

1994

## New Jersey Real Estate Brokers Have a Duty to Inspect and Warn

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### Recommended Citation

William Hahn *New Jersey Real Estate Brokers Have a Duty to Inspect and Warn*, 6 Loy. Consumer L. Rev. 70 (1994).  
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## Recent Cases

of endorsements when a person renews an insurance policy. ❖

— *Mona E. Dajani*

### New Jersey Real Estate Brokers Have a Duty to Inspect and Warn

In *Hopkins v. Fox & Lago Realtors*, 625 A.2d 1110 (N.J. 1993), the Supreme Court of New Jersey held that a real estate broker conducting an open house has a duty to inspect the premises if given the opportunity. The real estate broker must then warn prospective buyers and visitors of any dangerous conditions that are reasonably discoverable through an ordinary inspection.

#### *Camouflaged Step*

On April 26, 1987, plaintiff, Emily Hopkins, accompanied her son and daughter-in-law to an open house conducted by a real estate broker employed by defendant, Fox & Lago Realtors. The realtor met the Hopkins party and permitted them to inspect the premises on their own. While her son and daughter-in-law toured the home's patio and grounds, Hopkins waited in the family room. Upon hearing the others re-enter the home through the foyer, Hopkins attempted to join them. She proceeded down the hallway towards the foyer, but did not see that a step led down from the hallway into the foyer. Consequently, Hopkins stumbled and fell, fracturing her ankle. She brought suit against the broker, claiming that the use of the same vinyl flooring on both levels camouflaged the step and that the broker had a legal duty to warn her of any known risks or risks that a reasonable inspection would have revealed.

The trial court dismissed the plaintiff's complaint, concluding that the broker did not owe her any duty with respect to the dangerous condition of the property. On appeal, how-

ever, the appellate court determined that such a duty existed and reversed the trial court.

The appellate court agreed with the plaintiff's contentions that an open house visitor resembled an invitee or a business guest of the defendant. Moreover, the court concluded that the defendant broker was, in effect, a functional occupier of the premises. Having analogized the position of the broker to that of a proprietor of the home, the appellate court applied the common law principle of premises liability. Premises liability imposes on the landowner a duty of reasonable care to guard against any discoverable dangerous conditions on her property for the protection of her business invitees.

The defendant broker appealed, claiming that because a real estate broker is not the actual owner or occupier of the premises, but merely an agent of the homeowner, the broker does not owe a duty to inspect the premises and warn invitees of any dangerous conditions.

#### *Supreme Court Finds Duty to Inspect and Warn*

The Supreme Court of New Jersey upheld the appellate court's decision, reversing the trial court's dismissal of plaintiff's complaint and remanding the matter for trial. In reaching its decision, however, the court refused to follow the appellate court's strict application of the traditional common law doctrine governing premises liability. Rather, the court traced the history of premises liability law, arguing that as modern society has developed, so has the legal relationship of people to property. As a result, the court found that the rigid constructs of traditional common law premises liability could not adequately accommodate the legal relationship that exists between a broker and an open-house visitor. Since any attempt to classify the parties into the traditional common law categories would be strained and awkward, the court preferred a more flexible approach to

premises liability law.

The supreme court found that the best way to determine whether a duty existed was an inquiry into the fairness and justice of imposing such a duty in light of the actual relationship between the parties. This inquiry involved identifying and weighing several factors, including "the relationship of the parties, the nature of the attendant risk, the opportunity and the ability to exercise care, and the public interest in the proposed solution."

The court noted that the broker was authorized to invite visitors and offer various professional services, including his expertise with regard to the marketability of the premises and the physical features that affect marketability. Therefore, the court found that implicit in the offering of such services was the broker's familiarity with the premises on which an open-house visitor could reasonably rely. Furthermore, the court found that the broker received tangible economic benefits from this relationship, including the opportunity to earn commissions and cultivate future clients. Based on these findings, the court concluded that the broker's invitation to potential customers implied a commensurate degree of responsibility for the visitors' safety.

The defendant broker argued that imposing a duty on brokers was unfair because the homeowner is in the best position to guard against unreasonable dangers. The court agreed with the defendant's contention that homeowners have a pre-existing, nondelegable duty to guard against any reasonably discoverable defects. Nevertheless, the court concluded that a homeowner's pre-existing duty to prevent any foreseeable harm to invitees did not in any way affect the broker's own duty because two parties can possess similar duties with respect to a third party. In defining the scope of this newly created duty, the court ruled that the relevant questions include: what risks to others a reasonably prudent real estate broker conducting an open house would fore-

see; and what the broker would do under those circumstances to forestall that risk.

The court found it was highly foreseeable that visitors could be injured by dangerous conditions while wandering through an unfamiliar house. Nonetheless, the court ruled that the broker's duty to protect only included warning visitors of any dangerous physical features or conditions. These conditions must be: 1) discoverable only during an inspection to determine the marketability of the premises; and 2) features that a visitor would routinely examine during a tour of the premises.

In addition, the court limited this duty to circumstances where a broker could reasonably inspect the premises. Furthermore, the inspection must comport with customary standards outlined by expert witnesses. The court emphasized that the duty to warn did not apply to latent dangers that would not be revealed during the course of such a reasonable inspection.

### *Duty Comports with Public Policy*

The court found that the imposition of this new duty did not create an unreasonable economic burden upon the broker's livelihood. First, the court stated that it is reasonable and fair for a broker to absorb the cost of conducting an inspection and giving warnings, since the broker receives an economic benefit from holding the open house. Moreover, a broker could demand contribution or indemnification from the homeowner in the case of shared liability for a visitor's injury. Second, the court held that a broker may be in a better position than the homeowner to prevent injury during an open house, since the broker could anticipate any problems associated with holding an open house. Finally, the court noted that the imposition of this liability would create an incentive for the broker to prevent accidents and minimize risks.

### *Justice Clifford Concurs*

Justice Clifford concurred with the

majority's opinion and did not see the court's ruling as a "cataclysmic change in the law." The justice stated that the majority opinion rested on the well-established test of negligence, which bases duty on "what the reasonably prudent person would foresee and do under the circumstances." Clifford was also careful to point out the limited scope of the court's decision: the broker's duty only extends to prospective buyers and visitors in the context of open house tours.

The justice did, however, disagree with the court's decision requiring expert witnesses to establish the customary standards governing the responsibility of a real estate broker in an open-house setting. Clifford favored a general tort law approach, holding the broker to a duty of reasonable inspection prior to the arrival of the visitors, to determine if there are any reasonably discoverable dangers which require warning.

### *Justice Garibaldi Dissents*

In a dissenting opinion, Justice Garibaldi vigorously criticized the court's opinion as being expansive, ambiguous, and vague. The justice noted that the majority's decision failed to set boundaries regarding the extent of the new duty. Garibaldi also pointed out that a broker may not know what constitutes a dangerous condition or what a warning requirement entails. The justice further observed that a broker owes a fiduciary duty to the owner. Consequently, if the broker must disclose defects that the seller does not want disclosed, a conflict of interest may arise.

The dissenting justice further criticized the majority's opinion for its negative impact on public policy. First, Garibaldi stated that the injured party already had adequate remedy in her claims against the homeowner and the homebuilder. Second, the justice noted that imposing such a duty created an economic burden on the broker who must now purchase additional liability insurance. To defray the cost of insurance, the broker would simply

increase her commission. The net effect would be an increase in the asking price of homes. Finally, Garibaldi observed that the majority's decision not only would increase litigation by adding an extra layer of parties, but would also increase the cost of buying and selling a home. ♦

— William Hahn

## Correction

Volume 6, Number 1 of the *Consumer Law Reporter* case summary *Nobelman v. American Savings Bank*, 113 S.Ct. 2106 (1993).

The case summary mistakenly stated that Section 1322(b)(2) of the U.S. Bankruptcy Code disallows modification in specific instances where (1) a creditor's only security interest is that of the debtor's principal residence; (2) creditors hold unsecured claims; or (3) creditors' rights of any class of claims are unaffected. However, Section 1322(b) of the U.S. Bankruptcy Code actually provides that a debtor's Chapter 13 plan may modify the rights of holders of secured claims (except claims secured only by a security interest in real property). A plan may also modify the rights of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims. U.S.C. §1322(b)(2). The *Consumer Law Reporter* apologizes for any confusion the case summary may have caused.

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