

COMMUNITY COUNSEL

September, 2005

A Publication of Wean & Malchow, P.A.

Volume 9, Issue 9

RECENT CASES

- ♦ **A land owner may be liable for injury even from obvious conditions known to a guest on the land.**
- ♦ **Excessive smoke flowing between units was actionable, but the absence of proof of damages resulted in a small award for excessive 2nd-hand smoke.**

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Mediation and Confidentiality in Condos

Last month we discussed mediation and confidentiality for homeowners' associations, focusing on a provision of the Section 720.311(2)(a), Florida Statutes (2005), which allows a quorum of the Board to attend mediation but also allows exclusion of the association's members. This month we look at the same issue in condominium communities.

Although condominium associations are not subject to the same mandatory mediation requirements that apply to homeowners' associations, at some point a condominium association will likely be involved in a mediation. Unfortunately, Chapter 718, Florida Statutes (2005) does not have a provision comparable to Section 720.311(2)(a), Florida Statutes (2005) for condominium associations. However, Section 44.406(1), Florida Statutes (2005) does apply to condominium associations and it provides that a mediation participant who knowingly and willfully discloses a mediation communication may be subject to an injunction, damages, attorney fees, the mediator fees and costs incurred by the opposing party at the mediation, and the attorney fees and costs incurred in the legal proceeding to enforce the confidentiality statute. Condominium members who are not involved in the particular dispute being mediated are likely not to qualify as mediation participants under Section 44.406(1), Florida Statutes (2005) and therefore they must be excluded from the mediation conference.

If the Board is willing to appoint one or more directors, but less than a quorum of directors, to represent the Board at the mediation, then the association should not have any difficulty with the mediation confidentiality statute. A group of di-

rectors comprising less than a quorum is permitted to meet without invoking the attendance rights of the members. The Board must grant these representatives full settlement authority to settle the case.



If the entire Board wants to attend the mediation, the Board will have to take steps to ensure it does not have a meeting that must be opened up to all the members. Section 718.112(2)(c), Florida Statutes (2005) does allow the Board to conduct meetings closed to the members if the attorney is present and the purpose is to discuss pending litigation. However, if parties other than the Board, such as the mediator or the opposing party and counsel are present, then the exception does not apply.

A condo Board could need to have two attorneys Present at Mediation !

To comply with both the condominium and mediation confidentiality statute, the Board will need to have two attorneys present at the mediation. One attorney will stay with a quorum of the directors at all times and this quorum will remain separated from the mediator and the opposing counsel

and parties at all times. The other attorney and a minority of the directors will attend the sessions of the mediation involving the mediator and opposing counsel. When it came time to deliberate settlement, the entire Board would meet with both of its counsel, outside the presence of the mediator, the opposing parties and counsel.

This may seem like a cumbersome procedure but unfortunately it appears to be the only way at this time for an entire condo Board to participate in mediation and comply with all applicable provisions of the Florida Statutes.

RECENT CASE SUMMARIES

In **Miller vs. Slabaugh, 30 Fla. L. Weekly D2088a (Fla. 2nd DCA 9/2/2005)**, Guest sued property Owner for injuries suffered in a fall on Owner's property. Guest was helping Owner move a mattress and box spring into Owner's home. Guest fell from a stairway in Owner's home, which abutted a wall on one side and had no railing on the other side. Guest alleged that Owner negligently constructed and maintained the stairway. Owner defended the claim on the basis that the lack of a railing was an open and obvious condition for which they could not be held liable as a matter of law. The trial court granted summary judgment in favor of Owner. On appeal, the Second District Court of Appeal analyzed the law related to an owner's duty to notify guests. The appellate court noted that it ". . . has long been the rule that a landowner or occupier owes two duties to an invitee on his premises: 1) to use ordinary care in keeping the premises in a reasonably safe condition, and 2) to give timely notice of latent or concealed perils which are known or should be known to the owner, but which are not known to the invitee." The appellate court further noted that while the open and obvious nature of the condition may discharge a landowner's duty to warn, it does not discharge the landowner's duty to maintain the premises in a reasonably safe condition. A plaintiff's knowledge of a dangerous condition does not negate a defendant's potential liability for negligently permitting the dangerous condition to exist: it simply raises the issue of comparative negligence and precludes summary judgment. Based upon this law, the appellate court held that in order to have prevailed on their motion for summary judgment based upon the open and obvious nature of the missing railing, **Owner would have had to conclusively establish that they should not have anticipated the potential harm to Guest as a result of the missing railing, notwithstanding knowledge of the danger.** Because the record did not support such a conclusion, the appellate court reversed the trial court's entry of summary judgment in favor of Owner.

In **Merrill vs. Bosser, 12 Fla. L. Weekly Supp. 885b (Fla. 17th Circuit, Broward Cty, 6/29/2005)**, Plaintiff was a unit owner who owned a unit one floor below and one unit over from the unit owned by Defendant. As the trial court noted, this case ". . . is not about secondhand smoke. Rather, as persuasively argued by the Plaintiff, it is about excessive secondhand smoke." In 2003 Plaintiff and her family purchased a unit at the Palm Aire Condominium. At that time, Defendant resided in the condominium. Defendant was a smoker who smoked approximately one pack a day. Plaintiff had no problems with smoke at the time they moved into the unit. Thereafter however, a tenant moved into Defendant's unit. The tenant was also a smoker. After the tenant moved in, Plaintiff and other occupants directly next to Defendant's unit noticed smoke seeping into their units on a regular basis from Defendant's unit. The problem was particularly bothersome in the bathrooms. Plaintiff acknowledged that her family was "hypersensitive" to smoke due to a history of respiratory allergies. The smoke caused Plaintiff's family members' health to deteriorate. In an attempt to alleviate the problem, Plaintiff installed air purifiers in her home. However, this did not resolve the problem. Plaintiff complained directly to Defendant as well as to the association. Eventually, association installed a mechanical fan to draw air directly from the common shafts up through the roof. However, this also did not resolve the problem. The smoke got so bad that on several occasions Plaintiff's family had to sleep elsewhere. On one occasion, the smoke caused Plaintiff's smoke detector to go off. The problem continued for almost a year. Finally, after numerous complaints, the association advised Defendant that he would have to remove the tenant. The tenant moved out shortly thereafter, and the smoke problem stopped. Plaintiff brought suit against Defendant on the theories of trespass, common law nuisance, and breach of covenant. The trial court noted that in Florida, to establish a trespass to real property, one must show an injury to or use of land of another by one having no right or authority. In this case, the court found the evidence supported plaintiff's claim for trespass. In order to establish a cause of action for private nuisance, plaintiff was required to show that 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. The trial court held that the facts of the case demonstrated an interference with property on numerous occasions that goes beyond mere inconvenience or customary conduct. Lastly, 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. The evidence in this case supports plaintiff's claim for breach of covenant. However, the court noted that the weakness of plaintiff's case was the amount of her damages. Plaintiff established that she clearly suffered damages, however the court was limited in what it could award because of a lack of proof related to the amount of plaintiff's damages. Ultimately, the trial court awarded plaintiff \$1,000.00 and costs in the amount of \$275.00.