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Harvey v. Eastman Kodak Company: Faculty Note

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FACULTY NOTE

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In one brief opinion, the Arkansas Supreme Court has finally answered the question that has confused and beguiled attorneys since the adoption of the Arkansas Rules of Civil Procedure in July 1979: Has Arkansas moved toward or adopted the notice pleading of the Federal Rules of Civil Procedure? The simple answer: No.

From 1868 until 1979 Arkansas civil procedure followed code pleading.[1] Under this system, which replaced the rigid common law pleading, a complaint had to contain "a statement in ordinary and concise language, without representation, of the facts constituting the plaintiff's cause of action."[2] Failure to allege such facts in the complaint constituted grounds for a demurrer.[3] For example, actions based upon negligence were dismissed when the court concluded that the allegations were more in the nature of conclusions and less in the nature of ultimate facts.[4]

In drafting the proposed Arkansas Rules of Civil Procedure, the Arkansas Supreme Court Committee on Rules of Practice sought to avoid such out-dated factual pleading by adopting the notice pleading of the Federal Rules of Civil Procedure. The complaint would therefore require "a statement in ordinary and concise language of the *claim* showing that the pleader is entitled to relief."[5] Thus the defendant, placed upon notice of the general nature of the claim, could file a responsive pleading and enter into discovery with a general understanding of the basis of the lawsuit. The supreme court, however, did not accept this language; instead it amended the Committee's draft of the Rules to require "a statement in ordinary and concise language of *facts* showing that the plaintiff is entitled to relief."[6] A 12(b)(6) motion (which replaces the "demurrer") would then contend that the complaint lacked an allegation of facts upon

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1. Act of 1868, codified as ARK. STAT. ANN. § 27-101 *et seq.* (Repl. 1962 superseded).
2. ARK. STAT. ANN. § 27-1113 (Repl. 1962 superseded).
3. ARK. STAT. ANN. § 27-1115 (Repl. 1962 superseded).
4. Vandevier v. Chapman, 255 Ark. 1039, 505 S.W.2d 495 (1974).
5. *See* proposed Rule 8(a). *See also* Cox and Newbern, *The New Civil Procedure: The Court that Came in from the Code*, 33 ARK. L. REV. 1, 20 (1980).
6. ARK. R. CIV. P. 8(a)(2). (emphasis added).

which relief could be granted under the substantive law of Arkansas.[7]

This issue of the allegations necessary to withstand a 12(b)(6) motion was directly presented to the court in *Harvey v. Eastman Kodak Co.*[8] The plaintiff, Harvey, alleged that the defective condition of surveying equipment manufactured by the defendant had caused inadequate land surveys. Defendant sought indemnity under Rule 14, alleging that any defective condition of the surveying equipment had resulted from the negligence of the third party, Kodak, in supplying defective optical glue for the equipment. The plaintiff then asserted against the third party defendant a claim arising out of the transaction or occurrence that was the subject matter of the plaintiff's complaint against the defendant.[9] The complaint alleged that the third party defendant, Kodak, had "manufactured a glue," that there had been "a failure of such glue" and that "due to negligence of Kodak" the plaintiff had suffered damage. In a 12(b)(6) motion, Kodak challenged this direct complaint. The supreme court decided that the allegations were merely conclusions on a point of law; they did not allege the necessary facts upon which relief could be granted. In several concise paragraphs the court emphasized that Arkansas has not adopted the notice pleading of the federal courts. Yet, even if the court in 1979 did not intend to adopt notice pleading, but instead chose to perpetuate its tradition of 111 years, there are several disquieting aspects of the court's sketchy opinion.

First, the court's conclusion is not consistent with the rules nor with the comments approved by the court. For instance, Rule 7, which limits the number of pleadings, is intended to provide "a simple and elastic pleading procedure, . . . placing minimum emphasis upon form."[10] Certainly the court in *Harvey* does not seem to be minimizing form; nor is it following a simple and elastic procedure.[11] The court's holding also seems to conflict with Rule 8(f) which provides that "all pleadings shall be liberally construed so as to do substantial justice." In addressing identical language in the superseded statute, the court had stated that "a liberal construction requires that every reasonable intendment should be

7. ARK. R. CIV. P. 12(b)(6).

8. 271 Ark. 783, 610 S.W.2d 582 (1981).

9. This provision of Arkansas Rule 14 authorizing such a complaint is identical to Federal Rule 14. The United States Supreme Court has held that a claim by the plaintiff directly against a third party defendant does not fall within ancillary jurisdiction and an independent basis of federal jurisdiction is required. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978). *See generally* Brill, *Federal Rule of Civil Procedure 14 and Ancillary Jurisdiction*, 59 NEB. L. REV. 631, 669-677 (1980).

10. ARK. R. CIV. P. 8(a) (Reporter's Notes). In adopting the Rules, the court did modify some of the Reporter's Notes. *See, e.g.*, ARK. R. CIV. P. 23, 60 (notes as modified by the court). Therefore the court's failure to modify the notes to Rule 8(a) suggests approval.

11. *See also* ARK. R. CIV. P. 1: "The rules are to be construed to secure the just, speedy and inexpensive determination of actions."

indulged in favor of the pleader, and effect should be given to substance rather than form."[12] Given this prior and present view toward construction of the pleadings, whether the decision in *Harvey* does substantial justice is questionable.

When the court substituted "claim" for "facts" in Rule 8(a), it failed to change the note to this rule. The note, as approved, states that Rule 8 is substantially the same as the federal rule and is designed to require that pleadings be drafted so as to give a party fair notice of the claim and the grounds upon which it is based. Certainly, Harvey's statement of his claim satisfied this objective, but the court did not even mention the purpose of Rule 8(a) as stated in the note.

The court's interpretation of 12(b)(6) also conflicts with the last sentence of Rule 12(b), which refers to the failure to "state a *claim* upon which relief can be granted." In this instance the court retained the committee's language. This encouraged hope[13] that the court had finally recognized the benefits of notice pleading. Whether this inconsistency was intentional or whether it slipped by the court in its 1979 review of the committee's proposal is unclear. Regardless, the court did not refer to this language either.

The decision in *Harvey* is inconsistent with the factual sufficiency of pleadings permitted under the rules. Rule 8(b) authorizes a trial court to accept a general denial. Why then should a trial court not be authorized to accept a complaint that notifies the defendant in general terms?[14] Although general denials historically have been allowed, to require specific factual pleading with respect to complaints but tolerate general and vague answers is illogical. If the court insists on fact pleading, should it not equally insist on fact answering?[15] Why is a defendant entitled to more specificity than a plaintiff?

If the court is determined to adhere to code pleading, then at least it should eliminate inconsistencies in the Arkansas rules.[16] The failure in

12. Home Ins. Co. v. Williams, 252 Ark. 1012, 1015, 482 S.W.2d 626, 628 (1972) (citing ARK. STAT. ANN. § 27-1150 (Repl. 1962 superseded)).

13. Cox and Newbern, *supra* note 5, at 25-26.

14. As to some issues, the rules do require pleading with particularity. ARK. R. CIV. P. 9(b) (fraud, mistake, duress, under influence); 9(g) (items of special damage).

15. ARK. R. CIV. P. 8(b) requires that answers to complaint admit as much as is true. But the continued availability of a general denial, specifically authorized in Rule 8(b), undermines that requirement.

16. In another forum the Arkansas Supreme Court has accepted the notion of notice pleading. An action in a municipal or other inferior court is commenced by filing a "claim form," which states "the nature of the *claim* and the basis thereof and a statement as to the amount and nature of the relief sought." ARK. INFERIOR COURT RULES 3, 4. In contrast, the superseded ARK. STAT. ANN. 26-402 (Repl. 1962) provided that the plaintiff would file "a short written statement of the *facts* on which the action is founded." If the decision is appealed to the circuit court and tried de novo, apparently it is to be tried upon the claim

Harvey to mention those variances, suggests either the court's oversight of its own rules or, perhaps a tactful way to avoid highlighting its piecemeal alteration of the rules.

A second troubling aspect of the *Harvey* case is not only that the court resurrects code pleading, it also applies a very strict standard to judge the sufficiency of the complaint.[17] Some courts that demand code pleading have found allegations similar to those in Harvey's complaint adequate.[18] In particular, less factual detail has, and should be, required in an instance when the defendant has equal, if not more extensive, knowledge of the facts than the plaintiff does.[19] *Harvey*, a product liability case, was such a situation.

In this case the court was also unwilling to look at the third party complaint for indemnity to supply any deficiencies in the plaintiff's direct complaint against the third party. There is no authority, the court said, to support the proposition that "defects in the pleadings themselves on the direct complaint may be cured by the allegations contained by the third party complaint."[20] Given the lack of emphasis on pleadings in recent years,[21] this lack of authority is not surprising. Yet in the past, the court has been willing to look at matters, other than the complaint itself, to

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form that was the basis for the action originally. Thus in this instance notice pleading will be the basis for an action in a court of general jurisdiction.

17. Under code pleading there were two lines of authority as to the degree of specificity required in establishing the defendant's breach of duty in a negligence action. Those courts that remained in the stream of common law precedents, and previewed the federal rules, accepted complaints that described in general terms the defendants' acts and then characterized them as negligent. On the other hand, the emphasis that the code placed on pleading facts led some courts to require elaborate factual details as to the allegedly negligent acts. C. CLARK, CODE PLEADING 300-01 (2d ed. 1947).

18. *See, e.g.*, Heinemann v. Barfield, 136 Ark. 456, 207 S.W. 58 (1918). A complaint alleging defendant had sold flour containing arsenic was held valid: "The complaint was not skillfully drawn, yet, when taken as a whole, it stated facts sufficient to constitute a cause of action against appellant for the negligent sale of flour containing poison, which resulted in injury. . . . Alleging that a dealer sold flour which he knew at the time, or should have known, contained arsenic, which sale resulted in the poisoning of another, is the statement of a fact and not merely a legal conclusion. . . . Under the reformed procedure courts regard the substance rather than the form. The character of the action must be determined by the nature of the grievance rather than the form of the declaration." *Id.* at 464-465, 207 S.W. at 60. *See also* Fort Smith v. Bates, 260 Ark. 777, 544 S.W.2d 525 (1976), *noted in* Spears, *Comment: The 1979 Civil Procedure Rules*, 2 U.A.L.R. L.J. 89, 101 n. 73 (1979).

19. F. JAMES & G. HAZARD, CIVIL PROCEDURE 75 (2d ed. 1977).

20. Harvey v. Eastman Kodak Co., 271 Ark. 783, 787, 610 S.W.2d 582, 585 (1981).

21. The Arkansas indemnity provision is based directly on the Federal Rules. As reflected in the West digest, there is a dearth of federal cases on this precise point in recent decades. Instead there are general statements on curing defects in pleadings. *E.g.*, Albertson v. Federal Communications Comm'n, 182 F.2d 397, 401 (D.C. Cir. 1950) (complaint upheld on the basis of "the long established rule that a defective pleading may be aided by an opposing pleading and that a party will not be heard to insist that his adversary has omitted to allege facts he himself has supplied.").

determine if a complaint is sufficient.[22] Considering the liberal construction to be given pleadings, particularly a complaint that is challenged by a motion to dismiss,[23] and the supposed diminished emphasis upon form,[24] the court should have been willing to examine all other pleadings rather than dismiss the complaint outright.

The third disquieting aspect of the opinion in *Harvey* is its mystifying suggestion that some substantive theories might be treated differently and accepted without the factual pleading that is required when the cause of action is negligence. The court emphasized that the complaint's deficiency was its failure to meet the rules' requirements "with respect to the allegations of negligence." The court would not say whether the plaintiff could have asserted his cause of action against the third party defendant under either the theories of strict liability or breach of warranty. If the facts pleaded were insufficient to state a cause of action for negligence, would they be sufficient to state one for strict liability or warranty? Is the court suggesting that because these recently developed theories of liability[25] have been accepted by the courts without the factual pleading typically required in a negligence action,[26] it will therefore accept less factual

22. White v. Williams, 187 Ark. 113, 59 S.W.2d 23 (1933) (improper to dismiss a complaint in chancery; the bill of particulars filed along with the complaint contained the necessary allegations: "If, from the allegations of the facts in the complaint together with every reasonable inference arising from all of the allegations, a cause of action is stated, the demurrer should be overruled"); Lane v. Alexander, 168 Ark. 700, 271 S.W. 710 (1925) (error in complaint at law corrected by answer); St. Louis, I.M. & S. Ry. Co. v. Sharp, 115 Ark. 308, 171 S.W. 95 (1914) (omission in wrongful death complaint cured by the answer); Pindall v. Trevor & Colgate, 30 Ark. 249 (1875) (inadequate bill in equity saved from dismissal by the answer of a co-defendant). *See also* Firestone Tire & Rubber Co. v. Little, 599 S.W.2d 756 (Ark. Ct. App. 1980) (the untimely answer of a defendant must be accepted when the timely answer of a co-defendant raises common defenses).

23. A Rule 12(b)(6) motion is to be construed in the same fashion as a demurrer. "In testing the sufficiency of a complaint against a general demurrer, all well pleaded allegations and all inferences that can be reasonably drawn therefrom are admitted to be true . . . Every reasonable intendment and presumption is to be made in favor of the complaint and a general demurrer should be overruled if the facts state, together with every reasonable inference, constitute a cause of action." Green Seed Co. v. Williams, 246 Ark. 463, 465, 438 S.W.2d 717, 718 (1969).

24. ARK. R. CIV. P. 8(e)(1): "No technical forms of pleading or motions are required." *See also* notes 10, 11 *supra*.

25. *See* ARK. STAT. ANN. 85-2-318.2 (Repl. 1961) (strict liability). Actions asserting liability against the defendant for the failure of a product may be based upon deceit, negligence, express warranty, implied warranty, strict liability. *See generally* Leavell, *The Return of Caveat Venditor as the Law of Products Liability*, 23 ARK. L. REV. 355, 380 (1969); D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY 17-44 (2d ed. 1981).

26. Under the Arkansas strict-liability-in-tort statute, Ark. Stat. Ann. § 85-2-318, the plaintiff must allege that the defendant supplied the goods, that the goods contained a defect and that the plaintiff has suffered a loss as a result of that defect. *See generally* Legislative Note, 27 ARK. L. REV. 562 (1973). The plaintiff may not recover simply by alleging and proving that injury resulted from a defective product. "[P]laintiff must show a reasonable connection between the defect the product contained and the injury which the plaintiff suffered as a result of that defect." *Id.* at 567. "[A] plaintiff must still prove a defect in

pleading if the substantive theory is changed? Suppose strict liability rather than negligence had been pleaded. Would the complaint therefore have been valid? Can the court really mean that a complaint is less conclusory just because the theory of recovery is different?[27]

In some ways this is a unique case for considering the requirement of fact pleading. In a typical products liability case, the plaintiff lacks knowledge of the nature of the defects: Why did the brakes fail? Why did the bottle disintegrate? Why did the glue not hold? If this had been an automobile collision, the plaintiff could have more easily alleged in good faith some particular aspects of negligence. But how can the plaintiff be expected to allege in good faith, as required by Rule 11, the particular negligent acts in the manufacture of the glue? How can future plaintiffs satisfy such strict pleading requirements in products liability cases when extensive discovery is not available prior to commencement of the action? The court's opinion may tempt plaintiff's attorneys, compelled to allege sufficient facts to resist a 12(b)(6) motion, to allege facts without good grounds to support them, but knowing that the liberal amendment provisions will tolerate post-discovery clarification, revision or expansion of the specific facts alleged. For instance, the defendant alleged in its third party complaint that Kodak had been negligent in five specific ways, including failure "to properly manufacture the HE-104-2 cement" and failure "to exercise sufficient quality over the production." Such factual allegations apparently were sufficient to satisfy the court. Henceforth, plaintiffs should allege negligence in similar "factual" terms and amend the complaint after discovery.

One cannot help but question the court's policy decision to adhere to fact pleading in any form.[28] In view of the other elements of modern pleading and practice that have been incorporated into the Arkansas Rules, to retain an emphasis upon fact pleading is incongruous and un-

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design or manufacture which was a proximate cause of injury." Higgins v. General Motors Corp., 250 Ark. 551, 555, 465 S.W.2d 898, 900 (1971). In other words, recovery under a strict liability theory is more difficult than it would first appear, and it seems inconsistent to suggest less factual pleading would be tolerated. Whether the theory is warranty or strict liability, expert testimony will generally be necessary to establish the defect in the product. Woods, *The Personal Injury Action in Warranty—Has the Arkansas Strict Liability Rendered It Obsolete?*, 28 ARK. L. REV. 335, 348 (1974).

27. Supporting the conclusion that the courts have been more tolerant of generalized pleading when the substantive theory is something other than negligence is this very case. In its third party complaint, Vari-Tech alleged that Kodak, "as an entity engaged in the regular and systematic business of manufacturing and selling the described cement product, is *strictly liable* under the provisions of Ark. Stat. § 85-2-318.2 for furnishing said product in a defective condition to a third party plaintiff." The court noted that "the third party complaint alleged *with particularity* strict liability by Kodak." 271 Ark. at 788, 610 S.W.2d at 585 (emphasis added). Does the particularity exist because of the magic words "strict liability" or because a statute is cited?

28. *See generally*, F. JAMES & G. HAZARD, CIVIL PROCEDURE 92-96 (2d ed. 1977).

necessary. Motions for a more definite statement, expanded discovery, liberal amendment provisions[29] (even after the trial), pretrial conferences, liberal construction requirements—all diminish the need for specific factual pleading. For example, the defendant retains the option under Rule 12(e) to request a more definite statement if the complaint is so vague or ambiguous that he cannot respond. Such a motion would be a preferable way[30] to deal with a complaint that is inadequate in wording, or form, rather than having the court dismiss the complaint with finality.[31]

The tendency throughout the jurisdictions is to rely less upon pleadings and more upon discovery, pretrial conferences, and revisions of the initial pleadings. The Arkansas Supreme Court has turned its back upon this movement in an opinion that is far more severe than is called for simply by the substitution of the word "facts" in Rule 8(a). By emphasizing a single word, the court has distorted the meaning and direction of the Rules. It is a shame that the court in its denunciation of conclusory pleading failed to give the bar either a rationale or guidance that is anything more than conclusory.

29. The plaintiff's attorney in *Harvey* did not amend his complaint against the third party because he simply had no factual knowledge as to why the glue failed. Conversation with Steven G. Howard, Attorney at Law, Newport, Feb. 25, 1981.

30. *See, e.g.*, Chicago, Rock Island & Pacific Ry. Co. v. Smith, 94 Ark. 524, 127 S.W. 715 (1910) (wrongful death verdict for plaintiff reversed for new trial because of error in jury instructions; original complaint lacked a statement of the facts with reasonable certainty, but the evidence at the trial sufficiently advised the defendant; on remand, "should the motion be renewed to make the complaint more definite and certain in its allegations of the acts of negligence, this should be done." *Id.* at 529-530, 127 S.W. at 718). *See also* Cranna v. Long, 225 Ark. 153, 279 S.W.2d 828 (1955).

31. The plaintiff's action has been dismissed with prejudice for failure to state a claim for relief. Such a dismissal is a final adjudication of the negligence claim for purposes of res judicata. Burnett v. Palmer, 233 Ark. 205, 343 S.W.2d 570 (1961). Under a broad concept of "claim," although there are several grounds or theories of recovery, there is only one claim. *See generally* Dobbs, *Recent Developments in the Law of Judgments in Arkansas*, 10 ARK. L. REV. 468, 480-482 (1956). L. FRUMER & M. FRIEDMAN, 3A PRODUCTS LIABILITY § 46.01, at 16-58.5 (1980). In other words, if Harvey now wishes to bring an action against Kodak, based on either warranty or strict liability, such an action is barred by the judgment in his negligence claim. "The test is determining a plea of res judicata is not along whether matters presented in a subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issues and might have been litigated in the former suit." Moorman v. Chisler, 256 Ark. 304, 306, 506 S.W.2d 840, 841 (1974).