STATE OF MICHIGAN

COURT OF APPEALS

RONALD L. WINANS and DANETTE L. WINANS,

Plaintiffs-Appellees,

v

PAUL AND MARLENE, INC., d/b/a GRAND VALUE HOMES,

Defendant/Third-Party Plaintiff-Appellant,

and

SHOAL EXCAVATING,

Third-Party Defendant-Appellee.

UNPUBLISHED
July 8, 2003

No. 230944
Shiawassee Circuit Court
LC No. 98-002500-CH

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

PER CURIAM.

Defendant Grand Value Homes appeals from a judgment of the circuit court entered following a jury verdict in favor of plaintiffs on their breach of contract and Michigan Consumer Protection Act, MCL 445.901, claims.[1] We affirm in part, reverse in part and remand.

In September 1997, plaintiffs purchased a parcel of property upon which to build a home. Before receiving the deed to the property, they entered into a contract with Grand Value for the purchase of a modular home to be placed on the property. Grand Value is a licensed builder that sells manufactured homes.

Plaintiffs hired an employee of Grand Value, Eric Horoky, to prepare the housing site. Horoky hired a subcontractor, defendant Shoal Excavating, to do the excavation necessary for the placement of the home on the lot. Plaintiffs informed Horoky that they wished to have a

[1] Defendant raises no issue on appeal regarding the breach of contract claim.

walkout basement in their new home and chose a location near the rear of the property. Before excavation began, there was a meeting between plaintiffs, Horoky, Ronald Shoal of Shoal Excavating, a member of the health department and another excavator regarding whether the home should be placed in the location selected by plaintiffs. Ultimately, the location was changed and Horoky testified that everyone involved agreed to the location.

Thereafter, Shoal excavated the basement for the house according to a hand-drawn plan provided by Grand Value, following stakes laid out by either Grand Value or plaintiffs. Shoal had no further involvement with the project. Thereafter, the building inspector approved the inspections of the foundation footings and the backfill.

Grand Value then constructed the home on the site and plaintiffs moved in during December 1997. On February 16, 1998, plaintiffs experienced severe flooding in the basement after a heavy rainfall the previous night. Plaintiffs contacted a number of people regarding the problem, including Horoky. Horoky suggested that they place gutters on the house, but refused to repair the condition or offer any other help. Plaintiffs consulted with a professional engineer, who testified that the location of the house was not suitable for a basement of any kind. Throughout the late winter and spring of 1998 the floodwater was eighteen inches high on the outside of plaintiffs' basement walkout door.

The current litigation ensued. Although plaintiffs originally brought additional claims, at trial they agreed to dismiss all counts except for the breach of contract claim and the consumer protection act claim. As noted above, the jury found in plaintiffs' favor on both counts.

Defendant first argues that the trial court erred in denying its motion for directed verdict on the consumer protection act claim because, as a licensed contractor, it is exempt from the consumer protection act under the Supreme Court's decision in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). We agree.

In *Smith*, the Supreme Court addressed the question whether the defendant, an insurance company, was subject to the Michigan Consumer Protection Act concerning the manner in which it represented a policy for credit life and disability insurance. Specifically at issue was the provision of MCL 445.904(1) that exempts from coverage under the MCPA a "transaction or conduct specifically authorized under laws administered by a regulatory board . . . ." The Court in *Smith* also considered the effect of its prior opinion in *Attorney General v Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982), wherein the Court had held that a real estate broker was not exempt under the statute where the real estate broker was engaged in writing mortgages. In reaching its decision, *Smith, supra* at 464-465, opined as follows:

> 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.
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> Applying this analysis in *Kekel* [*v Allstate Ins Co*, 144 Mich App 379; 375 NW2d 455 (1985)], the Court of Appeals concluded that the defendant insurer in

that case was exempted from the plaintiff's alleged violations of the MCPA pursuant to MCL 445.903; MSA 19.418(3). It explained:

> "*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." [*Id.* at 384, citing MCL 445.904(1)(a); MSA 19.418(4)(1)(a).]"

> 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 the 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."

Plaintiffs argue that a defendant is not exempt from the applicability of the MCPA merely because it is regulated by the state. Plaintiff is correct in that assertion, which is effectively what *Diamond Mortgage* holds. In *Diamond Mortgage*, the defendant was subject to state regulation as a real estate broker, but the activity involved, writing real estate mortgages, was not the type of activity regulated by the state under real estate broker licensing. In *Smith*, the activity involved, writing credit life and disability policies, was specifically regulated under the insurance code.

Thus the question in the case at bar is whether the activity involved comes within the scope of the residential builder licensing scheme. Defendant identifies the activity as being the construction of a residential house, an activity clearly covered by the residential builder section of the Occupational Code. See MCL 339.2401 *et seq.* Not surprisingly, plaintiffs' brief identifies a much narrower activity as being involved, namely "advising Appellees as to the location of the house on the lot that they had purchased, making decisions regarding wetlands, or misleading the Appellees as to what their role and relationship was." This differs somewhat from what plaintiffs identified as the MCPA violations in their complaint, which alleged as follows:

> 45. As a result of the failure to repair the property, the Defendant has acted in such a manner as to cause a probability of confusion or misunderstanding of the legal rights and obligations of the Plaintiffs in violation of Michigan's Consumer Protection Act, MCLA 445.901 et. seq.

> 46. The Defendant made deceptive representations about the quality and standard of the construction work performed on the residence and its premises, in violation of the Michigan Consumer Protection Act.

In any event, we believe that plaintiffs take an unreasonably narrow view of the scope of the transaction or conduct involved in determining whether this case falls within the holding in *Diamond Mortgage* or within the holding of *Smith*. We think that *Smith* makes it clear that we look to the general transaction involved, not the specific action which plaintiff alleges violates the MCPA. Here, the general transaction was the construction of a residence on plaintiffs' lot, which is regulated. That is to say, while the actions in *Diamond Mortgage* of writing mortgages was not the type of activity for which one needs a real estate broker's license, the actions in the case are bar are those of someone who needs a residential builder's license.

We also find helpful the comments of Justice Corrigan in her concurrence to the denial of leave to appeal in *Forton v Laszar*, 463 Mich 969, 970; 622 NW2d 61 (2001):

> Subsection 4(1)(a) of the MCPA provides that the MCPA "does not apply" 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." Defendant now contends that his sale to plaintiffs comes within this exemption because he is a residential builder licensed and regulated under the Michigan Occupational Code, MCL 339.101 *et seq.*; MSA 18.425(101) *et seq.* Of particular importance, argues defendant, is article 24 of the Occupational Code, which prohibits residential builders from departing from plans without consent. See MCL 339.2411(2)(d); MSA 18.425(2411)(2)(d). In *Smith, supra*, we explained that the words "transaction or conduct" in subsection 4(1)(a) of the MCPA referred to the general transaction at issue rather than the specific misconduct alleged. We then held that subsection 4(1)(a) exempted the sale of credit life insurance from the MCPA, because (1) the sale of credit life insurance was specifically authorized under the state laws governing the sale of insurance, and (2) those laws were administered by the Insurance Commissioner. Arguably, the logic of *Smith* would apply equally to defendant's sale of a residential home, because (1) portions of the Occupational Code regulate the conduct of residential builders, and (2) residential builders are regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board.

Justice Corrigan joined in the denial of leave, however, because the defendant had failed to properly preserve the issue for review.

For the above reasons, we are persuaded that defendant has established its right to the exemption and, therefore, the trial court did err in failing to dismiss the claim under the MCPA.

Defendant's second issue on appeal is that the trial court erred in granting third-party defendant's motion for directed verdict on defendant's third-party claim. We disagree. We review this issue by looking at the evidence in a light most favorable to the non-moving party to determine whether a factual question exists. *Oakland Hills Development Corp v Leuders Drainage Dist*, 212 Mich App 284, 289; 537 NW2d 258 (1994). In the case at bar, the trial court

concluded that Shoal excavated the basement in the location directed and no evidence pointed to Shoal being at fault for the problems with the flooding of the basement.

Plaintiffs' expert testified that the location of the house was not suitable for a basement of any kind. Shoal was not involved in the decision where the house was located. Shoal was merely directed to excavate the area that had been staked out. Furthermore, defendant did not introduce any evidence that the excavation work was defective. At most, defendant was able to show that changing the grading of the ground was part of the correction of the problem, but not that Shoal had any reason to believe that the initial grading was improper at the time of the excavation.[2]

For the above reasons, we are not persuaded that the trial court erred in granting third-party defendant's motion for directed verdict.

Affirmed in part and reversed in part and remanded for entry of an amended judgment dismissing the MCPA claim consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Pat M. Donofrio

[2] Defendant argues that the building inspector testified that the grading was improper. In fact, the referenced testimony of the building inspector was merely that the grading had changed after his initial inspection. Furthermore, plaintiff's expert testified that while the person who determined the level of the basement contributed to the flooding problem, his opinion would change if the excavator had not encountered ground water or indications of ground water during the excavation. There is no indication that such problems were observed during the excavation.

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JANSEN, J. (*concurring in part and dissenting in part*).

I respectfully dissent from the portion of the majority's decision which would reverse the trial court for failing to direct a verdict on the Michigan Consumer Protection Act [hereinafter "MCPA"] claim. I cannot agree that a licensed builder is exempt from the MCPA pursuant to MCL 445.904(1) when it is alleged that the licensed builder made misrepresentations with regard to the standard of work performed. A licensed builder is not specifically authorized to make misrepresentations to consumers. The exemption granted by the majority was pursuant to general regulations with regard to construction of a residence. An extension of the MCPA exemption in this manner renders the MCPA inapplicable to most businesses and deprives consumers of a meaningful remedy. The majority's extension of the MCPA exemption is against public policy, and was not the intent of the legislature.

Statutory interpretation or construction is a question of law which is considered de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29, 32; 658 NW2d 139 (2003). I would find, unlike my colleagues, that defendant is not exempt from the MCPA under our Supreme Court's ruling in *Smith v Globe Life Insurance Co,* 460 Mich 446; 597 NW2d 28 (1999), because the plain language of the statute and the legislative intent behind it

demonstrates that MCL 445.904(1)(a) exempts conduct or transactions specifically authorized by law, not conduct or transactions by residential builders that is subject to general regulation. Defendant's case factually differs from the defendant's case in *Smith, supra,* because the real estate industry is not as extensively regulated as the insurance industry.

The MCPA was enacted to do the following:

> prohibit certain methods, acts, and practices in trade or commerce; to prescribe certain powers and duties; to provide for certain remedies, damages, and penalties; to provide for the promulgation of rules; to provide for certain investigations; and to prescribe penalties. [MCL 445.901.]

The resolution of this issue relies on the proper interpretation and application of the exemption section of the MCPA, MCL 445.904(1)(a). The exemption section of the MCPA, MCL 445.904(1), states, in relevant part, the following:

> (1) This act does not apply to either of the following:
> (a) 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.
>
> ***
>
> (4) The burden of proving an exemption from this act is upon the person claiming the exemption.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mutual Ins v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Draprop Corp v Ann Arbor*, 247 Mich App 410, 415; 636 NW2d 787 (2001). Once the intention of the Legislature is discovered, it must prevail regardless of any conflicting rule of statutory construction. *Green Oak Twp v Munzel*, 255 Mich App 235, 240; 661 NW2d 243 (2003). If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999); *Toth v AutoAlliance International (On Remand)*, 246 Mich App 732, 737; 635 NW2d 62 (2001). In reviewing a statute's language, every word should be given meaning, and the court should avoid a construction that would render any part of the statute surplusage or nugatory. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686, 690 (2001); *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). Statutory provisions must also be read in the context of the entire statute so as to produce a harmonious whole. *Macomb County Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001).

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 Lazar*, 239 Mich App 711, 715; 609 NW2d 850 (2000); *Price v Long Realty*, 199 Mich App 461, 470-471; 502 NW2d 337 (1993). In reviewing the statutory exemption language, the Court should

consider the purpose of the MCPA and the objective it seeks to accomplish. *Lorencz v Ford Motor Co*, 439 Mich 370, 377; 483 NW2d 844 (1992).

The plain language of the statute clearly demonstrates that MCL 445.904(1)(a) exempts conduct or transactions "specifically authorized" by law, not conduct or transactions subject to regulation generally or "generally regulated activities." On its face, the statutory language of MCL 445.904(1)(a) does not exempt all transactions and conduct of whole industries and types of businesses, generic behavior, methods, or practices, but rather, only exempts specific activity or singular actions that are "specifically authorized" by law. The legislative intent behind the MCPA reinforces the plain language reading of the statute. The MCPA was designed to protect consumers from damages resulting from material misrepresentations or omissions when making purchases. *Zine v Chrysler Corp*, 236 Mich App 261, 271; 600 NW2d 384 (1999). The clear intent of the MCPA is to protect consumers in the purchase of goods and services. *Forton, supra* at 715. The Michigan Legislature drafted the MCPA to apply to "trade or commerce," which is defined to include virtually all consumer transactions. MCL 445.902(d). MCPA was enacted to enlarge the "remedy for consumers who are mulcted by deceptive business practices." *Dix v American Bankers Life Ins Assurance Co of Florida*, 429 Mich 410, 417; 415 NW2d 206 (1987). Therefore, a reasonably narrow construction of the exemption section, as the plain meaning dictates, would allow the MCPA to accomplish its intended goals. When the statute is broadly construed, as the majority interprets it, the exemption provisions swallow the statute whole.

The majority relies heavily upon our Supreme Court's ruling in *Smith, supra* at 446, to extend the exemption section of the MCPA to residential builders contrary to the plain language reading and the legislative intent behind the MCPA. In *Smith, supra*, our Supreme Court analyzed the statutory exemption language "specifically authorized," and concluded that the defendant credit life insurance company was exempt from the MCPA. *Id.* at 465 The plaintiff in *Smith, supra*, sued the defendant life insurance company alleging breach of contract and violations of the MCPA regarding the manner in which the defendant represented the benefits and conditions of the plaintiff's insurance policy. *Id*. at 449. Credit life insurance is governed by MCL 550.601, which authorizes the sale of credit life insurance, and requires written insurance policies to be submitted to the Michigan Insurance Commission for review. The defendant asserted that it was exempt from the MCPA because the underlying transaction, the sale of credit life insurance, was "specifically authorized" by the insurance statute and all of the defendant's insurance forms were submitted to and approved by the state commissioner of insurance. The plaintiff argued that the insurance statute did not "specifically authorize" the alleged fraudulent insurance practices of the defendant, and thus, the defendant could not be exempt from the MCPA. *Id.* at 463. The *Smith* Court found that its decision in *Diamond Mortgage Co*, 414 Mich 603; 327 NW2d 805 (1982), controlled the resolution of this issue, and in concluding so, it analyzed *Diamond Mortgage Co* (a real estate industry case) and a case involving the insurance industry, *Kekel v Allstate*, 144 Mich App 379; 375 NW2d 455 (1985), overruled on other grounds by *Smith, supra* at 464 (in regard to an erroneous interpretation of MCL 445.904(2)).

In *Diamond Mortgage Co, supra*, the trial court's decision was reversed and it was found that a real estate broker's license does not exempt a real estate broker from the MCPA for the following reasons:

> 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)(a) 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. [*Id.* at 617.]

Thus, the *Diamond Mortgage* Court indicated that the MCL 445.904(1)(a) exemption will apply where a party is seeking to classify certain transactions or conduct as illegal under the MCPA, when the very same transactions and conduct are specifically authorized and under the regulatory control of a board or officer acting under statutory authority of this state or the United States. *Id*.

The Supreme Court in *Smith, supra,* noted that the defendant in *Diamond Mortgage, supra,* was not exempt from the MCPA because the transaction at issue, the mortgage writing, was not "specifically authorized" under the defendant's real estate broker's license. *Smith, supra* at 464. The Supreme Court then analyzed the difference between *Diamond Mortgage,* and a case involving the insurance industry, *Kekel, supra* at 379. In *Kekel*, the defendant insurer was found to be exempt from the MCPA after this Court found the following:

> *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." [*Kekel, supra* at 384.]

Consistent with the above findings in *Diamond Mortgage, supra,* and *Kekel, supra,* the Supreme Court in *Smith, supra,* interpreted the exemption language of the MCPA and held:

> [W]hen the Legislature said that transactions or conduct "specifically authorized" by law are exempt from the MCPA, it intended to include the 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 law, regardless of whether the specific misconduct alleged is prohibited, specifically authorizes the general transaction. [*Smith, supra* at 465.]

Thus, the Supreme Court found that the defendant insurer was exempt from the MCPA just as the insurer in *Kekel, supra,* was, but contrary to the real estate broker in *Diamond Mortgage,* because the general transaction of selling credit life insurance 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. The *Smith* Court did not address the applicability of the MCL 445.904(1)(a) exemption to other regulated businesses or transactions that were not before the Court. However, in response to concerns expressed in a dissenting opinion, the majority noted that the insurance business is not like other businesses and did not address other consumer transactions because "it is clear *in this case* that the sale of credit life insurance is 'specifically authorized' under the Credit Insurance Act." *Id.* at 465 n 12 (emphasis in original; citation omitted). The footnote in *Smith, supra*, seems to emphasize the decision was based on how heavily regulated the insurance industry is, and that the analysis did not apply to other consumer transactions.

Defendant asserts that it is exempt from the MCPA pursuant to *Smith, supra*, because the general activity it engaged in, resulting in this suit, is specifically authorized under its residential builder's license and regulated under the Occupational Code, MCL 339.2401(a). Subsection (a) applies to a builder that "assembles, constructs, deals in, or distributes a residential . . . structure which is prefabricated, preassembled, precut, packaged or shell housing." Yet, defendant fails to recognize that its case is more analogous to that of the defendant real estate broker in *Diamond, supra*, not the defendant in *Smith, supra*, nor *Kekel, supra*, where the insurance industry was concerned. The *Smith* Court noted that the insurance industry was unlike most other businesses because insurance transactions require an extensive degree of state authorization. *Smith, supra,* 460 Mich 465-466 n 12. Because of the extensive regulation of the insurance industry, and oversight of each document and aspect of every insurance transaction, the entire credit insurance transaction can be viewed as "specifically authorized" by the regulating board or commission. In the present case, the licensing and regulation of residential builders is not as extensive as the insurance industry and is similar to the statutory and regulatory treatment of many, if not most other industries in the state.[1] Therefore, every aspect of a transaction involving a residential builder should not be viewed as "specifically authorized" by the regulating board or commission.

[1] An overview of the regulation of residential builders compared to the regulation of credit life insurance companies demonstrates a significant difference in the levels of regulation. The Occupational Code, MCL 339.101, covers, among other businesses, barbers, cosmetologists, surveyors, real estate brokers, appraisers, hearing aid dealers, foresters, ocularists, and collection agencies. (MCL 339.1101; § 2001, § 2501, § 1301, § 2701, § 901, § 1201, § 2101, § 2601). The Occupational Code contains licensing requirements, requires the existence of a board or officer, and regulates each area of business to a similar extent. The same procedure for finding violations applies to all the businesses covered by the code, and one set of penalties is applicable to all violations. Pursuant to article 24, which applies to residential builders and contractors, a residential builder, maintenance and alteration contractor's board is created within the Department of Consumer and Industry Services [hereinafter "DCIS"] to promulgate rules, set minimal standards of practice, interpret licensure and registration requirements, and assess penalties for violations of the code. MCL 339.2403; MCL 339.2404. The board has little authority or control over residential builders' practices. The purpose of the residential builder's licensing act is only to protect homeowners from "incompetent, inexperienced, and fly-by-night contractors." *Kirkendall v Heckinger*, 105 Mich App 621, 627-628; 307 NW2d 699 (1981), citing *Alexander v Neal*, 364 Mich 485, 487; 110 NW2d 797 (1961). On the other hand, the

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The present case is analogous to *Price*, *supra* at 461, where the defendant real estate agency was sued for misrepresenting the fact that the plaintiff's house could be constructed close enough to the road so that a pole barn could be constructed behind it, when in fact it could not. It could not because the county health department had concluded that putting a house on the front part of the property created a serious health problem regarding installation of the septic system. *Price, supra,* 199 Mich App 464. While the Court found that real estate licensees who perpetrate fraud are subject to penalties under the Occupational Code, it found that the defendant's license does not specifically authorize the conduct that plaintiff alleges is violative of the MCPA. *Id.* at 471. This Court found that the mere fact that a regulatory board exists in a particular occupation will not warrant an exemption from the act unless that board specifically authorizes certain conduct. *Id.* Therefore, this Court ruled that a real estate agency's conduct in misrepresenting to purchasers the permitted location of their house on a vacant lot was not exempt from the MCPA, even though the listing and sale of the property is directly regulated by the occupational code under article 25, governing real estate brokers. *Id.* Similarly, defendant, in the present case, may have misrepresented the condition of the plaintiffs' land on which the house was constructed. [2] While a builder's license will subject defendant to certain penalties under the Occupational Code, it does not specifically authorize any of the conduct engaged in by defendant. The majority has over generalized the transaction to the point that a licensed contractor or residential builder is exempt from the MCPA whenever a general "construction of a residence" is involved.

As noted by the majority as "helpful," Chief Justice Corrigan commented in her concurrence to the denial of leave to appeal in *Forton v Laszar*, 463 Mich 969, 970; 622 NW2d 61 (2001), that "arguably" *Smith, supra,* would apply equally to the defendant's sale of a residential home because portions of the Occupational Code regulate the conduct of residential builders and a board regulates residential builders. *Forton, supra* at 970. However, as Justice

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(…continued)

Insurance Code manifests an intent to regulate the entire insurance field, and not leave any portion of it unregulated. Credit life insurance is regulated by the credit insurance act, MCL 550.602 to 550.624, and twenty-one rules in an administrative code with more than 130 subsections, 1999 AC, R 550.201 to R 550.221. Statutes and rules governing credit insurance require that virtually every document used to arrange and sell credit insurance be submitted for review by the insurance commissioner before being used in a sale to consumers. MCL 550.602 to 550.624; 1999 AC, R 550.201 to R 550.221. The commissioner also has authority over all rates and premiums charged in credit insurance transactions, and rates are set by rules conforming to 1999 AC, R 550.211 and R 550.212. Clearly, residential builders are not as regulated as the credit insurance industry.

[2] Defendant contends that the *Price, supra,* holding is incorrect as matter of law under the *Smith, supra,* ruling because the focus was incorrectly placed on whether the alleged misconduct was "specifically authorized," without looking at the overall transaction at issue, and whether that was "specifically authorized" under laws administered by a regulatory board or officer. However, *Price, supra,* is not incorrect under *Smith, supra,* because the *Smith* Court did not address other regulated industries, noting that the insurance industry is unlike most other businesses. To the contrary, *Smith, supra,* specifically notes that the holding applies on transactions involving the insurance industry, and not to other consumer transactions. *Id*. at 465, n 12.

Kelly reiterated in her concurrence with Chief Justice Corrigan, it is well settled that what is stated in an order denying leave has no precedential significance. *Id.* at 971. Specifically, Justice Kelly stated:

> I wish to reiterate the well-settled fact that nothing of precedential significance should be deduced from an order of this Court denying leave. Accordingly, I caution the bench and bar against treating such an order or, for that matter, an accompanying explanation as having legal precedential significance. [*Id.*; citations omitted.]

Therefore, as noted by Justice Kelly, the comments made by Chief Justice Corrigan, though maybe somewhat persuasive, are by no means precedential. *Id.*; See *Tebo v Havlick*, 418 Mich 350, 363 n 2; 343 NW2d 181 (1984).

Defendant also argues that the conduct complained of by plaintiffs, which is the failure to repair, and poor workmanship, are specifically regulated and prohibited under article 24 of the Occupational Code, MCL 339.2411(2)(h) and (m). Subsection (h) prohibits the failure to deliver to the purchaser the entire agreement of the parties when the agreement involves manufacture, assembly, construction, and sale of a residential structure that is prefabricated, preassembled, precut, packaged or shell housing. Subsection (m) provides for situations where workmanship did not meet the standards of the custom or trade. Nothing in the Occupational Code specifically authorizes a licensed builder to make misrepresentations regarding the condition of land and with regard to the quality and standard of work performed. While the Occupational Code does provide certain remedies, it does not specifically authorize the conduct and misrepresentations alleged by plaintiffs. Merely holding a license to build and sell homes is not specific authority for all the transactions of defendant's business. *Diamond Mortgage*, *supra* at 617. Defendant cited MCL 339.2411(2)(h) and (m) as conduct regulated by the Occupational Code, but it did not cite any statute that specifically authorized any of the activities resulting in this suit. Possession of a builder's license is not specific authority for the conduct of advising plaintiffs as to the location of the house on their property, making decisions regarding the condition of the land, or misrepresenting or misleading plaintiffs as to what their role and relationship was.

As argued by plaintiffs and the Attorney General, amicus curiae for plaintiffs, if the MCPA were read as exempting generic behavior because it is subject to government regulation, like licensing, it would nullify or render other parts of the MCPA surplusage.[3] Virtually all consumer lending businesses, including mortgage and finance companies, that are not licensed

[3] State and federal statutory schemes generally regulating credit or vehicular transactions would wholly displace application of the MCPA and these sections would not have any application. Additionally, a broad reading of MCL 445.904(1)(a) would make MCL 445.904(2) surplusage, exempting certain conduct already exempt by MCL 445.904(1)(a) as to Attorney General actions. Furthermore, MCL 445.904(3) exempting unfair, unconscionable, or deceptive methods, acts or practices made unlawful by chapter 20 of the Insurance Code, MCL 500.2001 to 500.2093, would also be surplusage, exempting conduct of licensed insurance agents already exempt a second time by a broad reading of MCL 445.904(1)(a).

and regulated by the federal government, must be licensed and regulated by the state.[4] The Legislature could not have intended to exempt lenders because the MCPA contains sections applicable only to lenders. See MCL 445.903.

Liberally construing the exemption provision of the MCPA, I would find that defendant is not exempt from the MCPA under our Supreme Court's ruling in *Smith, supra*, because the plain language of the statute and the legislative intent behind it demonstrates that MCL 445.904(1)(a) exempts conduct or transactions specifically authorized by law, not conduct or transactions subject to regulation generally. Defendant's case factually differs from the defendant's case in *Smith, supra,* because the real estate industry is not as extensively regulated as the insurance industry. As a public policy concern, extending the MCPA and granting a blanket exemption to residential builders who are involved with "construction of a residence" will render the MCPA inapplicable to most other businesses and deprive consumers of an effective, meaningful remedy.

For the above reasons, I would affirm the trial court.

/s/ Kathleen Jansen

[4] Mortgage lenders are regulated under the mortgage lenders, brokers and servicers act, MCL 445.1651, and pawnbrokers are regulated under the pawnbroker act, MCL 445.471. Sellers extending credit are regulated by the motor vehicle sales finance act, MCL 492.101, the home improvement finance act, MCL 445.1101, and other similar regulatory statutes. All lenders are also regulated by the truth in lending act, which is overseen by the Federal Reserve Board. 15 USC 1601.