Stubborn Facts Can Make Bad Pleadings

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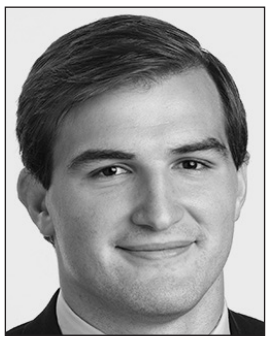

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Introduction

"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." While most people associate John Adams' famous quote with closing argument, facts can be stubborn things throughout the entirety of a lawsuit – including the pleading stage. And although "notice pleading" is all that is required, parties to a lawsuit often miss the "notice" part. Civ.R. 8 requires only a "short and plain statement of the claim showing that the party is entitled to relief." And while it is essentially the same as its Federal counterpart, the Ohio Supreme Court has yet to adopt the Federal plausibility standard. But that does not mean a pleader can assert elements, without facts, and survive. Ohio courts still apply some Federal pleading principles in deciding whether a party is entitled to relief. And while often ignored by parties and courts, a well-timed Motion can force additional facts and strategies out at the beginning of a case.

Twombly and the Ohio Supreme Court

In 2007, the United States Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), re-shaping the pleading standards under Fed.R.Civ.P. 8. Although the text of Fed.R.Civ.P. 8 never changed, the Court rejected 50 years of precedent, holding that a pleading must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 573. The Court required more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. In doing so, the Court held that requiring enough facts to show a plausible claim follows Fed.R.Civ.P 8 – "that the 'plain statement' possess enough heft to 'sho[w] the pleader is entitled to relief.'" *Id.* at 557. Two years later, the Court clarified *Twombly*, holding that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Although Civ.R 8 and Fed.R.Civ.P. 8 are identical in this regard – both requiring a "short and plain statement" of the facts/claim – the Ohio Supreme Court never adopted the federal "plausibility" standard. In the 14 years since *Twombly*, the Ohio Supreme Court only cited it two times. Once in *Foley v. Univ. of Dayton*, 150 Ohio St.3d 252, 2016 -Ohio- 7591, 81 N.E.3d 398, ¶ 22 (for the proposition that it may be wise to plead both intentional and unintentional torts) and once in *Felix v. Ganley Chevrolet, Inc.*, 145 Ohio St.3d 329, 2015 -Ohio- 3430, 49 N.E.3d 1224, ¶ 54 (discussing class certification under the "heightened federal-pleadings standard set forth in . . . *Twombly*."). Instead, in 2008, the Ohio Supreme Court re-affirmed that Ohio applies the old federal standard – "that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *Rayess v. Educational Comm. For Foreign Med. Graduates*, 134 Ohio St.3d 509, 2012 -Ohio- 5676, 983 N.E.2d 1267, ¶ 22.

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The Ohio Supreme Court's refusal to substantively address or cite *Twombly* is a bit baffling given the similarity of Fed.R.Civ.P. 8 and Civ.R. 8. This is all the more so because "federal case law that interprets the federal rule, while not controlling, is persuasive." *Myers v. City of Toledo*, 110 Ohio St.3d 218, 2006 -Ohio- 4353, 852 N.E.2d 1176, ¶ 18. And Courts throughout Ohio apply this principle when interpreting various other civil rules. For example, Civ.R. 35 (*Id.* at ¶18), Civ.R. 23 (*Stammco, LLC v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013 -Ohio- 3019, 994 N.E.2d 408, ¶ 18), Civ.R. 60(B)(4) (*In re J.W. J.W. J.W.*, 9th Dist. Summit No. 26874, 2013 -Ohio- 4368, ¶ 6), Civ.R. 37 (*Bellamy v. Montgomery*, 188 Ohio App.3d 76, 2010 -Ohio- 2724, 934 N.E.2d 403, ¶ 14), Civ.R. 24 (*Indiana Ins. Company v. Murphy*, 165 Ohio App.3d 812, 2006 -Ohio- 1264, 848 N.E.2d 889, ¶ 9), and Civ.R. 54 (*Perez Bar & Grill v. Schneider*, 9th Dist. Lorain No. 09CA009573, 2010 -Ohio- 1352, ¶ 17). But when it comes to Civ.R. 8, the Ohio Supreme Court has ignored it.

Twombly principles still have influence in Ohio

Despite the Ohio Supreme Court's sidestep of *Twombly* and *Iqbal*, various districts throughout Ohio rely on the "Twiqbal" cases to apply notice pleading principles other than plausibility. The logic of the Ohio appellate courts is that there must be some notice in notice pleading. As the Ninth District held, "[t]he ease of entry into the judicial arena introduced by 'notice pleading' was never intended to eliminate the need for a properly researched and factually supported cause of action." *Bratton v. Adkins*, 9th Dist. Summit No. 18136, 1997 WL 459979 (Aug. 6, 1997).

Indeed, some propositions of *Twombly* and *Iqbal* are "hardly a novel concept" and still apply to Ohio's notice pleading standard. Courts throughout Ohio have relied on *Twombly* and *Iqbal* to establish some guiding principles when reviewing the sufficiency of a complaint. These include:

- "A legal conclusion cannot be accepted as true for purposes of ruling on a motion to dismiss." *Cirotto v. Heartbeats of Licking Cty.*, 5th Dist. Licking No. 10-CA-21, 2010 -Ohio- 4238, ¶ 18;

- A complaint must contain more than mere "labels and conclusions." *Vagas v. Hudson*, 9th Dist. Summit No. 24713, 2009-Ohio-6794, ¶ 13;

- A mere recitation of the elements of a cause of action is insufficient without some factual allegations supporting the complaint. *Hoffman v. Fraser*, 11th Dist. Geauga No. 2010–G–2975, 2011-Ohio-2200, ¶ 21; and

- A complaint must contain more than just speculative relief. *Gallo v. Westfield Natl. Ins. Co.*, 8th Dist. Cuyahoga No. 91893, 2009-Ohio-1094, ¶ 9.

However, these general statements do not provide much helpful guidance. Ohio courts require only that the plaintiff show some set of facts that will entitle him to relief, not plausibility. *Snowville Subdivision Joint Venture Phase I v. Home S & L of Youngstown, Ohio*, 9th Dist. Cuyahoga No. 96675, 2012-Ohio-1342, ¶ 9. The official position is: Ohio courts "continue[] to apply and decide cases under traditional Civ.R. 12(b)(6) standards." *Tuleta v. Med Mut. Of Ohio*, 2014-Ohio-396, 6 N.E.3d 106, ¶ 27.

How much is enough?

Ohio courts evaluate the facts necessary to support a claim on a case-by-case basis, considering the elements of the case.

Pleading a "Special Relationship" requires a possibility

The Eighth District recently came close to plausibility by referencing a possibility standard in *Godwin v. Facebook, Inc.*, 2020-Ohio-4834, 160 N.E.3d 372 (8th Dist.). There, the plaintiff sued Facebook for 2017 murder of Robert Goodwin, Sr. in Cleveland, Ohio. Facebook moved to dismiss, arguing the general rule that there is no duty to control the conduct of a third person (here, the murder). *Id*. at ¶ 18. The plaintiff's complaint alleged a special relationship – much like how a psychiatrist "takes charge" of a patient in warning third persons of a potential risk of violence by the patient – Facebook "took charge" of the murderer and was therefore required to warn the

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authorities of his known dangerous propensities gathered by datamining. *Id*. at ¶ 25. But the court rejected the plaintiff's attempt to allege a special relationship between Facebook and the perpetrator, holding that "none of [the plaintiff's] allegations demonstrate the **possibility** of proving the existence of a special relationship . . . under Ohio law." *Id*. at ¶ 29 (emphasis added). Ultimately, the complaint was deficient because it failed to allege facts to supported those allegations that Facebook "voluntarily or involuntarily took charge of [the perpetrator] such that the duty to wield its control . . . arose." *Id*. at ¶ 26.

A plaintiff must allege facts to support an allegation of a duty

The Tenth District rejected a medical malpractice case by a former Ohio State Football player because he did not plead facts of a physician-patient relationship. *Montgomery v. Ohio State Univ.*, 10th Dist. Franklin No. 11AP–1024, 2012 -Ohio- 5489, ¶ 22. In *Montgomery v. Ohio State Univ.*, the former Ohio State football player, sued the university for medical malpractice after being denied workers' compensation benefits 10 years after his college career ended, based on a letter sent by an Ohio State physician documenting his history of high blood pressure while at Ohio State. *Id*. at ¶ 3. Ohio State moved to dismiss the Complaint, alleging that the plaintiff did not plead a physician-patient relationship. The court agreed – as the plaintiff's claim is predicated on a duty (physician-patient), the plaintiff must allege facts that support that duty. There, he did not, and the court appropriately dismissed his claims. *Id*. at ¶ 8.

When intentional conduct is an element, the plaintiff must plead facts that support that element.

In 2009, the Sixth District affirmed the dismissal of a pro se plaintiff's false imprisonment claims made against his former criminal defense attorney. *Clemens v. Katz*, 6th Dist. Lucas No. L–08–1274, 2009 -Ohio- 1461. In the complaint, the plaintiff alleged that his attorney's "request for a continuance" constituted false imprisonment. *Id*. at ¶ 9. The former lawyer moved to dismiss, arguing that the plaintiff did not plead facts that he confined the plaintiff "intentionally without lawful privilege." *Id.* at ¶8. The Sixth District ultimately agreed, holding that the plaintiff did not plead "facts" as to his false imprisonment – only "naked legal conclusions." *Id*. at ¶ 10.

Facts must support "extreme and outrageous" conduct element

Finally, the First District rejected a plaintiff's claims against a newspaper for intentional infliction of emotional distress because the plaintiff did not plead sufficient facts. *Mann v. Cincinnati Enquirer*, 1st Dist. Hamilton No. C–090747, 2010 -Ohio- 3963. The claim originated when the newspaper reported on the lawsuit between an exotic dancer and his former employer, misquoting the dancer. *Id*. at ¶ 4. The newspaper moved to dismiss, arguing that the plaintiff did not properly plead the "extreme and outrageous" element of an intentional infliction of emotional distress claim. The Court agreed. The plaintiff had to plead facts "that the defendant's conduct was 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . ." *Id.* at ¶24. However, the facts plead in the complaint did not arise to that level, and the court dismissed those claims. *Id.* at ¶25.

Using *Twombly* and *Iqbal* for product liability defense

The dividing line between sufficient and insufficient facts is not clear. And whether the Ohio Supreme Court will ever adopt plausibility, or even address it, is an open question.

But facts must still be plead to support all the elements of a plaintiff's claim. This is especially so in cases that are more "out of the norm." Relationship must be supported where a relationship is an element. Facts that show intent are necessary where intent is an element. Duty must be supported when duty is an element.

In product liability cases, courts should require some facts supporting the allegations of defect and causation. This is especially so when dealing with complex products that have varying component parts and unclear causation.

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For example, the Eighth District specifically rejected a product liability complaint under Ohio's notice pleading standard. *Allstate Ins. Co. v. Electrolux Home Prods., Inc.*, 8th Dist. Cuyahoga No. 97065, 2012 -Ohio- 90. In *Allstate*, an insurance company brought a subrogation claim against a dryer manufacturer to recover damages caused by a fire. *Id*. at ¶ 3. But the trial court dismissed the complaint for failing to sufficiently plead under Ohio's notice pleading standard. *Id*. at ¶ 4. On appeal, the Eighth District agreed, writing that the insurance company's complaint only set forth "conclusory statements." *Id*. at ¶ 9. Specifically, the court held that the complaint failed to allege "sufficient underlying facts" and "merely recit[ed] the elements of the law governing [the] causes of action." *Id*. at ¶¶ 10–11. The complaint was only 12 paragraphs and only alleged the defendant manufactured the insured's dryer, the dryer caught fire, the dryer was defective, and the defendant was liable. *Id*. at ¶ 9. Thus, the complaint was insufficient "[e]ven under Ohio's notice pleading standard. *Id*. at ¶ 10.

Allstate affirms that a plaintiff must do more than allege a defective design because something bad happened – he or she must provide some facts to support a design defect. Otherwise, a plaintiff's complaint is simply "the-defendant-unlawfully-harmed-me accusation." *See e.g. Ashcroft*, 556 U.S. at 678 (2009).

This is an important tool in defending product liability cases as it requires the plaintiff to provide notice to the defendants of what facts it alleges created a defective product. Product manufacturers and suppliers aren't the insurers of their products, and plaintiffs must provide more detail than that to bring a cognizable claim – even in Ohio. Either way, forcing a plaintiff to flesh out some facts early in the case can lead to limited and more tailored discovery or provide the defendant with a better indication of the plaintiff's claims. And in some cases, the plaintiff may not be able to plead facts to support his or her claim, and the case will be dismissed.

Either way, "facts are stubborn things" for plaintiffs in product liability cases, even at the pleading stage.

Jonathan Cooper, Esq., is a partner in Tucker Ellis LLP's Mass Tort and Product Liability group. Jonathan focuses on developing successful strategy and identifying and preparing experts who can tell the company's story from a science perspective.

For the past 30 years, Jonathan has represented individuals, small companies, partnerships, and Fortune 100 companies in a range of industries. He has tried over 20 cases to verdict or judgment, including matters involving allegations of breach of contract, trademark infringement, breach of warranty, securities fraud, theft of trade secrets, and products liability. In products liability and mass tort matters, he has worked diligently to understand the geology, mineralogy, and toxicology of the minerals involved in talc and asbestos litigation.

Joseph Manno, Esq., is a counsel in Tucker Ellis LLP's Mass Tort and Product Liability group. He is a member of Tucker Ellis's national and local counsel teams that defend manufacturers, suppliers, and distributors in mass tort and product liability claims.

Joe represents individuals, small businesses, and Fortune 50 companies in state and federal Courts in Ohio, Pennsylvania, and throughout the country. He is experienced in all aspects of litigation, including drafting pleadings, conducting and defending expert and lay witness depositions, drafting dispositive and evidentiary motions, and negotiating favorable settlements. Recently, Joe served as the lead associate or second chair in two product liability trials taken to verdict and knows the importance of maintaining a winning trial strategy throughout the case.

Riley Shaw, Esq., in as associate at Tucker Ellis LLP. He provides responsive and client-focused representation to a diverse group of industries, with particular emphasis on mass tort and product liability.

Riley is part of a Tucker Ellis team that defends a Fortune 200 manufacturer in state and federal courts across the country to resolve its premises liability, personal injury, and product liability matters. He handles various aspects of pre-trial litigation, including drafting pleadings, conducting fact investigation and expert discovery, preparing dispositive and evidentiary motions, and negotiating favorable settlements.