Court of Appeals of Ohio
LEICHTMAN, Appellant,
v.
WLW JACOR COMMUNICATIONS, INC. et al., Appellees.
92 Ohio App.3d 232, 634 N.E.2d 697

Decided Jan. 26, 1994.

PER CURIAM.

The plaintiff-appellant, Ahron Leichtman, appeals from the trial court's order dismissing his complaint against the defendants-appellees, WLW Jacor Communications ("WLW"), William Cunningham and Andy Furman, for battery, invasion of privacy, and a violation of Cincinnati Bd. of Health Reg. No. 00083. In his single assignment of error, Leichtman contends that his complaint was sufficient to state a claim upon which relief could be granted and, therefore, the trial court was in error when it granted [Furman's] Civ.R. 12(B)(6) motion. We agree in part.

In his complaint, Leichtman claims to be "a nationally known" antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress."

[1][2] Under the rules of notice pleading, Civ.R. 8(A)(1) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." When construing a complaint for failure to state a claim, under Civ.R. 12(B)(6), the court assumes that the factual allegations on the face of the complaint are true. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. For the court to grant a motion to dismiss, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Id.* A court cannot dismiss a complaint under Civ.R. 12(B)(6) merely because it doubts the plaintiff will prevail. . . . Because it is so easy for the pleader to satisfy the standard of Civ.R. 8(A), few complaints are subject to dismissal. . . . .

Leichtman contends that Furman's intentional act constituted a battery. The Restatement of the Law 2d, Torts (1965), states:

"An actor is subject to liability to another for battery if

"(a) he acts intending to cause a harmful or offensive contact with the person of the other * * *, and

"(b) a harmful contact with the person of the other directly or indirectly results[;] or.

(c) an offensive contact with the person of the other directly or indirectly results."[FN2]

*FN2. Offensive contact: Restatement, supra, at 30, Section 18. See, generally, Love at 99-100, 524 N.E.2d at 167, in which the court: (1) referred to battery as "intentional, offensive touching"; (2) defined offensive contact as that which is "offensive to a reasonable sense of personal dignity"; and (3) commented that if "an arrest is made by a mere touching * * * the touching is offensive and, unless privileged, is a 'battery.' " Id., 37 Ohio St.3d at 99, 524 N.E.2d at 167, fn. 3. See, also, Schultz v. Elm Beverage Shoppe (1988), 40 Ohio St.3d 326, 328, 533 N.E.2d 349, 352, fn. 2 (citing Restatement, supra, at 22, Chapter 2, Introductory Note), in which the court identified an interest in personality as "freedom from offensive bodily contacts"; Keister v. Gaker (Nov. 8, 1978), Warren App. Nos. 219 and 223, unreported (battery is offensive touching).*

**699[3] In determining if a person is liable for a battery, the Supreme Court has adopted the rule that "[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact." *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166, 167. It has defined "offensive" to mean "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness." *State v. Phipps* (1979), 58 Ohio St.2d 271, 274, 12 O.O.3d 273, 275, 389 N.E.2d 1128, 1131. Furthermore, tobacco smoke, as "particulate matter," has the physical properties capable of making contact. R.C. 3704.01(B) and 5709.20(A); Ohio Adm.Code 3745-17.

[4] As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. *Lacey v. Laird* (1956), 166 Ohio St. 12, 1 O.O.2d 158, 139 N.E.2d 25, ... The rationale is explained by Roscoe Pound in his essay "Liability": "[I]n civilized society men must be able to assume that others will do them no intentional injury--that others will commit no intentioned aggressions upon them." Pound, An Introduction to the Philosophy of Law (1922) 169.

Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. *Richardson v. Hennly* (1993), 209 Ga.App. 868, 871, 434 S.E.2d 772, 774-775. . . . .Leichtman alleges that Furman deliberately blew smoke into his face, [so] we find it unnecessary to address offensive contact from passive or secondary smoke. . . .

. . . .

Leichtman's battery claim, previously knocked out by the trial judge in the first round, now survives round two to advance again through the courts into round three.

We affirm the trial court's judgment as to the first and third counts of the complaint, but we reverse that portion of the trial court's order that dismissed the battery claim in the second count of the complaint.

This cause is remanded for further proceedings consistent with law on that claim only.

Judgment accordingly.

DOAN, P.J., and HILDEBRANDT and GORMAN, JJ., concur.