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Schuman v. Greenbelt Homes, Inc. (2013)

Factual History

In *Schuman*, the plaintiff, David S. Schuman sued both his cooperative housing association, Greenbelt Homes, Inc. ("GHI") and his neighbors Darko and Svetlana Popovic for (i) breach of the implied covenant of quiet enjoyment and negligence and (ii) breach of contract, nuisance, trespass, and negligence, respectively. Schuman and the Popovics own adjacent units in the GHI housing cooperative. In 1996, Schuman complained to GHI that cigarette smoke from the Popovics' apartment was seeping into his apartment. GHI attempted to mitigate Schuman's exposure by sealing the cracks in his bathroom and hired an Industrial Hygienist to test for nicotine levels in Schuman's home. At the time, no detectable levels of nicotine were found and the sealing performed by GHI seemed to resolve the problem. However, between 2008 and 2009 after Schuman renovated his unit he began smelling the Popovics' cigarette smoke again. GHI agreed to seal additional cracks in the walls of Schuman's unit but would not ask the Popovics to stop smoking because GHI was not a smoke-free community.

Case History

After several failed attempts by Schuman, the Popovics, and GHI to resolve the situation Schuman filed a complaint in the circuit court against GHI and the Popovics on March 10, 2010 for the causes of action outlined above and for a declaratory judgment that smoking was a nuisance under GHI's membership contract. In the same month that Schuman's complaint was filed, Mrs. Popovic was diagnosed with a brain tumor. This caused Mrs. Popovic to stop smoking and Mr. Popovic to stop smoking inside their unit. Mr. Popovic did continue to smoke but only four to six cigarettes in the evening on his outdoor patio.

The circuit court denied Schuman's request for injunctive and declaratory relief. However, Mr. Popovic consented to an injunction inside his unit so a preliminary injunction was granted by the court with respect to indoor smoking (based upon Mr. Popovic's consent). Schuman's request for a preliminary injunction was denied on the basis that he failed to show that he suffered irreparable harm from Mr. Popovic's outdoor smoking.[1] In addition, Schuman failed to show that the smoking diminished his property value.

[1] Schuman's expert report presented at trial only discussed the potential injury that could be caused to Mr. Schuman based upon Mr. Popovic's *indoor* smoking. Id. at 457-58.

Schuman appealed to the Court of Special Appeals which affirmed the trial court's ruling on the preliminary injunction and held that denial of the declaratory judgment was not yet appealable. The Court rejected any claims Schuman had against Mrs. Popovic since the trial court determined that she no longer smoked.[2] Therefore, the only remaining basis for Schuman's claims was Mr. Popovic's smoking on his patio. The Court concluded that the evidence presented in connection with the preliminary injunction did not support a finding that smoking was a nuisance *per se* (i.e., an act that would be a nuisance at all times and under any circumstances).[3] The Court determined that the evidence presented with respect to secondhand smoke was only a potential risk of disease and therefore Schuman did not suffer an irreparable injury.[4] In addition, since a neighbor testified that shutting the windows and running a small fan stopped the smell of smoke, Schuman was not being harmed and could have taken these steps to stop the smell. Schuman's expert also testified that the presence of nicotine in Schuman's unit could be eliminated by prohibiting smoking inside the Popovics' unit. This justified the trial court's conclusion that Mr. Popovic's consent to stop smoking inside resolved Schuman's problem. Finally, the Court agreed with the trial court's conclusion that there was no substantial or unreasonable interference with Schuman's use and enjoyment of his property because Mr. Popovic's smoking outside was limited. GHI filed a motion to dismiss and/or for summary judgment on Schuman's claims against GHI. The trial court granted the motion as to the declaratory judgment but denied the motion on the other counts.

At trial in November 2011, Schuman's request for a permanent injunction against Mr. Popovic smoking indoors was granted (based solely on Mr. Popovic's consent), but the court found against Schuman on all other claims. The trial court concluded that the testimony presented with respect to Schuman's injuries from the secondhand smoke entering his unit was speculative at best. Any evidence of injury presented related to the smoke seeping into his unit when the Popovics were smoking indoors. In addition, the trial court found that the amount of smoke seeping into Schuman's unit was inconclusive and that his problem could easily be remedied by closing his windows when Mr. Popovic was smoking on his patio. Even if this did not work, the trial court found that any smoke entering Schuman's home was not "substantial or unreasonable" because Mr. Popovic only smoked a limited amount of cigarettes for a limited amount of time at night. Schuman appealed.

Result

Breach of Contract and Nuisance

The GHI membership agreement included a provision which prohibited members from conduct that creates a nuisance.[5] Schuman's argument is that Mr. Popovic's smoking constitutes a "nuisance" under the GHI membership agreement. However, GHI did not find that Mr. Popovic's smoking was considered a "nuisance" under the meaning of the membership agreement. This decision by GHI is not subject to judicial review as it is protected by the business judgment rule (protecting parties from

[2] Note, Mrs. Popovic died in April 2012.
[3] "A nuisance per se is 'an act, occupation, or structure which is a nuisance at all times and under any circumstances regardless of location or surroundings.'" Id. at 458 (quoting Adams v. Comm'rs of Trappe, 204 Md. 165, 170 (1954).
[4] The court concluded that Schuman did not provide any medical testimony that he suffered an injury. Id. at 458.
[5] Specifically, the GHI membership contract stated in relevant part: "Member agrees not to do or allow any act or thing that shall or may be a nuisance, annoyance, inconvenience, or damage to GHI or its members or tenants, or to the occupants adjoining dwellings or of the neighborhood." *Id*. at 463.

judicial review of legitimate business decisions of an organization, absent fraud or bad faith).[6] As Schuman did not allege any fraud or bad faith in GHI's decision, it was not subject to review by the Court. The Court then examined Mr. Popovic's smoking under the theory of common law nuisance and concluded that his smoking was not negligence *per se*, nor was it a nuisance in fact. Although the Court conceded that secondhand smoke can obviously be harmful, the Court rejected Schuman's argument that any amount of secondhand smoke is harmful and annoying and therefore should constitute a nuisance.

Schuman did not present any evidence at the hearing or at the trial upon which the trial court could find that Mr. Popovic's smoking was nuisance *per se*. Furthermore, the Court stated that the very fact that GHI permits smoking on its property and always has renders the mere act of smoking in one's unit or patio "unlikely to be substantially and unreasonably offensive to any person at any time."[7] Ultimately, the Court concluded that a finding that any amount of secondhand smoke constituted a nuisance would be one step away from banning smoking in all private homes. In addition, the Court held that Mr. Popovic's smoking was not nuisance in fact because there was no "substantial or unreasonable interference with the use and enjoyment of his property." In Maryland, certain "discomforts will be seen as nuisances if they exceed what is ordinarily and reasonably expected in the community and cause unnecessary damage or annoyance."[8] Schuman did not present any evidence at the hearing or at trial to support a finding that the secondhand smoke drifting into his unit from Mr. Popovic's patio was anything more than a mere inconvenience. The fact that Schuman's neighbors testified that they could prevent the smoke from entering their units by simply closing the windows and running a small fan, weakened Schuman's position considerably. Therefore, the judgment of the trial court with respect to Schuman's claims for breach of contract and nuisance was affirmed.

Breach of Implied Covenant of Quiet Enjoyment

In Maryland, where a landlord-tenant relationship exists between two parties, unless the lease provides otherwise, there is an implied covenant of quiet enjoyment that is part of the landlord tenant agreement.[9] The implied covenant of quiet enjoyment requires that the landlord ensure that the tenant peaceably and quietly enter the leased premises at the beginning of the term of the lease.[10] Without an actual or constructive eviction, "a tenant will have a claim for damages caused by conduct by the landlord that strikes at the essence of its obligations under the lease."[11] Here, if Mr. Popovic's smoking had constituted a nuisance under the GHI membership agreement then GHI's failure to stop Mr. Popovic from smoking would have gone to the essence of GHI's obligations under the contract. However, since this is not the case, the judgment of the trial court with respect to Schuman's claim for breach of the implied covenant of quiet enjoyment was affirmed.

[6] *Id*. at 463-64 (citing *Fox Hills North Community Assoc., Inc*., 90 Md.App. 75, 81-83 (Md. App. 1992)).

[7] *Id*. at 466.
[8] *Id*. at 471 (quoting *Five Oaks Corp. v. Gathmann*, 190 Md. 348, 355 (1948)).
[9] *Id*. at 474 (quoting the Real Property Article of the Maryland Code, Section 2-115). Note the Court did not address whether a landlord tenant relationship actually existed between GHI and Schuman but assumed for purposes of their review that Schuman's assertion was correct. *Id*. However, generally in Maryland, "unless the relevant documents dictate otherwise, in actions involving the breach of occupancy agreements, the relationship of a housing cooperative to its member is that of landlord-tenant." *Village Green Mut. Homes, Inc. v. Randolph*, 361 Md. 179, 183 (2000).
[10] *Id*. (quoting the Real Property Article of the Maryland Code, Section 8-204(b)).
[11] *Id*. (quoting *Nationwide Mut. Ins. Co. v. Regency Furniture, Inc.*, 183 Md.App. 710, 734 (Md. App. 2009).

Trespass

Schuman claimed that the secondhand smoke drifting into his unit constituted a trespass. In Maryland, a trespass is defined as "an intentional or negligent intrusion upon or to the possessory interest in property of another" (i.e., there must be a tangible interference with the owner's property).[12] Typically as the Court explained, intangible intrusions like smoke, odor, light and noise are not actionable under a trespass theory.[13] There are some jurisdictions that recognize an intangible intrusion but only if the trespass causes physical damage.[14] Since the intrusion of secondhand smoke into Schuman's unit was intangible and no evidence of physical damage was presented, the Court affirmed the trial court's decision with respect to Schuman's trespass claim.

Negligence

A negligence claim requires duty, breach, causation, and harm.[15] Schuman argued that Mr. Popovic breached his duty to protect Schuman from the dangers and irritations of secondhand smoke by allowing the smoke to drift into his apartment. In addition, Schuman claims that GHI breached its duty to protect him from the dangers of secondhand smoke by refusing to stop Mr. Popovic from smoking.[16] The Court, addressing only this element, found that Schuman did not suffer any harm. Schuman presented no evidence at trial that he suffered any injury or would likely suffer an injury directly from Mr. Popovic's outdoor smoking. Therefore, the trial court's decision with respect to Schuman's negligence claim was affirmed.

Implications

The Schuman case provides substantial guidance on the potential success of claims brought by Maryland residents in condominiums, housing cooperatives, and homeowners associations against neighbors and housing organizations who are suffering from secondhand smoke drift. While the *Schuman* court did not explicitly discuss the legality of smoke-free policies in Maryland, the court did acknowledge that a cooperative agreement could contain a provision prohibiting smoking and its governing body would be within its discretion to interpret its cooperative contract as prohibiting smoking.[17] While smoke-free legislation in Maryland specifically exempts private residences, Maryland residents in communal housing arrangements are well within their rights to prohibit smoking on private property.[18] *Schuman* clearly states that as a matter of law, any amount of secondhand smoke does not constitute nuisance *per se* in condominiums where no rule or regulation is in place to prohibit smoking.[19] However, this leaves open the possibility for a claim of nuisance per se in either a smoke-free community or a community where smoking in certain areas is deemed a nuisance and is strictly

[12] *Id*. at 475 (quoting *Bittner v. Huth*, 162 Md.App. 745 (Md. App. 2005)).
[13] *Id*. (citing *Nissan Motor Corp. in U.S.A. v. Maryland Shipbuilding and Drydock Co.*, 544 F.Supp. 1104, 1116-17 (D.Md. 1982).
[14] *Id*. (citing *Darney v. Dragon Prods. Co. LLC*, 640 F.Supp.2d 117, 125 n. 11 (D.Maine 2009)).
[15] *Id*. at 476 (citing *Moscarillo v. Prof'l Risk Mgmt. Srvs., Inc*., 169 Md.App. 137, 147 n. 4 (Md. App. 2006)).
[16] *Id*.
[17] *See Schuman*, 212 Md.App. at 464 (discussing GHI's interpretation of its cooperative contract to permit smoking and the protection of such a determination by the business judgment rule). *See also id*. at 466-67 (discussing GHI's decision to permit smoking on its premises).
[18] *See id*. at 467.
[19] *See id.* at 466 (stating: "It is undisputed that GHI permits smoking in and outside of the units and always has done so. Thus, when the Popovics and Schuman signed their respective contracts, smoking was permitted. Because GHI's members were allowed to smoke at the time the contracts were signed (and still are), the mere act of smoking in one's unit or on one's patio is unlikely to be substantially and unreasonably offensive to any person at any time."

prohibited.[20] It seems that absent such rule, regulation or blanket prohibition, secondhand smoke in Maryland is not a nuisance *per se*. In terms of whether secondhand smoke will be deemed a nuisance in fact, to be successful plaintiffs will need to establish that the secondhand smoke is causing more than a mere inconvenience. There needs to be serious interference with the use and enjoyment of the plaintiff's property (possibly amounting to a constructive eviction) before secondhand smoke will be deemed to be a nuisance.[21] In addition, plaintiffs may be expected to take reasonable actions to limit their discomfort.[22] The court left open the question of whether an intangible invasion by secondhand smoke could constitute a trespass. It seems that if a plaintiff could show physical damage to his/her property the court would at very least consider the claim since it did not rule out a claim for intangible invasions.[23]

It should be noted that in terms of a claim for negligence due to secondhand smoke, the court in Schuman only examined the harm element of a negligence cause of action. The court made it clear that in order to prevail Schuman would have needed to present medical evidence that he suffered an injury or would likely suffer an injury directly from Mr. Popovic's outdoor smoking. Schuman could not make this showing and any plaintiff attempting to bring a negligence cause of action for secondhand smoke must provide evidence of actual harm. The mere fact that secondhand smoke is universally accepted to be harmful is not enough.[24]

Finally, although Schuman's claims were not successful, the Court of Special Appeals made it clear that its opinion was not "to be the final word on liability for secondhand smoke in multi-unit residential housing."[25] In fact, the court discussed many scenarios in which certain causes of action brought by residents of multi-unit housing complexes could be successful by examining cases in other jurisdictions. Going forward it seems clear that in Maryland, claims arising out of secondhand smoke drift will turn on the particular facts and circumstances of the case at hand. There is no specified amount of secondhand smoke that is automatically actionable. Unfortunately for residents in multi-unit housing, the lesson of *Schuman* seems to be the greater the amount of secondhand smoke and the greater the intrusion, the greater likelihood of success.

[20] See *id*. at 468 in which the court discusses *DeNardo v. Corneloup*, 163 P.3d 956, 961 (Alaska 2007) where the Alaskan trial court was "unwilling to find smoking to be a nuisance 'absent either a provision in the rental agreement or a statute or municipal ordinance prohibiting smoking or declaring smoke a nuisance in a multi-party residence.'" Although the *DeNardo* case involved a landlord-tenant dispute in an apartment building, the case could be analogized to a communal housing arrangement that contains a prohibition declaring smoke a nuisance in its bylaws or other governing document.
[21] *See id*. at 472.
[22] *See id*.
[23] *See id*. at 475-76.
[24] Id. at 466, 476-77.
[25] *Id*. at 478.