STATE OF MICHIGAN

IN THE SUPREME COURT
ON APPEAL FROM THE 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-Appellee,

v.

ROBERT TRUMAN and MARILYN TRUMAN,

Defendants-Appellants,

and

DANIEL TRUMAN,

Defendant.

Supreme Court Case No. 146725
Court of Appeals Case No. 307308
Emmet County No. 10-002711-NI

146725

BRIEF OF AMICI CURIAE APARTMENT AND REAL PROPERTY ASSOCIATIONS

Property Management Association Of Michigan, Detroit Metropolitan Apartment Association, Property Management Association Of West Michigan, Property Management Association Of Mid-Michigan, Washtenaw Area Apartment Association, Apartment Association Of Michigan, Rental Property Owners Association of Kent County

IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae are Michigan non-profit organizations founded to support the interest of apartment owners, builders, operators and managers throughout the state. These organizations are at times divergent in their opinions and emphases, but on this issue they have unified against the proposition that landowners should ever be liable for a nuisance created upon rented premises by a tenant.

Amicus **Property Management Association of Michigan (PMAM)** represents approximately 120,000 apartment units in Michigan through its affiliate chapters, Amicus **Detroit Metropolitan Apartment Association (DMAA)**, Amicus **Property Management Association of West Michigan (PMAWM)**, Amicus **Property Management Association of Mid-Michigan (PMAMM)**, and Amicus **Washtenaw Area Apartment Association (WAAA)**. The members of PMAM and its affiliates are predominantly multi-family housing communities and the owners and management companies which operate them. Amicus DMAA represents members throughout the Detroit Metropolitan area. Amicus PMAWM represents members throughout Western Michigan, including the cities of Grand Rapids, Kalamazoo, and the western portion of the Northern Lower Peninsula. Amicus PMAMM represents members in the central portion of Michigan, including those in the greater Lansing area and through the eastern portion of the Northern Lower Peninsula. Amicus WAAA represents members in Washtenaw County. PMAM and its amici affiliates are Michigan chapters of the National Apartment Association (NAA). The NAA represents 6.1 million apartment units throughout the United States and Canada.

Since the Court's Order granting this Amicus Curiae brief, the original movants (PMAM, DMAA, PMAWM, PMAMM, WAAA) have been joined in this brief by two additional interested parties: Apartment Association of Michigan and Rental Property Owners Association of Kent County.

Amicus **Apartment Association of Michigan (AAM)** represents approximately 125,000 apartment units throughout Michigan. Founded in 1969, AAM strives to serve its members, who are predominantly the builders, developers, owners and managers of multi-family residential housing, and

suppliers to the industry. AAM is an affiliate organization of the Home Builders Association of Southeastern Michigan, which is a chapter of the National Association of Homebuilders. AAM provides legislative and regulatory representation, educational programming, informational resources, networking opportunities, and group benefit programs to the industry.

Amicus **Rental Property Owners Association of Kent County (RPOA)** represents more than 1,400 members who own and/or manage approximately 18,000 rental units, primarily in West Michigan. The association was founded in 1968 to provide a united voice to legislators, city councils, building inspectors, zoning officials, social service departments, and others who have a direct bearing on the business of renting property. RPOA is a chapter of the Rental Property Owners Association of Michigan, and is a member of the National Real Estate Investors Association.

If the Court were to order it to assist in the decision of this case, Amici Curiae would be honored to appear and participate at oral argument.

I. SUMMARY OF THE ARGUMENT

This Court asked the parties to address "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." Order, attached as Exhibit 1.

Amici Curiae's position is that if an alleged nuisance is created by the person in control of the property and not the property owner, the property owner/landlord can never be liable for it. Regardless of a property owner's involvement in a particular parcel of rental property, no landlord can ensure the proper conduct of any tenant, nor should the landlord be expected to do so. If a tenant creates a nuisance, the landlord is powerless to prevent it or abate it. Amici Curiae believe the party who "controls" the property or the creation of the nuisance itself is the one liable for a public nuisance. Ownership should not be an issue in the analysis of nuisance liability as frequently the owner has no control over the activities within the leased premises.

Therefore, Amici Curiae urge this Court to reverse the Court of Appeals, to overrule the line of Court of Appeals' cases which use ownership as an element to determine liability for a public nuisance, and to hold that in a situation where a property owner leases property to a tenant, that property owner cannot be liable for any nuisance created by the tenant.

II. ARGUMENT

A LANDLORD CANNOT BE LIABLE FOR A NUISANCE CREATED OR CONTROLLED BY A TENANT

For Amici Curiae, the issue in this case is not so much about the landlord's liability when a landlord is not in possession and control of the premises but the extent to which, if at all, a landlord can be liable for a nuisance created by a tenant even when the landlord does retain possession and/or control over some or all of the leased premises and common areas.

Unlike the Defendants/Appellants in this case, most landlords do not relinquish all aspects of possession and control over the entirety of the leased property. In this case, as in a case of a commercial

leasehold or the lease of a singular parcel of residential property like a rented house, the landlord leases the premises to the tenant who possesses and controls the entire premises.

However, in most residential leasing situations – especially multi-family communities – the landlord leases individual units in an overall residential development to its tenants but retains possession and control over the common areas. Amici Curiae are concerned that if this Court holds that a landlord who did not retain any possession or control over the leased premises is liable for a tenant's public nuisance, it is a very easy step to hold a landlord liable for the acts and/or omissions of a tenant who creates a public nuisance from the leased premises for which a landlord maintains at least some possession or control, such as over the common areas.

Such a decision would create an untenable situation for Michigan landlords. Simply because they "own" the property, landlords cannot be held liable for the acts and/or omissions of their tenants upon the premises just like they cannot be responsible for the criminal actions of third parties on the premises.[1]

The Court of Appeals' decision in this case turned on the use of the word "owned."[2] Ownership alone is not the proper standard for nuisance liability. The liable party is the one who controls the land or the nuisance, and who is not necessarily the owner.

A. THE COURT OF APPEALS' DEFINITION OF NUISANCE IS OBITER DICTA.

In its decision, the Court of Appeals relied upon the definition provided by *Cloverleaf Car Co. v. Phillips Petroleum Co.*, 213 Mich. App. 186, 190; 540 NW2d 297 (1995):

> 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

[1] *Bailey v. Schaff*, ____ Mich. ____; ___ NW2d ____ (Docket No. 144055) (July 30, 2013), Slip op. p. 18.

[2] "Moreover, the Trumans owned the Property from which the alleged nuisance arose, which is sufficient to bring a nuisance action against them." Court of Appeals Slip op., p. 6 (attached as Exhibit 2).

> knew a nuisance would likely arise." Court of Appeals Slip op., p. 5, citing *Cloverleaf.*

Amici Curiae agree that a defendant would be liable where he created the nuisance or if he employed a person to create a nuisance. It would also make perfect sense for a defendant who "controlled" the land from which the nuisance arose to be responsible. The problem is the use of the word "owned."

Appellants explained in their Supplemental Brief the history of the use of the word "owned" in the case law which led the Court of Appeals its decision. As Appellants explained, the use of the phrase "owned or controlled" was obiter dicta. (Appellants' Supplemental Brief, pp. 16-22)

The trail which led to the elements the Court of Appeals used in this case and in *Cloverleaf* begins at *Stemen v. Coffman*, 92 Mich. App. 595; 285 NW2d 305 (1979). In that case, the Court of Appeals cited a treatise which addressed the concept of ownership as it relates to nuisance liability. In *Stemen*, the court held,

> "Liability for damage caused by a nuisance turns upon whether the defendant was in control, either through ownership or otherwise." 58 Am Jur 2d, Nuisances, § 49, p 616. We have found no authority imposing liability for damage caused by a nuisance where the defendant has not either created the nuisance, owned or controlled the property from which the nuisance arose, or employed another to do work which he knows is likely to create a nuisance. *Stemen*, at 598.

The treatise upon which the court relied focused the issue of liability on the party who "controlled" the property and used "ownership" as an example of how control could be determined. There is no doubt that "control" is the "controlling" factor, which is why control is determined by "ownership or otherwise." "Otherwise" would presumably include being the lawful tenant of the property. But the court took the concept much further in the next sentence when it equated ownership with control. The court had no basis to raise mere ownership to the level of actual control and cited no

legal authority for such a change. Further, since the issue of ownership was not a determinative issue in *Stemen*, the court's purported statement of law was by definition obiter dicta.[3]

Perhaps from the *Stemen* court's perspective, it did not consider that result because it was explaining a negative, i.e., why nuisance liability did not exist in that case. The court did not create elements of what would establish liability for a public nuisance; instead, it was delineating what elements did not exist which absolved the *Stemen* defendant from liability. Since *Stemen* set forth elements which did not determine the adjudication of the matter but instead explained what elements were not present, meaning that there was no liability, reliance upon *Stemen's* language was improper as it was obiter dicta.

Nevertheless, the treatise cited in *Stemen* focused on control, and not ownership. Since *Stemen*, the treatise language upon which the *Stemen* court relied has changed, but only to strengthen the legal conclusion that it is control, and not ownership, which is the proper determining factor for liability. The current language clarifies that ownership is only one basis upon which control can be established, but it confirms that ownership is not itself enough to establish liability for a nuisance.

> Property ownership is generally not a prerequisite to nuisance liability. Rather, the test of liability for damage caused by a nuisance turns on whether the defendants were in control over the instrumentality alleged to constitute the nuisance, either through ownership or otherwise. For one to be held liable for a nuisance, the person must control or manage or otherwise have some relationship to the offensive instrumentality or behavior that would allow the law to say that the defendant must stop causing it and/or pay damages for it. Thus dominion and control over the property causing the harm is sufficient to establish nuisance liability.
>
> Observation: A defendant must have control over the instrumentality causing the alleged nuisance at the time the damage occurs. 58 Am Jur 2d, Nuisances, §91.

[3] "Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, are, however illuminating, but *obiter dicta* and lack the force of an adjudication." *Hett v. Duffy*, 246 Mich. 456, 461; 78 NW2d 284 (1956).

The *Stemen* court found for the defendants, which were a municipality and its employees who had no ownership interest in the property from where the nuisance originated. But the elements *Stemen* delineated for what did not establish nuisance liability became the elements for what did cause a defendant to be liable for a nuisance in *Radloff v. Michigan*, 116 Mich. App. 745; 323 N.W.2d 541 (1982).

In *Radloff*, the Court of Appeals relied upon the *Stemen* decision to craft the three elements of nuisance liability upon which the Court of Appeals relied in this case. The second element was that the defendant must have "owned or controlled the land from which the nuisance arose." *Radloff*, at 758. In *Radloff*, however, the defendant whose nuisance liability the court affirmed both owned and controlled the property. Thus the *Radloff* court, which was the first to delineate these three elements in an opinion, did so as obiter dicta as the issue of "ownership or control" was not an issue adjudicated in that case.

From *Radloff*, the Court of Appeals restated these three elements again in *Gelman Sciences, Inc. v. Dow Chemical Co.*, 202 Mich. App. 250, 252; 508 NW2d 142 (1993) and again it was obiter dicta. In *Gelman Sciences*, plaintiff alleged a nuisance upon property by suing the manufacturer of an industrial solvent which was used to contaminate the property. Defendant neither owned nor controlled the property. It simply manufactured the solvent.

Based upon different case law[4] holding that a manufacturer cannot be liable for a nuisance based upon its product after it sells that product to a third party, the nuisance claim was dismissed. The three elements of nuisance liability which originated as obiter dicta in *Radloff* continued as such as they were not at all dispositive to the adjudication in *Gelman Sciences*.

The Court of Appeals panel in *Radloff* made two critical errors: First, it crafted an element for nuisance liability which changed the focus from who "controls" the property, which is the proper standard, to who "owns" the property, which is not. Second, it created that element from obiter dicta.

[4] *Detroit Board of Education v. Celotex (On remand)*, 196 Mich. App. 694, 712; 493 NW2d 513 (1992).

As explained *infra*, for decades this Court has looked to the person in control of the premises for liability. The *Radloff* court misinterpreted *Stemen* when it addressed examples of how a court should determine whether a party has control of property and made those examples determinative of the issue. When the *Stemen* court confirmed that control was the critical issue and explained that a court should look to the facts to determine who had control based upon "ownership or otherwise," that was not cause to change the law so that ownership equaled having control. Certainly, ownership does not equal control. A landlord who leases property relinquishes control to that property, *Bailey, supra.* It would therefore be impossible for a landlord to prevent a tenant from creating or perpetuating a nuisance from that tenant's leased property. As such, the Court of Appeals erred in this case as it erred in the previous cases cited, all of which must be overruled.

Second, the Court of Appeals' line of cases arose from and continued to be obiter dicta. These decisions should not have had any precedential value. None of the cases which cited the "owned or controlled" standard actually used that element to decide any of the cases. Either the defendant neither owned nor controlled the property or the defendant both owned and controlled the property. This is the first case arising from *Radloff* and its progeny where the defendants were the owners but not the controllers of the property. It was inappropriate for those prior cases to make a legal ruling based upon facts and circumstances which were not before the court. As a result, the line of decisions must be overruled.

B. IT IS THE PERSON WHO IS IN CONTROL OF THE NUISANCE WHO SHOULD BE HELD LIABLE, NOT THE PROPERTY OWNER

Since *Radloff* and through this case, the Court of Appeals has perpetuated this incorrect standard that ownership equals control. For decades prior to *Radloff,* this Court confirmed that Michigan's law of nuisance liability turns on who "controls" the property, regardless of ownership.

This Court has recently reaffirmed the long-standing Michigan principle that the issue of who has the obligation to care for real property and to oversee the conduct upon it is based upon who has the

control over it, be it landlord, tenant, or merchant. *Bailey, supra*. In *Bailey*, this Court went through an exhaustive review of various cases in numerous areas of Michigan tort law and in the end, this Court confirmed that a) a landlord may transfer control of a leasehold to a tenant and b) it is the person who has control of the premises who is responsible for the activities on those premises. *Id.*

This is hardly a newly-crafted statement of Michigan law, even as it applies to a nuisance originating from leased property. For example, this Court explained in *Samuelson v. The Cleveland Iron Mining Co.*, 49 Mich. 164; 13 NW 499 (1882):

> It is not pretended that the mere ownership of real estate upon which there are dangers will render the owner liable to those who may receive injury in consequence. Some personal fault must be involved, or neglect of duty, before there can be a personal liability. As between landlord and tenant the party presumptively responsible for a nuisance upon the leased premises is the tenant. But this might be otherwise if the lease itself contemplated the continuance of the nuisance, for in that case the personal fault of the landlord would be plain. *Id.*, at 171 (internal citations omitted).

Likewise, in *Rosen v. Mann*, 219 Mich. 687; 189 NW2d 916 (1922), this Court explained that it was the issue of control, and not ownership, which determines liability: "A tenant or occupant of premises having the entire control thereof is, so far as third persons are concerned, the owner. He is, therefore, as already stated, usually deemed to be *prima facie* liable for all injuries to third persons occasioned by the condition of the demised premises." *Id.*, at 692.

In additional cases, such as *Fisher v. Thirkell*, 21 Mich. 1 (1870), *Harris v. Cohen*, 50 Mich. 324; 15 NW 493 (1883), and *Maclam v. Hallem*, 165 Mich. 686; 131 NW 81 (1911), this Court has consistently affirmed that a tenant in control of property, and not the owner, is the liable party for a nuisance on leased property.

In *Maclam*, plaintiff sued the owners of real property because their tenants placed crates on the sidewalk for as long as four months, which plaintiff claimed was a public nuisance after he tripped over them. Plaintiff admitted that the landlords did not place the crates on the sidewalk but argued that the landlords had the obligation to remove their tenants' crates or be held liable for the nuisance. This Court

disagreed and held that because the tenant "had the exclusive right of possession and control" of the premises, the landlords were not liable for the nuisance and had no obligation to inspect the premises to make sure such a nuisance did not exist. *Maclam*, at 694.

Since the beginning of Michigan jurisprudence, this Court has made it clear that the person in control of the property is responsible for any nuisance emanating from it, regardless of who owns the property. Tenants in possession and control of leased premises take the place of the owner and are responsible for their own conduct and care of the property. Since it is the tenant who has control over leased property, it must be the tenant who is responsible for any nuisance that may arise from it.

For example, in a commercial landlord-tenant relationship, a business might lease a warehouse and its surrounding property from a landlord. In that leasehold, the business/tenant will have complete possession and control of the entire leasehold to the exclusion of the landlord. The business/tenant might tell the landlord that the business sells innocuous items, such as school supplies, which it purports to store in the leased warehouse. However, instead the business/tenant uses the warehouse to manufacture dangerous chemicals which causes the building to explode and for chemicals to rain over the neighboring parcels. Pursuant to *Radloff, Gelman Sciences*, and the Court of Appeals' decision in this case, the landlord would be liable for that nuisance, simply because it owned the property from which the nuisance arose. But if a court followed *Bailey, Samuelson, Rosen, Maclam,* and *Fisher*, the landlord would not be liable as it had relinquished possession and more importantly, control of the property to the tenant, who would be solely liable.

The party in control must be the liable party. Landlords cannot be the insurers of their tenants, which would drastically change landlord-tenant relationships to everyone's detriment. Rents would increase in response to the costs associated with landlords' new liabilities and landlords would demand greater access to rental property to inspect their tenants' behaviors. Tenants would bristle at losing their

rights to privacy and quiet enjoyment, while at the same time having to face higher rents. It would be a terrible outcome both economically and socially for all involved.

Landlords must remain free to transfer possession and control of leased premises to their tenants. If such a tenant uses those premises improperly and creates a nuisance, that tenant must be held liable for it. But the landlord, who transferred that control and who has no control, must similarly be absolved from liability.

C. A LANDLORD CANNOT CONTROL THE ACTIONS OR INACTIONS OF A TENANT

The reason that a landlord cannot be responsible for such a nuisance created upon leased property is because no landlord can control the actions or inactions of a tenant. Like a crime, it is impossible for a landlord to prevent or stop a tenant who might create, or even be in the act of creating, a public nuisance. A landlord's remedies are limited. This Court acknowledged this limitation when in *Bailey* this Court held, "A landlord does not have a duty to respond to criminal acts occurring within the leasehold of a tenant." *Bailey*, at 19.

When a landlord rents a property, either a portion of the whole or the entire property, the landlord loses its authority over that property. As much as an injured victim wants to believe, the landlord is not in the position to prevent any accident or nuisance from occurring any more than a landlord can prevent a crime from taking place. If a tenant allows or creates a public nuisance, the landlord is powerless to prevent it. There is no right to self-help in Michigan[5] and when a landlord transfers possession and control of a particular leased premise to a tenant, the tenant is entitled to the quiet enjoyment of that property without the landlord's interference.[6]

When a landlord and a tenant enter into an agreement for the lease of property, a landlord gives up substantial rights to use and control the property. These rights to use and control are transferred to

[5] MCL 600.5711; MCL 600.2918 (2); *Deroshia v. Union Terminal Piers*, 151 Mich. App. 715, 719-20; 391 NW2d 458 (1986).

[6] *Grinnell Bros. v. Asiuliewicz*, 241 Mich. 186; 216 N.W. 388 (1928).

the tenant and remain in effect until the tenancy is terminated and the landlord retakes physical possession of the property. While leases are contractual in nature and lease terms vary depending on the bargained for exchange between parties, there are several consistent restrictions on a landlord's right to leased property. These restrictions cannot be waived by the parties to a rental agreement. MCL 554.606.

A landlord in Michigan is prohibited from entering the leased premise unless the entry is permitted by law. MCL 600.5711. This prohibition is demonstrated through an explicit cause of action given to tenants whose possessory interested has been interfered with by a landlord. Under MCL 600.2918(2), any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents shall be entitled to recover the greater of actual damages or $200 for each occurrence. Unlawful interference goes beyond physical possession or intrusion onto the leased premises. In fact, landlords are forbidden from removing personal property of the possessor, changing locks or other security devices without providing keys to the person in possession, preventing or deterring the possessor's entry, or even introducing noise.[7]

A landlord retains the authority to enter common areas on property. Landlords have the right to enter, and have the duty to maintain, common areas of leased property. MCL 554.139 (1)(a). "The landlord grants to tenants rights of exclusive possession to designated portions of the property, but the landlord retains exclusive possession of the common areas. The landlord grants to tenants a license to use the common areas of the property. Tenants pay for this license as part of their rent." *Stanley v. Town Square Coop.*, 203 Mich. App. 143,147; 512 NW2d 51 (1993).[8] Under MCL 554.139, a landlord

[7] Other conduct prohibited by MCL 600.2918 includes the use of force or threat of force; the retention or destruction the possessor's personal property; the removal of doors, windows, or locks; causing the termination or interruption of an essential service procured by the tenant such as heat, water, electric, or gas service; and the introduction of any odor or other nuisance.

[8] *See also Allison v. AEW Capital Mgmt., L.L.P.*, 481 Mich. 419, 427; 751 NW2d 8 (2008) ("MCL 554.139 does not define the term "common areas." However, Black's Law Dictionary (6th ed), p 275, defines "common area" as: "[i]n law of landlord-tenant, the portion of demised premises used in common by tenants over which landlord retains control (e.g. hallways, stairs) and hence for whose condition he is liable, as contrasted with areas of which tenant has exclusive possession." This definition is in accord with the plain and ordinary meaning of the term. 'Common' is defined as 'belonging equally to, or shared alike by, two or more or all in question[.]' Random House Webster's College Dictionary (1997). Therefore, in the context of leased residential property, 'common areas' describes those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants. A lessor's duties regarding these areas arise from the control the lessor retains over them.")

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covenants that all common areas are fit for the intended use by the parties. Essentially, this is a covenant to keep common areas in good repair. Common areas are in contrast to areas occupied by tenants since landlords do not relinquish the right to exclusive control of common areas. However, a landlord's right to enter property, bar a few limited exceptions, does not extend beyond common areas. If a leased premises does not include common areas, such as the lease of a single-family home to a single tenant as opposed to the lease of a multi-unit apartment building with communal rooms and hallways, a landlord will have given the tenant exclusive control of the entire property and will not have the authority to freely enter any portion of the property.

The possessory interest of a tenant, to the exclusion of the landlord, is so strong that a landlord cannot re-enter a premise even when a tenant is wrongfully in possession. A landlord may not use force or self-help and must follow the summary proceedings process to evict a tenant who remains on a property even after the expiration of a lease or even to remove a trespasser. Although the tenant has absolutely no further right to occupy the property under a lease and a trespasser never did, the landlord is still excluded from the property until it evicts the tenant through the court process. *See* MCL 600.5701 et seq. [9]

Deroshia, supra, where the plaintiff leased a commercial property to operate a restaurant, highlights the little power a landlord retains over a leased property. The plaintiff became a holdover tenant and the landlord used self-help to recover possession of the property. *Id.,* at 716. The circuit court granted the landlord's motion to dismiss on the theory that since the plaintiff did not have lawful possession, the landlord was not prohibited from using the common-law self-help remedy to recover possession. *Id.* However, the Court of Appeals reversed, and held that self-help is prohibited under

Continued from previous page

[9] The same exclusive right to possession is even stronger in instances in mortgaged property or property under land contact. While a landlord may have a right to enter property after a tenant makes a repair request, such a relationship does not exist between a mortgagor and a mortgagee or a vendor or vendee. Further, a mortgagee for a mortgaged property or a vendor for property under land contract has no right to enter property due to a missed payment. A mortgagee or vendor must follow the proper the respective foreclosure or forfeiture process.

MCL 600.2918 even for a tenant who is wrongfully in possession. *Id.* The tenant's right to possession remains greater than anybody else's in the world, even the landlord, until the proper judicial process is taken.

Further, the relinquishment of a landlord's control over property is demonstrated beyond civil litigation. In *People v. Collier,*[10] police searched the defendant's apartment without a warrant. The police entered defendant's apartment with the apparent permission from the property owner. *Id.* The Court of Appeals found that the trial court erred in denying defendant's motion to suppress. *Id.,* at *14. "Contrary to the trial court's ruling, there can be no dispute that defendant, as the resident of apartment eight, had a reasonable expectation of privacy in the apartment. Further, it is well-settled that an owner may not give permission to the police to search a tenant's premises unless [ILLEGIBLE TEXT] the tenant's contract so provides." *Id.,* at *13 (citing *Stoner v California*, 376 U.S. 483; 84 S Ct 889; 11 L. Ed. 2d 856 (1964); *People v Chism*, 390 Mich. 104, 134; 211 N.W.2d 193 (1973)).

The same general principles of excluding landlords from leased property are found in other jurisdictions throughout the United States. In *Carroll v. Cooney*, 163 A. 599 (Conn. 1933), the Supreme Court of Errors of Connecticut was presented with the issue of determining if the plaintiff was a mere lodger or a bona fide tenant. *Id.* According to the court, the existence of a tenancy is not dependent on a person surrendering control or possession of a property, but is dependent on the landlord surrendering the exclusive right to possession and occupation of the premises with no retained control. *Id.,* at 600. Further, once a landlord surrenders the exclusive right to possession, a landlord may become a trespasser on the very land in which he holds title. "The landlord becomes a trespasser if he enters upon the leased

[10] 1997 Mich. App. LEXIS 1327, Michigan Court of Appeals Case No. 184478 (May 30, 1997)(unpublished), attached as Exhibit 1.

premises, and without the consent of the tenant appropriates possession to himself before the expiration of the term." *Clark v. Strohbeen*, 181 N.W. 430, 434-35 (Iowa 1921).[11]

Additionally, a common protection found in several jurisdictions prevents a landlord from entering upon a leased property, even for a lawful purpose such as inspecting or making essential repairs, unless notice is given to the tenant.[12] The amount of notice varies from jurisdiction to jurisdiction. The notice required can be anything from "reasonable" to a day or two. For example, Wis. Stat. § 704.05(2) (2012) states that "[u]ntil the expiration date specified in the lease . . .the tenant has the right to exclusive possession of the premises. . . . The landlord may upon advance notice and at reasonable times inspect the premises, make repairs and show the premises to prospective tenants or purchasers . . . ."

Finally, tenants enjoy the common law covenant of quiet enjoyment. The covenant of quiet enjoyment is a covenant at common law that grants a tenant the right to be free from disturbances or interferences regarding the use of the leased premises.[13] The covenant of quiet enjoyment goes beyond merely denying a tenant actual possession. "There are several ways in which a landlord might breach that covenant, each giving rise to, a different claim by the tenant. The landlord's actual physical dispossession of the tenant from the leased premises constitutes an actual eviction, either total or partial, as well as a breach of the covenant. Interferences by the landlord that fall short of a physical exclusion but that nevertheless substantially interfere with the tenant's enjoyment of the premises, causing the

[11] *See also Walden v. Conn.*, 1 S.W. 537, 538 (Ky. 1886) ("It is a well settled rule that when a contract of tenancy is consummated by the entry of the tenant, the exclusive right of possession is thereby instantly changed from the landlord to the tenant during his term, and for any injury to that possession, the right of action is exclusively in him. This is so whether he retains the possession or not, because it is his exclusive right of possession that gives him the exclusive right of action for any injury done to it, either by the landlord himself or a stranger, during the existence of that exclusive right.").

[12] Ala. Code. § 35-9A-303 (2 days' notice unless emergency or impractical); Ca. Civil Code § 1954 (reasonable notice with a presumption that 24 hours is reasonable); Conn. Gen. Stats. § 47a-16 (reasonable notice and during reasonable times); Haw. Rev. Stats. § 521-53 (2 days' notice unless emergency or impracticable); Kans. Stat. § 58-2557 (reasonable notice); Ohio Rev. Code § 5321.04(8) (reasonable notice with 24 hours presumed to be reasonable).

[13] The right to or covenant of quiet enjoyment is a common law doctrine that "obligates the landlord to refrain from interferences with the tenant's possession during the tenancy." Echo Consulting Services v. North Conway Bank, 140 N.H. 566, 568; 669 A.2d 227 (1995).

tenant to vacate, are actionable by the tenant as 'constructive' evictions." *Echo Consulting Services v. North Conway Bank*, 140 N.H. 566, 568; 669 A.2d 227 (1995) (internal quotations omitted).

In *Echo Consulting Services*, the New Hampshire Supreme Court reversed the trial court which held that the covenant of quiet enjoyment only protected the plaintiff's possessory interest of the property. The case was remanded to determine whether renovations that created noise, dirt, and electric service interruptions; newly created inaccessibility to parking lots; and changing of locks which limited access after business hours consisted a breach of the covenant of quiet enjoyment. *Id.*, at 567.

Such an expansion of the protections granted by the covenant of quiet enjoyment has occurred throughout jurisdictions. "To alleviate the tenant's burden, the courts broadened the scope of the long-recognized implied covenant of quiet enjoyment (apparently designed originally to protect the tenant against ouster by a title superior to that of his lessor) to include the right of the tenant to have the beneficial enjoyment and use of the premises for the agreed term." *Reste Realty Corp. v Cooper*, 251 A.2d 268, 276 (S. Ct. N.J., 1969). The court in *Reste Realty Corp.* extended the covenant of quiet enjoyment to apply in the case of recurring flooding of leased premises that substantially interfered with the use of the leased property. *Id.*, at 270, 276.

In this case, Defendants/Appellants had no way to know or expect that Daniel Truman's horse would break free from its corral. But more importantly, even if they did, they were powerless to prevent it from happening. Once the landlords relinquished possession and control over the leased premises to the tenant, it became the tenant's sole responsibility to properly use the premises and to oversee the animals he housed there. Plaintiff cannot expect that Defendants/Appellants would have the right and/or obligation to frequently inspect the leased premises,[14] which is what would have been necessary to try to prevent this accident. The Court cannot impose a duty upon a landlord to inspect every gate, fence post,

[14] *Maclam*, at 694.

wire, or the like to ensure that an animal does not break out because the Court cannot impose a duty to inspect upon the landlord.

Similarly, a landlord cannot be expected to have a duty to inspect a tenant's leased premises, nor would a tenant want to relinquish his privacy and quiet enjoyment to the landlord to allow that to happen. It would be an unreasonable burden on both landlords and tenants if landlords became obligated to inspect every leased premises for the potential of a public nuisance.

Obviously, a runaway horse is not the type of nuisance which is likely to arise out of an apartment community or other multi-family residential property, but there are other potential nuisances which could be imagined and for which it would be inequitable and unreasonable to hold the landlord liable. For example, a tenant could surreptitiously turn an apartment into a methamphetamine laboratory without the knowledge of his neighbors or landlord until the unfortunate day when that laboratory explodes, killing his neighbors and destroying the apartment building. A tenant could create any kind of potential public nuisance and the landlord could be without knowledge of the problem before it is too late.

The idea of "knowledge" is another problem for the landlord. If it such a nuisance is serious and overt, it might be obvious. But in some situations, like the meth lab example, it might only be a neighboring tenant who finds out about it, if at all. In that situation, the landlord is limited to the information provided to the landlord from the neighboring tenant. The neighbor has no duty to inform the landlord of a problem, although it would be appreciated. But even with that information, the landlord has no right to simply inspect apartments from time-to-time. If the landlord did have that right but chose not to use it, that failure to inspect might be the basis of a negligence action as well. So that simply creates additional problems.

If a neighbor informs a landlord about a problem that neighbor perceives occurring in another tenant's leased premises, the landlord then faces a quandary. First, the landlord has no actual proof

other than the unsubstantiated statement of a neighbor. Second, the landlord may have no legal authority to inspect the apartment to confirm or deny the neighbor's suspicions or allegations. Finally, if the allegation turns out to be verified, the landlord must then begin the legal process to evict the tenant. During the time of the pending eviction proceedings, the landlord has no recourse to prevent or abate the potential nuisance.

Very simply, the landlord has no control over the tenant or a tenant's actions in the leased premises – and this is as it should be. No landlord wants to be a parent to his tenant and no tenant wants his landlord to be constantly inspecting, checking the apartment, or telling him what to do and how to live. If a tenant is going to commit a crime, a tort against another individual, or a public nuisance as alleged here, the landlord is powerless to prevent it. Because the landlord has no power to abate or prevent such a nuisance, no landlord should be held liable for one.

III. CONCLUSION

This Court must hold that a property owner who is not in possession of the property and who does not have control over the property cannot be liable for a nuisance. Further, this Court should clarify that even if a property owner retains some semblance of control over the property, perhaps as it pertains to the common areas of the leased premises, unless that owner creates the nuisance or controls the cause and/or continuation of the nuisance, that such an owner cannot be liable for a nuisance.

As explained herein, the issue in this case and those which preceded it is "control." If a possessor or owner of land has control of that land or the cause of the nuisance, then that person should be liable for it. If not, then an owner cannot be liable for a nuisance simply because of his ownership.

Neither landlords nor tenants would want a landlord to be responsible for the conduct of a tenant on the leased premises. Tenants would not want the oversight that landlords would require and landlords would not want the obligation to be their tenants' insurers. It is critical that the Court clarify that tenants are entitled to quiet enjoyment of their premises without their landlords' interference and

that landlords do not have the responsibility to make sure that their tenants are behaving appropriately within their leased premises.

No landlord, regardless of whether he has access to any or all of the leased premises, has any authority to use self-help to impede upon his tenant's use of the leased premises. Even if a landlord knew that a tenant was causing a public nuisance, the landlord is powerless to stop it. The landlord's remedies are limited to the eviction processes, all of which take time. It would be patently unfair for a landlord to be liable for a tenant's nuisance, even if the landlord knew about it, when the landlord has no ability to do anything about it.

Finally, the case law which led to the Court of Appeals decision in this case was misguided. A panel of the Court of Appeals improperly equated control with ownership and a line of cases derived from obiter dicta followed.

As a result of all of the foregoing, Amici Curiae urge this Court to correct the Court of Appeals' errors and overrule *Radloff, Gelman Sciences,* and *Cloverleaf* and to reverse the Court of Appeals in this case. There can be no dispute that a property owner who relinquishes control over leased premises cannot be liable for a nuisance that arises from those premises.

Respectfully submitted;

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DATED: September 24, 2013

EXHIBIT 1

Order

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

In re Estate of TERRI A. SHOLBERG

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.
/

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). 8-2-13 KR 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.

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

h0618

EXHIBIT 2

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.

EXHIBIT 3

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ISAAC COLLIER, JR., Defendant-Appellant. PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v CLARENCE D. SCOTT, Defendant-Appellant.

No. 184478, No. 184480

COURT OF APPEALS OF MICHIGAN

1997 Mich. App. LEXIS 1327

May 30, 1997, Decided

NOTICE: [*1] IN ACCORDANCE WITH THE MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

SUBSEQUENT HISTORY: Appeal denied by, Sub nomine at People v. Scott, 458 Mich. 853, 587 N.W.2d 635, 1998 Mich. LEXIS 1496 (1998)
Appeal after remand at People v. Scott, 2007 Mich. App. LEXIS 1260 (Mich. Ct. App., Mar. 29, 2007)

DISPOSITION: Affirmed in Docket No. 184478. In Docket No. 184480, convictions of first-degree murder and felony-firearm affirmed, conviction of felony murder vacated, and remanded for proceedings consistent with this opinion.

JUDGES: Before: Wahls, P.J., and Hood and Jansen, JJ.

OPINION

PER CURIAM.

Following a joint jury trial in the Detroit Recorder's Court, defendant Isaac Collier, Jr. was convicted of felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), second-degree murder, MCL 750.317; MSA 28.549, and unarmed robbery, MCL 750.530; MSA 28.798. Defendant Clarence Scott was convicted of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Collier was [*2] sentenced to the mandatory term of life imprisonment without

the possibility of parole for the conviction of felony murder and ten to fifteen years for the conviction of unarmed robbery. Collier's conviction of second-degree murder was vacated by the trial court at sentencing. Scott was sentenced to the mandatory terms of life imprisonment without the possibility of parole for both convictions of felony murder and first-degree murder, and two years for felony-firearm. Defendants now appeal as of right. We vacate Scott's conviction of felony murder, and affirm the remaining convictions and sentences of both defendants.

This case arises out of the shooting death of Elwin Lilley on April 2, 1994 near Metro Airport in Romulus. Defendants attempted to steal money from the victim while he was in his parked car in the parking lot of a McDonald's restaurant. Scott, who had a sawed-off shotgun in the waistband of his pants, put the gun to the victim's head and demanded money. After the victim started his car and attempted to drive away, Scott shot him in the head. Both defendants then took some items from the car. Collier then ran to a gas station and stole a getaway car.

No. 184480

[*3] Defendant Collier raises two issues on appeal. He first contends that there was insufficient evidence to be convicted as an aider and abettor of felony murder and that he is entitled to a new trial because the trial court erred in failing to instruct the jury on the requested cognate lesser offense of accessory after the fact. We do not find either issue to require reversal.

I

First, Collier argues that there was insufficient evidence to convict him of felony murder as an aider and abettor. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting [*4] to commit, or assisting in the commission of any of the felonies enumerated in MCL 750.316; MSA 28.548. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995). To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *Id.*, p 568.

Taken in a light most favorable to the prosecution, there was sufficient evidence to sustain defendant's conviction of felony murder as an aider and abettor. In his police statement, defendant Collier admitted that he and Scott planned to steal money from someone. Collier also stated that Scott got out of the car, "stuck the gun on the man," and demanded the man's money. Scott then shot the victim when the victim attempted to drive away. Collier was also able to perfectly describe the gun to the police (a "sawed-off, one shot, [*5] 410 gauge" gun). Under these circumstances, there is sufficient evidence that Collier had the requisite intent; that is, that these defendants created a very high risk of death or great bodily harm with knowledge that such was the probable result. See *id.*, p 572.

II

Defendant Collier next argues that the trial court erred in failing to give his requested instruction on the cognate lesser offense of accessory after the fact. In determining whether to give an instruction on a cognate lesser offense, the record must be examined, and if there is evidence which would support a conviction of the cognate lesser offense, then the trial court, if requested, must instruct on it. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). However, there must be sufficient evidence that the defendant could be convicted of the lesser offense. *Id.*

This Court has recently held that the offense of accessory after the fact is not a cognate lesser offense of murder. *People v Perry*, 218 Mich App 520, 533; 554 NW2d 362 (1996). However, this is in contrast to *People v Usher*, 196 Mich App 228, 234; 492 NW2d 786 (1992), [*6] where this Court stated that the crime of accessory after the fact can be a cognate lesser included offense of aiding and abetting first-degree murder. In following *Perry*, there is no error in the trial court's refusal to instruct on accessory after the fact because it is not a cognate lesser offense of murder.

Even were we to apply *Usher* to this case, we would find no error. A person is an accessory after the fact when, after obtaining knowledge of the principal's guilt after the completion of the crime, that person renders assistance in an effort to hinder the detection, arrest, trial, or punishment of the principal. *Usher, supra*, p 232. In this case, Collier did not obtain knowledge of Scott's guilt *after* the completion of the crime. Collier and Scott worked together to steal money from someone. Collier waited in a car while Scott attempted to rob the victim of his money and then shot him as he attempted to drive away. Although Collier did steal a getaway car after the shooting, it is clear that Collier and Scott participated in an armed robbery together which resulted in the shooting death of the victim. This is not a situation where Collier merely [*7] rendered assistance to Scott to elude the crime scene.

Accordingly, the trial court did not err in denying Collier's requested instruction on accessory after the fact.

No. 184480

On appeal, defendant Scott raises five issues. He contends that the trial court abused its discretion when it denied his motion for severance or a separate jury, that the court erred in denying his motion to quash the information on the felony murder count, that the court erred in denying his motion to suppress evidence as the fruit of an illegal search, that his right to confrontation was violated when the codefendant's statement was read to the jury, and that his convictions of both felony murder and first-degree murder violate double jeopardy. We agree that the convictions of both felony murder and first-degree murder violate double jeopardy and we vacate the conviction of felony murder. However, we affirm Scott's remaining convictions and sentences as we do not find any other issue to require reversal.

III

Defendant Scott first argues that the trial court abused its discretion in denying his motion for a separate trial or, alternatively, for a separate jury. The decision to sever or join defendants [*8] lies within the discretion of the trial court. Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). The use of a separate jury is a partial form of severance to be evaluated under the standard applicable to motions for separate trials. *Id.*

In his motion for severance, defendant requested a separate trial because codefendant Collier had made an incriminating police statement implicating Scott and exculpating

himself in the shooting. It was Scott's contention that Collier's attempt to exculpate himself at the expense of inculpating Scott would deny Scott a fair trial. Therefore, it appears that Scott was arguing that he would be prejudiced by the admission of Collier's police statement as the statement would not be admissible against Scott if Collier did not testify at trial. See *id.*, p 346; *Zafiro v United States*, 506 U.S. 534; 113 S Ct 933; 122 L. Ed. 2d 317 (1993).

We find no abuse of discretion based [*9] on the record before us. Even if Scott was concerned that the unredacted police statement of a nontestifying codefendant might be improperly admitted against him, this was simply not the case presented to the trial court at the time of the motion. There was every indication that Collier would testify at trial, and would thus be subject to cross-examination. However, it was not until the third day of trial, after the motion for severance was made, that trial counsel informed the court that Collier would not testify. At the time that Scott moved for the severance, all parties believed that Collier would testify and there was no claim of mutually exclusive or antagonistic defenses. Further, a confession is not antagonistic for purposes of determining whether to sever a trial where, as here, the confession of a codefendant incriminates both the codefendant and the defendant. *People v Jackson*, 179 Mich App 344, 349; 445 NW2d 513 (1989), vacated in part on other grounds 437 Mich 866 (1991).

Therefore, Scott had not made any showing that clearly, affirmatively, and fully demonstrated that his substantial rights would be prejudiced and that severance [*10] was necessary to rectify the potential prejudice. *Hana, supra*, p 346. Accordingly, the trial court did not abuse its discretion in denying Scott's motion for severance.

IV

Defendant Scott next argues that the trial court erred in denying his motion to quash the felony murder charge. Scott argues that but for the confession of Collier, there was no evidence of an enumerated felony to support a bindover on a felony murder charge. We review the circuit court's affirmance of the district court's decision to bind over defendant on the felony murder charge for an abuse of discretion. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991); *People v Meredith (On Remand)*, 209 Mich App 403, 410; 531 NW2d 749 (1995).

If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial. MCR 6.110(E). There must be some evidence from which each element of the crime may be inferred. *People v Tower*, 215 Mich App 318, 320; [*11] 544 NW2d 752 (1996).

Here, there was probable cause to believe that defendant Scott committed the crime of felony murder. The parties stipulated that the victim died from a gunshot wound to his left cheek. Venita Campbell testified that on the day of the crime, Scott told her that he had gotten into some trouble at the airport and that he had to kill someone in the course of a robbery. Yolanda Pezzat, who was at the McDonald's restaurant at the time of the shooting, testified that she heard a loud pop and saw Scott with a gun standing by a gray car. Dean Patton also testified that he saw two men rummaging through a Buick in the McDonald's parking lot. Patton saw one of the men walk up to the car, pull out a gun, and stick the gun into the driver's side window. Patton also saw the two men take things from the car, fill their pockets, and transfer those items to another car. After the two men left, Patton saw a dead man in the Buick.

Accordingly, the district court did not abuse its discretion in binding over defendant Scott for trial on the charge of felony murder. The

evidence established probable cause to believe that Scott committed the crime of felony murder.

V

[*12] Defendant Scott next argues that the trial court erred in denying his motion to suppress evidence as fruit of an illegal search of his apartment. A trial court's ruling on a motion to suppress evidence is reviewed de novo. *People v Goforth*, Mich App ; NW2d (Docket No. 191325, issued 3/14/97), slip op, p 2, citing *Ornelas v United States*, 517 U.S. ; 116 S Ct 1657; 134 L. Ed. 2d 911, 919-920 (1996); *Thompson v Keohane*, 516 U.S. ; 116 S Ct 457; 133 L. Ed. 2d 383 (1995). The trial court's factual findings are reviewed under the clearly erroneous standard of review. MCR 2.613(C).

In order to show that a search was legal, the police must show either that they had a warrant, or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). Exceptions to the warrant requirement include: (1) searches incident to an arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances. *Id.* [*13] The trial court ruled that defendant Scott had no "personal proprietary interest" in the apartment building, and that the landlord, as the owner, had the right to enter the premises and allow the police to search the apartments.

In this case, defendant Scott's apartment was searched by the police without a warrant. The police seized two live .410-gauge shotgun shells and other documents. The owner of the apartment building, Saben Spearman, testified at the evidentiary hearing that defendant lived in apartment number eight in the building and that defendant was the manager of the building. Contrary to the trial court's ruling, there can be no dispute that defendant, as the resident of apartment eight, had a reasonable expectation of privacy in the apartment. Further, it is well-settled that an owner may *not* give permission to the police to search a tenant's premises unless [ILLEGIBLE TEXT] the tenant's contract so provides. *Stoner v California*, 376 U.S. 483; 84 S Ct 889; 11 L. Ed. 2d 856 (1964); *People v Chism*, 390 Mich 104, 134; 211 NW2d 193 (1973). There being no contractual evidence that the landlord [*14] could give permission to the police to search defendant's apartment, the landlord could not consent to the search of the apartment. Indeed, we note that the landlord testified that he did not consent to the police officers searching defendant's apartment and that the police entered by kicking down the door.

Therefore, the trial court erred in denying defendant's motion to suppress. There is no evidence in the record that defendant, or anyone with authority, consented to the search of the apartment. However, we find that the admission of the evidence at trial, which was very limited evidence (two live shotgun shells and some documents showing that defendant lived at the apartment's address), was harmless error. In other words, we are convinced beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

Here, there was ample eyewitness testimony that defendant Scott shot the victim. One witness also saw both defendants rummaging through the car and removing items from it. Further, shotgun pellets were [*15] recovered near the body of the victim and they matched the shells recovered from defendant's motel room. Under these circumstances, where the improperly seized evidence was very minimal and could not have contributed to defendant's conviction, we find that the error in admitting the two live shotgun shells was harmless beyond a reasonable doubt.

VI

Defendant Scott next argues that his right to confrontation was denied when his codefendant's unredacted police statement was read to the jury and the codefendant subsequently chose not to testify. Defendant claims that this constitutes a violation of *Bruton v United States*, 391 U.S. 123; 88 S Ct 1620; 20 L. Ed. 2d 476 (1968). However, a close inspection of the lower court record reveals that there was no violation of *Bruton* in this case.

In *Bruton*, the Supreme Court held that a defendant is deprived of his rights under the Confrontation Clause when the nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In the present case, during the [*16] third day of trial, defense counsel objected to admitting codefendant Collier's police statement as evidence against Scott because the statement directly incriminated Scott as well. However, Collier's counsel stated that Collier was going to testify at trial and would thus be available for cross-examination by Scott. It was not until after this discussion, later the same day, that Collier ultimately decided not to testify. At the time that counsel informed the court that Collier would not testify, Scott did not renew his objection to the fact that the statement had been admitted. Since the trial court believed that Collier was going to testify at trial at the time that Scott raised his objection to admitting Collier's police statement against him, we cannot conclude that the trial court erred in allowing the police statement at the time the objection was raised.

Moreover, even if we were to consider that a *Bruton* violation occurred in this case, we would find the error to be harmless beyond a reasonable doubt. See *People v Banks*, 438 Mich 408, 427; 475 NW2d 769 (1991). Collier's statement was not admitted until the end of the prosecutor's proofs. [*17] Before the statement was admitted, there was ample testimony that Scott had killed the victim. Yolanda Pezzet heard a loud pop and identified defendant as the man standing next to the gray car with a gun in his hand. Three other witnesses, while not positively identifying defendant as the man with the shotgun, all described a man wearing a black trench coat as the shooter. Dean Patton also identified Scott as the man wearing the black trench coat and that Scott had a gun.

Evidence seized from the motel room where the defendants had been staying also confirmed their actions in the killing. The police seized live .410-gauge shotgun shells, and pellets taken from the body of the victim were of the same size and weight as the pellets taken from the live shells found. There was additional testimony from Sue Rucker that she saw Scott with the sawed-off shotgun. Moreover, Scott had told Lisa Campbell that he had been involved in a murder, and he told his girlfriend, Venita Campbell, that he had gotten into some trouble at the airport. Specifically, Venita told the police that Scott had told her that he had to kill a man that he was trying to rob. Venita later retracted this testimony at [*18] trial, but she had made this statement to the police.

With respect to the statement itself, this is not a situation where Collier denied all criminal responsibility and shifted all blame onto Scott. In the statement, Collier admitted that he and Scott were out to "take some money from someone." Collier also stated the "Six-Nine" (referring to Scott) "stuck the gun on the man and told him to give him his money." The man attempted to drive off, and Scott shot him. Although Collier squarely places the actual shooting on Scott, there was ample evidence presented by the prosecutor before the statement was admitted that Scott was the shooter. Had the statement never been admitted, there was still overwhelming evidence that Scott was the shooter in this case.

Accordingly, we find that there was no *Bruton* violation in this case because the trial

court had been informed that Collier was going to testify when Scott objected to the introduction of Collier's police statement. Moreover, even if there was technically a *Bruton* violation, we find that the admission of the statement against Scott was harmless beyond a reasonable doubt because the properly admitted evidence of guilt was overwhelming [*19] and the prejudicial effect of the codefendant's statement was so insignificant by comparison.

VIII

Last, defendant Scott argues that his convictions of both felony murder and first-degree murder arising out of the same killing violate the protection against double jeopardy. The prosecutor concedes error and we agree with defendant's contention. The appropriate remedy is to vacate the conviction of felony murder. *People v Passeno*, 195 Mich App 91, 96; 489 NW2d 152 (1992). Accordingly, we remand for the limited purpose of allowing the trial court to amend the judgment of sentence to indicate that defendant Scott's conviction of felony murder is vacated. In all other respects, his convictions of first-degree murder and felony-firearm are affirmed.

Affirmed in Docket No. 184478. In Docket No. 184480, we affirm the convictions of first-degree murder and felony-firearm, vacate the conviction of felony murder, and remand for proceedings consistent with this opinion.

/S/ Myron H. Wahls

/s/ Harold Hood

/s/ Kathleen Jansen