

IN THE COUNTY COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

ROBIN HAINES MERRILL,
Plaintiff,

CASE NO.: 05-4239 COCE 53
JUDGE: ROBERT W. LEE

vs.

JIM BOSSER,
Defendant.

**FINAL JUDGMENT IN FAVOR OF PLAINTIFF
WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

THIS CAUSE came before the Court on April 27, 2005 and continued to May 19, 2005 for trial, and the Court's having reviewed the entire Court file; heard argument; received evidence; reviewed the relevant legal authorities; made finding of credibility consistent with this Judgment; and been sufficiently advised in the premises, finds as follows:

Findings of Fact: To start with, the Court believes it appropriate to state what this case is and is not about. This is not a case about secondhand smoke. Rather, as persuasively argued by the Plaintiff, it is about excessive secondhand smoke.

At some time in 2003, the Plaintiff and her family purchased a condominium unit at the Palm Aire Condominium in Pompano Beach. At that time, the Defendant was living in a unit one floor up and one unit over from Plaintiff. The Defendant is, and was at that time, a smoker who smoked about a pack a day. The Plaintiff had no problems with any smoke at that time. Thereafter, however, the Defendant acquired a tenant who was also a smoker. After the tenant moved in, the Plaintiff as well as the occupants directly next to the Defendant's unit, noticed

smoke seeping into their units on a regular basis from the Defendant's unit. The problem was particularly bothersome in the bathrooms.

The Plaintiff acknowledges that her family is "hypersensitive" to smoke due to a history of *respiratory allergies*. The smoke caused the family members' health to deteriorate. In an attempt to ameliorate the problem, the Plaintiff installed air purifiers in her home. The problem was not resolved. At some point, the Plaintiff complained to the Defendant directly, as well as to the condominium association. Eventually, the association installed a mechanical fan to draw air from the common shafts up through the roof. This also did not resolve the problem. The smoke got so bad that on several occasions the family had to sleep elsewhere. On one occasion, the smoke caused the Plaintiff's smoke detector to go off.

The problem continued for almost a year. Finally, after numerous complaints, the association advised the Defendant that he would have to remove the tenant from the unit. The association, however, based its complaint *not on the smoke, but rather on the Defendant's failure to get association approval of the tenant*. The tenant moved out very soon thereafter, and the *smoke problem stopped*.

At trial, the Defendant's neighbors testified, and the Court finds their testimony credible. They likewise experienced a smoke problem, although not as serious as the Plaintiff's. They tried to keep their bathroom doors closed to keep the smoke confined. They were also able to clearly detect smoke when walking on the catwalk adjacent to the Defendant's unit. As with the Plaintiff, the neighbors' smoke problem ended when the tenant moved out.

The Declaration of Condominium for the Palm-Aire Condominium provides in pertinent part in Article XIII that a "unit owner shall not permit or suffer anything to be done [. . .] in his unit [. . .] which will [. . .] interfere with the rights of other unit owners or annoy them by

unreasonable noises, or otherwise, nor shall the unit owners commit or permit any nuisance [. . .] in or about the Condominium property.”

The Plaintiff has brought suit against Defendant for damages under theories of trespass, common law nuisance, and breach of covenant.¹

Conclusions of Law.

A. Trespass

In Florida, to establish trespass to real property, one must show an injury to or use of land of another by one having no right or authority. *Winselman v. Reynolds*, 690 So.2d 1325, 1327 (Fla. 3d DCA 1997), citing *Brown v. Solary*, 37 Fla. 102, 112 (1896). See also 55 Fla. Jur. 2d *Trespass* §4 (2000).

There is no case on point in Florida which addresses whether secondhand smoke is considered a form of trespass onto real property. However, in Florida, the focus of the tort of trespass is the "disturbance of possession." *Id.* As pertains to smoke, secondary authority has summarized the status of the law as it relates to trespass as follows: "A trespass need not be inflicted directly on another's realty, but may be committed by discharging a foreign polluting matter at a point beyond the boundary of such realty." 75 Am. Jur. 2d *Trespass* §56 (2005). The Court believes, though, that in Florida common secondhand smoke which is customarily part of everyday life would not be actionable in trespass. See 55 Fla. Jur. 2d *Trespass* §9. The issue then is whether the evidence in the instant case demonstrates something more than mere custom, giving rise to a "disturbance of possession." The Court concludes that based on the unique facts of this unusual case, it does.

¹ The Court acknowledges with appreciation the research assistance of judicial intern Mark Kopelman of Nova Southeastern University School of Law.

As far as damages in trespass, Florida law notes that the "object of the law is to place the injured party in an actual [. . .] position financially equal to that which he would have occupied had his injuries not occurred, [. . .] and aside from the fact that one is always entitled to nominal damages for the vindication of his rights." *Id.* §13. Nominal damages are awarded when "the evidence is insufficient to reveal the extent of an injury that has undoubtedly been inflicted on the plaintiff." 17 Fla. Jur. 2d *Damages* §5 (2004). The Court finds that the evidence establishes that the Defendant is entitled to damages in trespass, as will be set forth hereinbelow.

B. Nuisance

The Supreme Court of Florida has recognized,

An owner or occupant of property must use it in a way that will not be a nuisance to other owners and occupants in the same community. Anything which annoys or disturbs one in the free use, possession, or enjoyment of his property of which renders its ordinary use or occupation physically uncomfortable may become a nuisance.

Knowles v. Central Allapattae Properties, Inc., 198 So. 819, 822 (Fla. 1940), quoting *Mercer v. Keynton*, 163 So. 411, 413 (Fla. 1935).

Nuisances can be identified as either public or private. For our purposes, we need only focus on private nuisance. To constitute a private nuisance, there must be an interference with the use and enjoyment of land, and such interference is wrong, only to those persons who have property rights or privileges in the land. *Page v. Niagara Chemical Division of Food Machinery & Chemical Corp.*, 68 So.2d 382 (Fla. 1953).

In *Page*, employees of Atlantic Coast Line Railroad (ACL) filed suit because various toxic chemicals and insecticides were descending into their workplace after being expelled from defendant's adjacent manufacturing plant. *Id.* at 383. The Supreme Court of Florida denied

plaintiff's claim of a private nuisance because "their assertion that they are 'occupants' of ACL property during working hours is not sufficient to show that they have such an interest in or relation to their employer's property as would entitle them to maintain a suit for a private nuisance." *Id.* at 384. In the instant case, however, the Plaintiff clearly has an interest in the subject property sufficient to maintain an action for private nuisance.

While there is no case on point in Florida as to whether secondhand smoke is considered a private nuisance, Florida courts have allowed a nuisance action to proceed based on odors created by another party. *See* 38 Fla. Jur. 2d *Nuisances* §84 (2005). Additionally, other courts outside the state have addressed this particular issue. The Court of Appeals of Nebraska held that to have the use and enjoyment of one's home interfered with by smoke, odor, and similar attacks upon one's senses is a serious harm. *Thomsen v. Greve*, 550 N.W.2d 49, 55 (Neb. Ct. App. 1996). In *Thomsen*, the court found that the appellants were affected physically when smoke had entered their home approximately one hundred and forty times over a span of four years. *Id.*

Although not as egregious as *Thomsen*, the facts of the instant case demonstrate an interference with property on numerous occasions that goes beyond mere inconvenience or customary conduct. The Plaintiff and her family had recurring illnesses as a result of the smoke, and on several occasions had to vacate the premises.

The availability of damages for nuisance is similar to those available for trespass. *See* 38 Fla. Jur. 2d *Nuisances* §84.

C. Breach of Covenant

In Florida, parties living in a condominium are bound by a declaration of condominium which sets forth rights and obligations of the parties which are, in essence, contractual in nature

and enforceable by one owner against another. Fla. Stat. §718.303(1)(b) (2004). See *Gittelmacher v. Anttila*, 595 So.2d 237, 238 (Fla. 4th DCA 1992). The Declaration of Condominium for Palm-Aire contains a covenant of quiet enjoyment. Similar to landlord-tenant situations, the covenant of quiet enjoyment is breached when a party obstructs, interferes with, or takes away from another party in a substantial degree the beneficial use of the property. See *Carner v. Shapiro*, 106 So.2d 87 (Fla. 2d DCA 1958); 49 Am. Jur. 2d, *Landlord and Tenant* § 606.

In Florida, while there is no case on point as to whether secondhand smoke is considered a breach of covenant of quiet enjoyment, a housing court in Massachusetts has ruled on this issue in analogous proceedings. In *50-58 Gainsborough Street Realty Trust v. Haile*, the defendants failed to pay several months rent due to smoke seeping into their apartment from a downstairs bar. No. 98-02279 (Mass. Housing Ct., Boston Div., June 8, 1998), cited in *Donnelley v. Cohasset Housing Authority*, 16 Mass. L. Rptr. 318, 2003 WL 21246199 *8 (Mass. Sup. Ct. 2003). The *Haile* court held that while smoking is legal, secondhand smoke can be considered a breach of the covenant of quiet enjoyment. *Id.* In *Donnelley*, the Massachusetts Superior Court distinguished *Haile* by noting that in *Haile* the plaintiff was able to establish that "smoke from the nightclub entered the apartment through cracks in the fireplaces and electrical outlets," which supported the decision against the nightclub. See *id.* The instant case is similar to *Haile* in that smoke actually seeped into the Plaintiff's apartment from Defendant's apartment on numerous occasions, once causing the smoke detector to sound and several times causing the Plaintiff's family to have to sleep elsewhere.

D. Damages

The weakness in the Plaintiff's case is that she failed to provide much competent evidence demonstrating the amount of her damages. While the Plaintiff established that she clearly suffered damages, the Court is, as a result, *limited in what it can award*. The Plaintiff's actual damages are likely greater than what the Court is awarding. The Court breaks down the Plaintiff's damages as follows:

- 1) medical expenses;
- 2) loss of use of premises; and
- 3) remedial expenses.

Accordingly, it is

ORDERED AND ADJUDGED that the Plaintiff shall recover from the Defendant the sum of \$1,000.00 and costs in the amount of \$275.00, all of which shall bear interest at the rate of 7% per annum.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, this 29th day of June, 2005.

JUDGE ROBERT W. LEE

ROBERT W. LEE
County Court Judge

Copies furnished:

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