

# ‘Open House’ of Horrors? Analyzing the Broker’s ‘Broken Step’ Obligation

Answering questions that have surfaced regarding realtors’ liability for injuries caused by dangerous conditions on properties listed for sale.

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In New Jersey, there was a flood of foreclosure filings after the foreclosure moratorium was lifted by Governor Christie in September of 2011. Some of these foreclosure properties were listed for sale by banks, private sellers and agents, and many contained defects and potential dangerous conditions. As a result, questions have surfaced regarding realtors’ liability for injuries caused by dangerous conditions on properties listed for sale.

A realtor’s obligation to exercise reasonable care with respect to a property listed for sale was first addressed by the New Jersey Supreme Court over 20 years ago in *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426 (1993). In *Hopkins*, the plaintiff tripped and fell on a camouflaged step during an open house. She sued the listing broker who hosted the open house, alleging it had a duty to warn her of any known risks inside the house. The court held the real estate broker had a duty to exercise reasonable care to protect the safety of prospective home buyers and visitors touring the “open house.” But the duty is limited.

A realtor has both a duty to inspect a property it is showing for purposes of potential sale and to warn of any reasonably discoverable physical conditions of the property that pose a foreseeable hazard to such visitors—if such an inspection would be consistent with the customary responsibilities and functions of realtors conducting an open house. The inspection should involve an examination of the premises to ascertain the obvious physical characteristics that are material to its salability, as well as those features that a prospective purchaser would routinely examine during a walk-through of the property. The broker is not obligated to inspect for latent defects, unless an inspection for such defects is part of the professional services undertaken by a reasonable broker in attempting to sell a house on behalf of its homeowner, and when having the opportunity to inspect. Likewise, a broker does not have to warn of latent conditions, unless it has actual knowledge of those concealed conditions or hidden defects.

Because the *Hopkins* court strongly emphasized the limits of the realtors’ duty

of care, it was unclear whether the holding was limited to the specific context of the open house. The ambiguity was also a result of the fact that the New Jersey Supreme Court changed the test for determining the existence and scope of a duty of care in premises liability cases. The court did away with assessing a property owner/possessor's duty of care under traditional land occupier classifications of invitee, licensee and trespasser, in favor of a multi-factor analysis which applies general principles of tort liability to determine whether the imposition of a duty comports with traditional notions of fundamental fairness. Courts must identify and weigh "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care and the public interest in the proposed solution" to determine whether "in light of the actual relationship of the parties under all of the surrounding circumstances, the imposition of a general duty to exercise reasonable care in preventing foreseeable harm is fair and just." *Olivo v. Owens-Illinois*, 186 N.J. 394, 401 (2006) (citing *Hopkins*, 132 N.J. at 439). Given this flexible, fact-specific approach, *Hopkins* can be read to expand the scope of liability for realtors outside of the context of the open house.

The *Hopkins* court explained it is the broker-customer relationship that gives rise to a duty of care in the context of an open house. During the open house, the hosting broker essentially used the listed property as its place of business. The broker derived an economic benefit from the prospective buyers' and visitors' presence on the property. The broker was there to offer his professional services regarding his knowledge of the physical features of the premises and factors affecting sale and

marketability. Therefore, the court held it was fair to impose a duty on the listing broker because it was reasonable for the prospective buyers to rely on the broker's knowledge regarding the property, it was foreseeable that open house visitors would be injured by dangerous conditions while wandering through an open house, and the broker had the opportunity and ability to exercise reasonable care with respect to the foreseeable hazards.

Since *Hopkins*, only one other published decision has addressed a realtor's duty to exercise reasonable care, and that is *Reyes v. Enger*, 404 N.J. Super. 433, 437 (App. Div. 2009), *aff'd*, 201 N.J. 417, 420 (2010). In *Reyes*, the court considered whether under *Hopkins* the listing broker of a short-term summer rental owed a duty of care to a visitor of the tenant who was injured on a single step down, eight days after taking possession of the beach house. At the time of the plaintiff's incident, the broker was not conducting a showing of the property for purposes of facilitating a sale, nor was the broker present at the time of the incident. In refusing to impose a duty of care on the listing broker who facilitated the two-week lease, the court clarified the *Reyes* holding was not to be interpreted as limiting *Hopkins* to the factual context of an open house; rather, the facts of *Reyes* simply did not support the extension of *Hopkins* and the imposition of a duty of care.

Consistent with *Reyes*, in two recent unpublished decisions, the Appellate Division refused to impose a duty of care on a listing broker to inspect and warn of physical conditions on the property when the realtor was neither conducting a showing nor present on the property for

purposes of facilitating a sale at the time of the alleged incident. *Ward v. Ochoa*, 2018 N.J. Super.; *Tomasco v. Rodd*, 2018 N.J. Super. In both cases, the court held the relationship of the parties did not support imposing a duty because the plaintiff's presence on the property was for a purpose other than the listing realtor's own benefit.

However, since *Reyes*, New Jersey courts have extended a realtor's duty under *Hopkins* to the context of an individual private showing in three unpublished decisions. *Byer v. Prudential Fox & Roach*, 2008 N.J. Super.; *Donlon v. Gluck Group*, 2011; *Francione v. Wells Fargo Bank, N.A.*, 2015. The courts held that showing agents, both buyer and seller agents, have a duty to ensure—through inspection and warning—the safety of prospective purchasers during private individual showings, once on the premises, even if the agent lacks previous familiarity with the actual features of the property. For reasons similar to *Hopkins*, the court held it was fair to impose a duty on the listing agent showing a property. With respect to the buyer's agent, the court held it was fair to impose a duty on the showing agent because she selected the properties according to the plaintiff's specifications, and it was foreseeable to her that the plaintiff could be injured on a condition of the property in light of plaintiff's known physical limitations. Nonetheless, some may argue it is unreasonable for a buyer's agent to inspect a home when the agent is not tasked with marketing the home to potential buyers on behalf of the homeowner.

Due to the potential for a broad application under the *Hopkins* multi-factor test, presently the law remains unsettled regarding whether a realtor who derives an

economic benefit from a plaintiff's presence on the property, but is not in actual possession of the property at the time of the alleged incident, has a duty to ensure the safety of those prospective purchasers and/or visitors. It may be the case that because the listing broker is not in actual possession of the property at the time of the alleged incident, that he or she is not in the best position to exercise care to prevent the risk of harm, such that it would be unreasonable to impose a duty of care on him or her. Ultimately, the New Jersey Supreme Court advised that "premises liability law can, and should, develop in a manner consistent with its fundamental purposes to deter conduct that creates an unreasonable risk of injuries to others." Thus, to the extent that imposing a duty on the realtor would not deter the number of preventable accidents, New Jersey courts may be hesitant to extend the *Hopkins* duty of care.

This unsettled legal environment puts realtors in the role of risk managers. Listing brokers should be sure to communicate with buyers' agents with regard to any possible physical conditions of a property which may pose a hazard to prospective purchasers when touring the house (such as inconspicuous single-steps down). To reduce liability, realtors (both listing and showing agents) should perform an inspection of physical conditions affecting the salability of a property as well as those characteristics that the broker could reasonably expect the prospective purchaser to examine. Prospective purchasers and visitors should be warned of any dangerous conditions which may be potentially hazardous to them. These may include, staircases, handrails, height

differentials, water damage, uncovered electrical wiring, etc.

Perhaps more importantly, when assessing whether a physical condition may be hazardous, a buyer's agent should consider the physical limitations of their client. The more foreseeable it is to the realtor that one visiting the property could be injured as a result of the condition, the more likely it is the court will find the realtor owed a duty of care. As such, if a client is wheelchair-bound or of limited mobility, the broker should check for height differentials between rooms and warn of any conditions which the broker believes may cause injury to the client. The realtor's inspection of the property should be limited and consistent with the functions and responsibilities of a reasonable broker. Depending on the facts of a case, expert testimony may be needed to prove whether a reasonable broker

inspection was warranted under the circumstances.

While the legal climate remains unsettled, it is clear that litigating these types of realtor liability cases can be challenging. Success in defending such cases revolves around four key points: whether the realtor exercised possession and control over the property at the time of the incident; the realtor's opportunity to conduct an inspection; whether the risk of harm to the plaintiff was foreseeable; and whether the realtor benefited from the presence on the property.



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