IN THE SUPREME COURT OF IOWA

NO. 21-0679

AMANDA DESOUSA

Plaintiff/Appellee,

vs.

IOWA REALTY CO. INC.,

Defendant/Appellant,

and

MELISSA FYNAARDT AND MATTHEW FYNAARDT,

Defendants.

PLAINTIFF-APPELLEE FINAL BRIEF

INTERLOCUTORY APPEAL FROM THE IOWA
DISTRICT COURT FOR DALLAS COUNTY
THE HONORABLE RANDY V. HEFNER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Iowa Supreme Court Cases:

Iowa Court of Appeals Cases:

Foreign Cases:

Iowa Rules:

Other Authorities:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. DID THE DISTRICT COURT ERR IN DENYING IOWA REALTY'S MOTION FOR SUMMARY JUDGMENT?

Authorities

Anderson v. Wiegand, 567 N.W.2d 452 (Mich. Ct. App. 1997)
Atherton v. Hoenig's Grocery, 86 N.W.2d 252, 255 (Iowa 1957)
Coughlin v. Harland L. Weaver, Inc., 230 P.2d 141 (Cal. Ct. App. 1951)
Fees v. Mutual Fire & Auto. Ins. Co., 490 N.W.2d 55, 57 (Iowa 1992)
Frantz v. Knights of Columbus, 205 N.W.2d 705, 712 (Iowa 1973)
Galloway v. Bankers Trust Co., 420 N.W.2d 437, 441 (Iowa 1988)
Gries v. Ames Ecumenical Housing, Inc., 944 N.W.2d 626, 629 (Iowa 2020)
Hlubek v. Pelecky, 701 N.W.2d 93, 95-96 (Iowa 2005)
Hoffnagle v. McDonald's Corp., 522 N.W.2d 808, 813 (Iowa 1994)
Hopkins v. Fox A& Lazo Realtors, 625 A.2d 1110, 1123 (N.J. 1993)
Jarr v. Seeco Constr. Co., 666 P.2d 392 (Wash. Ct. App. 1983)
Lewis v. Howard L. Allen Invs., Inc., 956 N.W.2d 489, 492 (Iowa 2021)
Liska v. First Nat'l Bank, 310 N.W.2d 531, 534 (Iowa Ct. App. 1981)
Masick v. McColly Realtors, Inc., 858 N.E. 2d 682, 690 (Ind. Ct. App. 2006)
Matter of Estate of Henrich, 389 N.W.2d 78, 80 (Iowa Ct. App. 1986)
McIlravy v. North River Ins. Co., 653 N.W.2d 323, 328 (Iowa 2002)
McQuistion v. City of Clinton, 872 N.W.2d 817, 822 (Iowa 2015)
Phillips v. Covenant Clinic, 625 N.W.2d 714, 718 (Iowa 2001)
Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430, 434 (Iowa 2008).
Reuter v. Iowa Trust & Savings Bank, 57 N.W.2d 225 (Iowa 1953).
Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873, 875 (Iowa 1996).
Smidt v. Porter, 695 N.W.2d 9, 15 (Iowa 2005)
Smith v. Shagnasty's Inc., 688 N.W2d 67, 71 (Iowa 2004)
Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009)
Van Essen v. McCormick Enters. Co., 599 N.W.2d 716, 718 (Iowa 1999)
Walls v. Jacob N. Printing, Co., 618 N.W.2d 282, 284 (Iowa 2000)
IOWA ADMIN. CODE. R. 193E-12
IOWA R. APP. P. 6.907 (2021)
IOWA R. CIV. P. 1.981(3) (2021)
Restatement (Second) of Torts § 328E
Restatement (Third) of Torts § 51

ROUTING STATEMENT

This appeal should be routed to the Iowa Court of Appeals because it involves issues of well-settled law and no issues of first impression.

STATEMENT OF THE CASE

On July 17, 2020, Plaintiff Amanda DeSousa filed an Amended Petition and Jury Demand against Defendants Iowa Realty Co. Inc., and Matthew and Melissa Fynaardt stemming from injuries she sustained in the driveway of a residential property located at 270 Parkview Drive, Waukee, Iowa 50263 (hereinafter "Parkview property"). (App. 0005). Against all defendants, she asserted a single negligence claim sounding in premises liability. (App. 0006).

On January 4, 2021, Iowa Realty moved for summary judgment, arguing that because it did not control the Parkview property and it owed the Plaintiff no duty of care. (App. 0014). In her resistance, DeSousa claimed that there was a genuine issue of material fact as to whether Iowa Realty exercised control over the Parkview property and could be considered a "land possessor" pursuant to Iowa premises liability law. (App. 0036). On February 11, 2021, the District Court deferred it's ruling on Iowa Realty's motion for summary judgment and ordered the parties to submit supplemental briefs by March 5, 2021. (App. 0067).

Each party submitted supplemental briefs and additional evidentiary documents, including a deposition transcript of Defendant Matthew Fynaardt taken on February 18, 2021. After considering the parties supplemental briefs, the District Court denied Iowa Realty's motion for summary judgment. (App. 0119). Iowa Realty submitted an application for interlocutory appeal, and on June 11, 2021, the application was granted.

STATEMENT OF FACTS

Matthew and Melissa Fynaardt listed their residential property located in Waukee, Iowa for sale and hired Iowa Realty to assist them in their endeavor. (App. 0006). By December 28, 2018, the Fynaardts had moved out of the Parkview Property and were residing at 12624 Horton Avenue in Urbandale, Iowa. (App. 0036). Iowa Realty, on behalf of the Fynaardts, were inviting potential homebuyers onto the Parkview Property so they could view the same. (App. 0006).

On December 28, 2018, Amanda DeSousa and her partner traveled Waukee, Iowa to view the Fynaardts' home. (App. 0005). Upon arriving, DeSousa and her partner parked in the driveway of the Parkview property. (App. 0006). Immediately upon stepping out of the vehicle, DeSousa fell on the ice-covered driveway, landing on her back and striking the back of her

head on the running board of her truck. (App. 0006). As a result of her fall, DeSousa sustained personal injuries. (App. 0006).

ARGUMENT

1. DID THE DISTRICT COURT ERR IN DENYING IOWA REALTY'S MOTION FOR SUMMARY JUDGMENT?

I. PRESERVATION OF ERROR

The matters at issue in this appeal were timely appealed.

II. STANDARD AND SCOPE OF REVIEW

A motion for summary judgment is appropriate and should be granted when "the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." IOWA R. CIV. P. 1.981(3) (2021). "An issue of fact is 'material' only when the dispute is over facts that might affect the outcome of the suit, given the applicable law." *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992). The moving party carries the burden of proving the absence of a material fact issue. *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002) (internal citations omitted). The facts must be viewed in the light most favorable to the non-moving party. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95-96 (Iowa 2005) (internal citations omitted). Thus, the Court considers "on behalf of the non-moving party every

legitimate inference that can be reasonably deduced from the record." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 718 (Iowa 2001) (internal citations omitted). "An inference is legitimate if it is 'rational, reasonable, and otherwise permissible under the governing substantive law.'" *Smith v. Shagnasty's Inc.*, 688 N.W2d 67, 71 (Iowa 2004) (quoting *McIlravy*, 653 N.W.2d at 328). "If reasonable minds could differ on how to resolve an issue, then a genuine issue of material fact exists." *Id*.

An Appellate Court reviews a district court summary judgment ruling for corrections of errors at law. IOWA R. APP. P. 6.907 (2021); *see also e.g., Phillips*, 625 N.W.2d at 717. The Court would review "whether a genuine issue of material fact exists and whether the district court correctly applied the law." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008) (internal citations omitted). To survive a motion for summary judgment, sufficient facts must be in the record to support the claims that a reasonable fact finder could find in the nonmoving party's favor. *McQuistion v. City of Clinton*, 872 N.W.2d 817, 822 (Iowa 2015) (citing *Smidt v. Porter*, 695 N.W.2d 9, 15 (Iowa 2005)). "[T]he resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact." *Matter of Estate of Henrich*, 389 N.W.2d 78,80 (Iowa Ct. App. 1986) (citing *Liska v. First Nat'l Bank*, 310 N.W.2d 531, 534 (Iowa Ct.

App. 1981)). However, *speculations and mere allegations* are not material facts. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95-96 (Iowa 2005) (internal citations omitted) (emphasis added). "[T]he proof in any case must be such that the fact finder is not left to speculate . . . ." *Walls v. Jacob N. Printing, Co.*, 618 N.W.2d 282, 284 (Iowa 2000).

III. THE DISTRICT COURT DID NOT ERR IN DENYING IOWA REALTY'S MOTION FOR SUMMARY JUDGMENT

A. The District Court did not impose a duty of care on the Appellant.

In their statement of issues presented for review, the Appellant contends, "that the District Court found the fact that an Iowa Realty agent listed the house for sale, standing alone, was sufficient to give rise to a duty of care." (Appellant's Proof Brief, p. 6). This is plainly not true. In the ruling denying summary judgment, the District Court stated:

> A reasonable juror could find that the Fynaardt's were unaware that the property was being shown to prospective buyers on that day, that Iowa Realty knew or should have known that the exterior walkways or driveway were slick, and that Iowa Realty should have exercised reasonable care to ensure they were safe.

(App. 0119). Nothing in the District Court's ruling could suggest that it had imposed a duty of reasonable care on the Appellant, only that a reasonable fact finder could find that one may have existed.

B. Whether Iowa Realty exercised the requisite control to be deemed a possessor of land is a genuine issue of material fact.

When determining premises liability under Iowa law, a party cannot be held responsible for injuries sustained on a property they did not possess or control. Whether a party is liable to another for violating a duty of care to his invitees depends on whether they are deemed to be a "possessor of land." If an individual is not a possessor of land, there can be no liability. *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 813 (Iowa 1994). Iowa has adopted the definition of "possessor" contained in section 328E of Restatement (Second) of Torts. This section of the Restatement provides:

> A possessor of land is a person who is in occupation of the land with intent to control it; or a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it; or a person who is entitled to immediate occupation of the land, if no other person is in possession under clauses (a) and (b).

Restatement (Second) of Torts § 328E. In Iowa, the status of a possessor of land is determined by the amount of control exercised over the property in question. *Van Essen v. McCormick Enters. Co.,* 599 N.W.2d 716, 718 (Iowa 1999). A party with no possession or control of the property owes no duty of care to maintain the property. *Lewis v. Howard L. Allen Invs., Inc.*, 956 N.W.2d 489, 492 (Iowa 2021). There must be evidence that a party exercised "substantial control" of the premises to give rise to a duty of care.

Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873, 875 (Iowa 1996). However, "mere ownership" alone is not sufficient to establish occupation and control of the premises. *Van Essen*, 599 N.W.2d at 718. Indeed, Iowa has recognized that the owner of land may in some situations loan its possession to another, thus rendering the other party the possessor. *Galloway v. Bankers Trust Co.,* 420 N.W.2d 437, 441 (Iowa 1988).

Iowa Realty is adamant that it is undisputed that it did not control the Parkview Property. The Appellant contends that the Fynaardts retained exclusive control over the property and DeSousa could offer no facts that could support a finding it was a possessor of land pursuant to Iowa law. (Appellant's Proof Brief, pg. 18). Iowa Realty further alleges that their agent simply listed the property for sale and that is the entire extent of its involvement. (*See generally* Appellant's Proof Brief). However, Appellant's assertions are not supported by any evidence currently contained in the record. On the contrary, in her Supplemental Brief Amanda DeSousa provided ample evidence of control exercised by Iowa Realty via the deposition of Matthew Fynaardt, taken February 11, 2021. In his deposition, Mr. Fynaardt testified that on the date of DeSousa's injury, he and his spouse were living in Urbandale, not at the Parkview Property. (App. 0101). If a potential buyer wanted to look at the Waukee property, this request

would go through Mr. Joel Goetsch at Iowa Realty. (App. 0102). If Mr. Fynaardt believed there would be snow or ice on the Parkview property, he would drive over with his snow-clearing equipment "after the event was done." (App. 0105). Mr. Fynaardt testified that it was his understanding that Mr. Goetsch would prepare the property if there was a showing "and make sure it was ready for whoever was to come." (App. 0105). Mr. Fynaardt further testified that this was his "understanding" due to the fact that "I didn't know when showings were going to be occurring." (App. 0106). And Mr. Fynaardt believed Mr. Goetsch would handle any snow or ice present on the exterior walkways of the house prior to a showing. (App. 0106).

The District Court clearly considered the evidence put forth by Amanda DeSousa in her Supplemental Brief pursuant to the Iowa Rules of Civil Procedure when it determined that a genuine issue of material fact exists in this proceeding. (*See generally* App. 0119). Iowa Realty's characterization that there are no facts that could support a ruling that it exercised at least some control over the Parkview property is not accurate. The District Court appropriately ruled that whether Iowa Realty exercised control substantial enough to give rise to a duty of care is a question to be answered by a jury.

C. Whether Iowa Realty owed a duty of care to Amanda DeSousa is a genuine issue of material fact.

Generally, an actor as a "duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009). The Appellant argues that DeSousa's injuries resulted from risks arising from natural conditions, not any act or omission by Iowa Realty, and thus it owed no duty of care to DeSousa under ordinary tort principles. (Appellant's Proof Brief, p. 15). The Iowa Supreme Court has recognized that a land possessor owes a duty of reasonable care to entrants on the land with regard to natural conditions on the land that pose risks to entrants on the land. *Gries v. Ames Ecumenical Housing, Inc.,* 944 N.W.2d 626, 629 (Iowa 2020)(quoting Restatement (Third) § 51(c) at 242). Indeed, it is longstanding Iowa law that a possessor of land has a duty to protect entrants against the hazards of natural accumulations of ice and snow. *Frantz v. Knights of Columbus*, 205 N.W.2d 705, 712 (Iowa 1973).

The Appellant does not allege that the District Court erred in denying its motion for summary judgment because the hazards caused Amanda DeSousa's injuries were open and obvious,[1] nor does it seek to avail itself of

[1] There is no liability for injuries from dangers that are obvious, reasonably apparent, or as well known to the person injured as they are to the owner. *Atherton v. Hoenig's Grocery,* 86 N.W.2d 252, 255 (Iowa 1957).

protection from liability by way of the continuing storm doctrine.[2] Iowa Realty argues only that it owes no duty of care because it lacked any control of the Parkview property. Thus, it would stand to reason that if there is a genuine issue of material fact as to whether Iowa Realty exercised sufficient control to be deemed a possessor of land, there is a genuine issue of material fact as to whether it owed Amanda DeSousa a duty of care. The District Court was correct in ruling the same.

IV. THE COURT SHOULD HOLD REALTOR'S TO THE SAME STANDARD OF CARE AS EVERY POSSESSOR OF LAND

Iowa Realty contends that the incident that occurred on December 28, 2020 qualifies as an "exceptional case" where this Court should decide as a matter of law that an ordinary duty of reasonable care should not apply to residential realtors in the state of Iowa. To support its claim, Iowa Realty cites a dissenting opinion from the New Jersey Supreme Court. In his dissent, Justice Garibaldi states:

> How can a broker know what constitutes a "dangerous condition?" If a jury can find that a step "camouflaged" with

[2] A business establishment, landlord, carrier, or other inviter, in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps. The general controlling principle is that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action, and that ordinary care does not require it. *Reuter v. Iowa Trust & Savings Bank*, 57 N.W.2d 225 (Iowa 1953).

> 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 v. Fox A& Lazo Realtors, 625 A.2d 1110, 1123 (N.J. 1993)(Garibaldi, J., dissenting)(internal citations and alterations omitted). It must be stated that Amanda DeSousa's injuries were not the result of a "camouflaged step" or an "errant skateboard." DeSousa's injuries were the result of natural accumulations of ice and snow. No expertise in home inspection or home repair was required to make the premises safe from harm. Indeed, Iowa law already exempts realtors from a duty to conduct independent home inspections of a property for the benefit of a buyer or tenant. *See* Iowa Admin. Code. R. 193E-12.3(2)(a). As such, requiring a realtor who has exercised sufficient control over a property they have listed for sale to exercise the same standard of reasonable care as any other land possessor could not be seen as imposing a duty that is "expansive,

ambiguous, and vague." (Appellant's Proof Brief, p. 27)(citing *Masick v. McColly Realtors, Inc.,* 858 N.E. 2d 682, 690 (Ind. Ct. App. 2006)).

Iowa Realty further alleges that imposing an ordinary duty of reasonable care on land possessors to make safe hazardous accumulations of ice and snow would have deleterious effects on the housing market. (Appellant's Proof Brief, p.27). Appellant claims such a duty would add costs, complexity, and confusion to the marketplace. That prospective homebuyers would be deterred by anxious realtors, that the process to sell a home would be considerably more difficult, and finally, that it would result in increased litigation in our courts. (Appellant's Proof Brief, p. 30-31). The fact that 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 would suggest that the potential for increased litigation is overstated. And while the Iowa Courts have yet to rule directly on the issue, other jurisdictions who have similarly adopted the Section 328E of Restatement of (Second) Torts' definition of 'possessor of land' have. See *Jarr v. Seeco Constr. Co.,* 666 P.2d 392 (Wash. Ct. App. 1983) (real estate agent who is in complete charge of premises for the purposes of showing it to prospective purchasers and who is responsible for controlling such purchasers on the premises has the same duty of care to the purchasers as the

owner); *Anderson v. Wiegand*, 567 N.W.2d 452 (Mich. Ct. App. 1997) (real estate agent was in control of the property at the time of an open house); *Coughlin v. Harland L. Weaver, Inc.*, 230 P.2d 141 (Cal. Ct. App. 1951) (evidence was sufficient to establish that seller's agent, who was showing premises when plaintiff was injured, was a possessor for purposes of premises liability). There is no evidence to suggest that the real estate industry in these states have been dramatically altered. Thus, it strains credulity to believe that the issue presented to this Court on appeal would qualify as an "exceptional case," and Iowa Courts have held that only in exceptional cases should a general duty to exercise reasonable care be set aside or altered. *Thompson*, 774.N.W.2d at 835.

CONCLUSION

It is not controversial that a residential property left in an unsafe condition may cause harm to others. For that very reason, Iowa law has long held that a land possessor owes a duty of care to protect entrants on the land from unreasonable risk of injury. There is no compelling policy reason or principle set forth as to why Iowa Realty and its agents should be exempt from that general duty of care owed by land possessors. Further, whether Iowa Realty exercised substantial control over the Parkview property they had listed for sale on behalf of the Fynaardts is a genuine issue of material

fact. For the foregoing reasons, Amanda DeSousa respectfully requests the Court affirm the district court's denial of summary judgment, and for such other and further relief deemed appropriate under the circumstances.

APPLICATION FOR APPELLATE ATTORNEY FEES

The Appellee applies for attorney fees in this appeal. A detailed application with an itemized statement for attorney fees of Appellee in this appeal will be filed when all of the briefs are completed.

ORAL ARGUMENT

Appellee believes this Court has enough information in front of it to make a legitimate finding and that oral arguments may not be beneficial when compared to time, resources, and cost. With that being said, if the court believes oral arguments would be beneficial and provide some clarity to either parties' arguments, then Appellees would have no objection.

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CERTIFICATE OF FILING AND SERVICE

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

1. This brief complies with the type volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 4,500 words.
2. This brief complies with the type face requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

CERTIFICATE OF COSTS

The undersigned hereby certifies that the cost of printing the Final Brief of the Appellees was $0.00.

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