

81896-7

No. 81896-7
SUPREME COURT
OF THE STATE OF WASHINGTON

ANNE and CHRIS McCURRY, on behalf of themselves and others
similarly situated,

Petitioners,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

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STATE OF WASHINGTON
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REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION TO REPLY

Chevy Chase Bank, F.S.B. (“Chevy Chase”) suggests that if the Supreme Court grants review, an additional matter that should be reviewed is the Court of Appeals’ refusal to adopt the standard for consideration of a CR 12(b)(6) motion recently discussed by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007). Petitioners McCurry agree that, in view of the considerable uncertainty engendered by the U.S. Supreme Court’s decision in *Twombly*, Washington’s Supreme Court should accept review and clarify whether a new standard exists in Washington for a trial court’s consideration of a CR 12(b)(6) motion to dismiss. The standard for whether a motion to dismiss should not be changed, but even if it is, the trial court should not have granted Chevy Chase’s motion, and the Court of Appeals should not have affirmed that decision.

II. ARGUMENT

- A. The Supreme Court should not discard the *Conley v. Gibson* test for determining if a CR 12(b)(6) motion to dismiss should be granted.**

In Washington, the test enunciated by the U.S. Supreme Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), applies to whether a CR 12(b)(6) motion to dismiss should be granted. Under that

test, the motion should be denied if there is a set of facts the plaintiff may prove consistent with the complaint that would entitle him to relief. *See e.g., In re Coday*, 156 Wn.2d 485, 497, 130 P.3d 809 (2006).

In *Twombly*, the U.S. Supreme Court granted certiorari “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.” *Twombly*, 127 S.Ct. at 1963. The plaintiff had filed a putative class action complaint against local telephone exchange carriers alleging that they had entered into agreements in violation of the Sherman Act, both to prevent competitive entry into local telephone and Internet service markets and to avoid competing with each other in their respective markets that “mentioned no specific time, place or person involved in the alleged conspiracies.” *Id.* at 1955, n.10.

The Supreme Court held that the plaintiff’s complaint did not state a claim upon which relief could be granted and affirmed the trial court’s dismissal of the case. The Court held that because the factual allegations of an illegal agreement in the complaint did not indicate that the allegations were “plausible,” the plaintiff’s complaint should have been dismissed:

In applying these general standards to a [Sherman Act] § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible

grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Id. at 1965. In other words, a complaint alleging a violation of Section 1 of the Sherman Act must contain enough facts to make it plausible that a conspiracy will be proven:

[O]f course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and “that a recovery is very remote and unlikely.” In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of [Civil] Rule 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.” A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a §1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation

of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of “entitle[ment] to relief.”

Id. at 1965-66 (citations and footnotes omitted). Thus, in cases where a plaintiff claims that a defendant violated Section 1 of the Sherman Act, the Supreme Court has discarded the *Conley v. Gibson* test for determining whether a complaint may withstand a CR 12(b)(6) motion to dismiss. *Id.* at 1969.

Nothing in the Supreme Court’s opinion in *Twombly* indicates, however, that the Court intended the *Conley v. Gibson* test to be discarded for cases other than ones alleging Sherman Act violations. In the Court’s own words, the narrow issue decided was “what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act.” *Id.* at 1964. Indeed, the Court denied that it was “requir[ing] heightened fact pleading of specifics,” *Id.* at 1974; “a complaint ... does not need detailed factual allegations.” *Id.* at 1964. Further, within weeks after deciding *Bell Atlantic*, the Supreme Court reversed a Tenth Circuit decision for requiring fact pleading. *Erickson v. Pardus*, 127 S.Ct. 2197 (2007) (per curiam). In that case, a prisoner, proceeding pro se, had complained that he had Hepatitis C, that he was on a one-year treatment program for it, that

shortly after the program began the prison officials withheld treatment, and that his life was in danger as a result. That was the context in which the Court said that "specific facts" need not be pleaded. *Id.* at 2200.

The U.S. Supreme Court has not, since the *Twombly* decision, issued any other decisions that clarify whether it intended to discard the *Conley v. Gibson* test for all cases. In fact, the only citation to *Twombly* in a majority decision was in *Erickson*, where the Court cited it to confirm that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,'" and that "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson*, 127 S.Ct. at 2200.

Because the Supreme Court's decision in *Twombly* by its terms applies only to cases alleging Sherman Act violations, because it does not clearly state that the *Conley v. Gibson* test is no longer applicable in all cases, and because it has not been clarified in any subsequent decision, it can hardly be said that the Court has issued a mandate that the *Conley v. Gibson* test should be discarded in cases other than ones alleging antitrust violations. To the contrary, given the uncertainty concerning the Supreme Court's intent, there should be a strong presumption in favor of narrowly

confining the decision to its facts. *Cohens v. Virginia*, 19 U.S. 264, 6 Wheat. 264, 5 L.Ed. 257 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."). Accordingly, in order to provide guidance to Washington trial courts that the *Conley v. Gibson* test still applies, this Court should accept review and confirm that a CR 12(b)(6) motion to dismiss should be denied if there is any set of facts which the plaintiff may prove consistent with the complaint that would entitle him to relief.

The McCurrys sought to recover the Notary Fee Chevy Chase charged them when they paid off their home loan; one of the conceivable facts supporting their opposition to Chevy Chase's motion to dismiss that claim was that Chevy Chase may not have incurred the Notary Fee that it charged the McCurrys. The Court of Appeals ruled that this conceivable set of facts was insufficient to withstand the motion to dismiss because "the McCurrys did not include such an allegation in their complaint." However, under notice pleading requirements of Civil Rule 8(a), detailed factual allegations concerning this fee were not required. All that was required was a short and plain statement of the claim showing that the McCurrys were entitled to relief. CR 8(a). In their Complaint, the

McCurrys alleged that when they paid off their loan, Chevy Chase demanded they pay “a ‘Notary Fee’ of \$2.00 not authorized by the Deed of Trust, as part of the ‘TOTAL AMOUNT DUE CHEVY CHASE,’” and that they paid the fee, which was “neither permitted nor secured by the Deed of Trust.” CP 4-5. Under the *Conley v. Gibson* test, because there was at least one conceivable set of facts consistent with the complaint that would have entitled the McCurrys to relief – that Chevy Chase passed on a fee for an alleged expense that it didn’t actually incur – the trial court should not have dismissed the McCurrys’ claim to recover the Notary Fee.

B. Even if the Court does consider the McCurrys’ claims under the “plausibility” standard of *Twombly*, their claim to recover the Notary Fee they paid should be reinstated.

Even if the Court applies the *Twombly* “plausibility” standard to the facts alleged in the McCurrys’ Complaint, the trial court’s dismissal of their claim to recover the Notary Fee should be reversed and their claim reinstated.

Under the *Twombly* test, a plaintiff may support his claim in response to a CR 12(b)(6) motion to dismiss by showing any set of facts consistent with the allegations in the complaint. *Twombly*, 127 S.Ct. at 1969. In other words, a claim may not be dismissed based solely on a court's supposition that the pleader is unlikely "to find evidentiary support

for his allegations or prove his claim to the satisfaction of the factfinder." *Id.* at n. 8. A plaintiff "receives the benefit of imagination," so long as the hypotheses are consistent with the complaint." *Id.* at 1969 (citation omitted).

Clearly, if Chevy Chase did not incur a Notary Fee, passing along this expense to the McCurrys to pay was not permitted by the Deed of Trust, and the fee was not secured by Deed of Trust. Thus, if Chevy Chase did not incur a Notary Fee it could not have passed along the fee to the McCurrys and their claim to recover the Fee should not have been dismissed. Their hypothesis – that Chevy Chase did not incur or pay a Notary Fee – is consistent with the facts alleged in the complaint that the Notary Fee was neither permitted by the McCurrys' Deed of Trust or secured by it. Therefore, even if the Washington Supreme Court adopts the "plausibility" test of *Twombly* for whether a defendant's CR 12(b)(6) motion to dismiss should be granted, the McCurrys' claim to recover the Notary Fee should withstand that test, and the trial court's dismissal of it should be reversed.

III. CONCLUSION

This Court should accept review of this case to confirm that the current test for determining whether a trial court should grant a CR

12(b)(6) motion to dismiss – a plaintiff’s complaint should not be dismissed if there is any set of facts he could prove consistent with the complaint that would entitle him to relief – should not be changed to the “plausibility” test discussed by the U.S. Supreme Court in *Twombly*. However, even if this Court does adopt the *Twombly* test, the McCurrys’ claim to recover the Notary Fee they paid Chevy Chase when they paid off their home loan should not have been dismissed by the trial court.

For the reasons discussed in this Answer and in their Petition for Review, the Supreme Court should accept review, reverse the Court of Appeals and trial court, and reinstate the McCurrys’ claims.

DATED THIS 18th day of August, 2008.

BECKETT LAW OFFICES, PLLC



Guy W. Beckett, WSBA #14939
Co-counsel for Petitioners

DECLARATION OF SERVICE

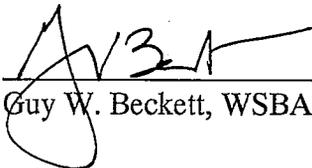
Guy W. Beckett declares

On August 18, 2008, I caused a copy of the foregoing document to be delivered to ABC-Legal Messengers for delivery on August 18, 2008 to:

Timothy J. Filer
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED THIS 18th day of August, 2008 at Seattle,
Washington.



Guy W. Beckett, WSBA #14939

OFFICE RECEPTIONIST, CLERK

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To: OFFICE RECEPTIONIST, CLERK
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Dear Clerk,

Attached for filing today is Petitioners Currys' Reply to Answer to Petition for Review. If you have any questions, please contact me. Thank you for your assistance.

Sincerely,

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