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Defending Colorado Real Estate Brokers From Personal Injury Claims: An Analysis of Colorado's Premises Liability Act and Negligence Framework

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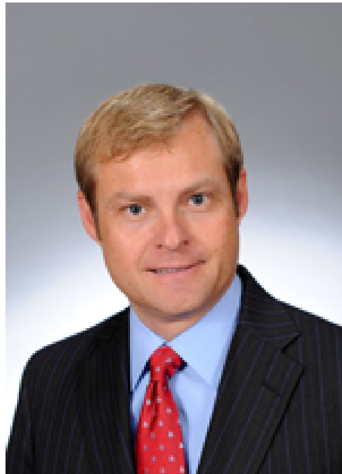

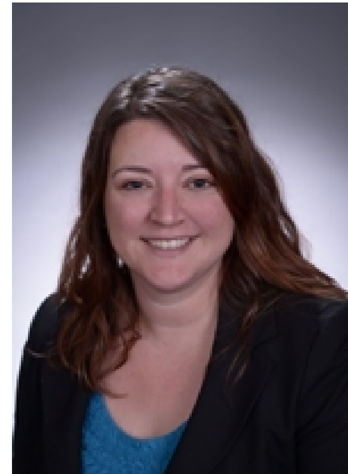

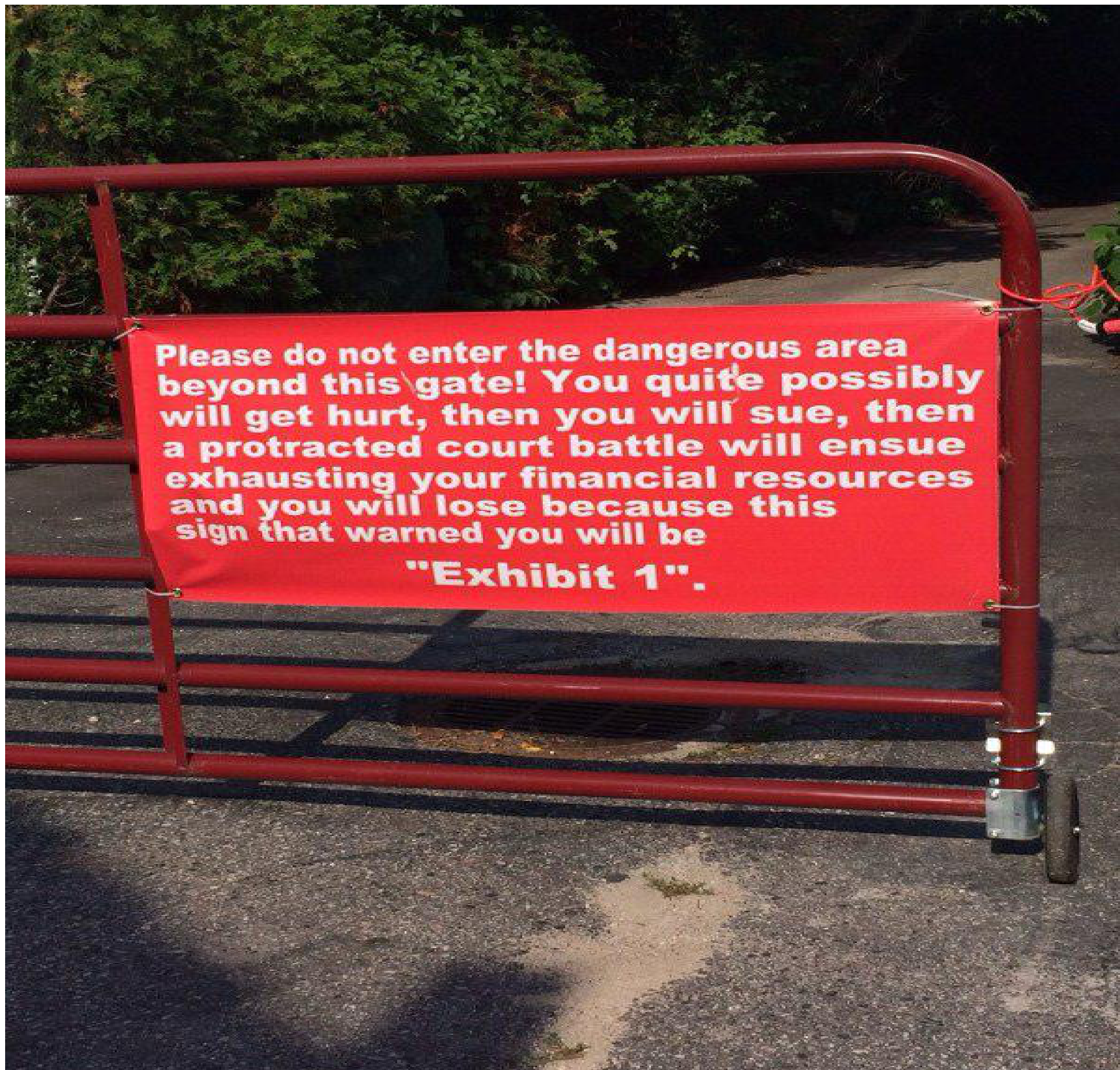

I. Introduction

Like many brokers, your typical day at work involves showing homes to potential buyers. You or your client locate potential properties to view, you come up with a schedule, a route and coordinate with the listing broker to view the homes. Most likely, you have never been to these particular homes before and know nothing about the homes other than what was disclosed in the listing service and maybe a few photos. Let us say that on this day your client shows up at the appointed time and meeting place. However, on this day the client is not alone and brings a guest, who turns out to be an older parent. The client wants the input of their guest on the residences they are going to view. You see no reason to object and give your client the printed materials. You summarize for your client what little you know about the home as you retrieve the key out of the lock box and open the door. As soon as your client and her guest enter the home, they scatter in different directions making it impossible for you to track both of them at

the same time. You decide to stay with your client to answer her questions. The guest goes off on his own. While you are in the upstairs master bedroom with your client, the guest wanders into the kitchen, finds the pantry door, opens it into a dark space, and steps into the black void looking for the pantry light. Unfortunately, it is not the pantry. The guest opened the door to the basement, stepped into the air like Wile E. Coyote running off the edge of a desert mesa. Then gravity takes over. Except this is not a cartoon.

You hear the thud, banging and cursing as the guest tumbles down the stairwell in pitch black striking his head, shoulder, back and hip on the edge of the steps and walls before breaking his fall on a hard concrete floor with his wrist. The result is a concussion, a torn rotator cuff, several herniated discs, and a compound spiral wrist fracture. You rush to the basement, flip on the light and find the guest bruised, bloodied and battered. You try to help the guest to your client's car as your client and her guest apologize for the inconvenience while everyone is embarrassed and concerned. The guest is taken to the hospital where surgery is eventually required. In addition to $100,000 in medical, surgical and physical therapy costs, the guest missed a considerable amount of time from work. The last you hear is that he will be ok and is recovering.

The next time you hear anything is when you are served with a civil lawsuit alleging a traumatic brain injury among all the other injuries, losses and damages. The complaint blames you as the broker for being the actual and proximate cause of the injuries. What do you do? What are your rights? What are your defenses as a real estate broker?

II. The Colorado Premises Liability Act

In Colorado, personal injury claims against brokers are uncommon. However, they are becoming more frequent. Typically two causes of action are asserted against brokers in these cases - one under Colorado's Premises Liability Act and another for negligence. These claims have not been tested in Colorado's appellate courts but there are defenses available to you as a broker. We start our analysis with the Colorado Premises Liability Act.

The Colorado Premises Liability Act (the "PLA"), C.R.S. § 13-21-115, "applies to 'any civil action against a landowner by a person who alleges injury occurring on real property of another by reason of the condition of such property, or activities conducted or circumstances existing on such property.' (citation omitted)." *Traynom v. Cinemark*, 940 F.Supp.2d 1339, 1343 (D. Colo. 2013). The PLA was intended to " 'protect landowners from liability in some circumstances when they were not so protected at common law,' (citation omitted)." *Id.*

A claim for premises liability under C.R.S. § 13-21-115 must meet four requirements: "(1) the action involves the plaintiff's entry on the landowner's real property; (2) the plaintiff's injury occurred while on the landowner's real property; (3) the injury occurred by reason of the property's condition, activities conducted on the property, or circumstances existing on the property; and (4) the landowner breached the duty of care it owed the plaintiff under the

premises liability statute's classification of trespasser, licensee, or invitee." *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558, 562 (Colo. 2013).

A. "Landowner" Status

The PLA provides a cause of action only available against a landowner. C.R.S. § 13-21-115. "Landowner" is defined by the statute as a "person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property." C.R.S. § 13-21-115(1).

While possession of the property is not dependant on titled ownership and need not be exclusive, to be a "landowner," the party must either maintain control over the property or be legally responsible for the condition of or activities conducted on the property. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003).

Your first defense against the guest's personal injury trip and fall civil action will be that you, as a showing broker, are not a "landowner" and are therefore not liable. A broker acting as a buyer's agent is not in possession of the subject premises. Buyer's agents are not the agents of the actual home owner. Showing agents are not in an agency relationship with the listing broker. Most important of all, buyer's agent does not create conditions on the premises, the circumstances, or the activities conducted. A buyer's agent showing a home has no more of right to possess a home during a showing than does a potential buyer. By simply showing a property, a real estate agent is no more responsible for the conditions, activities or circumstances on real property than is a potential buyer. As a buyer's agent, you should be on solid ground to defend against a premises liability claim.

B. Status of the Entrant

Additional analysis under the PLA reveals other potential defenses available to the broker. The classification of a person who enters real property determines what duty a "landowner" owes to that person. Colorado classifies persons who enter real property in three different ways, as follows:

1. Trespasser—A trespasser is a person who enters or remains on the land of another without the landowner's consent. A trespasser may recover only for damages willfully or deliberately caused by the landowner. C.R.S. § 13-21-115(5)(c); C.R.S. § 13-21-115(3)(a).

2. Licensee—A licensee is a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests pursuant to the landowner's permission or consent. A social guest is a licensee. The duties of care a landowner owes to a licensee are provided as follows:

(a) A landowner has a duty to exercise reasonable care with respect to known dangers on the land created by the landowner.

(b) A landowner has a duty to reasonably warn a person of dangers on the property when there is a condition on the land that was not created by the landowner, that is not ordinarily present on the property of the type involved, and that the landowner actually knew of. C.R.S. § 13-21-115(5)(b); C.R.S. § 13-21-115(3)(b).

3. Invitee—An invitee is a person who enters or remains on the land of another to transact business in which the parties are mutually interested, or one who enters or remains on the land at the express or implied request or invitation of the landowner. A business customer is typically an invitee. A landowner owes different duties to invitees depending on what type of land is in question.

(a) Farmland or Vacant Land—An invitee may recover against the landowner for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which the landowner actually knew.

(b) All Other Types of Land—An invitee may recover against a landowner for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually or should have known. C.R.S. § 13-21-115(5)(a); C.R.S. § 13-21-115(3)(c).

There are arguments for clarifying the guest in our scenario as either a licensee or an invitee. Colorado law is unclear on this point. The argument that the guest was a licensee is that he was not there to purchase the home for himself, but rather there at the request of the client. The guest had no business interest of his own to be on the property. The guest is more akin to a social guest.

The counter-argument is that the guest was there to assist the client with the purchase and should, therefore, be owed the duties of an invitee. Again, there is no Colorado precedent that has determined the status of an entrant in a similar context.

Regardless, you, as the buyer's agent, would have a defense under either the licensee or invitee classification. As the buyer's agent, you can argue that you did not create and know about the dangerous condition. Therefore, there would have been no duty to exercise reasonable skill and care in the form of a warning to the guest. It is the same argument under the invitee status. You had no actual knowledge of the dangerous condition.

C. The "Dangerous Condition"

What of this "dangerous condition?" The U.S. District Court for the District of Colorado indicated in *Traynom v. Cinemark* that a defendant's knowledge of the condition, activities or

circumstances on the property is not sufficient; instead, plaintiff must allege that the defendant actually knew or should have known of the danger associated with the condition, activities or circumstances. 940 F.Supp.2d 1339, 1343 (D. Colo. 2013), referencing, *McIntire v. Trammell Crow, Inc.*, 172 P.3d 977, 980 (Colo. App. 2007) "(although the danger must arise from the condition of the property or activities conducted or circumstances existing on the property, 'it is not knowledge of the condition, activities or circumstances that gives rise to liability; it is the danger of which the owner actually knew or should have known')".

Here you, as the buyer's agent, have another defense under the PLA. Simply because you may have known from the listing information that the home had an unfinished basement, that you permitted your client to bring her guest, that the guest may have been elderly or even have a physical disability, should not mean you are responsible for the injuries to the guest. The guest and his attorney will have to prove that you knew there was a material danger to the guest stepping into a black void thinking it was a pantry and not appreciating it was a stairwell. In other words, the guest will have to prove that you knew beforehand what the guest would think when he walked into the kitchen, opened the door and took that fateful misstep.

As the buyer's agent, you should be able to show that you had no additional knowledge about the condition of the house, the stairwell or the lack of lighting beyond what the guest himself possessed. Courts outside Colorado have found this type of reasoning to be persuasive.

In a nearly identical case to the scenario laid out above, the U.S. District Court for the Southern District of Indiana in *Campbell v. Fed. Home Mortg. Corp.*, was asked to address a situation where the plaintiff was viewing a house for sale with her showing agent when she opened a door to what she believed was a pantry and fell down the stairs that were behind the door. 2009 U.S. Dist. LEXIS 11290 (S.D. Ind. Feb. 13, 2009). There, the court stated "[t]he undisputed facts are that [plaintiff] opened a closed door and was confronted with pitch black darkness, without any knowledge of what that darkness contained…[Plaintiff] did not trip or slip on anything prior to her fall. There were no foreign objects on the floor that caused her fall. The bannister [sic] was not loose; the steps were not broken or even mis-shapen." *Id.* at *13 (internal citations omitted). The *Campbell* court further held the stairway did not pose an unreasonable risk of harm to plaintiff and was therefore not a latent defect. *Id.* at *15.

You probably feel good about your chances of winning under the PLA. However, you still need to deal with the negligence claim.

III. The Negligence Claim

Most likely the complaint will plead, in the alternative, a negligence claim. In making a claim for negligence, the plaintiff has the burden of establishing by a preponderance of the evidence: (i) the existence of a legal duty on the part of the Defendant(s); (ii) a breach of that duty; (iii) causation; and (iv) damages. *United Blood Services v. Quintana*, 827 P.2d 509, 519

(Colo. 1992). "A negligence claim fails when it is based on circumstances for which the law does not impose a duty." *English v. Griffith*, 99 P.3d 90, 93 (Colo. App. 2004).

The duties of a buyer's agent, or "Showing Agent," are set forth in C.R.S. § 12-61-805, which states, "a broker acting as a buyer's or tenant's agent owes no duty to conduct an independent inspection of the property for the benefit of the buyer or tenant and owes no duty to independently verify the accuracy or completeness of statements made by the seller, landlord, or independent inspectors." C.R.S. § 12-61-805(5).

The specific question of whether a buyer's agent has a duty for the safety of third parties on the property during a showing is an issue of first impression in Colorado. However, several other states have addressed this issue. Early decisions of the Oregon and Virginia state supreme courts imposed no duty on a showing agent. *See, Christopher v. McGuire*, 169 P.2d 879, 881 (Or. 1946) (refusing to attribute duty to broker showing sole customer residence in which neither party had ever been previously present); *Turner v. Carneal*, 159 S.E. 72, 74 (Va. 1931) (real estate agent is not in the same position as owner or occupant of premises).

In 2003, the Delaware Superior Court held the affirmative duty of a seller's agent to inspect and either make safe or warn of dangerous conditions relies on the theory that the seller's agent is in possession of the property he has undertaken to sell. *See, Johnson v. Chupp*, 2003 Del. Super. LEXIS 39, at *7 (Del. Super. Ct. Feb. 11, 2003). Because "Defendants had no more control over the property than the Plaintiffs themselves had," the court concluded the Defendant buyer's agents had no duty for the safety of the Plaintiffs while on the seller's property. *Id.*

Similarly, in the *Campbell v. Fed. Home Mortg. Corp.* case discussed above, the U.S. District Court for the Southern District of Indiana held that the duty owed by real estate agents differs from that owed by landowners, because " '[R]eal estate agents who do not control a premises [have no] duty to inspect properties for sale and to warn prospective buyers of dangerous conditions they discover.' " 2009 U.S. Dist. LEXIS 11290, at *14 (S.D. Ind. Feb. 13, 2009), quoting, *Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 687 (Ind. Ct. App. 2006).

IV. Defenses for the Listing/Seller's Agent

Let us change the facts slightly and analyze the claim from a different perspective. Let us say that you are not the buyer's agent, but are the seller's agent or that you are hosting an open house for public viewing. As a listing agent you could possibly be considered a "landowner" under the PLA. This issue also has not been determined under Colorado law.

A. Applying the PLA to the Listing/Seller's Agent

There is authority establishing such a precedent outside Colorado that suggests a seller's agent may be qualify as a "landowner". These cases from other jurisdictions that do impose a duty on agents for injuries sustained by third parties all involve agents showing the houses under a listing agreement with the owner (*i.e.*, seller's or listing agents), and were, therefore, determined to either possess the property or act on behalf of the possessors of the property, or

they involve agents hosting open houses on the property. *See, Coughlin v. Harland L. Weaver, Inc.*, 230 P.2d 141, 144 (Cal. Ct. App. 1951); *Jarr v. Seeco Constr. Co.*, 666 P.2d 392, 395 (Wash. App. Ct. 1983); *Smith v. Inman Realty Investment Co.*, 846 S.W.2d 819, 823 (Tenn. Ct. App. 1992); *Anderson v. Wiegand*, 567 N.W.2d 452 (Mich. App. 1997).

Fear not. As the listing agent or open house host, you still have defenses available to you. Most listing contracts state that the real estate agent is not responsible for the maintenance of the subject real property. Second, even if the PLA applies and the listing agent is determined to be a "landowner", the court will have to determine the classification of the entrant plaintiff and employ the appropriate standard of care. If you, as the listing broker, can demonstrate that you had no knowledge of the dangerous condition or that you acted reasonably by warning the entrant of the dangers about which you knew, this defense should be on solid footing.

B. Colorado's Comparative Fault Scheme

Then there are the other defenses that look at the acts of the injured guest such as the assumption of risk defense or comparative fault defense. There is also the open and obvious doctrine available to buyer's and seller's agent against such claims. They are intertwined.

Colorado has adopted a modified comparative fault scheme. Plaintiffs cannot recover if their negligence equal to or greater than that of the defendants. C.R.S. § 13-21-111. This means that a 50/50 verdict is a defense verdict, and the plaintiff does not recover.

The assumption of risk defense is also established by statute. In adopting a rule of modified comparative negligence, the Colorado Legislature eliminated common law the doctrine of assumption of the risk, as it was applied in the traditional contributory negligence setting. C.R.S. § 13-21-111. Today, a knowing and voluntary assumption of a known risk is most routinely considered as an element of a plaintiff's comparative negligence. A person assumes the risk of injury or damage, if the person voluntarily or unreasonably exposes himself or herself to such injury or damage with knowledge or appreciation of the danger and risk involved. Colorado Jury Instruction, 9.6 (2014).

Any broker facing a claim by someone injured as a result of his own decision to step into a dark room without knowing what lies beyond, should take personal responsibility for his own decisions and his own actions. It is not "victim bashing" to ask a jury to hold the injured party accountable for his own assumption of the risk that the door led to a pantry and not a stairwell, especially when the broker did nothing to create the impression that it was a pantry space.

V. Conclusion

Be proactive. Discourage your clients from bringing along uninvited guests. If you have more than one client or the client insists on bringing others, try to keep the group together. Finally, look before you leap. Turn on the lights if there is not enough natural lighting before

entering a room. If you are the listing broker or hosting an open house, take a tour of the property before opening the home to the public. Try to identify possible problems and the best way to eliminate or deal with the problem. Posting conspicuous signs and placing specific information in the marketing materials are good ideas.

Even if you do all of the above, there is still no guarantee that we or any other attorney can give you that you will not be sued. The best protective measure we can recommend is to procure insurance that will cover you from the risk of a personal injury claim regardless where they occur. Review your insurance policy and talk about personal injury coverage with your insurance company or insurance broker. Know what you are covered for before it happens, rather than wait to find out after the fact if there is insurance for a personal injury claim.