

STATE OF MICHIGAN
COURT OF APPEALS

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.

UNPUBLISHED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The facts of the present case are adequately presented in *Love v Ciccarelli*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2002 (Docket No. 221993), slip op p 1, as follows:

¹ 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