**Lect. 2**

Three main periods of litigation

* Pleading
  + Formal documents exchanged (generally no looking into evidence)
  + Getting rid of case at this point is cheap
* Discovery
  + See what each side has for evidence
    - Get rid of case if summary judgment is appropriate
    - If it becomes clear through discovery that a party did not have sufficient evidentiary support for factual allegations then Rule 11 sanctions
  + Motivates settlement
  + Makes trial an orderly process without surprises
* Trial
  + Expensive
  + Risky
* Then - Post-trial
  + Appeal
  + Also effect of judgment on subsequent litigation

**complaint**

* purposes of a complaint

when served with summons on D

* gives notice to D about nature of action
  + so they can start preparing for defense
  + summons warns about consequences of not answering (namely default)
* D answers complaint
  + admits denies factual allegations
* Q - what is purpose served by this?
  + Removes issues from proof at trial and from scope of discovery
* Q. any way that pleading standards for complaint can be used to dispose of frivolous suits?
* What is a frivolous action?
  + Inadequate evidentiary support to justify burden of litigation on defendant
* could weed out frivolous complaints by demanding more specificity?
  + Historically this was the case
  + common law pleading
  + later Field Code  
     - called “fact” or “code” pleading
  + Both used heightened pleading standards to weed out frivolous actions before trial
  + One important aspect – pleadings could not be conclusory
    - could not say “negligently drove” – that is the legal conclusion
  + had to say facts leading to legal conclusion
  + then went immediately to trial, without discovery
  + compare Form 11, which uses a conclusory allegation
  + Drafters of the Fed Rules concluded that older method didn’t work – they instead relied on discovery, R 11 and summary judgment to get rid of and discourage frivolous actions
* Three min things that can be wrong with factual allegations in a complaint:  
  1) legal sufficiency of factual allegations   
  2) level of specificity in factual allegations   
  3) evidentiary support for factual allegations

1) **legal sufficiency of factual allegations** – do they add up to a cause of action  
- need to make sure you have all the elements of a cause of action

What are the elements of a cause of action for negligence (tort)?

Duty

Breach

Causation

Damages

* What about the following case?
* P alleges that D drove 100 mph through stop sign, causing an accident resulting in damages to P  
  Does P’s complaint fail to state a claim because he does not say that it is not the case that P sued D already and lost?
* No – claim preclusion (or res judicata) is an affirmative defense

The plaintiff has no burden to allege its absence

Defendant has the burden of allegation of affirmative defense (in the answer)

Also defendant generally has burden of proof

Distinguish

Burden of allegation – who has the burden of introducing the issue in a pleading

* P has burden for elements of cause of action, D has burden for elements of affirmative defense

Burden of proof – who has burden of introducing evidence concerning the matter at trial

* P has burden for cause of action and D has burden for affirmative defense
* If neither side introduces evidence the person with the burden of proof loses concerning that matter

Standard of proof – what does the person with the burden of proof have to show?

* Civil – usually preponderance of the evidence (sometimes clear and convincing)
  + Criminal – beyond a reasonable doubt

**2) Level of specificity in factual allegations**

* Idea of Federal Rules is that little is required here
  + only enough to give notice to the defendant
* 8(a) says only need short plain statement of why you are entitled to relief

**3) inadequate support for** **factual allegations – can’t see that in the complaint – the question is what stands behind it**

What’s wrong with this complaint?

Defendant Ronney Wright intentionally engaged in contact with the person of Plaintiff Michael Green that was harmful or offensive, causing damages.

States a claim for battery, but insufficiently specific (even to satisfy R 8(a)(2))

On Monday, August 22, 2016 at 2:41 p.m., Defendant Ronney Wright intentionally failed to praise Plaintiff Michael Green for Plaintiff’s exemplary lecture on civil procedure, in circumstances in which praise would have been reasonable, thereby causing Plaintiff substantial psychological distress.

Sufficiently specific, but fails to state a claim

Over the period of June 30, 2016 to August 18, 2016 Defendant Ronney Wright operated a moon base which emitted mind rays directed at Plaintiff Michael Green, allowing Defendant to read Plaintiff’s thoughts and causing Plaintiff to experience severe headaches and ringing in the ears.

* States a claim
* Sufficiently specific
* BUT Lacks evid support

So, if a court were looking at the 3rd complaint, could it dismiss it on the basis of what it looks like?

NO – would have to wait till evidence stages (discovery) – summary judgment and Rule 11