



# **Michigan Consumer Protection Act Kit For REALTORS®**

**JUNE 2004**

# Memo

To: MAR Member Firms  
From: Bill Martin, CEO  
Date: 5/1/04  
Re: Risk Management-Michigan Consumer Protection Act Defense Kit

The Michigan Consumer Protection Act (MCPA) continues to be used to initiate lawsuits against REALTORS®. However, any member that has a lawsuit filed under the MCPA has a ready-made defense.

MAR's legal counsel, McClelland & Anderson, and other legal counsel using MAR's MCPA brief have been successful in getting MCPA cases against REALTORS® dismissed at the trial court level. To assist our members with MCPA litigation, MAR has developed the Michigan Consumer Protection Act Defense Kit.

The defense kit explains how to identify an MCPA case, answers frequently asked questions regarding the act and includes a legal brief for use by your attorney. You may download the entire kit from [www.mirealtors.com](http://www.mirealtors.com) or call MAR (800) 454-7842.

## Michigan Association of REALTORS® answers your questions about the Michigan Consumer Protection Act (MCPA)

Q: What is the Michigan Consumer Protection Act (MCPA)?

A: The MCPA is legislation that was enacted in Michigan many years ago to protect consumers when they purchase goods or services for personal use. The MCPA is attractive to attorneys, as it permits a court to grant them all actual, reasonable attorney fees, regardless of the amount of damages awarded under the MCPA.

Q: What kind of claims are made against REALTORS® under the MCPA?

A: Historically, there have been two types of claims asserted against REALTORS® under the MCPA. First, where there was a dispute over an earnest money deposit, buyers or sellers have occasionally sued a REALTOR® under the MCPA claiming that the REALTOR® failed to promptly restore their deposit to them. Second, where a dispute involved any alleged misrepresentations made by a REALTOR®, a buyer or seller sometimes also claimed that the misrepresentations were covered by the MCPA. In addition to these two most common types of claims under the MCPA, there have been various other claims against REALTORS® that lawyers have occasionally claimed are also covered by the MCPA, such as breach of fiduciary duty.

Recently, there has been a change to the rules governing a REALTOR®'s handling of earnest money deposits that should, hopefully, eliminate the first type of MCPA claim. Today, a REALTOR® faced with a claim from a buyer or seller who is unhappy that the REALTOR® will not release an earnest money deposit can simply point to the rule that prohibits the release of these funds in the event of a dispute. R339.22313(6).

Q: How do REALTORS® know when they have had a claim made against them under the MCPA?

A: When a lawsuit is started against a REALTOR®, he/she is served with a summons and a complaint. The complaint is normally broken down into various counts or claims against the REALTOR®. If a claim is being asserted against a REALTOR® under the MCPA, it is highly likely that the title of one of the counts or claims will state "Michigan Consumer Protection Act." If a REALTOR® receives a summons and complaint and it does not appear to contain a count or claim with this title, the REALTOR® should not assume that there is not an MCPA claim in the complaint. Instead, they should specifically ask their lawyer to review the complaint to make certain there is no such claim made against them.

Q: Are REALTORS® liable under the MCPA?

A: REALTORS® are not liable under the MCPA if the claims being made against them are based on a transaction or conduct regulated by the Department of Labor and Economic Growth under Article 25 of the Occupational Code. If a REALTOR® is alleged to have violated the MCPA based on some claimed misrepresentation made during the course of the transaction, the transaction and this conduct are specifically regulated under Article 25 of the Occupational Code, and the REALTOR® is exempt from the MCPA. On the other hand, if, for example, the REALTOR® is also in the business of loaning money, and it is alleged that the REALTOR® violated the MCPA in the course of loaning money, this conduct would not be exempt under the MCPA. The lending of money is not covered under Article 25 of the Occupational Code.

Q: What should REALTORS® do if an MCPA claim is made against them?

A: There are several steps that should be taken to defend a REALTOR® against an MCPA claim. Those steps include the following:

(1) When the REALTOR® is served with the summons and complaint, a written answer and affirmative defenses must be filed by a lawyer on behalf of the REALTOR® with the court. The answer and affirmative defenses filed on behalf of the REALTOR® should include an affirmative defense substantially as follows:

Plaintiffs' claims under the Michigan Consumer Protection Act are barred for the reason that Plaintiffs have failed to meet all the statutory requirements to state a claim under the MCPA and/or the REALTOR® Defendant is statutorily exempt from MCPA liability.

(2) A REALTOR® should visit MAR's website to obtain a copy of the MCPA brief, which has been prepared and successfully used by MAR's counsel and other counsel in the past in defeating MCPA claims. A copy of this brief should be provided to the REALTOR®'s lawyer. A review of the brief and the cases cited in the brief will quickly bring the REALTOR®'s lawyer up-to-speed in this area of the law.

(3) If the case involves a dispute over an earnest money deposit, and the REALTOR® is still holding the earnest money deposit at the time they are served with a summons and complaint, the REALTOR® should consider interpleading (i.e., depositing with the court) the earnest money deposit. If a REALTOR® wishes to have their lawyer interplead the earnest money deposit, MAR provides a form for interpleading earnest money deposits. The form is available at [www.mirealtors.com](http://www.mirealtors.com) or at the MAR office, 800-454-7842.

Q. My lawyer tells me there is a Michigan Court of Appeals decision that says REALTORS® can be liable under the MCPA.

A. Your lawyer is right. The Court of Appeals in *Price v Long Realty, Inc.*, misinterpreted a prior Michigan Supreme Court decision and did hold that REALTORS® could be liable under the MCPA. The Michigan Supreme Court has since corrected this mistake by the Court of Appeals, and the Court of Appeals decision in *Price v Long Realty, Inc.*, is no longer the law of Michigan. All of this is explained in MAR's MCPA brief.

Q. If REALTORS® have an MCPA claim asserted against them, can they use MAR's form of affirmative defenses and MCPA brief to defend themselves in court?

A. No, not ever. If the REALTOR® is a corporation, a corporation cannot be represented by an unlicensed person in court. Most importantly, the MAR's MCPA brief is written by lawyers to be explained to and read by another lawyer and a judge. The financial risk would be too great for a REALTOR® to try to handle this problem by themselves and without the help of legal counsel.

Q. What happens if the trial court does not understand the MCPA exemption and enters a judgment against a REALTOR® on an MCPA claim?

A. Any REALTOR® who has asserted MAR's affirmative defense and unsuccessfully sought dismissal of an MCPA claim from a trial court should contact MAR to let it know of the adverse result. MAR's Legal Action Committee may authorize assistance to the REALTOR® in appealing a wrong decision on an MCPA claim.

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM**

JOHN BUYER and MARY BUYER

Plaintiffs,

v

MAIN STREET REALTY, INC., a Michigan corporation,

Defendant.

Case No. XX-XXXX-XX

Hon. Stephen Wapner

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# DEFENDANT MAIN STREET REALTY INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

## I. STATEMENT OF FACTS

Defendant, Main Street Realty, Inc. ("Main Street"), is a real estate broker duly licensed under the Michigan Occupational Code, MCL 339.101 et seq (the ACode"). On October 15, 2002, Main Street listed for sale a home located at 1215 Burlington, Lansing, Michigan (the "Burlington Home"). On November 4, 2002, Plaintiffs attended an open house and immediately submitted an offer to purchase the Burlington Home. Plaintiffs closed on the Burlington Home several weeks later. Promptly after moving in, Plaintiffs discussed that the roof leaked, the septic system was failing and the pump for the well needed to be replaced.

Plaintiffs immediately filed the present lawsuit against Main Street in which they claim that by failing to disclose the defects in the home, Main Street violated the Michigan Consumer Protection Act, MCL 445.901 et seq (the "MCPA"). Main Street has filed a Motion for Summary Disposition under MCR 2.116(c)(8) and/or 2.116(c)(10) on the basis that Plaintiffs have failed to state a claim and/or there is no genuine issue of material fact. This Brief is filed in support of Main Street's Motion.

## II. ARGUMENT

Plaintiffs maintain that Main Street violated the MCPA by: Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

[MCL 445.903(1)(s).]

Section 4(1)(a) of the MCPA, MCL 445.904(1)(a), specifically exempts from coverage under the MCPA: A transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

It is Main Street's position that because it is a real estate broker licensed under the Code, and because the listing of homes is specifically regulated under the Code, Main Street's actions expressly fall within this exemption to the MCPA. As will be discussed fully below, for purposes of Main Street's Motion, the only issue for purposes of determining whether the MCPA exemption is applicable is whether the conduct in question is regulated under the Code. If so, then the law is clear that the MCPA does not apply.

The scope of the Section 4(1)(a) exemption to the MCPA is controlled by the Michigan Supreme Court's decisions in *Smith v Globe Life Ins Co*, 460 Mich 446; 59@ NW2d 28 (1999); and *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 32@ NW2d 805 (1982). Under those decisions, the statutory exemption will apply so long as the "general transaction" at issue is authorized by law, even though the legality of a defendant's conduct in performing the transaction might be in dispute. To this extent, as discussed below, *Smith*, decided in 1999, effectively overrules prior Michigan case law involving the application of the MCPA exemption to real estate licensees. See, *Price v Long Realty, Inc*, 199 Mich App 461; 502 NW2d 33@ (1993).

In *Smith*, the plaintiff alleged that the defendant insurance company violated the MCPA when it made certain misrepresentations in connection with a policy of credit life insurance purchased by the plaintiff's decedent. *Smith*, supra. Applying a "common sense reading" of Section 4(1)(a), the Court of Appeals held that the legislature did not intend to exempt illegal conduct from coverage under the MCPA, and thus, the exemption contained in Section 4(1)(a) would not apply. *Id* at 453. In reversing the Court of Appeals on this issue, the Supreme Court explained:

We conclude . . . that, when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute. Contrary to the "common-sense reading" of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited. Therefore, we conclude that

‘ 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such “transaction or conduct” is “specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.”

Id at 465-466 (emphasis added, footnotes omitted).

The focus on the authorized nature of the “general transaction” rather than the “specific misconduct” for purposes of applying the Section 4(1)(a) exemption is nothing new. As the Supreme Court noted in *Smith*, the issue is controlled by the court’s prior decision in *Diamond Mortgage*, supra. In that case, the Supreme Court held that a mortgage company’s real estate broker’s license would not insulate it from liability under the MCPA for fraudulent activities committed in connection with writing mortgages. *Diamond Mortgage*, supra, 414 Mich at 615-617. The basis for this holding was that the general activity B i.e., mortgage writing B was not something that was authorized by the defendant’s real estate broker’s license. Summarizing the holding in *Diamond Mortgage*, the Supreme Court in *Smith* explained:

As the Court of Appeals recognized, our decision in *Diamond Mortgage* controls the resolution of this issue.

The defendant in *Diamond Mortgage* argued that it was exempt from the MCPA under ‘ 4(1)(a) because it had a real estate broker’s license and that one of the activities contemplated was that a licensee would negotiate the mortgage of real estate. Like plaintiff here, the defendants in *Diamond Mortgage* responded that “no statute [or regulatory agency] specifically authorize[d] misrepresentations or false promises” made in conducting that activity.

In concluding that the defendants were not exempt from the MCPA, this Court reasoned: While the license generally authorizes *Diamond* to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act, nor transactions that result from that conduct. In so concluding, we disagree that the exemption of ‘ 4(1) becomes meaningless. While defendants are correct in stating that no statute or regulatory agency specifically authorizes misrepresentations or false promises, the exemption will nevertheless apply where a party seeks to attach such labels to “[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.” For this case, we need only decide that a real estate broker’s license is not specific authority for all the conduct and transactions of the licensee’s business.

In short, *Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is “specifically authorized.” Thus, the defendant in *Diamond Mortgage* was not exempt from the MCPA because the transaction at issue, mortgage writing, was not “specifically authorized” under the defendant’s real estate broker’s license.

Id at 463-464 (emphasis added, footnotes omitted).

Accordingly, as indicated, the *Smith* decision effectively overrules prior Michigan precedent involving the application of the MCPA’s exemption to real estate licensees. Specifically, in *Price v Long Realty, Inc*, 199 Mich App 461; 502 NW2d 337 (1993), the Court of Appeals, purporting to follow *Diamond Mortgage*, held that real estate licensees were not exempt from the MCPA for alleged fraudulent activities committed in connection with the sale of real estate because the regulatory scheme does not “authorize” the perpetration of a fraud. Id at 471. However, as the decision in *Smith* makes clear, the Court of Appeals in *Price* misconstrued the holding of *Diamond Mortgage*. The focus is not on whether the alleged misconduct is authorized. The focus is on whether the transaction is authorized. Accordingly, *Price* has been effectively overruled by *Smith*.

This reading of the *Smith* case was recently confirmed by the Court of Appeals in two unpublished decisions. In the first of these cases, *Timmons v Devoll*, unpublished decision of the Court of Appeals decided February 24, 2004 (Docket Nos. 241507 and 249015), after moving into their home, the buyers found numerous defects in the property including evidence of water in the basement. The Court of Appeals affirmed the decision of the circuit court dismissing the MCPA claim against the sellers’ real estate broker on the basis that this “transaction” was regulated under Article 25 of the Occupational Code and, therefore, exempt under the MCPA ‘ 4(1)(a) exemption.

Similarly, in *Love v Ciccarelli*, unpublished opinion of the Court of Appeals decided May 6, 2004 (Docket No. 243970), the purchasers sued both the seller and the sellers’ real estate agent after they discovered several defects in the home that

they had purchased. Plaintiff-purchasers cited the Diamond Mortgage decision in support of their theory that the MCPA '4(1)(a) exemption did not apply because the Occupational Code does not specifically authorize misrepresentation. The Court of Appeals rejected this argument, stating that the plaintiff-purchasers had misconstrued Diamond Mortgage and the Supreme Court's interpretation of it in *Smith v Globe Life*. The Court stated:

In the present case defendants' role as the real estate broker for the [sellers], was simply to sell the real property and engage in real estate services for the [sellers], both activities authorized and within the definition provided in MCL 339.2501(d) and (e) and, thus, the "transaction" and defendants' "conduct," which are Aspecifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States," are exempt from the MCPA under the above noted exemption, MCL 445.904(1)(a). Therefore, the trial court properly dismissed this claim, as summary disposition was proper.

When the holdings of *Diamond Mortgage*, *Smith*, *Timmons* and *Love* are applied to facts of this case, Main Street cannot be held liable under the MCPA. Simply stated, the general transaction at issue in this case -- i.e., the listing and sale of a residence -- is an activity expressly authorized and regulated by Michigan statutory law governing real estate licensees. Specifically, real estate brokers and salespersons in Michigan are licensed and regulated under the provisions of the Code, MCL 339.101 et seq. Pursuant to Section 2508 of the Code, MCL 339.2508, individuals, and principals of various entities to whom a broker's license has been issued, are authorized to perform the acts regulated by Article 25. Because Main Street was generally authorized by the Code to handle the listings of the home Plaintiffs purchased, it makes no difference whatsoever for purposes of the statutory exemption that the propriety of Main Street's actions. See, *Smith*, supra; *Diamond Mortgage*, supra. Rather, that the general activity is authorized and regulated as part of a statutorily created regulatory scheme administered by a board or officer of this State is the basis for applying the MCPA exemption. See, *Smith*, supra, quoting *Kekel v Allstate Ins Co*, 144 Mich App 379, 384; 375 NW2d 455 (1985). Such was clearly the case here.

### III. CONCLUSION AND RELIEF REQUESTED

Defendant, Main Street Realty, Inc., respectfully requests that this Honorable Court find that the conduct complained of in this action B i.e., the alleged nondisclosure of defects in a home listed by Defendant B is exempt from the provisions of the Michigan Consumer Protection Act because the conduct in question is regulated under the Michigan Occupational Code. Main Street requests further that accordingly, this Court grant its Motion for Summary Disposition pursuant to MCR 2.116(c)(8) and/or MCR 2.116(c)(10).

Respectfully submitted,

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May 1, 2004

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JAMES TIMMONS, CAROLYN TIMMONS, and  
TALIA CHAMPLIN,

Plaintiffs-Appellants,

v

ELIZABETH FRANKLIN DEVOLL, a/k/a  
ELIZABETH GAYLE FRANKLIN,

Defendant-Appellee,

and

GREGORY DEVOLL,

Defendant.

UNPUBLISHED  
February 24, 2004

No. 241507  
Calhoun Circuit Court  
LC No. 01-001092-CK

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JAMES TIMMONS, CAROLYN TIMMONS, and  
TALIA CHAMPLIN,

Plaintiffs-Appellants,

v

JOHN STETLER, GARY CURTIS, and  
STETLER, INC., d/b/a STETLER,  
VANDERVEER & ASSOCIATES,

Defendants-Appellees.

No. 249015  
Calhoun Circuit Court  
LC No. 02-003635-CK

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM

Plaintiffs James Timmons, Carolyn Timmons, and Talia Champlin appeal by right from two orders, one granting defendant Elizabeth Franklin DeVoll, also known as Elizabeth Gayle Franklin's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) (Docket No.

241507), and one granting defendants John Stetler, Gary Curtis, and Stetler, Inc., doing business as Stetler, Vanderveer & Associates' motion for summary disposition also pursuant to MCR 2.116(C)(8) and (10) (Docket No. 249015). We affirm.

This appeal arises out of a real estate transaction in which defendants Gregory DeVoll and Elizabeth Franklin listed their home for sale with their real estate agent, defendant Gary Curtis, and the office for which he was employed, defendant Stetler, Vanderveer & Associates. Plaintiffs James and Carolyn Timmons purchased the home with the assistance of their real estate agent, plaintiff Talia Champlin. After moving in, plaintiffs allegedly found "numerous defects" on the property regarding the electrical system, pool heater, wall liner and equipment, plumbing system, central air conditioning, central heating system, and furnace; evidence of water in the basement; and an addition that was constructed without the necessary construction permits. Plaintiffs filed a complaint against Franklin and DeVoll primarily based upon alleged misrepresentations in the seller's disclosure statement (hereinafter the SDS); they alleged a violation of the seller's disclosure act (hereinafter the SDA), MCL 565.951 *et seq.*, breach of contract, misrepresentation, innocent misrepresentation, silent fraud, and a violation of the Michigan Consumer Protection Act (hereinafter the MCPA), MCL 445.901 *et seq.* DeVoll subsequently defaulted; plaintiffs and Franklin moved for summary disposition; and after a hearing on both motions, the trial court granted summary disposition in favor of Franklin and against plaintiffs. Plaintiffs then filed substantively the same complaint against real estate agent Curtis, Stetler, and Stetler, Vanderveer & Associates; both parties moved for summary disposition, and after a hearing on both motions, the trial court granted it in favor of Curtis, Stetler, and Stetler, Vanderveer & Associates. This Court consolidated these cases for appeal.

We review the trial court's decision on a motion for summary disposition *de novo*. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint," and "[a]ll well-plead factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion brought under this rule may be granted where the claims alleged "are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery" and only the pleadings may be considered in deciding a motion brought under this subsection. *Id.* "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id.*, 119. In evaluating a motion brought under this subsection, the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.*, 119-120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*, 120.

*The Seller's Disclosure Act, MCL 565.951, et seq.*

Plaintiffs begin by conceding the fact that under MCL 565.954(4), there is no independent cause of action under the SDA after closing on the property and transferring the deed, but maintain that the trial court erred in dismissing this claim because the facts establishing defendants' violation of the SDA, by submitting an SDS with false and misleading statements, can serve as the factual basis for plaintiffs' claims of misrepresentation. We disagree.

MCL 565.954 provides the following in pertinent part:

(1) The transferor of any real property described in section 2 shall deliver to the transferor's agent or to the prospective transferee or the transferee's agent the written statement required by this act. . . . The written statement shall be delivered to the prospective transferee within the following limits:

(a) In the case of a sale, before the transferor executes a binding purchase agreement with the prospective transferee.

\* \* \*

(3) Except as provided in subsection (4), if any disclosure or amendment of any disclosure required to be made by this act is delivered after the transferor executes a binding purchase agreement, the prospective transferee may terminate the purchase agreement by delivering written notice of termination to the transferor or the transferor's agent within the following time limits[.]

\* \* \*

(4) A transferee's right to terminate the purchase agreement expires upon the transfer of the subject property by deed or installment sales contract.

Pursuant to MCL 565.964:

A transfer subject to this act shall not be invalidated solely because of the failure of any person to comply with a provision of this act.

Under the plain language of the SDA, plaintiffs' only relief for a violation of the act would have been termination of the purchase agreement, but after the transfer of the deed, plaintiffs' ability to terminate the purchase agreement had expired, and thus no independent cause of action existed for a violation of the SDA after the deed to the property was transferred. Also, under MCL 565.964 a transfer of property subject to this act will not be invalidated solely because someone failed to comply with one of its provisions.

Finally, as stated in *Malden, supra*, 461 Mich 119 "[a] motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint," and in the present case, taking all of plaintiffs' well-plead factual allegations as true, and viewing them in a light most favorable to plaintiffs, there cannot be a claim for a violation of the SDA because plaintiffs concede that under the SDA there cannot be an independent cause of action for a violation of the SDA here because the deed had already been transferred; and thus plaintiffs essentially admit that they failed to state a claim upon which relief could be granted. Therefore, the trial court properly dismissed this claim under MCR 2.116(C)(8) both with respect to defendant Franklin, and with respect to defendants Curtis, Stetler, and Stetler, Vanderveer and Associates.

*Misrepresentation, Innocent Misrepresentation, & Silent Fraud*

Plaintiffs argue that the trial court erred by denying their motion for summary disposition and granting defendants' motion for summary disposition when there is no genuine issue of

material fact that defendants met all of the requisite elements of fraudulent misrepresentation, innocent misrepresentation, and silent fraud. We disagree.

Fraudulent misrepresentation consists of the following elements:

(1) the defendant made a material misrepresentation; (2) the representation was false; (3) at the time the defendant made the representation, the defendant knew the representation was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998).]

"A claim of innocent misrepresentation is shown if a party detrimentally relies on a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *Id.*, 27.

Under the doctrine of silent fraud, a seller of real property may be held liable to a buyer for failing to disclose material defects in the property or its title. *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988). The elements include: 1) a material representation which is false; 2) known by defendant to be false, or made recklessly without knowledge of its truth or falsity; 3) that defendant intended plaintiff to rely upon the representation; 4) that, in fact, plaintiff acted in reliance upon it; and 5) plaintiff thereby suffered injury. *Id.*, 213. In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure. *US Fidelity & Guarantee Co v Black*, 412 Mich 99, 125; 313 NW2d 77 (1981). Each of the above misrepresentation claims requires a showing of the plaintiff's "reliance" in order to be actionable.

With respect to plaintiffs' claim for innocent misrepresentation, although the trial court did not address this claim individually, such a claim cannot exist under the SDA, because the act itself eliminates any claims based on innocent misrepresentation in reference to alleged misrepresentations within the SDS.

MCL 565.955(1) provides the following in relevant part:

The transferor or his or her agent is not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor, or was based entirely on information provided by public agencies or provided by other persons specified in subsection (3), and ordinary care was exercised in transmitting the information.

Thus, this claim could be properly dismissed under MCR 2.116(C)(8), for a failure to state a claim upon which relief could be granted. In any event, there is no genuine issue of material fact that a claim for innocent misrepresentation, as well as a claim for fraudulent misrepresentation and silent fraud, could not be sustained in the present case because there is no evidence that plaintiffs reasonably relied on any statements in the SDS, and reasonable reliance is an essential element to all of the above claims. To be actionable, a misrepresentation claim

requires actual reliance on a false representation. *Phinney v Perlmutter*, 222 Mich App 513, 534; 564 NW2d 532 (1997). Also, “[a] misrepresentation claim requires *reasonable* reliance on a false representation” and “[t]here can be no fraud where a person has the means to determine that a representation is not true.” *Nieves v Bell Industries, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994) (emphasis added). “[A] person who unreasonably relies on false statements should not be entitled to damages for misrepresentation.” *Novak v Nationwide Mutual Ins Co*, 235 Mich App 675, 690; 599 NW2d 546 (1999).

In the present case, plaintiffs opted to have the closing be contingent upon a satisfactory independent inspection of the home, the home was inspected, and plaintiffs subsequently released the inspection contingency, but only after the issues pointed out by the inspector were corrected as indicated in the addendums to the purchase agreement. While plaintiffs testified at their deposition that “we relied on [the statements in the SDS],” plaintiffs’ actions demonstrated that they relied on the independent inspection, specifically, the action they took by requesting that defendants make those repairs and corrections prior to closing. While plaintiffs’ actions demonstrated that they relied on the inspector’s findings prior to closing on the property, they recognized afterwards that the inspector probably “missed some stuff,” but they decided to formally release him from any liability.

Also, the evidence indicates that the alleged misrepresentations were not concealed and would have been discovered by a competent home inspector. For example, plaintiffs’ own expert witness Jeff Stiemsma, inspected the property and testified that he observed that the basement wall “was patched, somebody had done—tried to do something there before, the wall is patched with a hardening cement sealant, you know.” He also noted that he saw “water stains on the wall . . . [l]ike discoloration of water, a path where water has taken.” According to Stiemsma, although “it wouldn’t have been caught by a normal person looking at the house or anything like that,” somebody who was “inspecting the home” would have “noticed it” and “it wasn’t in anyway concealed” or “covered up by anything,” nothing was “sitting in front of it” and it had not been “painted over.”

Robert H. Burr, a licensed builder and an employee of the BrickKicker Home Inspection Company, inspected the property and identified numerous areas of the “Pergo floating floor” that were “loose and sliding” and “numerous past moisture stains on the concrete foundation walls.” Burr identified adequate grading and drainage away from the foundation in all areas “except the West side of the home,” and indicated that he “would have identified these issues to the home buyer at the time of his inspection.” Additionally, the law is clear that notice to an agent, constitutes notice to the principal. *US Fidelity & Guaranty Bank, supra*, 412 Mich 126. Thus, plaintiffs’ real estate agent’s knowledge was imputed onto plaintiffs, and they were on constructive notice that, contrary to the assertion in the SDS, certain necessary permits had not been pulled for the construction of the addition, indicating that the addition may not have been built according to code specifications.

Therefore, plaintiffs could not have reasonably relied on the alleged misrepresentations within the SDS because before closing on the property they opted to have the closing contingent upon an adequate inspection of the home “in order to determine if there were faults” in the home; and pursuant to their inspection, they requested certain repairs and corrections be made before proceeding to closing; they had constructive knowledge that certain building permits were not pulled for the “[s]tructural modifications, alterations or repairs made” on the home; and all of the

evidence demonstrates that the alleged misrepresentations could have easily been identified by a competent home inspector. Therefore, as stated above in *Nieves, supra*, 204 Mich App 464, here plaintiffs also had "the means" to determine whether the SDS contained true statements, and "[t]here can be no fraud where a person has the means to determine that a representation is not true." Without actual reliance on a false representation, there cannot be an action for misrepresentation. *Phinney, supra*, 222 Mich App 534-536. Therefore, the trial properly found that there is no genuine issue of fact that plaintiffs could not meet the requisite element of reliance for their claims of fraudulent misrepresentation, innocent misrepresentation, and silent fraud.

*The Michigan Consumer Protection Act, MCL, 445.901 et seq.*

With respect to defendant Franklin, plaintiffs argue that the trial court erred in dismissing their MCPA claim, improperly focusing on the parties' business instead of on the transaction in question. Moreover, with respect to defendants Curtis, Stetler and Stetler, Vanderveer & Associates, plaintiffs argue that the trial court erred in dismissing this claim as defendants were realtors engaged in "trade or commerce." We disagree.

MCL 445.901 prohibits "certain methods, acts, and practices, in trade or commerce." MCL 445.903(1) states that "[u]nfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful . . . ." MCL 445.902(d) provides the following definition:

"Trade or commerce" means the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.

The trial court properly dismissed the MCPA claim against Franklin because there is no genuine issue of material fact that Franklin does not fit the definition of one engaged in the "trade or commerce" of building and/or selling homes; there is no evidence that she was ever involved in DeVoll's business; she was only married to DeVoll, who was a licensed builder and built the home that they lived in and then subsequently sold to plaintiffs; and the sale of the home to plaintiffs was not due to the conduct nor was it in the course of DeVoll's business, as his business had no interest in the property at all. Plaintiff James Timmons only testified that in his mind Franklin's signature "amounted to a builders [sic] guarantee," but no support is offered by plaintiffs to demonstrate why he would have this belief, as no information was given to plaintiffs indicating that the sale was due to the conduct of a business. Thus, the trial court properly noted that both DeVoll and Franklin acted "as private home owners offering their residence for sale" and thus the MCPA is inapplicable and the trial court properly dismissed this claim.

The trial court also correctly dismissed the MCPA claim against Curtis, Stetler, and Stetler, Vanderveer & Associates. Real estate brokers and salespersons are regulated by the Department of Consumer & Industry Services pursuant to Article 25 of Michigan's Occupational Code, MCL 339.2501, *et seq.* Pursuant to the code, a "real estate sales person" is defined as:

A person who for compensation or valuable consideration is employed

either directly or indirectly by a licensed real estate broker to sell or offer to sell, to buy or to offer to buy, to provide or offer to provide market analysis, to list or offer to attempt to list or to negotiate the purchase or sale or exchange of mortgage or real estate . . . . [MCL 339.2501(e).]

The MCPA provides an exemption for "a transaction or conduct specifically authorized under the laws administered by a regulatory board or officer acting under statutory authority of this State or the United States" MCL 445.904(1)(a).

In the present case Curtis' role as DeVoll and Franklin's real estate agent, was simply to list the home for DeVoll and Franklin, the same home that he had listed for them on previous occasions, and thus the "transaction" and his "conduct" are exempt from the act under the above-noted exemption. In any event, even if his "conduct" is not exempt from the act, as previously discussed, there is no evidence to support plaintiffs' substantive claims of misrepresentation, innocent misrepresentation or silent fraud, and thus there is no cause of action under the MCPA, and the trial court properly dismissed this claim.

Breach of Contract

Plaintiffs argue that the trial court erred in dismissing their breach of contract claim because although it is premised upon the misrepresentation claims, it stems from the failure of consideration as a result of the defects on the property. We disagree.

Plaintiffs failed to set forth a separate cause of action with their breach of contract claim because the breach of contract they allege rests *only* on the claims of misrepresentation in the SDS, and if there were no claims of misrepresentation in the SDS, plaintiffs would not have a breach of contract claim. Therefore, the breach of contract *is* essentially the alleged misrepresentation in the SDS. Accordingly, the trial court properly dismissed plaintiffs' breach of contract claim under MCR 2.116(C)(8), as it did not set forth a separate cause of action.

Affirmed.

/s/ David H. Sawyer  
/s/ Henry William Saad  
/s/ Richard A. Bandstra

STATE OF MICHIGAN  
COURT OF APPEALS

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CHARLES LOVE and ANGELA LOVE,

Plaintiffs-Appellants,

v

DINO CICCARELLI, LYNDA CICCARELLI,  
ESTATE OF THEODORE KOLASA, and NEW  
REALITY, INC., d/b/a CENTURY 21-EAST,  
INC.,

Defendants-Appellees.

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UNPUBLISHED  
May 6, 2004

No. 243970  
Macomb Circuit Court  
LC No. 97-004363-CH

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order, on remand, granting defendants'<sup>1</sup> motion for summary disposition. On appeal, plaintiffs argue that the trial court's grant of summary disposition in favor of defendants, with regard to the Michigan Consumer Protection Act (MCPA) claim, was prohibited by the law of the case doctrine and that, regardless, defendants are not exempt from application of the MCPA. We affirm.

The facts of the present case are adequately presented in *Love v Ciccarelli*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2002 (Docket No. 221993), slip op p 1, as follows:

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<sup>1</sup> We note that the Michigan Consumer Protection Act claim, which is at issue in this appeal, is not applicable to defendants Dino Ciccarelli and Lynda Ciccarelli (hereinafter "Ciccarellis"). Plaintiffs' MCPA claim, in its amended complaint, does not include the Ciccarellis, and plaintiffs acknowledged in their answer to defendants' motion for summary disposition that the MCPA claim does not apply to the Ciccarellis and affirmatively stated, "the Michigan Consumer Protection Act (Count III) only sought relief against Defendant's [sic] Kolasa and New Reality, Inc." We further note that defendant Theodore Kolasa is now deceased, and that his estate is now the named defendant. Throughout this opinion the Ciccarellis will be referred to by name and New Realty, Inc., and Kolasa (now the estate of) will be referred to individually by name and collectively as defendants.

Plaintiffs purchased a Shelby Township home, formerly owned by defendants Dino Ciccarelli and Lynda Ciccarelli ("sellers"). After discovering several problems with the home, plaintiffs filed a three-count complaint alleging fraud and misrepresentation, violations of the Seller Disclosure Act, MCL 565.951 *et seq.*, and violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* Plaintiffs also named the seller's broker, Ted Kolasa and New Reality, Inc., d/b/a Century 21-East, Inc. ("broker") as defendants in this lawsuit.

Plaintiffs allege that the home contains several defects, specifically, water accumulation in the basement and the existence of a heating coil on the exterior of the home. Plaintiffs further state that despite defendants' assurances to the contrary, the home was subject to a homeowner's association. As a result of the association's bylaws, plaintiffs have been prevented from building the fence that they initially contemplated and discussed with defendants. Lastly, plaintiffs assert that the lot size differed materially from what defendants represented. Plaintiffs ultimately testified that they never would have purchased the home if these issues had been discussed.

In *Love, supra*, plaintiffs were appealing a trial court order granting a directed verdict in favor of defendants. This Court affirmed the trial court with regard to all claims except the MCPA claim, and reversed the trial court's grant of a directed verdict on the MCPA claim and remanded for further proceedings finding that "plaintiffs have successfully alleged at least one violation of the MCPA . . . . [b]ecause a reasonable juror could find that plaintiffs rationally believed the representations made by defendants, a directed verdict on plaintiff's MCPA claims was improper." *Love, supra* at slip op, p 4-5. The Court based its decision on plaintiffs' allegations that Kolasa and Lynda Ciccarelli had affirmatively represented to them that there was no homeowner's association. *Id.* at slip op, p 5. And, this Court indicated that the representation was material because plaintiffs allege that they would not have bought the home if they had known there was a homeowner's association. *Id.* On remand, defendants filed a motion for summary disposition claiming exemption from the MCPA pursuant to MCL 445.904(1)(a) because real estate licensees are regulated by the Michigan Occupational Code, MCL 339.101 *et seq.* The trial court granted defendants' motion for summary disposition.

Plaintiffs' first issue on appeal is that the law of the case doctrine prohibits relitigation with regard to the applicability of the MCPA claim. We disagree because the previous panel of this Court did not determine whether defendants were exempt from the MCPA claim pursuant to MCL 445.904(1)(a).

Whether the doctrine of law of the case applies is a question of law subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Under the doctrine of law of the case, a ruling by an appellate court on a legal question binds the appellate court and all lower tribunals, and the question may not be differently determined in the same case where the facts remain materially the same. *Grievance Administrator v Lopatin*, 462 Mich 235, 259260; 612 NW2d 120 (2000). This doctrine applies only to those questions determined by an appellate court's prior decision and to those questions that are necessary to the court's determination. *Poirier v Gd Blanc Twp (After Remand)*, 192 Mich App 539, 546; 481 NW2d 762 (1992).

This Court, in *Love, supra*, did not address whether defendants were exempt from the MCPA under MCL 445.904(1)(a) and our Supreme Court's holding in *Smith v Globe Life Insurance Co*, 460 Mich 446; 597 NW2d 28 (1999), in its prior opinion because this was not raised or challenged in the prior appeal. The trial court had directed a verdict in favor of defendants on the grounds that plaintiffs had failed to present any evidence of damages. No issue was raised or addressed during the prior appeal regarding whether defendants were exempt from the MCPA pursuant to MCL 445.904(1)(a). Thus, the law of the case doctrine does not preclude us from deciding the issue now. See, generally, *Lopatin, supra* at 261-262; *Burkhardt v Bailrey*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (Docket No. 243354, issued February 19, 2004) slip op, pp 15-16.

Plaintiffs' final issue on appeal is that reversal is required because a realtor's professional license does not exempt defendants from application of the MCPA. We disagree because defendants, in the present case, were engaged in conduct that is exempted from the MCPA and summary disposition was proper.

We review de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendants requested summary disposition under both MCR 2.116(C)(8) and (10). The trial court did not specify under which subrule it decided the motion under, MCR 2.116(C)(8) or (10). But it is apparent from the arguments of the parties that facts outside of the pleadings were relied on. Thus, we will review the trial court's grant of defendants' motion for summary disposition as having been granted under MCR 2.116(C)(10). A party's motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim considering affidavits, depositions, admissions, or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Spiek, supra*. Summary disposition is properly granted if no dispute exists regarding a fact material to a dispositive legal claim and the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120-121. To the extent our review of this issue requires us to interpret and apply the MCPA, we also review questions of statutory interpretation de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The MCPA provides an exemption for "a transaction or conduct specifically authorized under the laws administered by a regulatory board or officer acting under statutory authority of this State or the United States." MCL 445.904(1)(a). This exemption focuses on "whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.'" *Smith, supra* at 464; see also *Attorney General v Diamond Mortgage Co*, 414 Mich 603, 617; 327 NW2d 805 (1982).

Defendants, Kolasa an individual with a real estate broker's license and New Realty, Inc., a principal to entities to whom a broker's license has been issued, argue that the MCL 445.904(1)(a) exemption applies because the Michigan Occupational Code regulates defendants. Real estate brokers and salespersons are regulated by the Department of Consumer & Industry Services pursuant to Article 25 of Michigan's Occupational Code, MCL 339.2501, *et seq*. Pursuant to MCL 339.2501(d) and (e), a "real estate broker" and a "real estate sales person" are defined as:

(d) "Real estate broker" means an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those entities who with intent to collect or receive a fee, compensation, or valuable

consideration, sells or offers for sale, buys or offers to buy, provides or offers to provide market analyses, lists or offers or attempts to list, or negotiates the purchase or sale or exchange or mortgage of real estate, or negotiates for the construction of a building on real estate; who leases or offers or rents or offers for rent real estate or the improvements on the real estate for others, as a whole or partial vocation; who engages in property management as a whole or partial vocation; who sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others; or who, as owner or otherwise, engages in the sale of real estate as a principal vocation.

(e) "Real estate salesperson" means a person who for compensation or valuable consideration is employed either directly or indirectly by a licensed real estate broker to sell or offer to sell, to buy or offer to buy, to provide or offer to provide market analyses, to list or offer or attempt to list, or to negotiate the purchase or sale or exchange or mortgage of real estate, or to negotiate for the construction of a building on real estate, or to lease or offer to lease, rent or offer for rent real estate, who is employed by a real estate broker to engage in property management, or who sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others, as a whole or partial vocation.

Plaintiffs allege that defendants violated MCL 445.903(1)(bb) of the MCPA, which provides that it is "unlawful" to make "a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is." In *Love, supra*, this Court determined that a question of fact existed with regard to whether defendants' actions violated MCL 445.903(1)(bb). Plaintiffs contend that the MCL 445.904(1)(a) exemption does apply because defendants made a misrepresentation and Michigan's Occupational Code does not specifically authorize misrepresentations. Plaintiffs further contend that based on *Diamond Mortgage Co, supra*, the MCPA is applicable to business activity related to residential home sales and defendants, thus, are not exempted under MCL 445.904(1)(a).

Plaintiffs misconstrue *Diamond Mortgage Co, supra*, and our Supreme Court's interpretation of it in *Smith, supra*. In *Smith, supra* at 464-465, our Supreme Court explained:

In short, *Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is "specifically authorized." Thus, the defendant in *Diamond Mortgage* was not exempt from the MCPA because the transaction at issue, mortgage writing, was not "specifically authorized" under the defendant's real estate broker's license.

\* \* \*

Consistent with these rulings, we conclude here that, when the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include conduct the legality of which is in dispute.

Contrary to the "common-sense reading" of this provision by the Court of Appeals, we conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited. Therefore, we conclude that § 4(1)(a) generally exempts the sale of credit life insurance from the provisions of the MCPA, because such "transaction or conduct" is "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."

Further emphasis and explanation, is provided by a recent decision of this Court in *Kraft v Detroit Entertainment, L.L.C.*, \_\_ Mich App \_\_; \_\_ NW2d \_\_ (Docket No. 241405, issued April 13, 2004). In *Kraft, supra*, the plaintiff claimed that the defendants' made misrepresentations regarding slot machines, and further claimed that the MCL 445.904(1)(a) exemption did not apply because the misrepresentations were not specifically authorized by the regulatory act (which is the Michigan Gaming Control and Revenue Act). In finding the defendants exempt under MCL 445.904(1)(a) this Court, in *Kraft, supra* at slip op, p 4, provided "[a]pplying the legal standard established in *Smith, supra* at 465, we conclude that the general conduct involved in this case--the operation of slot machines--is regulated and was specifically authorized by the [Michigan Gaming Control Board]."

Plaintiffs, in the present case, improperly place emphasis on whether the specific conduct was authorized rather whether the general transaction was authorized. In the present case defendants' role as the real estate broker for the Ciccarellis, was simply to sell the real property and engage in real estate services for the Ciccarellis, both activities authorized and within the definition provided in MCL 339.2501(d) and (e) and, thus, the "transaction" and defendants' "conduct," which are "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States," are exempt from the MCPA under the above noted exemption, MCL 445.904(1)(a). Therefore, the trial court properly dismissed this claim, as summary disposition was proper.

Upon, a review de novo, we find that the trial court properly granted defendants' motion for summary disposition with regard to plaintiffs' MCPA claim against defendants.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Richard Allen Griffin  
/s/ Kathleen Jansen