

LAW REVIEW

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COURT BANS SECONDHAND SMOKE IN APARTMENT COMMON AREA

Every now and then a case comes along that has the potential to shake things up. Five-year old asthmatic Melinda Birke may have changed the world of smokers—at least those who like to step outside and have a puff.

Apartment Complex

Melinda Birke lives with her parents in Woodland Hills, California at the Oakwood Apartments. Oakwood prohibits smoking in all indoor units and indoor common areas but allows smoking in the outdoor common areas like the swimming pool, playground, and barbeque areas. Oakwood management allows such outside smoking to attract an international clientele.

Melinda suffered from asthma, had allergic reactions as a result of the secondhand smoke, and even claimed to have had three bouts of pneumonia after being exposed to the smoke.

Her dad asked the apartment manager to cordon-off or restrict the outdoor smoking areas but the request was denied.

Secondhand Smoke

Melinda's parents sued on her behalf alleging a public nuisance. The trial judge threw out the case which was appealed. The Court of Appeal examined the elements of the public nuisance claim, including that Oakwood "allowed,

encouraged and approved a toxic, noxious, hazardous, offensive—and in fact carcinogenic--condition to be present in all of the outdoor common areas of the complex.”

The suit claimed that the California Air Resources Board and Surgeon General found that secondhand smoke is “an airborne toxic substance that may cause and/or contribute to death or serious illness...there is no risk-free level of exposure to secondhand smoke...and that nonsmokers have increased risks of heart disease and lung cancer when exposed to secondhand smoke.”

The Court also discussed that individuals may make such claims for public nuisance only where they have suffered a special injury which is different in kind, not just degree, from the general public. The lawsuit alleged that Melinda sustained special injuries due to her susceptible medical condition.

Victory for Nonsmokers

You know the outcome already. The Court, based upon the allegations in the lawsuit, ruled that Melinda Birke properly made out a case for a public nuisance. Whether she can prove it will not be known until her trial, but she is entitled to move forward with her case.

The apartment manager’s downfall may have been in refusing to designate smoking and nonsmoking sections in the outside areas of the complex.

The Court found that Oakwood had an “indisputable duty to take reasonable steps to maintain its premises in a reasonably safe condition, (and) its failure to impose any type of limitation on smoking in common areas, including

swimming pools and the children's playground that Melinda Birke has a right to use and enjoy, breached that duty."

Road Map for More Lawsuits

The Court's Opinion provides potential plaintiffs with a roadmap on how to allege a public nuisance lawsuit for secondhand smoke, in this case against the owners of an apartment building for allowing smoking in all of the outdoor common areas.

My take is that this type of lawsuit could (and will) be expanded to office buildings, shopping centers, and even resort properties. It may be necessary to have a uniquely affected plaintiff like an asthmatic five-year old. Property owners and managers should carefully consider their smoking and secondhand smoke policies to avoid being sued.

If you have the hankering and the will to stop secondhand smoking in a common area near you, *Birke v. Oakwood Worldwide* is your blueprint.

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