IN THE COURT OF APPEALS OF OHIO TENTH APPELLATE DISTRICT

Jeff Ford et al., :

Plaintiffs-Appellants, :

No. 11AP-664

v. : (C.P.C. No. 10CVC-14156)

Donna Brooks et al., : (REGULAR CALENDAR)

Defendants-Appellees. :

DECISION

Rendered on March 8, 2012

Law Office of Brian M. Garvine, LLC, and Brian M. Garvine, for appellants.

Maguire & Schneider, L.L.P., Karl H. Schneider, and Mark R. Meterko, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Plaintiffs-appellants, Jeff Ford, Lisa Ford, Donald Lusk, and Frances Lusk (collectively, "appellants"), appeal the judgment of the Franklin County Court of Common Pleas, which dismissed their complaint against defendants-appellees, Donna Brooks ("Brooks") and HER Real Living ("HER") (collectively, "appellees"), for failure to state a claim upon which relief can be granted.

I. BACKGROUND

{¶2} Appellants initiated this action by filing a complaint in the Franklin County Court of Common Pleas on September 28, 2010. A First Amended Complaint, filed December 7, 2010, purports to allege claims against appellees for breach of fiduciary duty, breach of contract, negligent hiring and training, negligence, and fraud. Appellees filed a motion to dismiss the amended complaint, pursuant to Civ.R. 12(B)(6), which the trial court granted on July 5, 2011. The trial court issued a final judgment entry, dismissing appellants' amended complaint, on July 22, 2011, and appellants filed a timely notice of appeal.

II. ASSIGNMENTS OF ERROR

- $\{\P 3\}$ Appellants presently assert the following assignments of error:
 - [I.] THE TRIAL COURT ERRED WHEN IT DETERMINED THAT APPELLANTS' AMENDED COMPLAINT FAILED TO ALLEGE FACTS SUFFICIENT TO SUPPORT THEIR CLAIM FOR BREACH OF FIDUCIARY DUTY, NEGLIGENCE, OR BREACH OF CONTRACT[.]
 - [II.] THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLANTS' [sic] FAILED TO ALLEGE SUFFICIENT FACTS TO SUSTAIN THEIR CLAIM FOR NEGLIGENT HIRING/SUPERVISION AGAINST [HER.]
 - [III.] THE TRIAL COURT ERRED WHEN IT FOUND THAT APPELLANTS' [sic] FAILED TO PLEAD THEIR FRAUD CLAIM WITH SUFFICIENT PARTICULARITY, AND HAVE FAILED TO ALLEGE SUFFICIENT FACTS TO SUSTAIN THEIR CLAIM FOR FRAUD AGAINST [APPELLEES.]

III. DISCUSSION

{¶4} Each of appellants' assignments of error stem from the trial court's decision to dismiss their amended complaint for failure to state a claim upon which relief could be granted pursuant to Civ.R. 12(B)(6). A motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court may not rely on allegations

or evidence outside the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207 (1997). The court must presume that all factual allegations in the complaint are true and must draw all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). The trial court may only dismiss the case if it appears beyond doubt from the allegations in the complaint that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus.

- {¶ 5} We review a trial court's dismissal for failure to state a claim de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5. When examining a dismissal for failure to state a claim, we review the applicable law for each cause of action and determine whether the facts alleged would entitle the plaintiff to relief. *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, ¶ 12.
- {¶6} Because our consideration is limited to the allegations in the complaint, we first look to the factual allegations, which we presume as true for the purpose of appellees' motion. Appellants' amended complaint alleges the following facts. Brooks is a real estate agent, licensed to sell real estate in the state of Ohio. Brooks was employed by real estate broker HER, and Brooks served as appellants' real estate agent in their attempt to purchase real property (the "property"), located at 40 Wexford Drive, in Granville, Ohio, during the summer of 2010. Brooks' husband, also a real estate agent, but not a party to this action, escorted appellant Lisa Ford through the property on July 16, 2010. At that time, Ms. Ford measured for furniture and discussed various issues related to the purchase of the property, and Brooks' husband told Ms. Ford that appellants were getting the property for a "steal."
- {¶ 7} On July 21, 2010, before appellants made an offer for the property, Ms. Ford learned from the property owners that there was another offer on the property, written by Brooks. When Jeff Ford reached Brooks later that day, she denied writing the other offer, which the sellers ultimately accepted. The Fords finalized their own offer on the property in Brooks' office on July 22, 2010. Brooks' husband "indicated he saw a friend the previous Friday or Saturday evening and indicated to the friend that 'Donna's clients [the Fords] are in the process of writing an offer on the [property].' " Mr. Brooks'

friend "indicated the [p]roperty was his dream home and he wanted the house; within days, [he] wrote an offer through * * * Brooks and ultimately purchased the [p]roperty."

 $\{\P\ 8\}$ Appellants allege that Brooks breached R.C. Chapter 4735 by sharing appellants' confidential information with the purchaser of the property. They also allege that Brooks failed to be loyal to appellants and pursue their offer on the property, but instead "vigorously pursued the purchaser[']s offer * * * to [appellants'] detriment."

A. First Assignment of Error

- {¶9} In their first assignment of error, appellants contend that the trial court erred by dismissing their claims for breach of fiduciary duty, breach of contract, and negligence. The trial court addressed those claims together and found that appellants did not state claims upon which relief could be granted because appellees did not breach any duty or obligation to appellants by also representing the ultimate purchaser and because appellants' allegations regarding the sharing of confidential information are unsupported by factual allegations.
- {¶ 10} To prove a claim for breach of fiduciary duty under Ohio law, the claimant must establish the following elements: (1) a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately from that failure. Wells Fargo Bank, N.A. v. Sessley, 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 36 (10th Dist.). A claim for breach of fiduciary duty is basically a negligence claim requiring a higher standard of care. Strock v. Pressnell, 38 Ohio St.3d 207, 216 (1988). Here, appellants allege that appellees owed them a fiduciary duty, that appellees breached their fiduciary duty to appellants, and that appellees' breach proximately caused damage to appellants. They also allege that HER is responsible for Brooks' conduct based "upon the doctrines of respondeat superior, agency, apparent agency, and/or agency by estoppel." (Emphasis sic.)
- {¶ 11} "'A "fiduciary relationship" is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.' " Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc., 67 Ohio St.3d 274, 282 (1993), quoting In re Termination of Emp. of Pratt, 40 Ohio St.2d 107, 115 (1974). A

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fiduciary has a duty to act for someone else's benefit and may not possess an interest that might conflict with the interest of the person to whom the fiduciary owes a duty. *Belvedere* at 282. "Like other professionals, a person holding a real estate license is held to a higher standard of competency and fairness than is a lay member of the public in the market-place." *Richard T. Kiko Agency, Inc. v. Ohio Dept. of Commerce, Div. of Real Estate*, 48 Ohio St.3d 74, 76 (1990).

- {¶ 12} Real estate agents owe a fiduciary duty to their clients. *Parahoo v. Mancini*, 10th Dist. No. 97APE08-1071 (Apr. 14, 1998). Likewise, " 'real estate brokers have statutory and common law fiduciary duties of disclosure, good faith, and loyalty.' " *State Farm Fire & Cas. Co. v. Century 21 Arrow Realty*, 8th Dist. No. 87081, 2006-Ohio-3967, ¶ 33, quoting *Horning v. Fletcher*, 7th Dist. No. 05MA 7, 2005-Ohio-7078. R.C. 4735.62 sets forth a non-exhaustive list of statutory fiduciary duties applicable to a real estate agent or broker, which include the following:
 - (A) Exercising reasonable skill and care in representing the client and carrying out the responsibilities of the agency relationship;
 - (B) Performing the terms of any written agency agreement;

* * *

(D) Performing all duties specified in this chapter in a manner that is loyal to the interest of the client;

* * *

(F) Disclosing to the client any material facts of the transaction of which the licensee is aware or should be aware in the exercise of reasonable skill and care and that are not confidential information pursuant to a current or prior agency or dual agency relationship;

* * *

(I) Keeping confidential all confidential information, unless the licensee is permitted to disclose the information pursuant to division (B) of section 4735.74 of the Revised Code.

R.C. 4735.62. A real estate agent must also abide by common law fiduciary duties. *Century 21 Arrow Realty* at ¶ 33.

{¶ 13} The trial court essentially determined that appellants did not allege any facts suggesting appellees failed to observe a fiduciary duty owed to appellants. Because Ohio is a "notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity." *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 29. "[A]s 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, 145 (1991). "'Notice pleading' under Civ.R. 8(A) and 8(E) requires that a claim concisely set forth only those operative facts sufficient to give 'fair notice of the nature of the action.' " *Wildi v. Hondros College*, 10th Dist. No. 09AP-346, 2009-Ohio-5205, ¶ 12, quoting *DeVore v. Mut. of Omaha Ins. Co.*, 32 Ohio App.2d 36, 38 (7th Dist.1972).

{¶14} Appellants maintain that the factual allegations in their amended complaint gave appellees fair and sufficient notice of the nature of appellants' claims and satisfied the requirements of notice pleading. Appellees, on the other hand, argue that they did not breach a duty to appellants by representing both the ultimate purchaser and appellants because R.C. 4735.65(B) states that "[a] licensee does not breach any duty or obligation to the purchaser by showing the same properties to other purchasers or by acting as an agent or subagent for other purchasers." They also argue that appellants' allegation that Brooks shared confidential information is insufficient because it is unsupported by factual allegations, such as what confidential information was shared, when or how it caused the seller to reject appellants' offer.

{¶ 15} Appellants' factual allegation that Brooks shared appellants' confidential information with the purchaser of the property minimally, but sufficiently, pleads a failure to observe the fiduciary duty set forth in R.C. 4735.62(I). Under a notice-pleading standard, appellants are not required to particularly identify what confidential information Brooks allegedly shared or when that sharing allegedly occurred. In this context, "'[c]onfidential information' " is defined as "all information that a client directs to be kept confidential or that if disclosed would have an adverse effect on the client's

position in the real estate transaction, * * * and all information that is required by law to be kept confidential." R.C. 4735.51(G). From the context of the amended complaint and the statutory definition, we may presume that the confidential information allegedly shared arose out of the parties' fiduciary relationship and related to the terms of appellants' proposed purchase of the property. Appellants' allegation that Brooks shared confidential information with the purchaser of the property, without permission, is, itself, a factual allegation that appellees failed to observe a fiduciary duty owed to appellants.

{¶ 16} Appellants may also be able to establish an independent breach arising out of Brooks' actions regarding her preparation of a competing offer on behalf of the purchaser. As the trial court noted, R.C. 4735.65, which sets forth a licensee's duties and obligations to a purchaser, permits a real estate agent to show the same properties to multiple purchasers and to act as an agent or subagent for multiple purchasers. A licensee's duties to a purchaser include seeking a property at an acceptable price and with acceptable terms, assisting the purchaser in developing, communicating, and presenting offers or counteroffers, timely presenting offers to the seller or seller's agent, and answering questions within the scope of knowledge required for licensure regarding the steps required to fulfill contract terms. The allegations here involve not only showing the property to multiple purchasers or acting as an agent for multiple purchasers, but also involve the licensee writing competing offers on the same property on behalf of two different clients. We cannot say, as a matter of law, that R.C. 4735.65(B) necessarily permits a licensee to write competing offers on the same property without implicating the licensee's fiduciary duties, including the common law duty of loyalty to each client's interests and the statutory duties of "[e]xercising reasonable skill and care in representing the client" and "[d]isclosing to the client any material facts of the transaction of which the licensee is aware or should be aware in the exercise of reasonable skill and care." See R.C. 4735.62(A) and (F).

{¶ 17} Because appellants allege the existence of a fiduciary relationship between appellants and appellees, a breach of fiduciary duty by appellees, and damages to appellants as a proximate result of that breach, we conclude that the amended

complaint sets forth a claim for breach of fiduciary duty upon which relief could be granted and that the trial court erred by dismissing that claim pursuant to Civ.R. 12(B)(6).

{¶ 18} We now turn to appellants' negligence claim. The required elements of negligence include the existence of a duty, the defendant's breach of that duty, and an injury to the plaintiff proximately resulting from the defendant's breach. See Strother v. Hutchinson, 67 Ohio St.2d 282, 285 (1981). Appellants allege the following: (1) appellees owed them a duty of loyalty and a duty to disclose their relationship with the purchaser; (2) appellees breached their duty "by failing to use reasonable care in the course of their business, * * * by failing to be loyal to [appellants,] and by failing to disclose their relationship with the purchaser of the [p]roperty"; and (3) appellants were damaged as a proximate result of appellees' breach. The same factual allegations that support appellants' claim for breach of fiduciary duty also support appellants' claim for negligence and give appellees fair notice of the nature of the action. Accordingly, dismissal of appellants' negligence claim was not warranted under Civ.R. 12(B)(6).

{¶ 19} The final claim addressed in appellants' first assignment of error is a claim for breach of contract. In general, "[t]he essential elements of a cause of action for breach of contract are the existence of a contract, performance by the plaintiff, breach by the defendant and resulting damage to the plaintiff." Flaim v. Med. College of Ohio, 10th Dist. No. 04AP-1131, 2005-Ohio-1515, ¶ 12. Civ.R. 10(D) requires that, when a claim is based on a written contract, the claimant must attach a copy of the contract to the pleading or include within the pleading an explanation for its omission. Neither appellants' original complaint nor their amended complaint includes a copy of a written agency contract between appellants and appellees or explains the absence of the parties' contract. It is unclear, however, from the amended complaint whether the alleged agency contract was written or oral, and, without a determination of whether appellants' claim is founded on a written or oral contract, the trial court could not determine whether Civ.R. 10(D) was applicable in this case. See Muelder v. Abernethy, 8th Dist. No. 42500 (Dec. 18, 1980).

{¶ 20} Upon review, however, we conclude that appellants' allegations are insufficient to give fair notice of the nature of their breach of contract claim and the grounds upon which it rests. Appellants' amended complaint does not plead any obligations or duties required by the alleged contract or that appellees breached any specific contractual obligation. Rather, the amended complaint states only that appellees "entered into an agency contract with [appellants] to represent [appellants'] interests regarding the purchase of the [p]roperty" and that appellees "breached the agency contract." The allegation that appellees breached the agency agreement, with no underlying factual allegations that appellees failed to perform their contractual obligations, is conclusory and need not be presumed true for purposes of appellees' motion to dismiss. See Bond v. Frank, 2d Dist. No. 00CA55 (May 4, 2001) (failure to allege any duty or duties which the defendant promised, but failed, to perform cannot be cured merely by conclusively alleging that the defendant breached their contract). Additionally, appellants' amended complaint contains no allegation that appellants performed their own contractual obligations, which is a required element of a breach of contract action. Accordingly, we conclude that, even when the factual allegations in the amended complaint are presumed true and all reasonable inferences are made in appellants' favor, the amended complaint does not state a claim for breach of contract upon which relief could be granted.

 $\{\P\ 21\}$ For these reasons, we sustain appellants' first assignment of error with respect to their claims for breach of fiduciary duty and negligence, but we overrule appellants' first assignment of error with respect to their claim for breach of contract.

B. Second Assignment of Error

 \P 22} In their second assignment of error, appellants contend that the trial court erred by dismissing their claim for negligent hiring and supervision, referred to in the amended complaint as negligent hiring and training. The elements of negligent hiring and supervision are as follows: (1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act causing the plaintiff's injuries; and (5) the employer's negligence in hiring or supervising the employee as the proximate cause of

the plaintiff's injuries. *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 739 (10th Dist.1996); *Browning v. Ohio State Hwy. Patrol*, 151 Ohio App.3d 798, 2003-Ohio-1108, ¶ 67 (10th Dist.). Other courts have applied these same elements to claims of negligent training. *See, e.g., Jarvis v. Securitas Sec. Servs. USA, Inc.*, D.Md. No. 11-cv-00654-AW (Feb. 16, 2012). An underlying requirement in actions for negligent hiring, supervision, and training is that the employee is individually liable for a tort or guilty of a wrong against a third party, who seeks recovery against the employer. *Strock*, 38 Ohio St.3d at 217; *Godsey-Marshall v. Phillipsburg*, 2d Dist. No. 23687, 2010-Ohio-2266, ¶ 34.

{¶ 23} The trial court dismissed appellants' negligent hiring, supervision, and/or training claim based solely on its determination that appellants failed to allege an act by Brooks causing harm. Appellants alleged facts sufficient to satisfy the first, second, and fourth elements of their claim for negligent hiring, supervision, and/or training. First, appellants expressly allege an employment relationship between Brooks and HER. Next, contrary to appellees' argument that appellants failed to allege facts demonstrating any act by Brooks that proximately caused injury to appellants, we have already determined that appellants have, at least minimally, stated claims for breach of fiduciary duty and negligence by Brooks. Based on our resolution of appellants' first assignment of error, the grounds stated by the trial court do not support dismissal of appellants' claim for negligent hiring, supervision, and/or training.

{¶24} Although we disagree with the trial court's reasoning, we review its dismissal de novo and consider the remaining elements of appellants' claim. An appellate court should affirm a trial court's judgment if any grounds support it. *McKay v. Cutlip*, 80 Ohio App.3d 487, 491 (9th Dist.1992), citing *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96 (1990). A reviewing court may not reverse a correct judgment merely because the trial court expressed erroneous reasons for it. *State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89, 92 (1994). Here, while the amended complaint sets forth conclusory allegations that HER was negligent in hiring and/or training Brooks and that HER's negligence proximately caused damage to appellants, appellants do not allege any facts suggesting that HER possessed actual or constructive knowledge of Brooks' alleged

incompetence or that negligence by HER was the proximate cause of appellants' injuries. Beyond allegations that they used the services of both Brooks and HER and that they relied on appellees' skill, training, and advice, none of appellants' factual allegations relate to HER. Because appellants did not allege facts regarding each of the requisite elements of their purported claim, the trial court did not err by dismissing appellants' claim for negligent hiring, supervision, and/or training. We therefore overrule appellants' second assignment of error.

C. Third Assignment of Error

{¶ 25} In their third assignment of error, appellants contend that the trial court erred by dismissing their fraud claim based upon a failure to plead the elements of that claim with sufficient particularity. A civil fraud claim requires the establishment of the following six elements: "(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Burr v. Bd. of Cty. Commrs. of Stark Cty.*, 23 Ohio St.3d 69 (1986), paragraph two of the syllabus.

{¶ 26} In contrast to the notice-pleading standard in Civ.R. 8, Civ.R. 9(B) requires, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." This court has interpreted the "circumstances constituting fraud" to include the time, place, and content of the false representation, the fact represented, the individual who made the representation, and the nature of what was obtained or given as a consequence of the fraud. *Hancock v. Longo*, 10th Dist. No. 98AP-1518 (Oct. 14, 1999), citing *State Sav. Bank v. Gunther*, 127 Ohio App.3d 338, 345 (3d Dist.1998), quoting *Aluminum Line Prods. Co. v. Brad Smith Roofing Co., Inc.*, 109 Ohio App.3d 246, 259 (8th Dist.1996); *see also Korodi v. Minot*, 40 Ohio App.3d 1 (10th Dist.1987). Failure to plead the elements of fraud with particularity results in a defective claim that cannot withstand a Civ.R. 12(B)(6) motion.

Morrow v. Reminger & Reminger Co., L.P.A., 183 Ohio App.3d 40, 53, 2009-Ohio-2665 (10th Dist.).

- \P 27} Appellants' fraud claim includes additional factual allegations relevant to that claim. Appellants allege, in pertinent part, as follows:
 - 38. [Appellees] made untrue statements, misrepresentations and/or omissions of material fact including, without limitation, and subject to further discovery in this matter that:
 - a. They were sharing [appellants'] confidential information with the purchaser without [appellants'] permission;
 - b. They were actively pursing the purchaser's offer on the Property to [appellants'] detriment;
 - c. They were simultaneously intentionally failing to pursue [appellants'] offer on the Property.

They allege that they relied, to their detriment, on each of the "acts, omissions and/or failures to disclose material facts" by appellees.

{¶ 28} The trial court adopted appellees' arguments that appellants failed to plead with particularity "the who, what, where or how of their fraud claim," noting that appellants did not articulate who made the alleged misrepresentations or omissions, when those representations or omissions were made, and to whom. The court also found that, although appellants alleged that Brooks misrepresented that she did not write the offer accepted by the sellers, appellants did not allege facts supporting the elements of justifiable reliance on that misrepresentation or proximate cause because they alleged that they were already aware that Brooks had written the other offer before appellants made their offer and before the seller accepted either offer.

{¶ 29} Appellants expressly alleged that the property owners told Ms. Ford, on July 21, 2010, that Brooks had written an offer on the property, on behalf of another purchaser. Mr. Ford was aware of this fact because the amended complaint alleges that he questioned Brooks about it the day before the Fords met with Brooks to finalize their own offer on the property. Based on those facts, alleged in the amended complaint, we

agree with the trial court that appellants cannot allege that they justifiably and detrimentally relied on Brooks' misrepresentation regarding her submission of the offer ultimately accepted by the sellers.

{¶ 30} We also agree with the trial court that appellants failed to allege the circumstances constituting fraud with particularity in their amended complaint. Appellants do not specify whether their claim of fraud is based on affirmative misrepresentations, omissions or both, and do not allege what was obtained or given as the result of the alleged fraud. With one exception, appellants do not specify who made the alleged misrepresentations and/or omissions, to whom they were made or when they were made. Appellants point to no allegations in the amended complaint to rebut appellees' arguments or the trial court's findings but, instead, vaguely argue that, "[t]aken as a whole, [a]ppellants satisfy their Civ. R. 9(B) burden regarding justifiable reliance and proximate cause." We disagree. Because we conclude that appellants failed to allege the circumstances constituting fraud with the particularity required by Civ.R. 9(B), we discern no error in the trial court's dismissal of that claim, and we overrule appellants' third assignment of error.

IV. CONCLUSION

{¶ 31} For these reasons, we sustain in part and overrule in part appellants' first assignment of error, and we overrule appellants' second and third assignments of error. We reverse the trial court's judgment regarding appellants' claims for breach of fiduciary duty and negligence, but affirm the trial court's judgment regarding appellants' claims for breach of contract, negligent hiring, supervision, and/or training, and fraud. We therefore remand this matter to the Franklin County Court of Common Pleas for further proceedings consistent with this decision and the law.

Judgment affirmed in part, reversed in part; cause remanded.

KLATT and TYACK, JJ., concur.