

Condo owners win secondhand smoke case

By [MARILYN KALFUS](#)

2013-03-12 11:36:21

An Orange County [California] jury has found a homeowners association negligent for failing to resolve a secondhand smoke dispute between neighbors at a Trabuco Canyon condominium.

After a five-week trial, Superior Court jurors last week awarded a family more than \$15,000, finding the condo association and management failed to ensure the non-smoking family's right to the "quiet enjoyment" of their own unit.

The verdict comes amid a growing trend in California. Non-smokers are complaining to homeowners associations, filing lawsuits and appealing to city councils to try to stop tobacco smoke from infiltrating their apartments and condominiums. A bill is pending in the state Legislature that would ban smoking in multiunit residences.

Kim and Kai Chauncey filed their lawsuit in March 2011 against the Bella Palermo Homeowner Association in Trabuco Canyon and TSG Independent Management. The defendants included Lauren and Richard Lee Pulido, identified as tenants of the condo next door.

The Chaunceys alleged that the neighbors and their visitors smoked "incessantly" on their patio next to the family's condo and adjoining sidewalks in front of their home, with the "constant infiltration and presence of secondhand smoke" entering their condo through windows and a sliding-glass door. The Chaunceys said the smoke aggravated their young son's asthma.

They said that despite their repeated complaints, the homeowners association, the management company, the tenants and the condo owner did not stop the problem. The Chaunceys' lawyer, Scott Bonesteel, said in

an interview that because of the smoke, the family had to move out of its condo and rent a unit elsewhere.

Bonesteel said the jury found that the homeowners association and management company were liable for breach of contract and negligence.

The homeowners association's rules did not address secondhand smoke, he said, but "we basically said what you're doing, though it is not specifically called out in the CC & Rs, is in fact a breach."

The association's rules state, in part: "Section 9.03 – Nuisance. No noxious or offensive trade or activity shall be permitted upon any part of the covered property, nor shall anything be done thereon which shall in any way interfere with the quiet enjoyment of each of the owners of his respective residence."

Bonesteel asked the jury to award the Chauncey family \$120,000. Jurors came back with an award of \$15,500. Of that, \$6,000 was for economic damages and \$9,500 for emotional distress. The jury found the homeowners association to be 60 percent responsible for the emotional distress damages, Bonesteel said, while the management company, the owner and the tenants were held liable to lesser degrees.

Attorney Cyril Czajkowskyj, who represented the homeowners association and the management company, said the association did curtail smoking in some areas, including the swimming pool and tot lot, but he said the family never directly complained to the association about the neighbors' smoking on its patio – a statement that Bonesteel disputed.

Czajkowskyj also said medical records did not show the boy visited a doctor for an "acute asthma" exacerbation until the child got pneumonia, about a year after the smokers moved into the neighboring unit. Bonesteel said the family doctor testified there were continuous problems involving his asthma.

Czajkowskyj said he considered the award "a very nominal amount."

"To me, that suggests the jury did not accept the severity of the damages, particularly the emotional distress," he said.

The attorney for the tenants, Joseph Pertel, said they did nothing wrong. "I

think there's a strong argument that a person who rents a condo has a right to smoke on their patio, within certain limits," he said Monday.

The Chaunceys offered "very little evidence" that the smoke was infiltrating their home or causing the child's asthma to worsen, Pertel said.

"They were alleging smoke was traveling between 25 and 90 feet through a stucco wall," he said. "I think the jurors had a hard time believing that was causing them any harm."

The lawsuit cited an Orange County municipal ordinance that states, in part, "The Environmental Protection Agency has concluded that secondhand tobacco smoke is a human carcinogen and responsible for over 3,000 lung cancer deaths in non-smoking adults each year." The California Air Resources Board also identified secondhand smoke as a "toxic air contaminant," the suit said.

A bill filed by California Assemblyman Marc Levine, a San Rafael Democrat, would eliminate smoking in condominiums, duplexes and apartments. It would not affect stand-alone houses because the bill is aimed at secondhand smoke.

Contact the writer: mkalfus@ocregister.com

<http://www.ocregister.com/articles/smoke-499353-association-secondhand.html>