

STATE OF MICHIGAN  
COURT OF APPEALS

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PHILIP E. GLEASON and KIM GLEASON,  
Plaintiffs-Appellants,

UNPUBLISHED  
December 6, 2005

v

NEXES REALTY, INC., TOM BLAKE and  
MIKE LONNEE,

No. 253877  
Muskegon Circuit Court  
LC No. 03-042407-CH

Defendants-Appellees.

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Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(8) for failure to state a claim for violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, or for civil conspiracy related to defendants' failure to convey plaintiffs' offer to the sellers for the purchase of a home. We affirm.

I

We review de novo a trial court's decision on a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion for summary disposition brought under MCR 2.116(C)(8), for failure to state a claim upon which relief can be granted, tests the legal sufficiency of the claims based on the pleadings alone. *Id.* at 129-130. All well-pleaded factual allegations are accepted as true and are construed in a light most favorable to the nonmoving party. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair, supra*.

## II

The trial court granted summary disposition on the basis that defendants owed plaintiffs no duty, and the transaction involved is exempted from the coverage of the MCPA pursuant to MCL 445.904(1)(a). Accordingly, absent an underlying tort or violation of the MCPA, plaintiffs claim of civil conspiracy fails. We concur.<sup>1</sup>

“The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals.” *Forton v Laszar*, 239 Mich App 711, 715; 609 NW2d 850 (2000), citing *Price v Long Realty, Inc*, 199 Mich App 461, 470-471; 502 NW2d 337 (1993). “The MCPA prohibits, and defines by example, ‘[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce.’” *Forton, supra*, quoting MCL 445.903(1). MCL 445.904(1)(a) exempts from 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.”

In *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), relied on by the trial court in granting the motion, our Supreme Court interpreted the exemption to the MCPA in MCL 445.904(1)(a). Based on its holding in *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982), the Court stated that “the focus is on whether the transaction at issue, not the alleged misconduct, is ‘specifically authorized.’” *Smith, supra* at 464.

In *Smith*, the Court also cited this Court’s analysis in *Kekel v Allstate Ins Co*, 144 Mich App 379; 375 NW2d 455 (1985), in which the defendant insurer was found exempt from the MCPA pursuant to MCL 445.903:

“*Diamond* is distinguishable from the case at bar. The activities of the defendant in *Diamond* which the plaintiffs there were complaining of were not subject to any regulation under the real estate broker's license of the defendant and thus such conduct was not reviewable by the applicable licensing or regulatory authority. . . . The insurance industry is under the authority of the State Commissioner of Insurance and subject to the extensive statutory and regulatory scheme, all administered ‘by a regulatory board or officer acting under statutory authority of this state.’” [*Smith, supra* at 464-465, quoting *Kekel, supra* at 384.]

Based on *Diamond* and *Kekel*, the Court stated:

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.

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<sup>1</sup> In general, a seller’s real estate broker or agent owes no duty to a potential buyer and therefore absent a duty, no claim of negligence may be pursued. *Andrie v Chrystal-Anderson & Assocs Realtors, Inc*, 187 Mich App 333, 337; 466 NW2d 393 (1991). Because plaintiffs assert that their action is based on a claim of intentional wrongdoing, however, the holding in *Andrie* is irrelevant to the disposition on appeal.

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. [*Smith, supra* at 465.]

In this case, there is no dispute that defendants are subject to Michigan law governing real estate brokers, salespersons, and activities. MCL 339.2501(d) and (e); *Diamond Mortgage, supra* at 617; *Price, supra* at 471. The question is whether the conduct or transaction is specifically authorized by law. The general transaction at issue is the presentation of a potential buyer's offer to the seller by the seller's agent. This transaction is specifically authorized by law under the Michigan Administrative Code, 1999 AC, R 339.22307.<sup>2</sup> Therefore, based on the holding in *Smith*, the transaction or activity is exempt from the MCPA under MCL 445.904(1)(a).

Contrary to plaintiffs' argument, we do not find the holding in *Price, supra* at 471, controlling in this case because here, the general transaction at issue is clearly "specifically authorized" as provided in MCL 445.904(1)(a). Further, the *Price* panel found that case indistinguishable from *Diamond Mortgage*. As the Supreme Court stated in *Smith, supra* at 464, "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." *Diamond Mortgage* and *Price* are therefore distinguishable from this case.

Because plaintiffs' underlying claim fails, their conspiracy claim must also fail. *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). Therefore, the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Janet T. Neff  
/s/ Jane E. Markey

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<sup>2</sup> The rule provides in part: "(1) A licensee shall deliver to the buyer a signed copy of the offer to purchase immediately after it has been signed by the buyer," and "(2) A licensee shall promptly deliver all written offers to purchase to the seller upon receipt. . . ."