

No. 2024-1696

IN THE
SUPREME COURT OF OHIO

BETHEL OIL AND GAS, LLC, *et al.*,
Plaintiffs-Appellees,

v.

REDBIRD DEVELOPMENT, LLC, *et al.*,
Defendants-Appellants.

JURISDICTIONAL APPEAL FROM THE
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY, OHIO
CASE NO. 23-CA-5

**MERIT BRIEF OF AMICUS CURIAE OHIO ASSOCIATION
OF CIVIL TRIAL ATTORNEYS URGING REVERSAL**

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INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a statewide organization whose wide array of members consist of attorneys, supervisory or managerial employees of insurance companies, and corporate executives of other corporations who devote a substantial portion of their time to the defense of civil damage lawsuits and the management of insurance claims brought against individuals, corporations, and governmental entities. For over fifty years, OACTA has long been a voice in the ongoing effort to ensure that the civil justice system is fair and efficient by promoting predictability, stability, and consistency in Ohio’s constitutional safeguards, statutory laws, and legal precedents.

OACTA’s mission is to provide a forum where its members can work together and with others on common problems to propose and develop solutions that will promote and improve the fair and equal administration of justice in Ohio. OACTA strives for stability, predictability and consistency in Ohio’s case law and jurisprudence. On issues of importance to its members, OACTA has filed amicus curiae briefs in significant cases before federal and state courts in Ohio advocating and promoting public policy and sharing its perspective with the judiciary on matters that will shape and develop Ohio law.

OACTA’s appearance as *amicus* in this case is in support of the Proposition of Law advanced by Appellants and in favor of reversal of the Fourth Appellate District. OACTA urges this Court to overturn the decision below by explicitly adopting the federal court plausibility pleading standard articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Although it is well-recognized that the Ohio Rules of Civil Procedure follow the federal rules for pleading requirements and case law interpreting those rules, this Court has never explicitly adopted the

Twombly/Iqbal plausibility requirement, which has resulted in inconsistent treatment of the pleading sufficiency requirements throughout Ohio’s trial and appellate courts. By adopting the Proposition of Law and overturning the decision below, this Court can deter those inconsistencies by definitively adopting the *Twombly/Iqbal* pleading standards.

STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts from the Merit Brief being filed by the principal Appellants, K&H Partners LLC and Tallgrass Operations LLC.

ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW

Proposition of Law No. I: Ohio’s pleading standard under Civil Rule 8 includes the plausibility requirement outlined by the United States Supreme Court in *Iqbal* and *Twombly*.

I.

Introduction

In Ohio, justice is promoted by affording citizens access to the state’s courts in order to address grievances and provide fair compensation for those injured in their persons or property. However, this interest must be balanced to prevent lawsuits that are frivolous, factually unsupportable, or unreasonable. To initiate a civil lawsuit, parties must file a complaint that complies with the pleading requirements of the Ohio Rules of Civil Procedure. Pertinent here, Rule 8(A)(1) provides that a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” This Ohio rule has been interpreted to amount to a “notice pleading” standard developed 68-years ago under Federal Rule of Civil Procedure 8(a)(2) by the United States Supreme Court in *Conley v. Gibson*, 355 U.S. 41 (1957). *See, Maternal Grandmother v. Hamilton Cty. Dept. of Job & Family Servs.*, 2021-Ohio-4096, ¶ 22 (DeWine, J.,

concurring in judgment) (“We ‘incorporate[d]’ the notice-pleading standard from the Federal Rules of Civil Procedure as our own. *See York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063 (1991)”). This “notice pleading” standard does not require plaintiffs to prove their case at the pleading stage, but merely requires factual allegations that if proved would entitle the plaintiff to relief. *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 526 (1994).

Adopting the *Conley* standard, this Court has held that, in order for a complaint to be dismissed at the pleading stage, it “must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling [the plaintiff] to recovery.” *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. “Although the ‘no set of facts’ language is often parroted, it has not been strictly applied by this court or other courts in this state. Such a formulation is in tension with Civ.R. 8’s requirement of a statement ‘showing that the party is entitled to relief.’ Indeed, if ‘no set of facts’ were truly the standard, even the most cursory complaint could survive dismissal.” *Maternal Grandmother*, ¶ 23 (DeWine, J., concurring in judgment).

In 2007, upon finding the *Conley* standard that a complaint could be dismissed only if “no set of facts” could be shown to demonstrate a plaintiff’s entitlement to relief had proven to be too lenient and was being misapplied, the United States Supreme Court in *Twombly* set a more stringent standard to govern complaints. As Justice DeWine noted in his concurring opinion in *Maternal Grandmother*,

Over a decade ago, the United States Supreme Court recognized that this “no set of facts” standard was being routinely misapplied. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). As the court explained, under a “literal” reading, the “no set of facts” formulation would allow “a wholly conclusory statement [to survive dismissal] whenever the pleadings left open the possibility” that a plaintiff might discover something supporting recovery. *Id.* at 561. For this reason, “a good many judges and commentators” had balked at applying the literal terms of the passage. *Id.* at 562-

563 (citing cases and commentaries).

The *Twombly* court explained that the conventional understanding of the “no set of facts” standard took the language in *Conley* out of context. *Twombly* at 562-563. It was more appropriate to understand that language “in light of the opinion’s preceding summary of the complaint’s concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief.” *Id.* Nonetheless, “after puzzling the [legal] profession for 50 years,” the Court concluded that the phrase had “been questioned, criticized and explained away long enough.” *Id.* Having “earned its retirement,” the *Conley* phrase was discarded by the United States Supreme Court. *Twombly* at 563. We should consign the phrase to a similar fate in Ohio jurisprudence.

In addition to explaining that the “no set of facts” formulation had been misunderstood, the *Twombly* court discussed the appropriate standard for reviewing the sufficiency of a complaint. A complaint does not “need detailed factual allegations,” but there must be more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Id.* at 555. “Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* Thus, to survive a motion to dismiss, a plaintiff need not engage in “heightened fact pleading of specifics, but [must supply] enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A claim has facial plausibility,” the court later elaborated, “when the plaintiff pleads factual content” that presents “more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Maternal Grandmother, ¶ 25-27 (DeWine, J., concurring in judgment).

Two years after deciding *Twombly*, the United States Supreme Court extended the plausibility standard to all civil cases in *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

Good reasons exist for this shift to a more stringent pleading standard:

A major policy motive behind the *Twombly/Iqbal* standard (“*Twombly/Iqbal*”) is to protect defendants from burdensome discovery requests, especially from plaintiffs who rely almost exclusively on discovery to uncover whether their claims have merit. “Plausibility” therefore requires a complaint to set out “enough facts to raise a reasonable expectation that discovery will reveal evidence” of a claim for relief. This has become more relevant with the advent of e-discovery, where the use of evidence from large, electronically stored databases has become both necessary and commonplace, making discovery more costly and time-consuming.

Matthew Marino, *Debunking Twombly/Iqbal: Plausibility is More than Plausible in Ohio and*

Other States, 89 U. Cin. L. Rev. 1066, 1066-1067 (2021) (footnotes omitted).

Some Ohio courts have embraced the *Twombly/Iqbal* plausibility standard¹ while others have either not decided the issue² or – as the Fourth Appellate District has done here³ – expressly rejected the plausibility standard.⁴ This creates at least uncertainty or, worse, inconsistency in Ohio’s courts making the issue of whether Ohio applies the *Twombly/Iqbal* plausibility standard ripe for the Ohio Supreme Court to resolve.

OACTA urges the Court to adopt the *Twombly/Iqbal* pleading standard as governing Ohio civil procedure practice under Civil Rule 8(A). The *Twombly/Iqbal* plausibility requirement is a more stringent standard than the current notice pleading. But implementing *Twombly/Iqbal* in Ohio will not impair access to the courts. Rather, by requiring complaints to comply with *Twombly/Iqbal* will encourage more factually precise and supported complaints. This will lead to more well-defined factual bases for causes of action set forth in complaints, better and more focused pre-trial case management practice, and clearer expectations for attorneys and litigants, all of which will reduce the costs associated with early pre-trial litigation. Adoption of the *Twombly/Iqbal* standard in Ohio also comports with Ohio’s long-standing tradition of modeling its own rules of civil procedure after the Federal Rules of Civil Procedure and, thereby gaining the benefit of being able to rely upon federal case law to interpret those rules.

II.

Ohio’s Tradition of Mirroring the Federal Rules Supports Adoption of the *Twombly/Iqbal* Plausibility Pleading Standard.

¹ *Bumpus v. Ward*, 2012-Ohio-4674, ¶ 12 (5th Dist.); *Haas v. Stryker*, 2013-Ohio-2476, ¶¶ 10-11 (6th Dist.); *Vagas v. Hudson*, 2009-Ohio-6794, ¶ 13 (9th Dist.); *Mohat v. Horvath*, 2013-Ohio-4290, ¶ 17 (11th Dist.).

² The First, Third, Tenth, and Twelfth Appellate Districts have not addressed the issue.

³ *Bethel Oil & Gas, L.L.C. v. Redbird Dev., L.L.C.*, 2024-Ohio-5285, ¶¶ 37-39 (4th Dist.).

⁴ *Sacksteder v. Senney*, 2012-Ohio-4452, ¶ 46 (2d Dist.); *Fed. Natl. Mtge. Assn. v. Brown*, 2017-Ohio-9237, ¶ 19 (7th Dist.); *Shaut v. Roberts*, 2022-Ohio-817, ¶ 6 (8th Dist.).

When the Ohio Rules of Civil Procedure were being drafted in 1968, this Court advised the Rules Advisory Committee to use the Federal Rules as a model and starting point for the rules that were ultimately effective July 1, 1970. As Chief Justice (then Justice) Kennedy pointed out in her concurring opinion in *Burnham v. Cleveland Clinic*, 2016-Ohio-8000, ¶¶ 62-64:

The simplification of civil litigation was achieved with the promulgation of the Ohio Rules of Civil Procedure. The genesis of the rules was the 1968 passage of Issue 3, after approval by the General Assembly, which resulted in the Modern Courts Amendment's becoming part of the Ohio Constitution. Milligan & Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 Ohio St.L.J. 811 (1968), citing 1967 Am.Sub.H.J.Res. No. 42; see also Article IV, Section 5(B), Ohio Constitution.

One aspect of the amendment was a recognition that the “keystone to the reform of judicial procedure was the conferring of rule-making power on the courts.” Corrigan, *A Look at the Ohio Rules of Civil Procedure*, 43 Ohio St.Bar Assn. Rep. 727, 728 (1970). See also *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270, ¶ 2 (Modern Courts Amendment conferred authority on this court “to promulgate rules relating to matters of procedure in courts of Ohio”). The amendment empowered this court—not the General Assembly—with rulemaking authority. *Id.* “The power vested in the Court is complete,” Corrigan at 728, because the “[p]rocedural rules promulgated pursuant to the Modern Courts Amendment supersede conflicting statutes that affect procedural matters,” *Havel* at ¶ 2.

Thereafter, the Supreme Court of Ohio directed the Rules Advisory Committee to propose the Ohio Rules of Civil Procedure for its consideration, recommending that the Federal Rules of Civil Procedure be the general model. Corrigan at 728. Modeling Ohio's Rules on the Federal Rules was a “distinct advantage,” because there was “a considerable body of decisions” interpreting and applying the Federal Rules and some states had adopted similar rules. *Id.* at 729.

In step with this tradition of modeling Ohio's civil procedure rules with the federal rules, Ohio's current Rules of Civil Procedure have been amended and revised in recent years to be consistent with the Federal Rules of Civil Procedure. Several examples bear this out.

Ohio Rule 23 was originally modeled after Federal Rule 23, both of which govern class certification in class action lawsuits. Both Federal Rule 23(b)(3) and Ohio Rule 23(B)(3) require that questions of law or fact common to the proposed class members predominate over questions

affecting only individual members.

Ohio's adoption of Ohio Rule 26(B)(1) was influenced by the federal work product doctrine which standard was recognized and developed by the United States Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947) where the Court established a privilege for an attorney's written statements or materials created in preparation for trial. Based upon *Hickman*, Ohio Rule 26(B)(1) carves out an exception for discovery requests for documents and materials prepared in reasonable anticipation of litigation. *Burnham*, ¶ 16.

Through the years, Ohio's discovery practice has been tailored to track and correspond with modern federal practice:

Ohio Rule 26 mirrors the Federal Rules in other significant ways. For instance, the 2015 amendments to Federal Rule 26(b)(1) provided that "parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and *proportional to the needs of the case*." Requiring discovery requests proportional to the needs of a case encourages lawyers to tailor more specifically their discovery demands based on the specific facts and stakes of the case. Similarly, Ohio Rule 26(B)(1) was amended in 2020 to include the italicized language requiring *proportionality* in discovery requests, acknowledging the need for discovery limitations in an era of increasingly complex civil litigation.

Further, Ohio Rule 26(B)(6)(b) provides a mechanism for a party to recover inadvertently produced documents from an opponent, which was also previously adopted in the Federal Rules. Recognizing the need for procedural reform incident to the advent of e-discovery, this "claw-back" provision allows litigants to keep confidential documents that were accidentally disclosed as a result of discovery. Accidental disclosure is all the more likely in the age of e-discovery where thousands of documents may be requested at a time from electronic databases.

Matthew Marino, *Debunking Twombly/Iqbal: Plausibility is More than Plausible in Ohio and Other States*, 89 U. Cin. L. Rev. 1066, 1072 (footnotes omitted).

Adoption of the *Twombly/Iqbal* standard encourages better and more refined complaints at the early stage of pleading which will help litigants refine and tailor their discovery requests to the demands of their case which will help litigants' compliance with Ohio Rule 26(B)(1), requiring

discovery requests that are proportional to the needs of the case.

As this demonstrates, Ohio's long-standing efforts to mirror the federal rules in regard to class action litigation and discovery practice reinforces the policy reasons why Ohio courts should be utilizing the *Twombly/Iqbal* plausibility standard when evaluating the sufficiency of the factual predicates set forth in complaints.

III.

***Twombly/Iqbal* Does Not Impose An Insurmountable Probability Requirement At The Pleading Stage.**

The Supreme Court in *Twombly* held antitrust plaintiffs alleging violations of Section 1 of the Sherman Act must plead sufficient factual matter to support a plausible claim for relief. *Twombly*, 550 U.S. at 549. In setting out the new standard to govern Rule 8(a)(2) providing that a complaint must contain enough facts to make the allegations plausible on their face and not merely speculative, the *Twombly* Court explained that a complaint cannot be plausible if it only contains conclusory allegations, recites labels, or lists the elements of a claim. *Id.* at 555. While adopting a more stringent pleading standing, the Court in *Twombly* noted that plausibility does not require a complaint to contain overly detailed factual allegations, but there must be some facts to demonstrate a claim for relief.

Requiring plausible grounds to infer wrongdoing giving rise to a viable cause of action “does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [the alleged wrongdoing].” *Id.* at 556. The Court further reasoned that dismissing implausible complaints at the pleading stage saves time, money, and resources by dispensing quickly with groundless claims. *Id.* at 573.

In *Ashcroft v. Iqbal*, the plausibility standard set out in *Twombly* was extended to all civil cases, holding that a complaint must allege nonconclusory facts that, taken as true, support a claim

for relief that is plausible on its face. 556 U.S. at 678. As explained by the *Iqbal* Court,

The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of entitlement to relief.”

556 U.S. at 678 (citations omitted).

To be sure, the *Twombly/Iqbal* plausibility standard requires more factual specificity when drafting what would be a viable complaint: (1) the complaint must provide grounds of the plaintiff’s entitlement to relief, which requires “more than labels and conclusions;” (2) simply alleging the elements of a cause of action is not sufficient to survive a motion to dismiss; (3) more speculative allegations will be viewed with more scrutiny; and (4) the complaint must include factual allegations presenting “plausible grounds” indicating that the pleader is entitled to relief, or at least that discovery will reveal evidence of a claim for relief

Adoption of the plausibility standard will create clearer expectations for practitioners. If there would be any concerns that the adoption of the *Twombly/Iqbal* standard will lead to cases with merit being dismissed more often under a plausibility test, it is more likely that the plausibility standard would actually decrease granted motions to dismiss because practitioners will draft more viable, factually supportable complaints.

Consequently, the plausibility standard is not too onerous and will not foreclose access to Ohio courts for those parties who have legitimate and well-grounded claims to pursue which are based upon factually supportable allegations.

CONCLUSION

Amicus curiae The Ohio Association of Civil Trial Attorneys respectfully urges this Court to adopt the Proposition of Law advanced by Appellants establishing that Ohio's pleading standard under Civil Rule 8(A) includes the plausibility requirement outlined by the United States Supreme Court in *Iqbal* and *Twombly* and, thereby, clarify that all complaints initiating civil actions in Ohio must contain enough factual support to state a facially plausible claim that raises a right to relief beyond mere speculation. This case demonstrates and presents this critically important and wide-ranging, yet still unsettled, area of Ohio civil procedure law.

Respectfully submitted,

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