often purposefully shrouded in mystery and plausible deniability. The litigation is complex, the issues are often subtle, and the alleged actions carefully camouflaged. Through the pleadings and reasonable inferences therefrom, plaintiff has shown that the Bolinder defendants and defendant Pratt purposefully directed their activities toward the State of Illinois and no other. The Bolinder defendants and defendant Pratt should have reasonably anticipated that their conduct in setting out to "destroy" plaintiff's relationships and to uncover private and potentially damaging information from plaintiff's protected student file at Wheaton College would lead to litigation in Illinois and subject them to jurisdiction here. Accordingly, it is reasonable for the State of Illinois to exert personal jurisdiction over them. The trial court erred when it found otherwise.

¶ 95 E. Trial Court's Denial of Plaintiff's Requested Leave to Amend

¶ 96 Finally, plaintiff contends that the trial court erred by denying him leave to amend his complaint. Section 2-616(a) of the Code of Civil Procedure permits amendments to pleadings

before final judgment. 735 ILCS 5/2-616(a) (West 2012). A party's right to amend is not absolute, and the decision whether to grant leave to amend a pleading is within the sound discretion of the trial court. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). Our resolution of the foregoing issues obviates the need to address this ruling.

¶ 97 III. CONCLUSION

¶ 98 Count II of the amended complaint is sufficiently specific. The trial court's dismissal with prejudice was unwarranted. A cause of action should not be dismissed with prejudice unless it clearly appears that no set of facts can be proved which would entitle the plaintiff to relief. *Edgar County Bank & Trust Co. v. Paris Hospital, Inc.*, 57 Ill. 2d 298, 305 (1974).

¶ 99 For the reasons stated, we affirm the trial court's dismissal of count III of plaintiff's second amended verified complaint for failure to state a cause of action for tortious interference with an existing business relationship because plaintiff failed to establish a contractual relationship. We exercise personal jurisdiction over the nonresident defendants because they were all part of an alleged conspiracy to publicly disclose the private facts of plaintiff. We reverse the trial court's dismissal of count II of plaintiff's second amended verified complaint, which was directed toward Wheaton College. We remand for further proceedings consistent with this order.

¶ 100 Affirmed in part, reversed in part, and remanded.

¶ 101 JUSTICE BIRKETT, concurring in part and dissenting in part.

¶ 102 I concur in that portion of the majority's order which holds that the trial court properly dismissed count III of the plaintiff's second amended verified complaint for failure to state a cause of action for tortious interference with an existing business relationship. However, because plaintiff failed to state a cause of action for invasion of privacy based upon the public

disclosure of private facts, I must respectfully dissent from the majority's reversal of the trial court's order dismissing counts I and II.[1]

¶ 103 My colleagues note some of the deficiencies in plaintiff's brief regarding the "Nature of the Case" section and his failure to cite to the pages of his legal authority. See *supra* ¶¶ 49-51. I would go further. In my opinion, plaintiff has forfeited any argument that his second amended verified complaint stated a cause of action for invasion of privacy based on the public disclosure of private facts. Plaintiff cited no authority in his brief for the proposition that the public disclosure of a "false" accusation can support a claim for the public disclosure of private, true facts. Plaintiff does cite *Miller* regarding the publicity element (special relationship exception) but cites no authority to support a conclusion that the "matter made public would be highly offensive to a reasonable person." *Supra* ¶ 66. Central to the trial court's dismissal of plaintiff's claim for public disclosure of private facts was this finding:

> "Further, the content of the alleged disclosure, a false accusation that plaintiff impregnated a woman some 25 years earlier in college and counseled her to obtain an

[1] The majority correctly points out that the Bolinders and Pratt filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)) and they have therefore admitted to the legal sufficiency of the allegations at issue in this case. Supra, ¶ 87. However, since plaintiff has alleged no facts in order to recover against any of the defendants for the public disclosure of private facts, the trial court properly dismissed count I against the Bolinders and Pratt. See *Floyd ex rel. Floyd v. Rockford Park District*, 355 Ill. App. 3d 695, 704 (2005) (where plaintiff's complaint could not withstand a 2-615 motion to dismiss for failure to allege facts sufficient to state a cause of action the complaint was also properly dismissed pursuant to section 2-619(a)(9)).

> abortion, apparently, since it was a disclosure of a false accusation, is not a disclosure of true facts. Again, an element of this cause of action. I certainly will acknowledge that it is a disclosure to one person of an intimate fact of a false accusation."

¶ 104 A point raised in a brief but not supported by relevant authority is forfeited. *In re Marriage of Saheb and Khazel*, 377 Ill. App. 3d 615 (2007). Plaintiff devotes two pages of his brief to this issue. His only argument is "[t]his information was so offensive that Jane Doe, the other party to the information, moved to protect herself from the information" and "Wheaton College agreed to protect Jane Doe from the information." This argument is nothing more than a charade. Plaintiff cannot step into Jane Doe's position to support his claim that the information was highly offensive to a reasonable person in his position, not Jane Doe's.

¶ 105 The tort of public disclosure of private facts, like all forms of invasion of privacy, is highly personal. The record shows that Jane Doe entered this case to obtain a protective order when she learned that plaintiff intended to use her true identity in his amended complaint naming her as his false accuser. She noted that "the statute of limitations has long since passed on any claim in connection with the assertion in any event." The fact that Wheaton College and plaintiff agreed to the protective order does not in any way support the contention that revealing the dormant false accusation would be "highly offensive" to plaintiff. While one can understand why Jane Doe would experience "emotional distress and embarrassment" as a result of publicity of her false accusation, it is not reasonable to conclude that plaintiff would suffer from those same feelings. Plaintiff's failure to cite any authority for the proposition that because the disclosure was highly offensive to Jane Doe it is highly offensive to him should result in forfeiture of the argument. Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) requires more than a vague allegation. Even where an argument is developed beyond a vague allegation,

it may be insufficient if it does not include citation to authority. *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010). At oral argument, plaintiff's counsel was asked about his failure to cite any authority for the proposition that disclosure of a false accusation can support a cause of action for public disclosure of private facts. Counsel finally acknowledged that he had no such case, but suggested that *Duncan v. Peterson*, 359 Ill. App. 3d 1034 (2005) supported his claim. Problematic for plaintiff is that the *Duncan* case was a "false light" case, not a public disclosure of private facts case, and he cited that case only in his reply brief to support his "special relationship" argument, not the "highly offensive" element. Also, the communication at issue in Duncan did not include the statement that the allegation (of adultery) was a false allegation. Plaintiff's counsel, in recognizing the deficiencies in his brief, stated at oral argument, "I am better on my feet." Unfortunately, defects in a brief cannot be cured by oral argument. *People v. Thomas*, 164 Ill. 2d 410, 422 (1995).

¶ 106 Forfeiture aside, as I will explain, it is clear from the factual allegations and reasonable permissible inferences therefrom, that no set of facts could be proven that would entitle plaintiff to recovery under the law. *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2008).

¶ 107 As an initial matter, it is important to remember that our supreme court has warned courts to proceed with caution in defining the limits of the right to privacy. *Lovgren v. Citizens First National* Bank, 126 Ill. 2d 411, 421 (1989). As the majority sets outs, to state a claim for public disclosure of private facts, plaintiff was required to plead that: (1) publicity was given to the disclosure of private facts; (2) the facts were private and not public facts; and (3) the matter made public would be highly offensive to a reasonable person. *Johnson*, 311 Ill. App. 3d at 579 (citing *Miller*, 202 Ill. App. 3d at 978). The majority first addresses the second prong of the test—whether the facts at issue should be considered private—and concludes that the

information taken from plaintiff's student files "was clearly private, as it contained intimate and detailed information between plaintiff and another individual with whom he had a sexual relationship." *Supra* ¶ 72. However, the facts cited by the majority contain no reference to any allegations by plaintiff that he engaged in a sexual relationship with a Wheaton College student 25 years ago. As stated by the majority, the information that was disseminated about plaintiff reflected that, while plaintiff was a student at Wheaton College, a student there *falsely* accused him of fathering a child with her out of wedlock, and *falsely* accused him of counseling her to abort the child he had allegedly fathered with her. See s*upra* ¶ 14. However, an allegation that plaintiff was *falsely* accused of certain deeds, *i.e.*, fathering a child out of wedlock and counseling a woman to abort her child, is not an allegation of *true* facts concerning plaintiff's private sexual life. Something that is false cannot be considered private. Likewise, something that is false is not a fact. There is no authority for such a proposition because such a concept is unsound. Plaintiff clearly failed to allege the public disclosure of any private, true facts in his second amended verified complaint.

¶ 108 The majority next considers the third prong of the test to determine whether plaintiff sufficiently alleged that the "confidential and private information" taken from his student files would be highly offensive to a reasonable person. Again, this element is met when a reasonable person would be justified in the eyes of the community in feeling seriously offended and aggrieved. *Lovgren*, 126 Ill. 2d at 418 (analyzing a claim for false light invasion of privacy) (quoting Restatement (Second) of Torts, § 652E (1977)). In concluding that plaintiff sufficiently alleged that the contents of his student files would be highly offensive to a reasonable person, the majority cites to a comment from the Restatement concerning sexual relations being entirely private matters that contain intimate details which, when spread before the public in a highly

offensive manner, will cause an action for invasion of privacy to lie. See s*upra* ¶ 74. The majority then states, "[p]laintiff's private sexual relations and intimate details were acquired through a deception and then reported to defendant Pratt, who then distributed the information to defendant Garth Bolinder who in turn, passed the information to defendants Dixie and Megan Bolinder, and finally reaching Megan Bolinder's family law attorney in Arkansas." *Supra* ¶ 75. As with its determination that the facts involved in this case were "private," the majority's analysis is flawed with regard to whether the dissemination of this information would be highly offensive to a reasonable person. Unlike the example cited in the Restatement, the dissemination of information here *did not* involve intimate details of sexual relations. By plaintiff's own allegations, the information disseminated dealt with statements that were deemed false *at the time that they were disseminated*. Taking those allegations as true – and we must – it is illogical for a court to hold that information taken from plaintiff's student file that he had been *falsely accused* of something *over 25 years ago* cannot even come close the requirement that a reasonable person would be *highly offended* by the dissemination. To be sure, any type of sexual allegation might raise an eyebrow, but the fact that the allegations are said to be *false* dooms it from being considered highly offensive.

¶ 109 In rejecting defendant Wheaton College's correct assertion that the disseminated information reflected a false allegation and therefore plaintiff failed to allege the disclosure of intimate, true facts, the majority first attempts to distinguish the cases cited by Wheaton College by noting that in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993), that case was decided following a grant of summary judgment and not at the initial pleading stage. Also, with respect to *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (9th Cir. 1988), the majority notes that the plaintiff in that case failed to allege that the constitutionally protected opinions in the magazine

article were truthful facts about her. *Id*. at 894-95; *supra* ¶ 77. Neither of these distinctions, however, change the fact that in order to state a cause of action for the public disclosure of private facts one must allege that the allegations are *true*, but highly offensive or embarrassing, private facts. See *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill. App. 3d 731, 739, (2000); 62A Am. Jur. 2d *Privacy* § 93 (2014). In the instant case, plaintiff *did not allege* that the information disclosed constituted true facts.

¶ 110 "The tort of publication of private facts focuses on a *very narrow gap in tort law*; that is, to provide a remedy for *truthful* but damaging dissemination of private facts, which is nonactionable under defamation rules." (Emphasis added.) 62A Am. Jur. 2d *Privacy* § 93 (2014). At oral argument, plaintiff's counsel admitted that he could cite no authority for the proposition that where the disclosure of "private facts" is false, a suit for public disclosure of private facts can be maintained. He is unable to do so, of course, because such a proposition is illogical – if a fact is false, then by definition *it does not exist*. Again, a non-existent fact cannot be private. The legal definition of a "fact" is "something that actually exists" or "an actual or alleged event or circumstance." Black's Law Dictionary 610 (7th ed. 1999). I agree with the trial court when it said, "[a] disclosure of a false accusation is not a disclosure of true facts."

¶ 111 The majority also rejects defendant Wheaton College's correct assertion that the disseminated information reflected a false allegation by stating, "[w]e have reviewed plaintiff's allegations, and it appears to be more an issue of inartful drafting as opposed to a deficiency of the requisite facts upon which to base a cause of action." *Supra* ¶ 76. They conclude that plaintiff did not actually mean that when Wheaton College disseminated the information it specifically told Pratt that plaintiff had been *falsely accused* 25 years ago because, in his response to Wheaton College's section 2-615 motion to dismiss, plaintiff "provided that he had

'alleged that Wheaton disclosed private information that as a student he had been accused of fathering a child out of wedlock and had counseled abortion of that child.' " *Supra* ¶ 76. The majority then concludes, "plaintiff's simple response to the dismissal motion explains precisely what his allegations meant." It then states, "our review encompasses all facts apparent from the pleadings, including the exhibits attached thereto" and cites to *Napelton v. Village of Hinsdale*, 229 Ill. 2d 296, 321 (2008) (citing *Haddick v. Valor Insurance*, 198 Ill. 2d 409, 414 (2001); 735 ILCS 5/2-606 (West 2004)). *Supra* ¶ 76. Despite the clear allegations in plaintiff's first, second and proposed third amended complaint, the majority is somehow of the opinion that "the private facts were truthfully alleged" and sufficient to sustain a cause of action." *Supra* ¶ 77.

¶ 112 The majority is mistaken. First, plaintiff's response to Wheaton College's motion to dismiss is neither a pleading nor an exhibit attached to a pleading. This court has explained that a pleading consists of a party's formal allegations of his claims or defenses. *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 407 (2005). In contrast, a motion is an application to the court for a ruling or an order in a pending case. *Id*. Therefore, a response to a motion is also not a pleading. Second, and even more important, plaintiff has repeatedly alleged that President Ryken gave information to Pratt (and Pratt allegedly passed along that information to the Bolinders), that 25 years ago he was *falsely* accused of fathering a child out of wedlock and *falsely* accused of counseling a pregnant student to obtain an abortion. The record contains plaintiff's proposed third amended complaint which contains the identical language found in the first and second amended complaint. The notion of "inartful drafting" is not supported by the record. Such hairsplitting is not in keeping with the supreme court's admonition to proceed with caution in defining the limits of the right to privacy. Plaintiff's counsel was *specifically asked this question* at oral argument and he confirmed that the allegations at issue were indeed said to be false *at the*

time they were disseminated. When asked whether the fact that the allegations were false was problematic, counsel responded by saying that the falsity of the allegations was not a problem because "the true statement is the false allegation." If counsel's interpretation of the law were correct, any false allegation disseminated about a plaintiff would satisfy the requirement that the allegations be true, because, of course, the "truthful statement" was that the allegation was false. Such an interpretation of the law is nonsensical and makes a mockery of out this very narrow tort. "The very nature of the cause of action [public disclosure of private facts] is such that the facts disclosed are true, and it is this truthful disclosure that injures the plaintiff." 62A Am. Jur. 2d *Privacy* § 175 (2014).

¶ 113 Next, the majority addresses the publicity requirement to state a claim for the tort of public disclosure of private facts. It acknowledges that the parties agree that plaintiff's complaint did not allege a disclosure by defendant Wheaton College to the public at large. *Supra* ¶ 78. However, they then go on to find that: (1) Wheaton College's conduct of communication constituted a communication to "so many persons that the matter must be regarded as substantially certain to become one of public knowledge," such that plaintiff should be allowed the "special relationship" exception; and (2) plaintiff has pleaded facts sufficient to withstand a section 2-615 motion to dismiss. *Supra* ¶ 80. In coming to this conclusion the majority cites *Miller* as recognizing the need for flexibility in the application of the Restatement's theory to permit recovery for egregious conduct. See *Miller*, 202 Ill. App. 3d at 980; *supra* ¶ 81. It also notes that this court has recognized the special relationship exception in the past in *Beverly v. Reinert*, 239 Ill. App. 3d 91 (1992). It then delves into the specific facts of *McSurely v. McClellan*, 753 F. 2d 88 (D.C. Cir. 1985), and concludes that, like the circumstances set out in

McSurely, the methods by which all of the defendants used to obtain the information in this case was "particularly deceptive and under a veil of secrecy." *Supra* ¶ 82.

¶ 114 I also disagree with the majority's conclusion that plaintiff has sufficiently pled the publicity element, even under the relaxed "special relationship" exception recognized in *Miller*. First, although the *Miller* court did in fact hold that the public disclosure requirement may be satisfied by proof that the plaintiff has a special relationship with the "public" to whom the information is disclosed (*Miller*, 202 Ill. App. 3d at 981), the facts in *Miller* in no way support a finding of a special relationship in this case. In *Miller*, plaintiff's complaint alleged that she consulted with the defendant-employer's nurse about three leaves of absence that plaintiff took over a two-year period to undergo mastectomy and reconstructive surgeries. The complaint also alleged that plaintiff, who did not consent to the release of any of her medical information which was maintained at defendant's place of business, was told by a co-employee that she had been informed of plaintiff's mastectomy. Further, plaintiff alleged that as a result of defendant's disclosure *and plaintiff's belief of the awareness by numerous other employees of her condition*, she suffered severe physical, mental and emotional distress and took an early retirement from her 23-year employment with the defendant-employer. *Id*. at 979. *Miller* did not hold that the publicity element was satisfied by a disclosure to a single person with whom the plaintiff had a special relationship. In fact, it specifically noted that disclosure "may be just as devastating to the person even though the disclosure was made *to a limited number of people*." (Emphasis added.) *Id*. at 980-81.

¶ 115 In the instant case, defendant Wheaton College disclosed the information to *one person*, defendant Pratt. The fact that plaintiff alleged that Wheaton College disclosed information from plaintiff's student files to Pratt "with the knowledge that *he was going to communicate it* to the

Bolinders for use in the custody case" can in no way be construed as an allegation that Wheaton College itself disseminated the information to a limited number of people. An Illinois court has already specifically held that a disclosure to one person does not satisfy the public disclosure element of this tort. See *Roehrborn v. Lambert*, 277 Ill. App. 3d 181, 182-83 (1995) (affirming the trial court's section 2-615 dismissal on the ground that defendant only disclosed plaintiff's test results and evaluations to one person). Further, even if this publication to a "class of one" constitutes publicity, and it does not, plaintiff has alleged *no special relationship with Pratt whatsoever*. In his brief on appeal plaintiff argues that he might have a special relationship with "the mother and grandparents of [his] son" to whom Pratt allegedly later conveyed the allegations. However, plaintiff's claim against Wheaton College is for allegedly communicating facts to Pratt alone. Therefore, plaintiff's alleged "special relationship" with the Bolinders is irrelevant. Even with regard to plaintiff's action against Pratt and the Bolinders, plaintiff's claim that he has a "special relationship" with the Bolinders is meritless. The alleged dissemination of the information in question to the Bolinders did not cause *embarrassment* to plaintiff, nor did the Bolinders constitute a small group of people akin to fellow employees, club members, family or neighbors. See *Miller*, 202 Ill. App. 3d at 980-81. Instead, the information allegedly disseminated to the Bolinders from Pratt was to be used in a private civil action. Such a relationship does not constitute a "special relationship" under any legal precedent whatsoever.

¶ 116 Next, although the majority points out that "this court has recognized the special relationship exception in the past" (supra ¶ 81), until today this court has not found such a relationship to exist. In *Beverly v. Reinert*, 239 Ill. App. 3d 91 (1992), this court discussed the "special relationship" exception as set out in *Miller*, but affirmed the dismissal of an action for the public disclosure of private facts on the ground that the counter-plaintiff had not proven that

anyone in particular in the defendant law firm had intercepted the disseminated information, and that the counter-plaintiff did not have a special relationship with the law firm's employees. *Id*. at 99-100. More important, our supreme court has yet to rule on the issue of whether the "special relationship" exception is even a proper exception to the publicity requirement for this tort.

¶ 117 The majority also cites to *McSurely v. McClellan*, 753 F. 2d 88 (D.C. Cir. 1985) for the proposition that a single person will satisfy the "publicity" requirement for this tort, and attempts to analogize the facts in *McSurely* to the instant case.

¶ 118 I must first note that since *McSurely* is a federal case this court is not bound to follow its holding. See *People v. Eyler*, 133 Ill.2d 173, 225 (1989) (Illinois courts are generally not bound to follow federal case law). However, even if a "single person publicity requirement" were to be recognized in Illinois, the facts of *McSurely* and the instant case are so divergent that *McSurely* cannot support the majority's conclusion that under the facts of *this* case the publication element of this privacy tort was sufficiently pled in order to withstand a section 2-615 motion to dismiss. *Supra*, ¶ 82.

¶ 119 In *McSurely*, the husband and wife plaintiffs sued various Kentucky and federal officials on several grounds. One was invasion of the wife's privacy. Federal investigators seized the wife's personal papers, including love letters written from another man from before her marriage to plaintiff-husband. The federal investigator stood next to the husband and *forced him to read the wife's letters of which he had previously been unaware*. *McSurely*, 753 F. 2d at 94. In finding that the jury had more than sufficient evidence from which it could conclude that one of the defendants unreasonably and seriously interfered with the McSurley's interest in not having their affairs known to others, the *McSurely* court found:

> "Alan McSurely's right to be 'let alone'—to not have [defendant] stand by his side and pressure him to read about the intimate details of his wife's premarital relationships and to not have his marriage maliciously disrupted—is the type of privacy interest protected by the tort of intrusion. [Defendant's] conduct, which indisputably was 'highly offensive to a reasonable person,' constituted an intrusion into Alan McSurely's 'private affairs and concerns'—in this case, his marital relationship.
>
> Margaret McSurely's right to be let alone was at least as invaded when [defendant] intruded into her marriage, dredging up her past, directing her husband's attention to matters about which he neither needed nor wanted to know, and creating problems in a relationship which had up until then been satisfactory." *Id.* at 113.

¶ 120 The egregious facts in *McSurely,* which involved cruelly forcing a husband to read private, intimate details of his wife's former relationship with another man, can in no way compare to the facts in this case. Here, Wheaton College engaged in no forceful conduct whatsoever. Also, unlike in *McSurely,* the information that was allegedly disseminated was not private, because it was not true. Since the allegations were not true, they could not rise to the level of "highly offensive" to a reasonable person. Plaintiff also failed to establish that publicity was given to the disclosure of any private facts. When asked at oral argument how the information (the disclosure) came to light, plaintiff's counsel said plaintiff was asked questions in discovery in the Arkansas custody case. My colleagues forget that pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings are not public and in general are conducted in private. *Seattle Times Company v. Rhinehart,* 467 U.S. 20, 33 (1984). Plaintiff's second amended verified complaint contains no allegation whatsoever that the "disclosure" went beyond being asked questions in discovery. Being asked questions in

discovery is not publicity for purposes of establishing a cause of action for invasion of privacy. In my opinion, characterizing questioning in civil discovery as "publicity" is an absurd and intolerable expansion of what was intended to be a narrow tort. Trial courts in Illinois and Arkansas, as evidenced in this case, can enter a protective order precluding the parties from further disseminating harmful information that is exposed in discovery but is not relevant to the proceedings.[2] Unfortunately, in custody proceedings especially, emotions run high and parents go to extremes to safeguard their rights. That Megan Bolinder and her attorneys may have acted unreasonably in *attempting to obtain* damaging information from plaintiff in a custody dispute does not establish a cause of action for public disclosure of private facts. According to his complaint, plaintiff exposed "unflattering facts regarding the moral character of Ms. Bolinder …[.]" Plaintiff alleges that Ms. Bolinder and her parents "*attempted* to discover especially damaging information regarding Mr. John." (Emphasis added). As I have explained, the Bolinders failed in their attempt because the "private facts" were not "true facts." Likewise, plaintiff's complaint must fail.

¶ 121 For all these reasons, I would affirm the trial court's order dismissing counts I and II of the second amended verified complaint.

[2] See Ill. S. Ct. R. 201(c)(1) (eff. Jan. 1, 2013); Ark. R. Civ. P. 26(c).