

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

08.07.12

## Buyer's Real Estate Agent Owes No Duty Of Care To Buyer For Condition of Premises

By Drew Broaddus

It is well established that the first thing a plaintiff must prove, in order to proceed with a negligence claim, is duty. As our Supreme Court noted in *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004), “[i]t is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.” Duty requires a defendant to conform to a specific standard of conduct in order to protect others against unreasonable risks of harm. In the premises liability context, duty “is conditioned upon the presence of both possession and control over the land.” *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660 (1998). Outside of the premises liability context, courts determine whether there is a duty based upon several common-law factors, the most important being the relationship between the parties. *In re Certified Question*, 479 Mich 498, 504-505 (2007).

In *Davies v Johnson and Greenridge Realty*, released July 19, 2012, Case No. 304944, the Michigan Court of Appeals was confronted with the novel question of whether a real estate agent owed a duty to a prospective buyer, when the prospective buyer tripped and fell while the agent was showing him a house. The Court of Appeals, in an unpublished opinion, answered: no.

The incident that gave rise to the *Davies* suit occurred on February 5, 2008. Defendant Johnson, a licensed realtor, was showing a home to Plaintiff and his wife. Plaintiff had previously entered into an exclusive buyer agency contract with Johnson's employer, Greenridge Realty. The home that Johnson was showing to Plaintiff did not have heat or electricity. Johnson informed Plaintiff of this before they entered the home. Plaintiff's accident occurred in the lower level of the home, in an area that was described as a garage. Although Johnson had previously shown the home to Plaintiff, Johnson did not enter the garage. Unaccompanied by Johnson, Plaintiff opened the door to the garage, and noticed that it was very dark. Using only a cellular telephone and a cigarette lighter to illuminate the area, Plaintiff entered the garage. Unknown to Plaintiff or to Johnson, the garage floor was uneven and there was a four-foot drop-off. Plaintiff stepped over the edge and fell onto what he believed were buckets or paint cans on the cement floor, suffering fractures to his ankle, wrist, and elbow.

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*Davies* underscores that in any negligence action, the first question asked should be whether defendant owed a legal duty to plaintiff.

Duty in the premises liability context is premised upon ownership, possession, or control. If a particular defendant did not own, possess, or have control over the premises at the time of the plaintiff's injury, there is no tort duty and in turn, no tort claim.

It is not uncommon for plaintiffs to allege premises liability theories simply because the injury arose out of a defective condition of the land, without regard to whether a particular defendant had ownership, possession, or control.

The fact that defendant was the *buyer's* agent was clearly important to the *Davies* panel. The court noted that “[u]nlike seller's agents, buyer's agents have no control of the premises and have limited access.” It is unclear whether the result would have been different for a *seller's* agent. The case law from outside of Michigan pointed in opposite directions on this issue.

## CONTINUED...

Plaintiff filed suit against, among others, his real estate agent (Johnson) and Johnson's employer (Greenridge Realty). Plaintiff alleged that the real estate agent and the agency "owed Plaintiff Davies the duty to know enough about the condition of the premises in order to warn Plaintiff Davies of the drop-off which was part of the basement floor." Plaintiff further alleged that the agent "should have informed herself of the conditions of the premises before showing Davies through the house." The trial court granted the dispositive motion of Johnson and Johnson's employer, citing the lack of a duty owed.

The Court of Appeals affirmed, rejecting Plaintiff's argument that premises liability concepts should apply. The panel noted: "Michigan law distinguishes between claims sounding in ordinary negligence and claims based on premises liability. ... An action sounds in premises liability when the injury is the result of a condition of the land rather than an activity that created the condition." In this case, Plaintiff sought damages "for the injuries he sustained as a result of falling on the uneven concrete floor, which is clearly a condition of the land." Because Plaintiff did not allege that the real agent or the agency did anything to *create* the dangerous condition, the claim was analyzed under the premises liability rubric.

The panel then noted that "[i]n a premises liability case, like any negligence case, plaintiff must show duty, breach, causation, and damages." Duty, in the premises liability context, is premised upon the defendants being "[o]wners and occupiers of property," or otherwise having some type of control over it. In this case, it was clear that neither the real estate agent, nor the agency, owned the property on which plaintiff was injured. Further, defendants could not "reasonably be considered occupants of the property because defendants, as the buyer's agents, were granted access to the property for the limited purpose of showing it to plaintiff, a potential buyer. There is no evidence in the record that suggests defendants had any control over the premises."

Although Plaintiff had also argued that a special duty arose from this relationship, the panel noted a lack of case law "to support [the] claim that a buyer's agent has a duty to pre-inspect property before showing it to a potential buyer and to warn of any discovered dangers." Although some jurisdictions had imposed a similar duty on a seller's agent, the panel found these cases to be distinguishable because "[i]n those cases, the reason for imposing such a duty is based on the theory that the seller's agent is in possession of the property which she or he has undertaken to sell."

Judges Hoekstra and Whitbeck comprised the Court of Appeals majority. Judge Shapiro concurred in the result only.

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