[Cite as *Vogel v. Palmieri Interni, Inc.*, 2026-Ohio-3228.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MARK VOGEL, ET AL.,	:	
Plaintiffs-Appellants,	:	No. 115742
v.	:	
PALMIERI INTERNI INC., D/B/A HOUSE OF L, ET AL.	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: August 20, 2026

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-23-989114

Appearances:

Lieberman, Dvorin & Dowd, LLC, and David M. Dvorin; McMillan & Sobel, LLC, and Jonathan F. Sobel, *for appellants*.

Raslanpla & Company, LLC, Jorge Luis Pla, and Erika Molnar, *for appellees*.

KATHLEEN ANN KEOUGH, J.:

{¶ 1} In November 2023, Mark Vogel and Sonya Vogel ("the Vogels") filed a complaint naming Palmieri Interni Inc., d/b/a House of L and Lambrini Palmieri a/k/a Libby Palmieri (collectively, "HoL") as defendants, asserting claims for breach of contract, negligence, fraud, violating the Consumer Sales Practices act ("CSPA"), conversion, and accounting.[1] Palmieri is the sole shareholder of HoL, a full-service interior design business located in Cuyahoga County.

{¶ 2} The complaint detailed that the Vogels had recently purchased property in Sunny Isles, Florida. The Vogels had utilized HoL's interior design services in the past and approached HoL about providing design services for the property. In May 2022, HoL provided the Vogels with a proposed contract to provide interior design concept services and interior installation and merchandise purchasing services that the Vogels accepted. A copy of the contract was attached to the complaint.

{¶ 3} The Vogels agree that HoL timely performed all obligations under the contract but alleged in their complaint that since that time, the Vogels had discovered various alleged breaches of the contract. The Vogels argue that HoL breached the following provisions of the contract:

> A. [HoL] will where appropriate and subject to [the Vogels'] review and prior approval:
>
> 1. Select and/or specifically design interior installations and all required items of movable furniture, light fixtures and lamps, hardware, fixtures, accessors, and the like.
>
> 2. Prepare and submit for [the Vogels'] prior approval merchandise proposals (the "MP") for the purchase of Merchandise.
>
> . . .

[1] The Vogels abandoned their conversion claim in their merit brief.

> The price of each item to [the Vogels'] (a.k.a Client Price) shall be the net amount charged to [HoL] by the supplier plus mark-up determined by [HoL]. The cost of any item quoted by HoL shall not exceed MSRP [Manufacturers Suggested Retail Price].

{¶ 4} The Vogels alleged that HoL (1) charged above the MSRP for several items, (2) marked up certain merchandise without an MSRP to a "commercially unreasonable amount," (3) marked up freight charges, and (4) upcharged subcontractors and third-party contractors without notice and approval from the Vogels. According to the complaint, the Vogels approached Palmieri about these allegations and she "apologized, provided an unsatisfactory explanation for the excessive mark-ups, and issued the Vogels credit memos for various items."

{¶ 5} HoL answered and counterclaimed against the Vogels, alleging that the Vogels breached two separate interior design contracts, the same contract pertaining to the Florida property and another pertaining to a property in Aspen, Colorado for which HoL also provided design services. The Aspen property contract was attached as an exhibit.

{¶ 6} Regarding the Florida property's breach-of-contract claim, HoL averred that it custom ordered a "liquid bronze metal finish and cast bronze dining room table" according to the Vogels' specifications. When the table arrived, Sonya called HoL to "complain that the dining room table base was not what she ordered." HoL offered that the Vogels could use the table until HoL purchased another table and would remove the unsatisfactory table at its cost. The Vogels, however, refused delivery of the unsatisfactory table and "voiced their dissatisfaction with other pieces of merchandise and identified other pieces of furniture as damaged post-delivery." According to the counterclaim, HoL replaced some merchandise, had some merchandise repaired, and credited the Vogels for merchandise that could not be returned, replaced, or repaired. Nonetheless, the Vogels, inconsistent with the contract, failed to (1) identify the nature and extent of any default in performance and notify HoL within 15 business days from receipt of notice to cure the default; (2) permit HoL to access the house to complete scheduled work; (3) permit HoL to photograph the project; and (4) pay outstanding balances for work completed and merchandise delivered.

{¶ 7} Regarding the breach-of-contract claim for the Aspen property contract, HoL alleged that when the Vogels sold the Aspen property, they provided HoL's concept drawings and specifications to the buyer, allegedly in violation of the following provision of the Aspen contract:

> All concepts, drawings and specifications prepared by [HoL] (a.k.a. Project Documents) and all copyrights and other proprietary rights applicable thereto remain at all times [HoL]'s intellectual property. Project documents provided by [HoL] may not be used by Client for any purpose other than completion of Project.

{¶ 8} In February 2024, simultaneously with its answer and counterclaim, HoL filed a motion for judgment on the pleadings. The motion argued that the unambiguous terms of the Florida contract provided that the Vogels preapprove the merchandise and price prior to HoL ordering the merchandise, all of which allegedly occurred in this matter. The motion also argued that the Vogels' negligence, fraud, CSPA, and conversion claims were either improperly pled or duplicative of the underlying breach-of-contract claim.

{¶ 9} In October 2024, the court granted HoL's motion for judgment on the pleadings and issued the following journal entry:

> This is an action for breach of contract. Plaintiff has alleged five counts including fraud, negligence, conversion, breach of contract and a consumer sales practices act claim.
>
> The court has reviewed all of the filings in this case. While plaintiff correctly sets forth the elements of each claim, the court need not accept as true any conclusion and unsupported legal propositions. Plaintiff has not set forth any facts whch [sic] would support any of [sic] listed claims. The 8th District Court of Appeals has consistently held that the mere recitation of legal standards is not sufficient to prevail on a motion to dismiss for failure to state a claim or a judgment on the pleadings. Johnson v Johnsonc [sic], 8th Dist. Cuyahoga No. 108420, 2020-Ohio-1381.
>
> Plaintiff's attempt to pursue discovery and depositions prior to denendant's [sic] filing a responsive pleading is a veiled attempt to "build" their case by a fishing expedition. It is well settled that plaintiff cannot use discovery as a fishing expedition to "build" its case where no foundation has been set forth.
>
> Therefore, the court hereby grant [sic] defendant's motion to dismiss with prejudice.

{¶ 10} The case proceeded forward on the counterclaim, culminating in HoL filing a motion for partial summary judgment on liability for the breach-of-contract claims. The Vogels filed their own motion for summary judgment despite full dismissal of their complaint when the court granted HoL's motion for judgment on the pleadings. Regardless, on October 16, 2025, HoL filed a Civ.R. 41(A) notice dismissing both counterclaims against the Vogels without prejudice, rendering the case ripe for appeal. The Vogels accordingly filed the instant appeal, assigning the following four errors for our review:

> 1. The Trial Court erred in dismissing the Complaint for purportedly failing to set forth any facts that would support any of the claims for relief despite that the Complaint is replete with facts supporting Appellants' claims for relief.
>
> 2. The Trial Court erred in dismissing the Complaint for failing to set forth any facts that would support any of the claims for relief by mistakenly concluding that Appellants merely recited legal standards and by failing to construe the allegations in the Complaint, with reasonable inferences, in the Appellants' favor.
>
> 3. The Trial Court erred in determining that Appellants' issuance of written discovery and attempt to schedule depositions before Appellees filed a responsive pleading was a veiled attempt to build their case by a fishing expedition.
>
> 4. The Trial Court erred in dismissing the Complaint with prejudice thereby wrongfully preventing Appellants from refiling their claims for relief.

{¶ 11} All of the Vogels' assigned errors dispute the trial court's grant of HoL's motion for judgment on the pleadings, each for different reasons. For ease of discussion, we discuss them together and out of order as necessary.

{¶ 12} A motion for judgment on the pleadings is governed by Civ.R. 12(C). We review a trial court's decision on a motion for judgment on the pleadings de novo. *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 2019-Ohio-2851, ¶ 8. Dismissal under Civ.R. 12(C) is warranted when "(1) the court construes as true, and in favor of the nonmoving party, the material allegations in the complaint and all reasonable inferences to be drawn from those allegations and (2) it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief." *Reister v. Gardner*, 2020-Ohio-5484, ¶ 17, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 1996-Ohio-459, ¶ 21.

A pleading shall contain "(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). The Ohio Supreme Court, in *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), adopted the United States Supreme Court's articulation of the pleading standard in *Conley v. Gibson*, 355 U.S. 41 (1957). This pleading standard, known as "notice pleading," provides that a complaint is sufficiently pled unless "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *O'Brien* at 245, quoting *Conley* at 45.[2] Under the notice-pleading standard, we are mindful that a plaintiff need not prove its case at the pleading stage. *York v. Ohio State Hwy. Patrol,* 60 Ohio St.3d 143, 144-145 (1991). "[O]utside of a few specific circumstances, such as claims involving fraud or mistake, *see* Civ.R. 9(B), a party will not be expected to plead a claim with particularity."

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[2]*Conley* has since been overruled at the federal level and replaced with a heightened pleading standard generally requiring plausibility. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Since the Ohio Supreme Court has not adopted the pleading standards in *Twombly* and *Iqbal*, *O'Brien* and the pleading standard therein, known as "notice pleading," remains Ohio's pleading standard. *Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, ¶ 14 (8th Dist.). We acknowledge, however, that the Ohio Supreme Court heard arguments urging adoption of the federal pleading standards in *Twombly* and *Iqbal* on November 19, 2025. *03/04/2025 Case Announcements,* 2025-Ohio-705. *Bethel Oil & Gas, LLC, et al. v. Redbird Dev. LLC, et al.*, No. 2024-1696 (appeals accepted for review). As of the date of this opinion, a decision has not been released.

Maternal Grandmother, ADMR v. Hamilton Cty. Dept. of Job & Family Servs., 2021-Ohio-4096, ¶ 10.

A. Breach of Contract

{¶ 13} A breach-of-contract claim "is generally pleaded by setting forth the terms of the contract, the plaintiff's performance of [their] contractual obligations, the defendant's breach of the contract, damages, and consideration." *Wells v. Aust*, 1994 Ohio App. LEXIS 2169,*5 (8th Dist. May 19, 1994). In their complaint, the Vogels allege that HoL was in breach of the agreement because it (1) charged over the MSRP for items, (2) marked up items without an MSRP to a commercially unreasonable amount, and (3) marking up freight charges, subcontractor fees, and third-party contracts. The Vogels have pointed to specific promises within the contract and alleged that HoL breached them. HoL answers that every purchase was specifically approved by the Vogels through their merchandise proposals, but does not include evidence supporting this, such as merchandise proposals signed by the Vogels. Likewise, the Vogels have failed to attach any specific examples, photographs, or other exhibits exemplifying the alleged breaches of contract. However, we are mindful that at this stage, we may only consider the adequacy of the pleadings and the documents properly attached thereto. We also note that HoL's responses contest whether the Vogels themselves complied with their obligations under the contract, which affects the circumstances surrounding the breach and presents a question of fact that is not discernable from the pleadings alone. For these reasons, we find that these allegations, viewed in a light most favorable to the

Vogels, satisfy Ohio's notice pleading standards and properly pled a breach-of-contract claim.

B. Negligence

{¶ 14} Negligence is proven by demonstrating a duty, breach of that duty, and injury proximately resulting from the breach. *Woods v. Sharkin*, 2022-Ohio-1949, ¶ 97 (8th Dist.), citing *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). "Duty may be established by common law, legislative enactment, or by the particular facts and circumstances of the case." *Id.*, citing *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998).

{¶ 15} The Vogels' complaint alleges that HoL was negligent in breaching "an implied duty to perform the services in a good and workmanlike manner, free of defects in material and workmanship furnished and performed." However, as a general rule, "'the existence of a contract action generally excludes the opportunity to present the same case as a tort claim.'" *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151 (9th Dist. 1996), quoting *Wolfe v. Continental Cas. Co.*, 647 F.2d 705, 710 (6th Cir. 1981). "A tort claim based upon the same actions [as] those upon which a claim of contract breach is based will exist independently of the contract action only if the breaching party also breaches a duty owed separately from that created by the contract . . . ." *Textron* at *id.* Here, the Vogels' complaint does not identify a duty owed to them that is distinct from duties created by contract. We therefore find that the trial court did not err in granting judgment on the pleadings regarding the Vogels' negligence claim.

C. Fraud

{¶ 16} To properly plead a claim for fraud, the Vogels were required to aver the circumstances with particularity. Civ.R. 9(B). This rule "'places a higher burden than is normally required upon the person asserting such a claim to support general allegations with specific facts.'" *Fast Tract Title Servs. v. Barry*, 2022-Ohio-1943, ¶ 12 (8th Dist.), quoting *Reasoner v. State Farm Mut. Auto Ins. Co.*, 2002-Ohio-878, ¶ 20-21 (10th Dist.). The pleading must contain allegations of fact that tend to show each and every element of a cause of action for fraud. *Parmatown S. Assn. v. Atlantis Realty Co.*, 2018-Ohio-2520, ¶ 7. The party claiming fraud must state "the time, place, and content of the false representation, the fact misrepresented, and the nature of what was obtained or given as a consequence of the fraud." *Carter Jones Lumber Co. v. Denune*, 132 Ohio App.3d 430, 433 (10th Dist. 1999).

{¶ 17} We find that the fraud claim herein is not pled with the particularity required by Civ.R. 9(B). The claim avers that "[HoL] represented to the Vogels that they would not charge the Vogels for merchandise in excess of the MSRP, they would not mark-up freight charges and they would not up-charge subcontractors and third-party contracts without notice and prior approval from the Vogels." It further avers that the Vogels "have been substantially damaged by [HoL]'s fraudulent conduct." The fraud claim does not indicate or even surmise as to the time, place, content, misrepresentations, and consequences of the alleged fraud. This alone support's the trial court's dismissal of the claim, and as such we decline to address the parties' arguments as to whether the Vogels' breach-of-contract claims are factually intertwined with the alleged fraud claims.

{¶ 18} For the reasons discussed above, we agree that judgment on the pleadings was warranted on the Vogels' fraud claim.

D. CSPA Claims

{¶ 19} In the complaint, the Vogels alleged that HoL violated the CSPA; specifically, it alleged that HoL violated R.C. 1345.03(B)(6), which provides as part of a list of "unconscionable acts" the circumstances whether "a supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment." On appeal, the Vogels argue that they properly pled a CSPA claim because the complaint alleges that they relied on HoL's misrepresentations about custom pricing and MSRP values in entering into the contract and signing off on purchases and suffered financial damages as a consequence. Under the constraints of our review that is limited to the pleadings and viewing those allegations in a light most favorable to the Vogels, we find that the Vogels properly pled a claim for CSPA violations under Ohio's pleading standards.

{¶ 20} Based on the foregoing, we find that the trial court erred in granting judgment on the pleadings regarding the Vogels' breach-of-contract and CSPA claims. This partially affirms and partially reverses assignment of error Nos. 1 and 2.

{¶ 21} Based on our reversal of judgment on the pleadings on the breach-of-contract and CSPA claims, we need not resolve or address the court's statement that the Vogels were engaging in a "fishing expedition." We, however, note that Civ.R.

12(C) motions are limited to the content of the pleadings and the properly attached exhibits thereto; whether the Vogels are engaging in a "fishing expedition" cannot be determined from the pleadings alone. We accordingly overrule assignment of error No. 3 as moot.

{¶ 22} In assignment of error No. 4, the Vogels argue that the trial court erred in granting judgment on the pleadings and dismissing all claims with prejudice. We disagree.

{¶ 23} A Civ.R. 12(C) motion has been characterized as a "belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief can be granted" and as a motion used for answering questions of law. *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581 (2001). A review of the relevant case law demonstrates that the Ohio Supreme Court has inconsistently characterized Civ.R. 12(B)(6) dismissals. "A dismissal with prejudice operates as an adjudication on the merits" and thus, "a dismissal for reasons other than on the merits should be dismissed with prejudice." *Fletcher v. Univ. Hosps. of Cleveland*, 2008-Ohio-5379, ¶ 16. Under this reasoning, the Ohio Supreme Court held that dismissing a case for failure to state a claim adjudicates the adequacy of the pleading, not the merits of the claim itself and thus is typically entered without prejudice, "except in those cases where the claim cannot be pleaded in any other way." *Id.* at ¶ 17, citing *Collins v. Natl. City Bank*, 2003-Ohio-6893, ¶ 51 (2d Dist.). Less than one year later, the Ohio Supreme Court held, without mentioning *Fletcher*: "It follows that a dismissal grounded on a complaint's 'failure to state a claim upon which relief can be granted' constitutes a judgment that is an 'adjudication on the merits.'" *State ex rel. Arcadia Acres v. Ohio Dept. of Job & Family Servs.*, 2009-Ohio-4176, ¶ 14-15. As the Tenth District has recognized, "Although this holding [in *Fletcher*] contradicts the Supreme Court's pronouncement in *Arcadia Acres*, the Supreme Court did not distinguish or even mention *Fletcher* in *Arcadia Acres*." *Kromer v. Arthritis Found.*, 2025-Ohio-661, ¶ 34 (10th Dist.), *appeal not accepted*, 2025-Ohio-2348. In *Kromer*, the Tenth District followed the doctrine that "[w]here Supreme Court precedent conflicts, appellate courts are bound to follow the Supreme Court's most recent decision" and followed the more recent decision, *Arcadia Acres*. *Kromer* at ¶ 34, citing *Blackburn v. Hamoudi*, 1991 Ohio App. LEXIS 566, *6 (10th Dist. February 8, 1991).

{¶ 24} Fortunately, applying both *Fletcher* and *Arcadia Acres* to the matter herein yields the same result: the claims were properly dismissed with prejudice. *Fletcher* provides an exception where failure-to-state-a-claim claims may be dismissed with prejudice, and that is where the claim cannot be pleaded in another way. Applying *Fletcher*, we find that The Vogels' claims for negligence and fraud cannot be pleaded any other way. And, the Vogels did not attempt to plead them any other way after HoL filed its Civ.R. 12(C) motion. Though the complaint alleges that HoL had a duty separate from the contractual agreement, it does not allege a duty distinct from those assumed under the contract. And, the Vogels did not make any efforts to plead their fraud claim with any more particularity after its adequacy was challenged in the Civ.R. 12(C) motion. The pleadings could not have been pleaded any other way, and this is corroborated by the Vogels' failure to amend the complaint. Thus, under *Fletcher*, it was proper to dismiss the claims with prejudice. And of course, applying *Arcadia Acres* concludes that the negligence and fraud claims should be dismissed with prejudice. Since both support the trial court's decision to dismiss these claims with prejudice, we need not determine whether *Fletcher* or *Arcadia Acres* controls in this matter. Assignment of error No. 4 is sustained.

{¶ 25} Accordingly, the trial court's judgment is affirmed in part, reversed in part, and remanded. In summary, we find that the Vogels adequately pled CSPA and breach-of-contract claims. Those are reinstated. The Vogels' claims for negligence and fraud do not comply with Ohio's pleading standards and were correctly dismissed under Civ.R. 12(C). Dismissal of the negligence and fraud claims was properly entered with prejudice.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KATHLEEN ANN KEOUGH, JUDGE

MICHAEL JOHN RYAN, P.J., and
EILEEN A. GALLAGHER, J., CONCUR