STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS

DIANE K. SHOLBERG, as personal representative of the ESTATE OF TERRI A. SHOLBERG,

Plaintiff/Appellee,

v

ROBERT and MARILYN TRUMAN,

Defendants/Appellants,

and

DANIEL TRUMAN,

Defendant.

MSC Docket No. 146725

Companion Case MSC Docket No. 146721
Docket No. 307308
Circuit Court No. 11-2711-NI

146725

REPLY BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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REPLY BRIEF

Introduction

Plaintiff's decedent, Terri Sholberg was driving on Stutsmanville Road in Harbor Springs in the early morning hours of July 13, 2010, when her vehicle struck a horse owned by Defendant Daniel Truman that apparently escaped from his farm. Daniel Truman was slowly purchasing the farm property via land contract from his brother and sister-in-law, defendants Robert and Marilyn Truman ("the Trumans" or "Defendants"). Although Defendants did not own or possess the horse and did not have any role with operation of the farm, Plaintiff sued Daniel Truman and the Trumans, alleging negligence, common law nuisance, and violation of the Equine Activity Liability Act ("EALA"). Daniel Truman defaulted. The Trumans, however, defended this lawsuit and prevailed on summary disposition. There is simply no factual or legal tether between the incident and Defendants.

The Michigan Court of Appeals properly affirmed the dismissal of the negligence and EALA claims. As explained in the Trumans' application for leave to appeal to this Court, the Court of Appeals erred as a matter of fact and law in reversing the trial court's dismissal of the nuisance claim. Plaintiff responded to the Trumans' application for leave to appeal. As explained below, the Trumans respectfully reiterate that this Court should either grant the Trumans' application for leave to appeal or peremptorily reverse that part of the Court of Appeals' decision reversing the trial court's decision on the nuisance cause of action.

Response to Plaintiff's Statement of Facts

Plaintiff has regurgitated essentially the same statement of facts at all levels.[1] Plaintiff devotes ample space to the various police reports of animal elopements in the area of

[1] This Court's clerk's office has requested that appellate attorneys cease submitting appendices in support of applications for leave to appeal. Defendant will adhere to that request. For ease of reference, however, this brief

Stutsmanville Road, pretending that all of these *ipso facto* involve animals belonging to Daniel Truman (see Plaintiff's brief, 3-6). The records themselves, as well as the testimony elicited, are clear that not all of these incidents involve animals belonging to Daniel Truman.[2] Moreover, Jack Balchik, animal control officer for Emmet County, did not consider the issue to be significant enough to ever contact the Trumans (see Appendix N). While Balchik never made the determination that Daniel Truman might not own the property, the issue never became serious enough for him to find out. Emmet County never took action against Daniel Truman on the basis of any nuisance—whether based on the real property or the personal property (i.e. the animals). While it may seem odd for attorneys and justices residing in the lower part of Michigan, animals escaping from farms from time-to-time simply is not that shocking or rare of an event. Apparently, Emmet County officials were not bothered by Daniel Truman.

Regardless, even if Plaintiff could fairly attribute most of the incidents to Defendant Daniel Truman, Plaintiff cannot attribute any of them to the Trumans. Of the 20 witnesses deposed, none ever contacted the Trumans. Of the numerous additional names of individuals that contacted Emmet County to report a loose animal, there is not a shred of evidence that any of them contacted the Trumans. While Plaintiff wants this Court to believe that the Trumans knew about the alleged animal elopements, there is no evidence to back that up.

In fact, Plaintiff continues to take the misleading position that Marilyn Truman knew about the animal elopement—a patently false position. Plaintiff misleads this Court by ignoring Marilyn Truman's testimony regarding timing. She specifically testified that she received a few

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will note the appendices to Defendant's Brief on Appeal with the Michigan Court of Appeals. All references to "Appendix" refer to the appendices filed in the Michigan Court of Appeals.

[2] Of course, analyzing the content of the documents requires a consideration of hearsay within hearsay. While Plaintiff contends that MRE 803(8) allows the documents to be admissible, Plaintiff does not offer any explanation as to how the content of the documents would satisfy any hearsay exception.

calls, but that (a) all of those calls were before 2001 (i.e. 9 years before the incident); and (b) those calls were in the form of someone looking for Daniel Truman (Appendix O, 22-25). Thus, Plaintiff presents this Court with various incidents of animal elopement occurring from 2003 to the date of the incident, but presents no evidence that the Trumans knew about a single one of those incidents. To find evidence that the Trumans knew about these incidents is to create evidence that does not exist. It is both perplexing and disappointing that Plaintiff mischaracterizes her testimony in this fashion.

If Plaintiff did not believe the Trumans for some reason, Plaintiff was free to marshal testimony to rebut their testimony. Again, however, none of the 20 witnesses ever contacted the Trumans. No other individual identified provided an affidavit to Plaintiff indicating that he or she contacted the Trumans. Daniel Truman corroborated the fact that he and the Trumans are estranged and have not been communicating (Appendices B, C and O). Months and months of discovery confirmed that the Trumans did not know about any animal elopement between 2003 and the 2010 incident.

Plaintiff relies heavily on the testimony of William Brecheisen, Anne Brecheisen, Alfred Major, Janice Hartman, and Becky Major to suggest that there was frequency to the animal elopements (Plaintiff's brief, 6-7). Again, none of them ever contacted the Trumans to report the animal elopements. None of them contacted the Trumans at any point to complain about the way that Daniel Truman was operating his farm.

The Trumans appreciate that Plaintiff has enough evidence to create a factual question regarding the ownership of the property. What is clear, however, is that the Trumans have never had possession and control of the real property. And the Trumans certainly did not have ownership, possession, or control over any of the animals or other personal property that Daniel

Truman brought onto the property. If Daniel Truman had not purchased the horse in question, there would be no incident or lawsuit. It was not the real property that caused the nuisance, it was Daniel Truman's escaped horse.

Plaintiff tries to shift the argument from the horse onto the securing of the gate with baler twine (Plaintiff's brief, 9). Again, however, the Trumans were unaware that (a) Plaintiff had purchased the horse; and (b) that Plaintiff would place a horse in a location where baler twine was securing it in place. There is no evidence to the contrary. Moreover, there is no evidence that any other animal was ever maintained in this fashion. Although Daniel Truman has been investigated by Emmet County, there was no testimony that he had used baler twine in the past. So even if it is true that Daniel Truman made the improvident decision to secure a horse with baler twine on this one occasion, there was no reason for anyone to expect same. The Trumans certainly did not have actual or constructive knowledge of the potential for *this* incident. Holding them responsible under any theory is simply unfair.

Response to Argument I

Plaintiff's position is simple: because one court decision decided to state the elements of a nuisance claim as allowing for liability on the basis of the property being "owned or controlled," and other courts have quoted that language, it is therefore the law of Michigan that mere ownership of property alone gives rise to a nuisance claim not created by the owner of that property (see Plaintiff's brief, 13-17). The Trumans reiterate that this is not Michigan law. And if it is Michigan law, then this Court must intervene to clarify that this will no longer be Michigan law.

First, Plaintiff cites cases that quote the elements, but does not cite a single case where ownership of the land alone led to actual liability for a nuisance created by another. While the

Michigan Court of Appeals has quoted the language that mysteriously appeared once upon a time, the Court of Appeals has never taken the next step of recognizing an owner's liability based solely on ownership of land with a nuisance created by another.

This is not to say that the Trumans believe that ownership alone could never lead to liability for a nuisance. The key difference is that who created the nuisance. Where the nuisance arises out of some condition of the land or is not created by anyone, then it is fair to deem the owner, rather than the possessor of the land, responsible. Where, as here, the nuisance is not based on the condition of the land, but is instead created by the personal property of an exclusive possessor of the land, only the possessor should be liable. This is consistent with Michigan tort reform. And it is also fair with basic principles of fairness and equity.

While Plaintiff claims that she is not seeking to convert nuisance law into strict liability, that is exactly what is being done here. After all, regardless of the number of animals that allegedly escaped from Daniel Truman's farm in 2010 before the incident, there is not a shred of evidence that the Trumans knew about any of them. Similarly, regardless of the number of animals that allegedly escaped from Daniel Truman's farm in 2009, there is not a shred of evidence that the Trumans knew about any of them. And the Trumans can repeat this sentence for every year from 2008 back to 2002. The Trumans were not aware or made aware of any alleged animal elopement occurring between 2001 and the 2010 date of the incident. Holding them potentially responsible for an incident where they had no reason to believe that there was any potential for harm in the preceding nine years is the very definition of strict liability. It is imposing liability without regard to fault.

Moreover, this case may even be defensible from Daniel Truman's position. For all we know, each of the instances where an animal actually (rather than assumed based on the police

reports) escaped from his farm might have occurred from different, unforeseeable circumstances. In one instance, a horse might have jumped a fence area in the back of the farm. In other instance, it might have been an admittedly negligent failure to shut a fence gate. In another, it might have been lightning knocking down a tree, which broke a fence. Unlike a natural phenomenon, such as a mud slide, there are numerous different ways in which an animal can "escape." Thus, Daniel Truman could have fixed the fence in one area, but then had lightning cause a different area of the fence to break. And sometimes animal escapes are simply not preventable or foreseeable.

Regardless, even assuming that animals always escaped the same way, an animal escape is not a continuous event. The animal is retrieved, brought back into its area, and re-secured. The nuisance, if any, is remedied at that point. From Daniel Truman's perspective, the nuisance was never one that was perpetually ongoing. This is in direct contrast to a perpetual, uninterrupted nuisance. This is important because Plaintiff is going one step beyond that and suggesting that the Trumans should somehow be held liable for "maintaining" a nuisance (Plaintiff's brief, 14). But there was never a nuisance that was "maintained." The nuisance of one animal escape always ended before the next nuisance started. In order for the Trumans to know about an animal escape, they would have to coincidentally have been driving by the property at the very time an animal was currently escaping. The odds of this happening are simply too remote to be actionable.[3] At most, Defendant Daniel Truman allowed his personal

[3] Plaintiff references approximately 30 animal elopements over a span of more than 7 years. That is approximately 30 incidents and more than 2,000 days—nearly 1% of the days. That is more than 1,970 days where the Trumans could have driven by and assumed that the animals were all properly secured. Moreover, even within the days where an animal allegedly escaped, the Trumans could have driven by before or after an incident and been completely unaware of the incident. Regardless, the Trumans did not have a reason to drive by the property very often, especially due to the estrangement between Daniel Truman and Robert Truman.

property to lead to sporadic, temporary nuisances. His potential liability lends itself to negligence law, not nuisance law.

Regardless, the Trumans respectfully contend that Michigan law either does or should recognize that a property owner may not be held liable for an alleged nuisance arising out of the personal property brought onto the land by another. Here, even if the Trumans owned the land, the nuisance was the personal property (a horse) brought onto the land by another (Daniel Truman).[4]

Finally, it is notable that the Michigan Court of Appeals opinion at issue conflicts with *Szkodzinski v Griffin*, 171 Mich App 711; 431 NW2d 51 (1988), which rejected the conclusion that the owner of real property can be held responsible for the actions of a tenant's dog. In that case, the Michigan Court of Appeals rejected many of the same arguments being raised by Plaintiff here, including the reliance on an ordinance to establish a tort claim. This decision provides further support for a conclusion that the Michigan Court of Appeals erred, and that this Court should either peremptorily reverse the Michigan Court of Appeals or grant leave to appeal to consider the proper scope of nuisance law.

Response to Argument II

Plaintiff's Argument II addresses the Trumans' position that Michigan law does not allow them to take a default judgment as to Daniel Truman as the 100% cause of her damages, and then seek to pursue fault apportionment as to the Trumans (Plaintiffs' brief, 17-20). The Trumans respectfully contend that Plaintiff's argument is incorrect and that there is an alternate

[4] This Court's recent case of *Price v High Pointe Oil Co, Inc*, __ Mich __; __ NW2d __ (Dkt No 143831, issued 3/21/13) is instructive. In *Price*, this Court analyzed the law to determine (a) whether Michigan law allowed for non-economic damages to be recovered in a property damage case; and (b) whether Michigan law should be changed to allow the recovery of non-economic damages in a property damage case. There this Court concluded that no compelling reasons for altering the common law were present. As in *Price*, this Court should decline to modify the common law to allow for the mere ownership of real property to give rise to nuisance liability for a nuisance created by personal property owned by another.

basis upon which the Trumans were entitled to summary disposition with respect to any and all claims against them (including the negligence claim that remains at issue).

First, Plaintiff claims that the judgment against Defendant Daniel Truman does not reflect the full amount of her damages sustained (Plaintiff's brief, 18). Plaintiff forgets that she had an evidentiary hearing to determine the amount of damages sustained, with the resulting figure being $5,000,000. Plaintiff did not file a motion for additur to request that the trial court award greater damages. Plaintiff did not file a claim of appeal challenging the $5,000,000 damages finding as incomplete. Although Plaintiff had ample time to file a delayed application for leave to appeal, that time has now passed.[5] There is absolutely no support for Plaintiff's assertion that the $5,000,000 in damages does not represent a finding as to 100% of her damages.

Similarly, it was Plaintiff's decision to pursue entry of a default judgment for a sum certain against Defendant Daniel Truman that would reflect a 100% fault apportionment. Again, there was no argument that Defendant Daniel Truman was something less than 100% at fault for those damages. Plaintiff did not even *request* that the trial court consider a fault apportionment other than 100% as to Defendant Daniel Truman. Once again, there was no post-judgment motion practice or appellate practice relative to the 100% fault apportionment as to Defendant Daniel Truman. Thus, there are two judgment certainties—(a) Plaintiff suffered $5,000,000 in damages; and (b) Defendant Daniel Truman was 100% at fault for those damages. Given those findings, the Michigan Court of Appeals has consistently ruled that appellate proceedings as to other Defendants was moot (see Defendant's application for leave to appeal, § III).

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[5] The judgment against Daniel Truman was entered on November 4, 2011. The Trumans filed their appellate brief raising this issue on March 20, 2012. Plaintiff had until May 4, 2012, to file a delayed application for leave to appeal with the Michigan Court of Appeals challenging the amount of damages found by the trial court. MCR 7.205(F)(3). Despite having the opportunity to formally challenge the damages found by the trial court, Plaintiff did not do so.

Plaintiff attempts to distinguish the Michigan Court of Appeals cases by noting that two of them involved a plaintiff expressly requesting judgment for the "full amount of damages" sought (Plaintiff's brief, 18). But Plaintiff simply ignores *Arnold v American Investors Life Insurance Company*, unpublished per curiam opinion of the Michigan Court of Appeals (Docket Nos. 293429 & 293431, issued February 19, 2013 (Attachment 4 to the Trumans' Application for Leave to Appeal), where the Michigan Court of Appeals ruled that, in the context of a default judgment, "it was implicitly agreed by the parties that 100 percent of the fault would be allocated to Ruttenberg, thereby waiving the requirement that the trial court formally allocate fault. See MCL 600.6304(1)." *Id.* at *6. Accordingly, the Court of Appeals declined to consider any of the plaintiffs' substantive arguments, ruling that the non-defaulted defendants were properly dismissed. *Id.* at 7. In other words, if a plaintiff requests a judgment against a defaulting party (i.e. a party unable to assert defenses), that is an implicit request for a judgment for the full amount of damages.

Plaintiff's secondary argument seems to be that the non-economic damages in the instant matter could never represent full compensation (Plaintiff's brief, 18-19). While the Trumans are certainly sympathetic to Plaintiff having suffered a loss, the Trumans note that it is far more likely that the $5,000,000 judgment reflects substantially more than what an Emmet County jury would ever award. Moreover, Defendant Daniel Truman did not even attempt to contest damages, and he certainly did not raise the issue of comparative fault.

Further, it remains completely unclear how to reconcile this judgment for a sum certain with future trial practice. Will the trial be limited to an award of damages against the Trumans only if there is an award that exceeds $5,000,000? In other words, if a jury were to find nuisance damages of $100,000 or $1,000,000, would that mean no judgment as to the Trumans because

Defendant Daniel Truman is responsible for the first $5,000,000? Will the $5,000,000 judgment against Defendant Daniel Truman be vacated to allow consideration of the damages anew? And what about fault apportionment? These are issues that Plaintiff should have sorted out before proceeding with the entry of the default judgment and the appeal. Indeed, there were weeks between the entry of summary disposition for the Trumans and the judgment for Defendant Daniel Truman. Having taken the steps to enter a judgment and pursue an appeal, Plaintiff cannot now complain that the consequences of taking that action are somehow unfair. Where, as here, a plaintiff pursues entry of a judgment for a sum certain against a party, the fault apportionment and damages conclusions are final. These actions confirm that the Trumans are without fault and not the cause of any damages. Therefore, even if nuisance law is twisted to allow a trial against the Trumans, the trial is moot because there cannot be fault apportionment or damages awarded against them. Consequently, there is an alternate basis for this Court to peremptorily reverse or grant leave to appeal to consider the appropriateness of same.

CONCLUSION AND REQUEST FOR RELIEF

The Trumans respectfully request that this Honorable Court either grant Defendants' application for leave to appeal pursuant to either MCR 7.302(B)(3) and/or MCR 7.302(B)(5), or peremptorily reverse the Michigan Court of Appeals' decision.

Respectfully submitted,

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Dated: March 25, 2013

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PROOF OF SERVICE

The undersigned certifies that a copy of:

- **Reply Brief in Support of Defendants-Appellants' Application for Leave to Appeal;**
- **Proof of Service**

with copies of same served upon on March 25, 2013:

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I hereby declare, under penalty of perjury, that the above statements are true to the best of my information, knowledge and belief.

Kathy Zalewski