RENDERED: NOVEMBER 13, 2026; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2026-CA-0161-MR

JASON WAGNER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TRACY E. DAVIS, JUDGE
ACTION NO. 25-CI-000069

LENIHAN REAL ESTATE D/B/A
LENIHAN SOTHEBY'S
INTERNATIONAL REALTY AND
RICK WALTERS — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE, CALDWELL, AND EASTON, JUDGES.

EASTON, JUDGE: This is an appeal from an Order of the Jefferson Circuit Court dismissing, pursuant to CR[1] 12.02(f), Appellant Jason Wagner's (Wagner) Complaint against Appellee Rick Walters (Realtor) for (1) breach of fiduciary

[1] Kentucky Rules of Civil Procedure.

duty; (2) aiding and abetting a breach of fiduciary duty; (3) void transaction; (4) conversion; (5) civil conspiracy; and (6) negligent misrepresentation. Wagner also challenges the circuit court's Order granting summary judgment in favor of Appellee Lenihan Real Estate (Realty Company) on Wagner's Amended Complaint asserting claims for (1) breach of fiduciary duty; (2) void transaction; (3) conversion; and (4) negligent misrepresentation. After our *de novo* review, we determine that the Complaint against Realtor asserts facts which, if proven, would entitle Wagner to relief on all claims except negligent misrepresentation. We also determine there are genuine issues of material fact which bar summary judgment in favor of Realty Company as to all claims except negligent misrepresentation. We affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

At all times relevant to this appeal, Realtor was an experienced real estate broker licensed in Kentucky and employed as a sales associate for Realty Company, which permitted sales associates to sell real estate personally (as a non-agent). Realty Company would collect a fee for insurance purposes and maintain a copy of all transactional documents for these "personal" real estate transactions.

In mid-January 2024, Wagner met with Realtor at Wagner's home on Stable Springs Drive in Louisville to discuss listing the property for sale. This was Wagner's first time selling a home, and he was referred to Realtor by a mutual

friend. In addition to selling Wagner's home, Realtor also offered to assist him in finding a new home to purchase.

While the parties agree Realtor was initially engaged as Wagner's selling agent, neither party has entered the Stable Springs listing agreement into the record. Wagner completed forms for the Multiple Listing Service (MLS). The property was not advertised on the MLS until February to allow time to obtain professional photos of the property and to confirm property details. The property ultimately sold five days later, and the closing occurred in March 2024.

On January 24, 2024, the same day Wagner contracted Realtor as his selling agent, Wagner executed a residential sales contract for the purchase of a home that Realtor owned on Whipps Mill Road. The parties dispute whether Realtor told Wagner the house belonged to him or to his aunt, and whether Realtor advised Wagner the house would be worth substantially more than the asking price if certain renovations were completed. Regardless, the listing of Wagner's home and the sale of Realtor's home occurred simultaneously.

The main dispute concerns whether an agency relationship existed among the parties when Wagner purchased Realtor's home sufficient to give rise to various fiduciary duties. Wagner argues that, because he first hired Realtor to sell his Stable Springs home, he was in a fiduciary relationship with Realtor as a client

when he purchased the Whipps Mill property. And since Realtor represented him as an agent for Realty Company, they both owed him fiduciary duties.

Realtor denies a fiduciary relationship with Wagner, arguing he was only the contracted selling agent for Wagner's Stable Springs home. He sold his Whipps Mill home as an individual owner and not as an agent. Realty Company agrees and maintains that Realtor was not acting as its agent when Realtor sold the Whipps Mill property "FSBO" (for sale by owner). Realty Company denies it was ever involved in the Whipps Mill transaction, and it did not receive a fee or commission for the sale.

There is further dispute as to the sale price of the Whipps Mill home. Wagner maintains he purchased the home for $300,000 and, after these funds were paid, Realtor demanded an additional $85,000 to satisfy his wife, who was apparently unhappy with the sales price. Wagner argues he was inexperienced in real estate and admits he paid the additional sum, but only because he was pressured by Realtor to do so. He relied on Wagner's experience and believed that the demand for additional funds was common practice.

Realtor maintains Wagner agreed to purchase the Whipps Mill property for $385,000. Realtor testified at his deposition that Wagner only had $300,000 cash at the time of the sale, so Wagner signed a promissory note purportedly for the purchase of Realtor's aunt's furniture and tools remaining on

the property for the additional $85,000. Once Wagner closed on his Stable Springs property, he paid Realtor the remainder of the sales price.

Our review of the record indicates the residential sales contract for the Whipps Mill property identifies the sale price as $300,000, and further states that any amendment to the contract must be in writing. Neither party has submitted proof that the sales price was amended in writing from $300,000 to $385,000 or specifying any division between the real and personal property involved. And the sale was ultimately recorded as $300,000.

In addition, the parties agree that the title company collected Wagner's personal check for $300,000 at the closing. Wagner paid the additional $85,000 in March after closing on his Stable Springs home. Realtor alone received these funds. Realty Company did not collect fees or commissions on either the initial $300,000 payment or the subsequent $85,000 payment. And there is no evidence that Realty Company collected a fee for insurance purposes, or obtained a copy of the transaction documents, as would be their normal practice when a sales agent sells his own property outside the scope of his employment as a realtor.

Wagner filed a Complaint against Realtor and Realty Company for Breach of Fiduciary Duty, Aiding and Abetting Breach of Fiduciary Duty, Void Transaction, Conversion, Civil Conspiracy, and Negligent Misrepresentation. The factual allegations of the Complaint stated that Wagner purchased the Whipps Mill

property from Realtor on information and belief the home belonged to Realtor's aunt. The home was sold to Wagner for $300,000 and Realtor subsequently demanded an additional $85,000. Wagner acquiesced and paid the additional funds. At clause 11, Wagner states "at all times . . . Walters was acting as an agent for Lenihan's Real Estate."

Wagner further stated that Realtor said the Whipps Mill property would be worth $485,000 after certain renovations. Wagner purchased the property, completed the renovations, but later sold the property at a loss of $35,000, not a gain of $100,000. Wagner maintains it was at this time he learned the sale price of the Whipps Mill property was recorded at $300,000, not $385,000, and that Realtor was the actual owner, not his aunt. Importantly, Realtor did not mention the Stable Springs property or the listing agreement executed between the parties.

Realty Company filed its Answer denying the claims and asserting various defenses. Then in mid-February 2025, Realtor filed a Motion to Dismiss pursuant to CR 12.02(f), for failure to state a claim. Realtor argued no fiduciary duty existed between himself and Wagner because the Whipps Mill property was sold FSBO, and, in Kentucky, property sales between private individuals are generally arms-length transactions which do not create a fiduciary relationship between buyer and seller. Realtor also relied on Wagner's admission, that he had

acquiesced to the additional purchase price of $85,000, as a bar to his claims for void transaction, conversion, and civil conspiracy. Finally, Realtor argued there could be no claim for negligent misrepresentation because Realtor could not be held liable for alleged future estimations of value resulting from later renovations performed by Wagner after the sale of the home.

It is important to note that shortly after the filing of the Complaint in January 2025, Wagner's original attorney suddenly became severely ill, was hospitalized in early February, and was eventually diagnosed with Burkitt's Lymphoma. Tragically, he died on March 21, 2025.[2]

In Wagner's Response to Realtor's Motion to Dismiss, filed by his new counsel, Wagner attached an affidavit wherein he clarified that he first hired Realtor as his selling agent on the Stable Springs property and that he believed Realtor continued in this agency role when he sold him the Whipps Mill property; that he was inexperienced in real estate and relied on Realtor's experience; that Realtor pressured him to quickly purchase the Whipps Mill property without first obtaining a professional home inspection; and pressured him to pay an additional $85,000 for the home. Wagner further stated after he purchased the Whipps Mill property he learned that Realtor owned it, not his aunt, and that the recorded purchase price was $300,000, not $385,000, which contradicted Realtor's claim

[2] Appellant's Brief, Appendix Tab 15: Wagner's 4/11/25 Motion to Reconsider at 1.

that Wagner owed him more money after the closing. Upon contacting the title company to obtain transaction records, Wagner was advised to consult with an attorney.

Wagner also swore that at no point in his professional relations with Realtor did Realtor disclose that the $85,000 payment he demanded was *not* part of the official Whipps Mill transaction *or* that Wagner was entitled to independent representation in the Whipps Mill transaction. Had Wagner known these material facts, he would not have proceeded with the purchase of the home and would not have paid the additional $85,000.

The circuit court granted Realtor's Motion to Dismiss because Wagner failed to allege the existence of a realtor relationship. The circuit court noted that Wagner had attached an affidavit to his Response and the affidavit contained allegations that, if proven, *could* entitle Wagner to relief under the Complaint. But the circuit court did not consider the affidavit for purposes of the CR 12.02(f) dismissal because it could not find authority which supported a *plaintiff's* use of an affidavit to convert a *defendant's* motion to dismiss under CR 12.02(f) into one for summary judgment.

While recognizing that CR 12.02 allows the court to consider matters outside the pleadings, the circuit court construed the language of CR 12.02 to limit these matters (affidavits, depositions, admissions, stipulations) to those matters

submitted only by the *defendant*. And because Wagner never alleged he had engaged Realtor as an agent in the facts of the Complaint itself, he failed to state a claim upon which relief could be granted. The circuit court then *sua sponte* dismissed the Complaint against Realty Company as well. The Order contained finality language.

Wagner filed a timely Motion for Relief. The circuit court denied the motion in part. The circuit court reviewed the caselaw presented by Wagner in his brief, but determined that a party, in responding to a Motion to Dismiss, cannot submit matters outside the pleadings to alter and amend what was contained in their original pleading. Because Wagner's affidavit alleged entirely new and different facts to what was alleged in his Complaint, and because the court lacked authority to consider the affidavit, the Complaint must be dismissed pursuant to CR 12.02(f).

The circuit court then noted that Realty Company did not file a Motion to Dismiss and did not join Realtor's motion, despite the Complaint failing to establish that Realty Company was involved in the Whipps Mill transaction. The circuit court determined it was error for it to dismiss the Complaint as to Realty Company absent its own Motion to Dismiss. The court then granted Wagner's Motion for Relief as to Realty Company only and vacated the finality language from its prior Order.

In June 2025, Wagner filed a Motion to Amend the Complaint as to Realty Company only, which the circuit court granted. The Amended Complaint asserted claims against Realty Company for Breach of Fiduciary Duty, Void Transaction, Conversion, and Negligent Misrepresentation. The factual allegations of the Amended Complaint included the information Wagner provided in the affidavit attached to his Response to Realtor's Motion to Dismiss. Wagner also alleged that, at all times during the listing and sale of his Stable Springs home, he believed Realtor was acting as a licensed agent employed by Realty Company; that they each owed him a fiduciary relationship due to the agency (or implied agency); that this duty included the duty to act with the utmost good faith and loyalty in all dealings; that they owed a duty to disclose all material facts within their knowledge that could influence Wagner's judgment; not conceal other relevant information which could influence Wagner's judgment; and a duty to exercise reasonable diligence, skill, and judgment in performing their duties, including obtaining the best possible price for him and ensuring his interests were protected.

Realty Company filed its Answer, and after Realtor was deposed in October 2025, Realty Company filed a Motion for Summary Judgment. In it, Realty Company argued it did not owe a fiduciary duty to Wagner in the Whipps Mill transaction because it was not involved in that transaction, it received no money for the sale, and it made no representations to Wagner related to the Whipps

Mill property. Realty Company relied on the language in the contract to demonstrate there was no reference to Realty Company whatsoever.

In response, Wagner argued the motion was premature as discovery was not yet complete and there were genuine issues of material fact concerning whether Realtor was acting as an agent of Realty Company at the time of the sale. Wagner also argued Realty Company failed to disclose its "lack" of involvement in the Whipps Mill sale, which occurred simultaneously with Realty Company's admitted involvement in the sale of Wagner's Stable Springs property. Wagner was a current "seller" client of Realty Company and could not have known that this relationship did not apply to him as a "buyer" client of the Whipps Mill property absent full disclosure and waiver.

Wagner attached to his Response a second affidavit swearing he hired Realtor as his agent to sell his home; that shortly thereafter Realtor showed him the Whipps Mill property, which he falsely represented as belonging to a family member; and that during each of these events he believed he was represented by Realty Company via their agent (Realtor).

The circuit court granted summary judgment in favor of Realty Company, concluding that Wagner's affidavit attached to his Response to the Motion for Summary Judgment made no mention of discovery, stated no reasons why he lacked sufficient facts to oppose the motion, and made no showing that

further discovery may be available to counteract the testimony offer by Realtor during his October deposition. In granting summary judgment, the circuit court "refrained from a lengthy analysis" and simply determined Realty Company's supporting memorandum and attached exhibits were persuasive.

Wagner filed a timely Motion to Alter, Amend, or Vacate the Order in favor of Realty Company, and to reinstate Realtor as a defendant in the case. The circuit court denied the motion. This appeal followed. All issues have been sufficiently preserved, and the parties' respective briefs are compliant with our Rules of Appellate Procedure.

STANDARD OF REVIEW

Wagner first challenges the circuit court's dismissal of the Complaint against Realtor pursuant to CR 12.02(f), which authorizes a court to dismiss a complaint or any part of it for failure to state a claim for which relief can be granted. For such a dismissal to be granted, it must appear to a certainty that the claimant "would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Ky. Jockey Club,* 551 S.W.2d 801, 803 (Ky. 1977) (citation omitted).

"Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no

deference to a trial court's determination; instead, an appellate court reviews the issue de novo." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)).

"CR 12.02 . . . require[s] that a motion in which matters outside the pleadings are considered is to be treated as a motion for summary judgment." *Cabinet for Human Resources v. Women's Health Services, Inc.*, 878 S.W.2d 806, 807 (Ky. App. 1994) (citing *Craft v. Simmons,* 777 S.W.2d 618 (Ky. App. 1989)). But a CR 12.02(f) motion is not automatically converted to a summary judgment motion simply because there are attachments to the motion or response. The trial court is not *required* to consider other matters outside the pleadings, but rather, has discretion to do so.

"Kentucky Rule of Civil Procedure (CR) 12.02 mandates that a motion to dismiss is converted to a motion for summary judgment if matters outside the pleadings are presented to, *and not excluded by, the circuit court*." *Schell v. Young*, 640 S.W.3d 24, 33 (Ky. App. 2021) (emphasis added). "A trial court is *free to consider matters* outside the pleadings; however, doing so converts the request for dismissal into a motion for summary judgment." *Middleton v. Sampey*, 522 S.W.3d 875, 878 (Ky. App. 2017) (citing CR 12.02; *McCray v. City of Lake Louisvilla*, 332 S.W.2d 837, 840 (Ky. 1960)) (emphasis added).

Wagner also challenges the circuit court Order of Summary Judgment in favor of Realty Company. "The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). "Summary judgment is appropriate where the movant shows that the adverse party could not prevail under any circumstances." *Id.* In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citation omitted).

ANALYSIS

Dismissal under CR 12.02(f)

In granting CR 12.02 dismissal of the Complaint against Realtor, the circuit court did not convert the motion to one for summary judgment because it *declined* to consider matters outside the pleadings. Rather, the circuit court failed to consider matters outside the pleadings (Wagner's affidavit) *because it believed it had no discretion to do so*. This was error.

CR 12.02 provides that, "if a motion to dismiss is made and matters outside the pleadings are presented, the motion shall be treated as one for summary

judgment with supporting affidavits. CR 56.02. *The rule does not require that the affidavit be that of the movant.*" *Johnson v. Lohre*, 508 S.W.2d 785, 788 (Ky. App. 1974), *overruled on other grounds by Brooks v. Burkeen*, 549 S.W.2d 91 (Ky. 1977) (emphasis added). *See also Schell*, 640 S.W.3d at 33 ("Conversion from a motion to dismiss to a motion for summary judgment occurs *even if the extraneous matters are submitted by the non-moving party.*") (emphasis added).

While we cannot instruct the circuit court to consider Wagner's affidavit and thereby convert the dismissal motion to one for summary judgment (because this is a matter of trial court discretion), we note the circuit court indicated in its decision that Wagner's affidavit raised sufficient facts that could overcome dismissal of the Complaint. We agree. And our own de novo review of the record indicates there were sufficient allegations to overcome CR 12.02 dismissal of some claims even without consideration of the affidavit.

In reviewing each claim asserted in the Complaint to determine whether Wagner stated a claim upon which relief may be granted, we are guided by the principles set forth by the Kentucky Supreme Court in *Russell v. Johnson & Johnson, Inc.*, 610 S.W.3d 233, 240–41 (Ky. 2020):

> 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) (citing *Hoke v. Cullinan*, 914 S.W.2d 335, 339 (Ky. 1995)). In accordance with Kentucky Civil Rule 8.01(1), "[a] pleading which sets forth a claim for

> relief . . . shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled." As interpreted by this Court, "[i]t 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 Fraternal Order of Eagles v. Carneyhan*, 169 S.W. 3d 840, 844 (Ky. 2005) (citing *Cincinnati, Newport, & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. 1962)).
>
> Importantly, "[w]e 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). When reviewing a complaint to determine whether it states a cause of action, it "should be liberally construed." *Morgan v. O'Neil*, 652 S.W.2d 83, 85 (Ky. 1983). Our liberal pleading standard was recently demonstrated when we held that a complaint "couched in general and conclusory terms, complied with CR 8.01(1)." *KentuckyOne Health, Inc. v. Reid*, 522 S.W.3d 193, 197 (Ky. 2017).

Count 1 of the Complaint was a claim for Breach of Fiduciary Duty. It incorporated by reference all previous allegations, that Wagner purchased the Whipps Mill property from Realtor for $300,000 believing the property belonged to Realtor's aunt (when in fact it was Realtor's own property); that Realtor subsequently demanded an additional $85,000, which Wagner paid (believing he was required to do so when he was not); and that *when the purchase was made Wagner believed Realtor was acting as an agent for Realty Company*. This statement alone is enough to support a claim that a fiduciary relationship existed

between Wagner and Realtor because real estate brokers owe duties to the public in general.

In *Waldridge v. Homeservices of Kentucky, Inc*., 384 S.W.3d 165, 173 (Ky. App. 2011), we clarified that real estate brokers owe duties to the public in general and not simply to their principals. There, we relied on the reasoning of *Givan v. Aldemeyer/Stegman/ Kaiser, Inc. (Ask Realty)*, 788 S.W.2d 503 (Ky. App. 1990), that the "National Association of Realtors Code of Ethics contains 24 Articles outlining the duties of realtors in general terms. Article 7 requires that the realtor treat fairly all parties to the transaction." *Id.* at 505. The *Givan* Court concluded that brokers are professionals with the duty to adhere to the legal obligation of honesty, candor, and fair dealing "to all those with whom they deal, even in the absence of an express principal/agency relationship." *Id.*

In *Waldridge*, we reaffirmed the holding in *Givan.* "Under Kentucky's Real Estate Brokers and Salesman License Act, *even absent an agency relationship*, real estate brokers and agents occupy a position of trust and owe a duty to exercise good faith." *Waldridge*, 384 S.W.3d at 173 (emphasis added).

In addition, KRS[3] 324.160(4)(e)3. provides that, "Before a licensee sells, or receives compensation for property *in which the licensee owns an interest*, the licensee shall disclose, in writing, any interest in the property to all parties to

[3] Kentucky Revised Statutes.

the transaction[.]" Here, Wagner alleges Realtor failed to disclose his ownership interest in the Whipps Mill property, representing the home was owned by his aunt (who had gone into assisted living). And this is enough to survive a Motion to Dismiss under CR 12.02(f).

Realtor argues that the FSBO language in the contract is sufficient, written, disclosure of his personal interest in the property, and sufficient notice the property was being sold by him as an individual owner and not as a real estate agent. We disagree.

The contract[4] describes "Listing Company" at line 13 as FSBO and "Selling Company" at line 17 as FSBO. To clarify he was not selling the property as an agent, but rather as a private individual, Realtor could have crossed out the Listing/Selling Company language and wrote in "private sale." To complicate matters further, line 17 lists "Agent Name/License #" as Rick Walters #170792, which in no way clarifies he was selling the home as a non-agent. And at line 17 he lists his cell number under "Agent Telephone Number" but lists the same cell number he uses both personally *and* professionally. While Realtor lists his personal email address, at line 330 he makes the following statement: "Rick Walters is a real estate agent in Kentucky." It is unclear whether Realtor sold this

[4] Trial Record (TR), Volume I, p. 22-28; Appellant's Brief, Appendix Tab 9.

property for his aunt as a straw man,[5] or for himself as an owner in his individual capacity, or in his capacity as a real estate agent. The language of the Whipps Mill sales contract is thus insufficient to support Realtor's argument.

Further, Realtor admitted he was a licensed real estate broker when he sold his property to Wagner. And as a licensed real estate broker, Realtor was in a position of trust and owed a duty to Wagner to exercise good faith in the Whipps Mill transaction. Wagner claims Realtor breached this duty, not only by failing to disclose his ownership interest in the property but also by demanding additional funds for the sale of the home after the contract was executed. And these allegations, if proven at trial, would support a claim for breach of a fiduciary duty.

In addition, in both the Response to the Motion to Dismiss, as well as the attached affidavit, Wagner clarified that he initially hired Realtor to sell his home on Stable Springs and was thus *already a client* of Realty Company before he ever viewed or decided to purchase the Whipps Mills property. This factual allegation further supports the claim that a fiduciary relationship existed between the parties.

"Because of the contractual relations between a real estate broker and his principal, '(a)n obligation of mutual good faith and fair dealing is imposed by

[5] "The straw man simply acts as an intermediary title holder, and it is never intended that he obtain any lasting rights to the property." *Littleton v. Plybon*, 395 S.W.3d 505, 507 (Ky. App. 2012).

law[.]'" *Crabtree v. Bd. of Trs. of Immanuel Baptist Church*, 512 S.W.2d 311, 313 (Ky. 1974) (citing *Odem Realty Co. v. Dyer*, 45 S.W.2d 838 (Ky. 1932)). *See also* our non-binding, unpublished decision in *Jaffee v. Davis*, No. 2001-CA-000817-MR, 2003 WL 2002783, at *5 (Ky. App. May 2, 2003), relying on established precedent in *Odem*, *supra*, wherein we stated "Kentucky law is clear that contractual relations between a real estate broker and his principal impose an obligation of mutual good faith and fair dealing. This fiduciary duty is imposed by law, not by the terms of the contract." (Citation omitted.)

Wagner asserted Realtor had a fiduciary relationship with him; that he breached that duty; and that he suffered damages as a result. The complaint thus alleges "the basic elements of a breach-of-fiduciary-duty cause of action: (1) the existence of a fiduciary duty; (2) the breach of that duty; (3) injury; and (4) causation." *Baptist Physicians Lexington, Inc. v. New Lexington Clinic, P.S.C.*, 436 S.W.3d 189, 193 (Ky. 2013), *as modified* (Feb. 20, 2014). The Complaint gives fair notice and identifies the claim. The dismissal under CR 12.02(f) was improper.

Likewise, Count 2 of the Complaint, Aiding and Abetting a Breach of Fiduciary Duty, alleged Realtor and Realty Company knew that the conduct in question (demanding additional funds after the sale of the Whipps Mill home) breached a fiduciary duty to him, and they assisted each other in effectuating this

breach. To prevail on such a claim, "a plaintiff must prove the following elements: (1) the existence and breach of a fiduciary relationship; (2) the defendant gave the breaching party 'substantial assistance or encouragement' in effectuating the breach; and (3) the defendant knew that the party's conduct breached that fiduciary duty." *Insight Kentucky Partners II, L.P. v. Preferred Auto. Servs., Inc.*, 514 S.W.3d 537, 546 (Ky. App. 2016) (citing *Miles Farm Supply, LLC v. Helena Chem. Co.*, 595 F.3d 663, 666 (6th Cir. 2010)) (citations omitted) (applying Kentucky law). And although Realtor and Realty Company each dispute this allegation, the factual assertions in the Complaint are sufficient to overcome CR 12.02 dismissal.

Count 3 of the Complaint was a claim for Void Transaction and asserted the total purchase price Wagner was obligated to pay under the contract was $300,000; that the second payment of $85,000 was not a contractual obligation and was unsupported by consideration; and failed to comply with KRS 371.010, the Statute of Frauds, which requires such contracts to be in writing. These factual allegations put Realtor and Realty Company on fair notice of the claim and are sufficient to overcome CR 12.02 dismissal.

Count 4 of the Complaint was a claim for Conversion. "[C]onversion is essentially a tort action, but the tort may be waived in favor of a contract action[.]" *See State Auto. Mutual Ins. Co. v. Chrysler Credit Corp.*, 792 S.W.2d

626, 627 (Ky. App. 1990) (citation omitted). Conversion involves "the wrongful exercise of dominion and control over [the] property of another." *Id*.

> The elements of a Conversion claim consist of the following:
>
> (1) the plaintiff had legal title to the converted property;
>
> (2) the plaintiff had possession of the property or the right to possess it at the time of the conversion;
>
> (3) the defendant exercised dominion over the property in a manner which denied the plaintiff's rights to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment;
>
> (4) the defendant intended to interfere with the plaintiff's possession;
>
> (5) the plaintiff made some demand for the property's return which the defendant refused;
>
> (6) the defendant's act was the legal cause of the plaintiff's loss of the property; and
>
> (7) the plaintiff suffered damage by the loss of the property.

Kentucky Ass'n of Counties All Lines Fund Trust v. McClendon, 157 S.W.3d 626, 632 n.12 (Ky. 2005) (quoting 90 C.J.S. *Trover and Conversion* § 4 (2004)); *see also Meade v. Richardson Fuel, Inc.*, 166 S.W.3d 55, 58 (Ky. App. 2005).

Here, Wagner asserted that both Realtor and Realty Company exercised dominion over the $85,000 paid directly to Realtor; that the transaction was void; that Wagner had legal title to that property; that he had a right to possess

those specific funds at the time of the conversion; that one or both defendants intended to interfere with Wagner's possession; and that Wagner suffered damages by loss of the property.

Realtor disputes the claim that he had no right to possess the additional funds, and Realty Company maintains it never received any part of these funds. While they may be able to prove these contentions at trial, our review concerns the sufficiency of the pleadings. And the Complaint sufficiently alleges facts to overcome dismissal under CR 12.02(f).

Count 5 of the Complaint was a claim for Civil Conspiracy. "In order to prevail on a claim of civil conspiracy, the proponent must show an unlawful/corrupt combination or agreement between the alleged conspirators to do by some concerted action an unlawful act." *Peoples Bank of N. Kentucky, Inc. v. Crowe Chizek & Co. LLC*, 277 S.W.3d 255, 261 (Ky. App. 2008) (citation omitted).

In *Farmer v. City of Newport*, 748 S.W.2d 162, 164 (Ky. App. 1988), this Court referenced the *Restatement (Second) of Torts* § 876 (1979), relative to "concert of action":

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct

> himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct separately considered, constitutes a breach of duty to the third person.

Here, Wagner alleged Realtor and Realty Company knew the conduct of the other constituted a breach of duty, and they gave substantial assistance or encouragement to the other in accomplishing a tortious result (conversion) while their own conduct, separately considered, constituted a breach of duty to Wagner. This statement, in conjunction with the factual allegations concerning the sales price, alleged misrepresentation of the ownership of the Whipps Mill property, and breach of fiduciary duty while Realtor was employed by Realty Company, is enough to overcome CR 12.02 dismissal.

Finally, Count 6 of the Complaint was a claim for Negligent Misrepresentation. The Kentucky Supreme Court in *Presnell Construction Managers, Inc. v. EH Construction, LLC*, 134 S.W.3d 575, 580 (Ky. 2004), adopted the *Restatement (Second) of Torts* § 552, which outlines the elements of negligent misrepresentation as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Here, Wagner asserted that Realtor and Realty Company negligently misrepresented the home's value to him; that he was justified in relying on those misrepresentations; and that he suffered losses as a result. But Realtor's statement that the home would be worth $485,000 with certain improvements, if true, is nothing more than "sales talk" which is a common sales practice.

"Actionable misrepresentation must relate to a past or present material fact which is likely to affect the conduct of a reasonable man and be an inducement of the contract. A mere statement of opinion or prediction may not be the basis of an action. The representation must be short of a warranty but sufficient to deceive and to create in the mind a distinct representation of a fact." *McHargue v. Fayette Coal & Feed Co.*, 283 S.W.2d 170, 172 (Ky. 1955) (citations omitted).

The basis of Wagner's claim for negligent misrepresentation is that he bought the property because he believed Realtor's opinion about potential future profits. But statements about future equity after renovating or updating a home are simply not actionable, particularly when Realtor did not take part in the renovations himself. Wagner has thus failed to plead facts sufficient to support a claim for negligent misrepresentation. CR 12.02(f) dismissal of this claim was proper.

Our decision herein renders moot Wagner's argument that the circuit court erred in refusing to allow him to amend the Complaint against Realtor. But we note the record does not indicate Wagner ever requested leave to amend this Complaint under CR 15, and there is no authority to support Wagner's argument that the circuit court should have *sua sponte* demanded a "more definitive statement" in lieu of dismissing an otherwise deficiently pleaded Complaint. Questions of amendment may be revisited on remand.

Summary Judgment

Count 1 of the Amended Complaint against Realty Company was a claim for Breach of Fiduciary Duty. As we have already discussed, Wagner asserted sufficient facts in the Complaint against Realtor to establish the existence of a fiduciary relationship. And the factual allegations of the Amended Complaint against Realty Company are even more persuasive.

Wagner alleged that Realty Company's sales agent (Realtor) came to his home for the purpose of advising him on the sale of his Stable Springs property. Realtor provided guidance to Wagner on preparing the house for sale, proposed a listing price, and explained the marketing process, all under Realty Company's banner. Later, when Realtor sold Wagner the Whipps Mill property, Realty Company failed to disclose he was entitled to independent representation on this transaction and failed to disclose he was not required to pay the additional $85,000.

In its Motion for Summary Judgment, Realty Company argued there was no genuine issue of fact concerning the existence of a fiduciary duty because the Whipps Mill property was sold by Realtor as an individual owner and not as an agent. Realty Company thus argues it owed no fiduciary duty to Wagner.

In his Response to the Motion for Summary Judgment, Wagner attached as Exhibit 1 the deposition of Realtor. During this testimony, Realtor stated that at the time of the sale of the Whipps Mill property, he actively represented Wagner as a seller of the Stable Springs home, and he acknowledged that he owed a fiduciary duty to such clients. He also agreed that, as a real estate agent in the transaction concerning the Stable Springs home, he had a duty to guide and protect Wagner's best interest, and that during this time he was acting as an agent of Realty Company.

While Realty Company strenuously argues that the sale of the Whipps Mill property was a private sale which did not give rise to a fiduciary relationship, Wagner is correct in his argument that Realty Company ignores the elephant in the room: Wagner was already a client. Wagner did not contend that a fiduciary duty derived from his position as a *buyer* of the Whipps Mill property, but as a *seller* who had already contracted with Realty Company's agent to effectuate the sale of his Stable Springs home. And Realty Company was responsible for the actions of its agent. Realtor was a real estate sales associate licensed under KRS 324.046 and "affiliated with a Kentucky-licensed principal broker and who, when engaging in real estate brokerage, does so under the supervision of the principal broker[.]" KRS 324.010(6).

There is a factual dispute whether Realtor disclosed his actual ownership interest in the Whipps Mill property before selling it to Realty Company's client. There is also no proof in the record, or even a suggestion of proof, that Realtor or Realty Company disclosed, in writing, that the agency relationship with Wagner was limited to the Stable Springs transaction only. At trial, Realty Company may be able to produce evidence of a written disclosure clarifying the agency relationship that existed between the parties, but the language of the Whipps Mill sales contract alone is insufficient to resolve this issue of fact.

"Whether a fiduciary duty exists by virtue of the relationship between various actors is generally a question of law for the courts to decide as it essentially involves a policy determination. If a fiduciary relationship does exist between the parties, the question of whether one party breached that duty is one of fact." *Scott v. Forcht Bank, NA*, 521 S.W.3d 591, 597 (Ky. App. 2017) (citations omitted). And here, the question of whether Realty Company breached its duty to Wagner is a question for the jury. Summary judgment was improper.

Summary judgment was also improper on the void transaction and conversion claims. Whether Realty Company knew or should have known that Realtor misrepresented the actual sale price of the Whipps Mill home and wrongfully collected an additional $85,000 for the sale *after* the closing and without written amendment of the sales contract, is an issue of fact to be resolved by a jury. *See Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003) (citation omitted) ("Breach and injury[] are questions of fact for the jury to decide.").

The negligent misrepresentation claim fails against Realty Company for the same reasons it fails against Realtor. Future predictions of a property's value after renovations are not actionable. Summary judgment as to this claim was proper.

Although our decision herein renders moot Wagner's argument that summary judgment was erroneous because discovery was not yet complete, we

note the limited time the case was pending for discovery purposes. The Complaint was filed in January 2025 and dismissed four months later in April 2025. During this time, Wagner's trial counsel passed away suddenly, and Wagner had to retain new counsel.

Then, upon consideration of Wagner's Motion for Relief, the Complaint was reinstated (and later Amended) as against Realty Company in June 2025. The Amended Complaint was dismissed four months later after the parties had completed only one deposition.

"[S]ummary judgment may not properly be entered before the respondent has had an opportunity to complete discovery . . . . It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so." *Hartford Ins. Grp. v. Citizens Fid. Bank & Tr. Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979) (citations omitted). And here, we cannot say Wagner had sufficient opportunity to engage in discovery.

CONCLUSION

Finding the Complaint against Appellee Rick Walters asserted facts which, if proven, would entitle Wagner to relief on all claims except negligent misrepresentation; and further finding genuine issues of material fact which bar summary judgment for Appellee Realty Company as to all claims except negligent

misrepresentation, the Orders of the Jefferson Circuit Court are affirmed in part, reversed in part, and remanded for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Alex R. White
Brenton D. Stanley
Louisville, Kentucky

BRIEF FOR APPELLEE LENIHAN REAL ESTATE LLCS:

Michael B. Dailey
Jennings D. Kleeman
Louisville, Kentucky

BRIEF FOR APPELLEE RICK WALTERS:

Cynthia L. Effinger
Louisville, Kentucky