

STATE OF MICHIGAN

SUPREME COURT

**DIANE K. SHOLBERG**, as Personal Representative  
for the Estate of **TERRI A. SHOLBERG**,

146725

Docket No.: 146721

Plaintiff/Appellee,

v

COA Docket No.: 307308

Lower Court No.: 11-2711-NI

**ROBERT TRUMAN** and **MARILYN TRUMAN**,

Defendants/Appellants,

And

**DANIEL TRUMAN**,

Defendant.

*2* **Andrew P. Abood (P43366)**  
**ABOOD LAW FIRM**  
*Attorneys for Plaintiff/Appellant*  
246 East Saginaw Street, Suite One  
East Lansing, Michigan 48823  
(517) 332-5900 / (517) 332-0700

**Anthony F. Caffrey III (P60531)**  
**R. Carl Lanfear, Jr. (P60531)**  
**CARDELLI, LANFEAR & BUIKEMA**  
*Attorneys for Robert & Marilyn Truman*  
322 West Lincoln Avenue  
Royal Oak, Michigan 48067  
(248) 544-1100 / (248) 544-1191

PLAINTIFF/APPELLEE'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

**FILED**

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MICHIGAN SUPREME COURT

146725  
PLAINTIFF'S  
Suppl

**QUESTION FOR SUPPLEMENTAL BRIEF**

- I. WHETHER THE FACT THAT DEFENDANTS ARE OWNERS OF THE PROPERTY FROM WHICH THE NUISANCE AROSE IS SUFFICIENT TO ESTABLISH LIABILITY IN NUISANCE.**

Plaintiff Answers: Yes  
Defendants Answer: No  
Court of Appeals Answered: Yes  
This Court Should Answer: Yes

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## **STATEMENT OF PROCEEDINGS AND FACTS**

Plaintiff/Appellee (hereinafter “Plaintiff”) relies on its’ Statement of Facts as set forth in its Response to Defendant/Appellants’ (hereinafter “Defendant”) Application for Leave to Appeal. On June 21, 2013, this Honorable Court entered an Order requiring the parties to file Supplemental Briefs addressing the question of “whether, and under what circumstances a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance.”<sup>1</sup> Plaintiff now timely files its Supplemental Brief.

### **LAW AND ARGUMENT**

#### **STANDARD OF REVIEW**

The decision to grant or deny summary disposition is a question of law that is reviewed de novo.<sup>2</sup>

#### **I.**

#### **IN THIS CASE THE FACT THAT DEFENDANTS’ ARE OWNERS OF THE PROPERTY FROM WHICH THE NUISANCE AROSE IS SUFFICIENT TO ESTABLISH LIABILITY IN NUISANCE.**

Michigan jurisprudence has long held that a property owner can be liable in limited situations where the property owner is absentee. One obvious and well-established area is adverse possession. The policy reasons behind adverse possession are that when a property owner is absentee over a continuous uninterrupted period of time, another party can essentially usurp the owner’s property. The same theory is true with regard to a nuisance. Where a hazard or danger is continuous over an extended period of time, a property owner can be held liable where the property owner knew or should have known about the hazard.

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<sup>1</sup> Michigan Supreme Court Order dated June 21, 2013. See Exhibit I.

<sup>2</sup> *Van v Zahorik*, 460 Mich 320, 326, 597 NW2d 15, 18 (1999).

This unique and limited case falls squarely within the historical definition of a public nuisance. The property loosely occupied by Dan Truman has been a public nuisance for years. Public records show that reported instances of elopement have been continuous and substantiated for over ten years. The testimony of Defendant Marilyn Truman supports reports to her back even further. And the testimony of William and Ann Brecheisen supports facts showing that the elopement happened on *at least* a weekly basis and was a continual and habitual problem.<sup>3</sup> Ann Brecheisen testified that it happened about “*100 times a year.*” Defendants Robert and Marilyn Truman could have at any time taken action that would have ceased this hazard. They could have evicted Dan Truman or placed conditions on his occupancy. Instead by their own testimony, they did nothing. And it is not good public policy in this state when a property owner does nothing to abate a public nuisance.

The Court of Appeals held as follows when it reversed the Circuit Court’s grant of Summary Disposition in favor of Defendants on Plaintiff’s nuisance claim:

Sholberg provided evidence to the trial court of at least 30 instances of animal elopement from the Property between 2003 and 2010, which allegedly created hazards on Stutsmanville Road. There was evidence that the Trumans were aware of the issue regarding animal elopement and that complaints had been lodged. And there was no evidence presented that the Trumans did anything to address the problem. Thus, the record supports that the ongoing elopement of animals from the Property was an unreasonable interference with the public’s right to safely travel on Stutsmanville Road. Additionally, the decedent’s death is a harm suffered by Sholberg that is different form that of the general public. Moreover, the Trumans owned the Property from which the alleged nuisance arose, which is sufficient to bring a nuisance action against them. Thus, the trial court’s grant of summary disposition in favor of the Trumans regarding Sholberg’s nuisance claim was improper.<sup>4</sup>

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<sup>3</sup> Deposition of William Brecheisen, pg. 12, lines 12-17; Deposition of Ann Brecheisen, pg. 10, line 15, emphasis added; pg. 10, lines 4-5, emphasis added.

<sup>4</sup> Court of Appeals Opinion & Order pg. 6. Please See Attached Exhibit 2.

It has been long held that where a continuous hazard arises from ownership or operation of real property, whether it is noise, smell, environmental contamination (seepage), or the elopement of animals and the hazard is unabated by the property owner, a claim of nuisance can and does arise. In essence, the law says to land owners that you cannot just let someone else operate your land in a way that is a continuous hazard to the public. Unlike a negligence claim, which is typically a one-time incident, a nuisance claim is ongoing requiring responsibility to be placed with those who have the ability to abate the nuisance to prevent future harm. And quite frankly, that only makes sense and is good public policy. Nuisance law obligates a property owner to assert ownership where the occupant creates a hazard that is dangerous to the public.

Contrary to this policy, Defendants want this Court to impose liability only upon those who create the nuisance, which is a stance unsupported by case law. Cases analyzing nuisance claims focus their inquiry not narrowly upon those who created the nuisance, but more broadly upon the individuals with the power to abate the nuisance. And property owners have the legal authority to abate a public nuisance as it is either expressly prohibited in a lease or a common law right to evict a possessor of land who is creating a public nuisance. The purpose of which is obviously to avoid tragedies like in this case. Defendants had complete power to abate the nuisance, ie animal elopement, and they did nothing. Adopting Defendants argument will not only permit, but will promote landowners to turn a blind eye as to the happenings on their property in order to avoid liability but at the same time permit them to mortgage the property to reap one of the rewards of landownership. And this case is an example of the consequences of such an approach.

The attached photographs demonstrate the state of disrepair of Defendants' property.<sup>5</sup> When Defendant Daniel Truman was asked in his deposition if over the last ten years he has lived anywhere else, he testified that he stayed with his girlfriend on Quick Road.<sup>6</sup> Defendant Daniel Truman testified that he has been with his girlfriend for ten years and that he stayed with her at her residence for quite a few years.<sup>7</sup> When asked if he stills spends the night there, he replied in the affirmative.<sup>8</sup> Deposition testimony of numerous witnesses in this case establish that animal elopement was a continuing and habitual problem and one that was publicly known.

According to the records provided by the Emmet County Sheriff's Department, reports of animals eloping from 5151 Stutsmanville Road include but, are not limited to the following:

- On April 22, 2003, Jan Martindale reported that several cows escaped and entered the road on Stutsmanville Road, creating a road hazard.<sup>9</sup>
- On May 20, 2003, an unidentified female caller reported that cows escaped from their pen, and she was afraid someone would hit them.<sup>10</sup>
- On June 22, 2003, Dan Truman called to report that one of his boars had escaped.<sup>11</sup>
- On June 29, 2003, Lorie Seltenright reported that two pigs escaped and were in roadway on Stutsmanville Road creating a road hazard. She stated that she believe their owner to be the resident of the "crashed up" house nearby.<sup>12</sup>
- On July 12, 2003, Mike Ruggles reported that five horses escaped and were in roadway on Stutsmanville Road creating a road hazard.<sup>13</sup>
- On October 08, 2003, Cindy Shepard reported that cows had escaped and entered in roadway on Stutsmanville Road creating a road hazard.<sup>14</sup>
- On April 22, 2004, Becky Major reported that a cow was loose and on the side of Stutsmanville Road.<sup>15</sup>
- On July 13, 2004, Bill Harrison reported that three horses escaped and were on State Road creating a road hazard.<sup>16</sup>

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<sup>5</sup> See Attached Photographs. Exhibit 3.

<sup>6</sup> Deposition of Daniel Truman, pg. 9, lines 15-19.

<sup>7</sup> Deposition of Daniel Truman, pg. 38, line 25; pg. 39, lines 1-4.

<sup>8</sup> Deposition of Daniel Truman, pg. 38, line 14-15.

<sup>9</sup> See EMCD Event Report dated April 22, 2003.

<sup>10</sup> See EMCD Event Report dated May 20, 2003

<sup>11</sup> See EMCD Event Report dated June 22, 2003

<sup>12</sup> See EMCD Event Report dated June 29, 2003

<sup>13</sup> See EMCD Event Report dated July 12, 2003

<sup>14</sup> See EMCD Event Report dated October 8, 2003

<sup>15</sup> See EMCD Event Report dated April 22, 2004

- On July 25, 2004, Jan Morley reported that a horse escaped from its pen.<sup>17</sup>
- On July 25, 2004, Jessilynn Krebs reported that ten cows escaped and were in the roadway creating a road hazard.<sup>18</sup>
- On March 12, 2005, a passerby named Al Majors reported that a herd of cows escaped and were in the roadway creating a road hazard on Stutsmanville Road.<sup>19</sup>
- On May 09, 2005, Stacy Norton reported that 12 cows escaped and were headed down Walker towards State Road.<sup>20</sup>
- On June 2, 2005, a passerby named Steve Perry reported that three cows had escaped and were in the roadway creating a road hazard on Stutsmanville Road.<sup>21</sup>
- On June 29, 2005, Kimberly Boynton called and reported that three cows escaped and were in the roadway creating a road hazard on Stutsmanville Road.<sup>22</sup>
- On November 10, 2005, a passerby named Pat Schwartz reported that several cows escaped and were in the roadway creating a road hazard on Stutsmanville Road.<sup>23</sup>
- On January 24, 2006, Richard Cobb reported that six cows escaped and were in the roadway creating a road hazard on Stutsmanville Road.<sup>24</sup>
- On April 18, 2006, an anonymous caller reported that horses escaped and were in the middle of Stutsmanville Road “down by the Trumans.”<sup>25</sup>
- On May 09, 2006, an anonymous male caller reported that twenty cows escaped and were in the roadway creating a road hazard on Stutsmanville Road. The anonymous caller stated that he knew “Truman” was the last name of the owner of the cows.<sup>26</sup>
- On August 09, 2006, Edward Jelinek reported that five cows escaped and were in and out of the roadway creating a road hazard.<sup>27</sup>
- On December 08, 2006, Ann Jewell reported that several pigs escaped and were in the roadway creating a road hazard.<sup>28</sup>
- On February 26, 2007, an anonymous male caller reported that a pig escaped and was in the roadway on Stutsmanville Road.<sup>29</sup>
- On March 3, 2007, a caller reported that a black cow was loose and in the roadway.<sup>30</sup>

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16 See EMCD Event Report dated July 13, 2004  
17 See EMCD Event Report dated July 25, 2004  
18 See EMCD Event Report dated July 25, 2004  
19 See EMCD Event Report dated March 12, 2005  
20 See EMCD Event Report dated May 9, 2005  
21 See EMCD Event Report dated June 2, 2005  
22 See EMCD Event Report dated June 29, 2005  
23 See EMCD Event Report dated November 10, 2005  
24 See EMCD Event Report dated January 24, 2006  
25 See EMCD Event Report dated April 18, 2006  
26 See EMCD Event Report dated May 9, 2006  
27 See EMCD Event Report dated August 9, 2006  
28 See EMCD Event Report dated December 8, 2006  
29 See EMCD Event Report dated February 26, 2007  
30 See EMCD Event Report dated March 3, 2007

- On June 25, 2007, Al Majors reported that two calves and a escaped and were in the roadway creating a road hazard on Stutsmanville Road.<sup>31</sup>
- On June 26, 2007, Becky Majors reported that a calf escaped and was in the roadway creating a road hazard on Stutsmanville Road.<sup>32</sup>
- On July 7, 2007, Dan Truman called to let the police know that he was moving cows and one got away.<sup>33</sup>
- On July 8, 2007, an anonymous female caller reported that hogs escaped and were in the roadway on creating a road hazard Stutsmanville Road.<sup>34</sup>
- On October 4, 2007, a anonymous caller reported that two cows escaped and were walking down the middle of Stutsmanville Road.<sup>35</sup>
- On October 05, 2007, Mary Rigsby reported that three cows escaped and were the in roadway creating a road hazard on Stutsmanville Road.<sup>36</sup>
- On May 27, 2008, Jay Steffle reported that 15 Cattle were loose on State Road.<sup>37</sup>
- On August 25, 2008, Louie Fisher reported that two cows escaped and were creating a road hazard.<sup>38</sup>
- On April 3, 2010, Al Major reported that 8-10 cows escaped and were in the middle of Stutsmanville Road creating a road hazard.<sup>39</sup>
- On May 06, 2010, Janice Hartman reported that 10 cows were loose.<sup>40</sup>
- On May 07, 2010, James Major reported that a herd of cattle were out by the road at the Truman property.<sup>41</sup>
- On May 29, 2010, Becky Major reported that 12 or more cows escaped and were in the roadway on Stutsmanville Rd creating a road hazard.<sup>42</sup>
- On July 13, 2010, at 5:11 a.m. William Brecheisen reported a car accident that left a car upside down in a field with the driver deceased, and a deceased horse in the roadway.<sup>43</sup>

Additionally, depositions were taken of many of the witnesses of animal elopement, neighbors, and community members. These individuals confirmed numerous animal elopements from 5151 Stutsmanville Road.

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<sup>31</sup> See EMCD Event Report dated June 25, 2007  
<sup>32</sup> See EMCD Event Report dated June 26, 2007  
<sup>33</sup> See EMCD Event Report dated July 7, 2007  
<sup>34</sup> See EMCD Event Report dated July 8, 2007  
<sup>35</sup> See EMCD Event Report dated October 4, 2007  
<sup>36</sup> See EMCD Event Report dated October 5, 2007  
<sup>37</sup> See EMCD Event Report dated May 27, 2008  
<sup>38</sup> See EMCD Event Report dated August 25, 2008  
<sup>39</sup> See EMCD Event Report dated April 3, 2010  
<sup>40</sup> See EMCD Event Report dated May 6, 2010  
<sup>41</sup> See EMCD Event Report dated May 7, 2010  
<sup>42</sup> See EMCD Event Report dated May 29, 2010  
<sup>43</sup> Deposition of William Brecheisen (“William Brecheisen Dep.”), pg 8, lines 10-16

- William Brecheisen testified that the animals eloping from 5151 Stutsmanville Road was a “*continual thing* ever since [he] moved in”<sup>44</sup> and that “it’s been a constant thing, those animals always getting out.”<sup>45</sup>
- William Brecheisen testified that the animals eloping from 5151 Stutsmanville Road “was almost like monthly.”<sup>46</sup>
- Anne Brecheisen testified that the animals eloping from 5151 Stutsmanville Road was a “*habitual problem*,”<sup>47</sup> which happened on a “regular basis,”<sup>48</sup> and that animals “were continually getting out on the road.”<sup>49</sup>
- Anne Brecheisen testified that the animals eloped from 5151 Stutsmanville Road on “several occasions, once a week, twice a week,”<sup>50</sup> and that it was “about a 100 times a year.”<sup>51</sup>
- Alfred Major testified that it was “common knowledge in the community” and that “[e]verybody knew” that animals get loose from 5151 Stutsmanville Road.<sup>52</sup>
- Alfred Major testified that he struck a cow that had eloped from the 5151 Stutsmanville Road property.<sup>53</sup>
- Janice Hartman testified that she has experienced animals eloping from 5151 Stutsmanville Road “numerous times. Meaning at least a dozen.”<sup>54</sup>
- Becky Major testified that she is familiar with the fact that “animals get out a lot” from 5151 Stutsmanville Road.<sup>55</sup>
- Becky Major testified that she called 9-1-1 “twice within three weeks of the accident” regarding loose animals.<sup>56</sup>
- Becky Major testified that “[l]ast year [she] called [9-1-1] probably four or five times. In previous times to that, maybe a total of eight or nine times.”<sup>57</sup>

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<sup>44</sup> Deposition of William Brecheisen (“William Brecheisen Dep.”), pg 11, lines 24-25, emphasis added

<sup>45</sup> William Brecheisen Dep., pg 12, lines 12-17

<sup>46</sup> William Brecheisen Dep., pg 12, line 7

<sup>47</sup> Deposition of Ann Brecheisen (“Ann Brecheisen Dep.”), pg 10, line 15, emphasis added

<sup>48</sup> Anne Brecheisen Dep., pg 14, lines 19-20

<sup>49</sup> Anne Brecheisen Dep., pg 14, lines 15-18

<sup>50</sup> Anne Brecheisen Dep., pg 9, lines 10-13

<sup>51</sup> Anne Brecheisen Dep., pg 10, lines 4-5

<sup>52</sup> Alfred Major Dep., pg 14, lines 6-11

<sup>53</sup> Alfred Major Dep., pg 8, lines 6-8 and pg 13, lines 1-2

<sup>54</sup> Deposition of Janice Hartman (“Hartman Dep.”), pg 13, lines 20-21

<sup>55</sup> Becky Major Dep., pg 8, lines 1-3

<sup>56</sup> Becky Major Dep., pg 8, lines 12-16

<sup>57</sup> Becky Major Dep., pg 10, lines 15-18

- Becky Major testified that the 5151 Stutsmanville Road Property has a reputation in the community including that “it doesn’t seem to be well kept. The animals are constantly loose...”<sup>58</sup>
- Becky Major testified that “The community, family members and neighbors, we’ve discussed the fact that, you know, nobody really likes to drive past there because they don’t know what’s going to come out.”<sup>59</sup>
- Becky Major testified that her father, Alfred Major, hit and killed one of Daniel Truman’s cows and that Daniel Truman’s son took the unborn calf to school for science class.<sup>60</sup>

At common law, a “nuisance arises from the existence of a dangerous condition”<sup>61</sup> and an “unreasonable interference with a common right enjoyed by the general public.”<sup>62</sup> Contrary to Defendants’ assertion that a public nuisance always requires affirmative conduct, Michigan law recognizes that a nuisance can arise from an act, an omission, or a pattern of conduct.

Interestingly, in Defendants’ Application for Leave to Appeal, Defendants acknowledged “Plaintiff might have a compelling factual cause of action against Defendant Daniel Truman for allowing his horse to escape from his farm.”<sup>63</sup> Defendants then attempt to distinguish their liability from Defendant Daniel Truman’s arguing that Defendants were not responsible for causing the nuisance. Defendants’ argument centers around the ‘control’ element of nuisance liability.

It is well established that “[c]ontrol may be found where the defendant . . . *owns* or controls *the property from which the nuisance arose*. . . .”<sup>64</sup> Defendants’ argument, even if accepted as true, does not limit their liability as the owners of the property, which they admitted

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<sup>58</sup> Becky Major Dep., pg 22, lines 23-25

<sup>59</sup> Becky Major Dep., pg 23, lines 8-11

<sup>60</sup> Becky Major Dep., pg 26, lines 6-17

<sup>61</sup> *Martin v State*, 129 Mich App 100, 107, 341 NW2d 239, 243 (1983).

<sup>62</sup> *Cloverleaf Car Co v Wykstra Oil Co*, 213 Mich App 186, 190, 540 NW2d 297 (1995)

<sup>63</sup> Defendants’ Application for Leave to Appeal, pg. 13.

<sup>64</sup> *Baker v. Waste Management of Michigan, Inc.*, 208 Mich. App. 602, 606; 528 NW2d 835, 837 (1995).

to in their First Amended Complaint.<sup>65</sup> A copy of the deed is attached.<sup>66</sup> Here, the facts are clear that had the Defendants, Robert and Marilyn Truman taken actions against Daniel Truman to abate the nuisance for which they have had knowledge of for many years, this accident would not have happened. Not only did they have it, even if they argue that they did not know, they should have known about their own property and the public nature of the animal elopement, which as was documented above, was well known within the community.

Moreover, despite Defendants assertions now that they have no control over the property, when it came to the Defendants getting money as a result of ownership, Defendants' position was much different. In March of 2010, just four months prior to the accident in this case, the Defendants Robert and Marilyn Truman borrowed money against the property and represented to the Bank and to the world that:

**POSSESSION AND MAINTENANCE OF THE PROPERTY.**

Grantor and Lender agree that Grantor's possession and use of the Property shall be governed by the following provisions:

**Possession and Use.** Until the occurrence of an Event of Default, Grantor may (1) remain in possession and control of the Property; (2) use, operate or manage the Property, and (3) collect the Rents from the Property.

**Duty to Maintain.** Grantor shall maintain the property in good condition and promptly perform all repairs, replacement, and maintenance necessary to preserve its value.

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**Nuisance, Waste.** Grantor shall not cause, conduct, or permit any nuisance . . . on . . . the Property or any portion of the Property.

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<sup>65</sup> See Paragraphs 5 and 13 of Defendants' Answer to First Amended Complaint. See also Deed dated December 5, 1989.

<sup>66</sup> Deed to the property. Exhibit 4.

**Duty to Protect.** Grantor agrees *neither to abandon or leave unattended* the Property.<sup>67</sup>

Regardless of their arguments, Defendants not only agreed that they could remain in possession and control of the property, but also warranted that they would maintain the property in good condition and complete all necessary repairs and maintenance; that they would not permit nuisance on said property; and lastly, that they would not abandon or leave the property unattended. This was just months prior to the accident.

In *Cloverleaf Car Co v Wykstra Oil Co*,<sup>68</sup> the Michigan Court of Appeals outlined three different instances where a defendant will be held liable for nuisance:

- (1) the defendant created the nuisance;
- (2) the defendant *owned or* controlled the land from which the nuisance arose, or
- (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise.<sup>69</sup>

The conjunction “or” is used between “owned” and “controlled.” Allowing owners or possessors to be held liable creates an intentionally broader scope of liability. The reason for this broader scope of liability is that landowners should be held liable if they allow continuing patterns of activity on their property that constitutes a nuisance.

Defendants attempt to limit the instances imposing liability as set forth in *Cloverleaf* is circular at best. Interestingly, Defendants continuously cite cases and argue that control is required to establish nuisance liability, but go on to include that control can be established “*through ownership or otherwise.*”<sup>70</sup> Defendants, Robert and Marilyn Truman had control over,

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<sup>67</sup> Mortgage, page 2-3 (emphasis added). Exhibit 5.

<sup>68</sup> *Cloverleaf Car Co*, 213 Mich App at 191.

<sup>69</sup> *Id.* (emphasis added); see also *Gelman Sciences, Inc v Dow Chemical Co*, 202 Mich App 250, 252; 508 NW2d 142 (1993).

<sup>70</sup> Defendants Application for Leave to Appeal, pg. 20.

and ownership of, the property and easily could have taken action to abate this nuisance, but chose not too. And Defendants Robert and Marilyn Truman were certainly using the property for their pleasure just months before the accident by using it to obtain a loan to purchase an airplane.<sup>71</sup> More importantly, they knew about the potential for liability arising out of their ownership as they maintain a general liability policy for just such an instance on this property.

Although cited by Defendants, the Court of Appeals in *Wagner v. Regency Inn Corp.*<sup>72</sup> affirmed that a landowner as well as a possessor can be liable for a hazard or danger that is a continuing pattern. The *Wagner* Court explained:

We perceive a valid distinction between limiting a landowner's duty to protect his invitees from third-party crime and imposing liability on a *landowner* for creating or *allowing continuing patterns of . . . activity on his premises . . .*<sup>73</sup>

And again, the use of the conjunctive “or” in “creating or allowing” demonstrates that an owner can be held liable even if he or she did not create the nuisance complained of.

In *Wagner*, the plaintiff rented a vehicle from Americar, whose office was located in the lobby of the Regency Inn. After renting a vehicle, the plaintiff left to obtain her checkbook from her car in the parking lot and was robbed and raped.<sup>74</sup>

The essence of plaintiff's nuisance claims is that defendants, who owned or controlled the Regency Inn premises, intentionally or negligently created or allowed the existence of certain dangerous physical conditions and protracted criminal activities on their premises which combined to constitute a public nuisance.<sup>75</sup>

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<sup>71</sup> Robert Truman Dep, page 18, lines 22-24 and page 22, line 25 – page 23, line 1

<sup>72</sup> *Wagner v Regency Inn Corp*, 186 Mich App 158; 463 NW2d 450 (1990) (emphasis added)

<sup>73</sup> *Wagner v Regency Inn Corp*, 186 Mich App 158, 162-163, 463 NW2d 450 (1990) (emphasis added)

<sup>74</sup> *Id.* at 160-161.

<sup>75</sup> *Id.* at 163.

Notably, according to the terms of the lease in *Wagner*, “Americar controlled office and lobby space in the hotel, *as well as portions of the parking lot*, and was required to keep these areas in good repair.”<sup>76</sup> Interestingly, Defendants agree to those same terms with the bank in this case.

With respect to plaintiff’s allegations, the Court stated as follows:

We have reviewed counts I through III of plaintiff’s complaint and conclude that when the factual allegations are accepted as true, along with any inferences which may be fairly drawn therefrom, plaintiff stated sufficient claims for nuisance per se and nuisance in fact, both negligent and intentional.<sup>77</sup>

Contrary to Defendants assertion, there is nothing in *Wagner* that distinguished between owner or possessor of the property in regards to liability.

Although Defendants assert that because they were not in possession of the property they therefore were not in control, Defendants assertion is not supported by a single bit of evidence obtained in this case. The undisputed facts are that there was no signed written agreement (no lease, land contract, deed, mortgage, not even a purchase agreement) between or among Robert and Marilyn Truman and Daniel Truman. There was no single impediment that would have prohibited Robert and Marilyn Truman from taking action to abate this hazard. Given the public records and testimony of the general public as documented by the Plaintiff in this case, any court would likely have evicted Daniel Truman from the property just solely based on the animal elopement. But even Robert and Marilyn Truman testified that Daniel Truman had not made a payment on the property in years<sup>78</sup> and had not paid whatever amount it was pursuant to an alleged oral agreement to purchase the property from the Robert and Marilyn Truman.<sup>79</sup>

Ownership has always been a cornerstone of nuisance because, as owner, one has the

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<sup>76</sup> *Id.* at 165.

<sup>77</sup> *Id.* at 164-165.

<sup>78</sup> Deposition of Marilyn Truman, pg. 8, lines 13-17.

<sup>79</sup> Deposition of Robert Truman, pg. 46, lines 14-25.

inherent power to abate a nuisance being caused by a possessor through the summary proceedings act. And nuisance law by definition makes those responsible who have the power to abate the nuisance, which in this case included Defendants Robert and Marilyn Truman. Therefore, when a landowner knows, or has reason to know, of a continued pattern of behavior on property they own, the landowner may be held liable if he fails to exercise reasonable care to prevent the nuisance.<sup>80</sup>

Additionally, contrary to Defendants argument, an absentee owner that was not involved in creating the nuisance can still be held liable. 58 Am Jur 2d (2002 Ed.), § 118, pp 645-646, states:

To be liable for nuisance, it is not necessary for an individual to own the property on which the objectionable condition is maintained, but rather, liability for damages turns on whether the defendant controls the property, ***either through ownership or otherwise***. A person is liable if he or she knowingly permits the creation or maintenance of a nuisance on premises of which he or she has control, even though such person does not own the property, ***or even though such person is not physically present, such as where he or she is an absentee owner.***

There may be additional ways that control can be established, but it can be done at least by ownership according to Michigan and other jurisdictions around the country. If this were not the case, the law would read simply that control is sufficient to establish nuisance without mention of ownership. Any other interpretation would allow landowners to permit any of number of activities to be created and/or maintained on their property, even with knowledge thereof, and adopt a “do nothing” approach which was evident in this case and lead to this tragedy.

But contrary to Defendants’ argument, case law concludes that ownership is one form of control in determining liability for nuisance. In *Continental Paper & Supply Co., Inc. v. City of*

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<sup>80</sup> *Id.* at 163-164.

*Detroit*,<sup>81</sup> the owner of a piece of property, which was destroyed by a fire brought suit against the City of Detroit for failing to abate the nuisance causing the fire.<sup>82</sup> This Court found that the elements of condition and cause had been established; leaving the issue of whether the plaintiff established that the City had the requisite control of the warehouses.<sup>83</sup> In determining whether the City controlled the warehouses, this Court's analyzed whether the defendant had control of the property, first, through ownership, and second, whether "other" facts established control.<sup>84</sup> The Court ultimately did not find the City liable because not all the necessary paperwork vesting ownership of the land to the city had been completed.<sup>85</sup> In this case, ownership of the property is not in dispute. It has been admitted in the Answer to the First Amended Complaint that Robert and Marilyn were the title holders to the property.

Imposing liability on an absentee owner is supported further by the treatment of nuisance as a condition of the land and not the conduct creating or maintaining that condition. In *Buckeye Union Fire Ins. Co. v. Mich.*,<sup>86</sup> this Honorable Court stated:

Primarily, nuisance is a condition. Liability is not predicated on tortious conduct through action or inaction on the part of those responsible for the condition. Nuisance may result from want of due care (like a hole in a highway), but may still exist as a dangerous, offensive, or hazardous condition even with the best of care.<sup>87</sup>

Unlike negligence, "[n]uisance is a condition and not an act or failure to act."<sup>88</sup> In *Traver Lakes Community Maintenance Assoc. v. Douglas Co.*,<sup>89</sup> the Court of Appeals, in reviewing plaintiff's

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<sup>81</sup> 451 Mich. 162; 545 NW2d 657 (1995).

<sup>82</sup> *Id.* at 163-64.

<sup>83</sup> *Id.* at 164.

<sup>84</sup> *Id.* at 165-66.

<sup>85</sup> *Id.* at 165.

<sup>86</sup> 383 Mich. 630, 178 N.W.2d 476 (1970).

<sup>87</sup> *Id.* at 636.

<sup>88</sup> *Hobra v. Glass*, 143 Mich.App. 616, 630, 372 N.W.2d 630 (1985), quoting 58 Am Jur 2d, Nuisances, § 3, p. 557.

<sup>89</sup> 224 Mich.App. 335; 568 N.W.2d 847 (1997).

damages claim for trespass/nuisance, “focus[ed] [its] inquiry on the reasonableness of the interference with plaintiff’s property, not the reasonableness of defendants’ conduct in creating or maintaining the interference.”<sup>90</sup>

In *Traver*, the plaintiff sued the owner, contractor, and subcontractor responsible for building an apartment complex for negligence after the erosion control and drainage system they installed proved to be defective.<sup>91</sup> The plaintiff moved to amend the complaint to include a claim of nuisance; however, the trial court denied the motion on the ground of futility because there was no evidence to indicate that the defendants exercised possession or control of the system.<sup>92</sup> On appeal, this Court reversed on the ground that the plaintiff had alleged facts showing that the defendants “*either owned the land from which the excess silt was coming or* that they controlled the implementation of soil erosion controls during construction of the apartment complex.”<sup>93</sup>

Similarly, as discussed by the Court of Appeals in the unpublished opinion *Nelson v. Village of Milford*,<sup>94</sup> ‘control’ does not necessarily refer to control over the nuisance itself, but can be established by control of the property where the nuisance arose and control can be established through ownership of the property.<sup>95</sup> In *Nelson*, the nuisance complained of was a broken limb dangling from a tree into the public’s right of way outside the plaintiff’s house. In its analysis, the Court of Appeals articulated:

It is not disputed that defendant did not cause or create the nuisance or set it in motion. The plaintiffs admit that the storm caused the nuisance. While plaintiffs contend that defendant had

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<sup>90</sup> 224 Mich. App. 335, 345 (1997).

<sup>91</sup> *Id.* at 339.

<sup>92</sup> *Id.* at 339-344.

<sup>93</sup> *Id.* at 345-346.

<sup>94</sup> *Nelson v. Village of Milford*, unpublished opinion of the Court of Appeals of Michigan, issued April 20, 2001 (Docket No. 220627).

<sup>95</sup> *Id.*

control over the tree, the control element pertains to control over the intrusion itself *or the property whence it came*.<sup>96</sup>

“Plaintiffs also contend that defendant had control over the property itself. *Control may be found where the defendant owns the property where the nuisance arose* or had absolute control over the property.”<sup>97</sup>

In *Stevens v. Drekich*,<sup>98</sup> the Michigan Court of Appeals held that the plaintiff did not set forth a viable claim in nuisance against private landowners for an automobile accident involving a tree that was located on their premises but within the public's right of way.<sup>99</sup> Although the defendants were the owners in fee of the property in which the tree was located, it was held that the claim of nuisance against the defendants did not lie due to their lack of control because of the highway easement:

Plaintiffs argue that Count III of the complaint states a legally adequate claim based on a nuisance theory. Nuisance liability is predicated upon a dangerous, offensive, or hazardous condition in the land or an activity of similar characteristics conducted on the land. *Buckeye Union Fire Ins Co v. Michigan*, 383 Mich. 630, 636; 178 NW2d 476 (1970). *It requires that the defendant liable for the nuisance have possession or control of the land. Attorney General v. Ankersen*, 148 Mich.App 524, 560; 385 NW2d 658 (1986). Thus, the absence of any *right of possession* on the part of defendants to the berm area defeats liability predicated upon nuisance theory. [Emphasis added.]<sup>100</sup>

What is interesting about *Stevens* is that, along with the cases previously cited, it focuses on imposing liability upon those who have the ability to abate the nuisance. Here, we are not just talking about liability for individuals in possession of the property, but individuals with the *right or power* to abate the nuisance. In the present case, Defendants could have easily abated the

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*Id.*

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*Id.*

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178 Mich.App 273, 277-278; 443 NW2d 401 (1989)

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*Id.*

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*Id.* at 277-78.

nuisance, but chose not too. In fact, by their do nothing attitude, they approved of the conduct of Daniel Truman.

Additionally, while not binding on this Court, other jurisdictions' treatment of this issue is persuasive. For example, In *City of New York v. Capri Cinema, Incorporated*,<sup>101</sup> the New York Supreme Court examined "whether liability for [a] public nuisance can be imputed to [the owner], as an absentee owner of the premises, if he neither had notice of the nuisance, nor created the nuisance."<sup>102</sup> The Court answered this in the affirmative.<sup>103</sup>

In this case, a tenant of a theater regularly showed explicitly sexual triple x-rated films to roughly 1,200 patrons per week.<sup>104</sup> Based on this conduct, the City sought a preliminary injunction against both the tenant and the owner of the theater, barring the use of the theater until the resolution of the litigation.<sup>105</sup> The building owner in this case, Alfred Moody, denied knowledge of the nuisance and represented through counsel that he had not visited the premises in 27 years.<sup>106</sup> The Court granted the injunction and the owner appealed.<sup>107</sup> On appeal, the New York Supreme Court noted that while personal fault is not a consideration when determining whether to issue a preliminary injunction, assuming "*arguendo* that personal fault is a material consideration,"<sup>108</sup> the court found that an *absentee landlord* "proceeds at his own peril, and may suffer legal consequences as a result of his do-nothing policy."<sup>109</sup> Moreover, the Court held that the owner is "presumed to have knowledge of how his property is being used."<sup>110</sup>

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<sup>101</sup> *City of New York v Capri Cinema, Inc*, 169 Misc. 2d 18; 641 NYS.2d 969 (Sup Ct 1995).

<sup>102</sup> *Id.* at 27.

<sup>103</sup> *Id.* at 2708.

<sup>104</sup> *Id.* at 20.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 27.

<sup>107</sup> *Id.* at 20.

<sup>108</sup> *Id.* at 27.

<sup>109</sup> *Id.* at 28.

<sup>110</sup> *Id.*

The New York Supreme Court, Appellate Division for the Third Department, in *State v. Monarch Chemicals, Incorporated*,<sup>111</sup> rejected a landowner's argument that he was not liable for the tenant's public nuisance due to the absence of affirmative misconduct on his part.<sup>112</sup> In this case, the tenant corporation was found to have stored dangerous chemicals on site, which then contaminated the public water supply.<sup>113</sup> A cause of action for creating and maintaining a nuisance, along with other causes of action, were brought against the tenant and landowner.<sup>114</sup> The Court refused the landowner's request to dismiss the action as to him and found that "a landlord is required to maintain his property in a reasonably safe condition in view of all the circumstances."<sup>115</sup>

The New York Supreme Court, Appellate Division for the Second Department in *Berl v. Rochester State Corporation*,<sup>116</sup> found the owner of a premise and the lessee of said premises liable for the nuisance maintained on the premises despite not knowing whose conduct created the nuisance. In *Berl*,<sup>117</sup> the subject premises was known as the *Dixie Theater*, which was operated by the lessee.<sup>118</sup> In the concrete sidewalk in front of the premises was a coal shute which connected the building on the premises' cellar.<sup>119</sup> Said shute was covered by a round iron plate, which caused injury to plaintiff.<sup>120</sup> The Court found that a nuisance existed and held that in New York if "a nuisance exists, both owner and lessee may be jointly liable."<sup>121</sup> And further that,

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<sup>111</sup> *State v. Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (1982).

<sup>112</sup> *Id.* at 907.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Berl v. Rochester State Corp.*, 14 N.Y.S.2d 516, (City Ct. 1939).

<sup>117</sup> *Id.* at 518.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 519-20.

“[d]ominion over the hole cover was in the defendants,”<sup>122</sup> referring to both the owner and lessee. Thus, Court held that the owner was also liable for the nuisance despite not knowing who had constructed the shute.<sup>123</sup>

In *Tetzlaff v. Camp*,<sup>124</sup> the Iowa Supreme Court reversed the lower court’s decision to grant the co-defendant lessors’ motion for summary disposition, which released him of liability for the nuisance created by his lessees. In this case, the co-defendant lessees would spread hog manure in their personal garden, which were 90 feet from the south side and 160 feet from the north side of the plaintiff’s home.<sup>125</sup> The co-defendant lessor had notice of plaintiff’s complaint regarding this manure spreading procedure but allowed it to continue.<sup>126</sup> The Court referenced Section 837 of the Restatement Second of Torts, which provides as follows:

- (1) A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land while the lease continues and the lessor continues as owner, if the lessor would be liable if he had carried on the activity himself, and
  - (a) at the time of the lease the lessor consents to the activity or knows or has reason to know that it will be carried on, and
  - (b) he then knows or should know that it will necessarily involve or is already causing the nuisance.

The Court held that since there was “substantial evidence”<sup>127</sup> that the co-defendant landlord in this case knew of the plaintiff’s complaints regarding the co-defendant lessee’s manure spreading procedures, the Court found the co-defendant lessor liable for the public nuisance maintained on the leased property.<sup>128</sup>

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<sup>122</sup> *Id.* at 520.

<sup>123</sup> *Id.* at 520.

<sup>124</sup> *Tetzlaff v. Camp*, 715 N.W.2d 256 (Iowa 2006)

<sup>125</sup> *Id.* at 257.

<sup>126</sup> *Id.* at 257-8.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 261.

The Fourth District Court of Appeals for the State of Florida in *Bowen v. Holloway*,<sup>129</sup> reversed a lower court's determination on summary disposition in favor of the defendant landlord in relation to a motorcycle accident involving a horse who had strayed from the leased premises. The defendant landlord owned a property that was utilized for pasture and horses and was enclosed by a fence on three sides with the side adjacent to the public roadway open.<sup>130</sup> The property also contained horse stalls where the defendant lessee would occasionally leave the horses overnight.<sup>131</sup>

After leasing to the property to defendant lessee, there were multiple occasions where horses were found to have escaped from the horse stalls due to a faulty latch on the stall door and would often end up on the public roadway.<sup>132</sup> It was established that the defendant landlord/landowner knew of this fact.<sup>133</sup> On the night of the accident, a horse had once again strayed from the horse stall causing the accident.<sup>134</sup> Plaintiff brought suit under the theory of nuisance against defendant's lessor and lessee but the lower court found on summary disposition that the defendant lessor/landowner was not liable for the accident.<sup>135</sup> On appeal, the court held that:

A lessor landlord may be liable to third persons for injuries caused by defects in the leased premises during the term of the lease when the defect in or condition of the premises at the time of the lease was in the nature of either an existing or incipient nuisance.<sup>136</sup>

The court further explained that

Leases are made with a view to the use of the premises leased, and if at the time of the lease the premises are so defective, or if a

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<sup>129</sup> *Bowen v. Holloway*, 255 So. 2d 696 (Fla. Dist. Ct. App. 1971)

<sup>130</sup> *Id.* at 697.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 697-98.

structure thereon is of such a nature, that the reasonable, ordinary, and expected use of the property will result in a nuisance, or if the injury to the person or property of a stranger is the result of the reasonable, ordinary, and contemplated manner of use of the premises, the lessor will be responsible therefor, even though the premises, unused and as they stood at the time of the demise, were not of themselves a nuisance or would not have caused injury.<sup>137</sup>

Based upon this reasoning, the Court remanded the case for further determination of whether the three-sided fence constituted an incipient nuisance existing at the time the lease was executed which would impose liability upon the defendant lessor.<sup>138</sup>

In *City of Los Angeles v. Star Sand & Gravel Co.*,<sup>139</sup> the Second District of the District Court of Appeal suggested that an owner of leased property may be liable for the a nuisance maintained by the lessee of the property if he or she has knowledge that the premises would be used in a particular way and was on notice that it was in fact used in such a way.<sup>140</sup> The Court of Chancery of Delaware has also stated, “[c]learly a defendant can be guilty of maintaining a nuisance at a particular place without ever being physically present there, e. g., an absentee owner of the premises.”<sup>141</sup>

### CONCLUSION

The jurisprudence of this State and that of many other states has created a limited obligation of owners of real property to act, and not be absentee, under limited circumstances. Those circumstances arise when the hazard interferes with a public right away, when the hazard is continuous in nature, and when the owner of the property knew or should have known of the hazard. All of which are, at a minimum, present in this case.

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<sup>137</sup>

*Id.*

<sup>138</sup>

*Id.*

<sup>139</sup>

*City of Los Angeles v. Star Sand & Gravel Co.*, 124 Cal. App. 196, 12 P.2d 69 (1932)

<sup>140</sup>

*Id.* at 197.

<sup>141</sup>

*State of Delaware et al v. Peter C. Olivere*, 42 Del.Ch. 387, 393-94; 213 A.2d 53, 57 (1965).

We are not talking about a single incident where a dog might be loose or snow or ice has accumulated after a snowfall. Neither this case nor the law of nuisance by the Court of Appeals' decision in this case, is going to create additional claims filed by parties who will now allege nuisance. It is good public policy of this State to require property owners to maintain their property and to make sure when there is a public hazard that is dangerous to take appropriate actions.

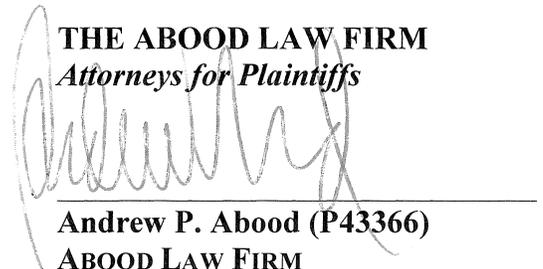
It is also good public policy that when a party occupies a premises who is not the property owner, that the property owner still be vigilant to some small degree where the possessor is creating a public nuisance. Here, Defendants knew or should have known about this public nuisance of animal elopement and took no action, and under the limited circumstance of this case, should be held liable to the Plaintiff.

**RELIEF REQUESTED**

Accordingly, Plaintiff respectfully requests that this Honorable Court deny Defendants/Appellants' Application for Leave to Appeal and grant any and all additional relief deemed just and equitable.

Respectfully submitted,

**THE ABOOD LAW FIRM**  
*Attorneys for Plaintiffs*



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**Andrew P. Abood (P43366)**  
**ABOOD LAW FIRM**  
246 East Saginaw, Ste One  
East Lansing, Michigan 48823

Dated: August 2, 2013

# Order

(11)  
Michigan Supreme Court  
Lansing, Michigan

June 21, 2013

146725

Robert P. Young, Jr.,  
Chief Justice

Michael F. Cavanagh  
Stephen J. Markman  
Mary Beth Kelly  
Brian K. Zahra  
Bridget M. McCormack  
David F. Viviano,  
Justices

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In re Estate of TERRI A. SHOLBERG

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DIANE K. SHOLBERG, as Personal  
Representative for the Estate of Terri A.  
Sholberg,

Plaintiff-Appellee,

v

SC: 146725  
COA: 307308  
Emmet CC: 10-002711-NI

ROBERT TRUMAN and MARILYN  
TRUMAN,

Defendants-Appellants,

and

DANIEL TRUMAN,  
Defendant.

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On order of the Court, the application for leave to appeal the November 15, 2012 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). The parties shall file supplemental briefs within 42 days of the date of this order addressing whether, and under what circumstances, a property owner who is not in possession of the property and does not participate in the conduct creating an alleged nuisance may be liable for the alleged nuisance. The parties should not submit mere restatements of their application papers.

We further ORDER that the stay issued by this Court on May 1, 2013 remains in effect until completion of this appeal.



h0618

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 21, 2013

  
Clerk

(2)

STATE OF MICHIGAN  
COURT OF APPEALS

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In re Estate of TERRI A. SHOLBERG.

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DIANE K. SHOLBERG, as Personal  
Representative for the Estate of TERRI A.  
SHOLBERG,

UNPUBLISHED  
November 15, 2012

Plaintiff/Appellant-Cross Appellee,

v

No. 307308  
Emmet Circuit Court  
LC No. 10-002711-NI

ROBERT TRUMAN and MARILYN TRUMAN,

Defendants/Appellees-Cross  
Appellants,

and

DANIEL TRUMAN,

Defendant.

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Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Diane K. Sholberg appeals as of right the trial court's grant of summary disposition<sup>1</sup> in favor of Robert and Marilyn Truman ("the Trumans"), in this case involving an automobile/horse accident that resulted in the death of Diane K. Sholberg's daughter, Terri A. Sholberg ("the decedent"). The Trumans also appeal the court's denial of their request for costs. We affirm in part, reverse in part and remand to the trial court for proceedings consistent this opinion.<sup>2</sup>

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<sup>1</sup> MCR 2.116(C)(8), (10).

<sup>2</sup> Because Sholberg did not receive the full amount of damages sought, we are not persuaded by the two unpublished cases cited by the Trumans in support of their assertion that Sholberg's appeal is moot.

In the early morning of July 13, 2010, the decedent was killed while driving to work on Stutsmanville Road when her car collided with a horse. The horse had escaped from a stable on property located at 5151 Stutsmanville Road ("the Property"). The Property is owned by the Trumans, but occupied by Daniel Truman, who is Robert's brother and Marilyn's brother-in-law.

Sergeant Timothy Rodwell, the lead investigator of the accident, determined that at the time of the accident, the decedent's vehicle was traveling "[b]etween 52 and 58 miles per hour" in a 55 mile an hour zone. Rodwell, who is qualified as an expert in accident reconstruction, testified as follows regarding how he believed the accident occurred:

I believe that [Daniel] Truman was keeping a horse in a — in a barn . . . . And the horse was kept on three sides with a — with wood. And the gate was a big, strong livestock gate; but it was secured to a wall with baling twine. The baling twine failed to keep that horse in, and it was broken when we looked at it, and the horse was running loose. The horse came into crossing Stutsmanville Road when the — [decedent] was — was driving on — on Stutsmanville Road. An impact occurred between the horse and the vehicle [decedent] was driving, caused [decedent] to lose control, go off the road, flip and rotate. . . . And then she came to rest, and we found her at rest with the seat belt on inside her vehicle.

Rodwell further testified that he did not attribute fault in the accident to the decedent.

A trial court's decision on a motion for summary disposition is reviewed de-novo.<sup>3</sup> We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law.<sup>4</sup> "[R]eview is limited to the evidence that had been presented to the [trial] court at the time the motion was decided."<sup>5</sup> "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party."<sup>6</sup> All reasonable inferences are to be drawn in favor of the nonmoving party.<sup>7</sup>

"This Court is liberal in finding genuine issues of material fact."<sup>8</sup> "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ."<sup>9</sup> "Summary disposition

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<sup>3</sup> *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004).

<sup>4</sup> *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

<sup>5</sup> *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

<sup>6</sup> *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007).

<sup>7</sup> *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

<sup>8</sup> *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

<sup>9</sup> *Ernsting*, 274 Mich App at 510.

is proper under [this subsection] if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.”<sup>10</sup>

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only when the claims alleged “are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.”<sup>11</sup>

On appeal, Sholberg asserts that the trial court erred when it found that the Equine Activity Liability Act (“EALA”)<sup>12</sup> did not create an independent cause of action or a theory of liability, and thus Sholberg failed to state a claim upon which relief could be granted. We disagree.

To determine whether the legislature intended the EALA to create an independent cause of action, it is necessary to examine the statute. Section 3 of the EALA provides in pertinent part:

Except as otherwise provided in section 5, an equine activity sponsor, an equine professional, or another person is not liable for an injury to or the death of a participant or property damage resulting from an inherent risk of an equine activity. Except as otherwise provided in section 5, a participant or participant’s representative shall not make a claim for, or recover, civil damages from an equine activity sponsor, an equine professional, or another person for injury to or the death of the participant or property damage resulting from an inherent risk of an equine activity.<sup>13</sup>

Section 5 of EALA provides various exceptions to the above limitations on liability for equine activity sponsors, equine professionals or others, some of which Sholberg asserts are applicable to the Trumans.<sup>14</sup>

“EALA abolished strict liability for horse owners, [but] it did not abolish negligence actions against horse owners.”<sup>15</sup> EALA, however, does not create an independent cause of action against the Trumans. Rather,

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<sup>10</sup> *Id.* at 509-510.

<sup>11</sup> *Johnson v Pastoriza*, 491 Mich 417, 434-435; 818 NW2d 279 (2012) (internal citations omitted).

<sup>12</sup> MCL 691.1661, *et seq.*

<sup>13</sup> MCL 691.1663.

<sup>14</sup> MCL 691.1665.

[p]ursuant to the clear and unambiguous language of the EALA, if a participant's injuries result from an inherent risk of an equine activity, the participant may not make a claim for damages against an equine professional; conversely, the equine professional is free from the "penalty" or "burden" of claims for damages.<sup>16</sup>

Thus, "[b]y providing that a class of persons is not bound or obligated with regard to an injury and by expressly disallowing claims under enumerating circumstances, the Legislature intended [EALA] to grant immunity to qualifying defendants[,] and not to create a theory of liability for plaintiffs.<sup>17</sup> Thus, the trial court did not err.

Sholberg next argues that the trial court erred when it dismissed her claim for negligence against the Trumans. We disagree.

The trial court found that "under the circumstances of this case, there's no situation that would properly give rise to a duty on [the Trumans] that would support any claim of negligence." The court asserted that the Property was "under the possession and control of Daniel Truman" and there was no evidence to support a claim that defendants "actively managed, supervised, maintained, possessed or controlled the subject property." Although the court acknowledged that the Trumans owned the Property, it found that "it was something more in the nature of a security interest than active ownership."

"A prima facie case of negligence requires the establishment of four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages."<sup>18</sup> "Whether a defendant owes a plaintiff a duty of care is a question of law for the court."<sup>19</sup> "A duty of care may arise from a statute, a contractual relationship, or by operation of the common law, which imposes an obligation to use due care or to act so as not to unreasonably endanger other persons or their property."<sup>20</sup>

Here, there is no statute or contractual relationship imposing a duty on the Trumans. Thus, we must look to the common law. Our Supreme Court has recently stated:

At common law, "[t]he determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person." "[T]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the

<sup>15</sup> *Beattie v Mickalich*, 486 Mich 1060; 784 NW2d 38 (2010) (internal citation omitted).

<sup>16</sup> *Amburgey v Sauder*, 238 Mich App 228, 233; 605 NW2d 84 (1999).

<sup>17</sup> *Id.*

<sup>18</sup> *Sherry v East Suburban Football League*, 292 Mich App 23, 29; 807 NW2d 859 (2011).

<sup>19</sup> *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

<sup>20</sup> *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009).

social costs of imposing a duty.” Factors relevant to the determination whether a legal duty exists include [] “the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.” We have recognized, however, that “[t]he most important factor to be considered [in this analysis] is the relationship of the parties” and also that there can be no duty imposed when the harm is not foreseeable. In other words, “[b]efore a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable.” If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors.<sup>21</sup>

Sholberg failed to address the relationship of the parties or how that relationship imposed a duty on the Trumans. Review of the record reveals that other than knowing the decedent, the extent of which is not clear, the Trumans did not have a relationship with the decedent. Additionally, while Sholberg contends that the Trumans “maintained possession and control of the [P]roperty,” she has failed to assert how the Trumans’ possession and control resulted in a duty owed to the decedent who was not injured on the Property. As such, there was no error by the trial court.<sup>22</sup>

Finally, Sholberg argues that the trial court erroneously found that the Trumans were not liable for nuisance because they were not in possession of the Property. We agree.

It appears from the complaint that Sholberg pled a cause of action for public nuisance. “A public nuisance is an unreasonable interference with a common right enjoyed by the general public.”<sup>23</sup> To constitute an unreasonable interference, the conduct must be of a sort that “(1) significantly interferes with the public’s health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights.”<sup>24</sup> To prevail in a public nuisance action, a private actor must “show he suffered a type of harm different from that of the general public.”<sup>25</sup> Despite the existence of a public nuisance, a defendant is only liable for damages “where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise.”<sup>26</sup>

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<sup>21</sup> *Hill v Sears, Roebuck and Co*, 492 Mich 651, \_\_\_; \_\_\_ NW2d \_\_\_ (2012), slip op, pp 10-11, quoting *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505-506, 508-509; 740 NW2d 206 (2007).

<sup>22</sup> *Id.*

<sup>23</sup> *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 191.

Sholberg provided evidence to the trial court of at least 30 instances of animal elopement from the Property between 2003 and 2010, which allegedly created hazards on Stutsmanville Road. There was evidence that the Trumans were aware of the issue regarding animal elopement and that complaints had been lodged. And there was no evidence presented that the Trumans did anything to address the problem. Thus, the record supports that the ongoing elopement of animals from the Property was an unreasonable interference with the public's right to safely travel on Stutsmanville Road. Additionally, the decedent's death is a harm suffered by Sholberg that is different from that of the general public. Moreover, the Trumans owned the Property from which the alleged nuisance arose, which is sufficient to bring a nuisance action against them. Thus, the trial court's grant of summary disposition in favor of the Trumans regarding Sholberg's nuisance claim was improper.<sup>27</sup>

~~Based on the above, the Trumans' cross-appeal is moot because there has been no verdict in this matter.~~<sup>28</sup>

Affirmed in part, reversed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot  
/s/ Jane M. Beckering  
/s/ Michael J. Kelly

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<sup>27</sup> *Id.* at 190-191.

<sup>28</sup> MCR 2.405.

(3)



W Stutzmanville Rd

1993

© 2013 Google

Imagery Date: 5/12/2012 45°30'25.75" N 85°01'10.65" W elev 992 ft eye alt 1356 ft

Google earth

W Stutsmanville Rd

Google earth  
5151 W Stutsmanville Rd, Harbor Spr

© 2013 Google

Imagery Date: 5/12/2012 45°30'24.04" N 85°01'10.87" W elev 1000 ft eye alt 1704 ft

1993

N



14

WARRANTY DEED-881  
AVAILABLE AT REGISTERED OFFICE, 200 N. WALNUT ST., ANN ARBOR, MICH. 48102 (State Use of Michigan Form)

LIBERO 421 PAGE 268

STATE OF MICHIGAN  
EMMET COUNTY  
RECORDED

1989 DEC 13 PM 3:08

*Alma J. Spear*  
REGISTER OF DEEDS

REVENUE STAMPS ATTACHED TO BACK OF DEED. 12/13/89 GS  
REAL ESTATE TRANSFER VALUATION AFFIDAVIT FILED

The Grantor(s) **LINDA S. TRUMAN,** whose address is  
**Middle Road, Harbor Springs, MI 49740**  
convey(s) and warrant(s) to **ROBERT W. TRUMAN and MARILYN J. TRUMAN,** husband and wife,  
whose address is **3424 Quick Road, Harbor Springs, MI 49740**  
the following described premises situated in the **Friendship** Township  
of **Friendship** County of **Emmet**  
and State of Michigan:

The East 1/2 of the West 1/2 of the Northeast 1/4 of the  
Northeast 1/4 of Section 22, Town 35 North, Range 6 West.

for the sum of **Real Estate Valuation Affidavit** filed herewith.  
subject to easements and building and use restrictions of record and further subject to restrictions,  
reservations, exceptions, easements and encroachments of record, or  
actually located and existing thereon.

Dated this **5th** day of **December**, 19 **89**.

Signed in presence of:  
*Paul W. Brown*  
\* **Paul W. Brown**  
*Donna J. Robinson*  
\* **Donna J. Robinson**

Signed by:  
*Linda S. Truman*  
\* **Linda S. Truman**

STATE OF MICHIGAN, }  
COUNTY OF **Emmet** } ss.

The foregoing instrument was acknowledged before me this **5th** day of **December**  
19 **89**, by **Linda S. Truman**

OFFICE OF  
Treasurer of Emmet County Petoskey, Mich. **12-12-1989**  
I hereby certify that I have examined the records in my  
office and it appears that the taxes on the within  
descriptions have been paid for the past five years and that  
there are no tax liens or titles held by this State or any  
individual for the past five years. Right to date of deed.  
*John Brunell*

*Donna J. Robinson*  
\* **Donna J. Robinson** County.  
Notary Public, **Emmet**  
Michigan  
My commission expires: **June 11, 1991**

County Treasurer's Certificate	County Treasurer	City Treasurer's Certificate
When Recorded Return To: (Name) (Street Address) (City and State)	Send Subsequent Tax Bills To:	Drafted By: <b>Paul W. Brown</b> Business Address: <b>Marco, Litzemberger, Smith, Brown &amp; Shart 300 Park Avenue Petoskey, MI 49770</b>
Tax Parcel #	Recording Fee	Transfer Tax

UNOFFICIAL COPY

\* TYPE OR PRINT NAMES UNDER SIGNATURES.

(5)



OFFICIAL SEAL Emmet Register or Deputy  
Michele E. Stine 03/16/2010 11:00:11

**B: 1121 P: 385**

**MORTGAGE**

RECEIVED  
EMMET COUNTY  
REGISTER OF DEEDS  
2010 MAR 16 A 10:39

**RECORDATION REQUESTED BY:**  
The Bank of Northern Michigan  
231-487-1765  
406 Bay Street  
Petoskey, MI 49770

**WHEN RECORDED MAIL TO:**  
The Bank of Northern Michigan  
231-487-1765  
406 Bay Street  
Petoskey, MI 49770

**FOR RECORDER'S USE ONLY**

THIS MORTGAGE dated March 2, 2010, is made and executed between ROBERT W TRUMAN, whose address is 630 CETAS RD, HARBOR SPRINGS, MI 49740 and MARILYN J TRUMAN, whose address is 630 CETAS RD, HARBOR SPRINGS, MI 49740; HUSBAND AND WIFE (referred to below as "Grantor") and The Bank of Northern Michigan, whose address is 406 Bay Street, Petoskey, MI 49770 (referred to below as "Lender").

**GRANT OF MORTGAGE.** For valuable consideration, Grantor mortgages and warrants to Lender all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures; all easements, rights of way, and appurtenances; all rights to make divisions of the land that are exempt from the platting requirements of the Michigan Land Division Act, as it shall be amended; all water, water rights, watercourses and ditch rights (including stock in utilities with ditch or irrigation rights); and all other rights, royalties, and profits relating to the real property, including without limitation all minerals, oil, gas, geothermal and similar matters, (the "Real Property") located in EMMET County, State of Michigan:

**SITUATED IN THE TOWNSHIP OF FRIENDSHIP, COUNTY OF EMMET, STATE OF MICHIGAN:**

**THE EAST 1/2 OF THE WEST 1/2 OF THE NORTHEAST 1/4 OF THE NORTHEAST 1/4 OF SECTION 22, TOWN 36 NORTH, RANGE 6 WEST.**

The Real Property or its address is commonly known as 5151 STUTSMANVILLE RD, HARBOR SPRINGS, MI 49740. The Real Property tax identification number is 24 06 12 22 200 003.

Grantor presently assigns to Lender all of Grantor's right, title, and interest in and to all present and future leases of the Property and all Rents from the Property. In addition, Grantor grants to Lender a Uniform Commercial Code security interest in the Personal Property and Rents.

DOC # 5073882 B: 1121 P: 385  
03/16/2010 11:00:18 AM Page 1 of 14  
Rec Fee: \$53.00 Doc Type: M  
Emmet County, Michigan, Michele E. Stine

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**MORTGAGE  
(Continued)**

Page 2

**THIS MORTGAGE, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF ANY AND ALL COVENANTS AND OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS MORTGAGE. THIS MORTGAGE IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS AND COVENANTS:**

**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Mortgage, Grantor shall pay to Lender all amounts secured by this Mortgage as they become due and shall strictly perform all of Grantor's obligations under this Mortgage.

**POSSESSION AND MAINTENANCE OF THE PROPERTY.** Grantor and Lender agree that Grantor's possession and use of the Property shall be governed by the following provisions:

**Possession and Use.** Until the occurrence of an Event of Default, Grantor may (1) remain in possession and control of the Property; (2) use, operate or manage the Property; and (3) collect the Rents from the Property.

**Duty to Maintain.** Grantor shall maintain the Property in good condition and promptly perform all repairs, replacements, and maintenance necessary to preserve its value.

**Compliance With Environmental Laws.** Grantor represents and warrants to Lender that: (1) During the period of Grantor's ownership of the Property, there has been no use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance by any person on, under, about or from the Property; (2) Grantor has no knowledge of, or reason to believe that there has been, except as previously disclosed to and acknowledged by Lender in writing, (a) any breach or violation of any Environmental Laws, (b) any use, generation, manufacture, storage, treatment, disposal, release or threatened release of any Hazardous Substance on, under, about or from the Property by any prior owners or occupants of the Property, or (c) any actual or threatened litigation or claims of any kind by any person relating to such matters; and (3) Except as previously disclosed to and acknowledged by Lender in writing, (a) neither Grantor nor any tenant, contractor, agent or other authorized user of the Property shall use, generate, manufacture, store, treat, dispose of or release any Hazardous Substance on, under, about or from the Property; and (b) any such activity shall be conducted in compliance with all applicable federal, state, and local laws, regulations and ordinances, including without limitation all Environmental Laws. Grantor authorizes Lender and its agents to enter upon the Property to make such inspections and tests, at Grantor's expense, as Lender may deem appropriate to determine compliance of the Property with this section of the Mortgage. Any inspections or tests made by Lender shall be for Lender's purposes only and shall not be construed to create any responsibility or liability on the part of Lender to Grantor or to any other person. The representations and warranties contained herein are based on Grantor's due diligence in investigating the Property for Hazardous Substances. Grantor hereby (1) releases and waives any future claims against Lender for indemnity or contribution in the event Grantor becomes liable for cleanup or other costs under any such laws; and (2) agrees to indemnify, defend, and hold harmless Lender against any and all claims, losses, liabilities, damages, penalties, and expenses which Lender may directly or indirectly sustain or suffer resulting from a breach of this section of the Mortgage or as a consequence of any use, generation, manufacture, storage, disposal, release or threatened release occurring prior to Grantor's ownership or interest in the Property, whether or not the same was or should have been known to Grantor. The provisions of this section of the Mortgage, including the obligation to indemnify and defend, shall survive the payment of the indebtedness and the satisfaction and reconveyance of the lien of this Mortgage and shall not be affected by Lender's acquisition of any interest in the Property, whether by foreclosure or otherwise.

**Nuisance, Waste.** Grantor shall not cause, conduct or permit any nuisance nor commit, permit, or suffer any stripping of or waste on or to the Property or any portion of the Property. Without limiting the generality of the foregoing, Grantor will not remove, or grant to any other party the right to remove, any timber, minerals (including oil and gas), coal, clay, scoria, soil, gravel or rock products without Lender's prior written consent.



**MORTGAGE  
(Continued)**

Page 3

**Removal of Improvements.** Grantor shall not demolish or remove any Improvements from the Real Property without Lender's prior written consent. As a condition to the removal of any Improvements, Lender may require Grantor to make arrangements satisfactory to Lender, to replace such Improvements with Improvements of at least equal value.

**Lender's Right to Enter.** Lender and Lender's agents and representatives may enter upon the Real Property at all reasonable times to (a) attend to Lender's interests, (b) inspect the Property for purposes of Grantor's compliance with the terms and conditions of this Mortgage, (c) appraise the property, (d) investigate whether the property is a site or source of environmental contamination, or (e) remove to remediate any environmental contamination. Without limiting the foregoing, Lender shall have the right to conduct and submit to appropriate governmental agencies a "baseline environmental assessment" of the property within the meaning of section 20101 of the Michigan Natural Resources and Environmental Protection Act, MCL section 324.20101, as it shall be amended from time to time. If, at the time of the appraisal, investigation, assessment, removal, or remediation, there shall have occurred and be continuing an Event of Default, then all costs and expenses of the appraisal, investigation, assessment, removal or remediation, shall be subject to the "Expenditures by Lender" section of this Mortgage. Grantor shall execute any consultant contract, waste manifest, notice, and other documents that Lender requests to enable Lender to take or conduct any action or activity contemplated by this paragraph, if Grantor is given a reasonable opportunity to negotiate the terms of the contract, manifest, notice, or other document.

**Compliance with Governmental Requirements.** Grantor shall promptly comply with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental authorities applicable to the use or occupancy of the Property. Grantor may contest in good faith any such law, ordinance, or regulation and withhold compliance during any proceeding, including appropriate appeals, so long as Grantor has notified Lender in writing prior to doing so and so long as, in Lender's sole opinion, Lender's interests in the Property are not jeopardized. Lender may require Grantor to post adequate security or a surety bond, reasonably satisfactory to Lender, to protect Lender's interest.

**Duty to Protect.** Grantor agrees neither to abandon or leave unattended the Property. Grantor shall do all other acts, in addition to those acts set forth above in this section, which from the character and use of the Property are reasonably necessary to protect and preserve the Property.

**DUE ON SALE - CONSENT BY LENDER.** Lender may, at Lender's option, declare immediately due and payable all sums secured by this Mortgage upon the sale or transfer, without Lender's prior written consent, of all or any part of the Real Property, or any interest in the Real Property. Grantor's "interest" in the Real Property shall be considered to include, without limitation, any right to make a division of the Real Property that is exempt from the requirement of the Michigan Land Division Act, as it shall be amended. A "sale or transfer" means the conveyance of Real Property or any right, title or interest in the Real Property; whether legal, beneficial or equitable; whether voluntary or involuntary; whether by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three (3) years, lease-option contract, or by sale, assignment, or transfer of any beneficial interest in or to any land trust holding title to the Real Property, or by any other method of conveyance of an interest in the Real Property. However, this option shall not be exercised by Lender if such exercise is prohibited by federal law or by Michigan law.

**TAXES AND LIENS.** The following provisions relating to the taxes and liens on the Property are part of this Mortgage:

**Payment.** Grantor shall pay when due (and in all events prior to delinquency) all taxes, payroll taxes, special taxes, assessments, water charges and sewer service charges levied against or on account of the Property, and shall pay when due all claims for work done on or for services rendered or material furnished to the Property. Grantor shall maintain the Property free of any liens having priority over or equal to the interest of Lender under this Mortgage, except for those liens specifically agreed to in writing by Lender, and except for the lien of taxes and assessments not due as further specified in the Right to Contest paragraph.



**MORTGAGE  
(Continued)**

Page 4

**Right to Contest.** Grantor may withhold payment of any tax, assessment, or claim in connection with a good faith dispute over the obligation to pay, so long as Lender's interest in the Property is not jeopardized. If a lien arises or is filed as a result of nonpayment, Grantor shall within fifteen (15) days after the lien arises or, if a lien is filed, within fifteen (15) days after Grantor has notice of the filing, secure the discharge of the lien, or if requested by Lender, deposit with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender in an amount sufficient to discharge the lien plus any costs and reasonable attorneys' fees, or other charges that could accrue as a result of a foreclosure or sale under the lien. In any contest, Grantor shall defend itself and Lender and shall satisfy any adverse judgment before enforcement against the Property. Grantor shall name Lender as an additional obligee under any surety bond furnished in the contest proceedings.

**Evidence of Payment.** Grantor shall upon demand furnish to Lender satisfactory evidence of payment of the taxes or assessments and shall authorize the appropriate governmental official to deliver to Lender at any time a written statement of the taxes and assessments against the Property.

**Notice of Construction.** Grantor shall notify Lender at least fifteen (15) days before any work is commenced, any services are furnished, or any materials are supplied to the Property, if any mechanic's lien, materialmen's lien, or other lien could be asserted on account of the work, services, or materials. Grantor will upon request of Lender furnish to Lender advance assurances satisfactory to Lender that Grantor can and will pay the cost of such improvements.

**PROPERTY DAMAGE INSURANCE.** The following provisions relating to insuring the Property are a part of this Mortgage:

**Maintenance of Insurance.** Grantor shall procure and maintain policies of fire insurance with standard extended coverage endorsements on a replacement basis for the full insurable value covering all improvements on the Real Property in an amount sufficient to avoid application of any coinsurance clause, and with a standard mortgagee clause in favor of Lender. Policies shall be written by such insurance companies and in such form as may be reasonably acceptable to Lender. Grantor shall deliver to Lender certificates of coverage from each insurer containing a stipulation that coverage will not be cancelled or diminished without a minimum of thirty (30) days' prior written notice to Lender and not containing any disclaimer of the insurer's liability for failure to give such notice. Each insurance policy also shall include an endorsement providing that coverage in favor of Lender will not be impaired in any way by any act, omission or default of Grantor or any other person. Should the Real Property be located in an area designated by the Director of the Federal Emergency Management Agency as a special flood hazard area, Grantor agrees to obtain and maintain Federal Flood Insurance, if available, for the full unpaid principal balance of the loan and any prior liens on the property securing the loan, up to the maximum policy limits set under the National Flood Insurance Program, or as otherwise required by Lender, and to maintain such insurance for the term of the loan.

**Application of Proceeds.** Grantor shall promptly notify Lender of any loss or damage to the Property. Lender may make proof of loss if Grantor fails to do so within fifteen (15) days of the casualty. Whether or not Lender's security is impaired, Lender may, at Lender's election, receive and retain the proceeds of any insurance and apply the proceeds to the reduction of the indebtedness, payment of any lien affecting the Property, or the restoration and repair of the Property. If Lender elects to apply the proceeds to restoration and repair, Grantor shall repair or replace the damaged or destroyed improvements in a manner satisfactory to Lender. Lender shall, upon satisfactory proof of such expenditure, pay or reimburse Grantor from the proceeds for the reasonable cost of repair or restoration if Grantor is not in default under this Mortgage. Any proceeds which have not been disbursed within 180 days after their receipt and which Lender has not committed to the repair or restoration of the Property shall be used first to pay any amount owing to Lender under this Mortgage, then to pay accrued interest, and the remainder, if any, shall be applied to the principal balance of the indebtedness. If Lender holds any proceeds after payment in full of the indebtedness, such proceeds shall be paid to Grantor as Grantor's interests may appear.

**LENDER'S EXPENDITURES.** If Grantor fails (A) to keep the Property free of all taxes, liens, security interests, encumbrances, and other claims, (B) to provide any required insurance on the Property, or (C) to make

**MORTGAGE  
(Continued)**

Page 5

repairs to the Property then Lender may do so. If any action or proceeding is commenced that would materially affect Lender's interests in the Property, then Lender on Grantor's behalf may, but is not required to, take any action that Lender believes to be appropriate to protect Lender's interests. All expenses incurred or paid by Lender for such purposes will then bear interest at the rate charged under the Note from the date incurred or paid by Lender to the date of repayment by Grantor. All such expenses will become a part of the Indebtedness and, at Lender's option, will (A) be payable on demand; (B) be added to the balance of the Note and be apportioned among and be payable with any installment payments to become due during either (1) the term of any applicable insurance policy; or (2) the remaining term of the Note; or (C) be treated as a balloon payment which will be due and payable at the Note's maturity. The Mortgage also will secure payment of these amounts. The rights provided for in this paragraph shall be in addition to any other rights or any remedies to which Lender may be entitled on account of any default. Any such action by Lender shall not be construed as curing the default so as to bar Lender from any remedy that it otherwise would have had.

**WARRANTY; DEFENSE OF TITLE.** The following provisions relating to ownership of the Property are a part of this Mortgage:

**Title.** Grantor warrants that: (a) Grantor holds good and marketable title of record to the Property in fee simple, free and clear of all liens and encumbrances other than those set forth in the Real Property description or in any title insurance policy, title report, or final title opinion issued in favor of, and accepted by, Lender in connection with this Mortgage, and (b) Grantor has the full right, power, and authority to execute and deliver this Mortgage to Lender.

**Defense of Title.** Subject to the exception in the paragraph above, Grantor warrants and will forever defend the title to the Property against the lawful claims of all persons. In the event any action or proceeding is commenced that questions Grantor's title or the interest of Lender under this Mortgage, Grantor shall defend the action at Grantor's expense. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of Lender's own choice, and Grantor will deliver, or cause to be delivered, to Lender such instruments as Lender may request from time to time to permit such participation.

**Compliance With Laws.** Grantor warrants that the Property and Grantor's use of the Property complies with all existing applicable laws, ordinances, and regulations of governmental authorities.

**Survival of Promises.** All promises, agreements, and statements Grantor has made in this Mortgage shall survive the execution and delivery of this Mortgage, shall be continuing in nature and shall remain in full force and effect until such time as Grantor's Indebtedness is paid in full.

**CONDEMNATION.** The following provisions relating to condemnation proceedings are a part of this Mortgage:

**Proceedings.** If any proceeding in condemnation is filed, Grantor shall promptly notify Lender in writing, and Grantor shall promptly take such steps as may be necessary to defend the action and obtain the award. Grantor may be the nominal party in such proceeding, but Lender shall be entitled to participate in the proceeding and to be represented in the proceeding by counsel of its own choice, and Grantor will deliver or cause to be delivered to Lender such instruments and documentation as may be requested by Lender from time to time to permit such participation.

**Application of Net Proceeds.** If all or any part of the Property is condemned by eminent domain proceedings or by any proceeding or purchase in lieu of condemnation, Lender may at its election require that all or any portion of the net proceeds of the award be applied to the Indebtedness or the repair or restoration of the Property. The net proceeds of the award shall mean the award after payment of all reasonable costs, expenses, and attorneys' fees incurred by Lender in connection with the condemnation.

**IMPOSITION OF TAXES, FEES AND CHARGES BY GOVERNMENTAL AUTHORITIES.** The following provisions relating to governmental taxes, fees and charges are a part of this Mortgage:

**Current Taxes, Fees and Charges.** Upon request by Lender, Grantor shall execute such documents in addition to this Mortgage and take whatever other action is requested by Lender to perfect and continue Lender's lien on the Real Property. Grantor shall reimburse Lender for all taxes, as described below,



**MORTGAGE  
(Continued)**

Page 6

together with all expenses incurred in recording, perfecting or continuing this Mortgage, including without limitation all taxes, fees, documentary stamps, and other charges for recording or registering this Mortgage.

**Taxes.** The following shall constitute taxes to which this section applies: (1) a specific tax upon this type of Mortgage or upon all or any part of the Indebtedness secured by this Mortgage; (2) a specific tax on Grantor which Grantor is authorized or required to deduct from payments on the Indebtedness secured by this type of Mortgage; (3) a tax on this type of Mortgage chargeable against the Lender or the holder of the Note; and (4) a specific tax on all or any portion of the Indebtedness or on payments of principal and interest made by Grantor.

**Subsequent Taxes.** If any tax to which this section applies is enacted subsequent to the date of this Mortgage, this event shall have the same effect as an Event of Default, and Lender may exercise any or all of its available remedies for an Event of Default as provided below unless Grantor either (1) pays the tax before it becomes delinquent, or (2) contests the tax as provided above in the Taxes and Liens section and deposits with Lender cash or a sufficient corporate surety bond or other security satisfactory to Lender.

**SECURITY AGREEMENT; FINANCING STATEMENTS.** The following provisions relating to this Mortgage as a security agreement are a part of this Mortgage:

**Security Agreement.** This instrument shall constitute a Security Agreement to the extent any of the Property constitutes fixtures, and Lender shall have all of the rights of a secured party under the Uniform Commercial Code as amended from time to time.

**Security Interest.** Upon request by Lender, Grantor shall take whatever action is requested by Lender to perfect and continue Lender's security interest in the Personal Property. In addition to recording this Mortgage in the real property records, Lender may, at any time and without further authorization from Grantor, file executed counterparts, copies or reproductions of this Mortgage as a financing statement. Grantor shall reimburse Lender for all expenses incurred in perfecting or continuing this security interest. Upon default, Grantor shall not remove, sever or detach the Personal Property from the Property. Upon default, Grantor shall assemble any Personal Property not affixed to the Property in a manner and at a place reasonably convenient to Grantor and Lender and make it available to Lender within three (3) days after receipt of written demand from Lender to the extent permitted by applicable law.

**Addresses.** The mailing addresses of Grantor (debtor) and Lender (secured party) from which information concerning the security interest granted by this Mortgage may be obtained (each as required by the Uniform Commercial Code) are as stated on the first page of this Mortgage.

**FURTHER ASSURANCES; ATTORNEY-IN-FACT.** The following provisions relating to further assurances and attorney-in-fact are a part of this Mortgage:

**Further Assurances.** At any time, and from time to time, upon request of Lender, Grantor will make, execute and deliver, or will cause to be made, executed or delivered, to Lender or to Lender's designee, and when requested by Lender, cause to be filed, recorded, refiled, or rerecorded, as the case may be, at such times and in such offices and places as Lender may deem appropriate, any and all such mortgages, deeds of trust, security deeds, security agreements, financing statements, continuation statements, instruments of further assurance, certificates, and other documents as may, in the sole opinion of Lender, be necessary or desirable in order to effectuate, complete, perfect, continue, or preserve (1) Grantor's obligations under the Note, this Mortgage, and the Related Documents, and (2) the liens and security interests created by this Mortgage as first and prior liens on the Property, whether now owned or hereafter acquired by Grantor. Unless prohibited by law or Lender agrees to the contrary in writing, Grantor shall reimburse Lender for all costs and expenses incurred in connection with the matters referred to in this paragraph.

**Attorney-in-Fact.** If Grantor fails to do any of the things referred to in the preceding paragraph, Lender may do so for and in the name of Grantor and at Grantor's expense. For such purposes, Grantor hereby irrevocably appoints Lender as Grantor's attorney-in-fact for the purpose of making, executing, delivering, filing, recording, and doing all other things as may be necessary or desirable, in Lender's sole opinion, to



**MORTGAGE  
(Continued)**

Page 10

**MISCELLANEOUS PROVISIONS.** The following miscellaneous provisions are a part of this Mortgage:

**Amendments.** What is written in this Mortgage and in the Related Documents is Grantor's entire agreement with Lender concerning the matters covered by this Mortgage. To be effective, any change or amendment to this Mortgage must be in writing and must be signed by whoever will be bound or obligated by the change or amendment.

**Caption Headings.** Caption headings in this Mortgage are for convenience purposes only and are not to be used to interpret or define the provisions of this Mortgage.

**Governing Law.** This Mortgage will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Michigan without regard to its conflicts of law provisions. This Mortgage has been accepted by Lender in the State of Michigan.

**Choice of Venue.** If there is a lawsuit, Grantor agrees upon Lender's request to submit to the jurisdiction of the courts of Emmet County, State of Michigan.

**Joint and Several Liability.** All obligations of Grantor under this Mortgage shall be joint and several, and all references to Grantor shall mean each and every Grantor. This means that each Grantor signing below is responsible for all obligations in this Mortgage.

**No Waiver by Lender.** Grantor understands Lender will not give up any of Lender's rights under this Mortgage unless Lender does so in writing. The fact that Lender delays or omits to exercise any right will not mean that Lender has given up that right. If Lender does agree in writing to give up one of Lender's rights, that does not mean Grantor will not have to comply with the other provisions of this Mortgage. Grantor also understands that if Lender does consent to a request, that does not mean that Grantor will not have to get Lender's consent again if the situation happens again. Grantor further understands that just because Lender consents to one or more of Grantor's requests, that does not mean Lender will be required to consent to any of Grantor's future requests. Grantor waives presentment, demand for payment, protest, and notice of dishonor.

**Severability.** If a court finds that any provision of this Mortgage is not valid or should not be enforced, that fact by itself will not mean that the rest of this Mortgage will not be valid or enforced. Therefore, a court will enforce the rest of the provisions of this Mortgage even if a provision of this Mortgage may be found to be invalid or unenforceable.

**Merger.** There shall be no merger of the interest or estate created by this Mortgage with any other interest or estate in the Property at any time held by or for the benefit of Lender in any capacity, without the written consent of Lender.

**Successors and Assigns.** Subject to any limitations stated in this Mortgage on transfer of Grantor's interest, this Mortgage shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Property becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Mortgage and the Indebtedness by way of forbearance or extension without releasing Grantor from the obligations of this Mortgage or liability under the Indebtedness.

**Time is of the Essence.** Time is of the essence in the performance of this Mortgage.

**Use of Pronouns.** Any term used to designate any of the parties in this Mortgage shall be deemed to include the respective heirs, estate representatives, successors, and assigns of the parties, and all pronouns and relative words used in this Mortgage are intended to apply in the singular, plural, feminine or neuter forms as the context may require, to appropriately refer to the parties designated.

**Waive Jury.** All parties to this Mortgage hereby waive the right to any jury trial in any action, proceeding, or counterclaim brought by any party against any other party.

**Waiver of Homestead Exemption.** Grantor hereby releases and waives all rights and benefits of the

**MORTGAGE  
(Continued)**

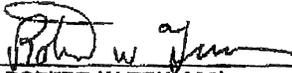
**Real Property.** The words "Real Property" mean the real property, interests and rights, as further described in this Mortgage.

**Related Documents.** The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

**Rents.** The word "Rents" means all present and future rents, revenues, income, issues, royalties, profits, and other benefits derived from the Property.

**EACH GRANTOR COVENANTS AND AGREES TO THE PROVISIONS OF THIS MORTGAGE.**

**GRANTOR:**

x   
ROBERT W TRUMAN

x   
MARILYN J TRUMAN

This Mortgage was prepared by: LAURA K WARD  
The Bank of Northern Michigan  
406 Bay Street  
Petoskey, MI 49770



**MORTGAGE  
(Continued)**

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**GRANTOR:**

**Witnesses:**

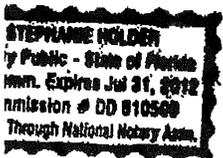
x Robert W Truman  
ROBERT W TRUMAN

Connie Moore  
Connie Moore

x Marilyn Truman  
MARILYN TRUMAN

Stephanie Holder  
Stephanie Holder

This Mortgage was prepared by: **LAURA K WARD**  
The Bank of Northern Michigan  
406 Bay Street  
Petoskey, MI 49770



Faint, illegible handwritten text or markings.

STANDARD FORM NO. 64  
U.S. GOVERNMENT PRINTING OFFICE  
WASHINGTON, D. C. 20540  
MAY 1962

MORTGAGE  
(Continued)

INDIVIDUAL ACKNOWLEDGMENT

STATE OF Florida )  
 )  
 ) SS  
COUNTY OF Gilchrist )

On this day before me, the undersigned Notary Public, personally appeared ROBERT W TRUMAN and MARILYN J TRUMAN, HUSBAND AND WIFE, to me known to be the individuals described in and who executed the Mortgage, and acknowledged that they signed the Mortgage as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 10 day of March, 2010

By Robert W Truman My commission expires 7-31-12

Marilyn J. Truman  
Notary Public, State of FL County of Gilchrist

Acting in the County of Gilchrist

By: Stephanie Holder

