STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of TERRI A. SHOLBERG.

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

Plaintiff/Appellant-Cross Appellee,

v

ROBERT TRUMAN and MARILYN TRUMAN,

Defendants/Appellees-Cross Appellants,

and

DANIEL TRUMAN,

Defendant.

UNPUBLISHED
November 15, 2012

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

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[1] 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.[2]

[1] MCR 2.116(C)(8), (10).

[2] Because Sholberg did not receive the full amount of damages sought, we are not persuaded by the two unpublished cases cited by the Trumans in support of their assertion that Sholberg's appeal is moot.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.[3] 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.[4] "[R]eview is limited to the evidence that had been presented to the [trial] court at the time the motion was decided."[5] "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."[6] All reasonable inferences are to be drawn in favor of the nonmoving party.[7]

"This Court is liberal in finding genuine issues of material fact."[8] "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."[9] "Summary disposition

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[3] *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004).

[4] *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

[5] *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

[6] *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007).

[7] *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

[8] *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

[9] *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."[10]

> 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."[11]

On appeal, Sholberg asserts that the trial court erred when it found that the Equine Activity Liability Act ("EALA")[12] 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.[13]

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.[14]

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

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[10] *Id*. at 509-510.

[11] *Johnson v Pastoriza*, 491 Mich 417, 434-435; 818 NW2d 279 (2012) (internal citations omitted).

[12] MCL 691.1661, *et seq.*

[13] MCL 691.1663.

[14] 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.[16]

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.[17] 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."[18] "Whether a defendant owes a plaintiff a duty of care is a question of law for the court."[19] "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."[20]

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

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[15] *Beattie v Mickalich*, 486 Mich 1060; 784 NW2d 38 (2010) (internal citation omitted).

[16] *Amburgey v Sauder*, 238 Mich App 228, 233; 605 NW2d 84 (1999).

[17] *Id*.

[18] *Sherry v East Suburban Football League*, 292 Mich App 23, 29; 807 NW2d 859 (2011).

[19] *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

[20] *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.[21]

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.[22]

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."[23] 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."[24] 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."[25] 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."[26]

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[21] *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).

[22] *Id*.

[23] *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).

[24] *Id*.

[25] *Id*.

[26] *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.[27]

Based on the above, the Trumans' cross-appeal is moot because there has been no verdict in this matter.[28]

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

[27] *Id*. at 190-191.

[28] MCR 2.405.