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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Public nuisance claims against property owners require possession or control.

By Drew Broaddus

On June 11, 2014, the Michigan Supreme Court in *Sholberg v Truman*, case no. 146725, addressed "whether title owners of real property may be held liable for a public nuisance that arose from that property, where someone other than the title owners is in possession of the property, is exercising control over the property, and is the one who created the alleged nuisance." *Sholberg*, Slip Op at 1-2. The Court answered in the negative, holding "that title owners of the real property cannot be held liable for a public nuisance under such circumstances." *Id.* at 2. Although *Sholberg* involved a relatively unusual fact pattern (a fatal motor vehicle accident resulting from a horse's escape from a farm), the Court's statements regarding public nuisance may have ramifications in a wide range of premises liability cases.

SECREST WARDLE NOTES:

Although not the question directly presented, *Sholberg* tells us, by implication, that when a title owner has possession or control, they may have liability under a public nuisance theory.

Public nuisance would not apply to *any* defective condition on the property but rather, only those conditions that involve "the unreasonable interference with a right common to all members of the general public." *Sholberg*, Slip Op at 4.

Nuisance is often pled to avoid the open and obvious doctrine, which would otherwise be available to the property owner under premises liability principles. However, another recent Supreme Court decision, *Veremis v Gratiot Place*, 495 Mich 938 (2014), suggests that the open and obvious defense would still apply to nuisance claims.

The language used by the Court suggests that a lesser degree of control would be needed to impose a duty under a nuisance theory, than would be needed to impose duty under premises liability. The opinion repeatedly refers to "possession or control," *Sholberg*, Slip Op at 5, 12, but in premises liability, duty "is conditioned upon the presence of both possession and control over the land." *Kubczak v Chemical Bank & Trust*, 456 Mich 653, 660 (1998) (emphasis added).

The *Sholberg* opinion expressly left open the question of "whether an absentee landowner *could* be held liable for a nuisance where *no one* is in possession of or exercising control over property." *Sholberg*, Slip Op at 14 n 13 (emphasis in original).

The tragic accident that gave rise to this appeal occurred four years ago when the Plaintiff's decent was driving her car and came upon a horse standing in the road. Plaintiff's decedent, traveling at or around the 55 m.p.h. speed limit, was unable to avoid hitting the horse and subsequently lost control, flipping the vehicle.[1] The horse had been stored in a three-walled enclosure with a heavy gate, but the gate had been secured with baling twine that had failed. Plaintiff brought this action against Daniel Truman, the owner of the horse, and his brother and sister-in-law, Robert and Marilyn Truman (hereinafter "Defendants"), the title owners of the farm operated by Daniel. Other than being the title owners, Defendants had nothing to do with the farm or with any of the animals on the farm, including the horse struck by Plaintiff's decedent. Plaintiff presented evidence of at least 30 instances of "animal elopement" near the farm between 2003 and 2010, each of which allegedly created traffic disruption. Marilyn Truman testified that no later than 2000, she received two or three telephone calls from people looking for Daniel Truman because his animals were loose.

Plaintiff proceeded against the Defendants under theories of negligence, violations Equine Activity Liability Act (MCL 691.1661, *et seq.*), and public nuisance. Defendants obtained summary disposition of the negligence and statutory claims, the Court of Appeals affirmed, and the Supreme Court declined to review those rulings. *Sholberg*, Slip Op at 3 n 5. Also, Plaintiff obtained a default judgment against Daniel. *Id.* at 3. Therefore, the only issue before the Court was whether Plaintiff could proceed with a public nuisance claim against the Defendants.

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[1] For additional facts, see the Court of Appeals' unpublished opinion, case no. 307308, rel'd 11/12/12.

[2] See *Thomas M. Cooley Law School v Doe*, 300 Mich App 245, 271 (2013).

The Court began by clarifying that claims for "animal elopement" can be compensable under a public nuisance theory. *Id.* at 4. Although the Court ostensibly assumed, "without deciding, that incidents of animal elopement can constitute a public nuisance," *Id.*, the analysis that follows presupposes the existence of a valid nuisance claim. Since the Court does not issue advisory opinions, except in very limited circumstances not present here,[2] the Court by implication found that such a cause of action can at least be pled against a property owner. However, the Court took note of a long line of cases from the Court of Appeals finding that "[a] defendant held liable for the nuisance must have possession or control of the land." *Sholberg*, Slip Op at 4-5. "Liability for nuisance … requires that the defendant liable for the nuisance have possession or control of the land on which the condition exists or the activity takes place." *Id.* at 5.

The Court found that Defendants lacked possession or control for the following reasons: Defendants merely owned the property. They never possessed or exercised any control over it. They had not visited it in more than a decade. They had no contact with the person who was in actual possession of the property and who was exercising control over that property. Defendants also had nothing to do with the horse that caused the accident, or with any other horse on the property. They did not own, possess, or control the horse, and did not know that Daniel owned the horse. Although Marilyn Truman testified that she received two or three telephone calls from people looking for Daniel because his animals were loose, she received these calls no later than 2000 - at least 10 years before the accident. None of the neighbors had ever called Defendants about the escaped animals. The Court found "no evidence of any kind that Defendants knew or had reason to know that Daniel Truman's animals were escaping the property when the accident happened in 2010." *Sholberg*, Slip Op at 12.

Based upon this record, the Court (Justices Markman, Young, Mary Beth Kelly, Zahra, and McCormack) concluded "that title owners of real property cannot be held liable for a public nuisance that arose from that property, when someone other than the title owners is in actual possession of the property, is exercising control over the property, and is the one who created the alleged nuisance." *Id.* at 15. Justice Cavanagh concurred in the result only. Justice Viviano concurred in part and dissented in part; he agreed that Defendants were entitled to summary disposition of the public nuisance claims, but felt that the majority identified the wrong reasons. He would have "reach[ed] the same result" on the grounds "that defendants' lack of knowledge of the nuisance provides an alternative basis for dismissal."

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