

**IN THE COURT OF APPEALS OF IOWA**

No. 9-120 / 08-1266  
Filed May 29, 2009

**ZACHARY D. OSTREM, a minor, by and  
through his Parents and Next Friends  
STACIE L. OSTREM and A. DAVID OSTREM, JR.,**  
Plaintiff-Appellant,

**vs.**

**HOME OPPORTUNITIES MADE EASY, INC.  
d/b/a H.O.M.E., INC., and/or HOME, INC.,**  
Defendant-Appellee.

---

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,  
Judge.

Plaintiff appeals from a district court ruling granting summary judgment in  
favor of defendant. **AFFIRMED.**

Jason D. Walke of Gunderson, Sharp & Walke, L.L.P., Des Moines, for  
appellant.

Patrick D. Smith and Amy R. Teas of Bradshaw, Fowler, Proctor &  
Fairgrave, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

**MILLER, J.**

Zachary Ostrem, by and through his parents, David and Stacie Ostrem,<sup>1</sup> appeals from a district court ruling granting summary judgment in favor of Home Opportunities Made Easy, Inc. (HOME), a nonprofit corporation that provides services designed to help low-income individuals in becoming homeowners. We affirm the judgment of the district court.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Zachary suffered a severe closed head injury at the home of Matthew and Lisa McVicker when he was ten months old. Lisa began babysitting Zachary for the Ostrem family in October 2002. When Zachary was at the McVickers' house, he slept in a playpen in their son Tyler's room. One afternoon in July 2003, after Lisa laid Zachary down for a nap, nine-year-old Tyler went into his room to get a video game magazine he had left under the playpen. According to Tyler, when he reached for the magazine Zachary stood up in the playpen and pulled Tyler's hair with both hands. Tyler could not get Zachary to let go, so he grabbed Zachary around his stomach and threw him off. Zachary hit his head on the wall next to the playpen. Lisa ran into Tyler's room when she heard Zachary scream and called 911. Zachary was taken to the hospital where it was determined he had suffered a right subdural hematoma and bilateral diffuse retinal hemorrhages as a result of the incident.

---

<sup>1</sup> David and Stacie were married when the events giving rise to this lawsuit occurred. They have since divorced, and Stacie has assumed her maiden name of Dohrman. However, for ease of reference, we will refer to Zachary's parents as the Ostrem family throughout this opinion.

After Zachary was injured, his parents learned the McVickers rented their house from HOME through its Homeownership Opportunities Services “lease/purchase program.” That program is designed to assist low-income individuals in becoming homeowners “by providing adequate, affordable housing which the family leases from HOME, Inc. until such time as the family can assume HOME, Inc.’s mortgage on the property.” Under their lease purchase agreement with HOME, the McVickers agreed to receive support services from HOME aimed at teaching them how to become financially responsible homeowners. They were required to meet with a homeownership counselor monthly and provide financial records to HOME upon request. The lease purchase agreement additionally provided that the property was “not to be subleased to others or used for business purposes.”

The Ostrems, individually and on Zachary’s behalf, filed a negligence action against the McVickers. They eventually dismissed that lawsuit after settling with the McVickers for the liability limit of their renters’ insurance policy. The Ostrems then filed a lawsuit on behalf of Zachary against HOME, seeking recovery under the following legal theories: (1) general negligence; (2) negligent failure to control the use of property under Restatement (Second) of Torts section 318 (1965); (3) negligent performance of an undertaking under Restatement (Second) of Torts section 324A; and (4) premises liability.<sup>2</sup>

HOME filed a motion for summary judgment, asserting it did not owe Zachary a duty of care under any of those theories. The district court agreed and

---

<sup>2</sup> The petition also alleged a breach of contract claim, which was dismissed by the district court in its summary judgment ruling. Zachary has not appealed that portion of the court’s ruling.

entered summary judgment in favor of HOME, dismissing Zachary's claims against it. Zachary appeals.

## **II. SCOPE AND STANDARDS OF REVIEW.**

We review the district court's summary judgment ruling for the correction of errors at law. Iowa R. App. P. 6.4; *Van Essen v. McCormick Enters. Co.*, 599 N.W.2d 716, 718 (Iowa 1999). Summary judgment will be upheld where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Van Essen*, 599 N.W.2d at 718.

While negligence actions are seldom capable of summary adjudication, the threshold question in any tort case is whether the defendant owed the plaintiff a duty of care. *Sankey v. Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990). "Whether such a duty arises out of the parties' relationship is always a matter of law for the court." *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994).

## **III. MERITS.**

"The elements of a negligence claim include the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages."<sup>3</sup> *Van Essen*, 599 N.W.2d at 718. Our courts have often relied on the Restatement (Second) of Torts when determining whether a given defendant owes a duty to a plaintiff. *Id.* "Ultimately, though, the existence of a duty is a policy decision, based on the relevant

---

<sup>3</sup> Because the district court resolved HOME's summary judgment motion on the duty of care issue, it did not address any other issues, such as proximate cause, that might also be lacking in this case.

circumstances, that the law should protect a particular person from a particular type of harm.” *Id.* at 719.

“Generally, a person does not have a duty to aid or protect another, or to control the conduct of a third person to prevent that person from causing physical harm to another.” *Pierce v. Staley*, 587 N.W.2d 484, 487 (Iowa 1998). There are exceptions to this rule, however. *Id.*; see also Restatement (Second) of Torts §§ 315-320. One such exception, under which Zachary seeks to impose liability on HOME, is based on section 318 of the Restatement (Second) of Torts, which relates to the duty of a possessor of land to control the conduct of a licensee so as to prevent harms to others. In *Pierce*, our supreme court emphasized “the requirement, found in the text of Restatement section 318, that the possessor be *present* on the land before the duty is imposed.” 587 N.W.2d at 487.

Although it is clear that requirement is not met here, Zachary nevertheless urges application of section 318 based on comment b to that section, which provides,

The rule stated in this Section is applicable where . . . *the activity is being carried on with [the possessor’s] permission*, and when, therefore, he has not only the ability to control the conduct of the third person as possessor, but also the opportunity to do so.

Restatement (Second) of Torts § 318, at 127-28 (emphasis added). We find no error of law in the district court’s conclusion that HOME “had no ability to control Tyler’s actions, nor did [HOME] know of the necessity for such control because the incident was not reasonably foreseeable.”

Zachary next seeks to impose liability on HOME under Restatement (Second) of Torts section 324A, which our supreme court has adopted in the

context of negligent inspection cases. See *Thompson v. Bohlken*, 312 N.W.2d 501, 507 (Iowa 1981). He asserts the district court erred in finding this section did not apply in light of the duties HOME assumed under its lease purchase agreement with the McVickers, specifically its duty to ensure that its clients were adequately insured and not operating businesses out of their home. However, liability under section 324A is imposed only where the services undertaken for another “should [be] recognize[d] as necessary for the protection of a third person.” Restatement (Second) of Torts § 324A, at 142; see also *Thompson*, 312 N.W.2d at 507. We believe the district court correctly determined HOME “did not undertake to render any services to the McVickers which it recognized as necessary for the protection of Zachary.”

This brings us to Zachary’s final theory of liability, which is based on HOME’s status as the landlord of the property inhabited by the McVickers. “As a general rule, a landlord is not liable for injuries caused by the unsafe condition of the property arising after it is leased, provided there is no agreement to repair.” *Allison by Fox v. Page*, 545 N.W.2d 281, 283 (Iowa 1996); see also Restatement (Second) of Torts § 356, at 240. An exception to this rule, which Zachary relies on here, “includes circumstances in which the landlord retains control, or the landlord and tenant have joint control over the premises where the injury occurs.” *Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33, 38 (Iowa 1999) (observing this exception generally applies “where the injury is caused by the condition of common areas over which the landlord, alone or jointly with the tenant, has control”). Contrary to Zachary’s assertions otherwise, “the issue of retained

control is inescapably part of the duty issue, which is necessarily and properly determined as a matter of law by the court.” *Hoffnagle*, 522 N.W.2d at 814; *accord Van Essen*, 599 N.W.2d at 720.

Zachary attempted to establish HOME’s control over the property based on HOME’s status as the owner and its ability under the lease purchase agreement to inspect the property and control whether the McVickers operated a business on it. We think the district court correctly concluded those facts did not establish that HOME had retained a sufficient amount of control over the property so as to justify imposing a duty on it to keep the premises safe for third persons lawfully on the land. See *Van Essen*, 599 N.W.2d at 720 (finding landlord’s contractual obligations to insure the property and share in the cost of repairs did not establish necessary degree of control); *Hoffnagle*, 522 N.W.2d at 815 (concluding franchisor’s retained authority over some aspects of franchisee’s operation did not establish sufficient control of the property).

#### **IV. CONCLUSION.**

We find no errors of law in the district court’s detailed, thorough, and well-reasoned ruling dismissing Zachary’s negligence claims against HOME and entering summary judgment in its favor. We have considered all issues presented on appeal, whether specifically addressed or not, and find any that are not specifically addressed to be without merit. The judgment of the district court is therefore affirmed.

**AFFIRMED.**