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COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2024-SC-311-DG

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MARCIE LYNN TROUTT AS ADMINISTRATRIX OF
THE ESTATE OF MADELYNN NOEL TROUTT,
MARCIE LYNN TROUTT INDIVIDUALLY, *and*
JEREMY TROUTT INDIVIDUALLY

APPELLANTS

vs.

On Discretionary Review
Court of Appeals Case No. 2023-CA-171-MR
Appeal from Jefferson Circuit Court
Civil Action No. 22-CI-909

THE BAIL PROJECT, INC. *et al.*

APPELLEES

BRIEF ON BEHALF OF THE APPELLANTS

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CERTIFICATE OF SERVICE

I certify that on the 10th day of February 2025, this brief was served via Fed Ex on the Clerk of the Kentucky Supreme Court with service copies sent via e-mail or U.S. Mail to: Hon. Kate Morgan, Clerk of the Kentucky Court of Appeals, 669 Chamberlin Ave., Suite B, Frankfort, KY 40601; Hon. Ann Bailey Smith, Judge, Jefferson Circuit Court, 700 W. Jefferson St., Louisville, KY 40202; Nathan A. Lennon, Reminger Co., L.P.A., 250 Grandview Drive, Suite 550, Ft. Mitchell, KY 41017-5667, Robert A. Ott, Reminger Co., L.P.A., 730 West Main Street, Suite 300, Louisville, KY 40202. I further certify that the certified record was not removed from the Clerk's office on appeal.

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INTRODUCTION AND STATEMENT CONCERNING ORAL ARGUMENT

In this wrongful death action involving the tragic death of Louisville teenager Madelynn Troutt, the Circuit Court *sua sponte*, and without notice, converted a pre-answer CR 12.02(f) motion to dismiss to a motion for summary judgment and, in the very same order, granted summary judgment to appellees The Bail Project, Inc., Carrie Cole, Holly Zoller, and Shameka Parrish-Wright (collectively “TBP”)—all without allowing *any* discovery.

Over a vigorous dissent, the Court of Appeals in a two-judge majority opinion affirmed, finding TBP and any similar entity has *no duty* under any set of facts to any victim like Madelynn harmed or killed by a criminal defendant for whom TBP secured bail and release.

The Court of Appeals’ majority erred in its “no duty” determination, especially given the Circuit Court’s without-notice conversion and entry of summary judgment absent any opportunity for discovery concerning TBP’s role in Madelynn’s death. This Court should reverse and remand.

Pursuant to RAP 38, this case has been designated for oral argument which will be scheduled by separate order.

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STATEMENT OF THE CASE¹

A. Introduction

This wrongful death case presents an issue of statewide importance—and one of first impression—involving the first principle of common-law negligence: duty. Over a vigorous dissent, the Court of Appeals in a two-judge majority opinion held that The Bail Project (TBP) or any entity like it has *no duty* under any circumstances or any set of facts to any victim harmed or killed by a criminal defendant for whom they secured bail and release.

The majority found “no duty” as a matter of “public policy” because (1) “the Supreme Court of Kentucky and the General Assembly have never created a civil cause of action” and (2) “[t]o do so would needlessly open the floodgates and overburden our courts’ civil dockets.” (Tab 1: Opinion at 9.) The first point incorrectly suggests the common-law duty owed by all is somehow contingent on legislative action or inaction. It is not. *Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky. 1984) (“The common law is our responsibility; the child of the courts. We are responsible for its direction.”). Even as to purely statutory matters “legislative inaction is a weak reed upon which to lean.” *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 560 (Ky. 2011). As to the second point, this Court recently rejected such fear-based assertions: “this Court has heard the ‘parade of horrors’ argument before in a variety of

¹ Record references are designated as “R.” followed by the page number.

contexts. Rarely has the party making it proved to be a Cassandra.” *Univ. of Kentucky v. Regard*, 670 S.W.3d 903, 920 (Ky. 2023).

Both comments will be misused by those who seek to limit access to the courts. This is doubly true where, as here, the opinion addresses the issue of duty which necessarily affects a broad range of cases as “the duty determination is better suited for large categories of cases rather than specific circumstances.” *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 908 (Ky. 2013).

The dissenting opinion from Judge Karem outlines the history and reality of bail in Kentucky while advancing strong and cogent arguments for recognition of duty on the part of the billionaire-funded TBP—at least sufficient where a court is confronted only with a complaint and answer without *any opportunity for discovery*. Although the majority considered fictional backlogs and feared floodgates, the dissent looked to common-law negligence principles from this Court’s precedent to consider this “issue of first impression”:

In negligent hiring/retention claims the law imposes a duty upon the employer to use reasonable care in the selection or retention of its employees.... Using [a similar] analysis, TBP owed a ... duty of care to Madelyn Troutt and a finding of summary judgment for TBP by the trial court was premature. Typically, duty is a question of law, while breach and injury are questions of fact for the jury to decide. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). Having found that TBP had a special relationship with DeWitt and that TBP owed a universal duty of care to Madelyn Troutt, I would reverse the trial court to proceed with litigation to further determine breach, causation, and damages, if any.

(Tab 1: Opinion at 17-19.)

Apart from the duty/no-duty determination, this case presents an opportunity to clarify an important issue of procedural due process: the notice required *before* a court converts a pre-answer CR 12.02(f) motion to a CR 56 motion for summary judgment and then rules on same. Although no party requested it, the Circuit Court *sua sponte* converted TBP's CR 12.02 motion to a motion for summary judgment simply because TBP attached a standard AOC bail form and court rules to TBP's CR 12.02 motion. In the very same order, the Circuit Court granted summary judgment to TBP. Over the Troutt family's repeated requests, both before and after the ruling, the Circuit Court allowed *no discovery*.

CR 12.02 permits conversion of a CR 12 motion to dismiss to a CR 56 motion for summary judgment, but CR 12.02 requires that "all parties *shall* be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." (Emphasis added). That did not happen here. The Troutt family brought this error to the attention of the Circuit Court and the appellate panel (in the opening brief, the reply brief, and again by way of a petition for rehearing (See Tabs 6-8)), but neither court thought the Troutt family—a family that has suffered an unimaginable yet entirely preventable tragedy—should at least be afforded notice and an opportunity to conduct discovery before the summary judgment ruling.

B. Madelynn Troutt's death

On March 1, 2021, Michael DeWitt drove a stolen vehicle while under

the influence of amphetamines and benzodiazepines and crossed the centerline of Dixie Highway, causing a head-on collision with a vehicle driven by Madelynn Troutt, a 17-year-old Butler High School student from Louisville. (R. 1: Compl. ¶¶ 21, 25, attached as Tab 5.) Vehicle data shows DeWitt was traveling 58 mph one second before the impact, which happened in a 45-mph zone. (*Id.* ¶ 22.) The stolen car that DeWitt was driving contained six stolen guns. (*Id.* ¶ 27.)

Madelynn was trapped in her vehicle, yet DeWitt failed to render her any aid, instead fleeing the scene. (*Id.* ¶¶ 23-24.) Madelynn died about 45 minutes after the crash at the University of Louisville Hospital. (*Id.* ¶ 26.)

DeWitt's actions were entirely consistent with his extensive criminal background dating back to 2012. (*Id.* ¶10.) Between 2012 and 2021, DeWitt was charged with multiple crimes including burglary, drug possession, breaking and entering, illegal possession of firearms, contempt of court, parole violation, vandalism and criminal trespass. (*Id.* ¶¶11-24.) Less than two weeks before the wreck, police arrested DeWitt in Louisville on charges of receiving stolen property (motor vehicle), public intoxication (controlled substance), criminal trespass, disorderly conduct, resisting arrest and assault on a police officer resulting in physical injury. (*Id.* ¶15.) The arrest citation states that DeWitt told police "he had taken heroin and 'a whole lot of shit' earlier in the night" and the officers noted he was "visibly under the influence." (*Id.* ¶16.)

Just five days before the wreck, employees or agents of TBP posted bail for DeWitt. (*Id.* ¶17.) Although the details surrounding the relationship between TBP and DeWitt pre- and post-release remain a mystery—because *no discovery* was ever allowed in this case—upon information and belief TBP undertook a duty to, among other things, ensure that DeWitt complied with a substance abuse program and the terms of his release. (*Id.* ¶20.) Before posting bail, TBP also failed to reasonably investigate DeWitt’s extensive criminal history and propensity to re-offend. (*Id.* ¶19.)

DeWitt was subsequently charged with receiving stolen property, possession of firearms by a convicted felon, operating a motor vehicle under the influence of intoxicants, burglary, tampering with evidence, fleeing or evading police, wanton endangerment and murder. (*Id.* ¶28.)

As for TBP, it has since stopped its bail-related activity to instead focus on “advocacy” efforts,² following sharp criticism from victims’ families, law enforcement, and members of the General Assembly who sought to curb abuses by TBP.³

² “Louisville Bail Project shifting strategy to public advocacy, ending free bail assistance,” WDRB News (June 26, 2023), available at: https://www.wdrb.com/news/louisville-bail-project-shifting-strategy-to-public-advocacy-ending-free-bail-assistance/article_458bb36c-1483-11ee-a6be-9794ce4f8bfe.html#:~:text=%22Armed%20with%20this%20evidence%2C%20The,bail%20assistance%20on%20July%2010 (last visited February 7, 2025).

³ “Kentucky lawmakers advance bill to limit bail organizations,” AP News (February 23, 2022), available at: <https://apnews.com/article/shootings-kentucky-louisville-df27af85c1c0d752ab65154d9c89e1b8> (last visited February 7, 2025).

C. The Troutt family files suit

In February of 2022, Madelynn's mother, Marcie Troutt, filed suit as administratrix of her daughter's estate along with Madelynn's father, Jeremy Troutt, asserting wrongful death and loss of parental consortium claims against TBP, its employees, Carrie Cole, Holly Zoller, Shameka Parrish-Wright, as well as other yet unknown defendants. (R. 1: Compl.) The Troutt family filed an amended complaint to add State Farm Mutual Automobile Insurance Company seeking benefits under the Troutt family's motor vehicle insurance policy. (R. 23: Amen. Compl.) State Farm filed a general denial answer. (R. 53: State Farm Answer.)

Unlike State Farm, TBP requested additional time to answer. The Troutt family accommodated TBP's request, and the parties submitted an agreed order to that effect. (R. 61: Agreed Order.) In lieu of filing an answer, as TBP suggested, TBP instead filed a CR 12.02(f) motion to dismiss. (R. 92: MTD.)

TBP's memorandum highlighted its "charitable" nature and made fact-based assertions that: (1) it owed "no duty" under any facts; (2) it was not the "cause in fact" of Madelynn's death; and (3) it "was engaging in political speech protected by the First Amendment by providing free bail assistance." (R. 72: TBP Memo.) TBP attached two and only two items to the motion, both public records: (1) a standard AOC-365 bail form, and (2) Supreme Court Order 2017-19 concerning bail. (R. 66, 67: Exh. A & B TBP Memo.) TBP

argued that its pre-answer motion to dismiss should be granted because its own one-sided portrayal of these limited “facts” should control. (R. 72: TBP Memo.) TBP also criticized the Troutt family for not specifically alleging facts in its complaint even though Kentucky is a notice-pleading state. This Court, in reversing a similar CR 12 dismissal, even held:

Formal discovery is necessary before a plaintiff can fairly be expected to provide a detailed statement of the specific bases for her claim ... *Before discovery, plaintiffs simply don't know what they don't know.*

Russell v. Johnson & Johnson, Inc., 610 S.W.3d 233, 242 (Ky. 2020)

(emphasis added).

The Troutt family filed a response; cited *Russell* among many other cases holding that dismissal would be improper under Kentucky’s notice-pleading standard; pointed out that the Complaint specifically alleged that TBP had a duty, or at least undertook a duty, when it investigated and screened Dewitt before posting bail which is all Kentucky notice pleading requires; correctly noted that a pre-answer dismissal without *any discovery* would be improper; and that TBP’s defenses and arguments would be appropriate, if at all, in a motion for summary judgment *after* discovery. (R. 98: Troutt Resp. Mot. to Dismiss.)

In contravention of Jefferson Circuit Court Local Rule 401, which prohibits replies over five pages, TBP submitted a skewed version of the “facts” in its reply and criticized the Troutt family for failing to supply their

own “facts” in the complaint—an impossible task before any discovery. (R. 112: TBP Reply.)

The matter was submitted for a ruling *solely* as a CR 12.02(f) motion and TBP *never* suggested or argued that its motion should be converted to a motion for summary judgment and ruled on as such. (*Id.*; R. 126.)

D. The Circuit Court’s without-notice conversion and order granting summary judgment

On October 13, 2022, the Circuit Court entered an Opinion and Order *sua sponte* converting TBP’s pre-answer CR 12.02(f) motion to dismiss to a CR 56 motion for summary judgment and *in the same order* granted summary judgment to TBP. (R. 129, Tab 3.) Although TBP *never* requested the conversion, the Circuit Court noted that “since ‘matters outside the pleading’ have been ‘presented and not excluded by the court’ within the meaning of CR 12.02, the Court will consider the defendant’s motion to be one for summary judgment pursuant to CR 56.01.” (*Id.* at 1-2.) Again, the only “matters outside the pleadings” were a standard bail form and this Court’s order regarding bail—both public records.

The Circuit Court found that “there is no genuine issue of material fact as to whether the defendants owed the plaintiffs’ decedent a duty of care” because “[a]ny facts associated with whether this duty exists are available in public records such as the Bail Form, and plaintiffs have not disputed the contents of that form.” (*Id.* at 4.) As for whether TBP undertook a duty, the Circuit Court found—without mentioning the request and implicit denial of

any opportunity for discovery on the part of Troutt family—that “the plaintiffs have pointed to nothing in the record from which this Court can even infer that the defendants ‘actually and specifically’ undertook the duties that plaintiffs seek to impose on them.” (*Id.*) The Circuit Court did not explain how such a record would exist when TBP had not yet filed an answer, or how the Troutt family would be able to point to any “proof” of record when TPB representatives had not yet been subject to depositions or discovery.

Following TBP’s lead, the Circuit Court even relied on Kentucky cases which granted summary judgment *after discovery*. Yet the Circuit Court criticized the Troutt family for properly relying on the allegations in their complaint, rather than providing “proof” of what TBP did or failed to do, noting “the plaintiffs argue that the Court should take their allegations in paragraphs 30 and 31 of the complaint, supra, as true and allow *further* discovery for plaintiffs to factually determine how the defendants undertook the duties the plaintiffs claim they did. The court rejects these arguments.” (*Id.* at 3-4.) The Troutt family could not seek “further discovery” because the family was *denied initial discovery*. Implicit in the Opinion and Order was the notion that if the Troutt family had just done more to develop “proof” then the motion would have been denied.

The Troutt family filed a timely CR 59 motion to vacate, noting that they were denied notice and CR 12.02 expressly requires “all parties shall be given reasonable opportunity to present all material made pertinent to such a

motion by Rule 56.” (R. 139: Mot. to Vacate.) The Troutt family also cited caselaw reversing summary judgment even under a palpable error standard where plaintiffs were not given even the 10-day notice required by CR 56.03. (*Id.*) The Troutt family also pointed to Kentucky’s summary judgment standard, which differs from the federal standard, and requires “ample opportunity to complete discovery” before entry of summary judgment. (*Id.*)

TBP responded and conceded that the Circuit Court “*sua sponte* converted the Motion to Dismiss to a Motion for Summary Judgment.” (R. 145: TBP Resp. to Mot. to Vacate.) TBP further admitted that the Troutt family expressly “sought discovery on what happened before and after DeWitt’s bond was posted” to determine what TBP knew and did with respect to DeWitt before and after TBP posted his bond. (*Id.*) The Troutt family filed a reply. (R. 154: Troutt Reply.) The Court denied the motion and the Troutt family appealed. (R. 160: Order, attached as Tab 4.)

E. The Court of Appeals’ divided Opinion

In a divided Opinion, two Court of Appeals judges affirmed. Like the Circuit Court, the majority did not address the issue of notice *before* converting a motion to dismiss to a motion for summary judgment. Also like the Circuit Court, the majority looked *only* to the “facts” in the standard bail form TBP attached to its motion to determine duty and the scope of any “special relationship.” The majority then made a categorical finding that “[t]here are no facts” under which TBP or similar defendants “could have

owed a duty” to the Troutts or similar plaintiffs. (Tab 1: Opinion at 9.) The majority noted that it would be “unsound public policy” to do so because this Court has yet to consider the issue; the legislature failed to act; and litigation floodgates would open. (*Id.*) The majority affirmed the “no duty” determination but rejected TBP’s First Amendment and causation arguments. (*Id.* at 9-11.)

Judge Karem filed an eight-page dissenting opinion addressing this “case of first impression in Kentucky.” (*Id.* at 12-19.) Applying this Court’s precedent, the dissent would have remanded for discovery. Judge Karem outlined the history and reality of bail in Kentucky while advancing strong and cogent reasons as to why the billionaire-funded TBP had a duty and a “special relationship” with DeWitt even in the absence of the Troutt family’s right to discovery.

The Troutt family filed a petition for rehearing, which was denied, and then filed a motion for discretionary review with this Court, which was granted. This brief follows.

ARGUMENT

The issues before the Court were preserved in the Troutt family’s Complaint (R. 1, Tab 5), the Troutt family’s response to TBP’s pre-answer CR 12.02(f) motion to dismiss (R. 98), the Troutt family’s motion to vacate and reply (R. 139, 154), the Circuit Court’s judgment and order (R. 129, 160, Tabs

3 and 4), the Troutt family's briefs and petition for rehearing filed in the Court of Appeals (Tabs 6, 7, 8), and the Court of Appeals Opinion (Tab1).

I. The Circuit Court properly refused to grant TBP's motion to dismiss for failure to state a claim.

"[A] motion to dismiss for failure to state a claim is viewed with disfavor and rarely granted." Phillips, Kramer & Burleigh, 6 KY. PRAC. R. CIV. PROC. ANN. RULE 12.02 (6th ed. 2012). "As a practical matter, dismissal for failure to state a claim should be granted only when the allegations in the complaint show an insuperable bar to recovery. For example, a complaint showing that the statute of limitations bars relief is properly presented in a Rule 12.02(f) motion." *Id.* (emphasis added).

Accordingly, the motion "is governed by a rigorous and sweeping standard which dictates that it should be granted only where 'it appears the pleading party would not be entitled to relief *under any set of facts which could be proved in support of his claim.*'" *Mitchell v. Coldstream Laboratories, Inc.*, 337 S.W.3d 642, 644-45 (Ky. App. 2010) (emphasis added) (quoting *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)).

When considering the motion, the allegations contained in the pleading are to be treated as true and must be construed in a light most favorable to the pleading party. *See Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App. 1987). Whether a plaintiff can prove the allegations or ultimately prevail under the

facts is irrelevant for the purpose of a CR 12.02 motion. *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327, 328 (Ky. 1992).

Indeed, a court must consider *any set of facts that* may entitle plaintiff to relief. A plaintiff is not required, at the complaint stage, to plead factual detail that may ultimately support the claim. Kentucky strictly adheres to the concept of a “notice pleading” under CR 8.01. As this Court has held: “[t]he purpose of this Rule [CR 8.01] is to assign to pleadings the function of giving notice and formulating true issues without the requirement that they give every fact which in the past may have been necessary to constitute a formal ‘cause of action’ or a defense.” *Smith v. Isaacs*, 777 S.W.2d 912, 915 (Ky. 1989) (citations omitted); *see also Lee v. Stamper*, 300 S.W.2d 251, 253 (Ky. 1957) (“The principal objective of a pleading is to give the opposing party fair notice of the essential nature of the claim presented and the type of relief to which the claimant deems himself entitled.”).

This Court recently—and firmly—reiterated our notice pleading standards, specifically “refus[ing] to mandate a heightened pleading standard” as in federal court and “reiterat[ing] Kentucky’s requirement of bare-bones, notice pleading.” *Russell v. Johnson & Johnson, Inc.*, 610 S.W.3d 233, 241 (Ky. 2020). Importantly, and as applicable to the present case, this Court in *Russell* also reiterated: “Formal discovery is necessary before a plaintiff can fairly be expected to provide a detailed statement of the specific

bases for her claim ... *Before discovery, plaintiffs simply don't know what they don't know.*" *Id.* at 242 (emphasis added).

The Circuit Court well understood this Court's directive in *Russell*, which is why the Circuit Court refused to grant TBP's CR 12.02(f) motion to dismiss.

A. TBP had a duty.

In its CR 12.02(f) motion and again in the Court of Appeals, TBP maintained it had no duty to "control the post-release actions" of DeWitt, which TBP argues is a "heretofore unknown legal duty." (R. 72, 112.)

But TBP ignored the Complaint's allegation that TBP *undertook* a duty to ensure that DeWitt complied with a substance abuse program and other terms of his release. (R. 1: Compl. ¶ 20.) The Circuit Court blamed the Troutt family for failing to produce "proof" of an undertaken duty, even though TBP acknowledged there was no opportunity for the discovery necessary to garner such "proof." And the Court of Appeals majority looked *only* at the standard bail form for any assumed duty. Like the Circuit Court, the majority refused to consider anything *outside* the bail form which would require discovery.

The undertaker's duty is well recognized in Kentucky law. A "duty voluntarily assumed cannot be carelessly abandoned without incurring liability for injury resulting from the abandonment." *Johnson v. Brey*, 438 S.W.2d 535, 536 (Ky. 1969); see *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 847 (Ky. 2005) (citing Restatement (Third) of

Torts: Liability for Physical Harm § 42 cmt. d (Proposed Final Draft No. 1, 2005)). “It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.” *Louisville Cooperage Co. v. Lawrence*, 313 Ky. 75, 78, 230 S.W.2d 103, 105 (1950) (quoting *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922)).

The allegation in the Complaint that TBP undertook duties and breached them was sufficient pleading and should have been sufficient to allow discovery. Unlike the federal courts which often require that the initiating complaint meet a factual plausibility standard,⁴ “Kentucky is a notice pleading jurisdiction, where the ‘central purpose of pleadings remains *notice of claims and defenses*.” *Pete v. Anderson*, 413 S.W.3d 291, 301 (Ky. 2013) (emphasis added). It “is not necessary to state a claim with technical precision under this rule, as long as a complaint gives a defendant fair notice and identifies the claim.” *Grand Aerie*, 169 S.W. 3d at 844. Accordingly, our courts “no longer approach pleadings searching for a flaw, a technicality upon which to strike down a claim or defense, as was formerly the case at common law.” *Smith v. Isaacs*, 777 S.W.2d 912, 915 (Ky. 1989). Instead, “much leniency should be shown in construing whether a complaint states a cause of action.” *Id.* Indeed, even a complaint “couched in general and conclusory

⁴ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) requiring that complaints filed in federal court assert “factually plausible” claims.

terms” complies with the notice pleading requirements. *KentuckyOne Health, Inc. v. Reid*, 522 S.W.3d 193, 197 (Ky. 2017).

This Court recently—and firmly—reiterated our notice pleading standards, specifically “refus[ing] to mandate a heightened pleading standard” as in federal court and “reiterat[ing] Kentucky’s requirement of bare-bones, notice pleading.” *Russell v. Johnson & Johnson, Inc.*, 610 S.W.3d 233, 241 (Ky. 2020). Importantly, and as applicable to a motion to dismiss, the Supreme Court in *Russell* said: “Formal discovery is necessary before a plaintiff can fairly be expected to provide a detailed statement of the specific bases for her claim ... ***Before discovery, plaintiffs simply don’t know what they don’t know.***” *Id.* at 242 (emphasis added). As the United States Supreme Court recognized long before *Russell*: “No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case. ***Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.***” *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (emphasis added).

Considering CR 12.02’s “rigorous and sweeping standard”—which supports Kentucky’s strong policy and preference for merits discovery—the only question at the pre-answer CR 12.02 stage is whether the Complaint states any legally cognizable claim against TBP. The answer here is clearly “yes” as the Complaint states a cognizable claim for negligence based on TBP’s breaches of duties it undertook, which is why even the Circuit Court

refused to grant TBP's CR 12.02(f) motion.

At the pre-answer pleading stage, it is premature to consider “facts” as to whether TBP also owed an affirmative duty to investigate DeWitt's extensive criminal history and propensity to re-offend. TBP asserted that this is a “threshold issue” that the Circuit Court had to decide. (R. 72, 112.) While TBP is correct that duty “is an issue of law,” it is *not* an issue which *must* be decided *only in the absence* of discovery. Duty is often difficult if not impossible to determine in a vacuum—and even more so when a defendant like TBP limits the scope of any factual inquiry to the public records it cherry-picks to reveal to a court. Under Kentucky law, “the scope and character of a defendant's duty is largely defined by the foreseeability of the injury” and foreseeability depends on “*the facts*” of each case. *Lee v. Farmer's Rural Elec. Coop. Corp.*, 245 S.W.3d 209, 212 (Ky. App. 2007) (emphasis added). Full development of the facts, of course, requires discovery.

Tellingly, the caselaw that TBP relied on in its motion to dismiss (R. 72, 112) was decided at the summary judgment stage or later. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 87 (Ky. 2003) (“Pathways moved for summary judgment on grounds that it owed no duty to Hammons.”); *Howard v. Spradlin*, 562 S.W.3d 281, 284 (Ky. App. 2018) (“appeal from a summary judgment”); *Merchs. Ice & Cold Storage Co. v. United Produce Co.*, 131 S.W.2d 469, 470 (Ky. 1939) (appeal following a trial); *Gaither v. Justice & Pub. Safety Cabinet*, 447 S.W.3d 628, 632 (Ky. 2014) (review of Board of

Claims decision awarding damages to Gaither's Estate). The only potential exception is *Fryman v. Harrison*, 896 S.W.2d 908, 910 (Ky. 1995). But even *Fryman* noted that duty depends on the particular "**factual situation**" of each case. *Id.* Accordingly, and consistent with the standards for a motion to dismiss, dismissal is only appropriate if there is *no set of facts* under which the Defendants could have owed a duty to the Estate. *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977).

TBP argued that *Fryman* is on point. *Fryman*, however, addresses a specialized duty issue, specifically the question of when *public officials* have an affirmative legal duty in the performance of their official duties. 896 S.W.2d at 910. "To establish a negligence claim against a public official, the complaint must allege a violation of a special duty owed to a specific identifiable person and not merely the breach of a general duty owed to the public at large." *Id.* "The public duty doctrine originated at common-law and shields a **public employee** from suits for injuries that are caused by the public employee's breach of a duty owed to the public at large." *McCuiston v. Butler*, 509 S.W.3d 76, 79 (Ky. App. 2017) (emphasis added, internal quotation omitted). Under the doctrine, "there must be a **special duty owed by the public official** to a specific, identifiable person and not merely a breach of a general duty owed to the public at large." *Id.* at 80 (emphasis added, citing *Fryman*, 896 S.W.2d at 910 (Ky. 1995)). For example, *Fryman* involved the *limited* duty owed by public officials: the jailer and the circuit

court clerk in that case. Because no “special relationship” existed between the public officials and the victims in *Fryman*, the public duty doctrine shielded the defendants from liability. The other Kentucky cases cited by TBP in the Court of Appeals involved public officers as defendants or defendants with statutory or common-law immunity. See *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009) (fire department and fire chief defendants); *James v. Wilson*, 95 S.W.3d 875 (Ky. App. 2002) (public school teacher defendants); *Carruthers v. Edwards*, 395 S.W.3d 488 (Ky. App. 2012) (limited immunity for defendant under Dram Shop Act).

Here, Respondents are *not* public officials, so Fryman’s public duty doctrine is inapplicable, and TBP does not claim immunity. However, even in the context of claims against public officials—for which the issue of governmental immunity looms large—this Court has reaffirmed that foreseeability remains the touchstone for determining whether a public officer owes a duty to a particular plaintiff. *Gaither*, 447 S.W.3d at 638.

Kentucky law recognizes a common-law “universal duty of care,” bounded by foreseeability. *Bramlett v. Ryan*, 635 S.W.3d 831, 839 (Ky. 2021). And foreseeability depends on “the facts” of each case, which often warrants discovery. *Lee*, 245 S.W.3d at 212. Curiously, even the Court of Appeals majority relied heavily on *Grand Aerie*—an opinion from this Court which found that the complaint properly asserted a claim for negligent supervision yet reinstated partial summary judgment *based on discovery in that case*.

(Opinion at 7-9.) Indeed, *Grand Aerie* specifically references “depositions” taken by the parties. *Grand Aerie*, 169 S.W.3d at 845.

Finally, a word about charities is necessary because, in its motion to dismiss, TBP touted its alleged charitable status to the Circuit Court as if TBP should be absolved of liability or treated differently from for-profit businesses. Kentucky long ago abandoned the doctrine of charitable immunity. Charities are no less responsible in tort than private for-profit businesses. “The incorporated charity should respond as do private individuals, business corporations and others, when it does good in the wrong way.” *Mullikin v. Jewish Hosp. Ass’n of Louisville*, 348 S.W.2d 930, 936 (Ky. 1961) (internal quotation omitted). The same reasoning applies to TBP which can and does guard against liability with liability insurance. Even so, there is nothing charitable about extending immunity. Kentucky precedent does not favor those who do “good in the wrong way” at the expense of victims’ rights.

Furthermore, labeling TBP as do-good organization is itself charitable. According to IRS filings, in 2021, TBP generated over \$33 million in annual revenue, accumulated over \$80 million in assets, and its employees enjoy six-figure annual base salaries.⁵ Fueled by celebrities and billionaires, TBP seeks to inflame those dissatisfied with the police and the courts by targeting “an

⁵ ProPublica IRS information for The Bail Project, Inc. available at <https://projects.propublica.org/nonprofits/organizations/814985512>(last visited February 7, 2025).

entire system of policing that terrorizes and devalues” others⁶ while releasing those charged with serious offenses⁷. TBP’s work does not end there. As TBP’s website admits: “*We don’t stop at paying bail.*”⁸ TBP offers support to those released, including transportation services, which it describes as their “model of Community Release with support.”⁹ Exactly *how* TBP supported Michael Dewitt and *what* duties TBP undertook before Dewitt killed young Madelynn Troutt are precisely the kind of issues that warrant discovery.

To absolve TBP of *any* duty would put TBP above the law while TBP seeks to hold law enforcement officers and the court system accountable. TBP should at least be held to its own standard and this Court’s standard. TBP has a common-law duty just like every other person or entity.

B. Causation is a jury issue.

In its CR 12.02(f) motion to dismiss, TBP also argued that causation is lacking “as a matter of law.” (R. 72, 112.) Whether a plaintiff’s damage was caused by the defendant typically “should be left to the jury to determine.” *Eichstadt v. Underwood*, 337 S.W.2d 684, 686 (Ky. 1960) (reviewing denial of defendant’s directed verdict motion). Even summary judgment for lack of proof of causation, as opposed to lack of proof regarding the standard of care,

⁶ The Bail Project, Inc. press release: <https://bailproject.org/press/the-bail-project-responds-to-jurys-decision-to-convict-police-officer-who-killed-george-floyd/> (last visited February 7, 2025).

⁷ The Bail Project, Inc.” <https://bailproject.org> (last visited February 7, 2025).

⁸ *Id.* at <https://bailproject.org/model/> (last visited February 7, 2025).

⁹ *Id.*

is extremely rare. See *Stathers v. Garrard County Bd. of Educ.*, 405 S.W.3d 473, 479 n.4 (Ky. App. 2012) (“Even in these [medical negligence] cases, summary judgment is not granted for lack of proof of causation; summary judgment is granted because there was no proof of the standard of care (i.e., the measure of the duty) and, therefore, no proof of a breach.”). “But-for causation is a *factual question* to be answered in an individual case *by the factfinder* deciding if the defendant’s conduct was a ‘substantial factor’ in causing the” plaintiff’s harm.” *Patton v. Bickford*, 529 S.W.3d 717, 730 (Ky. 2016) (emphasis added).

The fact that proximate cause and superseding/intervening cause—meaning the “public policy” limitation on causation—are issues of law does not mean that they must, or even should, be decided at the pleadings stage. In fact, superseding cause has largely been displaced by comparative fault. As this Court explained, the “rationale for the doctrine of superseding cause has been substantially diminished by the adoption of comparative negligence.” *Pile v. City of Brandenburg*, 215 S.W.3d 36, 42 (Ky. 2006).

Even where superseding cause does come into play, subsequent criminal actions are *not* a complete bar to liability. “The basic premise of a superseding cause is that it is ‘extraordinary and unforeseeable.’” *Gaither v. Justice & Pub. Safety Cabinet*, 447 S.W.3d 628, 640 (Ky. 2014) (emphasis added). “[C]riminal actions,” even murder, are foreseeable in many circumstances. *Id.* (murder “was a known risk and a foreseeable consequence

of using [informant] in a buy/bust operation” after informant’s “anonymity had been compromised”). The “fact is that the appendices to the Restatement (Second) of Torts, §§ 448 and 449, are replete with numerous cases, perhaps one hundred in number, from throughout these United States,” deciding that “the negligence of a defendant is actionable as a contributing cause, wherein the immediate cause is a subsequent criminal act.” *Britton v. Wooten*, 817 S.W.2d 443, 449 (Ky. 1991); *Waldon v. Housing Auth. of Paducah*, 854 S.W.2d 777, 779 (Ky. App. 1991) (“an intervening criminal act does not relieve one for liability for his or her negligent acts or omissions, where the criminal act is a reasonably foreseeable consequence of the defendant’s negligent act”).

Rather, superseding cause depends on the facts of each case, which—again—requires discovery. *See Patton*, 529 S.W.3d at 731 (assessment of superseding cause depends on the facts of each case).

Not surprisingly, TBP’s motion to dismiss failed to cite a single case in which a motion to dismiss was granted due to lack of causation. (R. 72, 112.) Once again, the cases TBP cited arose from summary judgment decisions or even later, after trial. *Patton*, 529 S.W.3d at 721 (appeal from summary judgment); *Bruck v. Thompson*, 131 S.W.3d 764, 765 (Ky. App. 2004) (same); *Lewis v. B&R Corp.*, 56 S.W.3d 432, 435-36 (Ky. App. 2001) (same); *Deutsch v. Shein*, 597 S.W.2d 141, 143 (Ky. 1980) (appeal from jury verdict finding defendant’s negligence was not a substantial factor in causing the plaintiff’s injury). The Louisiana cases that TBP relied on in its motion similarly arose

at the summary judgment stage or later. *Frank v. Pitre*, 353 So. 2d 1293, 1294 (La. 1977) (appeal from decision “awarding damages to a policeman who had suffered gunshot wounds in the performance of his duty”); *Jones v. Gaines*, 978 So. 2d 522, 524 (La. App. 2008) (appeal from summary judgment).

Any decision as to whether the superseding cause doctrine applies at all, much less whether DeWitt’s actions were a superseding cause, must wait for discovery. All that is required at the pleading stage is an *allegation* of causation.

Here, the Complaint specifically alleges that TBP’s breaches proximately caused Madelynn’s death. (R. 1, Compl. ¶ 33.) The Troutt family’s Complaint adequately pleads causation, which is why even the Circuit Court refused to grant TBP’s motion for lack of causation.

C. TBP’s First Amendment defense fails.

Finally, TBP argued in its CR 12.02(f) motion to dismiss that by paying DeWitt’s bail it engaged in “political speech” protected by the First Amendment, thus completely barring the Troutt family’s claims. (R. 72, 112.) As TBP’s motion noted, “the First Amendment ‘*can* serve as a ***defense*** in state tort suits,’ particularly where the speech at issue involves a matter of public concern,” citing *Snyder v. Phelps*, 562 U.S. 443, 451 (2011) (emphasis added). But the First Amendment is at most just that: a defense, on which TBP bears the burden of proof. *McManus v. Ky. Ret. Sys.*, 124 S.W.3d 454, 457-58 (Ky. App. 2003) (“The party asserting an affirmative defense has

the burden to establish that defense.”). TBP did not rely on a single Kentucky state case granting a motion to dismiss based on a First Amendment defense.

The *one* federal case TBP cited holding that the First Amendment *can* be a defense to a tort suit, *Snyder*, was on appeal *after* a jury trial. 562 U.S. at 447. As *Snyder* recognized whether the First Amendment might provide a tort defense is a fact specific inquiry that requires consideration of “all the circumstances of the case” as “revealed by the whole record.” *Id.* at 451, 453. Here, the record has not even begun to be developed.

While TBP asserted that paying bail is political speech, it did not—and cannot at the CR 12.02 stage—conclusively establish that disputed fact. TBP did not cite any authority holding that the act of paying bail is political speech. Instead, TBP relied on cases holding that making or soliciting charitable contributions *can* be protected speech, depending on the circumstances. But TBP did not even begin to explain how paying bail amounts to making a political contribution.

Instead, TBP argued that “restrictions” on “how a charity spends money” violate free speech rights, citing *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Consistent with the theme for TBP’s motion, *Schaumburg* was decided on a motion for summary judgment, not a motion to dismiss. *Id.* at 626. And *Schaumburg* considered whether a local ordinance limiting door-to-door solicitations by charitable organizations violated free speech rights. *Id.* at 622-23. *Schaumburg* did not address how or

when the First Amendment is a defense to a tort action, nor did it address whether the payment of bail is an action of political speech.

TBP also relied on *Meyer v. Grant*, 486 U.S. 414, 418 (1988), for the proposition that restrictions on how money is spent is “a constitutional restriction on speech.” Yet again, *Meyer* was not decided on a motion to dismiss, but after a trial. *Id.* And *Meyer* has nothing to do with the payment of bail or the First Amendment as a tort defense.

While renewing this argument in its brief filed in the Court of Appeals, TBP concealed that the Seventh Circuit Court of Appeals—in a published opinion no less—**rejected** TBP’s identical “free speech” argument after TBP sought to thwart Indiana legislation which implemented modest regulations on the bail industry.

In *The Bail Project, Inc. v. Comm’r, Indiana Dep’t of Ins.*, 76 F.4th 569 (7th Cir. 2023), TBP argued that its efforts were “inherently expressive” and therefore constitutionally protected by the First Amendment. A federal district court and later a panel of the Seventh Circuit rejected those arguments, finding no constitutional protection for TBP. The Seventh Circuit held that TBP’s “act of paying cash bail does not inherently express any message. On its own, paying bail for a pretrial defendant does not communicate even the most general version of The Bail Project’s message—its opposition to cash bail.” *Id.* at 577. “[T]he payment of cash bail is not entitled to First Amendment protection.” *Id.* at 578 (emphasis added).

Payment of bail is not political speech—just as the Seventh Circuit confirmed—and it most certainly cannot bar the Troutt family’s wrongful death and tort claims here. However, even if bail payment alone might be considered political speech, a court would still have to look at the overall relationship between TBP and DeWitt *under the facts as developed in discovery*, evaluate the obligations TBP undertook before and after posting bail for DeWitt, and then assess negligence (duty, breach, and causation) based TBP’s pre- and post-bail actions.

If “payment as speech” absolved a defendant of all liability under the First Amendment, then any business would be immune for its tortious conduct simply by touting a political message. Under TBP’s analysis, for example, a hospital would be immune from any claim of negligence so long as it lobbied the legislature for changes in health care law.

Not only did the Circuit Court reject TBP’s First Amendment defense, but *all three* judges on the Court of Appeals panel agreed that the Troutt family’s claims were not barred based on TBP’s alleged “free speech” argument. (Tab 1.)

II. The Circuit Court erred in converting TBP’s motion to dismiss to a motion for summary judgment without any notice and any opportunity for discovery.

As mentioned, the Circuit Court rejected each basis for TBP’s motion for CR 12.02(f) relief—the *only* relief requested by TBP.

TBP never asked or even suggested that the Circuit Court convert the motion to a motion for summary judgment. (R. 72, 112.) No such request was made by any party. And the Circuit Court erred in *sua sponte* converting TBP's CR 12.02(f) motion to a motion for summary judgment and ruling on the merits without any notice, based solely on TBP's attachment of a standard AOC bail form and a standing order on bail to its motion.

Had the Circuit Court given notice to the parties *before* conversion and entry of summary judgment, the Troutt family would have informed the Court that TBP's attachments—both of which are public records—cannot convert a motion to dismiss to a motion for summary judgment. Caselaw is clear: “***no conversion occurs if the circuit court considers matters of public record.***” *Schell v. Young*, 640 S.W.3d 24, 33 (Ky. App. 2021) (emphasis added), *citing Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 563-64 (Ky. App. 2017). There is no question that the standard bail AOC form and this Court's own rules regarding bail are public records. TBP has never argued otherwise. And TBP has never cited any authority suggesting that attaching public-record forms and rules to a CR 12.02(f) motion *could* properly convert a CR 12.02(f) motion to a motion for summary judgment.

In short, as of October 13, 2022, immediately before the circuit court issued its Opinion and Order, no party—certainly not TBP or the Troutt family—had any reason to believe that the Circuit Court would improperly convert TBP's CR 12.02(f) motion to a CR 56 motion for summary judgment

and simultaneously decide the merits based solely on TBP's public-record attachments which categorically *cannot* prompt such a conversion.

And notice of the conversion before ruling was required. CR 12.02 states in relevant part that "all parties *shall* be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" if the court decides to make the conversion. (Emphasis added.) CR 56.03 in turn requires that parties be allowed *at least* 10 days before a hearing to respond to a motion for summary judgment, and the nonmoving party must be allowed time to submit affidavits and rely on interrogatories, depositions, and the like.

The Circuit Court's failure to provide the Troutt family notice, and the Circuit Court's failure to provide any time to respond under CR 56.03, are violations so egregious they are considered plain error by this Court. *See, e.g., Perkins v. Hausladen*, 828 S.W.2d 652, 657 (Ky. 1992) (reversing where "the Perkinses were put at a disadvantage by not being able to put on any affidavits, additional legal research, nor other evidence to contradict the motion"). Even in *Perkins*, the appellants received *some* notice before entry of summary judgment even though the notice was given within 10 days before the hearing. Here, the Troutt family received *no notice*.

Although CR 56.02 permits a party to move for summary judgment "at any time," this Court has repeatedly "cautioned trial courts not to take up these motions prematurely and to consider summary judgment motions only

after the opposing party has been given ample opportunity to complete discovery.” *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010) (quotation marks and citation omitted). This Court “consider[s] whether the trial court gave the party opposing the motion an ample opportunity to respond and complete discovery before the court entered its ruling[.]” *Id.* The question is not whether the nonmoving party “has actually completed discovery”—rather, the question is whether the nonmoving party “has had an opportunity to do so.” *Hartford Ins. Group v. Citizens Fidelity Bank & Tr. Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979). In *Bowlin Grp., LLC v. Rebennack*, 626 S.W.3d 177, 187–88 (Ky. App. 2020), for example, the Court reversed where the circuit court entered summary judgment without providing the plaintiff with any opportunity to conduct discovery. That is precisely what happened here.

“While such a motion [for summary judgment] may be made at any time, it cannot be converted into a method of short-circuiting the right of a plaintiff to prove his case.” *Conley v. Hall*, 395 S.W.2d 575, 578 (Ky. 1965). A motion cannot be used to force a “premature showdown.” *Roberson v. Lampton*, 516 S.W.2d 838, 840 (Ky. 1974). For “summary judgment to be properly granted, the party opposing the motion must have been given adequate opportunity to discover the relevant facts. Only if that opportunity was given do we reach the issue of whether there were any material issues of fact precluding summary judgment.” *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky. App. 2007). Indeed, “[u]ntil the time of the trial every litigant must have

the opportunity to search for and secure whatever evidence may be necessary to perfect his case, and unless it is *manifestly impossible* for him to produce it he cannot be forced to a premature showdown in that respect by a motion for summary judgment.” *Roberson*, 516 S.W.2d at 840 (citation omitted) (emphasis added). “A summary judgment is a final order and, therefore, should not be entered ‘as a form of penalty for failure of the plaintiff to prove his case quickly enough.’” *Suter*, 226 S.W.3d at 842. Summary judgment should not be used as “a trick device for the premature termination of litigation.” *Roberson*, 516 S.W.2d at 840. Here, not only was there a premature showdown but the Circuit Court’s *sua sponte* conversion without notice amounted to a surprise assault on the Troutt family’s rights.

Finally, even if the Circuit Court properly converted TBP’s motion to a motion for summary judgment based solely on TBP’s public-record attachments—and it did not—courts have held that it is reversible error not to provide at least notice and a reasonable opportunity to present facts *before* the court enters summary judgment. For example, in *Froman v. Taylor*, 2003-CA-2782, 2005 WL 327111 (Ky. App. Feb. 11, 2005) (unpub., non-binding), a panel of the Court of Appeals, relying on the notice provision in CR 12.02, reversed entry of judgment for the defendant where the circuit court relied on matters outside the pleadings. The Court of Appeals found that “we believe that submission of the extraneous material served to convert the defendants’ motion to dismiss into a motion for summary judgment.

Therefore, before the court entered an order dismissing his action, [plaintiff] was entitled to an opportunity to present facts to establish the existence of genuine issues of material fact with respect to his various claims.” Id. at *2 (emphasis added).

Even in the Sixth Circuit, which applies a more defense-friendly federal summary judgment standard, the failure of a court to follow the notice-before-conversion provision in the rules is grounds for reversal. *See, e.g., Briggs v. Ohio Elections Comm’n*, 61 F.3d 487, 493 (6th Cir. 1995) (Reversing dismissal where district “drew a conclusion not argued in the pleadings and did not provide Briggs with notice and a reasonable opportunity to show that the Ohio statute failed to withstand strict scrutiny, as Rule 12(b)(6) requires. We therefore reverse the district court’s dismissal of Briggs’s claim.”); *Sorrells v. Fed. Mine Safety & Health Admin.*, 181 F.3d 103 (6th Cir. 1999) (vacating order of dismissal because “Sorrells was not put on notice that he needed to come forward with all of the evidence in support of his claim, but merely believed that he had to show that a claim was stated, which he did”); *Clubspecialists Int’l LLC v. Keeneland Ass’n, Inc.*, No. 5:16-CV-345-KKC, 2017 WL 522945, at *2 (E.D. Ky. Feb. 8, 2017) (“Because of the risk of prejudicial surprise arising from the Court’s treating a motion to dismiss as a motion for summary judgment, Rule 12(d) further requires notice and an opportunity to supplement the record before the Court enters summary judgment.”).

The standard bail form does not and cannot fully address *how* TBP supported Michael Dewitt and *what* duties TBP undertook on behalf of DeWitt before or after DeWitt's release. The full scope of TBP's relationship with DeWitt is precisely *why* the Troutt family requested discovery in their response to the CR 12.02(f) motion to dismiss and why the Circuit Court erred in granting summary judgment by surprise.

Here, the Circuit Court did not provide notice, let alone a reasonable opportunity to conduct discovery, before it ruled for TBP on TBP's never-filed summary judgment motion. And the Court of Appeals' majority erred in not reversing for that reason alone. This Court can and should reverse and remand this case to the Circuit Court to allow discovery.

III. For the reasons mentioned in the Court of Appeals' dissent, the Circuit Court and Court of Appeals erred in their "no duty" determination even without discovery.

Finally, even if all possible discovery regarding the *broader* relationship between TBP and DeWitt continues to be shielded from discovery, and even if consideration is given *only* to the four corners of the bail form, the bail form *still* is sufficient to support a common-law duty on the part of TBP for the reasons mentioned by Judge Karem in the dissenting opinion. (Tab 1: Opinion at 12-19.)

As Judge Karem explained, a person, or entity who posts bail for a defendant assumes the moniker of surety. "Surety" means a person other than the defendant who executes a bail bond and *assumes the obligations*

therein.” RCr 4.00(g) (emphasis added). In fact, TBP affirmatively assumed that obligation as evidenced by its signature on AOC Form 365.13 which TBP attached to the CR 12.02(f) motion to dismiss.

As Judge Karem also explained, one of the most well-litigated functions of a surety is the responsibility to guarantee the defendant’s appearance in court. Dating back to the 1800’s and continuing to the present day, Kentucky courts enforced this responsibility by ordering the posted bail be forfeited to the court when a defendant, out on bail, fails to return to court. *Briggs v. Commonwealth*, 185 Ky. 340, 214 S.W. 975 (1919) (bail is liable where surety has allowed the defendant to escape beyond the jurisdiction of the court); *Vaughn v. Commonwealth*, 395 S.W.2d 763 (Ky. 1965) (bail forfeited upon surety’s failure to produce defendant after his release from custody in Tennessee). In addition, a court may order forfeiture when a defendant violates *any* condition of release. Bonds are also used to impose certain non-financial conditions to control the defendant’s behavior while on pretrial release. Most jurisdictions allow courts to forfeit a defendant’s bond if one of these conditions is breached, and KRS 431.545 plainly states that bond forfeiture is appropriate if a defendant “shall willfully fail to appear *or shall willfully fail to comply with the conditions of his release...*” KRS 431.545 (emphasis added); see also RCr 4.42. Here, the arraigning judge set a \$5000 bond on DeWitt and added non-financial conditions which included no further violations of the law, no illegal use/possession of firearms or other

deadly weapons, and to make all court dates. Following arraignment, TBP stepped in and posted bond assuming an obligation to the court for DeWitt to return to court *and* that DeWitt would follow those conditions.

Contrary to the finding of the Circuit Court, as Judge Karem stated, “it is clear TBP voluntarily entered into a special relationship with [DeWitt].” (Tab 1: Opinion at 15.) Judge Karem considered the applicable court rules and case law regarding the duty owed by third persons for an actor’s conduct and found that “a surety who posts bond for a defendant and is liable to the court for the defendant’s actions (violating conditions of release) or inactions (not returning to court), has a special relationship with the defendant.” (Tab 1: Opinion at 17.) Likewise, after reviewing the case law cited in Section I(A), *supra*, as well as *Kendall v. Godbey*, 537 S.W. 3d 326 (Ky. App. 2017), *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705 (Ky. 2009), *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901 (Ky. 2013), and *Pathways, Inc. v. Hammons*, 113 S.W.3d 85 (Ky. 2003), Judge Karem concluded that, because TBP had a special relationship with DeWitt, and TBP owed a universal duty of care to Madelyn Troutt, reversal and remand were warranted.

For these additional reasons, this Court should reverse and remand the case to the Circuit Court for discovery.

CONCLUSION

The Troutt family sought much needed answers regarding the death of

Madelynn Troutt for which The Bail Project undoubtedly played a role. The family received *none*. Worse, the Troutt family was denied even the bare minimum notice and due process rights of any other litigant.

TBP filed a pre-answer CR 12.02(f) motion to dismiss for failure to state a claim, a motion which requires the allegations in the Complaint to be taken as true and must be resolved based on Kentucky's notice-pleading standard which favors discovery. The only document TBP attached to its CR 12.02(f) motion (other than an administrative order concerning bail) was a standard AOC bail form, a public record. TBP did not argue the document warranted conversion to a motion for summary judgment—or that the circuit court should do so contrary to the notice-of-conversion requirement in CR 12.02. And any conversion based solely on public records was contrary to Kentucky law for the reasons previously discussed.

More importantly, however, the bail form does not resolve, let alone address, TBP's entire relationship with DeWitt, including duties TBP undertook with respect to DeWitt or restrictions, conditions, or oversight TBP may have placed on Dewitt *before or after* posting bail for him—information which can only be obtained through formal discovery.

Despite the Troutt family's request for discovery in response to TBP's CR 12.02(f) motion, the Circuit Court and Court of Appeals criticized the Troutt family for not producing "facts" regarding TBP's duty outside the bail form—yet the Circuit Court gave no notice that the Troutt family needed to

produce any such information because the Circuit Court gave no notice of the conversion. And the Troutt family could only obtain such information from TBP through formal discovery anyway.

It is also worth noting that what happened in this case could effectively foreclose meaningful discovery in any wrongful death or personal injury case. So long as a defendant files a pre-answer CR 12.02(f) motion and attaches any single document—an accident report, an autopsy report, a death certificate, or one of defendant's own record—a court is authorized (even over plaintiff's request for discovery) to consider *only* the four corners of the attached document and enter summary judgment, all without any notice or any opportunity for discovery. This Court can and should reverse and remand for this reason alone.

Even though the Troutt family was denied any opportunity for discovery due to the Circuit Court's improper *sua sponte* conversion to summary judgment and simultaneous entry of summary judgment, TBP still had a common-law duty to Madelynn Troutt based even on the limited record for the reasons explained in the Court of Appeals dissenting opinion. This Court can and should reverse and remand for that reason as well.

Respectfully submitted,

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