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

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**AMANDA JOHNSTON f/k/a AMANDA DESOUSA,**
Plaintiff-Appellee,

vs.

**IOWA REALTY CO. INC.,**
Defendant-Appellant,

and

**MELISSA FYNAARDT AND MATTHEW FYNAARDT,**
Defendants.

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

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

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## Argument

### I. Because DeSousa's claim fails as a matter of law, the Court should reverse the denial of summary judgment.

Faced with the prospect of an entirely new duty constituting a dramatic expansion of liability, Iowa's residential real estate industry finds itself on the precipice of a slippery slope. This case does not involve some novel commercial arrangement or new real estate sales method. It is a classic real estate transaction between a traditional seller and traditional real estate agent. There is no duty owed under existing law and no reason why that should change.

#### A. No "reasonable juror" could find Iowa Realty owed a duty because duty is not a question of fact.

Duty is a question of law—this maxim is axiomatic.[1] Employing the classic circular-argument fallacy, DeSousa claims that the district court could not have imposed a new and unique duty because a jury had not yet found that

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[1] *E.g., Lukken v. Fleischer*, 962 N.W.2d 71, 77 (Iowa 2021); *Lewis v. Howard L. Allen Invs., Inc.*, 956 N.W.2d 489, 490 (Iowa 2021); *Est. of Gottschalk by Gottschalk v. Pomeroy Dev., Inc.*, 893 N.W.2d 579, 586 (Iowa 2017); *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 371 (Iowa 2012); *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) (citing *Shaw v. Soo Line R.R.,* 463 N.W.2d 51, 53 (Iowa 1990)); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 693 (Iowa 2009) (citing *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.,* 700 N.W.2d 333, 341 (Iowa 2005)); *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999) (citing *Burton v. Des Moines Metro. Transit Auth.,* 530 N.W.2d 696, 699 (Iowa 1995)); *Leonard v. State*, 491 N.W.2d 508, 509 (Iowa 1992) (citing *Anthony v. State,* 374 N.W.2d 662, 668 (Iowa 1985)); *Soike v. Evan Matthews & Co.*, 302 N.W.2d 841, 843–44 (Iowa 1981).

Iowa Realty owed and breached this novel duty of care. (Appellee brief, p. 12). In Iowa, a judge decides if a duty existed; a jury decides if it was breached.

"Judge and jury have separate and distinct roles" in our legal system, and a negligence claim is no exception. *State v. Longo*, 608 N.W.2d 471, 475 (Iowa 2000). "The role of the jury is to decide facts, not legal issues,"[2] while the court's role is to make legal determinations. *See Torner v. Reagen*, 437 N.W.2d 553, 554 (Iowa 1989) (stating a legal determination is "a matter to be resolved by the court rather than the jury"). DeSousa's insistence that a "reasonable juror" can determine the existence of a legal duty ignores or conflates these well-defined functions. (Appellee brief, p. 12).

In a negligence action, the threshold determination of whether a duty exists is "a question of law for the court to decide." *Morris v. Legends Fieldhouse Bar & Grill, LLC*, 958 N.W.2d 817, 822 (Iowa 2021) (citing *Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 775 (Iowa 2013)). If the court determines a duty exists, the remaining elements—breach of duty, causation, and damages—are ordinarily for the jury, as the finder of fact. *See Pitts v. Farm Bureau Life Ins. Co.,* 818 N.W.2d 91, 98 (Iowa 2012).

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[2] *United States v. Fincher*, 538 F.3d 868, 872 (8th Cir. 2008).

Again relying on circular logic, DeSousa argues that whether a duty exists turns on a "genuine issue of fact," [3] but simply put, a purely legal determination cannot also be a question of fact. And while she contends that "[n]othing in the district court's ruling could suggest that it had imposed a duty of care,"[4] to deny a summary judgment motion premised on the basis that no duty existed, the court necessarily recognized and imposed a duty—or else it improperly delegated this legal question to the finder of fact.

**B. As a matter of law, Iowa Realty owed no duty of care.**

On Iowa Realty's motion for summary judgment, there simply were no genuine issues of material fact. *See Nelson v. Lindaman*, 867 N.W.2d 1, 6 (Iowa 2015) (explaining a fact issue is "'material' only when the dispute involves facts which might affect the outcome of the suit"). As the district court observed in its initial ruling, no facts established that Iowa Realty "was in possession of the property on the date DeSousa sustained her injuries." (App. 0064-0065). The "only fact" that DeSousa attempted to rely on in contending otherwise was that "Iowa Realty was the listing agent." (App. 0064-0065).

On appeal, DeSousa contends there was "ample evidence of control exercised by Iowa Realty," but she points to only a few statements by Matthew

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[3] Appellee brief, p. 16 ("Whether Iowa Realty owed a duty of care to Amanda DeSousa is a genuine issue of fact.").
[4] Appellee brief, p. 12.

Fynaardt—none of which support her position. (Appellee Brief, p. 15.) Contrary to DeSousa's suggestions, Fynaardt did not testify that he transferred control or loaned possession to his real estate agent. Rather, his testimony established that the Fynaardts retained all of "the proverbial sticks in the bundle of property rights"[5] with respect to their home on Parkview Drive:

- the right to use and enjoy;[6]
- the right to possess and control;[7]
- the right to dispose or transfer;[8] and
- the right to exclude.[9]

In short, it is undisputed that the Fynaardts had actual ownership, possession, and control of their land. (App. 0044).

DeSousa attempts to evade these admissions by insisting that a duty arose because potential buyers' requests for showings went through Iowa

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[5] *Henderson v. United States*, 575 U.S. 622, 626 (2015).
[6] *Superior Bath House Co. v. McCarroll*, 312 U.S. 176, 180–81 (1941) ("The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership."); App. 0110 [16:11-13].
[7] *Burgess v. Leverett & Assocs.*, 105 N.W.2d 703, 706 (Iowa 1960) ("Actual possession is the type of possession or control owners ordinarily exercise in holding, managing and caring for property.") (collecting cases); App. 0044, 0110 [16:14-29].
[8] *Phillips v. Washington Legal Found.*, 524 U.S. 156, 170 (1998); *State v. Cowen*, 3 N.W.2d 176, 180 (Iowa 1942) ("Property in a thing consists not merely in its ownership and possession, but also in the unrestricted right of use, enjoyment, and disposal."); App. 0100-01 [6:13-7:4].
[9] *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (characterizing "the right to exclude" others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); *State v. Paye*, 865 N.W.2d 1, 6 (Iowa 2015); App. 0110-11 [16:20-17:2].

Realty. She offers no facts that support this contention, nor does she attempt to explain how that alone could suffice to impose liability.[10] Further, any argument that Iowa Realty owed some duty to clear snow before a showing is dispelled by Fynaardt's testimony that "[a]ny time there was any sort of snow or ice event," he "would get [his] truck ready and go over with [his] snowblower and [his] shovels" to clear the property after the "weather event had passed." (App. 0102-03 [8:19-9:4]; *see also* App. 0103-04 [9:5-13, 10:3-8], 0109-0110 [15:5-16:5]).

On Iowa Realty's motion for summary judgment, the only issue was the existence of a duty—a purely legal determination based upon the undisputed facts and the nature of the realtor-seller relationship. DeSousa relies on unsupported contentions to generate the specter of a fact issue, but her mere speculation cannot make up for the clear evidentiary shortcomings.

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[10] DeSousa cannot rely on Fynaardt's deposition, as Fynaardt testified that he had no personal knowledge as to how a potential buyer could request a showing or whether his realtor was even notified of such requests. (App. 0112-0113 [18:12-19:10]). The "basic requirement" for lay witnesses like Fynaardt "is that his testimony be founded upon personal knowledge." *Graen's Mens Wear, Inc. v. Stille-Pierce Agency*, 329 N.W.2d 295, 297 (Iowa 1983); *see* Iowa R. Evid. 5.603. Without personal knowledge, his testimony is inadmissible, and of course, inadmissible evidence cannot be used to create a fact issue that would preclude summary judgment. *Pitts*, 818 N.W.2d at 106 ("Motions for summary judgment must be decided based on admissible evidence."); *see Smith v. Kilgore*, 926 F.3d 479, 485 (8th Cir. 2019) ("'The district court must base its determination regarding the presence or absence of a material issue of factual dispute on evidence that will be admissible at trial.'").

"Summary judgment is not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a nonmoving party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 808 (Iowa 2019) (internal quotations omitted). Without any facts to warrant imposing a duty of care, DeSousa's claim against Iowa Realty should not have been allowed to survive summary judgment. *See* Iowa R. Civ. P. 1.981(5) ("If the adverse party does not so respond, summary judgment . . . shall be entered."). The district court's order to the contrary was erroneous and should be reversed.

### C. The Court should decline to dramatically expand the realm of negligence liability.

In her final brief point, DeSousa implicitly concedes that summary judgment was proper under existing law by urging this Court to create a new duty where one does not otherwise exist. In its principal brief, Iowa Realty outlined in detail why creating a broad new duty applicable to realtors would be commercially and socially unacceptable. DeSousa does not meaningfully address the merits of any of these arguments. She instead resorts to another classic logical fallacy: post hoc ergo propter hoc.[11] According to DeSousa,

[11] "After this, therefore resulting from it." *Post hoc ergo propter hoc*, Black's Law Dictionary (11th ed. 2019). "The logical fallacy of assuming that a causal relationship exists when acts or events are merely sequential." *Id.*; *Donahoe v.*

because "neither the Iowa Supreme Court nor the Iowa Court of Appeals have heard a case regarding whether a realtor could be deemed a land possessor," the numerous and costly results of creating a new duty must, somehow, be "overstated." (Appellee Brief, pp. 19-20). In other words, because reasonable persons have supposedly long presumed there is no special duty for Iowa relators (and have found no reason to create one), doing so won't have an adverse impact. Such an argument could be made about any recognized legal truism and should be rejected.

Ignoring this Court's explicit adoption of the Restatement (Third),[12] DeSousa further argues that other jurisdictions have found that a realtor can be a "land possessor" as defined by the Restatement (Second) of Torts § 328E. (Appellee brief, p. 20). As discussed in Iowa Realty's principal brief, the few courts to recognize a duty have done so only in limited circumstances when the realtor was in actual control of the premises—and often relied on a potential purchaser's status as an invitee in reaching that conclusion. *E.g., Jarr v. Seeco Const. Co.*, 666 P.2d 392, 394–95 (Wash. App. 1983); *Coughlin v. Harland L. Weaver, Inc.*, 230 P.2d 141, 143 (Cal. App. 1951). No jurisdiction has gone as far

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*Denman*, 275 N.W. 154, 157 (Iowa 1937) ("Post hoc, ergo propter hoc, has always been recognized as an outstanding fallacy in logic and cannot be recognized as a valid basis for a positive rule of law.").

[12] *See Thompson*, 774 N.W.2d at 834–36; *see also Ludman v. Davenport Assumption High Sch.*, 895 N.W.2d 902, 910 (Iowa 2017) (recognizing and adopting the rationale articulated in Restatement (Third) § 51).

as to hold that 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 v. McColly Realtors, Inc.*, 858 N.E.2d 682, 688 (Ind. Ct. App. 2006) (collecting cases); *see also* Restatement (Third) § 49.

Finally, DeSousa contends that "it strains credulity"[13] to think the facts here present an exceptional case warranting a no-duty determination. The Restatement (Third) itself refutes her attempts to minimize the broad implications of the duty she asks this Court to create. In *Hopkins*, the New Jersey Supreme Court recognized and imposed such a duty on realtors (over Justice Garibaldi's vigorous dissent)—a decision the Restatement (Third) references as an example of when a court "in some dramatic way expand[ed] the realm of negligence liability." Restatement (Third) § 13 cmt. b (citing *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1118 (N.J. 1993)).

Even within that realm of expansive liability, however, a realtor owes no duty of care to remove ice and snow from a client's property. As the New Jersey Superior Court explained in a case with virtually indistinguishable facts:

> Plaintiff argues ReMax [as the listing real estate brokerage] and the listing broker owed her a duty to protect her from the risk of harm created by the ice and snow on the property because her activities benefited them economically. This argument is unpersuasive. Plaintiff's presence on the property that day was not in response to an invitation by ReMax.
>
> . . .

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[13] Appellee brief, p. 20.

> Plaintiff also argues that ReMax'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. ReMax's relationship to the seller was defined by the terms of the listing agreement. ReMax did not agree to provide snow removal services.
>
> . . .
>
> There is no factual or legal support for imposing liability on ReMax. . . There is no legal or public policy basis to impose the property owner's common law burden to prevent this harm on ReMax.

*Tamasco v. Rodd*, No. A-1574-16T2, 2018 WL 4055919, at *4 (N.J. Super. Ct. App. Div. Aug. 27, 2018).

The same rationale is equally applicable to the facts of this case and strongly cautions against recognizing a broad new duty. There is no legal or factual support to hold Iowa Realty owed a duty of care to DeSousa, and there is no legal or public policy basis for shifting premises liability from the homeowners to realtors.

## 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.

## Certificate of compliance

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/s/ Haley Hermanson

## Certificate of cost

I, Haley Hermanson, certify that there were no costs to reproduce copies of Appellant Iowa Realty's Reply Brief because the appeal is being filed exclusively in the Appellate EDMS system.

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October 22, 2021

## Certificate of filing and service

The undersigned certifies that on October 22, 2021, a copy of this Reply was filed with the Clerk of the Iowa Supreme Court via EDMS, which will send notification of such filing to the counsel listed below:


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