No. 34805 – *Tricia Roth and Brian Roth v. DeFelicecare, Inc. and Leslie DeFelice*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., dissenting:

I join with my colleague, Justice Ketchum, and respectfully dissent from the majority decision. Though the complaint here capably sets forth a quantity of salacious allegations, the consideration before us, as it was for the court below, is whether all of these allegations adequately give notice of a claim for which our legal system may grant relief. I suspect the majority was swayed a bit by the nature of the Appellant's allegations. However, ours is and must be an inquiry and consideration of legal, not personal, dimensions. This court is simply not tasked with nor equipped to render judgments solely of a "feel good" nature. In a court such as this, such "feel good" justice is situational justice; its outcome necessarily dependent more on the personal beliefs and policy-preferences of individual judges than on the rule of law. Though tempting to make an exception here or there, "feel good" judging leads to instability in our legal system. Justice Ketchum succinctly sets forth the legal insufficiencies of appellant's pleadings and why dismissal, though perhaps unfortunate, was nevertheless appropriate below.

I write separately to comment more generally on the concept of notice pleadings and the current trends afoot to move courts back to fact-based pleadings. Justice Ketchum references two recent United States Supreme Court decisions, *Bell Atlantic Corp.*

v. Twombly, 550 U.S. 544, (2007) and *Ashroft v. Iqbal*, 556 U.S. (2009). By requiring federal courts to now adopt a two-pronged approach to their review of pleadings in which allegations that are merely conclusory are not considered and the remaining allegations are viewed from a "plausibility" of entitlement to relief standard, *Twombly* and *Iqbal* have had a profound impact on the pleadings terrain of the federal court system. That this shift to more fact-specific pleadings happened without advanced warning to litigants in a legal system which for some seventy years has been notice-based like ours is something worthy of note to West Virginia judges and attorneys. I suspect it will be only a matter of time before this Court is confronted with the issue of whether West Virginia should adopt an interpretation of our *Rules of Civil Procedure* akin to that of the United States Supreme Court and should change our standard for dismissing a pleading under Rules 8(a) and (e), and 12(b)(6) of the *West Virginia Rules of Civil Procedure*.

The pleadings components of the *Federal Rules of Civil Procedure* are substantively identical to those in our state rules. Rules 8(a)(2) and (d)(1) of the *Federal Rules of Civil Procedure* require that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and that "[e]ach allegation must be simple, concise, and direct", respectively. Rules 8(a)(1) and e(1) of the *West Virginia Rules of Civil Procedure* likewise require that the pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and that "[e]ach allegation shall be

simple, concise, and direct", respectively. Until now, the plain language of these rules has defined the simplicity of our concept of notice pleadings. First appearing in the 1938 Federal Rules of Civil Procedure, notice-based pleading requirements replaced fact-based pleading requirements – requirements viewed by many as having inhibited access to the justice system.[1]

In 1957, the United States Supreme Court rendered its decision in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed2d 80 (1957) (abrogated by *Bell Atlantic v. Twombly*, *supra*), in which it held that a claim could not be dismissed unless there was "no set of facts" that the plaintiff could set forth to show that he or she was entitled to relief.[2] West Virginia adopted the *Conley* standard. *See Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977). As noted by the majority herein, the *Conley* standard, though it has now been abrogated by the United States Supreme Court, apparently remains viable in West Virginia – at least for now.

Should West Virginia consider a heightened pleadings requirement? The reasons which led the United States Supreme Court to abrogate *Conley* cannot be simply

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[1]West Virginia adopted its *Rules of Civil Procedure* in 1960.

[2] As recently as in *Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), the United States Supreme Court held that requiring particularized pleadings was inconsistent with the notice pleading provisions of the *Federal Rules of Civil Procedure*.

dismissed. West Virginia would be foolish to simply stick its judicial head in the sand. The same policy considerations facing federal cases are also applicable in the state court system. Just as the notice-pleading provisions were designed to enhance access to the judicial system, a system which is overly expensive and overly complex may inhibit a party's access to justice. Case delays, litigation costs, costly procedures, and the like are necessary and present concerns to our justice system.

On the other hand, I am not certain that a "plausibility" standard at the initial pleading level is necessarily a good thing, since such a standard is certainly dependent on the legal and factual context of a given controversy and since it would seem to require a judge to make a value determination on the likelihood of whether a claim will ultimately succeed or not before meaningful discovery occurs, even if the law provides a remedy for the conduct alleged. Furthermore, I am uncertain how predictable the current federal standard may be given that each judge has a different level of experience in making such determinations. I believe we must also be weary of a procedure which could be harsh on *pro se* litigants or otherwise be viewed as imposing unnecessary hurdles at the courthouse door to the substantial rights of parties.

As to delays and costs in litigation, I believe there are a host of opportunities already present within our *Rules of Civil Procedure* to address, at least in part, such concerns.

These include Rule 12(e) requests for a more definite statement of a pleading, early Rule 16 pretrial conferences for scheduling and mandatory case management deadlines (held by the trial judge within a short time of the filing of the responsive pleading), and a court's tight management of discovery under Rules 26 to 37.

Ultimately, it is only a matter of time before this issue squarely confronts us. I believe it preferable that we consider it in the reflection of rule-making rather than in the vacuum of an individual case before us on appeal.

Finally, I must disagree on one point with my colleague, Justice Ketchum. I do not believe the pleading herein would satisfy the heightened *Twombly*/*Iqbal* pleading standard any more than it fails to meet the *Conley* standard. In making this determination, I believe that Rules 8(a) and (e) do have a "weeding out" potential. Here, whether one applies a "possibility" standard or a "plausibity" standard, the Plaintiffs still fail to state a claim for which relief may be granted. Dismissal was appropriate.