NO. 5-10-0172

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ADAM DAWSON and LINDSEY DAWSON,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	St. Clair County.
	)	
v.	)	No. 08-AR-720
	)	
JACK SCHMITT FORD, INC.,	)	Honorable
	)	Vincent J. Lopinot,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Spomer and Donovan concurred in the judgment.

R U L E 2 3 O R D E R

Held: The trial court properly granted a summary judgment in favor of the defendant.

The plaintiffs, Adam and Lindsey Dawson (the Dawsons), appeal the judgment entered by the circuit court of St. Clair County granting a summary judgment in favor of the defendant, Jack Schmitt Ford, Inc. (Jack Schmitt). For the following reasons, we affirm.

On February 15, 2007, the Dawsons purchased a 2003 Ford Excursion from Jack Schmitt. Sometime later in 2008, the Dawsons became aware that the Excursion had been repurchased by Ford Motor Company (Ford) in 2003. Jack Schmitt had not disclosed this information to the Dawsons at the time they purchased the Excursion. On June 19, 2008, the Dawsons filed a complaint arguing that Jack Schmitt violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/2 (West 2008)) because Jack Schmitt "omitted, suppressed and/or concealed" the material fact that the Excursion had been repurchased by the manufacturer, with the intent to induce them to accept and rely on the misrepresentations and purchase the Excursion.

On July 25, 2008, Jack Schmitt filed an answer and affirmative defenses contending that at the time of the sale it had no knowledge of the buyback, it did not omit, suppress, and/or conceal that information, and it did not have the intent to induce the Dawsons to accept and rely on said misrepresentations and/or omissions as alleged in the Dawsons' complaint. Jack Schmitt also argued that pursuant to section 5-104.2 of the Illinois Vehicle Code (625 ILCS 5/5-104.2 (West 2008)) a disclosure statement identifying the vehicle as repurchased or replaced under the New Vehicle Buyer Protection Act (815 ILCS 380/1 *et seq.* (West 2008)) or similar law must only accompany the vehicle through the first retail purchase after the repurchase or buyback. According to a Carfax report attached to the Dawsons' complaint, the Dawsons were not the first retail purchaser following the repurchase. Accordingly, there was no duty on the part of Jack Schmitt to disclose that information.

On February 13, 2009, Jack Schmitt filed a motion for a summary judgment pursuant to section 2-1005 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005 (West 2008)), alleging that the Dawsons failed to produce any facts showing that Jack Schmitt knew at the time of the sale that the Excursion had been repurchased by Ford. Jack Schmitt again noted that pursuant to section 5-104.2 of the Illinois Vehicle Code (625 ILCS 5/5-104.2 (West 2008)), it was not required to disclose the repurchase to the Dawsons. Jack Schmitt also argued that the nondisclosure was not actionable as consumer fraud pursuant to section 10b(1) of the Consumer Fraud Act (815 ILCS 505/10b(1) (West 2008). The Dawsons filed a response to the motion for a summary judgment on March 3, 2009, arguing that genuine issues of material fact existed regarding whether Jack Schmitt violated the Consumer Fraud Act by omitting the information that the vehicle had been repurchased by Ford. The Dawsons also alleged that there was ample evidence that the defendant knew, should have known, or was willfully ignorant of the fact that the Excursion had been repurchased by Ford.

A two-day hearing commenced on August 26, 2009. During the hearing, Adam Dawson testified that he had previously purchased two vehicles from Jack Schmitt. According to Adam, the first two vehicles were "perfect" and Jack Schmitt had been very professional and honest and had not hidden anything. The Excursion was the third vehicle that he bought from Jack Schmitt. The sales representative did not say anything about the Excursion's title history. Jack Schmitt completed an Illinois title application for the Dawsons. The application contained a section entitled "Vehicle Information" that listed check boxes for "other branded title." This box was not checked on the title application at the time of the purchase. The back of the application instructed that the "other branded title" be checked "if the vehicle contains buyback/lemon or other branding from outside Illinois." Although Adam Dawson did not know what "other branded title" meant, he testified that had the "other branded title" box been checked on the title application, he would not have purchased the Excursion. The Dawsons purchased the Excursion without knowing that it had been repurchased by Ford.

In April 2008, the Dawsons took the Excursion to Auffenberg Jeep because they were considering trading in the Excursion. The dealership ran a Carfax report on the Excursion, which revealed that the Excursion had been repurchased from Ford in 2003. The Excursion was reacquired by Ford because it did not conform to the manufacturer's warranty and either the nonconformity was not corrected within the time provided by law or the vehicle was repaired and carried a reacquired-vehicle, limited 12-month, 12,000-mile warranty.

In May 2008, Lindsey Dawson took the Excursion to Auffenberg Ford for repairs. The employees of Auffenberg Ford discovered a sticker on the driver's side door panel with Ford's manufacturer-buyback statement. The Dawsons had not seen this sticker at the time they purchased the Excursion. Although the Dawsons drove the Excursion regularly, neither of them saw the sticker until it was shown to them in May 2008. The Dawsons testified that

they would not have purchased the Excursion if they had known that the Excursion had been repurchased by Ford. Jack Schmitt had not represented to them that the Excursion was not a buyback.

After learning that the Excursion was a buyback, the Dawsons spoke with Jack Schmitt's sales manager, who did not indicate to them that Jack Schmitt knew about the buyback at the time of the sale. Jack Schmitt offered to allow the Dawsons to trade in the Excursion for book value, without any deduction for the buyback. The Dawsons declined this offer because Jack Schmitt would not assume their loan in its entirety.

Angie Schmitt, the general manager of Jack Schmitt, testified that Ford repurchased the Excursion before Jack Schmitt acquired the vehicle and that Jack Schmitt had no knowledge of the buyback when it sold the Excursion to the Dawsons. Jack Schmitt had purchased the Excursion from Menard Auto Sales (Menard), and at that time, Menard had not informed Jack Schmitt that the Excursion was a buyback. According to Angie, when Jack Schmitt purchases a vehicle, it reviews the seller's title; however, Jack Schmitt does not investigate the title history because it is not common practice to do so in the automobile industry. Angie also testified that Jack Schmitt only investigates the full chain of title for its vehicles when it appears that there is something wrong with the title that Jack Schmitt receives. The title given to Jack Schmitt from Menard had not been branded, and nothing on the title indicated that Ford had repurchased the Excursion. Angie further explained that Jack Schmitt only performs a Carfax report when requested by the customer. According to Angie, Carfax reports were not reliable. There had been incidents where cars had been in wrecks that were not disclosed in the Carfax report. She also testified that it was not common practice for other dealerships to perform Carfax reports. Angie also explained that under Ford's buyback policy, a repurchase by Ford must be disclosed to the next retail purchaser. A form called the "reacquired vehicle disclosure agreement" is used. Riess Ford

originally purchased the Excursion. Riess Ford disclosed that the Excursion had been repurchased to the first retail purchaser, Diecker Construction, following the buyback.

Rodney Menard, president of Menard Auto Sales (Menard), testified that he sold the Excursion to Jack Schmitt in January 2007. Menard had received the Excursion from Diecker Construction. Rodney testified that Diecker Construction had not disclosed to him that the Excursion had been repurchased by Ford. Accordingly, when he sold it to Jack Schmitt, Menard had no knowledge that the Excursion had been repurchased. Rodney further testified that he does not research title histories and has no way of knowing if a prior title is branded. Nothing on the face of the title provided by Dieker Construction indicated that the title to the Excursion was branded or that the Excursion had been repurchased by Ford. Menard did not run a Carfax report on the Excursion because it is not Menard's practice to do so and because Carfax reports can be inaccurate. Menard also testified that he does not run vehicles through the manufacturer's computer system unless the customer requests it. Menard did not disclose to Jack Schmitt that the Excursion had been repurchased by Ford.

Bill Wicklien, Jack Schmitt's service manager, testified that when Jack Schmitt acquires a used vehicle, it performs a 106-point inspection of the vehicle. This inspection includes a report in which the vehicle's information is entered into a computer system to generate a repair order. An "Oasis report" is automatically received on the vehicle from the network system provider, ADP. An Oasis report is a vehicle record that contains the history of warranty repairs, recalls, and campaigns. The goal of the 106-point inspection is to make sure that the vehicle is in good working order and that any open recalls, particularly safety recalls, have been performed. According to Wicklien, whether a vehicle has been repurchased by the manufacturer makes no difference for purposes of a used-car safety inspection. Wicklien was not aware of the practice of placing a manufacturer's sticker on a repurchased vehicle prior to this case.

Mark Miller, a service technician employed by Jack Schmitt, testified that he had performed the inspection on the Excursion. He also changed the oil, replaced wiper blades, and replaced three tires. He did not see a sticker on the Excursion indicating that it had been repurchased by Ford.

On September 25, 2009, the trial court entered a summary judgment in favor of Jack Schmitt. The trial court held that the Dawsons had not sufficiently alleged an affirmative "misrepresentation" but rather alleged only that Jack Schmitt "omitted, suppressed and/or concealed" a material fact. The trial court also held that the Dawsons failed to show the required elements of common law fraud and failed to establish that the fact allegedly concealed was, in fact, known to Jack Schmitt at the time of the sale. Furthermore, the trial court noted that under section 5-104.2(a) of the Illinois Vehicle Code (625 ILCS 5/5-104.2(a) (West 2008)), a disclosure statement must accompany the vehicle through the first retail purchase following the repurchase. In this case it was undisputed that the Dawsons were not the first retail purchasers following Ford's buyback, and accordingly, Jack Schmitt was not required to disclose the buyback to the Dawsons. The Dawsons filed a motion to reconsider on October 21, 2009, which was denied by the trial court on March 11, 2010. The Dawsons filed a timely notice of appeal on March 21, 2010.

The Dawsons first argue that the trial court erred in finding that they failed to plead an affirmative misrepresentation of material fact. The Dawsons argue that they sufficiently pled and proved that Jack Schmitt affirmatively misrepresented the Excursion's buyback history by not checking the applicable box on the title application labeled "other branded title." A summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits on file illustrate no genuine issue of material fact and the moving party is entitled to a summary judgment as a matter of law. *Largosa v. Ford Motor Co.*, 303 Ill. App. 3d 751, 753 (1999). This court reviews summary judgment orders *de novo*. *Largosa*, 303 Ill. App.

3d at 753. When reviewing the sufficiency of a complaint, we must accept as true all well-pled facts and all reasonable inferences that can be drawn from those facts. *Linker v. Allstate Insurance Co.*, 342 Ill. App. 3d 764, 773 (2003). An order granting a summary judgment should only be reversed if the evidence reveals that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law. *In re Estate of Herwig*, 237 Ill. App. 3d 737 (1992).

To prevail on a common law fraud claim, the plaintiffs must show that four elements existed: (1) a false statement of material fact, (2) the defendant's knowledge that the statement was false, (3) the defendant's intent that the statement induce the plaintiffs to act, and (4) the plaintiff's reliance on the statement. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496 (1996). The plaintiffs must plead a cause of action under consumer fraud law with the same particularity as required for a cause of action under the common law. See *Connick*, 174 Ill. 2d at 499.

Jack Schmitt points out that in support of their argument, the Dawsons cite various sections of their complaint in which they used the term "misrepresentation," but Jack Schmitt argues that the mere fact that the term "misrepresentation" is used in the complaint does not mean that they sufficiently alleged or proved an affirmative misrepresentation. Jack Schmitt also points out that the Dawsons allege that Jack Schmitt misrepresented a material fact by failing to check the applicable box on the title application but that nowhere in their complaint is the title application mentioned. In fact, the complaint is completely void of any mention of the title application.

We agree that the mere mention of the term "misrepresentation" in the complaint does not demonstrate that the Dawsons sufficiently pled an affirmative misrepresentation. We conclude that the Dawsons proceeded on a concealment or omission cause of action. The complaint alleges that Jack Schmitt "omitted, suppressed and/or concealed," not that Jack

Schmitt "misrepresented." Therefore, we find that no reasonable person would be placed on notice of a misrepresentation theory from a reasonable reading of the complaint. The Dawsons argue that a reading of the complaint reveals that Jack Schmitt misrepresented the fact that the Excursion had been repurchased by Ford. The fact that the Excursion was a buyback is true and undisputed. Accordingly, if the Dawsons were alleging an affirmative misrepresentation, they would have argued in their complaint that Jack Schmitt misrepresented to them that the Excursion had a clean title or had not been repurchased by Ford. However, the Dawsons failed to allege this in their complaint, and we cannot conclude that the trial court erred in finding that the Dawsons failed to plead an affirmative misrepresentation of material fact in their complaint.

We also conclude that the Dawsons failed to prove an affirmative misrepresentation by Jack Schmitt. The Dawsons have failed to cite any authority supporting their claim that Jack Schmitt's failure to check the applicable box on the title application was in any way deceptive, they failed to offer any evidence regarding the meaning of the term "other branded title," and they failed to prove proximate cause as it relates to the title application. Furthermore, the instructions provided by the Illinois Secretary of State on the title application direct that the "other branded title" box should be checked if the vehicle title includes buyback/lemon or other branding from outside Illinois. The Secretary of State does not reference stickers, multiple titles, or the vehicle's full title history. Rather, the Secretary of State directs the seller to rely on the title presented to it. This is precisely what Jack Schmitt did, and this is the current practice in the automobile industry. The plaintiffs cannot argue that Jack Schmitt deceived the Dawsons by following industry practices, the instructions from the Secretary of State, and its reliance on a clean title from the seller.

Moreover, the Dawsons failed to prove causation. Recent decisions have held that to prove causation, a plaintiff must have seen or heard the alleged misrepresentation. See

Oliveira v. Amoco Oil Co., 201 Ill. 2d 134, 150 (2002); *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 550-51 (2009); *Kremers v. Coca-Cola Co.*, 712 F. Supp. 2d 759 (S.D. Ill. 2010). In the instant case, the Dawsons failed to prove that they had any knowledge of the alleged misrepresentation before purchasing the Excursion. Mr. Dawson testified that he would not have purchased the Excursion had the "other branded title" box on the application been checked. However, Mr. Dawson also testified that he did not know what "other branded title" meant at the time of the purchase. Most important, the Dawsons did not testify that Jack Schmitt misrepresented the Excursion's title history to them or stated that the Excursion did not have an "other branded title" or was not a buyback. Accordingly, they have failed to show causation and have failed to prove an affirmative misrepresentation by Jack Schmitt.

Next on appeal the Dawsons argue that the trial court erred in ruling that Jack Schmitt cannot be held liable under the Illinois Consumer Fraud Act for failing to disclose information unknown to it. In its written order, the court held, "Plaintiffs were required to establish that the fact allegedly concealed was, in fact, known to the seller at the time of concealment." The court also held that plaintiffs "Failed to establish at trial that Defendant *** knew, at the time it sold the Ford Excursion to Plaintiffs, that the Ford Excursion had previously been repurchased by the manufacturer" and "[a]ny arguments that knowledge of the repurchase can be deducted by circumstantial evidence are unavailing."

Illinois courts have held that a defendant cannot be held liable under the Consumer Fraud Act for failing to disclose information of which it was not aware. *Rockford Memorial Hospital v. Havrilesko*, 368 Ill. App. 3d 115, 122 (2006); *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 658 (2001). Holding a defendant liable for failing to disclose information unknown to it would transform innocent, unknowing omissions into actionable deception. *Rockford Memorial Hospital*, 368 Ill. App. 3d at 122. Moreover, a defendant could not intend for a plaintiff to rely on its nondisclosure of unknown information, making

it impossible to prove a claim of consumer fraud. *Rockford Memorial Hospital*, 368 Ill. App. 3d at 122.

The Dawsons allege that Jack Schmitt's knowledge of the buyback may be inferred by circumstantial evidence and that Jack Schmitt cannot claim ignorance when the material fact concealed was easily discoverable. The Dawsons cite a line of cases that address willful blindness as grounds for actionable fraud under the Consumer Fraud Act. In *Crowder v. Bob Oberling Enterprises, Inc.*, 148 Ill. App. 3d 313 (1986), a plaintiff alleged that the defendant committed a deceptive act in failing to inform the plaintiff of water and frame damage to, and the salvage history of, a car which the plaintiff had purchased from the defendant. The defendant never conducted an inspection of the car even though he was told that "the car had paint and bodywork." The defendant had purchased the car from his uncle, from whom he had previously purchased 75 to 100 cars a year for 12 to 15 years. Approximately 60% to 70% of these cars had salvage titles. The defendant had also previously engaged in "title washing." The court found, "The evidence clearly supports a finding that both [defendant's uncle] and [defendant] sought by way of silence or determined ignorance to conceal the salvage history from the plaintiff." *Crowder*, 148 Ill. App. 3d at 317. *Crowder* is distinguishable from the instant case because Jack Schmitt did not engage in determined ignorance to conceal the buyback history of the Excursion. Jack Schmitt had no knowledge of the buyback. Although Jack Schmitt was aware that there was at least one other title for the Excursion, Jack Schmitt did not investigate the title history because it is not common practice to do so in the automobile industry.

The plaintiffs also cite *Totz v. Continental Du Page Acura*, 236 Ill. App. 3d 891 (1992). In *Totz*, a car dealership was held to have violated the Consumer Fraud Act by making false representations about the condition of a car it sold to the plaintiffs and failing to disclose that the car had sustained extensive damage in an accident. The dealership's

general manager and owner testified that after inspecting the car, they could tell that the car had been in an accident. The court determined that the defendant had inspected the car before it was sold to the plaintiffs and that "a cursory inspection would have revealed to one experienced in the automobile business that the [vehicle] had been extensively damaged in an accident." *Totz*, 236 Ill. App. 3d at 904. The court affirmed the trial court's ruling that it was reasonable to believe that at the time the car was sold to the plaintiffs the defendant's used-car manager had to have been aware that the vehicle had been in a prior accident. *Totz* is distinguishable from the instant case because Jack Schmitt had inspected the Excursion, but it did not have any obvious defects that could be noticed by simply looking at it. Jack Schmitt also reviewed the seller's title and did not find any defects. Two of Jack Schmitt's witnesses also testified that they did not see the sticker on the vehicle.

The Dawsons also cite *Black v. Iovino*, 219 Ill. App. 3d 378 (1991). In *Black*, the court found that a defendant knowingly misrepresented the salvage title of a vehicle even though the defendant denied having knowledge of the title. The defendant told the plaintiffs that the vehicle belonged to the defendant's father-in-law, who had owned the vehicle for several years, and that the vehicle had never been in an accident. The defendant also denied having knowledge of the vehicle's salvage title, but the court noted that the defendant had signed a document indicating the vehicle had a salvage title and that he had purchased the vehicle from the dealership after it had been rebuilt. *Black* is distinguishable from the case at bar because the testimony and other evidence reveal that Jack Schmitt did not have any knowledge of the Excursion's buyback history at the time it was sold to the Dawsons.

In the instant case, the trial court found Jack Schmitt's witnesses to be credible and found that at the time of the sale they had no knowledge of the buyback. Accordingly, Jack Schmitt could not have intended for the Dawsons to rely on the alleged deception that Jack Schmitt was unaware of. After reviewing the evidence in the instant case, we cannot

conclude that Jack Schmitt willingly ignored any evidence of the Excursion's buyback history. Thus, the trial court did not err in ruling that Jack Schmitt cannot be held liable under the Consumer Fraud Act.

The Dawsons' next argument on appeal is that the trial court erred by ruling that the Illinois Vehicle Code bars the Dawsons' cause of action. Section 5-104.2(a) of the Illinois Vehicle Code provides that a repurchased motor vehicle may be sold to any second and subsequent purchasers without any obligation to disclose the buyback:

> "Every manufacturer shall be prohibited from reselling any motor vehicle that has been finally ordered, determined, or adjudicated as having a nonconformity under the New Buyer Vehicle Protection Act or a similar law of any state, territory, or country, and that the manufacturer repurchased or replaced because of the nonconformity, unless the manufacturer has corrected the nonconformity and issues a disclosure statement prior to resale stating that the vehicle was repurchased or replaced under the New Vehicle Buyer Protection Act or similar law of any other state, territory, or country; identifying the nonconformity; and warranting that the nonconformity has been corrected. The disclosure statement must accompany the vehicle through the first retail purchase." 625 ILCS 5/5-104.2(a) (West 2008).

Because the Dawsons were the second retail purchasers after the buyback, there was no duty to disclose under the Illinois Vehicle Code and Jack Schmitt's alleged failure to disclose is not actionable consumer fraud as a matter of law. See 815 ILCS 505/10b(1) (West 2008); *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 421 (2002).

In the instant case, it is undisputed that the Dawsons were the second, or arguably third, retail purchasers of the Excursion. Thus, the trial court did not err in ruling that the Illinois Vehicle Code does not require that Jack Schmitt had to disclose the buyback to the Dawsons. Furthermore, the Illinois legislature's decision to limit the buyback disclosure

requirement to the first retail purchaser establishes that buyback history is immaterial to subsequent purchasers as a matter of law. See *Kitzes v. Home Depot, U.S.A., Inc.*, 374 Ill. App. 3d 1053, 1060-61 (2007). Had the legislature believed it to be important to disclose a buyback history to subsequent retail purchasers, it would have mandated that disclosure. The fact that the legislature does not require a disclosure to subsequent retail purchasers establishes a determination that a buyback disclosure is immaterial to subsequent purchasers. Accordingly, we conclude that the trial court did not err in ruling that the Illinois Vehicle Code bars the Dawsons' cause of action because they were not the first retail purchasers after the buyback.

Finally on appeal, the Dawsons argue that the court erred in ruling that the *Moorman* doctrine (*Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69 (1982)) prevents them from recovering any damages. Because we have concluded that the trial court did not err in granting a summary judgment in favor of Jack Schmitt, we need not address this issue.

For the foregoing reasons, the judgment entered by the circuit court of St. Clair County is affirmed.

Affirmed.