IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-0679

AMANDA JOHNSON f/k/a AMANDA DESOUSA,
Plaintiff-Appellee,

vs.

IOWA REALTY CO. INC.,
Defendant-Appellant,

and

MELISSA FYNAARDT AND MATTHEW FYNAARDT,
Defendants.

Interlocutory Appeal from the District Court for Dallas County
The Honorable Randy V. Hefner

BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® AND THE IOWA ASSOCIATION OF REALTORS® AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF IDENTITY AND INTERESTS OF AMICI CURIAE

Amici are the National Association of REALTORS® ("NAR") and the Iowa Association of REALTORS® ("IAR"). With their decades of experience and 1.5 million and 8,200 members in the real estate industry respectively, the NAR and IAR have a unique perspective on the potential ramifications of the District Court's decision and the issues presented by the parties on appeal.

The NAR, founded as the National Association of Real Estate Exchanges in 1908, is America's largest trade association with over 1.5 million members. Its members include residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Currently, members belong to one or more of approximately 1,200 local associations or boards and 54 state and territory associations.

The IAR, formed in 1949, has nearly 8,200 members, including Iowa brokers, licensed agents, inspection companies, mortgage companies, banks, and other companies affiliated with the real estate industry.

The District Court erred in its holding that Defendant-Appellant Iowa Realty Co., Inc. ("Iowa Realty"), in its role as listing agent for Defendants Melissa and Matthew Fynaardts' home ("Property"), owed a duty to others for purposes of premises liability, including to prospective buyer Plaintiff-

Appellee Amanda DeSousa ("DeSousa"). There is no question that such holding, if affirmed, will materially change and otherwise affect the practices of thousands of real estate professionals throughout Iowa and potentially over a million real estate professionals nationwide, as well as consumers. Because this case addresses an important question regarding real estate professional liability, its proper resolution is of substantial concern to the NAR, the IAR, and their respective members.

STATEMENT PURSUANT TO RULE 6.906(4)(d)

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), NAR and IAR affirmatively state that (1) neither counsel for Appellant Iowa Realty, nor counsel for any other party, authored this brief in whole or in part, and (2) no person, other than the NAR and IAR, made a monetary contribution to the preparation or submission of this brief.[1]

[1] Defendant-Appellant Iowa Realty pays annual dues to the Associations like all other members.

ARGUMENT

A. The District Court's extension of a duty of care to a listing agent not on site represents an extreme departure from existing caselaw in Iowa and throughout the country.

The District Court's extension of a duty of care to a listing agent who was not the possessor of the property and was not on site at the property represents an extreme departure from existing caselaw in Iowa and throughout the country. As is detailed herein, neither in Iowa nor in other jurisdictions has a court imposed such a broad duty on offsite listing agents to prospective buyers, as the District Court has attempted to do here.

The facts are important here: DeSousa did *not* attend an open house of the Property during which the Iowa Realty agent was present. DeSousa did *not* receive a private tour of the Property from the Iowa Realty agent. DeSousa and her agent did *not* speak to or otherwise interact with the Iowa Realty listing agent on the day of the incident. To reiterate, the Iowa Realty agent was *not* on site at any time *before, during, or after* the morning of the incident.

Rather, on December 28, 2018, DeSousa arrived at the Property for a private showing, with only her own agent who was unaffiliated with Iowa Realty. DeSousa's agent requested the private showing less than 24 hours before the 9:30 a.m. showing on December 28, 2018. (App. 0051). No Iowa Realty agent was on site for the showing, and there is no evidence in the record

that the listing agent was even notified of the private showing. (App. 0064). Further, per Defendant Matthew Fyndaardt's admission, it is undisputed that the seller-homeowner continued to maintain the Property and had control over the Property as of and including on December 28, the day of the incident. (App. 0044). It is important for this Court to remember these facts in rendering its decision in this matter and to recognize that this fact pattern is extremely typical for the industry.

1. Applicable Iowa Law.

The starting point for this Court's legal analysis, as noted by the District Court, is *Thompson v. Kaczinski*'s change to Iowa's duty element of a negligence claim. 774 N.W.2d 829 (Iowa 2009). Pursuant to *Thompson* and its progeny, a duty of reasonable care exists "when the actor's conduct creates a risk of physical harm." *Thompson*, 774 N.W.2d at 834 (quoting Restatement (Third) of Torts: Phys. & Emot. Harm ("Restatement (Third)") § 7(a)). Conversely, where, like here, an actor's conduct "has not created a risk of physical or emotional harm to another," there is "*no duty of care to the other.*" *Estate of McFarlin v. State*, 881 N.W.2d 51, 60 (Iowa 2016) (emphasis added) (citing Restatement (Third) § 37).

As the District Court noted, subsequent Iowa cases have extended the *Thompson* analysis to premises liability cases. (App. 0066) (citing *Hoyt v.*

Gutterz Bowl & Lounge, LLC, 829 N.W.2d 772 (Iowa 2013); *Benson v. 13 Associates, LLC*, No. 14-0132, 2015 WL 582053 (Iowa Ct. App. Feb. 11, 2015)). But, in analyzing *Thompson* and Restatement (Third) § 7, Iowa courts have also held that the duty of reasonable care will apply in most *but not all* circumstances. **Importantly, "a lack of duty may be found if either the relationship between the parties or public considerations warrants such a conclusion.**" *McCormick v. Nikkel & Associates, Inc.*, 819 N.W.2d 368, 371 (Iowa 2012) (emphasis added) (citing Restatement (Third) § 7(b) ("[W]hen an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.")). Iowa's longstanding "control rule persists under the Restatement (Third) of Torts . . . [because t]he party in control of the [property] is best positioned to take precautions to identify risks and take measures to improve safety." *Id.* at 374.

Here, Iowa Realty definitively did *not* create the risk of physical harm to DeSousa. There is nothing in the record to support an argument to the contrary. Rather, DeSousa slipped and fell on the "icy" pavement resulting from the ongoing winter weather, which was known to DeSousa. (App. 0053) (App. 0048-0049). DeSousa's injuries stem from the winter storm, which

created a "natural hazard." *Gries v. Ames Ecumenical Housing, Inc.*, 944 N.W.2d 626, 631 (Iowa 2020). Because Iowa Realty did not create a risk of harm to DeSousa, Iowa Realty owed her no duty under *Thompson*'s negligence analysis.

Next, and most importantly, this Court must look through the lens of Iowa's premises liability standard and the "control rule" in rendering its decision, and, in this regard, who is the "possessor of land is a threshold issue to determination of liability." *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 813 (Iowa 1994). Per Iowa law, a land possessor "owes a duty of reasonable care to entrants on the land" with regard to the land possessor's conduct that creates risks to entrants on the land and artificial and natural conditions on the land that pose risks to entrants on the land. *Lundman v. Davenport Assumption High School*, 895 N.W.2d 902, 910 (Iowa 2017) (quoting Restatement (Third) § 51).

A person is a possessor of land if he is or has been in occupation of the land with the intent to control it or is entitled to immediate occupation of the land if no other person is in possession of it. Restatement (Second) of Torts § 328E. In determining who is a "possessor" of the land, Iowa courts look to who has "control" of the land. A person is in "control" of the land if he has "the authority and ability to take precautions to reduce the risk of harm to

entrants." Restatement (Third) § 49, cmt. c. The issue of whether a party had control of the property such that he owes a duty is "necessarily and properly determined as a matter of law by the court." *Hoffnagle*, 522 N.W.2d at 814 (citing *Davis v. Kwik–Shop, Inc.*, 504 N.W.2d 877, 879 (Iowa 1993)). Typically, the property owner is in control of the property and the possessor of the land. However, the owner can permit others to take control of the land, such as a contractor who is performing work on the property, or to a tenant pursuant to a lease. *Id.* Though, even where a property owner entered into a property management contract with a third party, this Court held the property owner remained the sole possessor of the property and was liable in a premises liability case, explaining "[b]ased on this principle, we are convinced that the acts of [the property management company] in asserting possession and control over the premises are in legal effect the acts of [the property owner]. As a consequence of those acts, [the property owner] continued to be the possessor." *Wiedmeyer v. Equitable Life Assur. Soc'y of U.S.*, 644 N.W.2d 31, 34-35 (Iowa 2002).

Here, the record is devoid of any evidence that the Fynaardts ever ceded control of the Property to anyone, including Iowa Realty. Instead, it is undisputed that the Fynaardts owned the Property, had been in occupation of the Property, were in control of the Property, and intended to control the

Property. Iowa Realty's role as a listing agent was significantly less involved than a property management company, which this Court previously held insufficient to be a possessor of property. *See Wiedmeyer*, 644 N.W.2d at 35. Matthew Fynaardt admitted that he retained control of the Property and the accompanying, ongoing duty to maintain it, including removing any snow or ice that might occur on the Property. Not only did the Fynaardts retain control of the Property, but they also affirmatively acknowledged that their Iowa Realty listing agent did not have permission to "take precautions to reduce the risk of harm to entrants."

Iowa Realty did not have permission to make physical changes to the Property, nor was Iowa Realty expected to make any needed repairs. (App. 0109-110). Because the Fynaardts retained complete control of the Property and were the only ones who had the authority and ability to take precautions to reduce the risk of harm to entrants, including DeSousa, they were the sole possessors of the Property for purposes of premises liability.

2. Case Law Across the Country.

Other jurisdictions have repeatedly and consistently held that listing agents who are similarly situated to the Iowa Realty listing agent do not

control the property sufficiently during a private showing to justify a duty of care under premises liability law.[2]

In the highly analogous *Tamasco v. Rodd*, the New Jersey appellate court found that the listing agent owed no duty to the plaintiff who slipped on icy steps outside the property during a time where the listing agent was not present. There, the plaintiff was a buyer's agent who slipped and fell on an ice-covered staircase while accompanying an appraiser to the property. No. A-1574-16T2, 2018 WL 4055919, at *1 (N.J. Super. Aug. 27, 2018) (unpublished). The plaintiff sued both the property owner, who no longer resided in the vacant property, as well as the listing agent. *Id.* In *Tamasco*, like in this matter, the property owner conceded that she retained responsibility for maintaining the property. *Id.* In that case, the plaintiff argued that the listing agent owed a duty to keep the property free of snow and ice based on *Hopkins v. Fox & Lazo Realtors* and its progeny. *Id.* (citing *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110 (N.J. 1993)). The lower court disagreed, distinguishing *Hopkins,* which had involved a listing agent and a potential buyer *in an open house setting*, and granted the real estate professional's motion for summary judgment, which was affirmed on appeal. *Tamasco*, 2018 WL 4055919, at *2.

[2] *See* Appellant's Br. at 14-15 (citing several supportive out-of-state cases).

In affirming the lower court's order granting summary judgment and declining to expand *Hopkin*s beyond the open house scenario, the *Tamasco* court held "a real estate broker does not have a duty to take affirmative action to ensure the property of the client-owner is clear from ice and snow." *Id.* at *2. In responding to and rejecting several arguments raised by the plaintiff-buyer's agent, the Court reasoned as follows:

> Plaintiff also argues that [the listing agent's] relationship to the seller implicitly included a duty to ensure that access to the property was free of dangerous conditions like snow and ice on the entrance way. We disagree. [The listing agent's] relationship to the seller was defined by the terms of the listing agreement. [The listing agent] did not agree to provide snow removal services. . . .
>
> Plaintiff also argues that the second and third factors, the nature of the attendant risk and the opportunity and ability to exercise care, weigh in her favor. There is no factual or legal support for imposing liability on [the listing agent]. The risk associated with ascending an ice-covered staircase was readably discernible to plaintiff when she decided to accompany the appraiser to the property. There is no legal or public policy basis to impose the property owner's common law burden to prevent this harm on [the listing agent].

Id. at *4–5.

Similarly, the Arizona Court of Appeals affirmed a lower court's grant of summary judgment to the listing agents in *Lim v. Gillies*, No. 1 CA-CV 13-0478, 2014 WL 4980379, at *2 (Ariz. Ct. App. Oct. 7, 2014). In *Lim*, the prospective buyer's agent was injured during a private showing of a house

that she attended with the prospective buyer when the seller's listing agents were not present. The appellate court concluded that the listing agents did not occupy or control the house and otherwise were not the possessors of the house. In that regard, the court reasoned as follows:

> In seeking summary judgment, Seller's Agents submitted evidence that they did not own, control, occupy, maintain, or manage the property and that their only connection to the property was as a listing agent making it available to prospective buyers. [Plaintiff] did not controvert this evidence but claimed the exclusive nature of the listing agreement with [the seller's property manager] constituted a possessory interest because it allowed Seller's Agents to control the property by restricting access through the lockbox. The Restatement, however, requires occupation by the alleged possessor in addition to the element of control, see Restatement § 328E, and there is no evidence Seller's Agents occupied the property at any time. Given the undisputed evidence that Seller's Agents did not own or occupy the property, were not responsible for maintaining it, and had no right to immediately possess it, [plaintiff] failed to raise a material question of fact about whether Seller's Agents possessed the property.

Id. at *2-3. Indeed, the appellate court was unpersuaded by the plaintiff's claims that there were material disputed facts that prevented summary judgment relating to whether the buyer's agent retrieved the key from the MLS lockbox or if the seller's agent gave the buyer's agent the code for the non-MLS lockbox used to maintain the property, explaining that any such facts were immaterial. *Id*. at *1 n.2.

Further, the appellate court disagreed with the plaintiff that the listing agents owed him a duty of care because the listing agents were acting on behalf of the house's possessor. In that regard, the court held that the listing agents' actions, merely marketing and selling the house, did not create a duty, also noting "Seller's Agents did not create the hazard that injured [plaintiff] and were not present when he fell." *Id*. at *3. Based upon the foregoing, the seller's listing agents' summary judgment dismissal was affirmed.

Likewise, in the New York case of *Schwalb v. Kulaski*, 29 A.D.3d 563 (N.Y. Sup. 2006), the plaintiffs, the Schwalbs, were prospective buyers of a farm and sued the listing agent of the farm to recover damages for injuries allegedly sustained by Mr. Schwalb's fall through a floorboard in the barn on the property. The appellate court ruled that the real estate agent's motion for summary judgment should have been granted. In its decision, the Court explained as follows:

> Generally, liability for an allegedly defective condition on property must be based on occupancy, ownership, control, or special use of the premises. The [listing agent and company] established their prima facie entitlement to judgment as a matter of law by submitting evidence that they did not own, control, occupy, maintain, or manage the property and that their only connection to the property was to show it to prospective buyers. . . . Because the defendants owed no duty of care to the plaintiffs, and had no knowledge of the defect in the barn, they cannot be held liable for the allegedly defective condition on the property.

Id. at 697-698.

By way of further example, in *Christopher v. McGuire*, the Oregon Supreme Court declined to impose a duty on a listing agent where a prospective buyer was thrown from the porch after the porch fence gave way while on a private tour because the agent was not the owner of the property and therefore was "under no duty to keep the property in repair." 169 P.2d 879, 880 (Or. 1946). Indeed, in that case, the listing agent was present during the private tour, and the Oregon Supreme Court nonetheless found that the listing agent had no duty to the prospective buyer for her fall. In its ruling, the court stated: "A real estate broker employed to sell property has the right of entry for such purpose, but can it be said that by so doing he is in 'possession and control' of the property? We think not." *Id.* at 881. That court, like the others, concluded that, as a matter of law, a listing agent is not in possession or control of the house he or she is employed to sell merely by the fact that the agent is listing the house and has the right of entry into the house for such purpose. *Id.*

Consistent with the above cases, in the Connecticut case of *Purcaro v. Angelicola*, No. CV095014823, 2012 WL 3517614 (Conn. Super. Ct. July 20, 2012) (unpublished), a listing agent was again not liable for a prospective

buyer's injury. There, a prospective buyer fell down the stairs near where the listing agent had left the lockbox and subsequently filed suit against the real estate agent, asserting the agent was liable for her injuries. *Id.* at *1. In that case, the court held the listing agent owed no duty to the prospective buyer because there was no evidence that the listing agent "owned, occupied, controlled or made special use of the property." *Id.* at *13 (citing *Fabrizi v. Fitchett*, Dkt. No. 5002/10, 2012 Slip Op. 30923 (N.Y. Sup. Mar. 26, 2012)); *see, e.g.*, *Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 691 (Ind. Ct. App. 2006) (holding that a listing agent was not liable, "declin[ing] to impose such a duty on real estate brokers who do not have sufficient control over the premises to independently give rise to a duty to warn under recognized premises liability principles").

Similarly, courts in other jurisdictions have consistently held that listing agents, who are similarly situated to the Iowa Realty agent here, do not owe any duty to perform an inspection. Some courts recognize narrow exceptions where listing agents do owe a limited duty, none of which are present here. *Purcaro*, 2012 WL 3517614 at *12 (collecting cases). For example, some courts have imposed additional duties on listing agents during an open house where the listing agent has "a higher degree of responsibility to assure the safety of those persons accepting the invitation." *Hopkins*, 625 A.2d at 1113.

Even then, the duty is limited to "defects that are reasonably discoverable through an ordinary inspection of the home undertaken for purposes of its potential sale. The broker is not responsible for latent defects that are hidden and of which the broker has no actual knowledge." *Id.* Courts have consistently been unwilling to expand these narrow exceptions:

> Our holding in *Hopkins* did not suggest an intent to require that a realtor provide an ongoing guarantee of a property's safety, nor was it designed to protect occupants of a property from personal responsibility for awareness of their surroundings and the dangers inherent in those surroundings. Rather, *Hopkins* established the proposition that realtors owe a duty of care to protect invited visitors to a marketed piece of property from physical conditions that the nature and duration of their visit might not afford them an opportunity to recognize for themselves.

Reyes v. Egner, 991 A.2d 216, 218 (N.J. 2010).

Based on Iowa and other caselaw on point, the underlying circumstances do not justify a duty being imposed on Iowa Realty to DeSousa. In particular, DeSousa did not attend an open house. Rather, she requested and attended a private showing with her own agent, and the Iowa Realty listing agent was not present. Like in *Tamasco*, the Fynaardts retained control of the Property, including the responsibility to remove snow and ice at the end of a winter storm. Because Iowa Realty did nothing more than list the Fynaardts' Property, it lacked sufficient control of the Property to justify owing DeSousa

a duty of care. Accordingly, and consistent with longstanding premises liability precedent in Iowa and nationally, this Court should reverse the denial of Iowa Realty's Motion for Summary Judgment and hold that the District Court should grant such motion.

B. The District Court's ruling, if affirmed, will substantially disrupt and negatively impact the real estate industry.

As *amici*, IAR and NAR are focused not only on the applicable law as applied to the facts of this matter, but also on the implications of this Court's ruling on the real estate industry in Iowa and nationwide. Such implications are a certainty as this situation of a private showing, without the listing agent being present, happens every day in Iowa and nationwide in the real estate industry.

Indeed, the Iowa Supreme Court has recognized that this case involves exactly the type of legal question where courts can and should consider the larger impact and public policy considerations. The Iowa Supreme Court has long held that "the existence of a duty *depends largely on public policy*." *Kolbe v. State*, 661 N.W.2d 142, 147 (Iowa 2003) (emphasis added) (holding no duty owed to general public based on public policy concerns). As noted above, in *Gries*, the Iowa Supreme Court held that a land possessor did not have any duty or liability for a plaintiff's injuries in a slip-and-fall incident caused by ice/snow, expressly reasoning that "[s]ignificant policy reasons

justify relieving a land possessor of the duty" to remove snow and ice during a storm. *Gries*, 944 N.W.2d at 631-32. The Iowa Supreme Court has, on multiple occasions, explained that "**a lack of duty may be found if** either the relationship between the parties or **public considerations warrants such a conclusion**." *Morris v. Legends Fieldhouse Bar & Grill, LLC*, 958 N.W.2d 817, 822 (Iowa 2021), *as amended* (May 5, 2021) (citing *McCormick*, 819 N.W.2d at 371 and *Thompson,*774 N.W.2d at 834 (emphasis added)). Several of the out-of-state courts cited herein have explicitly discussed the public policy considerations supporting their decisions not to impose liability upon listing agents. *See also* Restatement (Third) § 7(b) ("[W]hen an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.").

The type of private showing that occurred in this case, without involvement of a listing agent, is common in the industry and in Iowa. There are several reasons for that. By way of background, before the advent of lockboxes and other recent technologies,[3] prospective buyers typically toured

[3] Lockboxes and keyboxes have evolved during the decades of their existence, with the first electronic keybox being introduced sometime in the 1990s. *See* https://www.suprasystems.com/OurCompany/Pages/History.aspx; https://www.thebalance.com/what-are-lockboxes-and-how-do-lockboxes-work-1799081.

a house for sale either (1) as part of an open house, which typically occurred on weekends, or (2) as part of a private showing where the listing agent would meet the buyer and buyer's agent at the listed house, unlock the house, and tour the house with the buyer and buyer's agent. The lockbox changed all of that, allowing prospective buyers and their agents to tour houses without the need for access from, or onsite participation by, the seller or seller's agent. A lockbox, which generally hangs around the doorknob of a house, holds the keys to the house to allow access for all real estate professionals, while continuing to keep the house secure.

Typically, and as was the case here, when listing a home, Iowa real estate professionals have used a lockbox, as well as a web-based application or software to approve and manage private showing requests. Prospective buyers' agents will request a private showing in the application, which is either approved or denied by the seller or the listing agent or is automatically approved or denied by the application/software based on the settings inputted by the seller's agent. Once the private showing request is manually or automatically approved, the buyer's agent uses their lockbox key upon arrival to access the property and to tour the home with his or her prospective buyer, without either the seller or listing agent present. Together, these innovations create efficiencies for all parties involved in the home buying process.

In addition to the efficiency of today's modern system of private showings, there is a convenience upside. Buyers and their agents have much greater flexibility on when they can tour houses, as opposed to touring houses only on weekends or at times that were convenient to the sellers and listing agents. If this Court holds that listing agents owe this new duty, they will no longer be able to approve private showings that are scheduled only several hours in advance, like here where DeSousa's agent requested the showing around 4:30 p.m. on December 27 for a 9:30 a.m. showing on December 28—less than 24 hours later. (App. 0050-0051). Listing agents would also need significantly more notice to ensure they could personally inspect the property beforehand, decreasing the number of showings and also making showings less convenient for buyers, sellers, and agents.

In addition, part of the appeal of the modern showing system is for buyers to be able to tour properties with their own agents *without* the sellers and/or the listing agent. Buyers want to be able to speak freely with their agent about a property while on site, whether about their likes and dislikes to better inform their agent moving forward or their interest in the property and potential offer strategy.

Finally, due to the ongoing COVID-19 pandemic, buyers, sellers, and their agents are less willing to participate in open houses with potentially

several people in close proximity touring a single property. Instead, buyers and their agents are more likely today even than they historically were to schedule private showings to avoid the health and safety concerns associated with traditional open houses.

Here, public policy considerations greatly undermine affirming the existence of this new duty. If the District Court's ruling is upheld, the entire home-buying industry will likely be adversely affected, ultimately leading to decreased efficiencies on the part of sellers and buyers and increased costs to consumers who are buying and/or selling a home, which many courts have taken note of in their decisions.[4]

Courts have recognized that imposing such a duty on real estate professionals[5], essentially to ensure the safety of all listed properties, is the "last thing" the housing market needs. *Purcaro*, 2012 WL 3517614 at *20. This duty "would result in substantial economic and social costs to all of the parties involved," *id.*, and would be "an unjustifiable economic burden on the

[4] This is particularly concerning at a time when housing supply is tight, and prices of homes are already skyrocketing. *See* Emily Badger and Quoctrung Bui, *Where Have All the Houses Gone?*, N.Y. Times, (Feb. 26, 2021, updated May 14, 2021),https://www.nytimes.com/2021/02/26/upshot/where-have-all-the-houses-gone.html? ("[O]nly about half as many homes" were for sale in early 2021 as early 2020, a "record-shattering decline in inventory").

[5] *Amici* incorporate and agree with Appellant's discussion of the existing duties already owed by real estate professionals under the Iowa Code and other Iowa statutes and regulations. *See* Appellant's Br. at 24-25.

residential real-estate industry." *Masick*, 858 N.E.2d at 690. The financial burden associated with such an extreme departure from existing law would severely disrupt the home-buying industry. As noted by multiple courts, if this new duty is implemented, it would likely lead to increased insurance premiums to real estate professionals in response to such an "expansive, ambiguous, and vague" duty. *Masick*, 858 N.W.2d at 690 (citing *Hopkins*, 625 A.2d at 1123 (Garibaldi, J., dissenting)). Listing agents would also face costs to "insert strong indemnification language into their listing agreements." *Purcaro*, 2012 WL 3517614 at *20. Moreover, if this new duty is implemented, real estate professionals would be forced to sue or join their own clients for failure to disclose or remedy defective or dangerous conditions, inherently changing "the broker's relationship with the principal, the seller." *Purcaro*, 2012 WL 3517614 at *16 (citing *Hopkins*, 625 A.2d at 1123 (Garibaldi, J., dissenting)). If this Court affirms the District Court's creation of this new duty, listing agents would be "saddled with the additional costs of liability insurance and accident-prevention measures," *Masick*, 858 N.E.2d at 690, which would "inevitabl[y] increase [listing agents'] liability insurance premiums [and] their commissions." *See Purcaro*, 2012 WL 3517614 at *20.

As acknowledged by several courts, if a listing agent owes a duty to prospective buyers and can be liable for a seller's failure to warn of or remedy defects, real estate professionals would be forced to "develop an expertise in home inspection" or hire third-party professionals to inspect the physical property before every showing while a home is on the market to ensure no hazards are present since the industry-standard lockbox process allows for buyers to visit the house outside of specific open house times. *Masick*, 858 N.W.2d at 690; *see also Mullins v. Mailloux*, No. TTDCV166010234S, 2017 WL 4172465, at *7 (Conn. Super. Ct. Aug. 3, 2017) (finding the listing agent owed no duty to inspect the property in part because "there is an entire industry of individuals who are specially trained in-home inspections"); *Rogers v. Bree*, 747 A.2d 299, 303 (N.J. Super. 2000) ("Home inspectors are more qualified than realtors to identify and locate defects in the property, and are more familiar with the potential dangers associated with the defects, and the cost of remedying them.").

Indeed, listing agents are "marketing agents, not structural engineers or contractors," and imposing such a duty on them would "convert[ ] real-estate brokers into home inspectors." *Purcaro*, 2012 WL 3517614 at *6, 16 (citing *Provost v. Miller*, 473 A.2d 1162, 1664 (Vt. 1984); *Hopkins*, 625 A.2d at 1123 (Garibaldi, J., dissenting)). It will be time consuming and costly if agents are

expected to inspect all properties they list—costs that would likely be passed onto consumers in some form. It is "unrealistic" and "unreasonable" for a listing agent to warn of and/or search a property for dangerous conditions, especially where, like here, the listing agent was unaware of any defects or dangerous conditions. *Purcaro*, 2012 WL 3517614 at *19 (citing *Provost*, 473 A.2d at 1164).

Such a duty would create a "nebulous standard" for listing agents with no guidelines regarding how to "ascertain what one's duty is and how it can be performed." *Purcaro*, 2012 WL 3517614 at *16 (citing *Hopkins*, 625 A.2d at 1123 (Garibaldi, J., dissenting)). A listing agent would be forced to guess how to meet his obligations while facing significant constraints—because the listing agent is not the owner or possessor of the property and is limited in his or her ability to remedy defects, and because he or she is acting as the seller's agent, the listing agent would need to both warn buyers of dangerous conditions while trying not to harm the "salability of the property" or deter potential buyers. *Id.*

Alternatively, rather than trying to navigate how to inspect and warn buyers of defects during private showings, listing agents may opt out of the process, offering a very limited number of showings or refusing to offer private showings entirely, instead showing the home only when the agent

and/or property inspector could be present. This approach would negate the usefulness of innovations like the lockbox and showings request application. Private showings will almost certainly drastically decrease, making the home-buying process much less convenient for buyers and real estate professionals alike. This will serve only to undermine the many efficiencies the industry has developed and create unnecessary obstacles for all parties.

Those same efficiencies are arguably more critical now than ever before, with showings-per-listing at historically high levels "with 110 markets across the country averaging more than 20 showings per listing during the first five days," per data from the ShowingTime app. *July 2021 Showing Index Results: Traffic Cools, though Showings Remain at Historic Levels*, ShowingTime Blog, (Aug. 20, 2021), https://www.showingtime.com/blog/july-2021-showing-index-results/. Imposing a novel duty on listing agents will all but require that listing agents are physically present for showings, an impracticable if not impossible ask given the current housing market and its higher-than-ever number of showings per listing.

Finally, and as noted above, buyers and buyers' agents *desire* to be able to tour properties *without* the sellers and/or the listing agents. However, if the Court affirms this new duty, listing agents may feel compelled to be present at all property tours and act as "an eager salesperson hovering around" to

"point out all potential safety hazards," almost certainly something neither sellers nor buyers want. *Purcaro*, 2012 WL 3517614 at *16 (citing *Hopkins*, 625 A.2d at 1123 (Garibaldi, J., dissenting)).

Simply put, "the imposition of a duty to inspect the listed premises and a duty to warn prospective buyers thereof of all discoverable defects, whether known or unknown, latent or illusionary" is contrary to public policy. *Purcaro*, 2012 WL 3517614 at *20. It would add significant costs and decrease important efficiencies for all involved parties "while providing almost no corollary benefit to society." *Mullins*, 2017 WL 4172465, at *8.

As a matter of policy, a real estate professional's listing of a house for sale does not and should not give rise to a duty of care. Accordingly, *amici* urge the Court to find that the District Court erred and to hold that no such duty exists.

C. Even if listing agents can be liable for failing to warn prospective buyers of a dangerous condition, Iowa Realty did not owe a duty of care to DeSousa based upon the undisputed facts of the case.

Even if this Court finds that Iowa Realty was the possessor of the land for premises liability—which the NAR and IAR believes would stand contrary to existing precedent—Iowa Realty cannot be liable for DeSousa's injuries based upon the undisputed facts under either the open and obvious or continuing storm doctrines. It is undisputed that DeSousa slipped on ice

outside the Fynaardts' property. In Iowa, the possessor of the land owes no duty to warn of obvious dangers, such as slick pavement during a winter storm, or to remove snow and ice until after the completion of a storm.

1. The risk to DeSousa was open and obvious, such that neither the sellers, Iowa Realty, nor the Iowa Realty listing agent owed DeSousa a duty.

Even if this Court holds that listing agents may owe duties to buyers solely based upon their role of listing and selling properties, they do not owe a duty to warn of open and obvious conditions, such as an obviously icy driveway on an Iowa winter day with an ongoing wintery mix. Under Iowa law, "there is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the persons injured as they are to the owner." *Atherton v. Hoenig's Grocery*, 86 N.W.2d 252, 255 (Iowa 1957) (citing several Iowa cases); *Hanson v. Town & Country Shopping Center, Inc.,* 144 N.W.2d 870, 873–76 (Iowa 1966). Section 343A of the Restatement (Second) of Torts sets forth the precise rule regarding readily apparent conditions:

> A possessor of land is *not liable* . . . for physical harm caused to [entrants] by any activity or condition on the land whose danger is *known or obvious* to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts at § 343A (emphasis added). Once a condition is determined to be known or obvious, the landowner is not liable unless the owner or possessor "should anticipate harm . . . notwithstanding such

knowledge." *Hanson*, 144 N.W.2d at 547. A "condition is 'known' if one is aware or conscious of its existence and of the risk of harm it presents" and a "condition is 'obvious' when both the condition and risk of harm are apparent to and would be recognized by a reasonable person, in the position of plaintiff, exercising ordinary perception, intelligence, and judgment." Iowa Civil Jury Instruction 900.7.

The underlying theory for the open and obvious doctrine is sound and logical: "The possessor of real estate is not an insurer of the safety of those who come upon its premises." *Atherton*, 86 N.W.2d at 255. Therefore, conditions which are readily apparent—that is, known or obvious—are not conditions that incur liability. *Id.* Consistent with this caselaw, Iowa courts have long recognized that "[e]very pedestrian who ventures out when the weather renders the premises slippery knows he is risking the chance of a fall and of a possible serious injury." *Gries*, 944 N.W.2d at 631 (citing *Walker v. Memorial Hospital*, 45 S.E.2d 898 (Va. 1948)).

As discussed in detail above, in *Tamasco*, plaintiff could not recover against the listing agent after she slipped and fell on ice-covered steps leading away from the house. *Tamasco*, 2018 WL 4055919 at *5. Here, the ice-covered driveway was similarly readily apparent to DeSousa. She undisputedly knew roads were "icy" and still risked traveling to and attending

the showing. (App. 0053). Because the snow and/or ice-covered driveway was an open and obvious condition that DeSousa was aware of, Iowa Realty cannot be liable for her injuries.

2. The continuing storm doctrine suspended any duty owed to DeSousa.

Iowa's continuing storm doctrine "suspends a property owner's general duty to exercise reasonable care in warning of or removing snow and ice hazards until a reasonable time after the storm because continually clearing ice and snow during an ongoing storm would be impracticable." *Gries*, 944 N.W.2d at 630. Indeed, a land possessor "is not a de facto insurer responsible for all accidents occurring on its property." *Id.* The doctrine, recognizing the "feebleness of human . . . efforts in attempting to cope with the power of the elements," "relieves a land possessor of the duty to remove or ameliorate the natural accumulation of snow or ice in less severe circumstances." *Id.* at 634. Iowa courts have held that the doctrine "is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of less severe, yet still inclement winter weather," applying even when "a trace of snow was recorded on the day of the Plaintiff's fall." *Id.* at 634 (citing *Hovden v. City of Decorah*, 155 N.W.2d 534, 537 (Iowa 1968)).

The record evidence establishes inclement weather on the day of DeSousa's showing and resulting injury. DeSousa herself acknowledged

central Iowa was under a "winter weather advisory till noon" on the morning of the showing. (App. 0053). Road conditions were described as "treacherous" with most of central Iowa being "partially covered with slick spots" around the time of DeSousa's showing. (App. 0048-0049). Based upon Iowa's continuing storm doctrine, neither Iowa Realty nor the Fynaardts had any duty to remove snow or ice while the winter storm was ongoing, which continued throughout the day of DeSousa's showing appointment.

CONCLUSION

Given the potential far-reaching impact of this case, the NAR and IAR offer the Court these additional industry, policy and legal considerations relevant to its review of the District Court's holding. As shown and based on the foregoing reasons, this Court should entirely reverse the District Court's denial of summary judgment and hold that Iowa Realty's motion for summary judgment should be granted.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains *6,781 words*, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). *See* Iowa R. App. P. 6.903(1)(g)(1) and 6.906(4) (providing for a maximum *amicus curiae* brief word count of not more than one-half of 14,000 words, *i.e.*, 7,000 words, excluding from such word count the Table of Contents, Table of Authorities, and all Certificates).

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