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Rob Samouce: Second hand smoke can be considered a legally actionable nuisance

By **ROB SAMOUCÉ**, Special to the Daily News
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Cannot one smoke in his own castle? A recent trial court case out of Broward County says no if you smoke "too much" in your castle. In the trial case of Merrill v. Bosser decided in June of this year, Robin Merrill and her family purchased a condominium unit at the Palm Aire Condominium in Pompano Beach (isn't it appropriate that a smoking case comes from a condo called Palm "Aire"). Mr. Bosser lived in a unit one floor up and one unit over from Merrill.

Bosser was a pack a day smoker and there were no smoke problems with Merrill at the time. However, Bosser then had a tenant move in who was also a smoker. After the tenant moved in, Merrill, as well as residents living directly next door to Bosser, noticed smoke seeping into their units on a regular basis from Bosser's unit. The problem was particularly bothersome in the bathrooms.

Merrill acknowledged that her family is "hypersensitive" to smoke due to a history of respiratory allergies. The smoke caused their health to deteriorate. She tried to solve the problem by installing air purifiers in her home. The smoke problem continued, so Merrill complained to Bosser and to the condominium association. The association eventually installed a mechanical fan to draw air from the common shafts up through the roof. The fan installation did not solve the problem.

The smoke got so bad that on several occasions Merrill's family had to sleep elsewhere. One time her smoke detector went off. The smoke problem continued for almost a year. The association finally advised Bosser that he would have to remove the tenant, based not on smoke, but rather on Bosser's failure to get association approval of the tenant. Soon thereafter, the tenant moved out and the smoke problem stopped.

The declaration of condominium for Palm-Aire Condominium provides, in part, 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, or shall the unit owners commit or permit any nuisance . . . in or about the Condominium property"

Merrill brought suit against Bosser for damages under theories of trespass, common law nuisance and breach of covenant.

Concerning the trespass theory, the trial court said that although there is no case on point as to whether secondhand smoke is considered a form of trespass, it believes that in Florida common secondhand smoke, which is customarily part of everyday life, would not be actionable in trespass. "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." The court then said that the evidence in this case demonstrates something more than customary secondhand smoke, thereby giving rise to a disturbance of possession or trespass.

With regard to the nuisance theory, again the trial court noticed that there is no case on point in Florida as to whether secondhand smoke is considered a private nuisance. It referred to a Nebraska case that 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." In that case, smoke had entered their home approximately 140 times over four years.

The Florida trial court then said that although the present case wasn't as egregious as the Nebraska case, "the facts of the instant case demonstrate an interference with property on numerous occasions that goes beyond mere inconvenience or customary conduct." Merrill and her family had recurring illnesses and had to vacate the premises on several occasions because of the smoke.