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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001819-MR

JOSEPH HILLYER AND
BROOKE HILLYER — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 09-CI-02272

PAUL MILLER FORD, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE, JUDGE; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

ACREE, CHIEF JUDGE: Appellants, Joseph and Brooke Hillyer, brought breach of contract/breach of warranty and fraud claims against Appellee Paul Miller Ford, Inc. Appellants' claims arose from their purchase of a truck with an allegedly damaged frame. The issue before us is whether the Fayette Circuit Court erred by granting summary judgment in Paul Miller's favor. Finding no error, we affirm.

I. Facts and Procedure

On January 13, 2007, Appellants purchased a new 2007 Ford F-350 pickup truck from Paul Miller Ford. The vehicle was dealer-traded from another Ford dealership in Tennessee and delivered to Paul Miller. As part of the purchase, Paul Miller provided Appellants with a number of sales documents, including a "Dealer Warranty Disclaimer" and a delivery checklist stating that the truck had been inspected prior to its delivery to Appellants. The checklist was signed by a representative of Paul Miller, and was also executed and acknowledged by Appellants. Appellants were also given a printed replication of a Ford window sticker setting forth a "vehicle description" of the truck. This document indicated that the truck had a three-year bumper-to-bumper warranty, a five-year powertrain warranty, and a five-year roadside assistance warranty.

Almost immediately, Appellants began experiencing problems with the truck. On March 19, 2007, they took the truck to Airport Ford in Florence,

Kentucky,[2] to determine why the truck's tailgate was difficult to open and close. Airport Ford realigned the front and back body panels on the truck, and this allowed the tailgate to close more easily. However, Appellants continued to have problems with the truck. For example, a camping trailer could not be hitched and unhitched to the truck without a board being placed under one of the tires. Appellants also noticed unusual tire wear on the truck and the trailer.

On November 4, 2008, nearly two years after the purchase, Joseph Hillyer brought the truck back to Paul Miller to be checked out. Service advisors and technicians at the dealership's service department looked at the truck and, based on their initial visual observations, concluded that the right side of the bed appeared to sit higher than the other side and that the frame might have been bent. Hillyer left with the vehicle, without asking for any repairs to be performed. A subsequent e-mail generated internally at Paul Miller indicated that Hillyer had declined any repairs because he "didn't want a truck that had [its] frame repaired."

When subsequent efforts to deal with Paul Miller failed to address Appellants' concerns, they submitted a claim against Ford Motor Company through a Better Business Bureau ("BBB") vehicle dispute resolution program called "Auto Line." As part of this process, Ford sent a field service engineer to Paul Miller to inspect the truck and to address any discovered defects.

[2] Appellants took the truck to this dealership because it was closer to Joseph Hillyer's place of employment.

According to Joseph Hillyer, the engineer advised him that while the truck did sit higher on its rear right side, the problem was not frame-related but was instead the result of some side-to-side "body lean" because the truck's "[b]ody panels just aren't sitting right on the frame." Paul Miller's records reflect that the engineer and Paul Miller employees switched some springs on each side of the truck and reseated the suspension as a corrective action to return the truck to factory "lean tolerance" levels. No repairs were made to the frame because it was determined that nothing else needed to be done to return the truck to factory-specification status. However, Hillyer indicated that the right rear of the truck still appeared to be sitting higher than the other side, and at least one employee with Paul Miller testified that the truck still "didn't look like it was sitting right" and still appeared to have a bent frame.

According to Joseph Hillyer, Paul Miller refused to allow its vehicle lift to be used to have the truck's frame more comprehensively measured with a laser. His deposition indicates that Paul Miller was "not comfortable with potential liability issues if they let an outside inspector use their frame machine." Paul Miller also took the position, consistent with the field service engineer's conclusions, that the frame of the truck was not bent even though multiple employees had earlier thought that it might be.

Dissatisfied with this result, Appellants pursued an arbitration hearing before the BBB. At this hearing, Ford took the position that there was no evidence of a bent frame on Appellants' vehicle. On March 5, 2009, the BBB arbitrator issued a decision denying Appellants' claim. After finding that the claim was not eligible under Kentucky's "lemon law" on technical grounds, the arbitrator further justified her decision as follows:

> This claim is not eligible under the Ford Auto Line Program Summary. Under the Ford program summary, a claim seeking repurchase must be presented within the first 36 months or 36,000 miles, whichever occurs first. There is one defect alleged in this vehicle. That defect is that the frame of the vehicle is warped. That defect manifests as the misaligned body panels and wheel misalignment. Consumer correctly stated that the body panels had been adjusted to cosmetically correct the problem. Those two repair attempts resulted in five days out of service.
>
> Consumer and manufacturer agree that the frame has not been examined to diagnose whether and how much the frame is within specifications. Consequently, manufacturer has not had an opportunity to repair the defect at all. On inspection, arbitrator found the body lines visibly inconsistent, and manual inspection revealed the bed to be much further from the cab on the left side than the right. This leads to the conclusion that the frame is likely warped. No evidence was produced to indicate that the frame warp was a result of any fault of the consumer.
>
> Arbitrator makes no finding at this time whether the frame nonconformity constitutes a significant impairment to the use, safety or value of the vehicle, since manufacturer must first be afforded reasonable

> opportunity to repair the nonconformity. At this time, a denial is in order.

Essentially, then, Appellants' claim was denied because the truck's frame had not been measured and, as a result, Ford had not had an opportunity to repair any potential defects in the frame. Appellants subsequently had the frame examined by a frame repair company, which determined that the frame was, in fact, twisted and bent.

On April 30, 2009, Appellants filed a complaint in Fayette Circuit Court in which they asserted negligence and breach of contract claims against Paul Miller. Appellants subsequently amended their complaint to add a number of other allegations, including claims of fraud, breach of warranty, and violating Kentucky's Consumer Protection Act (CPA) (Kentucky Revised Statutes (KRS) 367.170).[3] After discovery was conducted, Paul Miller moved for summary judgment on all of Appellants' claims. The circuit court granted that motion on August 18, 2010. Appellants filed a timely motion to vacate the summary judgment, but the motion was denied. Appellants appealed, arguing the circuit court erred by granting Paul Miller's summary-judgment motion.[4]

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[3] Appellants did not include Ford as a defendant at first, but the company was later brought into the action as a defendant. No claim against Ford is before us in this appeal.

[4] Paul Miller asks us to strike Appellants' brief because it fails to include adequate citations to the record in support of its allegations. *See* Kentucky Rules of Civil Procedure ("CR") 76.12(4)(c)(iv)-(v) & (8)(a). While Appellants' brief is lacking in this regard, we do not believe that the requested penalty is merited on this occasion.

II. Standard of Review

The standards for reviewing a circuit court's entry of summary judgment on appeal are well-established and were concisely summarized by this Court in *Lewis v. B & R Corp.*, 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing that there is a genuine issue of material fact for trial.

Id. at 436 (internal footnotes, quotation marks, and citations omitted). Summary judgments involve no fact-finding; accordingly, we review the circuit court's decision *de novo*. *3D Enters. Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist.*, 174 S.W.3d 440, 445 (Ky. 2005); *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

III. Analysis

Appellants first challenge the circuit court's award of summary judgment as to their breach of contract/breach of warranty claims against Paul

Miller. They contend the circuit court erred by concluding that Paul Miller had successfully disclaimed any potential obligations under provisions of Kentucky's Uniform Commercial Code ("UCC") regarding implied warranties of fitness and of merchantability. However, this decision is plainly supported by the record.

The parties do not dispute that a seller such as Paul Miller may effectively disclaim any implied warranties of fitness and of merchantability pursuant to the UCC by use of a conspicuous writing containing the appropriate language. *See* KRS 355.2-316(2) and (3). As part of their purchase of the truck, Appellants were provided with a "Dealer Warranty Disclaimer," which warned that "[t]he above described motor vehicle is being sold 'as is' and 'with all faults[.]'" The disclaimer also provided, in bold capital letters:

> THE SELLING DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF THIS VEHICLE. BUYER SHALL NOT BE ENTITLED TO RECOVER FROM THE SELLING DEALER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS, OR INCOME, OR ANY OTHER INCIDENTAL DAMAGES.

The disclaimer further noted that as to a "new vehicle" such as the one being purchased by Appellants, "THE ONLY WARRANTIES APPLYING TO THIS VEHICLE ARE THOSE OFFERED BY THE MANUFACTURER."[5]

From this language, it is clear that Paul Miller intended to disclaim all warranties at the time of sale and did so in a manner that satisfied the requirements of KRS 355.2–316. It is equally clear that Appellants were aware of this fact given that they signed the "Dealer Warranty Disclaimer" and thereby acknowledged that they had read, understood, and accepted its terms.[6] Moreover, in his deposition testimony, Joseph Hillyer fully acknowledged that he had reviewed and signed the "Dealer Warranty Disclaimer," and he further expressed his understanding that Paul Miller was not extending any warranties to Appellants regarding the truck:

> Q. When you purchased the truck and out of all those documents you signed did you read any of them?
>
> A. I'm sure I did at the time or they at least told me what they were.
>
> ***
>
> Q. Did you – when you purchased this vehicle did you have any reason to believe that Paul Miller Ford was extending any type of warranty to you, either expressed or implied?

[5] Appellants declined to purchase any extended warranty coverage.

[6] Appellants also signed their initials next to the following acknowledgment on another form: "I understand that in the event I have purchased/leased a new car, the warranty is as stated in the manufacturer's manual given herewith. In the event I have purchased a used car, the warranty (or guarantee), if any, is the remainder of factory warranty or strictly AS IS."

A. No extended warranty.

Q. That they were providing you with any warranty?

A. Not other than the factory warranty, no.

(Emphasis added).

Consequently, it would appear that any warranty claim in this case would have to be pursued against the truck's manufacturer. However, Appellants contend that despite their being provided with these explicit disclaimers, Paul Miller nonetheless created an express written warranty as a matter of law via: (1) a window sticker setting forth a "vehicle description" of the truck indicating that it had a three-year bumper-to-bumper warranty, a five-year powertrain warranty, and a five-year roadside assistance warranty; and (2) a delivery checklist stating that the truck had been inspected and road tested prior to its delivery to Appellants. Appellants argue that, because of this, Paul Miller is liable pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, which addresses warranty protections for consumers and consumer products.

In particular, Appellants rely upon 15 U.S.C. § 2308(a), which provides that "[n]o supplier may disclaim or modify . . . any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product[.]" Magnuson-Moss defines "written warranty," in relevant part, as "any written

affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time[.]" 15 U.S.C. § 2301(6)(A). "[I]f a seller issues a written warranty within the meaning of section 2301(6), section 2308(a) prohibits that seller from disclaiming any implied warranties." *Kraft v. Staten Island Boat Sales, Inc.*, 715 F. Supp. 2d 464, 474 (S.D.N.Y. 2010). Appellants argue that because of the "affirmative representations" made in the delivery checklist and the window sticker, Magnuson-Moss is invoked and a viable breach-of-warranty claim has been created. We disagree.

Appellants primarily rely upon *Marine Midland Bank, N.A. v. Carroll*, 98 A.D.2d 516 (N.Y. App. Div. 1984), wherein a New York court held that a "Dealer's Pre-Delivery Inspection Requirements" form similar to the one at issue here constituted a "written warranty" within the meaning of Magnuson-Moss. However, *Carroll* is distinguishable from the facts here because the subject provisions in that case "indicat[ed] that certain key parts in and attached to the vehicle had been inspected, tested and found to function as intended. Thereafter, problems involving the *inspected items* arose[.]" *Id.* at 517 (emphasis added).

In contrast, in this case the window sticker and delivery checklist do not address the truck's "frame" in any manner. We do not believe that the mere fact that the truck was "road tested" and generally inspected pre-delivery can be viewed as creating an express warranty as to the condition of the frame in the absence of an explicit confirmation that the frame itself had been inspected. The delivery checklist is simply a form that the dealer completed indicating that the vehicle had been prepared for delivery. It contains no language which could be construed as being a written warranty under Magnuson-Moss. Furthermore, nothing within the checklist is inconsistent with the written disclaimers of warranty found throughout the sales paperwork. *See* KRS 355.2-316(1). Without some evidence that Paul Miller used this form for warranty service purposes or for some other purpose, this Court declines to infer that the form created an express warranty under the Magnuson-Moss Warranty Act. *See Anderson v. Newmar Corp.*, 319 F. Supp. 2d 943, 947-48 (D. Minn. 2004); *Kraft*, 715 F. Supp. 2d at 474 n.3.

With respect to the window sticker's mention of a three-year bumper-to-bumper warranty, a five-year powertrain warranty, and a five-year roadside assistance warranty, Appellants contend that this reference effectively incorporated the manufacturer's warranty into the sales documents so as to create a written warranty by Paul Miller. They rely upon *Felde v. Chrysler Credit Corp.*, 580

N.E.2d 191 (Ill. App. 1991), for their position, but that case is also easily distinguished from the one before us.

In *Felde*, a dealer invoice given to the plaintiffs stated that "no warranties have been made by the dealer or manufacturer 'excepting only Chrysler Corporation's current printed warranty applicable to such vehicle or vehicle chassis *which warranty is incorporated herein and made a part hereof* and a copy of which will be delivered to buyer at the time of delivery of the new motor vehicle or motor vehicle chassis.'" *Id.* at 197 (emphasis added). Because of this language, the Illinois court concluded that the dealer had "adopted the Chrysler warranty since it was explicitly incorporated into the dealer invoice which set forth the conditions of the sale." *Id.* Consequently, the dealer's attempted disclaimer of implied warranties was invalid under 15 U.S.C. § 2308. *Id.*

Conversely, the record here reflects that Paul Miller never issued any documentation expressly incorporating the manufacturer's warranty into its terms of sale – unlike the dealer in *Felde*. The window sticker relied upon by Appellants certainly fails to include any language making such a statement or that could be viewed as adopting the warranty by reference. Indeed, as noted above, the sales documents instead reflect a clear intent to disclaim any dealer warranties and to advise Appellants that only a manufacturer's warranty is applicable. Even the delivery checklist relied upon by Appellants contains a signed confirmation that

the "[w]arranty coverage" and "new vehicle limited warranty coverages" sales provisions were fully explained to Appellants. Thus, we find unconvincing Appellants purported reliance on a window sticker for warranty coverage by Paul Miller.

On a related (and perhaps more important) note, Appellants' claim that Paul Miller created an express written warranty in this case must also fail because of a lack of evidence that such a warranty was part of the "basis of the bargain" between the parties. Per KRS 355.2-313, an express warranty by the seller is created by "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods *and becomes part of the basis of the bargain*[.]" KRS 355.2-313(1)(a) (emphasis added).

In this case, it is clear that Appellants did not rely on any alleged express warranty from Paul Miller in purchasing the subject vehicle. Indeed, Joseph Hillyer's deposition testimony fully refutes that contention, and Appellants admit in their reply brief that "they received the disclaimers and knew that the language specified that only the manufacturer's warranty would apply." Thus, even if it could be argued that Paul Miller somehow created an express warranty in this case, Appellants' breach-of-warranty claim still fails. "The mere existence of a warranty is insufficient to sustain an action for breach of an express warranty. The warranty must be 'part of the basis of the bargain' between the parties. A

warranty is the basis of the bargain if it has been relied upon as one of the inducements for purchasing the product." *Overstreet v. Norden Laboratories, Inc.*, 669 F.2d 1286, 1291 (6th Cir. 1982) (citations omitted). Appellants did not rely on any express warranties from Paul Miller in purchasing the subject vehicle. Therefore, for the foregoing reasons, the circuit court did not err in entering summary judgment as to Appellants' breach of contract/breach of warranty claims.

Appellants next contend that the circuit court erred by dismissing their fraud and Consumer Protection Act claims by summary judgment. They argue that these claims are supported by the fact that Paul Miller took the position that the frame of Appellants' truck was not bent even though multiple dealership employees told Appellants – and later testified – that the frame appeared to be damaged when the truck was brought in to the dealership in November 2008, twenty months after Appellants purchased the truck. Appellants have not presented sufficient evidence to overcome the summary judgment barrier.

If a seller such as Paul Miller perpetuates fraud, thereby inducing a consumer to purchase a motor vehicle, the consumer may be entitled to recover from the seller on the basis of that fraud. "KRS 190.071(1)(e) imposes an affirmative duty upon new motor vehicle dealers to disclose material facts to customers while in the course of conducting business" and that "failure to so inform the customers may constitute fraud." *Smith v. Gen. Motors Corp.*, 979

S.W.2d 127, 130 (Ky. App. 1998). KRS 190.071(1)(e) provides that "[i]t shall be a violation of this section for any new motor vehicle dealer . . . [t]o use false or fraudulent representations in connection with the operation of the new motor vehicle dealership." "Fraud," in the above context, is defined in KRS 190.010(24) as "a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made in good faith; or an intentional failure to disclose material fact[.]"

In their complaint, Appellants framed their fraud claim as follows: "[Paul Miller's] conduct in not disclosing the truth about the truck frame to the [Appellants] and to the Ford Motor Company constitutes fraud" resulting in damages. Appellants' fraud claim is fatally flawed in that it fails to allege any fraudulent conduct engaged in by Paul Miller *pre-sale*, on which Appellants relied, that could have induced the Appellants to purchase the truck; instead, it refers only to *post-sale* conduct.

To survive summary judgment, Appellants' fraud claim required proof that Paul Miller knew of the defective condition prior to the sale. The record is entirely devoid of evidence that anyone prior to the sale perceived any defect in the vehicle. It appears the failure to perceive the claimed defect, by untrained and trained eyes alike, was reasonable. Appellants did not perceive the defect upon their visual inspection. Even the mechanics at Airport Ford, well after the sale,

failed to diagnose a bent frame – the defect Appellants contend was hidden from them by Paul Miller.[7]

Instead, *twenty months* after Appellants purchased the truck, Paul Miller's mechanics first expressed their belief that the truck's frame was bent. Appellants rely on this post-sale expression to support their pre-sale fraud claim. Of course, logically, we cannot impute such knowledge *back in time* to the date of the sale. Concomitantly, we cannot impute the *mechanics'* knowledge back in time to the *sales agents*. *See 3M Co. v. Engle*, 328 S.W.3d 184, 189 (Ky. 2010)(issue was "whether [certain] knowledge can be imputed . . . under the circumstances *as they existed at that time*"; emphasis added).

Appellants simply attribute too much significance to Paul Miller's post-sale conduct. True, in proper circumstances, a defendant's post-sale conduct might suspend the running of the statute of limitations. KRS 413.190(2)("When a cause of action . . . accrues against a resident of this state, and he . . . obstructs the

[7] Considering the facts in a light most favorable to Appellants, as we are required to do, we presume there was a defect at the time of sale. However, Appellants' evidence of that fact is nearly non-existent. Larry Poynter's testimony indicates that if the frame had been bent before pre-delivery inspection, it would have been discovered by the mechanics. Yet nothing in Paul Miller's documentation indicates such a defect was discovered. Appellants' own testimony was that they saw nothing wrong upon visual inspection. Airport Ford re-aligned sheet metal panels, but did not say the frame was bent. The manufacturer's inspector found the vehicle to be within factory tolerances. Two years after the purchase, the "arbitrator found the body lines visibly inconsistent" but made "no finding whether the frame nonconformity constitutes a significant impairment to the use, safety or value of the vehicle[.]" Regardless of the paucity of evidence on this question of fact, we do not conclude that Appellants' fraud and CPA claims should fail because the vehicle was not defective at the time of sale; the claims should fail for a total absence of proof that Paul Miller was aware of any defect that may have existed.

prosecution of the action, the time of the . . . obstruction shall not be computed as any part of the period within which the action shall be commenced."). A defendant's post-sale conduct may also factor in the assessment of a punitive damages award. KRS 411.186(2)(d)("In determining the amount of punitive damages to be assessed, the trier of fact should consider . . . The duration of the misconduct and any concealment of it by the defendant."). Post-sale conduct may even be a part of one continuous scheme to defraud that was actionable on the pre-sale conduct alone. *Craig v. First American Capital Resources, Inc.*, 740 F.Supp. 530, 535-36 (N.D.Ill. 1990) (in the context of federal securities fraud).

However, no amount of "post-sale" conduct, by itself (which is all there is in this case), will support a claim that Appellants were induced to purchase the vehicle by fraud. The Appellants must base their cause of action on the facts that existed prior to their purchase. The record indicates they cannot.

It is difficult to tell whether Appellants' claim is fraudulent misrepresentation or fraud by omission. *See Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 746-48 (Ky. 2011)(for a discussion of both). Both, however, require proof that Paul Miller knew of the defective condition prior to sale; Appellants have failed to satisfy this evidentiary burden.

If the claim is fraudulent misrepresentation, Appellants were not only required to come forth with evidence that Paul Miller knew the truck was

defective, but also that it made an explicit, affirmative representation to the contrary. *See Giddings & Lewis, Inc.*, 348 S.W.3d at 746 ("Implicit representations in the course of the sale are not enough to state a prima facie case as to this particular tort because negligent misrepresentation requires an affirmative false statement."). Appellants baldly state in their brief that Paul Miller "knew that the truck was defective but told the customer [Appellants] that it was not in order to avoid responsibility." (Appellant's Brief at 11). If Paul Miller had made such an explicit, affirmative statement, we believe the Appellants would have brought it to our attention by identifying it in the record; they have not.

If the claim is fraud by omission, Paul Miller had no duty to disclose what it did not yet know. *Faulkner Drilling Co., Inc. v. Gross*, 943 S.W.2d 634, 638 (Ky. App. 1997 ("Fraudulent concealment implies knowledge of the material fact concealed."). As indicated above, there is nothing in the record to support even the inference that Paul Miller sales agents or mechanics, at the time of sale, actually knew of the defect about which the Appellants complain. Instead, the claimed bent-frame defect was not identified until some twenty months after the sale.

Similarly, the CPA claim cannot survive with no proof of Paul Miller's knowledge of a defect, or facts upon which such reasonable inference

could be based. Nor can there be a CPA claim based on KRS 190.071(1)(e) as in *Smith v. General Motors Corp.*, 979 S.W.2d 127 (Ky. App. 1998).

Although cited by Appellants, *Smith* illuminates nothing about the case before us other than the duty that *would have applied* under KRS 190.071(1)(e) *if* Appellants had presented evidence that Paul Miller knew the truck was defective. These Appellants failed to do so. Smith, on the other hand, presented substantial evidence of his seller's knowledge that the van he purchased had a defect which caused it to stall at highway speeds. As we noted in *Smith*,

> In the course of discovery, Smith learned that Royal Oaks had made pre-sale repairs to the van. In March 1994, some nine months before Smith acquired the van, repairs were made to the radiator. At the time, the odometer reading was eight miles. In August of the same year [still before Smith purchased the van], the van was serviced for engine performance problems, which included "[dying] at highway speeds." [Smith also learned d]uring discovery . . . that other General Motor's vans had experienced stalling problems.

Smith, 979 S.W.2d at 129. Appellants presented nothing of this sort.

Presuming their truck was defective when Appellants bought it, the viability of Appellants' fraud claim and CPA claim still hinge upon a decisive question of fact. Did Paul Miller know it was selling a defective vehicle? It was Appellants' obligation to present some evidence that would create a genuine issue as to that material fact. Considered in a light most favorable to Appellants, the most that can be said is that Paul Miller mechanics discovered no defect before

sale; but, then again, so did Appellants and Airport Ford and everyone for twenty months after the sale.

It was incumbent upon Appellants to create a genuine issue as to the decisive material fact that Paul Miller knew of the complained bent-frame defect. As a matter of law, they failed to do so. Accordingly, the circuit court did not err by entering summary judgment as to Appellants' fraud and CPA claims.

Appellants' remaining arguments were not identified as issues in their prehearing statement, and Appellants did not file a subsequent motion asking them to be submitted and considered on appeal. Therefore, they are not properly before this Court for review; we decline to address them. *See* CR 76.03(4)(h) & (8); *Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008); *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004).

IV. Conclusion

For the foregoing reasons, we affirm the Fayette Circuit Court's August 18, 2010 order granting summary judgment in Paul Miller's favor.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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