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

Appellant Iowa Realty's Final Brief
(Oral Argument Requested)

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Routing statement

This case presents a substantial issue of first impression: whether a realtor owes a duty of care for property by virtue of listing it for sale. *See* Iowa R. App. P. 6.1101(2)(c). Additionally, this case presents a substantial question asking the Court to enunciate legal principles delineating the parameters of this new duty, if such a duty exists. *See* Iowa R. App. P. 6.1101(2)(f).

Statement of the case

The question before this Court is whether listing a house for sale, standing alone, is sufficient to impose a duty of care on a realtor—a duty which, up until now, has owed exclusively by the land possessor, the party with control of the land.

Arriving to meet her own realtor (not an Iowa Realty agent) for a private showing, Amanda DeSousa slipped and fell on ice in the driveway of a home located in Waukee, Iowa. (App. 0056). She sued the property owners, Matthew and Melissa Fynaardt, and Iowa Realty Co. Inc., whose agent had listed the house for sale. (App. 0005-06). Against all defendants, she asserts a single negligence claim sounding in premises liability. (App. 0006 ¶ 13).

Iowa Realty moved for summary judgment, arguing that because it did not control the property, it owed DeSousa no duty of care. (App. 0012-13; 0069-0090 MSJ; Supp. Brief)). In her resistance, DeSousa claimed that the real estate brokerage was a "land possessor" for premises liability purposes simply because the Fynaardts hired an Iowa Realty agent to put their house on the market. (App. 0035-36). She offered no evidence in support of her conclusory contention; the record evidence establishing that Iowa Realty exercised no control over the land was undisputed. (App. 0060-61 [10:23-11:10]; App. 0065).

In its first ruling on the motion, the district court identified the sole issue as whether Iowa Realty "possessed" the Fynaardts' property at the time of

DeSousa's injury. (App. 0064). Before ruling, the court summarized the facts before it:

> If the issue hinged simply on the question of possession, I would conclude that a genuine issue of material fact has not been generated as to whether Iowa Realty was in possession of the property on the date DeSousa sustained her injuries. The only fact which Plaintiff relies on to contend otherwise is that Iowa Realty was the listing agent. Even if I accept Plaintiff's contention that a listing agent may be liable under certain circumstances for injuries sustained by a prospective buyer while on the listed property, no such circumstances exist here. For example, there is no evidence that Iowa Realty voluntarily assumed responsibility for maintenance of the driveway and sidewalk after the listing contract was signed and the Fynaardts vacated the premises. DeSousa was not injured during an open house when the realtor may have had temporary exclusive possession of the premises. Likewise, the situation may have been different if an Iowa Realty agent, using a key provided by the owners, was showing the property to a prospective buyer. But there are no such facts apparent from this record.

(App. 0064-65).

Despite concluding that no facts established that Iowa Realty controlled or possessed the land, the district court stopped short of granting summary judgment. (App. 0065-66). Instead, it ordered the parties to submit supplemental briefing regarding this Court's decision in *Thompson v. Kaczinski,* 774 N.W.2d 829 (Iowa 2009) and the resulting impact, if any, on the duty analysis in premises liability claims. (App. 0066-67).

Per the court's request, Iowa Realty and DeSousa each submitted supplemental briefs. (App. 0069-90; 0091-94)). On April 17, 2021, the district

court issued a one-page ruling denying summary judgment, reasoning that a "reasonable juror" could find that a duty existed and was owed by Iowa Realty here. (App. 0119). The court was not clear on how it believed the *Thompson* case impacted the duty analysis or its earlier finding that no facts established Iowa Realty was a land possessor. (*Compare* App. 0064-65, *with* App. 0119).

Iowa Realty timely filed an application for leave to file interlocutory appeal, which this Court granted on June 11, 2021.

Statement of facts

In 2018, Matthew and Melissa Fynaardt hired a realtor, Joel Goettsch of Iowa Realty, to assist with the sale of their home at 270 Parkview Drive in Waukee, Iowa. (App. 0005-06 ¶¶ 7-8). Though they had rented out the property for a few months before putting it on the market, the Fynaardts retained control of the premises and the responsibility for regular maintenance and upkeep, including snow and ice removal. (App. 0044 (Nos. 1-3); 0102-03 [8:16-9:9, 9:5-9]; 0108 [14:19-25]; 0110 [16:11-19]).

Searching for her "dream home," Plaintiff Amanda DeSousa saw the listing for the Fynaardts' house and contacted her realtor, Samantha Winebrenner, to schedule a showing on December 27, 2018. (App. 0005 ¶ 7; 0050; 0054; 0056). During a winter storm the next morning, DeSousa met her own realtor, a buyer's agent not affiliated with Iowa Realty, at the Fynaardts' property. (App. 0056). No agent of Iowa Realty was present, and no evidence

suggests that Iowa Realty was even notified of the showing. (App. 0056; *see also* App. 0064). As she stepped out of her car onto the driveway, DeSousa slipped and fell on ice. (App. 0056). She later brought this lawsuit, asserting that Iowa Realty and the Fynaardts were negligent in failing to provide her with an adequate warning of the icy conditions on the driveway and by failing to clear the ice. (App. 0005-06).

Summary of argument

In this case, DeSousa predicates her claim against Iowa Realty on a duty foreign to existing negligence and premises liability principles, seeking to hold the real estate brokerage liable as a possessor of land simply because its agent listed the property for sale. Practically speaking, she urges this Court to recognize an expansive new duty to inspect and warn, owed to prospective homebuyers by the sellers' realtor (and vicariously, real estate brokerage).

Iowa law has never before imposed an affirmative duty on realtors for the properties they list. Only the land possessor—the person in control of the land—owes a duty of care to keep the premises safe. Iowa Realty did not have any control over the driveway where DeSousa fell; its only connection to the property was its agent listing the house for sale. In finding that alone could give rise to liability, the district court imposed a novel duty on realtors. Its order denying summary judgment should be reversed.

Argument

I. Because Iowa Realty owed no duty of care, the district court erred in denying summary judgment.

A. Preservation of error and standard of review.

Iowa Realty preserved error by moving for summary judgment on the ground that it owed DeSousa no duty of care. (App. 0012-13; 0069-90). The district court ruled on the issue in its order denying summary judgment. (App. 0119-20).

This Court reviews a summary judgment ruling for corrections of errors at law. *Morris v. Legends Fieldhouse Bar & Grill, LLC*, 958 N.W.2d 817, 821 (Iowa 2021) (citation omitted). Though summary judgment is not always appropriate in negligence actions, "the determination of whether a duty is owed under particular circumstances is a matter of law for the court's determination." *Id.* (citing *Hoyt v. Gutterz Bowl & Lounge, L.L.C.*, 829 N.W.2d 772, 775 (Iowa 2013)). Where, as here, "the facts are undisputed and only the legal consequences are at issue, summary judgment is proper." *Breese v. City of Burlington*, 945 N.W.2d 12, 17 (Iowa 2020).

B. Under existing Iowa law, Iowa Realty did not owe a duty of care to DeSousa.

Like any other negligence action, the "threshold question" in this case is whether Iowa Realty owed a duty of care to Amanda DeSousa. *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999) (citation

omitted). This determination "is always a matter of law for the court to decide," and as such, is properly resolved on summary judgment. *St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W.2d 338, 346 (Iowa 2013) (citation omitted).

1. Applying ordinary tort principles, Iowa Realty did not owe a duty of care because its conduct did not create a risk of harm.

Generally, an actor has a "duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." *Thompson*, 774 N.W.2d at 834 (quoting Restatement (Third) of Torts: Liability for Physical Harm (hereinafter "Restatement (Third)") § 7(a)). Conversely, "an actor whose conduct has not created a risk of physical harm to another has no duty of care to the other." *Estate of McFarlin v. State*, 881 N.W.2d 51, 60 (Iowa 2016) (quoting Restatement (Third) § 37) (alterations omitted).

Here, it is undisputed that Iowa Realty's conduct did not create the risk of harm. A winter storm before and during the showing "left roads, streets and the Fynaardt[s'] driveway icy." (App. 0063-68; 0048-49). DeSousa's slip-and-fall resulted from risks arising from natural conditions, not any action or omission by Iowa Realty. (App. 0006 ¶ 12; 0048-50); *see also McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 374-75 (Iowa 2012) ("Another way of looking at this case is to say that [the subcontractor not in control of the land] did not create a 'risk of physical harm' giving rise to a general duty under section 7(a) of

the Third Restatement"). As such, Iowa Realty owed DeSousa no duty of care under ordinary tort principles. *See McFarlin*, 881 N.W.2d at 60 (quoting Restatement (Third) § 37).

2. Iowa Realty did not owe a duty of care because it was not a possessor of land.

The unique characteristics of land ownership justify a modification of the general rule. Both the Restatement (Third) and Iowa law recognize "a 'specific application' of the duty to exercise reasonable care 'based on the circumstance of real-property ownership.'" *Gries v. Ames Ecumenical Hous., Inc.*, 944 N.W.2d 626, 628 (Iowa 2020) (quoting Restatement (Third) § 51 cmt. b). Accordingly, a land possessor owes a duty of reasonable care to entrants with respect to risks arising from natural and artificial conditions on the land. *Ludman v. Davenport Assumption High Sch.*, 895 N.W.2d 902, 910 (Iowa 2017) (quoting and adopting the duty analysis set forth in Restatement (Third) § 51).

This Court has long held that control determines the status of land possessor, and the corresponding duty of care, for premises liability purposes. *See McFarlin*, 881 N.W.2d at 64 ("Liability follows control."); *Van Essen v. McCormick Enters. Co.,* 599 N.W.2d 716, 720 n.3 (Iowa 1999) (""The general rule and exceptions ... reveal a common principle: *liability is premised upon control.*"") (citation omitted); *Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873, 875 (Iowa 1996) ("[The] determination depends primarily upon the amount of

control that a particular person exercises over the property."); *see also Lewis v. Howard L. Allen Invs., Inc.*, 956 N.W.2d 489, 492 (Iowa 2021) (holding party with "no possession or control of the property. . .owed no duty of care to maintain the property"). There must be evidence that the defendant exercised "substantial control" of the premises to give rise to a duty of care. *Robinson*, 553 N.W.2d at 876 ("Only where the record reveals substantial control over the premises has liability been imposed."); *see also Downs v. A & H Const., Ltd.*, 481 N.W.2d 520, 524 (Iowa 1992) (agreeing there must be "substantial" control to give rise to liability).

A person is in "control" of the land if he or she "has the authority and ability to take precautions to reduce the risk of harm to entrants," which is, of course, "the reason for imposing [the duty of care] on land possessors." Restatement (Third) § 49, cmt. c; *accord Downs*, 481 N.W.2d at 524. This rule derives from common sense and sound policy considerations. *Gries*, 944 N.W.2d at 629 (citation omitted). A party who does not have control over the property is not in a position to know of the risks that entrants may encounter and cannot take any measures to remediate potential dangers. *See Morris*, 958 N.W.2d at 826 ("The reason is simple: the party in control … is best positioned to take precautions to identify risks and take measures to improve safety"); *Van Essen*, 599 N.W.2d at 720–21 (explaining a non-possessor "may not enter the property to cure any deficiency").

In this case, only the Fynaardts had control of their land and "the authority and ability to take precautions to reduce the risk of harm" to DeSousa, as an entrant. *See* Restatement (Third) § 49, cmt. c; *see also id.* § 49(b)–(c) (providing alternatives if "if no other person is a possessor of the land" under the preceding subsections). The Fynaardts admit they controlled and possessed the property at the time of DeSousa's injury. (App. 0044). They had lived in the house on Parkview Drive for a number of years and were entitled to continue to do so if they wished. (App. 0044; 0102-03 [8:16-9:9, 9:5-9]; 0108 [14:19-25]; 0110 [16:11-19]); *see also* Restatement (Third) § 49. After listing the house for sale in December 2018, their obligations as homeowners didn't change. (App. 0102-03 [8:16-9:4]; 0104 [10:3-8]; 0108 [14:14-25]). With the exclusive right of control, the Fynaardts are the land possessors and the only proper parties against whom DeSousa can assert her premises liability claim. *See* Restatement (Third) § 49.

3. The undisputed facts establish that, as the listing real estate brokerage, Iowa Realty had no control of the land.

In support of its motion for summary judgment, Iowa Realty put forward competent evidence establishing both that it lacked any control over the property and that the Fynaardts remained in control. (App. 0044). In her

resistance, DeSousa offered no facts that could support a finding to the contrary.[1] (*See generally*, App. 0032-33; 0064).

There is no evidence suggesting Iowa Realty was a land possessor owing a duty to entrants on the Fynaardts' property. (App. 0064). As discussed, the record is devoid of any evidence that Iowa Realty was actually present at the time of injury or that it was even notified of the showing. (App. 0064; *see also* App. 0112-13 [18:22-19:10]). Likewise, the record contains "no evidence that Iowa Realty voluntarily assumed responsibility for maintenance of the driveway and sidewalk." (App. 0066; 0102-03 [8:16-9:4]; 0108 [14:19-25]). Indeed, the district court noted in its earlier order that the "only fact" that DeSousa relied on in arguing that Iowa Realty was a land possessor "is that Iowa Realty was the listing agent." (App. 0065).

Listing a house for sale cannot be considered sufficient control to give rise to a duty of care as a matter of law. The fact that a realtor agrees to assist homeowners in selling their property does not transfer control of the property—and the corresponding duty of care—from the homeowners to the listing agent. The district court concluded there was no evidence Iowa Realty assumed control of the property, and the record confirms the Fynaardts'

[1] Nor did she claim that she lacked sufficient information to adequately resist the motion. *See* Iowa R. Civ. P. 1.981(6); *see also* (App. 0064).

understood they maintained exclusive control of the property. (App. 0064-65; 0102-03 [8:16-9:9]).

The facts here are illustrative of a routine real estate transaction. While a seller's agent can offer suggestions, only his or her clients can effectuate actual change to the land. And a realtor's limited involvement in the marketing and sale of a property falls far short of the care and control the homeowners exercise over their land. *See Van Essen*, 599 N.W.2d at 720 (holding defendant did not have sufficient control to impose a duty of care).

Absent evidence showing Iowa Realty actually controlled the land, DeSousa's claim should not have been allowed to survive summary judgment. *See id.* (affirming summary judgment); *accord Robinson*, 553 N.W.2d at 876 (concluding defendant's "limited involvement" was "insufficient as a matter of law to create liability as a possessor of land" and affirming summary judgment); *Hoffnagle v. McDonald's Corp.,* 522 N.W.2d 808, 810 (Iowa 1994) (affirming summary judgment for defendant lessor because lessor "did not retain sufficient control. . .so as to give rise to a duty"); *Butler v. Wells Fargo Fin., Inc.*, No. 19-0554, 2020 WL 4200854, at *4 (Iowa Ct. App. July 22, 2020) (affirming summary judgment where no evidence showed defendant exercised possession or control of land).

Other state courts considering this issue have concluded realtors "do not have sufficient control over the premises to independently give rise to a duty to

warn under recognized premises liability principles." *Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 691 (Ind. Ct. App. 2006). *See also Lopez v. JP Morgan Chase Bank*, No. FBTCV146046621S, 2016 WL 6237590, at *2 (Conn. Super. Ct. Sept. 28, 2016) (holding realtors did not owe a duty "simply by marketing the premises for sale absent possession or control"); *Lim v. Gillies*, No. 1 CA-CV 13-0478, 2014 WL 4980379, at *2 (Ariz. Ct. App. Oct. 7, 2014) (affirming summary judgment in favor of listing agent whose "only connection to the property was as a listing agent making it available to prospective buyers"); *Purcaro v. Angelicola*, No. CV095014823, 2012 WL 3517614, at *13 (Conn. Super. Ct. July 20, 2012) ("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.") (citation omitted); *Knight v. Realty USA.com, Inc.*, 96 A.D.3d 1443, 1444 (N.Y.S.2d 2012) (concluding agents "whose only connection to the property was listing it for sale and showing it to prospective buyers" owed no duty of care); *Fabrizi v. Fitchett*, No. 5002/10, 2012 WL 1144733 (N.Y. Sup. Ct. Mar. 26, 2012) ("Absent control, a real estate broker does not owe a duty of care to a prospective buyer injured on the premises being shown."); *Perez v. Leslie J. Garfield & Co.*, No. 118500/99, 2003 WL 1793057, at *3 (N.Y. Sup. Ct. Mar. 12, 2003) (holding listing agent did not owe a duty because she "lacked any control of the subject premises"); *White v. Rick Canup Realtors, Inc.*, No. 07-99-

0381-CV, 2000 WL 621263, at *3 (Tex. App. May 15, 2000) ("[T]he duty owed by a landowner/occupier to invitees simply does not transfer through a chain of real estate agents.").

The few courts to find a limited duty have done so only where the realtor was hosting an open house and present at the time of the injury—in other words, where the realtor was actually in control of the premises. *See Jarr v. Seeco Const. Co.*, 666 P.2d 392, 395 (Wash. App. 1983) (finding duty owed where realtor admitted he was in "complete control" of the property and "conceded at oral argument that [he] was a possessor of land for purposes of premises liability"); *Anderson v. Wiegand*, 567 N.W.2d 452, 455 (Mich. App. 1997) (recognizing duty owed to open house visitors where the homeowners "ceded possession and control of the premises" at realtor's request); *Hopkins v. Fox & Lazo Realtors,* 625 A.2d 1110, 1117 (N.J. 1993) (holding the unique "nature and circumstances surrounding an open house" justified the imposition of a limited duty to "warn of latent defects of which the realtor is aware"); *see also Ludwig v. Cambria*, No. HHDCV186097734S, 2020 WL 3441065, at *4–5 (Conn. Super. Ct. Apr. 27, 2020) (noting courts have restricted liability "to situations that involve open houses"); *Purcaro*, 2012 WL 3517614, at *16 (collecting cases and observing courts to impose a duty "have done so only when the broker was conducting an open house tour of the listed premises"). Notably, many of these jurisdictions have not (or had not yet) abolished the common law distinctions

for entrants on land and relied on prospective purchasers' status as "invitees" in reaching that conclusion. *E.g., Jarr*, 666 P.2d at 394-95 (reasoning there is a "greater duty" owed to invitees); *Hopkins,* 625 A.2d at 1114; *Coughlin v. Harland L. Weaver, Inc.*, 230 P.2d 141, 143 (Cal. App. 1951); *Anderson*, 567 N.W.2d at 553-54. Iowa has, of course, abandoned the common law distinctions,[2] and the record here fails to establish any comparable facts. DeSousa's injury occurred during a private showing that she requested, hosted by her own realtor. (App. 0050; 0056). No one from Iowa Realty was present, and no evidence suggests that Iowa Realty was even notified of the showing. (App. 0064-65; *see also* App. 0112-13 [18:22-19:10]).

In sum, DeSousa's insistence that Iowa Realty owed her a duty of care as a "land possessor" rests solely on its agent listing the Fynaardts' home for sale. That alone cannot, as a matter of law, be "sufficient to establish that [a realtor has] the requisite degree of control so as to justify the imposition of a duty to keep the premises safe." *Van Essen*, 599 N.W.2d at 720. Because Iowa Realty had no other connection to the Fynaardts' land, it could not have owed a duty of care, and the district court's denial of summary judgment should be reversed.

[2] *Ludman*, 895 N.W.2d at 909-10 (discussing *Koenig v. Koenig*, 766 N.W.2d 635, 645 (Iowa 2009)). For a compendium of the status of the duties owed by land possessors in each state, see Restatement (Third) § 51, Reporter's Note, cmt. d.

C. **The Court should not create a new duty of care applicable to realtors.**

This Court has long held that "the existence of a duty depends largely on public policy"[3] and has consistently relied on public policy considerations in making no-duty determinations. *E.g., Morris*, 958 N.W.2d at 821; *Gries*, 944 N.W.2d at 631-32. In exceptional cases, "when an articulated countervailing principle or [public] policy warrants denying or limiting liability," the court may decide as a matter of law "that the defendant has no duty or that the ordinary duty of reasonable care requires modification." *Ludman*, 895 N.W.2d at 910 (quoting Restatement (Third) § 7(b)).[4] Iowa courts look to "legislative enactments, prior judicial decisions, and general legal principles as a source for the existence of a duty." *Van Essen*, 599 N.W.2d at 718-19.

Realtors are licensed members of a highly-regulated profession. *See Menzel v. Morse*, 362 N.W.2d 465, 473 (Iowa 1985) (instructing "[a]s a matter of public policy, consideration should be given to evidence of applicable ethical standards" and relying on manuals published by the Iowa Real Estate

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[3] *Kolbe v. State*, 661 N.W.2d 142, 147 (Iowa 2003).

[4] The "principles of a no-duty rule" contained in the Restatement (Third) § 7(b) apply with equal force to the duties of land possessors, as this Court has repeatedly recognized. *Ludman*, 895 N.W.2d at 910 ("Section 51 has not modified the principles of a no-duty rule contained in the remainder of the Restatement (Third)"); *see also Gries*, 944 N.W.2d at 629 (explaining duty exceptions "are in accord with the Restatement (Third), [which] recognizes there are exceptions to the duty of reasonable care") (citing Restatement (Third) §§ 7(b), 51 cmt. b).

Commission). As such, Iowa law specifically delineates the obligations and duties owed by realtors in any given transaction. *See* Iowa Code § 543B.56; Iowa Admin. Code ch. 193E-12. While recognizing that a real estate licensee representing a seller owes some limited duties to prospective buyers, the rules explicitly provide:

> Duty to a buyer or tenant. A licensee acting as an exclusive seller's or exclusive landlord's agent shall disclose to any customer all material adverse facts actually known by the licensee. . . . *The licensee owes no duty to conduct an independent inspection of the property for the benefit of the buyer* or tenant and owes no duty to independently verify the accuracy or completeness of any statement made by the seller or landlord or any independent inspector, unless the licensee knows or has reason to believe the information is not accurate.

Iowa Admin. Code r. 193E-12.3(2)(a) (emphasis added). If a listing agent "owes no duty to conduct an independent inspection of the property for the benefit of the buyer," it follows there can be no duty to ferret out and warn prospective buyers of all potentially dangerous conditions. *See id.*

Sound public policy supports this "no duty" provision, whether in the context of pre-sale disclosures or a duty to warn, as recognized by decisions from other jurisdictions discussing the policy considerations that caution against imposing such a duty on realtors. Of those to consider the issue, only a handful of courts impose a duty of care on realtors and only in limited

circumstances, none of which are applicable here.[5] Crucially, as discussed, no jurisdiction has concluded a realtor acquires the status of a "land possessor" or otherwise owes a duty of care simply by virtue of listing a client's house for sale. *See Masick*, 858 N.E.2d at 688 (collecting cases); *see also Lim*, 2014 WL 4980379, at *2–4.

First, courts have recognized that this duty would come at an enormous cost. In declining to impose "a duty to inspect properties for sale and to warn prospective buyers of dangerous conditions," the Indiana Court of Appeals reasoned the duty would amount to "an unjustifiable economic burden on the residential real-estate industry." *Masick*, 858 N.E.2d at 690 (internal quotation marks omitted). "Real estate agents would not only have to develop an expertise in home inspection but would be saddled with the additional costs of liability insurance and accident-prevention measures, which would presumably be passed on to the consumer in one form or another." *Id.*

[5] As noted above, the courts that have imposed a duty have done so only on facts showing the listing agent actually had control of the home, often reasoning that prospective homebuyers are invitees and thus owed a greater duty of care. *E.g., Anderson*, 567 N.W.2d at 455; *Hopkins,* 625 A.2d at 1113–14; *Jarr*, 666 P.2d at 395; *Coughlin*, 230 P.2d at 143. Courts have universally rejected attempts to impose a duty of care on buyers' agents. *See Purcaro*, 2012 WL 3517614, at *12–16 (collecting cases and observing "no appellate court has held the buyer's agent liable for any injury to the prospective buyer that resulted from any defective condition on the premises").

Echoing that rationale, another court emphasized the impact the duty would have on the housing market, which is "crucial to the state of our economy." *Purcaro*, 2012 WL 3517614, at *20. Realtors "would add the inevitable increase in their liability insurance premiums to their commissions and would insert strong indemnification language into their listing agreements, thus resulting in homeowners increasing the sales price, making it more expensive for prospective buyers to own a home, which in turn would eliminate some of those buyers from the market." *Id.* Reasoning the practical consequences would be "substantial economic and social costs to all of the parties involved," the court concluded that imposing such a duty is "the last thing [the housing] market needs." *Id.* (affirming summary judgment).[6]

[6] Both courts agreed with a dissent authored by New Jersey Supreme Court Justice Garibaldi, which stressed the shifting and increasing costs and liability that would result: "If a duty to inspect and warn was imposed, brokers forced to defray the cost of the additional liability insurance will simply add costs to the commission. Moreover, the broker still would retain the right of either contribution or indemnification from the homeowner. Thus, in the end, the homeowner will pay even more to insure against injuries that might occur in the home, while the brokers will have no more incentive to inspect and warn than they did before such duties were imposed. In addition, the smart homeowner, saddled with new costs, will simply increase the asking price for the house. Therefore, the potential buyer will have to pay more for a house, which has had costs added to the purchase price, all in the name of the buyer's protection. Rather than serving the public, such a decision would add extra layers of litigation, paperwork, and cost to the already complex and expensive process of selling and buying a house." *Id.* (internal alterations omitted) (quoting *Masick*, 625 A.2d at 691-92) (in turn quoting *Hopkins,* 625 A.2d at 1123 (Garibaldi, J., dissenting)).

Second, yet simultaneously, the housing market would find itself in additional upheaval as realtors struggled to determine what steps they needed to take to discharge this newfound duty. For the first time, a listing agent like Mr. Goettsch would be held to the same standard of care as his clients, the homeowners, without any direction as to the parameters of this newly-imposed duty. If a realtor is liable for the homeowners' failure to clear snow and ice, what other dangers must be discovered and remedied? *See Masick*, 625 A.2d at 690 (describing the duty as imposing "expansive, ambiguous, and vague liability"); *see also Kolbe*, 625 N.W.2d at 730 (observing Iowa's public policy would not be furthered by "a drastic expansion of liability"). The novel duty would at best impose "nebulous standards" providing no guidance for realtors, as Justice Garibaldi exemplified by asking:

> How can a broker know what constitutes a "dangerous condition?" If a jury can find that a step "camouflaged" with the same color linoleum as the surrounding area is a "dangerous condition" then what other common features in a house will be considered perilous to the unsuspecting open-house attendee? What exactly must a broker do?
>
> Must a broker arrive at the site early, inspect the premises and then post warning signs on all steps, low ceilings, railings, hanging plants, newly-waxed floors, and other potential "dangerous conditions?" Must the broker tidy up the house and pick up errant skateboards or banana peels? Or must the broker escort people who might prefer to look at the home without an eager salesperson hovering around, so that the broker can point out all potential safety hazards? Or should the broker greet the potential purchasers at the door with a list of conceivable hazards?

Hopkins, 625 A.2d at 1123 (Garibaldi, J., dissenting) (internal citations and alterations omitted).[7]

Third, a duty to inspect for hidden defects would be outside realtor's training and expertise. *See* Iowa Admin. Code r. 193E-3.1(543B) (outlining licensing requirements); *accord Barfield v. Hall Realty, Inc.*, 232 P.3d 286, 291 (Colo. App. 2010) (relying on statute delineating broker's obligations in concluding defendant owed "no duty as a matter of law to conduct an investigation"); *Johnson v. Chupp*, No. CIV.A. 02-C-04304JEB, 2003 WL 292168, at *2 (Del. Super. Ct. Feb. 11, 2003) (recognizing a broker owes a duty of "full disclosure of all material facts to those whom the agent represents, not a duty to buyers regarding dangerous conditions on a seller's property").

Essentially, realtors would be required to act as home inspectors, charged with scrutinizing each square foot for any potentially dangerous conditions so as to warn potential buyers and avoid liability. *See Masick*, 625 A.2d at 690 (stating the duty would require realtors "to develop an expertise in home inspection"). But homeowners hire realtors to help with the marketing and sale of their house, not to inspect and manage the property. *See Provost v.*

[7] Iowa Realty asked similar questions at the hearing on its motion for summary judgment. (App. 0060 [10:11-16] ("[The injury resulted] from a natural condition that Iowa Realty had nothing to do with… I guess I'm not sure what duty [Plaintiff] is urging on Iowa Realty here. [She] wanted someone from Iowa Realty to come out prior to [her] meeting her own realtor?")).

Miller, 473 A.2d 1162 (Vt. 1984) ("Real estate brokers and agents are marketing agents, not structural engineers or contractors."); *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."); *see also Mullins v. Mailloux*, No. TTDCV166010234S, 2017 WL 4172465, at *7 (Conn. Super. Ct. Aug. 3, 2017) (noting "there is an entire industry of individuals who are specially trained in home inspections" and finding no reasonable expectation that a realtor would "take on the home inspection responsibility").

Next, the realtor's anxious warnings would inevitably deter prospective homebuyers and make the actual process of selling a house much more difficult. This, in turn, would sour the relationship between the listing agent and the homeowners. *See Hopkins*, 625 A.2d at 1123 (questioning how a realtor's compliance would impact "the salability of the property and the [realtor's] relationship with the principal, the seller") (Garibaldi, J., dissenting); *see also Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 104 (Iowa 2012) (weighing the "potential threat to the professional relationship," among other policy considerations, in analyzing existence of duty); *Kolbe*, 661 N.W.2d at 149 (same). Yet critically, this new duty would not come with the corresponding authority to allow a realtor to make any changes to the land.

A realtor is in no position to know of (much less take steps to remedy) all the potentially dangerous conditions on or around a client's home. To discharge this duty, the seller's agent would be required to inspect each one of the numerous properties he has listed before every showing—a showing often led solely by the prospective buyer's agent, as DeSousa's own realtor did here. (App. 0050; 0056). And to avoid liability, he would need to return to each property immediately prior to every showing to ensure no new dangerous conditions arose since the last pre-showing inspection. To make matters worse, these repeated inspections would result in little more than a warning. Lacking control over the land, the realtor could not take any steps to remediate any dangers revealed. (App. 0110 [16:11-19]).

Finally, while adding costs, complexity, and confusion, the imposition of this new duty would offer "little or no added benefit to society." *Masick*, 858 N.E.2d at 290; *see Mullins*, 2017 WL 4172465, at *8 ("Creating class of potential defendants [by imposing a duty to warn on brokers] would result in increased litigation while providing almost no corollary benefit to society."). An injured prospective homebuyer already has readily available recourse—a cause of action in premises liability against the homeowners selling the property. *Purcaro*, 2012 WL 3517614, at *15 ("All this for a simple slip-and-fall accident in which the injured party already has readily available redress against the homeowner, the broker's principal who has control and possession of the property and the

knowledge and authority to make the necessary repairs.") (citation omitted); *Hopkins*, 625 A.2d at 1123 ("Neither the law nor public policy require the creation of further needless litigation when the injured party already has adequate redress for her injuries.") (Garibaldi, J., dissenting).

Weighing the significant burdens against the minimal benefit, many courts have declined to impose a duty of care onto realtors out of public policy concerns. *E.g., Ludwig*, 2020 WL 3441065, at *5 (finding "public policy concerns militate against the imposition of a legal duty" on realtors to investigate the safety of the premises); *Purcaro*, 2012 WL 3517614, at *19-20 (concluding such a duty "would be inconsistent with public policy by creating additional expense to all involved, adversely affecting the housing market and increasing litigation in our courts"); *Masick*, 858 N.E.2d at 691 (citing public policy concerns); *Rogers*, 747 A.2d at 302 (agreeing public policy would not be furthered by imposing a duty on realtors "to search every nook and cranny of the [listed] premises to discover latent defects"); *see also Young v. Fed. Home Loan Mortg. Corp.*, No. CV 13-83-M-DWM, 2014 WL 5304966, at *4 (D. Mont. Oct. 15, 2014) ("Such a notion would shift the duty to maintain a property in a safe condition from the party with the power and ability to do so to any interested visitor. [The] law places the duty of due care squarely on the shoulders of the owner/possessor of the property, who likely maintains insurance for this type of eventuality.") (internal citation omitted).

The same rationale applies with equal force here. The Fynaardts were not just the record property owners; they were in the process of selling the house they had made their home. Iowa Realty's agent, Mr. Goettsch, had no more control over the Fynaardts' property than he does over any other of the number of given houses he lists as part of his routine business as a realtor. To hold Iowa Realty liable under the circumstances here would broadly expand liability and have a ripple effect on the residential real estate industry. The newly-created duty would open a floodgate of litigation, resulting in rising housing costs and complicating the home-buying process. And all this for what? DeSousa already has readily available recourse against the true land possessors—as is made clear by her naming Matthew and Melissa Fynaardt as defendants in this lawsuit.

Simply put, allowing the district court's ruling to stand and imposing the duty urged by DeSousa will only "increase litigation by clogging the dockets with new parties for plaintiffs to sue." *Hopkins,* 625 A.2d at 1123 (Garibaldi, J., dissenting). Under well-established Iowa law, only land possessors—those who control the property—owe a duty of care to keep the premises safe. *See Gries*, 944 N.W.2d at 629. DeSousa's claim is not only foreign to the established standards of the residential real estate industry; it threatens to nullify the

"guiding maxim"[8] of premises liability precedent that liability follows control. *McCormick*, 819 N.W.2d at 372–73 (Iowa 2012) (""The general rule and exceptions. . . reveal a common principle: *liability is premised upon control*."") (emphasis original).

Under Iowa law, the court may find a lack of duty "if either the relationship between the parties or public considerations warrants such a conclusion." *Morris*, 958 N.W.2d at 821. Public policy considerations, as well as longstanding premises liability precedent, undeniably warrant the conclusion that Iowa Realty owed Amanda DeSousa no duty of care.

Conclusion

For the foregoing reasons, Iowa Realty respectfully requests the Court reverse the district court's denial of summary judgment, remand with instructions that the district court enter judgment in Iowa Realty's favor, and for such other relief deemed appropriate under the circumstances.

[8] *Benson v. 13 Assocs., L.L.C.*, No. 14-0132, 2015 WL 582053, at *5 (Iowa Ct. App. Feb. 11, 2015).

Request for oral argument

Appellant Iowa Realty Co., Inc. respectfully requests oral argument regarding the issues presented in this appeal.

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