[Cite as *Lombardo v. Best Western Hotels & Resorts*, 2023-Ohio-2300.]

**COURT OF APPEALS OF OHIO**

**EIGHTH APPELLATE DISTRICT**
**COUNTY OF CUYAHOGA**

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| MICHAEL LOMBARDO, ADMINISTRATOR, ET AL., | : | |
| Plaintiffs-Appellants, | : | No. 112075 |
| v. | : | |
| BEST WESTERN HOTELS & RESORTS, ET AL., | : | |
| Defendants-Appellees. | : | |

JOURNAL ENTRY AND OPINION

**JUDGMENT:** AFFIRMED
**RELEASED AND JOURNALIZED:** July 6, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-22-965221

***Appearances:***

Patrick J. Weiss, *for appellants*.

Raymond H. Decker, Jr., *for appellees*.

EILEEN A. GALLAGHER, J.:

{¶ 1} Plaintiff-appellant Michael Lombardo, both individually and as the administrator of the estate of Anthony Lombardo and plaintiff-appellant Patricia Lombardo appeal the dismissal of their complaint against the defendants-appellees Best Western Hotels & Resorts; Holiday Inn Cleveland-Strongsville IHG Americas

Office; Cleveland Strongsville Hospitality, LLC, DBA Holiday Inn Strongsville; Cleveland Strongsville Hospitality II, LLC and Twin Tier Hospitality, LLC.

{¶ 2} For the reasons that follow, we affirm.

## I. Factual Background and Procedural History

{¶ 3} In June 2022, the plaintiffs filed a complaint against Best Western Hotels & Resorts and Holiday Inn Cleveland-Strongsville IHG Americas Office. Those defendants filed a Civ.R. 12(B)(6) motion to dismiss on August 2, 2022. The plaintiffs filed an amended complaint on August 16, 2022, adding as defendants Cleveland Strongsville Hospitality, LLC, DBA Holiday Inn Strongsville; Cleveland Strongsville Hospitality II, LLC and Twin Tier Hospitality, LLC.[1]

{¶ 4} The amended complaint alleged the following facts:

{¶ 5} The defendants own and operate the Best Western Hotel located at 15471 Royalton Road in Strongsville, Ohio. Anthony Lombardo was a guest at the hotel in June 2020. The defendants, "their employees, agents, or other representatives may have been aware of or even responsible for the presence of illicit substances and other dangerous activities in or around the hotel property" while Anthony was a guest there. On June 22, 2020, Anthony's father — Michael Lombardo — and Anthony's sobriety sponsor contacted the hotel to request that hotel employees conduct "wellness checks" on Anthony. The hotel did not conduct

[1] The plaintiffs also named ten John Doe defendants in their amended complaint, who the plaintiffs said were "management, employees, individuals, institutions, businesses, organizations, and/or corporations who contributed and/or participated in the negligent acts * * *." The plaintiffs voluntarily dismissed these John Doe defendants.

a wellness check; moreover, Michael and the sponsor "were led to believe [that Anthony] was not a guest or even present at [the hotel]." Michael and the sponsor were unable to reach or contact Anthony at the hotel "[b]y reason of the negligent acts and/or omissions" of the defendants and started looking elsewhere for Anthony. On June 24, 2020, Anthony — while still a guest at the hotel — "sustained injuries that ultimately caused his death[;]" he "suffered severe pain, both physical and mental[,]" before his death. His body was found at the hotel.

**{¶ 6}** Michael Lombardo, as the administrator of Anthony's estate, sought damages for the injuries Anthony suffered and for burial and funeral expenses. Michael and Patricia, individually as Anthony's parents and next of kin, sought damages for "the loss of companionship, care, assistance, attention, protection, advice, counseling, instruction, training and education of [Anthony]" as well as damages for "mental anguish" resulting from his death.

**{¶ 7}** In August 2022, the defendants filed a motion to dismiss the amended complaint pursuant to Civ.R. 12(B)(6). The defendants argued that the amended complaint did not adequately allege "[t]he circumstances and chain of events surrounding [Anthony's] injuries and death" such that the defendants would have adequate notice of the alleged duty, breach and causation underpinning the plaintiffs' negligence claim. The defendants further complained that the allegations do not "provide any context to even allow Defendants to reasonably infer what Plaintiffs claim was unsafe or what dangerous activities occurred at the hotel," let

alone "what duty Defendants had, how they breached that duty, and what caused [Anthony's] injuries and death."

{¶ 8} To the extent that the plaintiffs allege that Anthony died from using illicit drugs at the hotel, the defendants said "that is an inherently dangerous and voluntary act on [Anthony's] part" and "Defendants are unaware of any duty to warn [Anthony] of the harms of illicit substances or protect him from the harm of using illicit substances." The defendants also contended that a hotel has no duty to conduct wellness checks on its guests, there is no allegation that a hotel employee agreed to conduct a wellness check on Anthony and failed to do so, and that any claim would be barred by the Good Samaritan Law (R.C. 2305.23).

{¶ 9} The plaintiffs opposed the motion.

{¶ 10} In September 2022, the trial court granted the motion and dismissed the complaint.

{¶ 11} The plaintiffs appealed,[2] raising the following assignment of error for review:

> The trial court erred by granting appellees' motion to dismiss on the grounds that the complaint and first amended complaint were inadequate.

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[2] On October 6, 2022, prior to filing this appeal, the plaintiffs filed a motion for relief from judgment under Civ.R. 60(B)(5) asking the trial court to either (1) reverse the Civ.R. 12(B)(6) dismissal and allow them to voluntarily dismiss the complaint under Civ.R. 41(A) or (2) "amend" the dismissal order to indicate that the dismissal was without prejudice and was not on the merits of the claims. The defendants opposed that motion and it remains pending.

## II. Law and Analysis

**{¶ 12}** We review rulings on Civ.R. 12(B)(6) motions to dismiss under a de novo standard. "A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. Under a de novo analysis, we must accept all factual allegations of the complaint as true and all reasonable inferences must be drawn in favor of the nonmoving party." (Citation omitted.) *NorthPoint Properties, Inc. v. Petticord*, 179 Ohio App.3d 342, 2008-Ohio-5996, 901 N.E.2d 869, ¶ 11 (8th Dist.). "For a trial court to grant a motion to dismiss for failure to state a claim upon which relief can be granted, it must appear 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling [the plaintiff] to relief.'" *Graham v. Lakewood*, 2018-Ohio-1850, 113 N.E.3d 44, ¶ 47 (8th Dist.), quoting *Grey v. Walgreen Co.*, 197 Ohio App.3d 418, 2011-Ohio-6167, 967 N.E.2d 1249, ¶ 3 (8th Dist.). A court's factual review is generally confined to the four corners of the complaint. *See, e.g.*, *Dabney v. Metro Appraisal Group, Inc.*, 8th Dist. Cuyahoga No. 106917, 2018-Ohio-4601, ¶ 15.

**{¶ 13}** The plaintiffs' amended complaint raises claims of negligence and wrongful death. To "'maintain a wrongful death action on a theory of negligence, a plaintiff must show (1) the existence of a duty owing to plaintiff's decedent, (2) a breach of that duty, and (3) proximate causation between the breach of duty and the death.'" *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation & Dev. Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2, ¶ 14, quoting

*Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 92, 529 N.E.2d 449 (1988).

**{¶ 14}** The plaintiffs allege several theories of liability: (1) the defendants "may have" breached some duty owed to Anthony because they "may have" been aware of the presence of drugs or other unspecified dangerous activities in or around the hotel or may have been responsible for the presence of those drugs or activities while Anthony was a guest there; (2) the defendants owed Anthony a duty to perform a "wellness check" when his father and sponsor called with concerns that Anthony failed to attend a scheduled appointment and they breached that duty by failing to perform the wellness check and (3) the defendants owed Anthony or his father and sponsor a duty to provide truthful information about whether Anthony was a guest at the hotel and breached that duty by misleading Michael and the sponsor about whether Anthony was a guest. The complaint alleges that these breaches of the defendants' duties caused Anthony to suffer pain and die at the hotel.

**{¶ 15}** The amended complaint fails to state a claim because the plaintiffs argue theories of duty that lack support under existing Ohio law and the allegation that the defendants "may have" been aware of or created an unsafe environment is too speculative to survive a motion to dismiss.

**{¶ 16}** As for the latter, the plaintiffs allege that "Defendants, their employees, agents, or other representatives may have been aware of or even responsible for the presence of illicit substances and other dangerous activities occurring in or around the hotel property." The plaintiffs do not refer to these

allegations in their appellate brief in defense of the complaint. Nevertheless, to the extent that the plaintiffs have not abandoned this theory of alleged liability, we find the claim speculative.

**{¶ 17}** While a party is not normally "expected to plead a claim with particularity" — *Maternal Grandmother, ADMR. v. Hamilton Cty. Dept. of Job & Family Servs.*, 167 Ohio St.3d 390, 2021-Ohio-4096, 193 N.E.3d 536 ¶ 10 — even Ohio's liberal notice-pleading standard does not permit mere speculation. *Maternal Grandmother, ADMR* at ¶ 29 (DeWine, J., concurring in judgment only) ("Ohio courts have made clear that mere speculation, unsupported by operative facts, is not enough to state a claim."), citing *Sacksteder v. Senney*, 2d Dist. Montgomery No. 24993, 2012-Ohio-4452, ¶ 45; *see also Digiorgio v. Cleveland*, 8th Dist. Cuyahoga No. 95945, 2011-Ohio-5878, ¶ 41.

**{¶ 18}** The plaintiffs' allegation that the defendants "may" (read, "or may not") have been aware of or responsible for (in some unspecified way) illicit substances or unspecified "other dangerous activities" somewhere on "or around" the Best Western Hotel, such that the defendants somehow breached some duty owed to Anthony in a way that proximately caused his death, presents a claim that is too speculative to survive a motion to dismiss.

**{¶ 19}** The plaintiffs' allegations regarding the hotel's failure to conduct a wellness check and its failure to truthfully confirm that Anthony was a guest also fail to state a claim because the hotel was under no duty to do those things under the facts as alleged.

**{¶ 20}** The plaintiffs explain in their motion-to-dismiss briefing that Michael and Anthony's sobriety sponsor called the hotel multiple times on June 22, 2020, communicated that Anthony "may be in need of medical assistance" and requested that the hotel conduct a "wellness check" on Anthony. Michael and the sponsor were concerned about Anthony's safety because Anthony had failed to return phone calls and missed a planned meeting with Michael. There is no allegation that *anyone* contacted emergency services for the purpose of conducting a wellness check on Anthony and there is no allegation that anyone at the hotel was actually aware that Anthony was in medical distress. There is also no allegation that the hotel agreed to conduct a wellness check and then failed to reasonably do so. *Compare O'Malley v. Hospitality Staffing Solutions*, 228 Cal.Rptr.3d 731 (Cal.Ct.App.2018) (reversing summary judgment based on a "negligent undertaking" theory of liability when the hotel agreed to conduct a wellness check and failed to discover the guest, who had suffered a brain aneurysm, in the room). The plaintiffs instead allege that the hotel should be liable in negligence because it did not take affirmative steps to determine if Anthony was in need of medical attention based on his father's and sponsor's concerns that Anthony might be in need of help.

**{¶ 21}** "'The existence of a duty is a question of law for a court to decide, even if resolving that question requires the court to consider the facts or evidence.'" *Masterson v. Brody*, 2022-Ohio-3428, 196 N.E.3d 927, ¶ 8 (8th Dist.), quoting *A.M. v. Miami Univ.*, 2017-Ohio-8586, 88 N.E.3d 1013, ¶ 33 (10th Dist.).

**{¶ 22}** While ordinarily there is no duty requiring an individual to act affirmatively for the protection of others, even when harm is foreseeable — *e.g.*, *Jackson v. Forest City Ents.*, 111 Ohio App.3d 283, 285, 675 N.E.2d 1356 (8th Dist.1996) — the relationship between a hotel and its guest is one of the "special and definite" relationships that give rise to a special duty on the part of the hotel to protect the guest. *E.g.*, *id.* (calling the relationship one between "innkeeper and guests").

**{¶ 23}** We conclude, however, that under the circumstances alleged in the complaint, the hotel did not owe Anthony a duty to conduct a wellness check or truthfully confirm to third parties that he was a guest at the hotel. The plaintiffs cite to no Ohio authority in support of the existence of these claimed duties.

**{¶ 24}** In Ohio, "an innkeeper is not an insurer of [its] guest's safety * * *." *McDowell v. Rockey*, 32 Ohio App. 26, 33, 167 N.E. 589 (5th Dist.1929). Indeed, "[i]t is generally held that * * * [an innkeeper's] responsibility is limited to the exercise of reasonable care." *Fineberg v. Lincoln-Phelps Apt. Co.*, 55 Ohio App. 402, 9 N.E.2d 1011 (7th Dist.1935); *cf.* Restatement of the Law 3d, Torts: Liability for Physical and Emotional Harm, Section 40 (2012) ("An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.").

**{¶ 25}** Even assuming, without deciding, that our state would recognize that the duty of reasonable care would require a hotel to "give [a guest] first aid after it knows or has reason to know that they are ill or injured, and to care for them until

they can be cared for by others" — *see* Restatement of the Law 2d, Torts, Section 314A(1)–(2) (1965)[3] — the plaintiffs offer us no authority to support extending this duty to require a hotel to conduct a wellness check on an emancipated adult guest based solely upon a third party's concern that the guest is a user of dangerous drugs, did not attend a scheduled appointment and therefore may have overdosed.

**{¶ 26}** The allegations in the plaintiffs' complaint are similar to those alleged in *Bonafini v. G6 Hospitality Property, LLC*, 194 N.E.3d 234 (Mass.App.Ct.2022). There, a motel guest's mother and wife informed the motel that the guest was at risk of suicide and asked for his room number so that they could help him. *Id.* at 236. The motel called the guest, who reported that he did not want to be disturbed, and the motel did not further assist the concerned family members; the motel did not give them his room number. *Id.* Tragically, the guest died by suicide in the motel as his family feared he would. *Id.* The guest's estate sued the motel, arguing that it failed to take reasonable steps to prevent the suicide because it failed to call the police to conduct a wellness check when the family expressed their concerns. *Id.* The complaint was dismissed and the dismissal was affirmed on appeal because the family members' concerns, without more, were deemed insufficient to trigger any duty on the part of the motel to rescue the guest. *Id.* at 238.

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[3] The Restatement of the Law 3d, Torts, Section 40 replaced Section 314A and identified a hotel's duty as a general one of "reasonable care;" the change was made considering "technological advances" like defibrillators. *See id.* at Comment d, Reporter's Note Comment d.

**{¶ 27}** When considering the allegations raised in the plaintiffs' complaint, we similarly find that the defendants were under no duty to conduct a wellness check on Anthony or assist Anthony's father and sponsor by truthfully confirming that Anthony was a guest. There is no allegation that the hotel had actual knowledge that Anthony was overdosing or experiencing any medical distress; indeed, beyond Michael's and the sponsor's concerns, there is no allegation that the hotel had reason to suspect that Anthony needed medical assistance.

**{¶ 28}** As "tragic as the consequences of inaction were" here, *see Bonafini* at 238, the allegations in the plaintiffs' amended complaint do not state a claim that the hotel breached an established duty owed to Anthony, Michael or the sponsor.

**{¶ 29}** Our conclusion should not be read too broadly; we are asked only to consider the unique and specific allegations raised in the plaintiffs' amended complaint. We leave consideration of a hotel's duty under other circumstances — like where another guest at the hotel reports hearing sounds of a medical emergency coming from someone's room, *see Estate of Chance v. Fairfield Inn & Suites*, 881 S.E.2d 760 (N.C.Ct.App.2022); or where a third party reported that a guest, while on the phone, screamed out in pain before dropping the phone or a myriad of other possibilities — to future cases where those circumstances are presented.

**{¶ 30}** Because the plaintiffs' complaint was speculative and asserted duties that are not supported by Ohio law, we overrule the appellants' assignment of error.

## III. Conclusion

{¶ 31} Having overruled the appellants' sole assignment of error for the reasons stated above, we affirm the dismissal of the amended complaint.

It is ordered that the appellees recover from the appellants the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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EILEEN A. GALLAGHER, JUDGE

LISA B. FORBES, J., CONCURS;
FRANK DANIEL CELEBREZZE, III, P.J., DISSENTS (WITH SEPARATE OPINION)

FRANK DANIEL CELEBREZZE, III, P.J., DISSENTING:

{¶ 32} I respectfully dissent from the majority. I cannot join the majority in holding as a matter of law that no duty exists based on allegations contained in the complaint without allowing the parties to engage in discovery. I also do not agree that the complaint was too speculative to survive Ohio's liberal notice pleading standard based on current Ohio law. I would have found that the trial court erred in granting the defendants' Civ.R. 12(B)(6) motion and reversed and remanded this matter for further proceedings.

**{¶ 33}** The plaintiffs' second amended complaint presented several theories of liability. First, they alleged that the negligent acts or omissions of the defendants and/or respective agents, which includes employees, placed Anthony in an unsafe environment and further averred that the defendants knew of or created the unsafe environment, which included the presence of illicit substances. Second, they averred that the defendants acted negligently in misleading Michael and Anthony's sponsor as to whether Anthony was a guest at the hotel. Third, they alleged that the hotel acted negligently in performing or failing to perform a wellness check.

**{¶ 34}** No definitive formula exists for determining as a matter of law whether a duty exists. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). "Duty is '* * * the court's expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" *Id.,* quoting Prosser, *Law of Torts*, 325-326 (4th Ed.1971). I would find that there is a bevy of Ohio law that supports a theory of recovery under these claims as alleged. While there is ordinarily no duty to act affirmatively to protect others, a hotel may have an affirmative duty to protect others where "there exists a special and definite relationship between the parties." *Jackson v. Forest City Ents.*, 111 Ohio App.3d 283, 285, 675 N.E.2d 1356 (8th Dist.1996), citing *Slagle v. White Castle Sys., Inc.*, 79 Ohio App.3d 210, 216, 607 N.E.2d 45 (10th Dist.1992). Where a special relationship exists, liability could be premised on a failure to act or failure to control a third party's conduct. *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018, ¶ 38. "[O]nce a duty is undertaken voluntarily, it must

be performed with ordinary care." *Sawicki v. Ottawa Hills*, 37 Ohio St.3d 222, 227, 525 N.E.2d 468 (1988). Additionally, "an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of *respondeat superior*[.]" *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 628 N.E.2d 46 (1994). The majority even cites *McDowell v. Rockey*, 32 Ohio App. 26, 33, 167 N.E. 589 (5th Dist.1929) and *Fineberg v. Lincoln-Phelps Apt. Co.*, 55 Ohio App. 402, 9 N.E.2d 1011 (7th Dist.1935), to conclude that the defendants' duty was to exercise reasonable care. That alone establishes that a duty exists in the instant matter. While the majority asserts that "[t]he plaintiffs cite to no Ohio authority in support of the existence of these claimed duties," the majority does not cite any Ohio law that definitively refutes the existence of a duty in the situation as pled.

**{¶ 35}** I am also reluctant to join the majority's engagement in factfinding as to breach. While I disagree with the majority's resolution, I concede that duty is a matter of law and the majority is within their right to find that in this particular complaint, there was no duty as a matter of law. However, whether there was a breach of such duty is a question of fact normally reserved for a jury. *Commerce & Industry Ins. Co. v. Toledo*, 45 Ohio St.3d 96, 98, 543 N.E.2d 1188 (1989), citing *Gedeon v. E. Ohio Gas Co.*, 128 Ohio St. 335, 338, 190 N.E. 924 (1934); *Payne v. Vance*, 103 Ohio St. 59, 77, 133 N.E. 85 (1921); *Blancke v. New York Cent. RR. Co.*, 103 Ohio St. 178, 178, 133 N.E. 484 (1921). The majority finds:

> There is no allegation that *anyone* contacted emergency services for the purpose of conducting a wellness check on Anthony and there is no allegation that anyone at the hotel was actually aware that Anthony was

> in medical distress. There is also no allegation that the hotel agreed to conduct a wellness check and then failed to reasonably do so.

Majority opinion at ¶ 20.

> There is no allegation that the hotel had actual knowledge that Anthony was overdosing or experiencing any medical distress; indeed, beyond Michael's and the sponsor's concerns, there is no allegation that the hotel had reason to suspect that Anthony needed medical assistance.

Majority opinion at ¶ 27.

**{¶ 36}** "A complaint should not be dismissed for failure to state a claim merely because the allegations do not support the legal theory on which the plaintiff relies. Instead, a trial court must examine the complaint to determine if the allegations provide for relief on any possible theory." *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995). While I recognize that the majority's consideration of these allegations (or lack thereof) informed their analysis of duty, these considerations hinge on facts that inform whether the defendants breached a duty. I cannot engage in factfinding before the plaintiffs have been given an opportunity to prove any facts. "[A] plaintiff is not required to prove his or her case at the pleading stage. Very often, the evidence necessary for a plaintiff to prevail is not obtained until the plaintiff is able to discover materials in the defendant's possession." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 144-145, 573 N.E.2d 1063 (1991). The purpose of the complaint is to give defendants "reasonable notice of the claim." *State ex rel. Harris v. Toledo*, 74 Ohio St.3d 36, 37, 656 N.E.2d 334 (1995). Under Ohio law, I find that the complaint adequately states a claim for relief where, construing the facts and reasonable inferences therefrom as true,

plaintiffs could conceivably recover from the defendants. "That is all that is required at this stage of the proceedings." *Fink v. Twentieth Century Homes, Inc.*, 8th Dist. Cuyahoga No. 94519, 2010-Ohio-5486, ¶ 38.

**{¶ 37}** I would further find that the complaint is not too speculative under Ohio law. Ohio law requires complaints to meet the standards of "notice pleading" as opposed to "fact pleading." *York* at 144. Civ.R. 8(A) directs that a pleading shall contain "a short and plain statement of the claim showing that the party is entitled to relief" and a demand for judgment. Civ.R. 8(E) further directs averments in a complaint to be simple, concise, and direct. Accordingly, "Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136, ¶ 29. This court has noted that "'few complaints fail to meet the liberal standards of [Civ.R.] 8 and become subject to dismissal.'" *Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, 6 N.E.3d 106, ¶ 15 (8th Dist.), quoting *Slife v. Kundtz*, 40 Ohio App.2d 179, 182, 318 N.E.2d 557 (8th Dist.1974).

**{¶ 38}** In my view, the complaint was sufficient to state a prima facie claim sounding in negligence or wrongful death against the defendants and/or its agents and properly meets Ohio's notice pleading requirements. "[T]he complaint * * * need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided." *Tuleta* at ¶ 16, citing *Fancher v. Fancher*, 8 Ohio App.3d 79, 83, 455 N.E.2d 1344 (1st Dist.1982). The facts alleged in the complaint are sufficient to put defendants on notice of the claim.

I would have found that the complaint properly states a claim for relief where, construing the facts and reasonable inferences therefrom as true, it is impossible to say that there is no set of facts entitling plaintiffs to relief.

**{¶ 39}** I therefore respectfully dissent.