STATE OF MICHIGAN

COURT OF APPEALS

DENISE BESHADA,

Plaintiff-Appellant,

v

MILLARD REALTY, RAILSIDE APPRAISAL SERVICES, RICHARD J. HANSEN, MARILYN J. HANSEN, and RICK A. HANSEN,

Defendants-Appellees.

UNPUBLISHED
January 13, 2004

No. 244635
Montcalm Circuit Court
LC No. 00-000729-CZ

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

This is a civil action for damages arising out of plaintiff's purchase of a residence in Montcalm County. Plaintiff alleged in her complaint that defendants were liable for failing to disclose material defects in the home. The trial court granted defendant Railside summary disposition pursuant to MCR 2.116(C)(8) and (10) by order entered December 28, 2001, and entered final judgment on October 4, 2002, granting defendant Millard and defendants Hansens' summary disposition pursuant to MCR 2.116(C)(10). We conclude that the trial court did not err by granting defendants Hansens and defendant Millard summary disposition because plaintiff failed to produce evidence that a material issue of fact remained for trial that if proved would entitle her to relief. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court also properly granted Railside summary disposition pursuant to MCR 2.116(8) and (10) because, based on the undisputed facts, Railside did not owe plaintiff a duty of care. Accordingly, we affirm.

I. Summary of Material Facts.

Plaintiff, a twenty-one-year-old, first-time homebuyer, agreed to purchase a home from defendant Hansens contingent on her obtaining a Federal Housing Administration (FHA) insured mortgage loan. The Hansens had purchased the older residence about a year before the sale to plaintiff specifically for the purpose of remodeling and reselling it. The buy-sell agreement (BSA) between plaintiff and the Hansens contained in ¶ 10 an "as is" clause also giving plaintiff the right of inspection and cancellation, and plaintiff also inserted "must pass for mortgage" into that paragraph. It is undisputed that the FHA appraisal by Railside failed to disclose certain problems with the residence, which if disclosed, would have precluded the residence from

meeting minimum FHA standards. But it is also undisputed that plaintiff received her loan on FHA terms. Further, after closing and discovery of the deficiencies, Railside's appraiser and the mortgagee, the Independent Mortgage Company, paid contractors $9,600 to correct the problems so that the house met minimum FHA standards. Plaintiff acknowledged in discovery that two appraisals of the home after the post-closing repairs showed the home was worth more than she had paid for it.

Plaintiff alleged several theories of liability against the Hansens, their real estate agent, defendant Millard, and the FHA appraiser, Railside. Count I of plaintiff's amended complaint alleged the Hansens and Millard were negligent in failing to disclose known deficiencies and that Railside was negligent in failing to detect and report the deficiencies. In Count II, plaintiff alleged a violation of Michigan's Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, based on defendants' alleged misrepresentations, failure to reveal material facts, and misleading statements and actions. Plaintiff alleged in Count III a theory of innocent misrepresentation. Plaintiff alleged common law fraud in Count IV. Finally, in Count V, plaintiff claimed that the Hansens breached their contract. Plaintiff sought money damages, not rescission.

II. Standard of Review

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). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the pleadings standing alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion must be granted if no factual development could justify plaintiff's claim for relief. *Id*.; *Spiek, supra*. Also, whether a duty exists, the violation of which may result in tort liability, is a question of law for a court to decide. *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999). We review de novo the trial court's answer to that question. *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001).

A party's motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Spiek, supra*. The moving party must identify the undisputed factual issues, MCR 2.116(G)(4), and the trial court must consider the submitted documentary evidence in the light most favorable to the nonmoving party. *Maiden, supra* at 120; MCR 2.116(G)(5). If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with evidentiary materials that a genuine and material issue of disputed fact exists. MCR 2.116(G)(4); *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 547; 619 NW2d 66 (2000); *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). If no dispute exists regarding a fact material to a dispositive legal claim, the moving party is entitled to judgment as a matter of law and summary disposition is properly granted. *Id*.; *Maiden, supra* at 120-121.

III. Plaintiff's claims against the Hansens and Millard

The trial court did not err by granting defendants summary disposition pursuant to MCR 2.116(C)(10) because plaintiff failed to produce evidence that a material issue of fact remained for trial that if proved would entitle her to relief. *Smith v Globe Life Ins Co*, 460 Mich 446, 455;

597 NW2d 28 (1999). Moreover, plaintiff cannot establish that she sustained any damages after her lender and the FHA appraiser paid for repairs to the home. Reviewing the facts in the light most favorable to plaintiff, she bargained for, and received, a home meeting FHA standards, financed with an FHA-insured mortgage. The benefit of an FHA-insured mortgage loan to the borrower is obtaining financing to purchase a home at terms more favorable than those available on the private market. See *Clark v Grover*, 132 Mich App 476, 481; 347 NW2d 748 (1984), and *Cason v United States*, 381 F Supp 1362, 1364-1365 (WD Mo, 1974), aff'd sub nom *Summers v United States*, 510 F2d 123 (CA 8, 1975), cert den 423 US 851; 96 S Ct 95; 46 L Ed 2d 75 (1975). After the mortgage company and appraiser paid for the repairs, plaintiff's home had an appraised value higher than the purchase price she paid. In short, even if the legal theories plaintiff advances had merit, because plaintiff sought money damages instead of rescission, she has no damages that entitle her to relief.

A. Breach of Contract: The trial court properly dismissed plaintiff's claim for breach of contract as a matter of law because the Hansens did not promise to deliver a house that met FHA standards. Plaintiff cannot convert her subjective expectations into a legal promise by the Hansens.

The interpretation of a contract is a question of law reviewed de novo on appeal. *Archambo v Lawyers Title Insurance Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). Further, whether contract language is ambiguous, and requires resolution by the trier of fact is also a question of law reviewed de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 480; 663 NW2d 447 (2003). The main goal of interpreting a contract is to honor the intent of the parties. *Mahnick v Bell Co*, 256 Mich App 154, 159-160; 662 NW2d 830 (2003). But courts must discern the parties' intent from the words used in the contract and must enforce an unambiguous contract according to its plain terms. *Id*. at 160; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

In this case, the plaintiff's offer to buy and the Hansens' offer to sell the subject property was contingent on plaintiff's ability to obtain an FHA-insured mortgage. Paragraph ten of the BSA provided that plaintiff agreed to accept the property "as is," subject to her right to inspect the building and its various components. Paragraph ten also provided a remedy should plaintiff's inspections disclose unacceptable conditions: the right to terminate the agreement. Into the sentence of ¶ 10 describing the various inspections plaintiff could have, she handwrote: "must pass for mortgage." It is settled that contracts must be interpreted and their legal effects determined as a whole. *Perry v Sied*, 461 Mich 680, 689 n 10; 611 NW2d 516 (2000). It addition to reading a contract as a whole, its various words and phrases must be read in harmony, if possible. *Wilkie, supra* at 50 n 11.

Here, the language "must pass for mortgage" inserted into ¶ 10, when read in context with the entire BSA, clearly provided plaintiff the right to cancel the contract if the home did not pass the inspection required for an FHA-insured mortgage. It was a condition precedent to plaintiff's obligation to perform, not an independent promise by the Hansens that the home met certain standards. "A 'condition precedent' is a fact or event that the parties intend must take place before there is a right to performance. A condition precedent is distinguished from a promise in that it creates no right or duty in itself, but is merely a limiting or modifying factor." *Mikonczyk v Detroit Newspapers, Inc*, 238 Mich App 347, 350; 605 NW2d 360 (1999), citing

Reed v Citizens Ins Co of America, 198 Mich App 443, 447; 499 NW2d 22 (1993). Thus, if the home failed to pass FHA inspection, plaintiff had the option to terminate her obligation to complete her purchase. *Archambo, supra* at 409. But the contractual condition that the home must pass an FHA inspection was not an independent promise by the Hansens that may form a basis for breach of contract. *Mikonczyk, supra*.

This result is not changed by plaintiff's subjective expectation that the condition would assure her of a certain quality home. "'It is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms. Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms.'" *Zurcher v Herveat*, 238 Mich App 267, 299; 605 NW2d 329 (1999), quoting *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 604; 576 NW2d 392 (1997). So, plaintiff's subjective reliance on the FHA inspection process to verify the condition of the home is irrelevant to the construction of the contract. The Hansens simply made no promise that the home would meet FHA standards. Rather, plaintiff bore the burden under ¶ 10 of the BSA to ascertain the condition of the property, and plaintiff bore the risk of defects as well. Accordingly, plaintiff has no claim for breach of contract. *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 32 n 15; 331 NW2d 203 (1982); *Niecko v Emro*, 769 F Supp 973, 979 (ED Mich, 1991).

B. Negligence, Silent Fraud and Innocent Misrepresentation: Plaintiff conceded she had no evidence that either the Hansens or Millard committed common-law fraud in concealing the complained-of defects in the home. Common-law fraud requires proof that (1) defendant made a material representation; (2) it was false; (3) when it was made defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) defendant made it with the intent that it should be acted upon by plaintiff; (5) plaintiff did act in reliance upon it; and (6) plaintiff thereby suffered injury. *Hord v Environmental Research Inst (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000); *Webb v Malmquist*, 195 Mich App 470, 473; 491 NW2d 851 (1992). Rather, plaintiff asserts theories of negligence and innocent misrepresentation.

To establish a claim of negligence, "a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000), footnote omitted. "'Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person.'" *Christy v Prestige Builders, Inc*, 415 Mich 684, 693, 329 NW2d 748 (1982), quoting *Moning v Alfono*, 400 Mich 425, 438-439; 254 NW2d 759 (1977). Here, plaintiff claims a duty to disclose defects in the home arose from the relationship of vendor and vendee between the Hansens and plaintiff, and the relationship of Millard as the Hansens' real estate agent. Plaintiff claims the Hansens and Millard breached this duty by failing to disclose defects about which defendants knew about or should have known. In short, plaintiff claims defendants are liable for silent fraud or fraudulent concealment. See *M & D, Inc v McConkey*, 231 Mich App 22, 28-36; 585 NW2d 33 (1998).

The common-law rule in land sales is caveat emptor, which provides "a land vendor who surrenders title, possession, and control of property shifts all responsibility for the land's

condition to the purchaser." *Christy, supra* at 694. But a special conflict panel of this Court in *McConkey, supra*, explained that although neither a land vendor nor a vendor's agent has a general duty to disclose material defects to a prospective vendee, silence may constitute actionable fraud where a legal or equitable duty of disclosure exists. After reviewing Supreme Court decisions in this area, the *McConkey* panel concluded that a plaintiff must establish more than that the vendor was aware of a hidden defect. *Id.* at 32. Rather, "in order to prove a claim of silent fraud, a plaintiff must show that some type of representation that was false or misleading was made, and that there was a legal or equitable duty of disclosure." *Id*. The *McConkey* Court summarized,

> a claim of silent fraud is established when there is a suppression of material facts and there is a legal or equitable duty of disclosure. We emphasize that there must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud. [*Id*. at 36.]

In general, as real estate agent for the seller, Millard owed no duty of disclosure to plaintiff, the buyer *McMullen v Joldersma*, 174 Mich App 207, 212; 435 NW2d 428 (1988). "In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure." *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 125; 313 NW2d 77(1981), citing 37 Am Jur 2d, Fraud and Deceit, § 146. Here, the course of dealing between the parties did not establish that Millard had either a legal or equitable duty to disclose to plaintiff.

Plaintiff argues that Millard misrepresented that the home passed FHA inspection with "flying colors," and that it withheld a "red-flag" water report. But Millard did no more than convey information it had received from others to plaintiff, or in the case of the water report, to the parties responsible for approving plaintiff's FHA loan-her lender and the FHA appraiser. Further, the statement that the home passed inspection was obviously inaccurate. Plaintiff was notified that both the appraisal report and the water report uncovered certain deficiencies in the home that needed to be corrected, including adding handrails and drilling a new well. In essence, plaintiff was placed on notice of potential problems but took no action. She could have obtained her own inspections or requested a copy of the water report from its author, Millard, the appraiser, or her lender. No fraud occurs where plaintiff has the means of discovering the truth and is not precluded from employing those means. *Webb, supra* at 474. In sum, Millard did no more than act as a conduit of information. Millard owed no independent duty of disclosure to plaintiff and did not actively conceal any material information.

The Hansens, however, had a legal duty to disclose certain conditions of the home to plaintiff under the Seller Disclosure Act, MCL 565.951, *et seq*. Moreover, an "as is" clause will not preclude liability based on fraud. *Lenawee Co, supra* at 32 n 16. See also, *Clemens v Lesnek*, 200 Mich App 456 460; 505 NW2d 283 (1993), and *McConkey, supra* at 32. The Seller Disclosure Act required the Hansens to provide plaintiff with a seller's disclosure statement (SDS) on a form prescribed by the act. MCL 565.594, 597. Plaintiff claims the Hansens' SDS contained misrepresentations because check-marks "yes" indicated that the home's electrical, heating and plumbing systems were in working order. But plaintiff produced no evidence the Hansens' statements were false, or that Hansens knew of defects that were not disclosed. Nor did plaintiff present any evidence the Hansens knew of either asbestos in the basement or of a

nonconforming gray water discharge. The Hansens' SDS disclosed that the condition of the well, septic tank, pump, drain field and environmental problems were all "unknown." Plaintiff only argues that because repairs were later necessary to meet FHA specifications, the statements were false or misleading. A statement that a system is in working order is simply not a statement that the system meets FHA standards. Plaintiff's unwarranted inference from something the SDS says does not support a claim that there was misrepresentation. See, e.g., *Hord, supra* at 10 (financial information about one fiscal year was not a representation of financial condition in subsequent years). Plaintiff simply cannot establish a claim of silent fraud without some type of misrepresentation that was false or misleading. *McConkey, supra* at 36.

Similarly, plaintiff's claim of innocent misrepresentation must fail. "A claim of innocent misrepresentation is shown if a party detrimentally relies upon 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." *McConkey, supra* at 27, citing *United States Fidelity, supra* at 118. But a plaintiff may only assert a claim of innocent misrepresentation against a defendant where privity of contract exists. *McConkey, supra* at 28. Applying these principles to the case at bar, plaintiff may not assert an innocent misrepresentation claim against Millard because there is no privity of contract. As to the Hansens, because their only representations were set forth in the SDS and because there was no evidence those representations were false, plaintiff's innocent misrepresentation claim fails.

C. The Michigan Consumer Protection Act: The Consumer Protection Act prohibits "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). The act defines "trade or commerce" as "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." MCL 445.902(d). The Legislature clearly intended the MCPA to protect consumers in their purchase of goods and services. *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000). But the MCPA does not apply to purchases primarily for business purposes. *Slobin v Henry Ford Health Care*, 469 Mich 211, 216 NW2d 632 (2003); *Zine v Chrysler Corp*, 236 Mich App 261, 273; 600 NW2d 384 (1999). Further, the MCPA exempts from its purview 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." 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).

In the instant case, plaintiff alleges violation of subsections (s), (bb), and (cc) from the list of "unfair, unconscionable, or deceptive methods, acts, or practices" found in MCL 445.903(1), which subsections provide:

> (s) 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.

(bb) Making 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.

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

Michigan courts have held the MCPA applicable to business activity related to residential home sales. See, e.g., *Diamond Mortgage, supra* (application of the MCPA to a real estate broker's charging usurious interest rates); *Forton, supra* (application of the MCPA to a licensed residential builder's deviation from construction plans); and *Price v Long Realty, Inc*, 199 Mich App 461; 502 NW2d 337 (1993) (application of the MCPA to a real estate agents sale of property for the purpose of building a family residence). Thus, the MCPA applies in general to a real estate agent's business endeavors to sell residential property to the ultimate consumer. Although the Hansens' activity of buying a single older home to remodel and then resell presents a closer question, the Hansens' for-profit activity appears to fit within the act's broad definition of "trade or commerce." MCL 445.902(d). Accordingly, the Hansen's and Millard's business activity falls with the purview of the MCPA.

Although the MCPA applies to the Hansens and Millard, plaintiff's theory of liability stems from the same factual claims of misrepresentation and fraudulent concealment. For the reasons already discussed, plaintiff failed to produce evidence that the Hansens misrepresented or withheld material information concerning the home. Accordingly, plaintiff's MCPA claim against the Hansens fails.

Similarly, the facts of this case create no liability for Millard. First, even though Millard did not provide plaintiff with the water test report, plaintiff had easy access to it. Second, the water report's reference to a nonconforming gray water discharge was not so inherently obvious as to alert either plaintiff or Millard to be concerned about FHA compliance. Third, plaintiff failed to produce any evidence that a nonconforming gray water discharge was contrary to FHA standards. Fourth, Millard did not conceal the water report. Millard simply distributed it to the entities that could interpret and apply the results to determine if FHA standards were satisfied, the mortgage company and the FHA appraiser. Last, as already discussed, Millard owed no duty to disclose material facts to plaintiff.

Plaintiff also bases her claims against Millard under the MCPA because Millard was a conduit of the FHA appraisal which later proved defective. This claim must also fail. An FHA appraisal is a "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of . . . the United States." MCL 445.904(1)(a). The Secretary of Housing and Urban Development is authorized, upon application by the mortgagee, to insure mortgages eligible under 12 USC 1709 on such terms as the Secretary prescribes. Further, 12 USC 1708(e) provides that the "Secretary shall prescribe standards for the appraisal of all property to be insured by the Federal Housing Administration." Federal regulations require an application for insurance to be accompanied by a property appraisal upon a form meeting the requirements of the Secretary. 24 CFR 203.255(b)(1). Thus, the transaction at issue in this case, the FHA appraisal, was (1) specifically authorized by the laws of the United States and (2) administered by an officer acting under statutory authority of

the United States. Accordingly, the appraisal was exempted from the MCPA. MCL 445.904(1)(a); *Smith, supra* at 464; *Diamond Mortgage, supra* at 617. Millard cannot be liable under the MCPA for merely relaying truthful information concerning a transaction exempted from the act.

In sum, plaintiff failed produce evidence of disputed material fact that could establish the liability of either the Hansens or Millard. Accordingly, the trial court properly granted summary disposition to defendants. MCR 2.116(C)(10), (G)(4).

IV. Plaintiff's claims against Railside

The trial court properly granted Railside summary disposition pursuant to MCR 2.116(8) and (10). First, plaintiff's claim of innocent misrepresentation against Railside fails because no privity of contract exists between plaintiff and Railside. *McConkey, supra* at 28. Second, the FHA appraisal is a transaction "specifically authorized under laws administered by a[n] . . . officer acting under statutory authority of . . . the United States." MCL 445.904(1)(a). Accordingly, Railside is not subject to liability under the MCPA. *Smith, supra* at 464. Last, plaintiff's claim of negligent misrepresentation against Railside fails because as an FHA appraiser, Railside owed no duty of due care to plaintiff. *Clark v Grover*, 132 Mich App 476; 347 NW2d 748 (1984).

In *Clark, supra* at 479, the plaintiff's sought damages for personal injuries suffered as a consequence of carbon monoxide poisoning from a defective furnace which had been subject to an FHA loan inspection. The plaintiffs claimed the negligent performance of the inspection was a proximate cause of their injuries. The trial court granted summary disposition in favor of the lender that had hired the negligent furnace inspector. The question on appeal in *Clark* was whether the lender owed the homeowners, and through them the injured plaintiffs, a duty of care. *Id*. at 480. This Court concluded that federal laws and regulations regarding inspections and insurance of mortgages address "(1) the availability of mortgages on terms more favorable to the mortgagor than the market would otherwise provide, and (2) the security of the government's insurance funds." *Id* at 481. Further, "[s]afety conditions in buildings on the mortgaged property are relevant only because they affect the value and marketability of the property and thus affect the risk assumed by the government as insurer of the mortgage." *Id*. The Court therefore concluded "that the federal statute and rules, including the inspection requirements, were not intended to impose upon the mortgagee any duty of care concerning safety." *Id*.

The *Clark* Court cited federal decisions, quoting *United States v Neustadt*, 366 US 696, 709; 81 S Ct 1294; 6 L Ed 2d 614 (1961):

> [It] was repeatedly emphasized that the primary and predominant objective of the appraisal system was the 'protection of the Government and its insurance funds'; that the mortgage insurance program was not designed to insure anything other than the repayment of loans made by lender-mortgagees, and that there is no legal relationship between the FHA and the individual mortgagor. Never once was it even intimated that, by an FHA appraisal, the Government would, in any sense, represent or guarantee to the purchaser that he was receiving a certain value for

his money. [*Clark, supra* at 481-482, quoting *Neustadt, supra* at 709 (Footnotes and internal punctuation omitted).]

The *Clark* Court also quoted *Cason, supra*:

> It is now settled, however, that the primary and predominant objective of the FHA appraisal system is the protection of the Government and its insurance funds; that the mortgage insurance programs do not insure anything other than the repayment of loans made by lender-mortgagees; and that there is no legal relationship between the FHA and the individual mortgagor. * * * Although *Neustadt* was based on a different theory of liability, the Court believes that the Supreme Court completely rejected the notion that Congress intended to establish a duty of due care for the benefit of mortgagors such as plaintiffs. [*Clark, supra* at 482, quoting *Cason, supra* at 1367 (Internal punctuation omitted).]

Moreover, the *Clark* Court relied upon the Michigan Supreme Court precedent of *Smith v Allendale Mutual Ins Co*, 410 Mich 685; 303 NW2d 702 (1981). In *Smith* the issue was the liability of a fire insurer for injuries resulting from a fire caused by hazards not detected by the fire insurer's inspection of the insured's premises. The *Smith* Court held:

> [The] threshold requirement of an *undertaking to render services to another* is lacking in these cases. An insurer's inspection of an insured's premises for fire hazards does not in itself demonstrate an undertaking to render fire inspection and prevention services to the insured. Absent evidence that the insurer agreed or intended to provide services for the benefit of the insured, there is no basis for a conclusion that such inspections are conducted other than to serve the insurer's interests in underwriting, rating and loss prevention and hence there is no undertaking. An insurer who does not undertake to inspect for the insured's benefit owes no duty to the insured or the insured's employees to inspect with reasonable care; such an insurer is, however, subject to liability if it engages in affirmative conduct creating or enlarging a fire hazard. [*Clark, supra* at 483, quoting *Smith, supra*, 410 Mich at 705-706 (Emphasis in original).]

Based on *Neustadt, Cason,* and *Smith*, the *Clark* Court concluded:

> [T]here is no basis here for a conclusion that the inspection was conducted for any reason other than to serve the mortgagee's interest in obtaining insurance pursuant to 12 USC 1709. No well-pled facts in plaintiffs' complaints suggest that defendant agreed or intended to have the inspection performed for plaintiffs' benefit or that defendant engaged in affirmative conduct creating or enlarging a safety hazard. We therefore conclude that [the lender] owed no duty to the plaintiffs. [*Clark, supra* at 483-484.]

Likewise, in the instant case there is no evidence that Railside performed its appraisal of the subject property for any purpose other than to allow the mortgage company to determine if the property possessed sufficient value to underwrite a loan to plaintiff and to qualify the property for an FHA certificate of insurance. Plaintiff's edition of paragraph ten of the BSA

with the words "must pass for mortgage" plainly placed the burden on her to obtain any structural or mechanical inspections she desired. Otherwise, she was accepting the property "as is." The appraisal report itself clearly warns: "This report has been prepared for mortgage lending purposes only. Any other use is strictly prohibited without the express written consent of the appraiser." Most telling, plaintiff signed a warning letter more than three weeks before closing advising her of the purpose for the FHA appraisal and also warning her that FHA appraisals are not the same as home inspections. That warning provided:

> As part of our job insuring the mortgage for the lender, the FHA requires the lender to conduct an appraisal to:
>
> - estimate the value of your potential new home
> - make sure it meets minimal FHA standards
> - ensure that it will be marketable
>
> *Appraisals are different from home inspections.* Home inspections give more detailed information about your potential new home.

This Court's decision in *Clark* controls the outcome of plaintiff's claim against Railside. Railside performed its appraisal for the mortgage company only for FHA lending purposes. There is simply no evidence that Railside undertook an inspection of the property for plaintiff's benefit. Accordingly, Railside owed no duty of care to plaintiff. Because Railside owed no duty of care, plaintiff's claim of negligent misrepresentation fails. *Clark, supra* at 484.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot