

RENDERED: OCTOBER 13, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000419-MR

JASON STRADER; LAUREN BROOKE MICHAELS; AND  
GREEN HILL MEMORIAL GARDENS OF CHRISTIAN  
COUNTY, INC.

APPELLANTS

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JOHN L. ATKINS, JUDGE  
ACTION NO. 15-CI-00690

MILTON MARSHALL AND NELL MARSHALL

APPELLEES

OPINION  
AFFIRMING

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BEFORE: JONES, J. LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Jason Strader, Lauren Brooke Michaels, and Green Hill Memorial Gardens of Christian County, Inc. appeal from the denial of a Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial and Motion to Alter, Amend or Vacate Judgment rendered by the Christian Circuit Court. They

argue that the circuit court improperly applied statutes of limitation in dismissing their claim under the Kentucky Consumer Protection Act, and erred in granting Summary Judgment in favor of Milton Marshall and Nell Marshall. For the reasons addressed below, we find no error and AFFIRM the Orders on appeal.

In 2011, Jason and Taunya Strader (“the Straders”) entered into a stock purchase agreement of Greenhill Memorial Gardens of Christian County, Inc. and Resthaven Memorial Gardens, Inc. from sellers Milton Marshall and his wife, Nell Marshall (“the Marshalls”). The purchase agreement, which was drafted by the Straders’ counsel, set forth the terms of the sale and contained reciprocal “hold harmless” provisions acknowledging that all parties were knowledgeable and experienced in business matters and were capable of evaluating the risks of such transactions.

Prior to closing, the Marshalls provided to the Straders the financial records of the businesses, including profit and loss statements, and tax returns. Further, after signing the final Stock Purchase Agreement on February 2, 2012, the Straders worked on-site at Green Hill and were provided with access to all corporate records of both businesses. The sale was consummated on July 23, 2012, and the Straders paid to the Marshalls \$500,000 for 100% of the outstanding stock.

In May of 2013, the Straders had an audit performed. The Straders would later allege that the audit uncovered at least four financial schemes where the Marshalls had defrauded consumers of approximately \$1,500,000. The corpus of the allegation was that Milton Marshall would sell customers “Lawn Crypts” and simply pocket the money rather than placing it into a Preneed Merchandise Trust as required by Kentucky Revised Statute (KRS) 367.934(1). The Straders further maintained that Milton Marshall filed false Annual Reports with the Kentucky Attorney General for approximately 10 years to explain away why there was no money in the Trust. In sum, the Straders alleged four separate schemes arising from improper usage of customer funds arising from Lawn Crypt and Pre-Construction mausoleum sales.

Based on the foregoing allegations, the Straders filed a RICO claim (Racketeering in Corrupt Organization) against the Marshalls in United States District Court for the Western District of Kentucky. The Complaint also set out several state claims including common law fraud in the inducement arising from the four alleged schemes. The Federal District Court dismissed the RICO claim and declined to exercise jurisdiction over the state claims.

Thereafter, the Straders filed the instant action against the Marshalls in Christian Circuit Court. That Complaint largely mirrored the claims asserted in Federal District Court, minus the RICO action. The Straders asserted a host of

allegations largely centered on the Kentucky Consumer Protection Act (“KCPA”), as well as claims of breach of fiduciary duty and fraud.

The Marshalls responded with a Motion to Dismiss the Straders’ KCPA claims, arguing that 1) the statute of limitations had expired, 2) the Straders lacked privity of contract with respect to the items sued upon, and 3) the Lawn Crypts and other goods that formed the basis of the Straders’ KCPA claims were not “consumer goods” in their hands. The Straders did not file a written response. An extended hearing on the Motion was conducted, after which the circuit court rendered an Order dismissing all KCPA claims. In support of the Order, the court determined that the statute of limitations had run, there were no “consumer goods” in the hands of the Straders or Green Hill, and the Straders lacked privity.

The Marshalls then moved for Summary Judgment on the remaining claims, which included “fraud in the inducement,” “common law fraud,” and “fraudulent concealment.” Based on the statute of limitations, the Marshalls also filed a Motion to Dismiss the claims of breach of fiduciary duty as a corporate director as the claimed bad acts occurred more than five years prior to the filing of the Complaint. The Motions were granted by way of Order rendered on December 23, 2015.

Finally, the Marshalls filed a Motion for Summary Judgment to dispose of the remaining breach of corporate fiduciary duty claims that purportedly

took place within the five-year statutory period. The Straders' counsel assented to the Motion during a hearing, and the circuit court granted the Motion on January 19, 2016. The Straders then moved for a new trial, to amend or vacate, and for a judgment notwithstanding the verdict. They also sought additional findings. The circuit court summarily denied the motions, and this appeal followed.

The Straders now assert two claims of error. They first argue that the Christian Circuit Court improperly failed to consider the statutes of limitation, including their accrual and expiration dates, before dismissing the KCPA claim. The Straders note that the Complaint sets out 1,941 persons who were alleged victims of fraud under the KCPA, with losses totaling \$1,500,000 plus interest. They argue that the circuit court's dismissal of these claims was based in part on the five-year statute of limitations, but the court never made any specific findings as to which statute applied, the dates of accrual of the causes of action, nor the dates the limitations would expire. Moreover, the Straders contend that the limitation on fraud claims do not run until the fraud is discovered. In sum, the Straders argue that because the sale was closed on July 23, 2012, the five-year statute of limitations would not expire until July 23, 2017, and for this reason the statute of limitations defense is not a bar to any of the fraud counts in the Complaint.

In dismissing the aforementioned claims, the Christian Circuit Court made three express findings. First, it determined that “All of the Plaintiffs’ KCPA claims are barred by the statute of limitations set forth in KRS 367.220(5)”. Second, the court found that “the Plaintiffs are not in privity with the Defendants in regard to the goods and services from which their KCPA claims arise[.]” And third, the court concluded that “the Plaintiffs’ KCPA claims are barred because the goods and services from which their KCPA claims arise are not intended ‘primarily for personal, family or household purposes’ in the hands of the Plaintiffs. Thus, as commercial goods, the Plaintiffs’ claims fall outside the scope of the KCPA.”

The Straders take issue with the circuit court’s application of the statute of limitations, but do not challenge the court’s finding of lack of privity, nor its determination that the goods at issue are commercial and therefore outside the scope of the KCPA. As properly noted by the Marshalls, it is axiomatic that an appellate court may affirm the trial court for any reason sustainable by the record. *Kentucky Farm Bureau Mutual Insurance Company v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991). We will not search the record for errors, and absent palpable error, issues which are not raised by an appellant will not be addressed on appeal. *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

Accordingly, and *arguendo*, even if the Straders are correct in their assertion that their claims were not barred by the statute of limitations, they have not challenged the circuit court's alternative bases for dismissal, to wit, the Straders' lack of privity and their failure to assert actionable claims under the KCPA. Because the Straders have not alleged error on these alternative findings, and as they provide a proper basis for court's conclusions, we find no error.

The Straders also briefly argue that the Marshalls' Motion for Summary Judgment was not properly analyzed by the trial court, and should not bar this action from continuing. The focus of their argument on this issue is not that the order sustaining the motion was erroneous or was otherwise unsupported by the record and the law, but rather that circuit court failed to provide any analysis of the motion.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). 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. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a 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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to the Straders and resolving all doubts in their favor, we have no basis for concluding that there is a genuine issue as to any material fact remaining for resolution. The Straders do not assert that a genuine issue of material fact remains to be resolved, nor what that issue might be. Nor do they direct our attention to anything in the record, nor any statute or case law in support of an argument that an issue remains for adjudication. Rather, the Straders merely argue that the circuit court’s analysis was insufficient, and therefore must be reversed.

“The presumption is that a trial court . . . renders the correct judgment under the facts developed before it.” *City of Jackson v. Terry*, 302 Ky. 132, 135, 194 S.W.2d 77, 78 (1946). The Straders have not met the burden of overcoming this presumption, as they have neither alleged nor demonstrated the existence of a



genuine issue of material fact requiring further adjudication. As such, and even when resolving all doubts in their favor, we find no error on this issue.

For the foregoing reasons, we AFFIRM the Order denying the Motion for Judgment Notwithstanding the Verdict, Motion for a New Trial and Motion to Alter, Amend or Vacate Judgment rendered by the Christian Circuit Court.

ALL CONCUR.

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