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DEBBIE GODWIN

vs.

FACEBOOK, INC. ET AL.

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Judge:

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Case No. CA-19-109203

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

DEBBIE GODWIN

Plaintiff-Appellant

vs.

FACEBOOK, INC. et al

Defendants-Appellees.

Appeal from the Court of Common Pleas
Cuyahoga County, Ohio
Case No. CV-18-891841
Judge Timothy McCormick

BRIEF OF PLAINTIFF-APPELLANT DEBBIE GODWIN, EXECUTRIX OF THE ESTATE OF ROBERT GODWIN, SR.

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ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

I. The trial court erred as a matter of law in dismissing at the liberal initial pleading stage each of Plaintiff's claims against the Facebook Defendants.

II. The trial court erred as a matter of law in dismissing Plaintiff's claims for common law negligence (Count One) and wrongful death (Count Four) because Plaintiff alleged sufficient facts of a special relationship between the Facebook Defendants and Defendant Stephens to establish a duty to warn and/or to prevent harm to third parties.

III. The trial court erred as a matter of law in dismissing at the liberal initial pleading stage Plaintiff's statutory claims for civil recovery for a criminal act under R.C. 2909.23 (Count Two), and for statutory negligence/failure to warn in contravention of R.C. 2921.22 (Count Three).

IV. The trial court erred as a matter of law in finding that Facebook is immune from suit under the Communications Decency Act, 47 U.S.C. 230(c) ("CDA").

V. The trial court committed reversible error by quashing the subpoena to Facebook.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Godwin sufficiently alleged the required elements of a special relationship between Facebook and its users, including sufficient detail concerning Facebook's ability to control or manipulate user behavior, to survive a motion to dismiss under Ohio's liberal pleading standards. (Assignments of Error I and II.)

2. Whether the trial court erred by prematurely deciding whether a special relationship exists between Facebook and its users without a fully developed factual record. (Assignments of Error I and II.)

3. Whether public policy favors recognizing a duty by social media networks to warn of credible threats of violence made online or that become known through its own data mining practices, especially where the online social media platform already uses artificial intelligence and algorithms to identify such threats. (Assignments of Error I and II.)

4. Whether the making of a "dead serious" threat to do "some murder shit" that is posted online on Facebook would cause fear or intimidation of a reasonable person, and therefore qualify as a "terroristic threat" under R.C. 2909.23. (Assignments of Error I and III.)

5. Whether each of the claims in the Complaint seeks to hold Facebook liable as a "publisher" under the CDA, even though Godwin's allegations disclaim any such intention to impose publisher liability. (Assignment of Error IV.)

6. Whether the personal representative of Stephens' estate can provide "lawful consent" for the disclosure of Stephens' Facebook account on Stephens' behalf following his death. (Assignment of Error V.)

INTRODUCTION

Robert Godwin, Sr., was murdered on Easter Sunday in April 2017 on a Cleveland street while on a Sunday stroll. His killer, Steve Stephens, posted an intimidating and terrorizing warning message on Facebook preceding the killing:

> FB my life for the pass year has really been fuck up!!! [sic] lost everything ever had due to gambling at the Cleveland Jack casino and Erie casino…I not going to go into details [sic] but I'm at my breaking point I'm really on some murder shit…FB you have 4 minutes to tell me why I shouldn't be on deathrow!!!! dead serious #teamdeathrow.

The Facebook Defendants sat on their hands after learning of this "dead serious" and credible threat of violence. They did nothing despite knowledge gleaned from the intimidating post and from their special relationship with Stephens. This special relationship was developed over years through the Facebook Defendants' sophisticated data mining and data collection activities targeted at unsuspecting users of the Facebook platform while online and offline, including knowledge of (1) Stephens' ownership and use of firearms, (2) his precise location when the murder threat was made, (3) his unwillingness to wait any longer for a response from Facebook before unleashing his criminal activity, and (4) far, far more intimate details about Stephens' behaviors, intentions, likes, dislikes, tendencies, and activities (much of which Plaintiff was precluded from showing because she was refused discovery into Stephens' Facebook account and Facebook's data collection practices). Had the Facebook Defendants honored their legal (and moral) duty to prevent harm given the special relationship they enjoyed with Stephens and alerted law enforcement instead of sitting on their hands on that fateful Sunday, this "Easter Day slaughter" (as Stephens called it) could have been avoided.

Ohio courts have long been at the forefront of developing the common law. This appeal presents another opportunity to do so. The main question posed by this appeal is straightforward

and one with far-reaching implications: do Ohio courts want to take the lead in the development of the common law and recognize a duty to warn of impending threats of concrete harm on a social media business that collects, analyzes, and sells personal information about its users, including when it knows that some "murder shit" is about to take place? Because social media and data mining behemoths like Facebook have both the knowledge and the tools in place to reduce the likelihood of a specific and concrete online threat made on their virtual reality business premises from becoming a real-world harm, the answer should be "yes."

The secondary and related question posed by this appeal is equally important: whether a social media entity like Facebook is entitled to broad immunity from suit under the Communications Decency Act, 47 U.S.C. 230(c), such that it will never have to answer for state-law based claims that only tangentially involve social media posts made on the Internet? This secondary question should be answered "no."

STATEMENT OF THE CASE AND FACTS

A. The Parties

Plaintiff Debbie Godwin is the executrix of the estate of her late father, Robert Godwin Sr. Plaintiff seeks redress for her father's death and cold-blooded murder on April 16, 2017. (Complaint, ¶10.) Godwin's killer, Steve Stephens, died two days later of a self-inflicted gunshot wound, and Stephens's estate is a nominal defendant to this action. (*Id.* at ¶¶ 9, 16.)

Defendant Facebook, Inc. is an online social networking service that also operates "a separate and distinct business – a business that focuses on the collection, analysis, use, exploitation and/or sale of information." (*Id.* at ¶2.) It is this separate data collection and data mining business "that creates a special relationship between Facebook and its users and, in turn, a duty of care." (*Id.*)

Facebook also employs a network of subsidiary entities to develop and execute its data collection and data mining activities, including through Defendants Facebook Payments, Inc., Facebook Services, Inc., Atlas Solutions, LLC, and CrowdTangle, Inc. (collectively, the "Facebook Defendants") (*Id.* at ¶¶4, 12-15.) Each of the Facebook subsidiary entities is alleged to have provided material support and assistance to Facebook in connection with its separate data collection and data mining business activities at the heart of this lawsuit. (*Id.*)

B. The Lawsuit and Claims Asserted

The tragic events giving rise to this suit occurred on Easter Sunday 2017 when Steve Stephens shot and killed Robert Godwin. (*Id.* at ¶¶ 68-78.) Before the murder, Stephens posted a warning message on his Facebook page in which he proclaimed to Facebook and his Facebook audience that "I'm at my breaking point" and "I'm really on some murder shit." (*Id.*, ¶ 68.) Stephens also implored Facebook to intercede, warning that "you have 4 minutes to tell me why I shouldn't be on death row" and reiterating the "dead serious" nature of his murderous threat. (*Id.*) Although there was sufficient time to alert law enforcement and for authorities to intercede in time to prevent the subsequent killing of Godwin from taking place, the Facebook Defendants took no action in response to the information they collected. (*Id.*, ¶¶ 69-75.) Godwin alleges that her father's tragic death could have been avoided had the Facebook Defendants, armed with a special relationship with the killer, said something or done something before it unfolded. Plaintiff's lawsuit therefore asserts five causes of action: (1) common law negligence/failure to warn, (2) civil recovery for a criminal act, (3) statutory negligence/failure to warn in violation of R.C. 2921.22, (4) wrongful death, and (5) survivorship.[1]

[1] Counts One through Three of the Complaint are against the Facebook Defendants only. (Complaint, ¶¶ 81-106). Count Four [*Id.*, ¶¶ 107-110] and Count Five [*Id.*, ¶¶ 111-115] are against all Defendants, including the Facebook Defendants and Stephens' estate.

C. The Complaint's Detailed Allegations of a Special Relationship Extend Far Beyond Ohio's Liberal Pleading Requirements

Plaintiff's Complaint painstakingly details each of the elements necessary to state a claim under Ohio law for each of her five causes of action. Although not required by Civ.R. 8(A), it lays out significant detail concerning the nature and extent of Facebook's special relationship with Stephens. For instance, Godwin alleges that the Facebook Defendants had a complete and holistic picture of Stephens developed over an extended period of time, including extensive knowledge and information about Stephens' behaviors, intentions, tendencies, likes, and dislikes. (*Id.*, ¶61.) Even without the benefit of post-suit discovery, the Complaint contains detailed allegations concerning Facebook's knowledge of the threat that Stephens posed based on its special relationship with him. (*Id.*, ¶¶ 69-75). Facebook is alleged to have known about Stephens' precise locations on the date of the murder, his ownership and use of firearms, his threats to commit random acts of murder, and his unwillingness to wait any longer for a response from Facebook before commencing his criminal activity. (*Id.*) As the totality of Plaintiff's allegations make clear, Facebook's notice and knowledge of the danger posed by Stephens extended far beyond a single post on Easter Sunday.

The Complaint goes even further and details far more about the intimate knowledge that Facebook possesses about users such as Stephens through its extensive data mining practices. Godwin specifically alleges that Facebook collects and analyzes information about their users' emotional states [*Id.*, ¶27], precise location [*Id.*, ¶31], internet sites and third-party mobile applications visited away from Facebook [*Id.*, ¶32], offline activities (including tracking purchases made offline) [*Id.*, ¶33], things shared between users such as messages and photos [*Id.*, ¶25], and that Facebook uses the information and data collected to make inferences and predictions about behavior away from its platform [*Id.*, ¶¶38, 40]. This wealth of information and

data is used by Facebook to predict and even manipulate the moods of their users such as Stephens – indeed, the very ability to control and influence behavior. (*Id.* ¶40.) These same data mining practices and capabilities allow Facebook to specifically target and find people, both quickly and in an emergency. (*Id.*, ¶¶48, 62.)

Because of this unfettered access to personal information that Facebook demands and obtains from its users, Plaintiff alleges a special relationship exists between Facebook and users like Stephens. (*Id.*, ¶¶2, 7, 36, 61, 79, 82, 85). In turn, Facebook admits having a duty to prevent harm and keep people safe, including the "duty to notify and to work with law enforcement when there is a genuine risk of physical harm or threats to public safety." (*Id.*, ¶¶ 61-64.)

D. The Facebook Defendants Move to Dismiss

The Facebook Defendants moved to dismiss Godwin's claims against them for lack of personal jurisdiction under Civ.R. 12(B)(2) and for failure to state a claim on which relief can be granted under Civ.R. 12(B)(6). They advanced a three-prong attack: (1) absence of personal jurisdiction due to insufficient contacts (Motion to dismiss at 4-6); (2) immunity under the CDA, primarily because the Complaint supposedly seeks to hold Facebook liable as a "publisher" or "speaker" of Stephens' threatening post (Motion to dismiss at 6-16); and, (3) failure to state any actionable claims under state law (Motion to dismiss at 16-26).

E. Plaintiff's Opposition to the Motion to Dismiss

Plaintiff opposed the motion to dismiss and made four major counter-arguments. First, Godwin asserted that personal jurisdiction is proper because the Facebook Defendants purposefully avail themselves of the privileges of acting in Ohio via their extensive data collection and data mining activities. (Brief in opposition at 11-18.) Second, Godwin argued that the Facebook Defendants are not entitled to immunity under the CDA for three separate reasons:

(i) the Facebook subsidiary defendants do not meet the statutory definition of an "interactive computer service" for CDA immunity purposes, (ii) the Complaint expressly disavows any attempt to hold them liable in any "speaker" or "publisher" capacity, and, (iii) Facebook is not entitled to immunity because it also serves as an "information content provider" under the CDA through its data collection and data mining activities. (Brief in opposition at 20–29.)

Third, in response to the attacks on her common law negligence-based claims, Plaintiff argued that she adequately stated a claim under Ohio's liberal pleading standards for negligence/failure to warn. (Brief in opposition at 29–38.) In defending the Complaint's adequacy, Godwin urged the trial court to avoid prematurely deciding mixed questions of fact and law, or even purely legal ones, involving the intersecting duty of care, special relationship, foreseeability, and causation issues without a fully-developed factual record. (*Id.* at 31-32, 36.) She also asserted having sufficiently pled the elements necessary to state a prima facie claim of negligence. (*Id.* at 32-36.) Godwin also advanced public policy considerations for recognizing a duty to warn under the particular circumstances of her case. (*Id.* at 36-38).

Fourth, Godwin argued that she alleged sufficient facts to support her statutory claims. (*Id.* at 38-40.) Once again, she emphasized that the crux of the attack levied by the Facebook Defendants involved disputed factual issues (i.e., whether a threat to do some "murder shit" was intimidating or not) that are inappropriate for resolution at the initial pleading stages. (*Id.* at 39.)

F. The Trial Court Dismisses Plaintiff's Claims Against the Facebook Defendants

On October 5, 2018, the trial court issued a journal entry granting the Facebook Defendants motion to dismiss under Civ. R. 12(B), but without any determination of no just cause for delay given Plaintiff's claims against the Stephens estate remained pending. (October 5, 2018 Journal Entry.) The trial court found that it had specific personal jurisdiction over the

Facebook Defendants, and therefore, it denied the motion to dismiss under Rule 12(B)(2). (October 5, 2018 Opinion and Order ["Order"], at 12). On the merits, the trial court granted the motion to dismiss for failure to state a claim and dismissed with prejudice each of Plaintiff's claims against the Facebook Defendants. (Order at 36.)

Despite Godwin's disclaimers that she is not seeking to hold the Facebook Defendants responsible in any publisher capacity, the trial court concluded that Facebook qualifies as a publisher under Section 230. (*Id.* at 24.) The trial court likewise rejected the notion that Facebook's development of information that it obtains from its users through its data mining activities renders it an information content provider under the CDA. (*Id.* at 26.) Consequently, the trial court found that Facebook is entitled to immunity under the CDA. (*Id.* at 27.)

However, because each of the Facebook subsidiaries did not satisfy the statutory definition of an "interactive computer service," they did not qualify for CDA immunity. (*Id.* at 16-17, 27.) Thus, the trial court preceded to determine whether the Complaint stated a claim against the Facebook subsidiary defendants under Ohio law. Ultimately, the trial court held that Plaintiff's negligence claims and related statutory claims failed as a matter of law. (*Id.* at 36.)

As to the common law negligence claim, the trial court observed that "there is generally no duty to prevent a third person from harming another" even when a harmful event may be foreseeable. (*Id.* at 27). After reciting the general "no duty to control" rule, the trial court acknowledged the "special relationship" exception to it and noted the Ohio Supreme Court has "set out a middle path for analyzing questions of control." (*Id.* at 28, citing *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St. 3d 284, 1997-Ohio-194, 673 N.E.2d 131 ["*Morgan*"].) The trial court also noted that *Morgan* specifically rejected the "myopic" view of some courts that control is limited to "actual constraint or confinement." (*Id.*) Rather, *Morgan*

embraced the modern view that "there will be diverse levels of control which give rise to corresponding degrees of responsibility." (*Id.* at 29.)

Despite paying lip service to the "middle path" and "diverse levels of control" observations made in *Morgan*, the trial court determined that Godwin failed to state a claim based on the breach of a duty to warn, ostensibly because of the "absence of allegations of specialized knowledge [by Facebook] or a meaningful ability to control Stephens." (*Id.* at 31.) In so finding, the trial court gave far greater weight to the myopic concept of "'control' over Stephens' person," i.e., one requiring physical constraint or physical control over Stephen's movements, while discounting Godwin's more modern and diverse concept of control like that represented by Facebook's data mining activities and manipulation of user behavior. (*Id.* at 29.)

The trial court also refused to recognize a duty to warn on public policy grounds. (*Id.* at 31.) While acknowledging the flexible nature of the common law to keep up with the "ever-changing needs of a modern society," the trial court refused to "stray from precedent of the Ohio Supreme Court" to recognize a special relationship between the Facebook Defendants and users of the Facebook platform. (*Id.*) And, even if it were appropriate to reevaluate whether a special relationship existed in such circumstances, the trial court questioned the efficacy of a "vague and general warning to users and law enforcement about vague potential harms." (*Id.* at 32.)

As to the statutory claims for failure to report a threatened felony, the trial court focused solely on whether Stephens' threatening post to do "some murder shit" and "why I shouldn't be on deathrow" qualifies as a terroristic threat under R.C. 2909.23. According to the trial court, "intending to do some 'murder shit' is not the same as intending to intimidate a civilian population." (*Id.* at 34.) The trial court further determined that the Complaint failed to allege any facts demonstrating that the post created a reasonable expectation or fear of the imminent

commission of the specified offense under R.C. 2909.23(A)(2). (*Id.* at 35.) Thus, the trial court dismissed the statutory claims, Counts Two and Three, with prejudice as well. (*Id.*)

G. The Trial Court Grants Facebook's Motion to Quash

With claims still pending against Stephens' estate, Godwin issued a subpoena to Facebook seeking, among other things, the content of Stephens' Facebook account. Facebook moved to quash on the basis that Stephens had not consented to the disclosure, and thus, Facebook was precluded from complying with it. (R.72) On June 26, 2019, the trial court issued a decision, granting Facebook's motion to quash, without opinion. (R. 75).

On November 8. 2019, the remaining parties entered into a Joint Motion for Stipulated Order Pursuant to Civ. R. 54(B), which was granted that same day thereby terminating the litigation. On November 14, 2019, Plaintiff timely filed her appeal of the trial court's orders.

STANDARD OF REVIEW

This Court employs a de novo standard of review when reviewing a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Perrysburg Twp. v. Rossford,* 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5. When reviewing a Civ.R. 12(B)(6) motion to dismiss, this Court must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Johnson v. Microsoft Corp.,* 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 6. For a defendant to prevail on the motion, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a court in granting relief. *O'Brien v. Univ. Community Tenants Union, Inc.,* 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). "Under these rules, a plaintiff is not required to prove his or her case at the pleading stage. * * * Consequently, as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover,

the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol,* 60 Ohio St.3d 143, 144–145, 573 N.E.2d 1063 (1991).

Additionally, under Ohio's liberal pleading rules, all that is required of a plaintiff bringing suit is "(1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled." Civ.R. 8(A). Coming as it does at the pleading stage, a motion to dismiss is viewed with disfavor and should rarely be granted. *Kobe v. Kobe*, 61 Ohio App. 2d 67, 68, 399 N.E.2d 124 (8th Dist. 1978).

ARGUMENT

I. SOCIETAL AND TECHNOLOGICAL CHANGES NECESSITATE THE RECOGNITION OF A SPECIAL RELATIONSHIP BETWEEN THE FACEBOOK DEFENDANTS AND USERS OF ITS PLATFORM AND AN ATTENDANT DUTY TO WARN LAW ENFORCEMENT OF CREDIBLE THREATS OF HARM WHICH BECOME KNOWN TO IT THROUGH ITS OWN DATA MINING EFFORTS

"The common law is ever-evolving and [appellate courts] have the duty, absent action by the General Assembly on a specific question, to be certain that the law keeps up with the ever-changing needs of a modern society." *Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244, 251, 617 N.E.2d 1052 (1993). This appeal seeks further evolution of the law to adapt to the ever-changing needs of our modern, online society.

A. Current Framework for Common Law Negligence Claims and the Duty to Prevent Harm to Third Parties from Criminal Conduct

1. Ohio common law regarding the duty to act affirmatively to prevent harm to third parties and the special relationship exception to it

To prevail on a negligence claim, a plaintiff must demonstrate the existence of a duty, breach of that duty, and a resulting injury. *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989). While the determination of duty is a matter of law, there is "no formula for ascertaining whether a duty exists." *Wallace v. Ohio DOC*, 96 Ohio St.3d 266, 2002-Ohio-4210,

773 N.E.2d 1018, ¶ 24, quoting Prosser, Law of Torts, 325-326 (4th Ed. 1971). Thus, the duty element of a negligence claim may be established by common law, legislative enactment, or the particular circumstances of a case. *Wallace*, ¶ 23. "[A] defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position." *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 645, 597 N.E.2d 504 (1992). And it is generally recognized that where the defendant "in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it." *Morgan*, 77 Ohio St. 3d at 293, 673 N.E.2d 131.

In certain types of negligence actions, such as ones based on the failure to act for another's protection, a duty will arise normally only where a "special relationship" exists between the plaintiff and defendant or the defendant and the third-party actor. *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.*, 45 Ohio St.3d 171, 173, 543 N.E.2d 769 (1989). This is primarily because "liability for non-feasance was slow to receive any recognition in the law. It appeared first in and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff." 2 Restatement of the Law 2d, Torts, Section 314 (1965); s*ee also*, *Morgan*, *supra* at 293, fn. 2.

In Ohio, "a 'special relation' exists when one takes charge of a person whom he knows or should know is likely to cause bodily harm to others if not controlled." *Littleton v. Good Samaritan Hosp. & Health Ctr.*, 39 Ohio St.3d 86, 92, 529 N.E.2d 449 (1988), citation omitted. But the special relationship exception is not strictly limited to situations where a defendant has the ability to control the actions of the party with whom it enjoys a special relationship. Thus, while recognizing the special relationship element as a prerequisite to the duty to protect against

third-party misconduct, the Ohio Supreme Court has not enumerated an exhaustive list of the specific relationships that qualify, leaving such issues for courts to decide on a case-by-case basis. *Accord*, 2 Restatement of the Law 2d, Torts, Section 314A, Comment b (1965) ("The [special] relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found.")

To date, special relationships triggering a duty to act when a threat of harm is foreseeable include those between a business owner and invitee. *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130,135, 652 N.E.2d 702 (1995). Other "[r]elationships which result in an affirmative duty to protect others include (1) common carrier and its passengers, (2) innkeeper and guests, (3) possessor of land and invitee, (4) custodian and individual taken into custody, and (5) employer and employee." *Jackson v. Forest City Ent., Inc.*, 111 Ohio App.3d 283, 285, 675 N.E.2d 1356 (8th Dist. 1996). No Ohio court has addressed whether a special relationship exists under the particular facts and circumstances here, i.e. where an online business entity exerts significant control over the personal information, data, intentions and emotions of one of its users.

Even absent a special relationship, several commentators have condemned the "no duty to act" common law negligence rule as being antithetical to the rule of law and "revolting to any moral sense." 2 Restatement of the Law 2d, Torts, Section 314, Comment c (1965). Indeed, the Second Restatement authors emphasized the inherent unfairness in such a "no duty to act" general rule and predicted its inevitable narrowing:

> The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. *It appears inevitable that, sooner or later such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule.*

(Emphasis added. *Id.*)[2] Consistent with that prediction, the Ohio Supreme Court recognized nearly twenty-five years ago that "[a]t least two courts have already imposed a duty to summon aid for the benefit of another." *Morgan*, *supra* at 293, fn. 2, citing *Soldano v. O'Daniels* (1983), 141 Cal.App.3d 443, 449, 190 Cal.Rptr. 310, 314, and *Griffith v. Southland Corp.* (1992), 94 Md.App. 242, 257, 617 A.2d 598, 606.

2. Ohio courts consider foreseeability in determining whether a duty to act or prevent harm exists

The Ohio Supreme Court has held that "[t]he concept of foreseeability is an important part of all negligence claims, because '[t]he existence of a duty depends on the foreseeability of the injury.'" *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 24, quoting *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984). The Court in *Menifee* employed the following test for foreseeability: "whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance *or nonperformance* of an act." *Menifee* at 77 (emphasis added).

Such duty usually arises from the foreseeability of injury to someone in the plaintiff's "general situation." *Cromer* at ¶ 24, citing *Gedeon v. E. Ohio Gas Co.*, 128 Ohio St. 335, 339, 190 N.E. 924 (1934). As a general rule, one is not expected to foresee the criminal conduct of a third party. *Fed. Steel & Wire Corp.*, *supra* at 174. But there are exceptions to this rule and situations in which a reasonable person "is required to anticipate and guard against the intentional, or even criminal, misconduct of others." *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 761, 680 N.E.2d 161 (10th Dist.1996) (Lazarus, J., dissenting) (citation omitted).

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[2] The Second Restatement of Torts likewise recognizes there is a body of developing law imposing a duty to act in cases where a special relationship exists: "[t]he law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence." *Id.*, Section 314A, Comment b.

This Court likewise recognizes "[t]he foreseeability of a criminal act depends upon the knowledge of the defendant, which must be determined by the totality of the circumstances, and it is only when the totality of the circumstances are 'somewhat overwhelming' that the defendant will be held liable." *Diemer v. Minute Men, Inc.*, 2018-Ohio-1290 at ¶16, 110 N.E.3d 152 (8th Dist.); *Reitz v. May Co. Dept. Stores*, 66 Ohio App.3d 188, 583 N.E.2d 1071 (8th Dist. 1990). The Second Restatement of Torts provides further guidance as to the particular circumstances justifying the imposition of a duty to protect against criminal misconduct:

> *It is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct.* As in other cases of negligence ... *it is a matter of balancing the magnitude of the risk against the utility of the actor's conduct.* Factors to be considered are the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take.

(emphasis added) 2 Restatement of the Law 2d, Torts, Section 302B, Comment f.

3. Public policy considerations also must be considered in determining whether to recognize a particular duty to act reasonably under the circumstances

The Ohio Supreme Court recognizes that "the concept of duty in negligence law is at times an elusive one." *Wallace*, *supra* at ¶24. "Duty *** is the court's expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (*Id.*) The imposition of a duty may also be justified based on "the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall." *Id.*, citing *Mussivand* 45 Ohio St.3d at 318. Thus, public policy may justify imposition of a specific legal duty in a particular case.

Certainly, public policy favors preserving human life, preventing crime, and reporting suspected criminal activity. *State v. Thomas*, 77 Ohio St.3d 323, 328, 673 N.E.2d 1339 (1997) (acknowledging public policy of preserving human life); *Welch v. Cleveland*, 97 Ohio St. 311, 316, 120 N.E. 206 (1917)(acknowledging public policy of preventing crime). Policy reasons alone though are not sufficient to establish a duty. Courts must balance the broader consequences of creating a new duty against the burden of the precautions that defendant(s) may be required to take. Here, and as more fully discussed below, that balance tips mightily in favor of Godwin.

B. Plaintiff Adequately States A Claim Under Ohio Law for Negligence/Failure to Warn

The trial court erred when it ignored the well-pleaded allegations in the Complaint and essentially rendered summary judgment in favor of the Facebook Defendants by making factual determinations and leaps in legal logic concerning the existence and extent of Facebook's special relationship with Stephens. By diving headfirst into fact-intensive waters at the pleading stage and indulging the defendants' views on how the law should be applied to such conjectural evidence before any fact-finding whatsoever, the trial court committed reversible error.

1. Godwin sufficiently pled each prima facie element of a Negligence/Failure to warn claim under Ohio law

As this Court observed in *Reitz*, issues of foreseeability, and a defendant's knowledge of danger, should be evaluated under the totality of the circumstances, an inherently fact-specific standard. *Reitz,* 66 Ohio App.3d at 193, 583 N.E.2d 1071. Plus, "a complaint need not contain every factual allegation that the complainant intends to prove, as such facts may not be available until after discovery." *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-4945, 797 N.E.2d 1002, ¶ 50 (8th Dist.). Given these guideposts, the trial court erred by dismissing Plaintiff's claims at the initial pleading stages and without crucial discovery.

a. The trial court erred by prematurely deciding the special relationship issue, a mixed question of fact and law, without a fully-developed factual record.

In their motion to dismiss, the Facebook Defendants asserted that special relationships are "extremely rare under Ohio law." From there, they proceeded to argue that Plaintiff cannot possibly establish special relationship status because "Facebook had no control over Stephens" and "could not have foreseen" that Stephens would murder Godwin. (Motion to Dismiss at 18-22.) The trial court essentially adopted each of the Facebook Defendants' faulty factual premises when it dismissed Godwin's negligence claim due to "absence of allegations of specialized knowledge or a meaningful ability to control Stephens." (Order at 29-31.) This was error.

One key error made by the trial court in dismissing the complaint at this early stage is that doing so precluded the trial court from having a full understanding of the actual level of control that Facebook has over its users and the knowledge it possessed about Stephens *as a factual matter* before making the mixed legal/factual determination about whether a duty to act or a special relationship existed. The Ohio Supreme Court's decision in *Morgan* is illustrative on the issue. *Morgan*, 77 Ohio St. 3d 284, 673 N.E.2d 131. *Morgan* came up on appeal as a review of a summary judgment decision in favor of the defendants. *Morgan* at 292. Although the trial court granted summary judgment on the basis there was no special relationship between the psychotherapist and his former outpatient (and thus no duty to warn), the Court in *Morgan* held otherwise. *Id.* at 305. In so holding, the Court emphasized how the evidence submitted at summary judgment supported the establishment of a theretofore non-existent duty to warn based on the parties' special relationship. *Id.* at 299 (in determining whether a duty to warn existed in an outpatient setting, the Court could not "feign ignorance of the facts and testimony in the case *sub judice.")*. Of course, had the trial court in *Morgan* dismissed the complaint out of hand

at the 12(B)(6) stage instead of allowing the plaintiffs to marshal evidence to support the existence of a special relationship (including through experts), the Ohio Supreme Court would not have been able to rely on the evidence *sub judice* to establish a new duty to warn. *Id.* at 300.

This case should be no different than *Morgan* or countless others that have survived a motion to dismiss under Civ.R.12(B)(6) on far skimpier allegations. As the Ohio Supreme Court recognized almost thirty years ago:

> [A] plaintiff is not required to prove his or her case at the pleading stage. Very often, the evidence necessary for a plaintiff to prevail is not obtained until the plaintiff is able to discover materials in the defendant's possession. ***If the plaintiff were required to prove his or her case in the complaint, many valid claims would be dismissed because of the plaintiff's lack of access to relevant evidence.***

York, 60 Ohio St.3d at 144–145, 573 N.E.2d 1063 (emphasis added).

Here, it was premature for the trial court to conclude as a matter of law that "Godwin's complaint does not allege any facts which demonstrate that the Facebook Defendants had the actual ability to control Stephens as that term is understood." (Order at p. 29). Nor was it proper for the trial court to determine that Facebook's "ability to manipulate is not the same as the duty to control under Ohio law" without any factual record to make such a finding. (*Id.* at 31.) It likewise was improper for the trial court to decide whether Facebook had knowledge of any prior violent acts by Stephens before Godwin's murder, "as such facts may not be available until after discovery." *Landskroner, supra* at ¶50. Godwin should be given the same opportunity as the plaintiff in *Morgan* and countless others to develop a factual record and prove her case.

b. Plaintiff adequately pled the existence of a special relationship between Stephens and the Facebook defendants to survive a motion to dismiss.

The key inquiry at the 12(B)(6) stage is whether Plaintiff has put forth sufficient facts that would impose a recognizable duty upon the Facebook Defendants to state a prima facie negligence claim. By any measure, she easily did so under Ohio's liberal pleading standards.

The Complaint specifically identifies the factors supporting the existence of a duty to act and the presence of a special relationship between Facebook and Stephens. (Complaint, ¶¶2-7, 36, 61, 79, 82, 85.) Not one to rest on conclusory allegations, Plaintiff claims that the defendants required Stephens to relinquish *control* of his personal information and data in order to use Facebook's services [*Id.*, ¶ 21], and in return, Facebook received free license to collect and analyze content and information from Stephens, including intimate information about his emotional status, purchases, browsing activity, photos, messages, friends, group interactions, online activities, offline activities, and precise location. (*Id.*, ¶¶ 24-33.) Notably, the Complaint specifically alleges that the Facebook Defendants "*have the unique ability to control every aspect of the relationship*" because of their unfettered access to users' specific behaviors, intentions, likes, dislikes, tendencies, locations and activities. (*Id.*, ¶36, emphasis added.) Facebook's alleged ability to control user behavior (which the trial court claimed is lacking) includes the ability to predict and manipulate users' behaviors, moods, likes and dislikes. (*Id.*, ¶¶ 38, 40-41.) These allegations, taken as true and with all reasonable inferences drawn in Godwin's favor, are sufficient to establish the existence of a special relationship.

Nevertheless, the trial court ignored the thrust of Plaintiff's well-pleaded Complaint and essentially did what a trial court is not supposed to do at the 12(B)(6) stage: require Godwin to plead operative facts with particularity. *York*, *supra* at 145; *Cincinnati v. Beretta USA Corp.*, 95 Ohio St.3d 416, 423-24, 2002-Ohio-2480, 768 N.E.2d 1136 ("Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity."). This too was error.

c. The Complaint adequately alleges foreseeability of harm and proximate causation

Although the trial court did not address purported foreseeability and causation pleading deficiencies in its dismissal order, the Facebook Defendants made several fact-intensive

challenges about those elements of Plaintiff's prima facie case in seeking dismissal. (Motion to Dismiss at 21-24). Because this Court's review of a ruling on a motion to dismiss is *de novo*, Godwin addresses these issues briefly below.

The Complaint sufficiently pled each element of a prima facie negligence claim (1) the genesis and nature of the special relationship between Facebook and Stephens [Complaint, ¶¶2-7, 21-60, and 82], (2) the resulting duty to warn owed by the Facebook Defendants [*Id.*, ¶¶7-8, 61-64, 84-85, 96, and 102], (3) the foreseeability of harm to third parties [*Id.*, ¶¶65-66, 68, 70, 72, 74, 79, 83, and 91-93], (4) Facebook's acknowledgment of foreseeability, its attendant duty to warn/help prevent harm, and voluntary undertaking of responsibility to prevent harm to third parties [*Id.*, ¶¶ 61-64, and 80], (5) Facebook's breach of its duty of care [*Id.*, ¶¶69, 71, 73, 75, 86, 95-98, and 103], (6) causation [*Id.*, ¶¶75, 87-88, 99, 104, and 113], and, (7) damages [*Id.*, ¶¶77-78, 88-89, 99-100, 105-06, 109-10, 112, and 114-15].

As to foreseeability, Godwin alleges the Facebook Defendants possess unique knowledge and insight into the actions and intentions of their users, including "threats of violence, safety, security and criminal activity." (*Id.*, ¶65.) Concerning the foreseeable threat posed by Stephens in particular, Facebook is alleged to possess actual and/or constructive knowledge of him making intimidating and coercive threats of violence, in addition to having prior knowledge of his ownership and use of firearms. (*Id.*, ¶¶ 69-70.) The complaint further alleges that Facebook became aware of additional information suggesting Stephens' criminal activity was imminent, but took no action in response. (*Id.*, ¶¶ 70-74.)

Foreseeability is also apparent from Mark Zuckerberg's public statements acknowledging Facebook's "unique position to help prevent harm." (*Id.*, ¶62.) Facebook even concedes they have a duty to notify and to work with law enforcement, consistent with their own Data Policy,

when there is a genuine risk of physical harm or threats to public safety. (*Id.*, ¶ 64.) Thus, foreseeability of harm (and the attendant duty to warn of it) are sufficiently pled to put the defendants on notice of the claims against them.

The challenge to the causation element of Plaintiff's prima facie case fails for similar reasons. Godwin set forth a short and plain statement of the chain of causation. Concisely, Plaintiff alleges the Facebook defendants (i) possessed a wealth of information concerning Stephens, including the danger he posed and his ownership/prior use of firearms, through their data collection and data mining activities [*Id.*, ¶¶ 68-70, 72, 74, 83], (ii) took no action in response to the wealth of information they collected concerning Stephens [*Id.*, ¶¶ 71, 73, 75], (iii) knew Stephens' precise physical location [*Id.*, ¶¶ 31, 39, 48, 74, 84], (iv) had the ability to alert law enforcement with more than sufficient time to act and prevent Godwin's death [*Id.*, ¶¶ 75, 84], (v) failed to alert law enforcement [*Id.*, ¶86], and, (vi) could have prevented Godwin's death, which occurred within a reasonable vicinity of Stephens' location [*Id.*, ¶ 87].

As several courts have recognized, fact-specific questions regarding foreseeability, proximate causation and/or the reasonableness of a defendant's actions are also ill-suited for resolution at the motion to dismiss stage. *See, e.g.*, *Beretta U.S.A. Corp.*, *supra*; *Moffitt v. Auberle*, 167 Ohio App.3d 120, 854 N.E.2d 22, 2006-Ohio-3064 (6th Dist.). Here, too, it was wholly inappropriate for the trial court to dismiss the complaint at the pleadings stage. Godwin should not be deprived of the opportunity to prove her claims, especially after having sufficiently pled a set of facts to proceed with her negligence/duty to warn claim.

2. Public policy considerations further support allowing Plaintiff's Complaint to proceed to discovery

The trial court refused to recognize a special relationship between Facebook and its users, both on policy grounds and an unwillingness to stray from precedent. (Order at 31-32.) For

policy reasons, the trial court stated that imposing a duty to warn on Facebook would be impractical and would likely result in a "vague and general warning to users and law enforcement about vague potential harms." (*Id.* at 32.) With all due respect, the trial court could not have been more wrong.

Whenever a new duty in tort is recognized or expanded, courts must weigh the benefit that will be derived by the general public from the new obligation with the attendant costs and broader consequences of imposing such a duty upon certain actors. Here, Godwin is not asking for anything revolutionary from Facebook. Indeed, Facebook already employs neutral algorithms and other artificial intelligence mechanisms as part of its data mining and data collection efforts to identify security and human safety threats. For instance, Facebook already utilizes its own technology and applications, in conjunction with efforts of its internal security team, to track the location and activity of users who make threats against Facebook executives, employees, or offices. *See*, Salvador Rodriguez, CNBC, *Facebook uses its aps to track users it thinks could threaten employees and offices,* (Feb. 14, 2019), https://www.cnbc.com/2019/02/14/facebooks-security-team-tracks-posts-location-for-bolo-threat-list.html (last accessed Feb. 24, 2020). Facebook also already uses artificial intelligence to identify users who are suicidal or who pose a risk of serious harm to themselves or others. *See,* Natasha Singer, New York Times, *In Screening for Suicide Risk, Facebook Takes On Tricky Public Health Role*, (Dec. 31, 2018), available at https://www.nytimes.com/2018/12/31/technology/facebook-suicide-screening-algorithm.html (last accessed Feb. 24, 2020). Notably, in those cases where a credible threat to human life is detected, Facebook routinely alerts local law enforcement to intervene. *Id.*

On balance, there is little incremental cost to Facebook to continue doing what it is already doing in terms of identifying and reporting security and human safety threats to law

enforcement. On the other hand, if the benefit to be gained by society is the saving of even one human life (as Facebook's suicide intervention tools have already proven) and likely far more lives, the balancing scale tips heavily towards recognizing a special relationship and the attendant duty to warn of credible threats to human safety.

Surprisingly, despite already having and employing the artificial intelligence and internal systems in place to detect and react to threats made by users like Stephens, Facebook insists that recognizing a special relationship under Ohio law would create "an impossible task [for Facebook], and one that tort law does not and should not impose." (Motion to Dismiss at p.20.) A similar sky-is-falling argument was raised by psychotherapists more than two decades ago and rejected by the Ohio Supreme Court. *Morgan*, *supra* at 305. In *Morgan*, the Court addressed the then-novel issue of whether a psychotherapist enjoyed a special relationship with and attendant duty to warn of a patient's violent tendencies who was being treated on an out-patient basis. In finding that a special relationship indeed was present, the Court observed:

> [W]e must bear in mind that duty is not an immutable concept, nor is it grounded in natural law. As Prosser & Keeton explains, "[t]he statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. * * * '[D]uty' is not sacrosanct in itself but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." Prosser & Keeton on Torts, *supra,* at 357–358, Section 53. Thus, "'duty' is only a word with which we state our conclusion, and no more." *Id.* at 281, Section 43.
>
> Accordingly, there is no more magic inherent in the conclusory term "special relation" than there is in the term "duty." Both are part and parcel of the same inquiry into whether and how the law should regulate the activities and dealings that people have with each other. *As society changes, as our sciences develop and our activities become more interdependent, so our relations to one another change, and the law must adjust accordingly*. "Duty" is not a rigid formalistic concept forever embedded in the standards of a simplistic yesteryear. *Relations perhaps regarded as tenuous in a bygone era may now be of such importance in our modern complicated society as to require certain assurances that risks associated therewith be contained*. These principles do not shed their inherent

> flexibility when applied in the context of a defendant's duty to control the violent conduct of a third person. [citations omitted].

Id. at 297-98 (emphasis added); *see also, Jones v. Stanko*, 118 Ohio St. 147, 160 N.E. 456 (1928), at paragraphs one and two of the syllabus (a duty to warn can arise by virtue of the public interest to contain certain risks).

This Court, as was done in *Morgan*, should recognize that our society indeed has changed. We are far more dependent on the internet and our social media connections now than ever before. Facebook played, and continues to play, a major role in that evolution. Given the vast amount of personal information and data that Facebook collects from its users and exploits for its own commercial advantage, it is for the courts to step in and "require certain assurances that risks associated therewith be contained." If a brick and mortar business owner owes a duty to its invitees to prevent harm from third-parties occurring on or near its premises (including the duty to alert authorities of ongoing criminal activity known to it) because of the special relationship deemed to be present, why should Facebook be held to a lesser standard – none at all – when it comes to criminal activity being threatened on its virtual online premises? The answer of course is there should be no difference. As times change, the law should change accordingly. The trial court's decision should be reversed.[3]

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[3] Of course, merely allowing Plaintiff to advance beyond the initial pleading stage does not mean that she will prevail on the merits. It only means she will have the opportunity to prove her case with a fully-developed factual record. As the Ohio Supreme Court noted when addressing comparable public policy issues in *Beretta U.S.A.*, supra, "[w]hat [our decision] does mean is that appellant has alleged the facts necessary to withstand a motion to dismiss and will now have the opportunity to pursue its claims. *While we do not predict the outcome of this case, we would be remiss if we did not recognize the importance of allowing this type of litigation to go past the pleading stages.* As two commentators so aptly noted: "If as a result of both private and municipal lawsuits, firearms are designed to be safer and new marketing practices make it more difficult for criminals to obtain guns, some firearm-related deaths and injuries may be prevented. While no one should believe that lawsuits against gun manufacturers and dealers will solve the multifaceted problem of firearm violence, such litigation may have an important role to

II. THERE ARE SUFFICIENT FACTS IN THE COMPLAINT TO SUPPORT PLAINTIFF'S CLAIMS FOR CIVIL RECOVERY FOR A CRIMINAL ACT AND FAILURE TO WARN BASED ON A STATUTORY DUTY

The trial court dismissed Plaintiff's statutory claims because it did not find Stephens' post to do some "murder shit" to be a "terroristic threat" under R.C. 2909.23. (Order at 35.) In particular, the trial court found that the post did not create a "reasonable expectation of fear of the imminent commission of the specified offense" as required by the statute. (*Id.*) The trial court also found, without any factual record from which to draw, that the post did not intimidate, frighten, or coerce a civilian population, ostensibly because "intending to do some 'murder shit' is not the same as intending [to] intimidate a civilian population." (*Id.* at 34.) Thus, the trial court determined there was no crime for the Facebook Defendants to report, and hence, no violations of R.C. 2921.22 or 2909.23 occurred. (*Id.* at 35.)

Here, too, the trial court erred by dismissing Godwin's claims at the initial pleading stage. Indeed, Plaintiff's allegations in Counts Two and Three of the Complaint easily satisfy Ohio's liberal pleading standards. Plaintiff specifically alleged that Stephens *intended* to do some 'murder shit' by making such a statement and that his post, standing alone, constitutes a *terroristic threat* in violation of R.C. §2909.23. (Complaint, ¶93, emphasis added.) And, certainly, someone intending to do some random 'murder shit' is likely to cause fear in a reasonable person's mind.

The trial court found otherwise, primarily because it believed as a factual matter that no member of the civilian population had a "reasonable expectation of its imminent commission." That conclusion defies common sense. Any reasonable person reading Stephens' post, especially

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play, complementing other interventions available to cities and states." 95 Ohio St.3d at 430 (emphasis added), citations omitted.

his Facebook "friends" who knew him well, easily would have felt intimidated by Stephens' "dead serious" threat.[4] In any event, by jumping to such a conclusion without any factual record to base it on, the trial court violated the fundamental rule that all reasonable inferences at the 12(B)(6) stage must be drawn in Plaintiff's favor, not defendants. *York*, *supra* at 144-145.

Counts Two and Three of the Complaint should not have been dismissed on the pleadings. The Complaint clearly alleges that the defendants: (i) were aware that Stephens was committing a felony [*Id.*, ¶95], (ii) had a duty to report such information to law enforcement [*Id.*, ¶¶96, 102], (iii) knowingly failed to report Stephens' commission of a felony to law enforcement [*Id.*, ¶¶97, 103], and, (iv) "knowing failure" to report Stephens' felonious threat was itself a violation of R.C. §2921.22 [*Id.*, ¶98]. Whether Facebook actually "knew" that the content of Stephens' post qualified as a "terroristic threat" or that it "knew" that such a threat was a felony does not matter at the initial stage of the pleadings. (Motion to dismiss at 25.) Again, those are fact issues. They have no bearing on the sufficiency of the statutory claims as pleaded. Given these well-pleaded allegations, it was error for the trial court to dismiss them.

III. FACEBOOK IS NOT ENTITLED TO IMMUNITY UNDER THE CDA

The trial court also erred by finding that Facebook is immune from suit as a "publisher" under section 230 of the CDA. (Order at 26-27). In reaching its decision, the trial court sided with several other courts that have adopted the view that section 230 "imposes a broad immunity from claims that stem from third-party provided content." (Order at 20.). In so doing, the trial court extended a statutory provision that was designed to encourage computer service providers

[4] Of course, had Plaintiff been given an opportunity for discovery, she could have introduced evidence that members of the general public felt threatened by Stephens' post. Plus, given the fear that enveloped parts of Cleveland on Easter Sunday after Stephens' post and subsequent killing of Godwin circulated on both traditional and online media, the trial court's contrary determination was not well-founded.

to shield minors from obscene material into one that now shields computer service providers from virtually any liability or common law tort duty whatsoever. *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 76-89 (2d Cir.2019) (Katzmann, C.J., dissenting), *petition for cert. pending*, No. 19-859 (filed Jan. 9, 2020).

A. Section 230 of the CDA Does Not Provide Blanket Immunity

The primary purpose of Section 230 "was to protect children from sexually explicit internet content." *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir.2016) (citing 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) (statement of Sen. Exon)); *see also*, *Force*, *supra* at 77-80 (Katzmann, C.J., dissenting) (thoroughly analyzing the legislative history of Section 230, which "focused squarely on protecting minors from offensive online material" (*Id.* at 79)). The secondary purpose of Section 230 was to overrule a 1995 New York State trial court decision that the online service Prodigy, by deciding to remove certain indecent material from its site, had become a "publisher" and thus was liable for defamation when it failed to remove other objectionable content. *LeadClick*, 838 F.3d at 173 (citing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)).

Given this legislative history and the statute's plain text, Section 230 does not grant internet publishers blanket immunity for the full range of activities in which they might engage. Indeed, numerous courts have found that Section 230 does not create "a general immunity from liability deriving from third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir.2009); *Accord, City of Chicago, Il. v. Stubhub!, Inc.*, 624 F.3d 363, 366 (7th Cir.2010) (same); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164, 1171 (9th Cir.2008) (en banc) (noting that "[t]he Communications Decency Act was not

meant to create a lawless no-man's land on the Internet" and to "provid[e] immunity every time a website uses data initially obtained from third parties would eviscerate [the statute]").

Rather, Section 230(c)(1) of the CDA only precludes liability for claims involving: "(1) a provider or user of an interactive computer service, (2) whom a plaintiff seeks to treat, under a state law cause of action, as publisher or speaker, (3) of information provided by another information content provider." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir.2016); *Jones v. Dirty World Recordings, LLC*, 755 F.3d 398, 409 (6th Cir.2014). The CDA thus allows interactive computer services companies "to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete." *Roommates.com,* 521 F.3d at 1163.

The correct test for gauging publisher immunity is not whether a challenged activity merely bears some connection to online content. Rather, it is whether a claim "inherently requires the court to treat" the "interactive computer service" as "the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1102. "To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.' If it does, section 230(c)(1) precludes liability." *Id.* If it does not, there is no immunity.[5]

Applying this test, courts have denied CDA immunity when a claim does not turn on holding an Internet service provider liable for posting or failing to remove content provided by a third party. *Compare Internet Brands*, 824 F.3d at 851 (declining to find preemption of duty to

[5] The CDA also provides for a second type of immunity involving the policing of content pursuant to Section 230(c)(2). Because neither Facebook nor the trial court relied upon Section 230(c)(2) immunity, Godwin does not address whether this second type of CDA immunity has any application to this appeal.

warn claim relating to defendant's online practices); *Barnes*, 570 F.3d at 1107 (denying preemption of promissory estoppel claim relating to online postings because "Barnes does not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract"); *with Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136, 153 (3rd Cir.2019) (holding that the CDA does not bar claims against online marketplace to the extent that they rely on Amazon's role as an actor in the sales process, including both "selling" and "marketing," but that CDA does bar certain claims based on Amazon's failure to provide or to edit adequate warning language found online regarding the use of a dog collar). So too here, where Plaintiff's claims challenge Facebook's own conduct, special knowledge, and breach of duty stemming from their special relationship with Stephens and cares not a whit about what is or is not featured online by Facebook about Stephens or authored by Stephens.

B. The Complaint Does Not Seek To Hold Facebook Liable In Any Capacity As A Speaker Or Publisher Of Third Party Content

In determining whether a plaintiff's theory of liability seeks to treat a defendant as a publisher or speaker of third-party content, courts focus on whether core or traditional publishing functions are being challenged, including whether the defendant is being held accountable as an "intermediary" (i.e., vicariously) in a publisher role for the content of third party information posted on its site or in its editorial role (i.e., directly) for failing to edit or remove such third-party information altogether. *See, e.g.*, *Barnes*, 570 F.3d at 1102 ("We have indicated that publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content."). At the same time, courts must closely hew to the text of the CDA's statutory bar on liability in construing its extent. *Id.* at 1100.

As the Complaint repeatedly alleges, Plaintiff is not seeking to hold Facebook (or its network of subsidiaries) liable as a "speaker" or "publisher" of any content that appeared on its

platform, including Stephens' post threatening some 'murder shit' or the video of the murder itself. (Complaint ¶¶ 2, 8, 85.) Rather, Plaintiff seeks to hold Facebook liable for its *own* tortious conduct arising out of what they recognize as a "new kind of platform" that allows advertisers to specifically target users based upon state-of-the-art data mining/collection technology. In other words, Facebook is a far cry from a company that simply provides a platform or online bulletin board upon which its users can post/exchange information. Facebook, instead, aggressively uses and exploits information it collects and mines from users while both online and offline to further its profit motives. The CDA, a statute that was written in the era of floppy disks, says nothing about immunizing online publishers or speakers for their own conduct in *acquiring* information via sophisticated data mining activities or *developing* information once acquired or allowing them free reign to engage in tortious conduct unrelated to their publishing activities.

Godwin is not challenging any publishing or editorial decision by Facebook, specifically alleging that her claims "do not require the Facebook Defendants to monitor, edit, withdraw or block any content supplied by its users. Plaintiff does not challenge the Facebook Defendants' right to publish or permit any information they receive from their users on their interactive computer services." (*Id.*, ¶ 8.) Rather, Plaintiff seeks to hold Facebook responsible for not acting in response to information that it had collected and mined from Stephens.

When Godwin's allegations are viewed in their proper context, it is apparent that she is not seeking to make Facebook account for what Stephens posted or what Facebook published. Instead, her sole focus is on Facebook's distinct and independent business of mining, analyzing and then selling, for profit, user information and the intricate knowledge obtain therefrom. For example, the special relationship and tort duty asserted here by Godwin do not arise from an alleged failure to adequately regulate access to user content as was alleged in *Doe v. MySpace,*

Inc., 528 F.3d 413 (5th Cir.2008) (holding that CDA bars claims for negligence and gross negligence in not preventing a 13-year-old girl from lying about her age to create a personal profile that led to contact with a sexual predator). Similarly, Plaintiff does not allege that there was any "mishandling of" or "unreasonable delay in removing" third-party content as claimed in *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir.2014) (finding that CDA bars claims for intentional assault and negligence based on Facebook's alleged unreasonable delay in removing a page that called for Muslims to rise up and kill the Jewish people).

Plaintiff's claims are not limited to Facebook's access to, or knowledge of, information because it was posted on their platform. Plaintiff's claims are more broadly based upon the specific and direct action taken by Facebook to mine, collect, analyze and then sell the information that it obtains from users (often surreptitiously) in connection with their separate advertising business; a business and activity that has absolutely nothing to do with its role as a service provider. It is this selling, advertising, and marketing business that produces the special relationship and knowledge which, in turn, gives rise to the duty of care.

Moreover, Plaintiff does not limit the scope of the Facebook defendants' actual or constructive knowledge to the content of a single post by Stephens. Rather, Plaintiff alleges that the special relationship between Facebook and Stephens - and the attendant knowledge, which includes a complete and holistic picture of Stephens' thoughts, emotions, desires, location and intentions developed from Facebook's array of data collection and data mining activities - extend far beyond a single post. (Complaint, ¶ 82; see also, ¶¶ 7, 21, 24-33, 36, 61, 65, 69-75.)

In any event, the CDA does not provide general immunity against all claims derived from third-party content posted online and/or derived from online content. *Doe v. Internet Brands, Inc.*, 824 F.3d at 853. In *Internet Brands*, the Ninth Circuit held that the CDA did not bar the

plaintiff's failure to warn claim under state law. *Id.* at 854. In so holding, the court specifically rejected the defendant's argument that the website was entitled to immunity because its publishing of online third-party content was a "but-for" cause of plaintiff's alleged injuries. *Id.* at 852-53. The Ninth Circuit's reasoning is instructive:

> Barring Jane Doe's failure to warn claim would stretch the CDA beyond its narrow language and its purpose. To be sure, Internet Brands acted as the "publisher or speaker" of user content by hosting Jane Doe's user profile on the Model Mayhem website, and that action could be described as a "but-for" cause of her injuries. Without it, Flanders and Callum would not have identified her and been able to lure her to their trap. But that does not mean the failure to warn claim seeks to hold Internet Brands liable as the "publisher or speaker" of user content.
>
> Publishing activity is a but-for cause of just about everything Model Mayhem is involved in. It is an internet publishing business. Without publishing user content, it would not exist. As noted above, however, we held in *Barnes* that the CDA does not provide a general immunity against all claims derived from third-party content. In that case ... [t]he publication of the offensive profile posted by the plaintiff's former boyfriend was a "but-for" cause there, as well, because without that posting the plaintiff would not have suffered any injury. But that did not mean the CDA immunized the proprietor of the website from all potential liability.

Id. at 853.

Here, too, the mere fact that one of Stephens' posts may have played a "but-for" role in the chain of events leading to Facebook's culpability for Godwin's death does not mean that Facebook is being held liable for publishing activity. To the contrary, Plaintiff seeks to hold Facebook responsible for the totality of its knowledge, data collection and data mining activities, and not at all for content that Stephens posted online. Certainly, Facebook's duty to warn of a danger learned via the superior knowledge and special relationship it developed with Stephens through both online and offline activity is not something traditionally expected of publishers. Thus, the CDA should not bar Plaintiff's state law claims predicated on failure to warn.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY QUASHING THE SUBPOENA TO FACEBOOK

After the Facebook Defendants were dismissed from the case, Plaintiff issued a subpoena to Facebook seeking, among other documents, Stephens' Facebook account. (R. 72 at Ex. 1) In an effort to reduce any possible burden and expense, the request was narrowed to only content from December 2016 through April 2017. (R. 73 at Ex. 5) The Executor of Stephens' estate provided written consent to the production of the content. (*Id.* at Ex. 6) As well, Godwin agreed to Facebook's proposed confidentiality provisions. (*Id.* at Ex. 5) Godwin even agreed to accept the content for a limited, attorneys-eyes only review. (*Id.*)

In response, Facebook argued that it could not comply with the subpoena under federal law, state law, or Facebook's terms of service because Stephens did not provide his "consent." (R. 72) Facebook also argued that the production of material from Joy Lane's account should resolve the issue (it does not). (*Id.*) Indeed, entirely absent from the Lane production were Facebook communications/postings *made by Stevens*, as well as the content of the Facebook messenger direct messages *he* sent to her. (R. 73) It is believed that, when Facebook took affirmative steps to shut down Stephens' account, it also removed the information on his account that was accessible to the outside world and in so doing destroyed anyone else's ability to access any of Stephens' prior postings or messages. (*Id.*). Had Facebook not shut down Stephens' account and pulled his posts and messages back into its corporate bowels (and, thus, under the blanket of the privacy arguments it advanced below), Godwin could have accessed much of the discovery she has been denied though the use of the internet and a few simple mouse clicks.

A. Lawful Consent has been provided

Under federal or state law, Facebook is permitted to disclose the contents of an account if lawful consent is provided. Under federal or state law, lawful consent can be provided by the

administrator/fiduciary of a decedent's estate. Here, it is undisputed that the fiduciary appointed by the Probate Court to administer Stephens' estate, Joseph Kacyon, has provided lawful consent to the disclosure of the Stephens' Facebook account. (R. 73 at Ex. 6).

Kacyon also agreed to indemnify Facebook for any claims arising from or relating to Facebook's production in this matter. (*Id.*) Likewise, both federal and state law provide Facebook with immunity from liability based upon the production of the content of Stephens' Facebook account. Finally, an extensive and comprehensive Protective Order governing the disclosure of the content of Stephens' Facebook account was issued by the trial court.

1. Lawful consent pursuant to 18 U.S.C. 2702

The Stored Communications Act permits the disclosure of the content of Stephens' Facebook account upon the "lawful consent" of the "originator" or the "subscriber." 18 U.S.C. 2702. Stephens, the originator and/or the subscriber of the subject content, did not provide his consent prior to taking his own life. The issue in this case is whether the personal representative of Stephens' estate can provide "lawful consent" on behalf of Stephens following his death. It is crystal clear that Kacyon can—and did-- provide lawful consent on behalf of Stevens.

Indeed, this very issue was addressed and decided by the Supreme Judicial Court of Massachusetts in *Ajemian v. Yahoo!, Inc* 478 Mass. 169, 84 N.E. 3d 766 (2017). The facts in *Ajemian* are straightforward. John Ajemian died unexpectedly in a bicycle accident. The personal representatives of Ajemian's estate sought access to his electronic email account at Yahoo! Since Ajemian left no instructions regarding the disclosure of the content of his electronic communications, Yahoo declined to provide the personal representatives with access to the

account, claiming that it was prohibited from doing so by the Stored Communications Act.[6] A lawsuit was filed by the personal representatives of the Ajemian estate, challenging Yahoo's refusal and seeking the content of the electronic communication.

The Court in *Ajemian* prefaced its review as follows:

> At issue here is 18 U.S.C. § 2702, which restricts the voluntary disclosure of stored communications. That section prohibits entities that provide "service[s] to the public" from voluntarily disclosing the "contents" of stored communications unless certain statutory exceptions apply. The exceptions…allow a service provider to disclose such contents without incurring civil liability under the SCA.

Id. at 175. In connection with the "lawful consent" exception, the Supreme Judicial Court framed the parties' respective positions:

> The personal representatives claim also that they may consent to the release of the contents of the decedent's email account in order to take possession of it as property of the estate….Yahoo contends that the personal representatives of the estate cannot lawfully consent on behalf of the decedent, regardless of the estate's property interest in the e-mail messages. In Yahoo's view, the lawful consent exception requires the user's actual consent-i.e., express consent from a living user.

Id. at 177-178.

The Court in *Ajemian* recognized that the SCA does not define the term "lawful consent." *Id.* at 180-181. As a result, the Court applied the "ordinary meaning" of the words and concluded that "nothing in this definition would suggest that lawful consent precludes consent by a personal representative on a decedent's behalf." *Id.* at 180. Indeed, the Court highlighted the fact that a personal representative may provide consent for the disclosure of the decedent's health information and consent for the waiver of the attorney-client, physician-patient and psychotherapist-patient privileges. *Id.* at 181. The Court in *Ajemian* therefore concluded that "a

[6] Yahoo also claimed that the terms of service governing the account provided it with discretion to reject the personal representatives' request. The court did not decide the issue surrounding the terms of service.

construction of lawful consent that allows personal representatives to accede to the release of a decedent's stored communications accords with the broad authority of a lawfully appointed personal representative to act on behalf of a decedent." *Id.* at 182.

Finally, the Court in *Ajemian* reviewed the SCA's legislative history. The House committee report notes state that "lawful consent" "need not take the form of a formal written document of consent." *Id.* at 183. It was also noted that "lawful consent could flow from a user having had a reasonable basis for knowing that disclosure or use may be made with respect to a communication, and having taken action that evidences acquiescence to such disclosure or use." *Id.* At a minimum, the Court determined that Congress "did not intend to place stringent limitations on lawful consent even for living users." *Id.* Accordingly, the Court held, in the only opinion that has addressed the issue, as follows: ***"we conclude that the personal representatives may provide lawful consent on the decedent's behalf to the release of the contents of the Yahoo e-mail account."*** (Emphasis added) *Id.* at 184.

Here, it is undisputed that Kacyon was not only duly appointed, but also actually selected, by the Probate Court of Summit County to serve as the personal representative of Stephens' estate. It is likewise beyond debate that, as the personal representative, Kacyon is obligated to take possession of all of the property of the estate pursuant to Ohio law. *See* R.C. 2113.25 and 2113.31. Stephens' Facebook account is undeniably property of the estate. Finally, Kacyon provided clear consent to the disclosure of the content of Stephens' Facebook account pursuant to Plaintiff's subpoena and in the exact form prescribed by Facebook.

It is also worth noting that Kacyon's consent to the disclosure of Stephens' Facebook content is entirely consistent with Stephens' pre-death actions and wishes that evidence acquiescence to such disclosure. After all, Stephens announced his intent to commit murder,

blamed Facebook for his actions, and live streamed the heinous act on his Facebook account. To suggest at this point that Stephens somehow wished to maintain the content of his communications on Facebook as private flies in the face of the facts and logic.

It was not Stephens who led Facebook to deem his account private. On the contrary, Stephens was quite calculated in his effort to make his Facebook account as accessible to the public as possible. It was Facebook who unilaterally determined that the account should be private after he committed his heinous crimes. Facebook has now gone one step further as it attempts to cloak Stephens' Facebook account in secrecy to the point where they do not want to accept the lawful consent of the fiduciary of Stephens' estate.

2. Lawful consent pursuant to R.C. Chapter 2137

Although no court has yet to address the issue of lawful consent under the Revised Uniform Fiduciary Access to Digital Assets Act, the analysis, and the ultimate conclusion, are the same as articulated above under the SCA. Specifically, R.C. 2137.06, entitled "Disclosure of content of electronic communications of deceased user," requires consent as follows: "unless the user provided direction using an online tool, a copy of the user's will, trust power of attorney, ***or other record evidencing the user's consent to disclosure of the content of electronic communications.***" (Emphasis added). Again, the focus of the inquiry in this case is on the existence of any ***other record evidencing Stephens' consent.*** The answer, as above, is found in the lawful consent provided by the fiduciary of Stephens' estate, Joseph Kacyon.

The Historical and Statutory Notes for R.C. § 2137.06 state that the Ohio law is analogous to Section 7 of the Revised Uniform Fiduciary Access to Digital Assets Act. The legislative history of Section 7 states: "***Material for which the user is the "originator" (or the "subscriber" to a remote computing service) can be disclosed to third parties only with the***

account holder's "lawful consent." (Emphasis added).

The Bill Analysis provided by the Ohio Legislative Service Commission before enactment, further states:

> The bill enacts the Revised Uniform Fiduciary Access to Digital Assets act, which parallels the model act of the same name.... It provides for continued access or control over digital assets when the owner of those assets dies or becomes incapacitated. The bill authorizes persons legally acting on behalf of the owner to access and take action in relation to the assets.

(R. 73 at Ex. 7) Under the bill, a fiduciary is an executor or administrator of an estate. (*Id.*) Moreover, as long as the fiduciary is acting within the scope of his authority, the fiduciary is an authorized user of the digital assets. (*Id.*). Specifically, the Bill Analysis states: "If a fiduciary has authority over the tangible, personal property of the other person, the fiduciary has the right to access that property and any digital asset stored in it." (*Id.*); *See also* R.C. 2137.14 (D)(E)(1)(2). The statute provides further protection for the deceased by imposing a duty of care, a duty of loyalty, and a duty of confidentiality upon the fiduciary with respect to the digital assets. *See* R.C. 2137.14 (A) (1-3).

B. The Facebook Terms of Service Do Not Bar Disclosure of Stephens' Account

Finally, the terms of service do not preclude Facebook from complying with the subpoena. To the contrary, the terms of service applicable to Stephens' account state in bold: **"By using or accessing Facebook Services, you agree that we can collect and use such content and information in accordance with the Data Policy..."** (*Id.* at Ex. 9) As it relates to the issue now before this Court, the Data Policy, under the heading "How do we respond to legal requests or prevent harm?" provides in pertinent part:

> ***We may access, preserve and share your information in response to a legal request (like a*** search warrant, court order or ***subpoena***) if we have a good faith belief that the law requires us to do so....We may also access, preserve and share information when we have a good faith belief it is necessary to detect, prevent and address fraud and other illegal activity; to protect ourselves, you and others,

including as part of investigations; or to prevent death or imminent bodily harm. (Emphasis added) (*Id.*) Godwin is simply asking Facebook to comply with the applicable terms of service.

CONCLUSION

Mark Zuckerberg and the Facebook Defendants are the proverbial people sitting on the dock of the bay, cigar in hand, life preserver ring within reach, and watching the Robert Godwins of the world drowning nearby. But, unlike a beach visitor who suddenly comes upon a drowning swimmer by happenstance, the Facebook Defendants here, through their extensive data mining practices and neutral algorithms, did not stumble upon this tragic situation by accident. Through their data mining practices, the Facebook Defendants have developed intimate knowledge about each of their users, including the ability to control and manipulate behavior. More importantly, they have the tools in place to identify, evaluate, and pinpoint the precise location of potential drowning victims before they even dip their toes into such dangerous waters.

Evolution of the common law is often slow. But it need not be set in stone. The time has come for the common law to evolve and to recognize the special relationship that exists between a social media platform/data mining company like Facebook and its users. Indeed, the time is ***now*** for the common law to recognize a duty for companies like Facebook to reach for the life preserver ring within arm's reach and to throw it into the waters below. While it might be too late to have saved *this* swimmer (Godwin) from drowning, it should never be too late for the common law to evolve to prevent the next drowning from taking place.

Godwin thus requests that the trial court's order granting the Facebook Defendants' motion to dismiss be reversed, and further, that Plaintiff be afforded an opportunity to conduct discovery to determine whether a breach of duty occurred in this case of first impression.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Plaintiff-Appellant Debbie Godwin, Executrix of the Estate of Robert Godwin, Sr.* was filed electronically on this 26th day of February 2020. All parties will receive notice of this filing and can access this filing by operation of the Court's electronic filing system.

/s/ Andrew A. Kabat
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