

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

**ESTATE OF ANDY CHENG LI and  
FEI YING ZHENG,**

**Plaintiffs,**

**Case No. 3:14-cv-391**

**Judge Thomas M. Rose**

**-v-**

**TACO BELL OF AMERICA,**

**Defendant.**

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**ENTRY AND ORDER GRANTING TACO BELL'S MOTION TO  
DISMISS (Doc. #3) WITHOUT PREJUDICE TO THE FILING, WITHIN  
THIRTY (30) DAYS, OF AN AMENDED COMPLAINT THAT ALLEGES  
CIRCUMSTANCES UNDER WHICH TACO BELL HAD A LEGAL DUTY  
TO ANDY CHENG LI**

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The Complaint in this matter was originally filed in the Court of Common Pleas for Montgomery County, Ohio. The case was then removed, based upon diversity jurisdiction, to the United States District Court for the Southern District of Ohio, Eastern Division.<sup>1</sup> (Doc. #1.) It was subsequently transferred to the United States District Court for the Southern District of Ohio, Western Division at Dayton because venue is proper here. (Doc. #6.)

The Notice of Removal indicates that this Court has diversity jurisdiction. The Plaintiffs, according to the Notice of Removal, are citizens of Ohio and the only member of Defendant Taco Bell of America, LLC ("Taco Bell") is a citizen of North Carolina and Kentucky. The Plaintiffs have not opposed the removal, and the Court will assume subject matter jurisdiction.

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<sup>1</sup>The Notice of Removal indicates that the Complaint was to be removed to the United States District Court for the Southern District of Ohio, Western Division, but the Complaint was apparently removed to the United States District Court for the Southern District of Ohio, Eastern Division.

Now before the Court is a Motion To Dismiss (doc. #3) filed by Defendant Taco Bell. This Motion To Dismiss was filed while this case was on the docket of the United States Court for the Southern District of Ohio, Eastern Division. This Motion is now fully briefed and ripe for decision.

Taco Bell seeks to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. More specifically, Taco Bell asserts that the Complaint fails to allege that it owed any duty to Plaintiffs, and, even if it did, such an allegation would be contrary to Ohio law. The Plaintiffs respond that the Complaint's allegations support all of the elements required for a negligence action.

### **RELEVANT FACTUAL BACKGROUND<sup>2</sup>**

This action concerns an incident that occurred on October 16, 2012, that entailed a motor vehicle hitting and killing a person on a public sidewalk when the driver of the vehicle was pulling out of the driveway of a Taco Bell restaurant. (Compl. ¶¶ 4, 5.) The driver turned prematurely through a deteriorated curb on the premises of the Taco Bell restaurant located at 2509 Smithville Road. (Id. at ¶ 5.) The driver struck and killed Andy Cheng Li.

The incident allegedly occurred on the public sidewalk and not on Taco Bell's premises. (Compl. ¶ 16.) Further, the Complaint does not allege that Andy Cheng Li was on Taco Bell's premises for purposes of patronizing the Restaurant. He allegedly was on his bicycle on the public sidewalk passing by the Restaurant. Thus, the Complaint does not allege nor do the construed facts pled allege that Andy Cheng Li was a Taco Bell business invitee.

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<sup>2</sup>For purposes of this Motion To Dismiss, all well-pleaded material allegations in the Complaint are taken as true and construed in a light most favorable to the Plaintiffs.

The Complaint alleges five (5) causes of action. All of the causes of action sound in negligence.

### STANDARD OF REVIEW

Taco Bell has filed its Motion To Dismiss based upon Fed. R. Civ. P. 12(b)(6). Pursuant to Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. To avoid dismissal pursuant to Rule 12(b)(6), a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)(quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard is not like a probability requirement. *Id.* The plausibility standard seeks more than a possibility that a defendant has acted unlawfully. *Id.* Where a complaint does not permit a court to infer more than the mere possibility of misconduct, the complaint has not shown that the complainant is entitled to relief. *Id.* at 679.

When considering a 12 (b)(6) motion, all well-pleaded material allegations of the pleadings of the opposing party are taken as true. *Fritz v. Charter Township of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010). Also, the well-pleaded material allegations are construed in a light most favorable to the opposing party. *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009). However, legal conclusions are not accepted as true nor are recitations of the elements of a cause of action. *Fritz*, 592 F.3d at 722. The motion is granted only if the moving party is nevertheless clearly entitled to judgment as a matter of law. *Id.*

### ANALYSIS

Taco Bell makes two arguments for dismissal. Each will be addressed seriatim.

#### **Failure of the Complaint To Allege that Taco Bell Owed a Duty To Andy Cheng Li**

To state a claim for negligence, a complaint must allege that the defendant owed a duty to the plaintiff. *See Lang v. Holly Mill Motel, Inc.*, 909 N.E.2d 120, 122-23 (Ohio 2009). Regarding duty, the Plaintiffs argue that the Complaint alleges that,

Taco Bell had a duty to: (a) maintain its premises in a reasonable safe condition; (b) warn its invitees of hidden dangers or dangerous conditions that are not reasonably discoverable; (c) maintain its premises pursuant to its own policies and procedures; (d) design its curb structure to protect the ingress and egress of its invitees; (e) place sufficient warnings in the form of signage or stop bars to provide safe ingress and egress to the public; and (f) maintain its curbs in accordance with state and local law.

Thus, the Complaint alleges that Taco Bell owed a duty to its business invitees. However, nowhere does the Complaint allege that Andy Cheng Li was a business invitee of Taco Bell. Therefore, nowhere does the Complaint allege that Taco Bell owed a duty to Andy Cheng Li or to any of the named Plaintiffs. As a result, the Complaint fails to state a claim upon which relief may be granted.

#### **Duty To Andy Cheng Li as a Matter of Law**

Taco Bell also argues that it does not owe a duty to Andy Cheng Li as a matter of law. The Plaintiffs respond that Taco Bell owes a duty to Andy Cheng Li as a matter of law.

As indicated above, to maintain a negligence action, the plaintiff must show, among other things, the existence of a duty. “A ‘duty’ is an obligation imposed by law on one person to act for the benefit of another person due to the relationship between them.” *Stibley v. Zimmerman*, No. 97 CA 51, 1998 WL 548755 at \*6 (Ohio Ct. App. Aug. 26, 1998).

“The existence of a duty in a negligence action is a question of law for the court to determine.” *Mussivand v. David*, 544 N.E.2d 265, 270 (Ohio 1989). “There is no formula for ascertaining whether a duty exists,” and “any number of considerations may justify the

imposition of duty in particular circumstances....” *Id.* Based upon the circumstances pled in the Complaint, a duty determination in this case involves whether to impose a duty on a business owner (Taco Bell) to protect third parties (Andy Cheng Li) from negligent acts of business invitees (the driver of the car that struck Andy Cheng Li) which acts occur outside of the owner’s property (on the public sidewalk) if the driver of the vehicle was influenced by a defective curb on Taco Bell’s premises.

To better inform its decision regarding duty, the Court first looks to statutes to determine if a duty is imposed in the case at hand. The Court has found none and none of the Parties have identified such a duty.

The Court next turns to the caselaw to determine if other courts have found a duty to exist in a set of circumstances similar to those at hand. Taco Bell directs the Court to a case where the Ohio Supreme Court found that a property owner owed no affirmative duty to protect third parties from the negligence of business invitees. *Gelbman v. Second National Bank of Warren*, 458 N.E.2d 1262 (Ohio 1984). The Plaintiffs direct the Court to a case where the Ohio Court of Appeals found that, “a business owner had a duty to maintain a reasonable safe ingress and egress that serves to protect not only its patrons from harm, but that also serves to protect pedestrians and motorists crossing in front of the premises from harm.” *Sibley*, 1998 WL 548755 at \*8.

While both of these cases provide guidance, neither involves relevant circumstances similar to those at hand. In *Gelbman*, there was no allegation that there was anything on the business owner’s premises that caused the negligence of the driver. In this case, there are allegations in the Complaint that there was a deteriorated curb on the business owner’s (Taco

Bell's) premises. In *Stibley*, the Ohio Court of Appeals found that a business owner, *arguendo*, breached a duty of care involving placing signs or other obstructions that block a business invitee's view of pedestrian and vehicular traffic when entering or exiting the premises. In this case, there are no allegations that the business owner (Taco Bell) placed anything that blocked the driver's sight when exiting the business owner's premises.

In this case, the allegation is that Taco Bell owed Andy Cheng Li, not a Taco Bell business invitee, a duty to maintain the curbs on Taco Bell's premises so that a Taco Bell business invitee did not injure Andy Cheng Li on a public sidewalk. However, based upon the circumstances presented in the Complaint, Taco Bell did not owe Andy Cheng Li such a duty. Andy Cheng Li was not a business invitee of Taco Bell, the alleged accident did not occur on Taco Bell's premises and there is no assertion that the driver's view was blocked by anything on Taco Bell's premises.

### **Conclusion**

Taco Bell's Motion To Dismiss (doc. #3) is GRANTED. The Plaintiffs have not alleged in their Complaint that Taco Bell owed a duty to Andy Cheng Li nor does Taco Bell owe a duty to Andy Cheng Li as a matter of law.

The Plaintiffs have until not later than thirty (30) days following entry of this Order to file an amended complaint, if they can, that alleges circumstances in which Taco Bell has a duty of care to Andy Cheng Li. Otherwise, the captioned cause will be terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

**DONE** and **ORDERED** in Dayton, Ohio this 22<sup>nd</sup> day of January, 2015.

**s/Thomas M. Rose**

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THOMAS M. ROSE  
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record