

WHEN WHAT YOU DON'T KNOW CAN HURT YOU: THIRD PARTY LIABILITY FOR FRAUDULENT MISREPRESENTATION IN NON-COMMERCIAL SETTINGS AFTER *DOE V. DILLING*, 888 N.E.2D 24 (ILL. 2008)*

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Adults tell an average of one lie per day, according to one psychological study.¹ College students, another group within the study, tell an even greater number of lies, with an average of two lies per day.² The study, which required community members to record their social interactions in a diary and determine how often they lied, revealed most of the participants did not consider their lies to be serious and were not worried about being caught.³

Given these statistics, most people have both lied and been lied to. The majority of those lies were, most likely, inconsequential “white lies” that went unnoticed. But what if one of those lies was not so harmless, but rather a life-altering falsehood concerning the health of a loved one, and ultimately, impacted one’s own health? What if the liars were not merely acquaintances, but rather one’s future in-laws? In *Doe v. Dilling*, the plaintiff experienced this exact type of betrayal and responded by seeking monetary relief from her fiancé’s parents through the court system.⁴

Dilling is a fascinating and novel case because it is the first time a plaintiff has attempted to hold the parents of an adult sexual partner liable for allegedly misrepresenting their child’s human immunodeficiency virus (HIV) status. Prior to *Dilling*, courts rarely allowed plaintiffs to recover for fraudulent misrepresentation when the misrepresentation and harm occurred in a purely personal setting. The Illinois Supreme Court maintained this approach in *Dilling*, denying Jane Doe’s claim. While the *Dilling* court correctly rejected Doe’s claim of misrepresentation, the opinion, nevertheless,

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1. Bella M. DePaulo, Deborah A. Kashy, Susan E. Kirkendol, & Melissa M. Wyer, *Lying in Everyday Life*, 70 J. PERSONALITY & SOC. PSYCHOL., 979 (1996).

2. *Id.*

3. *Id.*

4. *Doe v. Dilling*, 888 N.E.2d 24 (Ill. 2008).

failed to provide a holding that encompassed the complex facts presented in the case, specifically the context of the misrepresentation and the relationship between the Dillings and Doe. Therefore, *Dilling* is extremely susceptible to misinterpretation. Such potential misinterpretation, however, could have been avoided if the court had utilized the following framework: (1) fraudulent misrepresentation cannot extend to personal settings unless the defendant owes an inherent duty to the plaintiff, and (2) the defendant does not have an inherent duty if he or she is a third party to the occurrence causing the harm, unless he or she is in privity with the plaintiff. Lacking such guidelines, *Dilling* has the potential to be misinterpreted as barring relief to all claimants alleging fraudulent misrepresentation within a non-commercial setting.

Section II of this Note will provide an overview of the tort of fraudulent misrepresentation⁵ and discuss several types of prior cases that have allowed the use of the cause of action within a personal setting. Next, Section III will discuss the facts of *Dilling* and the opposing holdings issued by the Illinois Appellate Court for the First District and the Illinois Supreme Court. Finally, Section IV will discuss why the Illinois Supreme Court was correct in refusing to extend the tort of fraudulent misrepresentation to the facts of the case at hand but how the court's framework could easily be misinterpreted, thereby depriving relief to numerous deserving litigants.

II. LEGAL BACKGROUND

A. Overview of Fraudulent Misrepresentation

Fraudulent misrepresentation, also known as fraud or deceit, is defined as “a false statement that is known to be false or is made recklessly—without knowing or caring whether it is true or false—and that is intended to induce a party to detrimentally rely on it.”⁶ In Illinois, a plaintiff must prove the following elements to establish liability: (1) the defendant made a false statement of material fact; (2) the defendant knew or believed the statement to be false; (3) the defendant made the false statement with the intent to induce

5. This Note will not discuss the tort of negligent misrepresentation. Although Doe asserted both negligent and fraudulent misrepresentation, negligent misrepresentation requires additional elements, i.e. that the defendant owes a duty to the plaintiff to accurately state information and that the defendant is careless or negligent in discovering the truth of the information. *See Bd. of Educ. of Chi. v. A,C &S, Inc.*, 546 N.E.2d 580, 591 (Ill. 1989). Consideration of these elements within the complex facts of the case is beyond the scope of this Note. Furthermore, the court focused the bulk of its analysis on fraudulent, rather than negligent, misrepresentation. *See Dilling*, 888 N.E.2d at 24.

6. BLACK'S LAW DICTIONARY 1022 (8th ed. 2004).

the plaintiff to act; (4) the plaintiff acted in justifiable reliance on the truth of the statement; and (5) the plaintiff sustained damages.⁷

The tort of fraudulent misrepresentation originated from the common law action of deceit.⁸ Deceit was a very narrow tort and, prior to the 18th century, required that the misrepresentation occur in a contractual dealing between the parties.⁹ Although a contractual relationship is no longer required to sustain a claim for fraudulent misrepresentation, the tort is still “confined ‘very largely to the invasion of interests of a financial or commercial character, in the course of business dealings.’”¹⁰

Generally, a person is liable for a misrepresentation that induces another to act and consequently suffer damages, regardless of whether the two parties are in privity of contract¹¹ or whether the person making the misrepresentation derives any benefit from the misrepresentation.¹² Further, in fraudulent misrepresentation’s traditional commercial application, courts have found liability even when the misrepresentation is made by a third party to the actual transaction causing the harm.¹³

B. Fraudulent Misrepresentation in Non-commercial Settings

Although fraudulent misrepresentations typically occur in economic or business settings, courts have also allowed recovery for harm caused by misrepresentations in personal settings.¹⁴ The Restatement (Second) of Torts recognizes liability for a fraudulent misrepresentation that causes physical harm, or economic loss resulting from physical harm, to a person who justifiably relies on the misrepresentation.¹⁵ In the *Law of Remedies*, Professor Dobbs also notes that, although fraud is an economic tort protecting economic interests, courts have allowed recovery for emotional distress when the fraudulent misrepresentations involve highly personal elements.¹⁶

In Illinois, however, only one case had discussed the use of the tort in a non-commercial setting prior to *Dilling*.¹⁷ In *Neurosurgery & Spine Surgery*,

7. *Dilling*, 888 N.E.2d at 35.

8. *Neurosurgery & Spine Surgery, S.C. v. Goldman*, 790 N.E.2d 925, 931 (Ill. App. Ct. 2003).

9. *Id.*

10. *U.S. v. Neustadt*, 366 U.S. 696, 711 n.26 (1961) (quoting William Prosser, *HANDBOOK OF THE LAW OF TORTS* § 85(1941)).

11. 37 C.J.S. *Fraud* § 105 (2007).

12. *Id.* at § 108.

13. *Id.*

14. *Id.*

15. *RESTATEMENT (SECOND) OF TORTS* § 557A, cmt. a at 149 (1977).

16. Dan D. Dobbs, *LAW OF REMEDIES* § 9.2(4) at 564–65 (2d ed. 1993).

17. *Neurosurgery & Spine Surgery, S.C. v. Goldman*, 790 N.E.2d 925, 933 (Ill. App. Ct. 2003).

S.C. v. Goldman, a physician sued a patient for defamation.¹⁸ In defense, the patient filed a third-party complaint against a nurse employed by the doctor's practice for fraudulent misrepresentation.¹⁹ The patient alleged that the nurse misrepresented that the physician had been dismissed from the staff of two hospitals, that the patient relied upon this statement and repeated the information to third parties, and that because of the patient's statements to the third parties, the physician sued the patient for defamation.²⁰ The Illinois Appellate Court denied the patient's third-party claim because her allegations did not "involve a business or financial transaction" and she did not sufficiently allege damages.²¹ Relying on the tort's historical development in a commercial setting, the court broadly declared that "fraudulent misrepresentation has emerged as a tort distinct from the general milieu of negligent and intentional wrongs and applies only to interferences with financial or commercial interests where a party suffers some pecuniary loss."²²

Contrary to the court's conclusion in *Neurosurgery* that fraudulent misrepresentation is confined to the business context, several jurisdictions have allowed claims for fraudulent misrepresentation in numerous personal settings.

1. *Transmission of Venereal Diseases*

Perhaps no situation is more personal than a misrepresentation leading to the transmission of a venereal disease. Despite this particularly delicate personal scenario, numerous jurisdictions have recognized such claims.²³ Several of the courts that allow recovery focus on the duty of a person to prevent the disease from spreading, which requires notifying others with whom the infected individual intends to have sexual contact.²⁴ In *B.N. v. K.K.*, the Maryland Supreme Court found the defendant liable for failing to inform

18. *Id.* at 927.

19. *Id.*

20. *Id.* at 933.

21. *Id.*

22. *Id.* at 932–33.

23. See *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Cal. Ct. App. 1984); *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1988); *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988); *Doe v. Roe*, 598 N.Y.S.2d 678 (Just Ct. 1993); *De Vall v. Strunk*, 96 S.W.2d 245 (Tex. App. 1936). See also Gregory G. Sarno, *Tort Liability for Infliction of Venereal Disease*, 40 A.L.R. 4th 1089 (1985); Michele L. Mekel, Note, *Kiss and Tell: Making the Case for Tortious Transmission of Herpes and Human Papillomavirus*, 66 MO. L. REV. 929 (2001). To date, no Illinois cases discuss liability for fraudulently misrepresenting whether one has a venereal disease to his or her sexual partner and then infecting that partner with such a disease.

24. *B.N.*, 538 A.2d at 1175; *R.A.P.*, 428 N.W.2d at 103.

the plaintiff that he had genital herpes.²⁵ While the court acknowledged that fraudulent misrepresentation is traditionally a business tort, it held that “a business setting and pecuniary loss are not required.”²⁶ The court further found that the infected partner has a “general tort duty” to disclose any sexually transmitted disease to his or her partner before engaging in sexual relations.²⁷

Other courts have focused on the need to balance the parties’ right to privacy with the need to protect against the spread of diseases. In *Kathleen K. v. Robert B.*, the plaintiff sued for fraud, alleging the defendant deliberately misrepresented to her that he was free from venereal diseases.²⁸ The plaintiff relied on this representation, had sexual relations with the defendant, and subsequently contracted herpes.²⁹ While acknowledging that “[c]ourts have long recognized the right of privacy in matters relating to marriage, family and sex,” the court recognized that the state also has the right to protect its citizens from injury.³⁰ The court then concluded that the tortious infection of another with a “contagious and dangerous” disease qualifies as an injury that warrants judicial inquiry into private matters.³¹

2. *Wrongful Adoption*

Another application of the fraudulent misrepresentation tort in a non-commercial setting arises from the adoption process. The majority of courts recognize the tort of “wrongful adoption,” a cause of action brought by parents

25. *B.N.*, 538 A.2d at 1175.

26. *Id.* at 1182.

27. *Id.* at 1184.

28. *Kathleen K.*, 198 Cal. Rptr. at 994.

29. *Id.*

30. *Id.* at 996.

31. *Id.*

of an adopted child against the adoption agency for fraudulently misrepresenting the health or background of their adopted child.³²

a. Overview

The first case to outline the elements required for wrongful adoption was *Burr v. Board of County Commissioners of Stark County*.³³ In *Burr*, the adoption agency falsely informed the adoptive parents that their adopted child's mother was an unwed teenager, the biological grandparents treated the child harshly, and the mother had voluntarily placed the child up for adoption because she was leaving the state in search of employment.³⁴ In actuality, the mother of the child was a 31-year-old mental patient, and the father was also suspected to be a mental patient.³⁵ More importantly, the child had suffered from numerous health problems since birth and was developing slowly.³⁶ The court found the adoptive parents could bring an action for the material misrepresentations by the agency.³⁷

Several reasons support the extension of the tort of fraudulent misrepresentation to the adoption setting. First, under a moral justification, adoption agencies are "trustees of the child's destiny" and "obligated to act with morals greater than those found in a purveyor's common marketplace."³⁸ Similarly, adoption agencies have a legal duty, as well as the authority, to control adoption proceedings and, therefore, must perform this duty with justice and integrity.³⁹ Finally, courts have also validated this extension by relying on the plain language of the common law elements of fraudulent

32. See *Ferenc v. World Child, Inc.*, 977 F. Supp. 56 (D. D.C. 1997) (applying District of Columbia law); *Wolford v. Children's Home Soc'y of W.Va.*, 17 F. Supp. 2d 577 (S.D. W. Va. 1998) (applying West Virginia law); *Michael J. v. L.A. County Dept. of Adoptions*, 247 Cal. Rptr. 504 (2d Dist. 1988); *Mohr v. Commonwealth*, 653 N.E.2d 1104 (Mass. 1995); *Juman v. Louis Wise Serv.*, 608 N.Y.S.2d 612 (N.Y. Sup. Ct. 1994); *Moreau v. Archdiocese of N.Y.*, 261 A.2d 456 (N.Y. App. Div. 1999); *Reidy v. Albany County Dept. of Soc. Serv.*, 598 N.Y.S.2d 115 (N.Y. App. Div. 1993); *Parham v. Iredell County Dept. of Soc. Serv.*, 489 S.E.2d 610 (N.C. 1997); *Burr v. Bd. of County Comm'rs of Stark County*, 491 N.E.2d 1101 (Ohio 1986); *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994); see also *Thanda A. Fields*, Note, *Declaring a Policy of Truth: Recognizing the Wrongful Adoption Claim*, 37 B.C. L. REV. 975 (1996); *Harriet Dinegar Milks*, Annotation, "Wrongful Adoption" Causes of Action Against Adoption Agencies Where Children Have or Develop Mental or Physical Problems That Are Misrepresented or Not Disclosed to Adoptive Parents, 74 A.L.R. 5th 1 (1999).

33. *Burr*, 491 N.E.2d 1101.

34. *Id.* at 1103.

35. *Id.*

36. *Id.* at 1104.

37. *Id.* at 1105.

38. *Michael J. v. L.A. County Dept. of Adoptions*, 247 Cal. Rptr. 504, 513 (Cal. Ct. App. 1988).

39. *Juman v. Louis Wise Serv.*, 608 N.Y.S.2d 612, 616 (N.Y. App. Div. 1994); *Burr*, 491 N.E.2d at 1107; *Gibbs v. Ernst*, 647 A.2d 882, 889-90 (Pa. 1994).

misrepresentation, which, on their face, do not bar the tort's expansion to this setting.⁴⁰

Notably, only one court has refused to recognize wrongful adoption as a cause of action.⁴¹ In *Zernhelt v. Lehigh County Office of Children & Youth Services*, the court rejected the parents' claim of fraudulent misrepresentation only because a Pennsylvania statute granted the adoption agency immunity from all liability, except liability for negligent acts.⁴² Because the alleged tort was intentional, rather than negligent, the agency retained immunity from suit.⁴³

b. Illinois

In Illinois, two cases have allowed recovery for wrongful adoption claims.⁴⁴ In the first, *Roe v. Catholic Charities of the Diocese of Springfield, Illinois*, the adoption agency falsely represented that the adopted children were healthy and promised the adoptive parents they "would incur no unusual or extraordinary expense for the care and treatment of the children."⁴⁵ After the parents adopted the children, the children engaged in constant destructive and violent behavior, including cutting the whiskers off the family cat, flattening the tires of one parent's car, and vandalizing a neighbor's house with paint.⁴⁶ Because the children had displayed this behavior prior to their adoption, the court found the agency liable, establishing wrongful adoption as a valid claim in Illinois that consisted of the same elements as common law fraud.⁴⁷

The court relied heavily on the reasoning used by other jurisdictions in recognizing the claim, specifically citing morality, honesty, and justice as policies underlying the cause of action.⁴⁸ Finally, the court rejected the defendant's argument that, because adoption was created by a statute, the adoption process can only be governed by statutory law.⁴⁹ Rather, the court held that adoption agencies are subject to liability under common law because the adoption statute is silent on the issue of fraud, and other statutorily created

40. *Mohr v. Commonwealth*, 653 N.E.2d 1104, at 1111 (Mass. 1995).

41. *See Zernhelt v. Lehigh County Office of Children & Youth Servs.*, 659 A.2d 89 (Pa. Commw. Ct. 1995).

42. *Id.* at 91.

43. *Id.*

44. *Roe v. Catholic Charities of the Diocese of Springfield, Ill.*, 588 N.E.2d 354 (Ill. App. Ct. 1992); *Roe v. Jewish Children's Bureau of Chi.*, 790 N.E.2d 882 (Ill. App. Ct. 2003).

45. *Catholic Charities*, 588 N.E.2d at 359.

46. *Id.* at 356.

47. *Id.* at 357.

48. *Id.* at 357–58.

49. *Id.* at 359.

entities, such as corporations, are still subject to liability for common law torts.⁵⁰

Similarly, in *Roe v. Jewish Children's Bureau of Chicago*, the court found an adoption agency liable for negligent and fraudulent misrepresentation when the agency made false statements regarding the mental health of the adopted child's biological mother.⁵¹ Interestingly, the court did not focus on whether a claim for fraud was available outside the commercial setting, but rather on whether the traditional test of causation should apply in this personal situation.⁵² The court concluded the causation test typically applied in the traditional commercial setting must be altered because it "impose[d] on the participants in such an important process nothing more than the morals of the marketplace."⁵³ Particularly important to the court when distinguishing adoption cases from commercial cases was the fact that adoption "alters forever the lives of both the child and adoptive parents," making it essential to discourage any acts of fraud by agencies that deny adoptive parents the ability to make an informed decision.⁵⁴

3. *Inducement of Marriage*

In the past, several jurisdictions have recognized liability for fraudulently inducing the plaintiff to marry a third party.⁵⁵ In this line of cases, third parties typically attempted to induce one party to marry another by making misrepresentations about the marriage candidate's traits, such as wealth⁵⁶ or virtuousness.⁵⁷

Courts continued to uphold this cause of action into the 20th century. In *Leventhal v. Liberman*, the plaintiff brought an action against her husband's father and sister for inducing her to marry her husband.⁵⁸ She claimed both defendants explicitly assured her that her husband "had never been sick, was a well boy, and that he had no bad habits known to them" when they both knew he was tubercular and addicted to drugs.⁵⁹ While recognizing that parents are allowed to praise their children and are not required to disclose

50. *Id.*

51. *Roe v. Jewish Children's Bureau of Chi.*, 790 N.E.2d 882, 887 (Ill. App. Ct. 2003).

52. *Id.* at 894.

53. *Id.*

54. *Id.* at 894-95.

55. *See Right of Action for Damages Against Third Person for Fraud in Inducing Marriage*, 88 A.L.R. 786 (1934). There are no reported cases in Illinois for the claim of fraudulent inducement to marry.

56. *Piper v. Hoard*, 13 N.E. 626 (N.Y. 1887).

57. *Kujek v. Goldman*, 44 N.E. 773 (N.Y. 1896).

58. *Leventhal v. Liberman*, 186 N.E. 675, 676 (N.Y. 1933).

59. *Id.*

“any or all imperfections or unhappy traits” to the person they intend to marry, the court found that “there comes a time when the truth must be spoken.”⁶⁰ As a remedy, the court held that the plaintiff was entitled to recover damages for the change of her “status from a single woman to a married woman, [loss of] the consortium, attentions, and support of a well man, and [that she] endured mental pain and anguish as well as humiliation from being bound in matrimony to an invalid and drug addict.”⁶¹

4. Sterility or Use of Birth Control Resulting in Pregnancy

Yet another misrepresentation made in an intimately personal setting is a statement to one’s sexual partner regarding sterility or use of birth control. Whether such a cause of action is allowed generally depends on the harm allegedly caused by the misrepresentation.⁶² When a plaintiff claims that the defendant’s misrepresentation caused the wrongful birth of a perfectly healthy child, courts have consistently refused to uphold such claims for public policy reasons.⁶³ Alternatively, one court has allowed recovery when the plaintiff alleged the defendant’s misrepresentation resulted in physical harm.⁶⁴ In *Barbara A. v. John G.*, the defendant falsely stated that he could not “possibly get anyone pregnant,” and the plaintiff had unprotected sexual intercourse with him. This intercourse resulted in an ectopic pregnancy⁶⁵ that caused the plaintiff severe bodily harm.⁶⁶

Those courts that have denied claims for fraudulent misrepresentation causing the birth of a child relied heavily on two policy reasons. First, courts have refused to cross the threshold into this extremely private arena to simply “supervise the promises made between two consenting adults as to the

60. *Id.* at 677.

61. *Id.*

62. Compare *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618 (Cal. Ct. App. 1980) (denying recovery for birth of child), with *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Cal. Ct. App. 1983) (allowing recovery for bodily harm caused by ectopic pregnancy).

63. See *Stephen K.*, 164 Cal. Rptr. 618; *Wallis v. Smith*, 22 P.3d 682 (N.M. Ct. App. 2001); *Jose F. v. Pat M.*, 154 Misc.2d 883 (N.Y. Sup. Ct. 1992); *Welzenbach v. Powers*, 660 A.2d 1133 (N.H. 1995); *Moorman v. Walker*, 773 P.2d 887 (Wash. Ct. App. 1989); *Douglas v. Suzanne M.*, 487 N.Y.S.2d. 244 (N.Y. App. Div. 1985); *C.A.M. v. R.A.W.*, 568 A.2d 556 (N.J. Super. Ct. App. Div. 1990).

64. *Barbara A.*, 193 Cal. Rptr. 422.

65. An ectopic pregnancy occurs when the fertilized egg grows outside of the uterus, usually in a fallopian tube. The American College of Obstetricians and Gynecologists, Ectopic Pregnancy, http://www.acog.org/publications/patient_education/bp155.cfm (last visited Dec. 1, 2008). Ectopic pregnancies can cause the mother to suffer severe internal injuries, and at times, can be life threatening. *Id.* An ectopic pregnancy does not reach term and can cause infertility. *Id.*

66. *Barbara A.*, 193 Cal. Rptr. 422.

circumstances of their private sexual conduct.”⁶⁷ For example, in *Stephen K. v. Roni L.*, the plaintiff father alleged the defendant mother falsely represented that she was taking birth control pills and, in reliance upon that statement, he engaged in unprotected sexual intercourse with her, which produced a healthy baby.⁶⁸ The court concluded that the state had only a “minimal interest” in the matter, and, although the defendant may have betrayed the plaintiff, this betrayal within the context of an extremely private relationship did not justify the court in “defin[ing] any standard of conduct.”⁶⁹

Second, courts have found that allowing one parent to recover from the other for the wrongful birth of their child “flies in the face of all reason” when the state has enacted paternity statutes that mandate payment of child support.⁷⁰ In other words, courts should not force a parent to pay child support, and then allow that parent to recover that support in the form of damages.⁷¹ Rather, courts should hold each parent responsible for the child created by their consensual conduct, thereby ensuring that the child is always the paramount interest.⁷²

While recognizing the validity of *Stephen K.*’s holding, that one parent cannot recover damages from the other for economic loss resulting from the support of an unwanted child, the court in *Barbara A.* allowed the mother of an unintended pregnancy to recover for severe bodily harm caused by an ectopic pregnancy.⁷³ After first determining that the claim did not violate the state’s statute barring claims for seduction, the court then distinguished the facts from the *Stephen K.* line of cases.⁷⁴ The court found the two situations implicate different policy concerns because of the type of damages alleged.⁷⁵ Thus, because the plaintiff in *Barbara A.* claimed damages for her physical harm, rather than economic costs of caring for an unwanted child, the policy of discouraging suits “over the wrongful birth of their child” was not applicable.⁷⁶ Furthermore, while recognizing the private nature of the

67. *Stephen K.*, 568 A.2d at 618.

68. *Id.*

69. *Id.*

70. *Welzenbach v. Powers*, 660 A.2d 1133, at 1136 (N.H. 1995).

71. *Wallis v. Smith*, 22 P.3d 682, 684 (N.M. Ct. App. 2001). Courts are also reluctant to recognize other tort claims seeking recovery for the wrongful birth of a child. See Anne M. Payne, *Sexual Partner’s Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R. 5th 301 (1992).

72. *Id.*

73. *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Cal. Ct. App. 1983).

74. *Id.* at 429.

75. *Id.*

76. *Id.*

situation, the court found that there is no absolute right to privacy.⁷⁷ The court analogized the facts to the venereal disease line of cases and refused to “insulate from liability one sexual partner who by intentionally tortuous conduct causes physical injury to the other.”⁷⁸

III. EXPOSITION OF *DOE V. DILLING*

Dilling presented the novel issue of whether the adult plaintiff could hold the parents of her adult sexual partner liable for allegedly misrepresenting whether her partner was infected with HIV. The Illinois Supreme Court denied Doe’s claim, relying upon the tort’s traditional use in commercial settings and distinguishing the factual scenario from other cases in which courts have extended the tort to misrepresentations in personal settings.

A. Statement of Facts

In April 1996, 44-year-old Albert Dilling, son of the defendants, began dating 41-year-old Doe,⁷⁹ the plaintiff.⁸⁰ According to Doe, Albert looked healthy at the beginning of their relationship, and they engaged in a conversation about sexually transmitted diseases (STDs) prior to having sexual relations.⁸¹ Despite Doe’s inquiry as to whether “[Albert] had anything to tell her on this subject,” Albert failed to inform Doe that he was HIV-positive.⁸²

During the summer of 1996, Albert and Doe began having sexual relations and soon stopped using protection during intercourse.⁸³ During this time, Doe noticed Albert’s genitalia had dark-colored pigmentation, but Albert assured her it was from a previous case of genital warts he had acquired by handling plant and fungal materials in his job as a landscaper.⁸⁴ He further assured her he had the warts surgically removed by cauterization.⁸⁵

In September 1996, Doe experienced flu-like symptoms, including a very high fever and a rash.⁸⁶ At the time, she sought no medical treatment because

77. *Id.* at 430.

78. *Id.* at 432.

79. Doe was a college-educated business owner, a fact the court considered when analyzing whether her reliance on the alleged misrepresentations was justified. *Doe v. Dilling*, 888 N.E.2d 24, 40 (Ill. 2008).

80. *Id.* at 27.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

she believed it was merely the flu.⁸⁷ Years later, however, her doctors inferred that this illness was actually an “acute HIV infection,” marking the point at which she acquired HIV from Albert.⁸⁸

Doe and Albert were engaged by the end of 1996.⁸⁹ Around this time, Doe recalled she noticed Albert looked tired and that his skin was dry and ashen.⁹⁰ Albert attributed his health problems to heavy-metal poisoning, and at one time, showed Doe a printout of lab test results indicating he indeed had “heavy-metals in his system.”⁹¹

Doe met Albert’s parents, Kirk and Betty Dilling, in May 1997.⁹² During their initial conversation, Betty informed Doe that Albert had heavy-metal poisoning but that he would recover.⁹³ Betty further assured Doe that she and Kirk were “in charge of [Albert’s] medical care” because Kirk “was a medical expert in these matters” due to his successful career as an attorney in the food and drug industry.⁹⁴

Doe and the Dillings continued to discuss Albert’s health frequently throughout the next two years both in person and over the telephone because Albert’s condition deteriorated so rapidly.⁹⁵ During that time period, Albert experienced several health problems, including severe abdominal pain, blood in his stool, weight loss, and unsteadiness when walking.⁹⁶ He eventually could no longer care for himself or perform daily life activities such as eating, dressing, or driving.⁹⁷

Doe alleged that the Dillings “repeatedly told [her] that heavy-metal poisoning was Albert’s only health ailment, that he was receiving care from the right doctors and that eventually he would get well.”⁹⁸ Notably, Doe also claimed that Betty expressly rejected her concerns that Albert suffered from acquired immune deficiency syndrome (AIDS).⁹⁹ In the summer of 1999, Albert sought treatment from Dr. Hauser, one of Kirk’s former clients.¹⁰⁰ Dr. Hauser diagnosed Albert with Lyme disease and showed the lab report to

87. *Id.*

88. *Id.* at 32–33.

89. *Id.*

90. *Id.*

91. *Id.* at 28.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 28–29.

97. *Id.* at 29.

98. *Id.*

99. *Id.* In 1999, Betty revealed that Albert had a blood transfusion in 1979. *Id.* at 30. Doe admitted she knew this information previously, but had doubted its accuracy until Betty’s confirmation. *Id.*

100. *Id.*

Doe.¹⁰¹ Trial testimony revealed a dispute as to whether the Dillings knew that Albert was infected with HIV and even whether Albert, himself, knew of his infection.¹⁰²

By the end of the summer of 1999, Doe's health also began to deteriorate, and she experienced fatigue, hair loss, bleeding gums, a yeast infection, splitting skin, and sores on her skin.¹⁰³ Despite these symptoms, Doe did not seek medical care because she believed her health problems were caused by the stress of caring for Albert.¹⁰⁴

Finally, on November 2, 1999, Doe took Albert to Dr. Waitley, who tested Albert for HIV.¹⁰⁵ The test was positive, establishing that Albert suffered from AIDS.¹⁰⁶ Soon after, Doe was tested and learned she too was HIV-positive.¹⁰⁷ On November 29, 1999, Albert died from complications due to the AIDS.¹⁰⁸ The two were never married.¹⁰⁹ On May 4, 2000, Doe filed suit in the Illinois Circuit Court of Cook County.¹¹⁰

B. Procedural History

Doe's first complaint contained nine counts against Albert's estate as well as Betty and Kirk Dilling ("the Dillings").¹¹¹ Doe amended the complaint several times during pretrial proceedings, resulting in her final Fifth Amended Complaint alleging counts of fraudulent misrepresentation and negligent misrepresentation against Betty Dilling and the estate of Kirk Dilling, who had died since the initial filing.¹¹² Doe dropped Albert's estate as a defendant after pretrial discovery revealed the estate had no assets and a negative net worth.¹¹³

In her complaint, Doe alleged that the Dillings falsely stated that Albert did not have HIV or AIDS when, in fact, they knew he was HIV-positive and had AIDS.¹¹⁴ Doe claimed she relied on these representations, causing her to delay getting tested for HIV and ultimately suffer the physical harm of

101. *Id.*

102. *Id.* at 31–32.

103. *Id.* at 30.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 26.

111. *Id.*

112. *Id.* at 27.

113. *Id.* at 27 n.2.

114. *Id.*

developing AIDS.¹¹⁵ The circuit court directed a verdict in favor of the Dillings on the fraudulent misrepresentation claim, while the negligent misrepresentation claim resulted in a hung jury.¹¹⁶

In the second trial, a different circuit court judge directed a verdict in favor of the Dillings on the negligent misrepresentation claim, denied Doe's request for punitive damages, and submitted the fraudulent misrepresentation claim to the jury.¹¹⁷ This jury awarded Doe \$2 million in compensatory damages.¹¹⁸ The court denied the parties' post-trial motions.¹¹⁹

On an appeal by the defendants, the Illinois Appellate Court for the First District vacated the jury's award of damages, finding the plaintiff's reliance on the defendants' representations was not justified.¹²⁰ The appellate court also affirmed the directed verdict on the count of negligent misrepresentation.¹²¹ In its analysis, the court found that the tort of fraudulent misrepresentation could apply in a "noncommercial or nontransactional setting, particularly if physical harm is involved," because "[w]hat limits the viability of a cause of action for fraudulent misrepresentation is not the distinction between an economic and an interpersonal setting, but rather whether the person alleging misrepresentation was justified in her reliance on the truthfulness of the statements."¹²² Additionally, the appellate court explicitly disregarded the fact that other cases involving the transmission of venereal diseases have held the actual transmitter, rather than a third party, liable because "the Restatement does not make any such distinction, and neither do the cases we have cited from other jurisdictions. . . . Conceptually, under either scenario, misrepresentations must be viewed in terms of the elements comprising the tort of fraudulent misrepresentation, which makes no such distinction."¹²³

The appellate court then explained that, when the application of the tort is expanded into "noncommercial situations, as well as to third parties who are not directly involved in the infliction of the injury, particularized scrutiny must be given to the elements comprising the tort, especially the element of justifiable reliance."¹²⁴ In applying this "particularized scrutiny," the court

115. *Id.*

116. *Id.* at 27 n.4.

117. *Id.* at 35.

118. *Id.*

119. *Id.*

120. *Doe v. Dilling*, 861 N.E.2d 1052, 1073 (Ill. App. Ct. 2006).

121. *Id.* at 1055.

122. *Id.* at 1066.

123. *Id.*

124. *Id.*

found Doe's reliance was not justified because, among other reasons, "it was unreasonable for [Doe] to look to the Dillings for secondhand information about Albert's health to try to extrapolate her own HIV status from their answers."¹²⁵

Doe petitioned the Illinois Supreme Court for leave to appeal the decision of the appellate court, and the Illinois Supreme Court granted her petition.¹²⁶

C. Holding and Reasoning of the Illinois Supreme Court

On appeal, the Illinois Supreme Court was presented with the threshold question of whether the tort of fraudulent misrepresentation could extend to this personal setting.¹²⁷ The court began its analysis with the tort's historical application in business and contractual dealings, noting that courts today continue to limit its use to commercial settings.¹²⁸ The court also acknowledged, however, that this limitation was, in part, related to the simple fact that most fraudulent misrepresentation claims arise out of commercial transactions, rather than personal ones.¹²⁹

Next, the court addressed Doe's argument that Illinois had previously extended the tort of fraudulent misrepresentation beyond its commercial background in the wrongful adoption cases.¹³⁰ Rejecting the contention that these cases expanded the tort to a purely personal setting and distinguishing them factually from the instant case, the court explained that the adoption setting necessarily assigns a duty to adoption agencies to disclose the complete background of an adopted child because the agencies hold information to which no other party is privy.¹³¹ This inherent duty also stems from the state's "valid public policy interest in adoption proceedings, which are highly regulated."¹³²

Finally, overturning the appellate court's holding, the court rejected Doe's argument that the tort of fraudulent misrepresentation should be extended to these facts because other states have applied the tort to misrepresentations of the transmission of venereal diseases.¹³³ Similar to its analysis of the wrongful adoption cases, the court found the defendants in the

125. *Id.* at 1073–74.

126. *Doe v. Dilling*, 888 N.E.2d 24, 35 (Ill. 2008).

127. *Id.*

128. *Id.* at 36 (citing W. Keeton, PROSSER & KEETON ON TORTS § 105, at 726 (5th ed. 1984)).

129. *Id.*

130. *Dilling*, 888 N.E.2d at 37–38.

131. *Id.* at 39.

132. *Id.* See also 750 ILL. COMP. STAT. 50/1 *et seq.* (2008).

133. *Dilling*, 888 N.E.2d at 39.

venereal disease cases owed a duty to the plaintiffs because the defendants were the transmitters of the disease, rather than a third party.¹³⁴ Accordingly, the court found those cases factually dissimilar to the instant case because the Dillings were third parties to the relationship between Doe and Albert and not responsible for actually transmitting the disease.¹³⁵

After holding that fraudulent misrepresentation could not extend beyond its traditional commercial application to this claim, the court affirmed the appellate court's finding that Doe had not justifiably relied upon the Dillings' representations.¹³⁶ The court concluded that Doe's inability to establish justifiable reliance was a "clear illustration" of why the tort should not apply to the case at bar.¹³⁷

IV. ANALYSIS

The instant case poses a novel use of the tort of fraudulent misrepresentation. First, it is rare for a plaintiff to allege fraudulent misrepresentation in a personal setting. Rather, the majority of cases applying the tort involve a traditional, commercial setting. Second, *Dilling* represents the first time a plaintiff has attempted to hold the parents of his or her sexual partner liable for misrepresenting whether or not their child was infected with an STD. Accordingly, the *Dilling* court correctly distinguished this case from precedent and denied Doe's claim. This section will discuss why the Illinois Supreme Court's holding is correct, why the opinion's reasoning is insufficiently articulated, the framework the court should have provided to guide future cases, and how the opinion is susceptible to misinterpretation.

A. The *Dilling* Court Reached the Correct Result

While the court's opinion may not have sufficiently explained the reasoning behind its holding, it correctly barred Doe's claim. The facts of *Dilling* were unlike those in any prior case in which a claim of fraudulent

134. *Id.*

135. *Id.* at 40.

136. *Id.*

137. *Id.* The court additionally affirmed the appellate court's ruling that the circuit court correctly directed a verdict for the Dillings with regard to Doe's negligent representation claim. *Id.* The concurrence of Justice Kilbride focused on the majority's discussion of the sufficiency of the evidence supporting the plaintiff's justifiable reliance. *Id.* at 46 (Kilbride, J., concurring). Justice Kilbride argued that the court unnecessarily analyzed Doe's reliance after already barring her claim, and also that the majority's discussion was not completely accurate. *Id.* These topics are not directly relevant to the substance of this Note and, therefore, are not discussed.

misrepresentation arose from statements made in a personal setting, and there was no independent reason to extend the tort to a claim such as Doe's. Finding a third party with no inherent duty to the plaintiff liable would also create several negative consequences and conflict with established legal principles.

1. *Dilling is Distinguishable from Precedent*

Although one Illinois case, *Neurosurgery*,¹³⁸ discussed the general application of fraudulent misrepresentation in a non-commercial setting, the *Dilling* court could not solely rely on its inaccurate and broad rejection of all fraud claims arising from a personal setting. As discussed previously, many jurisdictions have allowed recovery for physical harm caused by the transmission of a venereal disease, without requiring the plaintiff allege harm to a business or financial interest.¹³⁹ The *Dilling* court correctly refused to follow the reasoning in *Neurosurgery* and bar all such non-commercial causes of action,¹⁴⁰ but instead merely distinguished them from the case at hand.¹⁴¹ Thus, *Neurosurgery*'s overly-broad holding is out of synch with precedent in the majority of jurisdictions and could not be followed in *Dilling*.

Dilling is also distinguishable from the venereal disease transmission cases, because, in *Dilling*, the defendants did not physically cause Doe's harm; rather, Albert transmitted the STD to Doe, not the Dillings.¹⁴² In the cases allowing liability for the transmission of an STD, such as *R.A.P.* and *Kathleen K.*, the party making the misrepresentation also caused the actual harm to the plaintiff.¹⁴³ This distinction is crucial when considering the policy reasons behind holding a defendant liable for lying about his or her health and then transmitting an infectious disease. Courts have recognized that the viability of a cause of action is based on a defendant's inherent duty to disclose whether he or she is infected with a disease prior to having sexual relations with another.¹⁴⁴ Because the Dillings were not the transmitters of the disease, they had no such duty. This lack of a duty sets this case apart from the line of cases allowing liability for the transmission of an STD.

138. See *Neurosurgery & Spine Surgery, S.C. v. Goldman*, 790 N.E.2d 925 (Ill. App. Ct. 2003).

139. See cases cited *supra* note 23.

140. In fact, considering the wide acceptance of claims for the transmission of a venereal disease and the court's lack of criticism of those cases, it is quite likely that Illinois would permit a plaintiff to recover from a defendant transmitter.

141. *Dilling*, 888 N.E.2d at 40.

142. *Id.* at 30.

143. See cases cited *supra* note 23.

144. See cases cited *supra* note 23.

Similar inherent duty analysis is present in the wrongful adoption cases. Although the defendant adoption agencies did not create the underlying conditions that caused the plaintiff parents to actually suffer harm, the privity between the agency and the adoptive parents gave rise to a duty to disclose the underlying conditions to the plaintiffs. This duty arises from the fact that the agencies are the parents' sole source of information regarding the child's background, and this information is vital to a decision that fundamentally alters the lives of both the parents and the child.¹⁴⁵ Under this analysis, the Dillings, again, had no inherent duty to disclose Albert's condition. In fact, they were likely barred from doing so under the A.I.D.S. Confidentiality Act.¹⁴⁶ Moreover, the Dillings were not Doe's sole source of information about Albert's HIV status, and they were not parties to Doe and Albert's decision to engage in sexual conduct. Thus, the adoption agencies' inherent duty distinguishes the wrongful adoption line of cases from *Dilling*.

Next, *Dilling* is also unlike the historical line of cases in which a third party induced the plaintiff to marry. Instead, the legal and contractual nature of marriage at the time those cases were decided essentially places them in the traditional, commercial category of fraudulent misrepresentation. Comparing *Dilling* to *Leventhal* is helpful to this analysis. Although *Dilling* and *Leventhal* both involve a man's family misrepresenting his health to a potential spouse, the two cases are distinguishable.

In *Leventhal*, the misrepresentations were made for the specific purpose of inducing the plaintiff to marry the defendants' family member,¹⁴⁷ rather than to protect the man's privacy or any other reason unrelated to inducing a marriage. Furthermore, the plaintiff's claim arose solely from the resulting marriage, and the damages were related to the marriage itself. This difference distinguishes *Leventhal* from *Dilling* because marriage is a type of civil contract, from which legal consequences flow.¹⁴⁸ While marriage involves intimately personal aspects, and has always been different from traditional business transactions, it is also distinguishable from Doe's scenario because of its contractual implications and governmental regulation. Accordingly, the plaintiff's injuries alleged in *Leventhal* were not physical harm attributable to

145. See *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354 (Ill. App. Ct. 1992); *Roe v. Jewish Children's Bureau of Chi.*, 790 N.E.2d 882 (Ill. App. Ct. 2003); see also *Dilling*, 888 N.E.2d at 39.

146. 410 ILL. COMP. STAT. 305/9 (2008). Whether the Dillings' disclosure of Albert's HIV status to Doe would have violated the Act is beyond the scope of this Note. See April J. Morgan, Northern Exposure, *Am I My Brother In Law's Keeper?: Doe v. Dilling and Family Members' Protection Under the AIDS Confidentiality Act*, 20 DCBABR 34 (2008).

147. *Leventhal v. Liberman*, 186 N.E. 675, 676 (N.Y. 1933).

148. *In re Estate of Crockett*, 728 N.E.2d 765, 767 (Ill. App. Ct. 2000).

her spouse infecting her with a disease, but rather the change of her “status from a single woman to a married woman, [loss of] the consortium, attentions, and support of a well man, and [the fact that she] endured mental pain and anguish as well as humiliation from being bound in matrimony to an invalid and drug addict.”¹⁴⁹ The ability to recover for these injuries stems from the rights obtained under a legal marriage.

Unlike *Leventhal*, the Dillings alleged misrepresentations were not stated for the purpose of inducing a marriage. In fact, Albert and Doe were already engaged at the time the misrepresentations allegedly occurred.¹⁵⁰ Moreover, Doe’s injury was completely unrelated to her impending marriage. Thus, her cause of action did not arise from the consequences of entering into a marriage, but rather from the physical harm she suffered as a result of the Dillings’ misrepresentations about Albert’s health condition.¹⁵¹ Because the misrepresentation in *Dilling* occurred in a purely private setting without an injury resulting from the legal consequences of marriage, the two cases are not analogous.

Finally, *Dilling* is distinguishable from the lines of cases involving claims of misrepresentation about one’s sterility or the use of birth control. Although the misrepresentations in those cases and in *Dilling* both occurred in intimate, private settings, the policies justifying the court’s intrusion into this private arena in those cases do not support such an intrusion in *Dilling*.

First, recovery for Doe’s injury, the physical harm resulting from the advancement of her HIV infection without her knowledge, is not contrary to public policy, such as seeking recovery for the birth of a child as in *Stephen K.* Second, although *Barbara A.* similarly involved physical harm, its facts are distinguishable because the party causing the harm in *Barbara A.* was also the party making the misrepresentation.¹⁵² Thus, the defendant in *Barbara A.* had an inherent duty to refrain from misrepresenting his fertility just as defendant transmitters of STDs have an inherent duty to inform their sexual partners of their infection prior to intercourse. As discussed previously, the Dillings were not the party inflicting the harm on Doe and, therefore, had no inherent duty to disclose Albert’s condition.

149. *Leventhal*, 186 N.E. at 676.

150. *Doe v. Dilling*, 888 N.E.2d 24, 28 (Ill. 2008).

151. *Id.* at 27.

152. *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 426 (Cal. Ct. App. 1983).

2. *A Third Party in a Personal Setting Rarely Has an Inherent Duty to the Plaintiff*

Not only was *Dilling* distinguishable from precedent, there was no independent reason to extend liability to the Dillings. Because the Dillings did not infect Doe with HIV and were not Doe's sole source of knowledge about Albert's health, the Dillings were merely third parties to the conduct causing Doe's injury. Indeed, third parties, like the Dillings, will rarely have an inherent duty in a personal setting to provide a plaintiff with accurate information concerning potentially harmful conduct.

Dilling is a perfect example of why courts will rarely find third parties have such a duty. Details concerning private situations, such as sexual relations or sexual health, are usually not disclosed to third parties outside of the relationship. Imposing a duty on a third party to disclose or to accurately state information regarding such inherently intimate matters in which they are not involved, and about which they may not have accurate information, would reach too far into a fundamentally private realm. As feared by the court in *Stephen K.*,¹⁵³ courts would constantly be forced to police whether these duties were being fulfilled within a context the state has traditionally not entered. Liability cannot be limitless, and the *Dilling* court correctly drew a line by refusing to impose liability on a third party to such an innately personal relationship.

On the other hand, a duty will be imposed upon a third party in the adoption cases because the third party in such cases, the agency, is in privity with the plaintiff parents. When the third party and the plaintiffs are in privity, obligations are imposed on the third party relating to the subject of the contract. These obligations justify a court in finding that the third party has a duty to disclose certain personal information to the plaintiffs.¹⁵⁴ The Dillings and Doe were not in privity, and therefore, the Dillings did not owe a duty to Doe to accurately represent information regarding Albert's health.

3. *Potential Consequences Had the Court Allowed Doe's Claim*

There is no question that the *Dilling* court correctly denied Doe relief. Had the court found the defendants liable for a misrepresentation made in a personal setting where the defendants were not directly involved in the actions giving rise to the harm, several negative results would have followed. First,

153. *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980).

154. *See Dilling*, 888 N.E.2d at 39.

the decision would open the door to a flood of litigation from any party who had suffered harm as a result of another's inaccurate statement. Given the sheer volume of intentional lies—let alone mere inaccuracies—told on a daily basis,¹⁵⁵ the magnitude of claims would cripple the court system. To protect against this deluge of litigation, courts must continue to place limits on fraudulent misrepresentation claims according to the context and relationship between the parties.

Next, such a decision would impair judicial efficiency. When a third party makes a misrepresentation in a personal setting in the absence of privity, it will always be questionable whether the plaintiff's reliance on the third party's statements was justified. If the *Dilling* court had allowed Doe's claim, the justifiable reliance element of such claims would be consistently disputed, as *Dilling* demonstrates. Consequentially, courts would have to expend additional time determining whether this element was satisfied. As explained below, the *Dilling* court correctly avoided this result by restricting a claimant's access to the court system through enforcing limits on the relationship between the parties and the setting of the misrepresentation, rather than forcing courts to repeatedly examine the interplay between the two factors within the context of justifiable reliance.

B. The *Dilling* Court Failed to Articulate a Clear Holding

Although the *Dilling* court correctly denied Doe's claim, the court's opinion did not sufficiently articulate a holding that reflects the rationale behind its conclusion. After discussing the history of fraudulent misrepresentation and distinguishing this case from the wrongful adoption and transmission of venereal disease cases, the court simply concluded that "[t]he factual circumstances of the instant appeal are inappropriate for the recognition of this tort beyond its general historical application to cases arising in the commercial context."¹⁵⁶ Unfortunately, the court failed to explicitly state *why* the factual circumstances are inappropriate, thus leaving the holding open to misinterpretation.

155. See Bella M. DePaulo, Deborah A. Kashy, Susan E. Kirkendol, & Melissa M. Wyer, *Lying in Everyday Life*, 70 J. OF PERSONALITY & SOC. PSYCHOL., 979 (1996).

156. *Dilling*, 888 N.E.2d at 40.

1. A Non-commercial Setting Does Not, Alone, Bar a Claim for Fraudulent Misrepresentation

The first inadequacy of the *Dilling* opinion is the court's over-emphasis on fraudulent misrepresentation's historical commercial use. While the unusual non-commercial setting presented in *Dilling* is certainly significant, it is, alone, insufficient to bar Doe's claim. Instead, the court should have analyzed the significance of a personal setting when combined with the other material facts of the case, specifically that the misrepresentation was made by third parties to the occurrence who were not in privity with the plaintiff.

Focusing on the importance of the tort's commercial use implies that Doe's non-commercial application is her claim's main deficiency, when, in fact, the extension of the tort into those areas has been widely accepted.¹⁵⁷ Extending the use of fraudulent misrepresentation to a personal setting is only untenable when the court finds that the defendant owes no inherent duty to the plaintiff. Evidence that the tort of fraudulent misrepresentation can be expanded to personal settings is present in the two groups of cases the court discussed in its analysis: wrongful adoption and the transmission of STDs.¹⁵⁸ Although the court mentioned that other jurisdictions have occasionally extended the tort to non-commercial settings when the plaintiff filed suit against the person who actually caused the harm, the court failed to elaborate on this statement and its implications to the case at hand. Had the court's opinion explored the legal principles supporting prior extensions of the tort, it would have clearly articulated that, in order to find a third party defendant liable, the court must first find that the defendant owed an inherent duty to the plaintiff.

2. The Court Failed to Expressly Require an Inherent Duty in Fraudulent Misrepresentations Claims in Non-Commercial Settings

The court failed to take the next step and explicitly require that the plaintiff prove the defendant owed her an inherent duty in order to recover for fraudulent misrepresentation in a non-commercial setting. Although the court correctly observed that the denial of Doe's claim "is supported by [her] own inability to prove that she justifiably relied upon the alleged statements made

157. See discussion *supra* Part II.B.

158. *Dilling*, 888 N.E.2d at 38–40.

by the Dillings,¹⁵⁹ it did not explain this statement, and as a result, did not provide a framework of analysis for lower courts to apply.

Faced with the problem of a plaintiff's inability to establish justifiable reliance when a third party, who is not in privity with the plaintiff, made a misrepresentation in a personal setting, the *Dilling* court could have denied Doe relief in one of two ways. First, the court could have allowed the use of the tort in a personal setting when a third party makes a misrepresentation, but required strict analysis of the element of justifiable reliance. The appellate court followed this approach, finding Doe established her claim, but overturning the jury's finding that Doe justifiably relied on the Dillings' alleged statements.¹⁶⁰ Second, the court could have refused to allow the use of the tort when a third party, who did not owe an inherent duty to the plaintiff, made a misrepresentation in a personal setting. This is the approach actually chosen by the Illinois Supreme Court, but it was not clearly articulated as such.¹⁶¹

A comparison of the two methods reveals the latter is preferable because it promotes judicial economy.¹⁶² By denying a plaintiff's claim at the outset of the case when the two factors are present, a personal setting and no inherent duty to the plaintiff, fewer meritless claims proceed to trial. Furthermore, the court conserves time because it does not have to analyze whether the plaintiff justifiably relied on the misrepresentation, the element of the tort that will always be suspect in such cases.

Nevertheless, the court, while choosing the preferable alternative, failed to clearly elucidate both prongs of the requisite analysis in rejecting Doe's claim. While the court correctly recognized the duty analysis of both the wrongful adoption and venereal disease transmission cases, it merely distinguished those cases from the facts of *Dilling*. Instead, the court should have established this duty analysis as the applicable legal framework to apply when presented with a claim of fraudulent misrepresentation arising from a non-commercial setting, and then should have expressly applied it to the case at bar. Specifically, the court should have set out a rule stating that: (1) fraudulent misrepresentation cannot extend to personal settings unless the defendant owes a duty to the plaintiff; and (2) the defendant will have no inherent duty as a third party to the occurrence causing the harm, unless the defendant is in privity with the plaintiff.

159. *Id.* at 40.

160. *See Doe v. Dilling*, 861 N.E.2d 1052 (Ill. App. Ct. 2006).

161. *See Dilling*, 888 N.E.2d 24.

162. *See* discussion *supra* Part IV.A.3.

When this duty analysis is applied to the facts of *Dilling*, it is apparent that Doe failed to establish a valid claim because the parties who made the misrepresentations were third parties to the personal occurrence causing the harm and were not in privity with Doe. These factors, when combined, establish that the third parties had no duty to inform the plaintiff. Therefore, the plaintiff's reliance lacks justification because of the disconnect between the parties' statements and the conduct from which the harm arose.

By clearly establishing a framework for lower courts to use in analyzing claims for fraudulent misrepresentation in a personal setting, the *Dilling* court could have cleared the fog surrounding such claims once and for all. Instead, the court produced a narrow opinion that only applies to a specific type of misrepresentation committed by third parties in a specific personal setting, while providing little, if any, guidance on the applicable legal principles.

3. *The Court's Holding Risks Misinterpretation*

Because the court did not sufficiently explain its reasoning as to why Doe's claim must fail, or when the tort of fraudulent misrepresentation may be recognized beyond its historical commercial application, the holding is at risk of misinterpretation, and its significance as precedent is diminished. For instance, a recent article in the *Illinois Bar Journal* (entitled *Fraudulent Misrepresentation Tort Limited to Business: Fraudulent Misrepresentation Applies Only to Business-Related, not Personal, Injury, The Illinois Supreme Court Rules*) has already paved the way for such misinterpretation.¹⁶³ Not only is the title itself misleading, the article implies that *Dilling* restricts the tort to commercial settings in which the plaintiff suffers a pecuniary loss.¹⁶⁴ Although the article also notes that the court distinguished *Dilling* from the wrongful adoption cases based on the agencies' inherent duty to disclose accurate information,¹⁶⁵ its title may overshadow the court's actual holding and improperly inform those in the legal profession that all claims of fraudulent misrepresentation in non-commercial setting are precluded.

163. Helen Gunnarsson, Law Pulse, *Fraudulent Misrepresentation Tort Limited to Business: Fraudulent Misrepresentation Applies Only to Business-Related, Not Personal, Injury, The Illinois Supreme Court Rules*, 96 ILL. B.J. No. 6., 282 (2008).

164. *Id.*

165. *Id.*

V. CONCLUSION

By denying Doe's claim for fraudulent misrepresentation in a personal setting against the Dillings, third parties who were not in privity with Doe, the Illinois Supreme Court properly preserved the tort's limits within the non-commercial setting. While the court reached the correct result, it failed to provide a clear holding that encompassed the full breadth of its reasoning. Rather than simply denying the tort's use in a personal context, the court should have combined prior case law with the facts of *Dilling* to create a framework of analysis for lower courts to apply when faced with a claim for fraudulent misrepresentation within a non-commercial setting. When *Dilling* is compared to prior cases applying fraudulent misrepresentation in a non-commercial setting, it is evident that: (1) fraudulent misrepresentation cannot extend to personal settings unless the defendant owes an inherent duty to the plaintiff; and (2) unless the defendant is in privity with the plaintiff, no such duty is owed by a third party to the occurrence causing the harm. Because the court did not fully articulate its holding in *Dilling*, the opinion runs the risk of misinterpretation.

