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CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF BENEWAH**

**JAMES BATCHELOR, et ux,**

*Plaintiffs,*

vs.

**DOUGLAS PAYNE, et ux.**

*Defendants.*

Case No. **BEN CV 2007 427**

**MEMORANDUM DECISION AND  
ORDER DENYING DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT**

**I. INTRODUCTION AND BACKGROUND.**

Defendants Douglas and Kristi Payne (Payne) personally constructed a two-story single-family residence in Benewah County, completing construction thereon in approximately February 2002. The Paynes resided in the home from February 2002, until April 1, 2006. In July 2005, on two occasions, plaintiffs James and Sandra Batchelor (Batchelor) visited the property with a real estate agent from St. Maries Real Estate. Batchelors entered into a Real Estate Purchase and Sale Agreement with Paynes to purchase the property on July 12, 2005. On September 29, 2005, the transaction closed and Batchelors took title by warranty deed. Pursuant to the sales agreement, Batchelors leased the property to Paynes and did not move into the home until approximately April 10, 2006. Batchelors allege it was only after they moved in that they observed defects and building code violations not disclosed by Paynes in the Seller's Property Disclosure Form.

On September 7, 2007, Batchelors filed this lawsuit. On October 2, 2007, Paynes filed their Answer. Douglas Payne represents himself and his wife in this matter. Douglas Payne at the present time, and at the time of the events in question, is the Benewah County Prosecuting Attorney. On October 9, 2008, this matter was originally scheduled for a court trial to begin on January 14, 2009. On December 23, 2009, Paynes filed a Motion for a Jury Trial. Oral argument on that motion was heard on what was to be the first day of the court trial, January 14, 2009. Paynes' Motion for Jury Trial was denied, and a five-day court trial was re-scheduled for October 19, 2009. On July 2, 2009, Paynes filed their motion for summary judgment. Oral argument was held on August 11, 2009.

Also pending at the time of oral argument on Paynes' motion for summary judgment were: Batchelors' Motion to File an Amended Complaint (withdrawing their negligence claim); Batchelors' Motion to Strike Defendants' Affidavits, Exhibits, and Statement of Undisputed Facts; and Paynes' Motion for Leave to File Amended Answer and Counterclaim. Because the plaintiffs' Motion to File an Amended Complaint was dispositive on one issue on defendants' Motion for Summary Judgment (Batchelors' negligence claim), the Court decided to first hear oral argument on Batchelors' Motion to File an Amended Complaint. At the conclusion of that oral argument, this Court granted Batchelors' Motion to File an Amended Complaint. This obviates the need to decide Paynes' Motion for Summary Judgment on the Batchelors' negligence claim. The Court also granted in part and denied in part Batchelors' Motion to Strike Defendants' Affidavits, Exhibits, and Statement of Undisputed Facts, and granted Paynes' Motion for Leave to File Amended Answer and Counterclaim (but striking any references to punitive damages for Paynes' failure to comply with I.C. § 6-1604).

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## II. STANDARD OF REVIEW.

Idaho Rule of Civil Procedure 56 sets forth that, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996). In any case which will be tried to the court, rather than to a jury, the trial judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment, but instead, can arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982).

## III. ANALYSIS.

Paynes move this Court for an Order granting them summary judgment on all of the Batchelors' claims. Paynes argue the Paynes disclosed to the Batchelors all known construction defects and relied upon the Batchelors' representations that all warranties

would be waived and only the Batchelors' own inspections would be relied upon, not any representations by Paynes. Memorandum in Support of Motion for Summary Judgment, p. 3.

**A. Breach of Contract.**

Paynes argue the Batchelors cannot prove any alleged breach of contract for several reasons: (1) the Batchelors' agent prepared the contract and, as such, it should be construed against the Batchelors; (2) the Batchelors represented in the contract they would not rely on any representations by the Paynes and would waive all expressed or implied warranties made by the Paynes; (3) the Paynes, in turn, relied upon the representations by Batchelors that all warranties would be waived and no statements by the Paynes would be relied upon; (4) there is no contract term warranting compliance with the building code and no representations were made that the home was built to code; (5) the Paynes disclosed all defects known to them in the Seller's Property Disclosure Form; and (6) the contract's merger clause prohibits any extrinsic terms from becoming part of the negotiated contract. Memorandum in Support of Defendant's Motion for Summary Judgment, pp. 3-5. At oral argument, Paynes' argument was simply that the breach, if any, was not material.

Batchelors argue statements made by Paynes in the Seller's Property Disclosure Form were "expressed" in the contract within the meaning of the Purchase and Sale Agreement's merger clause and these statements breached the contract by being false and inaccurate and failing to fully disclose known problems and defects. Brief in Opposition to Motion for Summary Judgment, p. 2. Specifically, Batchelors point to the Paynes having stated they were not aware of any toxic mold or conditions which may cause toxic mold in the disclosure. *Id.*, citing Addendum to Property Seller's Disclosure

Form, at A7. But in his deposition testimony, Payne admitted to moisture damage and mildew in the sun room of the home. Affidavit of Scott Poorman, p. 5, ¶ bb, citing Deposition of Douglas Payne, pp. 82-83, ll. 21-25, 1-12. Additionally, Batchelors note Douglas Payne's deposition testimony regarding his knowledge of odors coming from the septic tank contradicts his disclosure form representation listing no problems with the septic system. Brief in Opposition to Motion for Summary Judgment, p. 2, citing Affidavit of Scott Poorman, p. 6, ¶ cc, citing Deposition of Douglas Payne, pp. 84, L. 8 – p. 85, L. 18.

The contract language at issue is:

The undersigned Buyer hereby acknowledges further that he has not received or relied upon any statements or representations by the undersigned broker or his representatives or by the Seller which are not herein expressed. The Buyer has entered into this agreement relying solely upon the information and knowledge obtained from his own investigation or personal inspection of the premises. This agreement constitutes the whole agreement between the parties and that no warranties, agreements, or representations have been made or shall be binding upon either party, unless herein set forth.

Real Estate Purchase and Sale Agreement, p. 2, ¶ 17. This pre-printed, boilerplate language can be found in all Purchase and Sale Agreements like the one used by the parties in the instant matter. Paynes argue (this is not an established fact due to the Court's ruling on Batchelors' Motion to Strike) the Purchase and Sale Agreement was signed on July 7, 2005, and, following counter-offers, Batchelors' counteroffer was accepted on July 8, 2005, at which time a Seller's Property Disclosure Form was completed. Statement of Undisputed Facts, pp. 1-2, ¶¶ 13-16.

The Idaho Supreme Court has held a waiver is "a voluntary, intentional relinquishment of a known right or advantage", and a party asserting waiver "must show that he acted in reasonable reliance upon it and that he thereby has altered his position

to his detriment. *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 256, 846 P.2d 904, 907 (1993). The existence of waiver is a question of fact, and if there is substantial evidence in the record to support waiver, the trier of fact determines whether the evidence establishes waiver. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 518, 650 P.2d 657, 660 (1982). Here, the parties executed the Seller's Property Disclosure Form the day following their signing of the Purchase and Sale Agreement; the parties also each counter-offered with additional requirements and amounts to be paid varying the July 7, 2005, Purchase and Sale Agreement. It appears that Batchelors argue it was the Seller's Property Disclosure Form which was breached, not the underlying Purchase and Sale Agreement. See Complaint, p. 3, ¶¶ XII- XIV. Batchelors have set forth genuine issues of material fact with regard to the Seller's Property Disclosure Form differing from deposition testimony, and Paynes are not entitled to summary judgment on this issue. To the extent the Purchase and Sale Agreement is at issue, waiver remains a question of fact for the trier of fact, and Paynes have only presented this Court with the affidavits of Kristi and Douglas Payne stating that but for Plaintiffs' "representations" in paragraph 17 of the Agreement, they would have refused to sell the property at issue. It is a question of fact whether this amounts to having altered their positions to their detriment.

**B. Breach of Implied Covenant of Good Faith and Fair Dealing.**

Paynes appear to argue the covenant of good faith and fair dealing does not apply where no fiduciary relationship between the parties exists. Memorandum in Support of Motion for Summary Judgment, p. 6. Paynes go on to argue that the covenant of good faith and fair dealing will not be implied where it is contrary to the terms of the contract negotiated and executed by the parties. *Id.* To the extent the

covenant is applicable, Paynes argue they did disclose the two problems known to them in good faith and were not aware of any additional problems as of the date the Disclosure was signed. *Id.*, p. 7.

Batchelors reply the implied covenant of good faith and fair dealing applies in all contracts and the Paynes failed to, in good faith, disclose all known defects and problems with the property accurately and completely. Brief in Opposition to Motion for Summary Judgment, p. 3. The Batchelors' argument is more apt.

The implied covenant of good faith and fair dealing applies to all contracts. *Luzar v. Western Surety Co.*, 107 Idaho 693, 696, 692 P.2d 337, 340 (1984). It is a covenant that is implied by law, and it "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Idaho First Nat. Bank v. Bliss Valley Foods*, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991), quoting *Badgett v. Security State Bank*, 116 Wash.2d 563, 569, 807 P.2d 356, 360 (1991). The implied covenant "requires only that the parties perform in good faith the obligations imposed by their agreement." *Id.*

*Record Steel & Constr., Inc. v. Martel Constr., Inc.*, 129 Idaho 288, 292, 923 P.2d 995, 999 (Ct.App. 1996). The Seller's Property Disclosure Form specifically states:

The Seller certifies that the information contained herein is true and correct to the best of Seller's knowledge as to the date signed by the Seller. The Seller is familiar with the residential real property. Each act performed in making a disclosure of an item of information is made and performed in good faith.

Seller's Property Disclosure Form, p. 1. Here, Batchelors have provided the Court with evidence that Douglas Payne's deposition testimony contradicts the disclosures alleged to have been made in good faith. Further, the deposition testimony of Douglas Payne indicates that the knowledge of problems with the septic system and mold predated the signing of the Disclosure. It is apparent that, taking the facts in the light most favorable to the non-moving party, the Batchelors, questions of fact remain regarding whether disclosure made by Paynes performing the obligations imposed by the Seller's Property

Disclosure Form were made and performed in good faith.

**C. Fraud and Fraudulent Nondisclosure.**

Paynes argue: (1) Batchelors should be barred from raising any representations made by the Paynes other than those on the Seller's Property Disclosure Form; (2) the Paynes representations were not false; (3) representations about Payne's past and current profession and the characteristics of the house are not material; (4) no evidence exists that Paynes knew their statements were false; (5) Paynes did not intend for their statements to be acted upon; (6) Batchelors cannot prove they relied upon Paynes' statements, except as to the Property Disclosure Form; (7) all claims to rely on statements, other than those in the Property Disclosure Form, have been waived; and (8) Batchelors cannot prove any injury or that Paynes were the proximate cause of any injury. Memorandum in Support of Motion for Summary Judgment, pp. 7-19. At oral argument, Paynes directed the Court's attention to *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987), for the proposition that *Tusch* requires knowledge on the part of the party not disclosing something, and Batchelors knew Douglas Payne was not a contractor. While *Tusch* does discuss the ordinary fraud element that the speaker must know his or her statements to be false, (113 Idaho 37, 41-43, 740 P.2d 1022, 1026-28), this Court can find no statement in *Tusch* that creates a defense to knowledge of falsity simply because the speaker is not an expert in a given field.

Batchelors correctly point out that the burden of clear and convincing evidence upon a party alleging fraud does not apply at summary judgment; rather, a party must only meet the traditional summary judgment principles and standards. Brief in Opposition to Motion for Summary Judgment, p. 4, citing *G & M Farms, v. Funk Irr. Co.*, 119 Idaho 514, 518, 808 P.2d 851, 855 (1991). Batchelors state their verified complaint

and affidavits set forth genuine issues of material fact regarding the fraud claim, including the septic tank and mold issues and statements the house was “well built” and “good quality”. *Id.*, p. 4. [As a side note, although discussed by Paynes, there have been no allegations made by Batchelors regarding a banister, cabinets, or fiberglass doors.] Batchelors also argue their inspection of the home does not immunize Paynes from a fraud claim. *Id.*, pp. 5-6, citing *Lindberg v. Roseth*, 137 Idaho 222, 228 (2002).

Batchelors’ arguments are well-taken. The Idaho Supreme Court, in *G & M Farms*, stated, “traditional I.R.C.P. 56(c) summary judgment principles and standards govern the granting of summary judgment on the issues of fraud and intentional misrepresentation.” 119 Idaho 514, 518, 808 P.2d 851, 855 (1991). Thus, to prevail, a party need only show that they have presented sufficient evidence to create a material issue of fact as to each element. *Country Cove Development, Inc. v. May*, 143 Idaho 595, 600, 150 P.3d 288, 293 (2006).

Nine elements must be proved to sustain an action for fraud: (1) a statement of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent to induce reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) the hearer's right to rely; and (9) consequent and proximate injury. *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 368, 109 P.3d 1104, 1110 (2005). The party alleging fraud must plead with particularity the factual circumstances constituting fraud, I.R.C.P. 9(b), and ultimately each of the elements must be proven by clear and convincing evidence. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 518, 808 P.2d 851, 855 (1991).

*County Cove Development, Inc.*, 143 Idaho 595, 600, 150 P.3d 288, 293. Even if the Court were to not consider the “well built” and “good quality” statements alleged (which are likely statements of opinion, rather than fact), the statements made and/or omitted on the Seller’s Property Disclosure Form were clearly statements of fact, which were false (at least there is a genuine issue as to the falsity) and material (again, at least an

issue of fact as to materiality) to Batchelors' purchase. Based on the deposition testimony provided to this Court, Batchelors have raised genuine issues of fact regarding the Paynes' knowledge of their statements' falsity and the intent to induce reliance. There is no evidence of a lack of Batchelors' ignorance of the falsity and their reliance upon the Disclosure Form. Finally, there has been no argument set forth that Batchelors for some reason could not rely upon the Disclosure Form. Paynes state "Defendants also did not expect plaintiffs to rely upon the Property Disclosure Form of July 8<sup>th</sup> except for what it says it requires which is good faith disclosure of any problems, known to defendants on July 8, 2005." Memorandum in Support of Motion for Summary Judgment, p. 14. Importantly, the Idaho Supreme Court has found a party entitled to relief even where a representation made by another was made innocently or without fraudulent intent, where the other is required to make a full disclosure of all facts affecting the result and misrepresents material facts. *Morrow v. Wm. Berklund Forest Products Co.*, 81 Idaho 428, 437-38, 346 P.2d 623, 628-29 (1959). The Supreme Court quoted a relevant treatise:

...Fraud may be predicated upon an equivocal, evasive or misleading answer calculated to convey a false impression even though it may be literally true as far as it goes. A partial and fragmentary disclosure accompanied by willful concealment of material and qualifying facts is not a true statement and is often as much a fraud as is an actual misrepresentation.

*Id.*, quoting 55 Am.Jur., *Vendor and Purchaser*, § 88, pp. 563-64. Here, Batchelors have set forth sufficient genuine issues of material fact to survive summary judgment on the fraud/fraudulent nondisclosure claims, at least as pertains to the Seller's Property Disclosure Form.

Paynes argue Batchelors should be estopped from alleging reliance upon any statements made prior to July 7, 2005, but Batchelors have not alleged with any

specificity which statements amounted to fraud (complaining only of statements that the property was free from defects and building code violations), and appear to base their fraud claim only on the Disclosure Form, which was signed on July 8, 2005.

Paynes also argue paragraph 17 of the Purchase and Sale Agreement, see *supra*, amounts to a waiver by Batchelors. However, Paynes have not set forth how, if a trier of fact finds such a waiver, it would encompass the Seller's Property Disclosure Form.

#### **D. Violation of the Property Condition Disclosure Act.**

Paynes argue Batchelors' general allegations of defects and building code violations do not fall within the purview of the Property Condition Disclosure Act, Title 55, Chapter 25 of the Idaho Code. Memorandum in Support of Motion for Summary Judgment, p. 20. Paynes argue no problems other than the ones noted were evident on July 8, 2005. *Id.* At oral argument, Paynes argued the Property Condition Disclosure Act only applies at closing.

Batchelors respond Paynes failed to properly amend their disclosure regarding two water intrusions into the home between closing in September 2005 and the time Batchelors took over possession in April 2006. Brief in Opposition to Motion for Summary Judgment, p. 9.

Paynes' argument fails because the form used (identical to that set forth in I.C. § 55-2508), asks about: "9. Any other problems, including legal, physical, or other not listed above that you know concerning the property:" Viewed in the light most favorable to the non-moving party, the Batchelors, it is likely that building code violations and general defects fall within the catch-all question of the Disclosure Form. Idaho Code § 55-2523 only requires that a "[t]ransferor shall amend the disclosure statement prior to

closing if the transferor discovers any of the information on the original statement has changed.” I.C. § 55-2513. (emphasis added). Any defects noted by Paynes following closing and before the time Batchelors took possession of the property likely do not fall within the mandatory disclosure requirements of the Property Condition Disclosure Act.

Paynes are not entitled to summary judgment on this issue because the failure to disclose defects may fall within the catch-all provision of the Disclosure Form.

#### **E. Violation of the Idaho Consumer Protection Act.**

Paynes argue that despite Batchelors’ complaints of a failure to disclose defects and the presence of building code violations, Paynes did not breach the standard of care found in the Idaho Consumer Protection Act. Memorandum in Support of Motion for Summary Judgment, p. 22. Paynes argue: they never stated the home was built to code; the Benewah County building inspector, in an exercise of his discretion, inspected and passed the home on at least six occasions; and, the Paynes did not fail to disclose known defects. *Id.*, pp. 22-23. At oral argument, Paynes argued that while the Batchelors claim he (Douglas Payne) was in the construction business, it is undisputed that he (Douglas Payne) was not in the commercial construction business, having built only three houses in nineteen years. At oral argument, Paynes cited *Hibbler v. Fisher*, 109 Idaho 1007, 712 P.2d 708 (1985), for the proposition that the sale needs to be a “commercial sale” in order for the implied warranty of suitability or habitability to apply. Indeed, the case indicates that is the law. 109 Idaho 1007, 1013, 712 P.2d 708, 714. However, the examples given show determining what constitutes a commercial sale is not clear.

Batchelors reply only that Payne held himself out as an experienced builder and contractor, having built houses in Colorado and Benewah County. Brief in Opposition to

Motion for Summary Judgment, p. 9. At oral argument, Batchelors argued that there is a dispute of fact as to whether Douglas Payne was “in the business” of selling houses that he had built. This Court agrees there is a dispute of fact on that issue. This Court also finds it is not clear at the present juncture, when the actual construction of this house was “finished” or “completed”. That is a relevant issue under *Hibbler*.

The Consumer Protection Act’s purpose is to “protect both consumers and businesses against unfair methods of competition and unfair and deceptive practices in the conduct of trade or commerce and to provide efficient and economical procedures to secure such protection.” I.C. § 48-601. The Act should be construed liberally. *Id.* Real property clearly falls within the definition of “goods” in the act. *Fenn v. Noah*, 142 Idaho 775, 780, 133 P.3d 1240, 1245 (2006); I.C. § 48-602(6). In *Fenn*, involving a buyer’s suit against a predecessor in interest to the seller resulting from a survey not matching the fence lines, the Supreme Court upheld summary judgment in favor of the seller’s predecessor in interest, Noah, where Fenn failed to raise any genuine issue of material facts as to whether Noah’s representations were unfair or deceptive under the Act. *Id.* The Court found Noah’s incorrect metes and bounds description was not misrepresentation because under Idaho law, Fenn would take title to the property described in the deed, not what he believed he possessed. *Id.* The Court also found Noah was not acting in the conduct of trade or commerce in discussing a survey and extending an offer to Fenn. 142 Idaho 775, 780-81, 133 P.3d 1240, 1245-46.

Here, it appears from Batchelors’ brief in Opposition to the Motion for Summary Judgment that the alleged violation of the Act surrounds Payne’s describing himself as an experienced builder or contractor. Therefore, the only unfair methods or practices likely at issue are:

2. Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; and

5. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, connection, qualifications, or license that he does not have.

I.C. § 48-603. While Payne allegedly described himself as an experienced builder and contractor, Batchelors were aware of his present (and at the time in question) occupation of prosecuting attorney for Benewah County, Idaho. It is unclear when the statements regarding Payne's experience were made to Batchelors. To the extent they were made after an offer was made, and at a time that the property was not listed for sale, it is unclear whether Payne made such statements while acting in the conduct of trade or commerce. *Fenn*, 142 Idaho 775, 780-81, 133 P.3d 1240, 1245-46. The Affidavit of James Batchelor sets forth that during the July 7, 2005, visit to the property (the date on which Batchelors submitted an offer), Payne explained he had built the home himself, was proud of his work, and would complete several changes/improvements. Affidavit of James Batchelor, p. 2, ¶ 6. Questions of fact remain for the trier of fact regarding whether and how Payne caused misunderstanding, confusion, or misrepresented the goods and services at issue.

#### **F. Negligence.**

With the granting of Batchelors' Motion to File Amended Complaint, Batchelors have withdrawn their negligence claim. This portion of Paynes' Motion for Summary Judgment is now moot.

#### **IV. CONCLUSION AND ORDER.**

For the reasons stated above, this Court finds a question of material fact remains as to all of Batchelors' claims. Accordingly, Paynes' Motion for Summary Judgment

must be denied.

IT IS HEREBY ORDERED defendants' Motion for Summary Judgment is DENIED.

Entered this 17<sup>th</sup> day of August, 2009.

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John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of August, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

**Lawyer**  
Scott L. Poorman

**Fax #**  
772-7243

**Lawyer**  
Douglas Paul Payne, Pro Se

**Fax #**  
208 245-1915

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Deputy Clerk