

BUYER'S AGENT'S LIABILITY FOR SAFETY OF BUYER-CLIENT

I. INTRODUCTION

There is a case currently pending in the Michigan Court of Appeals that is significant for any Michigan REALTOR® who ever represents buyers. In that case, a buyer who was injured during a showing asserted that his buyer's broker and agent are responsible for those injuries. The claim is that, prior to any showing, a buyer's agent owes a duty to inspect the home and discover any defects or dangerous conditions.

II. DISCUSSION

The events giving rise to this lawsuit occurred at a house located on Gun Lake in Barry County, Michigan (the "Property"). In 2007, the Property was listed for sale with Defendant, Listing Broker ("Listing Broker"). In July 2007, Davies entered into an Exclusive Buyer Agency Contract with Defendant, Buyer's Broker ("Buyer's Broker").

On February 4, 2008, Davies viewed the Property. Prior to the viewing, Davies was made aware that the home had no heat or electricity. While touring the home, Davies opened a door to a dark room. No one knew what was inside the room. Davies walked into the room and tried to light the room using a cell phone and a cigarette lighter. Davies could not see what he was walking on and, a few steps in, walked off a 3 to 4-foot ledge into a boat dock well. Davies was subsequently treated for a sprained right ankle and a fracture to his left elbow.

Davies sued the Property owners, the Listing Broker and its agent, as well as the Buyer's Broker and its agent. The two claims against the real estate licensees were for

ordinary negligence and premises liability. The Circuit Court granted summary disposition in favor of the Buyer's Broker and its Agent as to both negligence and premises liability, ruling that these defendants owed no duty to Davies as a matter of law, stating:

With respect to [the buyer's broker and its agent], I really don't think there is any duty beyond the duty of-general duty of due care, and I don't see how that was breached in this case. So-so there-there's no special relationship, and therefore there is no duty to warn. There is no duty to warn about a condition you don't know about. I don't think there was any duty to pre-inspect the property. I do think that [the buyer's agent and her broker] had temporary possession and control of the premises. But the-the condition, a dark room, which might have a hidden condition that would be dangerous, is open and obvious. And so I'm going to grant the Defendants' motion for summary disposition.

I'm very sorry, Mr. Davies, that you got injured. I really think that you're the person primarily responsible for your own injuries.

Davies has appealed this decision, claiming that the Buyer's Broker had two legal duties: (1) a duty to discover all conditions of the Property; and (2) a duty to warn Davies about all conditions of the Property (including the boat well in the dark room).

A. Michigan Statutory Law

The Michigan Legislature has already addressed and defined the duties of a buyer's agent. Those duties do not include a duty of inspection, examination and a determination of the physical condition of real estate. The "Agency Disclosure Law," MCL 339.2517, as amended, resulted in a form which must be provided to members of the public when selling or acquiring residential real estate entitled, "Disclosure Regarding Real Estate Agency

Relationships” (the “Agency Disclosure Law”). In the Agency Disclosure Law, the Legislature statutorily defined the duties of buyer’s agents as follows:

An agent providing services under any service provision agreement owes, at a minimum, the following duties to the client:

- (a) The exercise of reasonable care and skill in representing the client and carrying out responsibilities of the agency relationship.
- (b) The performance of the terms of the service provision agreement.
- (c) Loyalty to the interest of the client.
- (d) Compliance with the laws, rules, and regulations of this state and any applicable federal statutes or regulations.
- (e) Referral of the client to other licensed professionals for expert advice related to material matters that are not within the expertise of the licensed agent.
- (f) An accounting in a timely manner of all money and property received by the agent in which the client has or may have an interest.
- (g) Confidentiality of all information obtained within the course of the agency relationship, unless disclosed with the client’s permission or as provided by law, including the duty not to disclose confidential information to any licensee who is not an agent of the client.

MCL 339.2517. These defined duties for buyer’s agents obviously do not include the physical examination or inspection of real estate to determine its physical condition, including matters which may involve the safety of buyers.

Moreover, the Michigan Legislature has already placed the responsibility for disclosure of the condition of residential real estate upon a single party, *i.e.*, the sellers. As REALTORS® are very aware, at the time sellers place their home on the market, they are required to complete a statutorily required Sellers' Disclosure Statement in which they are required to report all known conditions affecting the property. MCL 565.95. The sellers expressly authorize their agent, *i.e.*, the listing agent, to provide the Sellers' Disclosure Statement to all potential buyers and their agents. MCL 565.95. Accordingly, any defects in the property which a buyer's agent could discover upon inspection should already have been disclosed by the sellers at the time the property is listed for sale.

B. Michigan Case Law

Under Michigan law, there has been only one situation in which REALTORS⁷ have been found to have a duty to discover dangerous conditions – when holding an open house during which time the property is open to all members of the public and the REALTOR⁷ has exclusive possession and control of the property. Specifically, in *Anderson v Wiegand*, 223 Mich App 549 (1997), the listing REALTOR⁷ was going to hold an open house on a Sunday. It snowed on Saturday night. The sellers cleared the snow from the sidewalk and driveway and then, acting under instructions from the REALTOR⁷, left town on Sunday. It was warm on Sunday morning and there was a slight thaw. As the day progressed, it became colder. The thawed areas that were in shade turned to ice. A person attending the open house was walking up the driveway and slipped and fell on the ice.

This Court in *Anderson* found that the sellers/property owners had surrendered exclusive possession and control of the house to their listing agent for the entire duration of the open house, as a consequence of which, the listing agent essentially assumed the duty of the sellers/property owners to members of the public to “take reasonable steps within a reasonable time to diminish the hazard of injury after an accumulation of ice and snow.” Whether the listing agent had “taken reasonable steps” was determined to be a question for the jury.

Obviously, in the current case, the Buyer’s Broker did not have control over the Property. A buyer’s agent’s only authority to enter and show homes to the clients is through the listing agreement between the sellers and the listing REALTOR⁷. In the listing agreement, the sellers/property owners authorize the listing REALTOR⁷ to allow buyer’s agents to enter and show the home. Therefore, a buyer’s agent’s access to the home is limited to isolated instances. Listing agreements do not authorize the “pre-inspection” of the home by buyer’s agents prior to showing the home to their clients. In most instances, buyer’s agents are viewing a property for the first time when showing it to their clients. Accordingly, and quite simply, buyer’s agents are never given “exclusive” control and possession of the properties which they show.

C. Out-of-State Case Law

In a case in which the facts are eerily similar to the facts in the current Michigan case, the United States District Court for the Southern District of Indiana granted summary judgment in favor of all REALTOR⁷ defendants (listing and buyer’s brokers and agents) on

plaintiff=s negligence and loss of consortium claims. *Campbell v Federal Home Loan Mortgage Corp*, 2009 WL 395207, unpublished opinion of the U.S. District Court, S.D. Indiana, entered February 13, 2009. In *Campbell*, plaintiff was the potential purchaser of a house listed for sale with Eagle Real Estate. Campbell contacted her buyer’s agent, Teresa Mumford (“Mumford”), and asked Mumford to show her the house. As Campbell was looking around the home, she opened a narrow door near the kitchen which she believed was a pantry. She felt for a light switch, but did not find one. She leaned forward and reached out, thinking she would find a pull-string. She lost her balance and fell down an unlit stairway. Apparently, there was a light switch on the wall at the top of the stairs, but it was not functioning. Campbell’s husband testified that, from the top of the stairs, you could not see the first step of the stairway without illumination provided by his cigarette lighter.

The federal court applied Indiana law, finding that real estate agents who do not control the premises have no duty to inspect properties for sale and to warn prospective buyers of dangerous conditions they discover. In finding in favor of the REALTOR⁷ defendants, the Court found significant that:

1. “Campbell opened a closed door and was confronted with pitch black darkness, without any knowledge of what the darkness contained”; and
2. “[Campbell] leaned into that darkness, lost her balance, and fell.”

Another good example of the law on this subject is a recent decision rendered in Delaware – *Johnson v Chupp*, 2003 WL 292168, unpublished opinion of the Delaware Superior Court, entered February 11, 2003. The Johnsons were purchasing an undeveloped

parcel of land owned by defendant, Andrew Chupp. The property was approximately 1.3 acres in size. There was no question that the property was unkempt and overgrown and had a dilapidated structure on it. The Johnsons' agent, defendant REALTOR⁷ Scott Venables, was walking the property with the Johnsons. Unfortunately, while they were walking the property, Mrs. Johnson fell partly into an open, unmarked well which was hidden by the underbrush. In addition, Mr. Johnson contended that he was holding hands with Mrs. Johnson at the time of the fall; thus, he was also injured. The Johnsons sought damages for physical injuries, pain and suffering, loss of enjoyment of life, medical and travel expenses, and loss of consortium.

The Delaware court summarily dismissed the Johnsons' claims. The Delaware court accepted the fact that there was no dispute that the property was overgrown with weeds and was generally unkempt. However, the Delaware court refused to find that a buyer's agent has a duty to inspect property or to warn prospective buyers of any dangers on the property. More specifically, the Delaware court found that, while it was true that buyer's agents owe certain duties to their buyer clients, such as the duty of full disclosure of all material facts, these duties do not include a duty to buyers regarding dangerous conditions on a seller's property. The court found that the buyer's agent had no more control over the property and its condition than the buyers, themselves.

III. CONCLUSION

There is no basis in Michigan law (or elsewhere) supporting the position that prior to a showing, a buyer's broker has a duty to inspect a home for safety or to warn buyers of any

Michigan Realtors®
April 2012

damages. The practical problems raised if such a duty was imposed would be significant.

Accordingly, MAR has filed an amicus brief in support of the buyer's broker in the Davies case currently pending in the Court of Appeals and we hope to be able to report very shortly that there has been a positive decision in this case.