

# Lawsuit Over Second-Hand Smoke Goes “Up in Smoke”

By Arthur Blitz

CIGARETTE SMOKERS - REJOICE! This past summer you may have found a new friend in the Maryland Court of Special Appeals. In July, 2013, the court may have introduced a breath of fresh air into the nicotine stained and smoke filled rooms of private homes all over the State. *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 451 (2013). Here's what happened.

In 1995, David Schuman, a non-smoker, moved into a two-story townhouse in the Greenbelt Homes cooperative housing development. In a cooperative housing development, each member of the “co-op” has the right to inhabit one specific townhouse. In this particular development, each townhouse has an outside patio in the back of the property and each shares a common wall with the connecting townhouse. Every member of the co-op is legally obligated to abide by the Mutual Ownership Contract, and the entire community is governed by a cooperative housing association (“Association”), much like a homeowners association.

The following year, Mr. and Mrs. Popovic, both of whom were avid cigarette smokers, moved into the townhouse adjoining the Schuman property. It didn't take long for Mr. Schuman complain to the Association that cigarette smoke from the Popovic townhouse was making its way into his unit. The Association sealed some cracks in the common wall between the two units and this solved the problem until 2008, when Schuman undertook some extensive renovations to his townhouse. In 2009, the offending odors from cigarette smoke could again be detected in Schuman's unit. Although the Association and the Popovics tried to solve the problem, nothing seemed to work. The Popovics continued to smoke and the smell of cigarettes continued to find their way into the Schuman residence. It made his eyes water, gave him headaches, and produced other unpleasant symptoms.

In 2010, Schuman sued the Popovics and the Association alleging causes of action known as breach of the covenant of quiet enjoyment, negligence, nuisance, breach of contract and trespass. He asked the trial court to issue an injunction against the Popovics to stop them from smoking. Within a month of the filing, Mrs. Popovic passed away and her widow consented to a court order forbidding him from smoking inside his house, but reserved the right for Mr. Popovic to smoke outside on his patio. Mr. Popovich *never again smoked inside his house*, but he did light up on occasion on his patio. Mr. Schuman eventually complained that even the smoke from Popovic's outside patio found its way into his unit.

The trial court ruled that there was insufficient evidence to support Mr. Schuman's claims, and thus Mr. Popovic prevailed. Upon appeal, legal briefs and oral arguments were filed and presented by both sides. After the dust settled and the smoke cleared, the Maryland Court of Special Appeals affirmed the trial court's findings and sent the case back to the trial court for entry of a declaratory judgment in favor of Mr. Popovic.

Although the decision in favor of the smoker made clear that smoking in the privacy of ones own home has never been illegal, the court suggested that under more compelling facts the non-smoker might have a decent chance to obtain a court order converting the smoking neighbor's den into a smoke free zone. Here's why Mr. Schuman lost his case on each of his claims.

**Breach of Contract and Nuisance Claims.** Mr. Schuman argued that the Association breached the Mutual Ownership Contract under which the Association promised, in writing, that every member (townhouse owner) had the obligation to refrain from objectionable conduct and that no member is allowed to do anything which “shall or may be a nuisance, annoyance, inconvenience, or damage to the [Association], or its members or tenants, or to the occupants of adjoining dwellings or of the neighborhood”. Mr. Schuman claimed the Popovics' smoking created a nuisance, annoyance, inconvenience and damage. The court found that, under the facts presented, the act of cigarette smoking by Mr. Popovic on his outside patio, standing alone, did not create a nuisance in the legal sense. In the absence of any nuisance, the Association could not be found to be in breach for failing to stop the

smoking. In simple terms, there was no nuisance to stop.

**Breach of the Implied Covenant of Quiet Enjoyment.** Since the court found that Popovic's smoking a few cigarettes on his outside patio did not create a legal nuisance, the Association did not breach any obligation by failing to stop the smoking.

**Trespass.** Mr. Schuman argued that the smoke which entered his unit amounted to a trespass. In order to find a trespass, the court must find that the offending conduct interfered with Mr. Schuman's "possession of his land" and caused physical damage to his land. Schuman failed to argue or present any evidence that the cigarette smoke caused any physical damage to his land, thus rendering the trespass claim unsubstantiated.

**Negligence.** To prevail on a negligence claim, Mr. Schuman would have to prove the existence of a legal duty owed by Popovic to Schuman, a breach of that duty, causation and harm. Mr. Schuman presented no evidence of harm. There was no medical evidence that Mr. Schuman suffered any injury caused by Popovic's smoking outdoors on his patio. Causation is a key element of negligence, i.e. that the offending conduct was the cause of the injury. In this case, there was no proof of injury, let alone any proof of causation.

**SMOKERS BEWARE.** While the court found in favor of Mr. Popovic, it expressly acknowledged what is common knowledge, which is that "cigarette smoke and its harmful effects is an extremely serious issue", and suggested that the result could be different in the presence of medical evidence that the non-smoking plaintiff sustained significant injury *caused* by the secondhand smoke coming from a neighbors house. The court also noted that "the extent of the exposure necessary to cause harm is an evolving area". Mr. Schuman presented no such medical testimony, nor could he. Even the watery eyes, headaches and other symptoms he experienced at the outset of the problem, went away after Mr. Popovic limited his smoking to his outside patio. The facts in Mr. Schuman's case were against him. Armed with better facts, he may have emerged victorious.