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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (DECEMBER 19, 2019)

RECOMMENDED FOR FULL-TEXT PUBLICATION PURSUANT TO SIXTH CIRCUIT I.O.P. 32.1(B)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHYLLIS DAVIS,

Plaintiff-Appellant,

v.

ECHO VALLEY CONDOMINIUM ASSOCIATION; CASA BELLA PROPERTY MANAGEMENT, INC.,

Defendants-Appellees.

File Name: 19a0302p.06

Case No. 18-2405

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:17-cv-12475, David M. Lawson, District Judge.

Argued: June 20, 2019

December 19, 2019

Before: COOK, NALBANDIAN, and MURPHY, Circuit Judges.

OPINION

MURPHY, Circuit Judge. Phyllis Davis suffers from asthma but lives in a condominium complex that allows residents to smoke in their condos. Davis asserts that the smell of smoke regularly emanating from a neighbor's condo aggravated her asthma. Unsatisfied with her condo association's efforts to address the situation, she sued the association and its property manager. Davis alleged that these defendants, by refusing to ban smoking, discriminated against her under the Fair Housing Amendments Act, violated various condo bylaws, and allowed a tortious nuisance to persist. The district court rejected Davis's claims on summary judgment. We affirm.

I.

In the 1970s, a developer built the Echo Valley Condominium complex in Farmington Hills, Michigan. The complex is governed by a master deed, bylaws, and the Michigan Condominium Act, Mich. Comp. Laws § 559.101–.276. The bylaws impose many regulations on condo owners. They contain several specific bans, including, for example, a ban on keeping a dog or cat in a condo. They also contain general rules like the following: "No immoral, improper, unlawful or offensive activity shall be carried on in any apartment or upon the common elements, limited or general, nor shall anything be done which may be or become an annoyance or a nuisance to the co-owners of the Condominium."

The Echo Valley Condominium Association—an association of co-owners organized as a nonprofit corporation that we will call the "Association"—manages the Echo Valley complex. A board of direc-

tors made up of volunteer co-owners oversees this Association. The bylaws give the board "all powers and duties necessary for the administration" of the Echo Valley complex, including maintaining the common elements, collecting the assessments, and enforcing the bylaws. The board also must contract with a professional manager to carry out its duties. At most times relevant here, the Association contracted with Casa Bella Property Management, Inc., to help run the complex.

The minutes from the regular meetings of the Association's board show that condo living can be trying, and board membership a thankless task. The board fields complaints ranging from the need for repairs ("We have had nine A.C. units break down since we last [met]"), to non-residents sneaking into the pool ("I could not believe the condition of the water after the guests left"), to inflamed passions from the pet ban ("another lady is very upset and is considering taking [a board member] to court if she stays on the board with a pet").

This case concerns another fact of life in Echo Valley: Condo owners regularly detect odors from each other's condos. Residents, for example, have complained about the smell of their neighbors' cooking. Some residents also smoke cigarettes in their condos. Michigan law permits smoking in one's home, *cf.* Mich. Comp. Laws § 333.12603(1), and the Association has long read the bylaws to permit residents to smoke in their units. (The bylaws say nothing specific about smoking.) Yet neighbors can sometimes smell this smoke, and in-condo smoking has produced complaints to the Board over the years. Some residents have

even moved out because of the Association's policy allowing smoking.

Davis, a cancer survivor with "a history of asthma and multiple chemical sensitivity disorder," seeks to change the Association's smoking policy through this suit. In 2004, she bought a condo on the second floor of a four-unit building in the complex. The condos in her building share a common entryway, basement, and attic. A 2015 letter that Davis addressed to "Dear Neighbor" suggests that smells and sounds carry across her building. As for smells, Davis told her neighbor that she "almost had an asthma attack" because "[t]he smell of whatever you were cooking this morning engulfed my condo." She asked her neighbor to cook with the windows open and exhaust fan on. As for sounds, Davis added: "Also, please stop slamming your door when you come in as it is very loud."

Davis's more recent concern has been cigarette smoke. Moisey and Ella Lamnin owned a condo on the first floor of Davis's building and began renting it to Wanda Rule in 2012. At some point not apparent in the record, the smell of smoke from the Lamnins' condo (presumably from Wanda Rule and her husband) started entering Davis's unit and lingering in the building's common areas. According to Davis, the smoke "has significant adverse effects on [her] ability to breathe comfortably."

On March 1, 2016, in her first written complaint in the record, Davis emailed a Casa Bella employee to report that the Lamnins' tenants "do not work, so they are home all day and night chain smoking," which affected her "breathing, causing constant coughing, and near asthma attacks." She asked if the board could "make owners accountable for cigarette and

other types of smoke seeping through the cracks of their doors and vents." The Association's board, which at that time included Davis, discussed her complaint at a March 2016 meeting. The board ultimately directed the Casa Bella employee to send a letter to the Lamnins. The letter noted that the board had received complaints about the smoke and that, "[w]hile there is no rule or regulation that prohibits smoking inside one's home, it can be considered a nuisance to those who do not smoke." The letter requested the Lamnins' "assistance in keeping the smell contained," such as by asking their tenants to smoke on their balcony or by further insulating their doors.

Minutes from a board meeting in February 2017 memorialize another complaint. Davis urged the board to send a second letter to the Lamnins about "heavy smoking of cigarettes, weed and etc[.], infiltrating common areas and other units." This time the board chose a different path. It asked Mark Clor, a heating and cooling contractor, to install a $275 fresh-air system on Davis's ductwork. This system allowed Davis's furnace to draw in fresh air from outside rather than stale air from the basement. Other board members who had installed a similar system thought that it eliminated a significant portion of the smoke smell infiltrating their condos.

While Davis told Clor that the system "was helping with the smell of smoke," it did not fully eliminate the odor. In April 2017, her lawyer sent a letter to the Lamnins stating that the smoke pervading her condo affected her health. The letter suggested that the Rules' smoking breached various bylaws and created a common-law nuisance. It asked the Lamnins either to ensure that smoke did not escape their

condo or to order their tenants to stop smoking. It also copied the Association's board and made "a formal demand that [it] take further action."

In their response, the Lamnins declined to force the Rules to cease smoking because the bylaws permitted the practice. Yet the Rules, "in the spirit of being good neighbors," volunteered to "purchase and use an air purifier/ionizer[] to clean the air in their unit of any residual cigarette smoke." This solution did not appease Davis either. In "logs" that she kept between May and July 2017, she regularly identified times that she could still smell smoke in her condo or the hallways.

Things came to a head in July 2017. Davis sued the Association, Casa Bella, and the Lamnins (and later amended her complaint to add Wanda Rule). Davis alleged that, by refusing to ban smoking in her building, the Association had discriminated against her because of her disability in violation of the Fair Housing Amendments Act, 42 U.S.C. § 3604(f), and a similar Michigan law. (The parties agree that the state law has the same elements as the federal act, so we do not discuss it separately.) Davis also asserted two other state-law claims: a breach-of-covenant claim for violations of various bylaws, and a nuisance claim. She sought damages and an injunction against smoking in her building.

Davis's suit was apparently the last straw for the Lamnins. They told Wanda Rule that they would terminate her lease effective December 31, 2017. The Rules moved out, and the Lamnins sold their condo. By March 2018, Davis had settled with the Lamnins and dismissed them from this suit.

Even after the primary source of Davis's complaints had moved out, she continued to litigate the suit against the Association and Casa Bella. In March 2018, she began keeping "logs" again after smelling cigarette and marijuana smoke from a new source. The next month, her lawyer told defense counsel that another resident "in Ms. Davis'[s] building ha[d] started smoking cigarettes and marijuana," which was "triggering Ms. Davis'[s] asthma, and making it very difficult for her to breathe." The lawyer asked the Association to grant Davis "a reasonable accommodation and prohibit smoking within her building." The Association requested more information about the source, but never received a definitive answer (at least not one in the record). Around this time, as a result of this suit, the Association circulated a bylaws-amendment package to condo owners proposing a smoking ban in the complex. The proposal failed to pass.

Following these developments, each side moved for summary judgment. The district court granted the defendants' motion. *Davis v. Echo Valley Condo. Ass'n*, 349 F. Supp. 3d 645, 665 (E.D. Mich. 2018). It recognized that the Fair Housing Amendments Act prohibits discrimination based on disability and defines "discrimination" to include the refusal to grant a reasonable accommodation. *Id.* at 657. The court held, however, that Davis's requested smoking ban was not a "reasonable accommodation." *Id.* at 659. The ban would fundamentally change the Association's smoking policy by barring residents "from engaging in a lawful activity on their own property." *Id.* The court next rejected Davis's nuisance claim, analogizing to Michigan cases that refused to hold a landlord liable for a

tenant's nuisance. *Id.* at 660. And it found that Davis's four breach-of-covenant claims failed for various reasons. *Id.* at 661–65.

II.

Davis raises eight issues on appeal. She disputes the district court's resolution of her disability claim, her breach-of-covenant claims, and her nuisance claim. She also asserts evidentiary and discovery challenges. Reviewing the court's grant of summary judgment de novo, *Westfield Ins. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003), and its procedural rulings for an abuse of discretion, *United States v. Kelsor*, 665 F.3d 684, 696 (6th Cir. 2011); *Vance ex rel. Hammons v. United States*, 90 F.3d 1145, 1149 (6th Cir. 1996), we affirm on all fronts.

A.

We begin with the disability claim. The Fair Housing Amendments Act of 1988 amended the Fair Housing Act to bar housing discrimination against the handicapped. Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620–22 (adding 42 U.S.C. § 3604(f)). Section 3604(f) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of" that person. 42 U.S.C. § 3604(f)(2). Section 3604(f) then defines "discrimination" "[f]or purposes of this subsection" to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *Id.* § 3604(f)(3)(B).

Combining these two paragraphs in § 3604(f), Davis argues that the Association and Casa Bella "discriminate[d] against" her "in [their] provision of services or facilities in connection with" her condo by refusing to provide a "reasonable accommodation[]" (a smoking ban in her building) to their general "polic[y]" allowing smoking. *Id.* § 3604(f)(2)–(3).

Section 3604(f)'s text requires Davis to prove several things. *See Hollis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 541 (6th Cir. 2014). To begin with, § 3604(f)(2) prohibits discrimination only "because of a handicap," so Davis must show that her asthma falls within the definition of "handicap." *See* 42 U.S.C. § 3602(h). But Davis offered little evidence that, apart from the smoke-related aggravation, her asthma was otherwise severe enough to "substantially limit[]" a "major life activit[y]." *Id.* § 3602(h)(1); *cf. Milton v. Tex. Dep't of Criminal Justice*, 707 F.3d 570, 573–74 (5th Cir. 2013); *Wofsy v. Palmshores Ret. Cmty.*, 285 F. App'x 631, 634 (11th Cir. 2008) (per curiam); *Sebest v. Campbell City Sch. Dist. Bd. of Educ.*, 94 F. App'x 320, 325–26 (6th Cir. 2004).

In addition, § 3604(f)(3)(B) requires only those accommodations that are "necessary" to give a person with a handicap an "equal opportunity to use and enjoy a dwelling." But, as the district court noted, Davis's total smoking ban likely was not necessary (that is, "'indispensable,' 'essential,' something that 'cannot be done without'") to give her the same opportunity to use and enjoy her condo as compared to a non-disabled person who dislikes the smell of smoke. *Cinnamon Hills Youth Crisis Ctr. v. St. George City*, 685 F.3d 917, 923 (10th Cir. 2012) (Gorsuch, J.) (citation omitted); *Vorchheimer v. Philadelphian Owners*

Ass'n, 903 F.3d 100, 105–09 (3d Cir. 2018); *see Davis*, 349 F. Supp. 3d at 658–59. In fact, Davis was apparently able to use her condo for "several years" despite the Rules' smoking, *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002), and the law "does not require *more* or *better* opportunities" for those with handicaps as compared to those without, *Cinnamon Hills*, 685 F.3d at 923.

Ultimately, though, we find it easiest to resolve Davis's claim on another ground: She must show that her request qualifies as a "reasonable accommodation" to the Association's policy of allowing smoking. Davis cannot meet this element. Text and precedent both show that the phrase "reasonable accommodation" means a moderate adjustment to a challenged policy, not a fundamental change in the policy. Davis's smoking ban falls in the latter camp.

Start, as always, with the text. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979). The Fair Housing Amendments Act defines discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services." 42 U.S.C. § 3604(f)(3)(B). In this context, the word "accommodation" means "adjustment." 1 *Oxford English Dictionary* 79 (2d ed. 1989); *The American Heritage Dictionary of the English Language* 11 (3d ed. 1992). Like the word "modification," therefore, "accommodation" is not an apt word choice if Congress sought to mandate "fundamental changes" to a housing policy. *See MCI Telecomms. Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 225 (1994). Consider two examples: One would naturally say that a blind tenant requests an accommodation from an apartment's "no pets" policy if the tenant seeks an exemption for a seeing eye dog.

24 C.F.R. § 100.204(b)(1). But one would not naturally say that a tenant with allergies requests an accommodation from an apartment's "pet friendly" policy if the tenant seeks a total pet ban. The former tenant seeks a *one-off adjustment*; the latter seeks a *complete change*. The word "accommodation" includes the first, but not the second, request.

The adjective "reasonable" further narrows the types of accommodations that the text directs property owners to make. Even if a request would qualify as an "adjustment," the adjustment still must be "moderate," "not extravagant or excessive." 13 *Oxford English Dictionary*, *supra*, at 291; *American Heritage Dictionary*, *supra*, at 1506. Put another way, the word "reasonable" conveys that the adjustment cannot "impose[] 'undue financial and administrative burdens.'" *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996) (citation omitted). The word also indicates the process that courts should undertake when deciding if a proposed adjustment is unduly burdensome. Dating back to the "'reasonable' person of tort fame," a reasonableness inquiry "has long been associated with the balancing of costs and benefits." *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. OSHA*, 938 F.2d 1310, 1319 (D.C. Cir. 1991) (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.)). So an adjustment goes too far if the costs of implementing it exceed any expected benefits it will provide the person requesting it. *Smith & Lee Assocs.*, 102 F.3d at 795.

The backdrop against which Congress legislated also supports this reading of "reasonable accommodation." When the Supreme Court has given a phrase a

specific meaning, courts assume that Congress intends that meaning to carry over to the "same wording in related statutes." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 54, at 322 (2012); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85–86 (2006). Here, when Congress passed the Fair Housing Amendments Act, the Supreme Court had already coined the phrase "reasonable accommodation" to delimit the requirements of the Rehabilitation Act of 1973. *Alexander v. Choate*, 469 U.S. 287, 300 & n.20, 301 & n.21 (1985).

And *Choate* contrasted the "reasonable accommodations" that the Rehabilitation Act compels with the "fundamental alteration[s]" that it does not. *Id.* at 300 n.20 (quoting *Davis*, 442 U.S. at 410). This preexisting view confirms that the Fair Housing Amendments Act requires only moderate adjustments.

One last textual point. The prepositional phrase "in rules, policies, practices, or services" modifies the noun "accommodation" and provides the benchmark against which to assess whether a request qualifies as a "reasonable accommodation." *See* 42 U.S.C. § 3604(f)(3)(B). In other words, the phrase tells courts that they should not ask whether the request is a moderate adjustment or a fundamental change in some abstract sense. Rather, they should ask whether the request is a modest adjustment or fundamental change of the "rule, policy, practice, or service" that the plaintiff challenges.

Now turn to precedent. Whether under the Rehabilitation Act, the Fair Housing Accommodations Act, or the Americans with Disabilities Act of 1990, caselaw interpreting the phrase "reasonable accommodation" has long distinguished the types of moderate

adjustments that are required from the fundamental changes that are not. *See, e.g.*, *Davis*, 442 U.S. at 409–10; *Groner v. Golden Gate Apartments*, 250 F.3d 1039, 1046–47 (6th Cir. 2001); *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 461–63 (6th Cir. 1997) (en banc).

Two lines of cases—one focused on the nature of a housing facility's policy, the other on an accommodation's effects on third parties—reveal the types of changes that are "fundamental."

A request works a fundamental change if it turns the challenged policy into something else entirely. In *Davis*, for example, a nursing-school applicant with a hearing impairment asked a college to adjust its curriculum to accommodate her disability. 442 U.S. at 407–08. But her proposed changes—such as allowing the applicant to skip certain courses—would have transformed the nursing degree that the college offered into an altogether different degree. *Id.* at 409–10. Similarly, in the employment context, a party may not ask for changes to a job's duties that would alter the job's "essential functions." *Jasany v. U.S. Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985). So, when a job's primary task was operating a mail-sorting machine, a post-office employee did not propose a reasonable accommodation by asking not to use the machine. *Id.*

Apart from changes to a policy, courts also reject requested changes that interfere with the rights of third parties. As we said in *Groner*, a third party's "rights [do] not have to be sacrificed on the altar of reasonable accommodation." 250 F.3d at 1046 (quoting *Temple v. Gunsalus*, No. 95-3175, 1996 WL 536710, at *2 (6th Cir. Sept. 20, 1996) (per curiam)). There,

the plaintiff's mental illness caused him to disturb a neighbor by screaming at all hours of the night. 250 F.3d at 1041. As one of his proposed accommodations, the plaintiff asked his apartment complex to force the neighbor out in violation of its lease. *Id.* at 1046. We held that landlords need not breach their contracts with neighboring tenants on account of a handicapped person's needs. *Id.*; *see also Temple*, 1996 WL 536710, at *2. The same is generally true in the employment context. An employer need not "bump another employee from a position in order to accommodate a disabled employee." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001); *see also U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002).

Both lines of precedent should foreshadow the outcome here. Davis's proposed smoking ban amounts to a "fundamental alteration" of the Association's smoking policy. *Howard*, 276 F.3d at 806 (citation omitted). No one would describe a change from a smoking-permitted policy to a smoking-prohibited policy as an "accommodation" in the policy. It is more rewrite than adjustment. *Cf. Falchenberg v. N.Y. State Dep't of Educ.*, 338 F. App'x 11, 13–14 (2d Cir. 2009) (summary order); *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1035 (6th Cir. 1995). Not only that, Davis's proposal would intrude on the rights of third parties. Neighbors who smoke may well have bought their condos because of the Association's policy permitting smoking. So, unlike the blind applicant asking to keep a seeing eye dog in an apartment building that bans pets, Davis is like the person with allergies seeking to expel all dogs from a building that allows pets. Here, as in *Groner*, a third party's "rights [do] not have to be sacrificed on the altar of

reasonable accommodation." 250 F.3d at 1046 (citation omitted).

B.

We next turn to Davis's breach-of-covenant claims. Under Michigan law, the complex's bylaws are "in the nature of a contract" between the condo owners and the Association. *Sawgrass Ridge Condo. Ass'n v. Alarie*, No. 335144, 2018 WL 340944, at *2 (Mich. Ct. App. Jan. 9, 2018) (per curiam); *Stadler v. Fontainebleau Condos. Ass'n*, No. 343303, 2019 WL 1574776, at *2 (Mich. Ct. App. April 11, 2019) (per curiam). Davis seeks to enforce four of the bylaws. The first requires owners to maintain their "apartment[s]" and certain "appurtenant" spaces "in a safe, clean and sanitary condition." The second tells them: "nor shall anything be done which may be or become an annoyance or a nuisance to the co-owners of the Condominium." The third says: "No co-owner shall do . . . in his apartment . . . anything that will increase the rate of insurance on the Condominium." And the last notes that no "unlawful or offensive activity shall be carried on in any apartment."

For three general reasons, all of Davis's claims face significant headwinds. Reason One: These provisions are restrictive covenants on the use of property. *See Vill. of Hickory Pointe Homeowners Ass'n v. Smyk*, 686 N.W.2d 506, 508 (Mich. Ct. App. 2004). Because of the "bedrock principle in [Michigan] law that a landowner's bundle of rights includes the broad freedom to make legal use of her property," *Thiel v. Goyings*, __ N.W.2d __, 2019 WL 3331810, at *6 (Mich. July 24, 2019), Michigan courts construe restrictive covenants "strictly against those claiming to enforce

them, and all doubts [are] resolved in favor of the free use of the property," *Moore v. Kimball*, 289 N.W. 213, 215 (Mich. 1939); *Millpointe of Hartland Condo. Ass'n v. Cipolla*, No. 289668, 2010 WL 1873085, at *1 (Mich. Ct. App. May 11, 2010) (per curiam). Unless the bylaws plainly cover the challenged in-condo smoking, therefore, Davis must lose.

Reason Two: Nowhere do the Association's bylaws specifically prohibit (or even regulate) smoking. The record shows instead that the Association has long read the bylaws to permit smoking and that Echo Valley residents have long smoked in their homes. The bylaws do, by comparison, *specifically* prohibit many activities, ranging from keeping a dog or cat in a condo, to drying one's clothes in common areas, to shooting a BB gun, to displaying a sign. If these bylaws meant to ban smoking, they would have done so with similarly specific language. They would not have hidden a smoking ban in, for example, a bylaw requiring owners to keep their apartments "in a safe, clean and sanitary condition." Davis thus cannot rely on any theory of "breach" that compels the Association to impose a categorical ban on smoking.

Reason Three: Davis does not sue the purported violators. The Lamnins sold their condo, their tenants moved out, and Davis does not name any other resident whose smoking affects her condo. Instead, she sues the condo association (the Association) and its former property manager (Casa Bella) for failing to enforce the bylaws. The bylaws do say that the Association's board "shall be responsible" for the bylaws' "enforce[ment]." *See also* Mich. Comp. Laws § 559.207. But this secondary-liability theory means that Davis must show more than that she has a breach-

of-covenant claim against the Lamnins. She must show that she has a failure-to-enforce claim against the Association and Casa Bella despite their efforts to accommodate her.

Against this backdrop, Davis's four breach-of-covenant claims fall short.

1. *Safe and Clean*. Davis argues that the Association and Casa Bella failed to enforce the bylaw requiring owners to keep their condos in a "safe" and "clean" "condition." As generally understood, "safe" means "free from danger," 14 *Oxford English Dictionary*, *supra*, at 355, whereas "clean" means "free from pollution," *The Random House Dictionary of the English Language* 383 (2d ed. 1987). But these words must be construed in their context rather than in a vacuum. *Thiel*, 2019 WL 3331810, at *6. And, notably, they are part of a bylaws package that allows smoking. *Id.* So ordinary levels of "smoke" cannot be considered a "danger" or "pollution"; otherwise, this provision would ban a practice that the bylaws permit.

Davis's claim fails under this reading. We need not decide whether unusual amounts or types of smoking might violate this provision, because her theory of "breach" is far more expansive. Based on a combination of common knowledge and board-member admissions, she argues that *any* smoke makes condos unsafe and unclean because smoking is harmful to health. This interpretation would incorrectly compel the Association to ban smoking, which we view as inconsistent with the bylaws when read as a whole.

2. *Annoyance or Nuisance*. Davis next contends that smoking falls within the bylaw prohibiting activities "which may be or become an annoyance or a

nuisance to the co-owners of the Condominium." The bylaw does not define these terms. A "nuisance" is, however, a well-known common-law concept. *See Weimer v. Bunbury*, 30 Mich. 201, 211 (1874) (Cooley, J.). Under Michigan law, a private nuisance is an "unreasonable interference with the use or enjoyment of property" that results in "significant harm." *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 222 (Mich. Ct. App. 1999) (emphasis omitted); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 720–21 (Mich. 1992). And, in this context, "annoyance" is synonymous with "nuisance." An "annoyance" is "[a]nything annoying or causing trouble, a *nuisance*." 1 *Oxford English Dictionary*, *supra*, at 486 (emphasis added); *see also Random House Dictionary*, *supra*, at 84 (same); *cf. Black's Law Dictionary* 82 (5th ed. 1979) (cross-referencing "Nuisance").

To be sure, this reading renders these terms largely duplicative. But that is inevitable. Any reading of "annoyance" (even one that reduces the required interference with property) swallows up the term "nuisance." And "[s]ometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." Scalia & Garner, *supra*, § 26, at 176–77 (listing "peace and quiet" as an example). We must also consider the restriction's context. *Thiel*, 2019 WL 3331810, at *8, *10. It regulates neighbors who have opted to live relatively close to each other, making it unlikely that an owner's slight irritation would trigger a bylaw permitting the owner to bring an "action to recover sums due for damages" against a co-owner. Context compels limiting this

bylaw's coverage to activities that most residents would *reasonably* find *significantly* bothersome—in contrast to the activities that can be "generally expected" in a condo complex. *Cf. Bedows v. Hoffman*, No. 4-16-0146, 2016 WL 6906744, at *11 (Ill. Ct. App. Nov. 22, 2016).

We agree with the district court that Davis did not create a genuine issue of material fact that the Board violated its duty to enforce this nuisance bylaw. *Davis*, 349 F. Supp. 3d at 662–65. Davis chose to live in a condo complex whose bylaws do not restrict smoking. As other courts have found, while even a small amount of smoke might be a nuisance in a complex that bans smoking, the same cannot be said for a complex that allows it. *See Schuman v. Greenbelt Homes, Inc.*, 69 A.3d 512, 520 (Md. Ct. Spec. App. 2013). Indeed, other courts reviewing these claims "have almost uniformly found no right to relief" on nuisance theories. *Nuncio v. Rock Knoll Townhome Vill., Inc.*, 389 P.3d 370, 374–75 (Okla. Civ. App. 2016); *see Ewen v. Maccherone*, 927 N.Y.S.2d 274, 276–77 (N.Y. App. Div. 2011) (per curiam); *Boffoli v. Orton*, No. 63457-7-I, 2010 WL 1533397, at *3 (Wash. Ct. App. Apr. 19, 2010); *DeNardo v. Corneloup*, 163 P.3d 956, 961 (Alaska 2007). These cases identify a (clear) default rule around which parties may bargain by, for example, adopting restrictive covenants imposing a specific ban (or limit) on smoking in their communities. *Cf.* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

In addition, while smoking affects Davis more than other residents given her unique sensitivities, that fact undercuts her breach-of-covenant claim. As another court has noted, "nuisance is not subjective."

Schuman, 69 A.3d at 525. This bylaw ties the standard of liability to an ordinary resident, not a resident with unique needs.

Lastly, the Association and Casa Bella did not simply ignore Davis's concerns. They sought to facilitate a compromise. The Association's board initially authorized a letter asking the Lamnins to assist in keeping the smoke smell contained to their condo. At the Association's expense, the board then contracted for a $275 fresh-air system for Davis's condo, a system that Davis said helped to reduce the smell of smoke. The Rules also agreed to use an air purifier in their unit. And the board ultimately put the issue to the condo owners by holding a vote on whether to ban smoking. After the Rules left, moreover, Davis never identified for the board any other specific resident that allegedly violated a bylaw. These efforts undermine any claim that the board failed to enforce the bylaw. *Cf. America v. Sunspray Condo. Ass'n*, 61 A.3d 1249, 1255–56 (Me. 2013).

In response, Davis argues that a relaxed standard of annoyance applies because the bylaw covers activities that "*may* be or become" an annoyance. "As used here," we read "the auxiliary verb 'may' [to] signal[] a hazard that is yet to come"; it does not lower the level of hazard that must be shown. *Russell v. Citigroup, Inc.*, 748 F.3d 677, 680 (6th Cir. 2014) (citing a definition of "may" in *Oxford English Dictionary* (3d ed. 2012)). Indeed, when asked at oral argument why this lower level of annoyance would not ban a resident from cooking if a neighbor found the smell annoying (as Davis has found it previously), her counsel responded that "cooking is necessary." We see no textual basis for that distinction;

instead, we think the standard of annoyance must be set at a sufficiently high level to permit activities that are "generally expected" in a condo complex. *Bedows*, 2016 WL 6906744, at *11. And in the Echo Valley complex, those expected activities include both cooking *and* smoking in one's condo.

Davis also points to evidence suggesting that the amount of smoke infiltrating her condo and her hallways is "strong," at times even leaving the smell on clothes and towels. Like the district court, though, we do not think this evidence suffices to take this case outside the default rule that smoking cannot be considered a nuisance in a condo complex that allows it. Indeed, Davis presented no evidence that her neighbors had "unique" "smoking habits." *Davis*, 349 F. Supp. 3d at 664.

3. *Rate of Insurance*. Davis next invokes the bylaw that bars condo owners from doing anything "that will increase the rate of insurance on the Condominium." She alleges that smoking increases that rate because it is a "fire hazard." Like her first theory, this claim fails because it ignores the overall context of permissible smoking at Echo Valley. We can no more read this provision to ban smoking than we can read it to ban other fire hazards like cooking. Even if we accepted the theory, Davis's sole evidence in support—a board member's personal opinion that smoking raises insurance rates—does not suffice to withstand summary judgment. Davis does not explain why this board member may competently opine on actuarial science.

4. *Unlawful or Offensive Activity*. Davis last contends that the Association failed to enforce the bylaw provision prohibiting "unlawful or offensive activi-

ties." Her argument turns on the fact that marijuana is unlawful, and on board-member opinions that marijuana and cigarette smoke are offensive. This claim fails for a procedural reason: Davis did not allege it in her complaint, and she did not properly move to amend her complaint to include it. *Davis*, 349 F. Supp. 3d at 661.

Parties who seek to raise new claims at the summary-judgment stage must first move to amend their pleadings under Federal Rule of Civil Procedure 15(a) before asserting the claims in summary-judgment briefing. *See Rafferty v. Trumbull County*, 758 F. App'x 425, 429 (6th Cir. 2018); *Carter v. Ford Motor Co.*, 561 F.3d 562, 567–69 (6th Cir. 2009); *Tucker v. Union of Needletrades, Indus., & Textile Emps.*, 407 F.3d 784, 788 (6th Cir. 2005). By that point, "a plaintiff has conducted discovery and has had the opportunity to amend the complaint and raise additional theories." *West v. Wayne County*, 672 F. App'x 535, 541 (6th Cir. 2016). But if the plaintiff raises the new claims for the first time in the summary-judgment briefing, it generally "subjects a defendant to 'unfair surprise,' because the defendant has no opportunity to investigate the claim during discovery." *M.D. ex rel. Deweese v. Bowling Green Indep. Sch. Dist.*, 709 F. App'x 775, 778 (6th Cir. 2017) (citation omitted).

Davis's failure to follow this rule dooms her claim. Davis's unlawful-or-offensive claim relies on a different substance, different smokers, a different time period, and a different bylaw. Her complaint did not mention marijuana or this specific bylaw. Nor did it challenge smoking other than from the Lamnins' condo. The complaint instead alleged that other condos in Davis's building had "been designated non-smoking

by their respective owners." It was not until April 2018—after Davis had filed her amended complaint and after the Lamnins had terminated Rule's lease—that Davis's lawyer informed the Association that someone else "in Ms. Davis' building has started smoking cigarettes and marijuana." In short, Davis never notified the Association and Casa Bella in the correct way that she sought to bring this new claim into the case.

Davis responds by framing her "claim" at a high level of generality, suggesting that her "breach of covenant" claim encompasses any violation of any bylaw by any source. This expansive theory does not suffice at the motion-to-dismiss stage, *cf. Northampton Rest. Grp. v. FirstMerit Bank, N.A.*, 492 F. App'x 518, 521–22 (6th Cir. 2012), let alone at the summary-judgment stage, *Tucker*, 407 F.3d at 788. Davis also argues that, unlike in the cases we cite, she raised her new claim in her *own* summary-judgment motion, not just in her *opposition* to the other side's motion. She does not explain why that distinction matters. In both contexts, a defendant has "no opportunity to investigate the claim during discovery." *Deweese*, 709 F. App'x at 778. Davis finally suggests that the district court should have granted her leave to amend. But she "buried" her request for leave in a perfunctory footnote in a summary-judgment brief that did not cite Rule 15 or the relevant caselaw. *See Pulte Homes, Inc. v. Laborers' Int'l Union of N. Am.*, 648 F.3d 295, 305 (6th Cir. 2011). The district court did not abuse its discretion by finding this approach inadequate. *See id.*

Up next is Davis's tort claim for nuisance. In Michigan, as noted, a nuisance is an "unreasonable

interference with the use or enjoyment of . . . property." *Adams*, 602 N.W.2d at 222. To be liable, a party must have "possession and control over the property" causing the nuisance. *Sholberg v. Truman*, 852 N.W.2d 89, 93 (Mich. 2014) (quoting *Merritt v. Nickelson*, 287 N.W.2d 178, 181 (Mich. 1980)). A landlord, for example, generally does not face liability for a tenant's actions that create a nuisance because the landlord does not possess or control the tenant's property. *See Samuelson v. Cleveland Iron Mining Co.*, 13 N.W. 499, 502 (Mich. 1882) (Cooley, J.). This principle bars Davis's nuisance claim against the Association and Casa Bella because they did not possess or control the condo units in Davis's building. As the district court noted, "a condominium association is even farther removed" from the conduct of its condo owners than is a landlord from the conduct of its tenants. *Davis*, 349 F. Supp. 3d at 660.

Davis responds that this principle applies only in "the absence of a contract duty on the part of the" defendant and that the Association undertook the contractual duty to enforce the bylaws. *See Sholberg*, 852 N.W.2d at 93–97. But we have already found that her breach-of-covenant claims fail. Because Davis did not establish a contract breach, she could not show that Echo Valley or Casa Bella had any contractual ability to prevent the challenged conduct.

We end with two procedural claims. Davis argues that the district court should have excluded a "sham affidavit" from Mark Clor—the heating-and-cooling contractor who noted that Davis's unit does not share a ventilation system with other units—because Clor did not meet expert-witness requirements. *See* Fed. R. Evid. 702. But the district court did not abuse its dis-

cretion in concluding that Clor testified as a lay witness, not an expert, based on his personal observations of the basement's open ductwork. *Kelsor*, 665 F.3d at 696. And his testimony fell comfortably within the rules for lay opinions because it was "rationally based on [his] perception," "helpful," and "not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701; *United States v. Manzano*, __ F. App'x __, 2019 WL 5561389, at *3 (6th Cir. Oct. 29, 2019). Contrary to Davis's claim that Clor's opinion would require the "supernatural" ability to see through walls, "[i]t took no special knowledge for Clor to describe what was there in the basement to be seen." *Davis*, 349 F. Supp. 3d at 654. And Davis's remaining arguments—that Clor's testimony was contradicted by other evidence or based on limited knowledge—go to weight, not admissibility.

Davis also says that the district court did not give her an adequate opportunity to prove her claims because it dismissed two of her discovery motions as moot when it ruled for the Association and Casa Bella. Davis is correct in one respect: "The general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery." *Vance*, 90 F.3d at 1148. But she is wrong in another: She did not lack a sufficient opportunity for discovery. The parties engaged in extensive discovery, and her single paragraph on this issue fails to tell us what information she needed or why it was relevant. Her conclusory claim falls well short of establishing an abuse of discretion.

We affirm.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DENYING PLAINTIFF'S MOTION TO EXCLUDE MARK CLOR'S TESTIMONY, DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DISMISSING CERTAIN DISCOVERY MOTIONS, AND DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE (NOVEMBER 7, 2018)

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

PHYLLIS DAVIS,

Plaintiff,

v.

ECHO VALLEY CONDOMINIUM ASSOCIATION, CASA BELLA PROPERTY MANAGEMENT, INC., AND WANDA RULE, ,

Defendants.

Case Number 17-12475

Honorable David M. Lawson

Plaintiff Phyllis Davis, an asthmatic, alleges that defendant Echo Valley Condominium Association violated the Fair Housing Amendments Act when it did not accommodate her sensitivity to secondhand smoke by banning smoking throughout the condominium complex, including within private residences. The plaintiff also brought claims under state statutory and common law. Davis has moved for summary judgment on liability. Echo Valley and its former property manager, Casa Bella Property Management, Inc., also moved for summary judgment, arguing, among other things, that the accommodation Davis demands is unreasonable, particularly because smoking within one's home is not illegal. Davis has not identified evidence that creates a material question of fact on all the elements of her claims. Therefore, the Court will deny the plaintiff's motion for summary judgment, grant the defendants' motion for summary judgment, and dismiss the amended complaint with prejudice.

Davis also contends that testimony from a heating contractor about the furnace duct work in Davis's building should be rejected for a variety of reasons. None of them have merit, so Davis's motion to strike his testimony will be denied as well.

I.

Plaintiff Phyllis Davis is a breast cancer survivor, who has asthma and multiple-chemical sensitivity disorder. She says that her medical conditions substantially interfere with her ability to breathe when she is exposed to certain chemicals and irritants. A major offender is cigarette smoke.

Davis lives in Unit 214 in the Echo Valley subdivision, a condominium she purchased on 2004. Defendant Echo Valley Condominium Association is responsible for governing and managing eight buildings in the Echo Valley subdivision. On November 10, 2014, defendant Casa Bella Property Management, Inc. contracted with Echo Valley to manage the property within the subdivision. Casa Bella's contract expired at the end of 2017, and it no longer provides property management services to Echo Valley.

The units at Echo Valley are subject to a master deed and bylaws as amended, and to covenants, conditions, and restrictions found in those documents or created based on them. The bylaws vest in Echo Valley's board of directors the power to make rules "necessary for the administration of the affairs of the Association," including "[r]easonable regulations . . . concerning the use of the common elements." The interior space of a condominium unit is not considered a "common element" within the master deed's definition. The bylaws prohibit "immoral, improper, unlawful or offensive activity" in the common elements and the individual units. There is no ban on smoking at the condominium complex.

Davis's Unit 214 is one of four in the building. It shares a common hallway and stairs with the three other units: Unit 114, Unit 115, and Unit 215. The parties dispute whether these spaces share a ventilation system that circulates air (including pollutants and contaminants) among the connected units.

In 2012, former defendants Moisey and Ella Lamnin leased Unit 115 to defendant Wanda Rule. Rule occupied the unit until December 31, 2017. During Rule's tenancy, the plaintiff complained that Rule

and her guests regularly smoked tobacco and other substances in Unit 115, which Davis says she could smell from her unit. On April 3, 2018, plaintiff's counsel informed defense counsel that "someone in Ms. Davis' building has started smoking cigarettes and marijuana." When prompted for more detail as to the source of the smoke, plaintiff's counsel replied that he was "investigating" the source, but he believed that "it may be coming from Unit 114."

Davis believes that the secondhand smoke has exacerbated her health conditions, and, as a breast cancer survivor, exposes her to an increased risk of cancer and cancer-related problems. A doctor at Davis's medical care facility stated that exposure to tobacco is detrimental to Davis's health and increases the risk of her suffering an asthma attack.

In addition to tobacco-related smoke, Davis has complained that other smells and fumes were problematic. In a January 31, 2015 letter, Davis informed her neighbor that the cooking smells emanating from the neighbor's unit "engulfed" her condo and she "almost had an asthma attack." She requested that her neighbor open her window and turn the exhaust fan on when frying or grilling. In that same letter, the plaintiff complained about and demanded accommodations relating to slamming doors and FedEx ringing the doorbells of other residents' units.

Davis says that she has made the defendants aware of her medical conditions on several occasions and asked that the smoking issue be addressed. On March 1, 2016, Davis sent Colleen O'Rourke, an agent of Casa Bella, two emails that raised Davis's concerns about the smoking issue. In the first email, Davis asked O'Rourke what can be done to make owners

accountable for smoke that enters the shared ventilation system and stated that they should be able to make smokers insulate their doors and vents. Davis wrote that asthmatics suffer when forced to breathe in second-and third-hand smoke toxins, and that something had to be done about the smoking nuisance that was affecting Davis's breathing and causing constant coughing and near asthma attacks. In the second email, Davis wrote that because of the heavy smoke, she must turn the heat up and open the windows in her condo so that she can breathe. O'Rourke promptly responded to Davis's emails and explained that because the Echo Valley bylaws and state law did not prohibit smoking in one's home, she did not believe anything could be done. The email suggested that Davis's complaint could be placed on the condo board's meeting agenda to see if the board would like an attorney's opinion on the matter.

Davis took up O'Rourke on her offer and asked that her issue be placed on the upcoming board meeting agenda, seeking to have smoking designated a nuisance under the bylaws. She also suggested that the owner of Unit 115 reseal the gaps in his doors and reevaluate his vents. The item was taken up at the March 15, 2016, board meeting. Board member Tony Barker suggested that Davis and other aggrieved residents cover their door base openings to prevent the smell from coming into their units. The board apparently questioned whether smoking may legally be labeled a health nuisance and did not reach a decision.

On March 29, 2016, O'Rourke sent a letter to the Lamnins that mentioned complaints regarding the heavy cigarette smoke emanating from Unit 115 and

requested, on behalf of the condo board, that the Lamnins assist in keeping the smell contained to their unit. O'Rourke suggested that the odor could be prevented from spreading throughout the building by smoking outside on the balcony or deck, using air purifiers, or insulating the entry door. O'Rourke noted that there was no rule or regulation that prohibited smoking in one's home, but that it could be considered a nuisance to those who do not smoke. O'Rourke later testified that the board had agreed that the letter would be sent with the wording that Davis requested.

On February 21, 2017, the board held a meeting; the minutes reflect that Davis requested that another letter be sent to the owners of Unit 115 about the heavy smoking. Davis apparently told the board that the smoke was infiltrating common areas and other units, and the smell was horrendous and was bringing down the property value of the building.

On March 6, 2017, the Association installed a fresh air system on Davis's furnace ductwork to help with the smoke problem. Mark Clor, the licensed contractor who worked on Davis's system, testified that he installed the fresh air system to allow Davis's furnace to draw in air from the outside of the building. Clor also averred that each unit has its own furnace and ductwork. He testified at his deposition that after the fresh air system was installed, Davis told him that she thought it made a difference. He said that he was personally familiar with the heating and cooling system that services Davis's unit as well as the connected units and asserted that none of the units draw air from or ventilate air into the other connected units. He also stated that none of the con-

nected units draw air from the common element stairway, and that the ducts that vent air into the common element stairway for heating purposes can be closed.

On April 24, 2017, the plaintiff's previous lawyer sent the Lamnins a letter detailing her health issues and asserting that by allowing their tenant(s) to smoke, the Lamnins were in breach of the condominium documents and committing common law nuisance. The lawyer demanded that the Lamnins take appropriate measures to assure that smoke will not continue to escape into Davis's unit or the common element areas of the building. He alternatively demanded that the Lamnins request their tenant(s) immediately to cease and desist from further smoking. Davis's lawyer asked the Lamnins to contact him with a proposal as to how they intended to eliminate the nuisance and continuing violation of condominium documents. The letter also was sent to Echo Valley, asserting that it served as a "formal demand" that Echo Valley take further action to provide relief, and warning that Davis intended to take legal action if the matter were not resolved.

On May 17, 2017, Davis's former lawyer received a response from the Lamnins that denied any breach of condominium documents or the existence of a nuisance. The Lamnins took issue with the idea that any smoke emanating from their unit impaired or aggravated Davis's pre-existing health conditions, noting that neither the condominium's bylaws nor Michigan law prohibited smoking inside one's apartment. However, the Lamnins stated that Rule and her husband had notified them that they were willing

to purchase and use an air purifier to clean the air in their unit.

Davis asserts that she discussed her asthma and expressed her concern about the smoking issue at multiple condo board meetings, and she made numerous verbal requests to O'Rourke and Echo Valley board members to address the problem. She also kept "smoke logs" beginning in May of 2017 documenting times when she smelled smoke. Former board president Tony Barker testified that when he was in Davis's hallway, he could smell a "pretty significant amount of smoke," and that the smell was worse in Davis's building than in others. Barker admitted, though, that he could not speak to the odor in Davis's unit as he was never inside.

After this litigation commenced, the Echo Valley board proposed an amendment to the bylaws that would prohibit smoking on the property. Under Michigan law, the proposed amendment required two-thirds approval from all co-owners eligible to vote. The vote occurred on April 9, 2018, and the proposed amendment did not pass.

On July 31, 2017, Davis filed a four-count complaint against Echo Valley, Casa Bella, and the Lamnins, alleging violations of the federal Fair Housing Amendments Act (FHAA) (Count I) and Michigan Persons with Disabilities Civil Rights Act (PWDCRA) (Count II), tortious nuisance (Count III), and breach of covenants (Count IV). Two months later, Davis filed her first motion for a preliminary injunction against the three defendants. At a status conference on November 7, 2017, the Court advised the plaintiff to amend the complaint to include the Lamnins' tenant. The next week, Davis filed an amended com-

plaint that named the tenant, Wanda Rule, as a defendant. Davis then filed a second motion for preliminary injunction against Ms. Rule. Davis did not serve the lawsuit on Rule until December 6, 2017. She did not serve notice of the preliminary injunction hearing on Rule until January 2, 2018. On January 5, 2018, the Court learned that Ms. Rule permanently moved out of Unit 115 on December 31, 2017. Rule never responded to the lawsuit, the parties agreed to resolve the plaintiff's motion for a preliminary injunction by stipulation, and the Lamnins thereafter were dismissed from the case with prejudice.

II.

On March 6, 2017, heating and cooling contractor Mark Clor installed a fresh air system on the plaintiff's furnace ductwork. Clor owns MC Home Heating & Cooling in Garden City, Michigan, and he has been in the business for 35 years. Based on his own observations and his experience working on Echo Valley's heating and cooling systems since 2008, Clor testified that Davis's condominium does not share ventilation ductwork with any of the other three units in her building. Because the basement is open and all the furnaces and ducts were visible to him, he could say that each unit has its own furnace and ductwork that is separate from the others.

Characterizing Clor's testimony as an expert opinion, Davis argues that the Court should not let him testify (and presumably not consider his evidence on the summary judgment motions) because the defendants' answer to the complaint says that the ventilation systems are shared, which is a judicial admission foreclosing contrary evidence on the point; Clor's testimony is not based on sufficient facts

or reliable methods (Clor did not examine a blueprint and was unable to point to any documentation to support his observation); the testimony is unreliable because it was contradicted by statements made by board members and was based on Clor's recollection from over a year ago; and the defendants did not furnish a timely expert report.

None of these arguments is persuasive. *First*, Davis fails to recognize that the defendants filed an answer to the *amended* complaint, which essentially nullifies its original answer as a pleading in the case. "'Generally, amended pleadings supersede original pleadings.'" *Braden v. United States*, 817 F.3d 926, 930 (6th Cir. 2016) (quoting *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 617 (6th Cir. 2014)). Davis relies on *Pennsylvania Railroad Company v. City of Girard*, 210 F.2d 437, 440 (6th Cir. 1954), in which the court noted that "pleadings withdrawn or superseded by amended pleadings are admissions against the pleader in the action in which they were filed." That may be true, but those "admissions" are evidentiary admissions, not judicial admissions. *See ibid.* (noting that the statement in the original cross-petition "stood admitted on the pleadings until the filing of the amended cross-petition," whereupon the statement in the original pleading became "an admission against interest"). An evidentiary admission does not preclude contrary proof to dispute a fact, and it certainly would not serve as a bar to Clor's testimony. *See Cadle Co. II v. Gasbusters Prod. I Ltd. P'ship*, 441 F. App'x 310, 313 (6th Cir. 2011).

Second, Davis's several objections based on the idea that Clor will furnish expert testimony are not on solid ground. When Clor testified that the ventila-

tion systems were separate, he was relating his own observation. He testified:

Q. Have you ever looked at a blueprint or something like that to determine how duct work is laid out in any of the buildings?

A. No.

Q. So you've never seen a blueprint or anything that resembles a blueprint, a drawing, a sketch —

A. No.

Q. — of Echo Valley?

A. No.

Q. How do you determine the extent of the HVAC system in each of these different units that you've applied a fresh-air intake to, just a visual inspections or—

A. A visual. You can go in the basement. It's an open basement.

Q. Okay.

A. All the units are next to each other. All the duct work is in the basement. You can trace it visually. That's all you can — you can see where it goes visually. Each unit has its own duct system.

Q. Okay. And so aside from the visual inspection, you haven't inspected any other duct work, necessarily, outside of what was in the basement —

A. No.

Q. — of those units? And no one's provided you with information of the layout of the duct work?

A. No.

Q. Is that pretty common in your field, that you wouldn't get a blueprint?

A. Yes.

Q. And you would just fix it as you saw it.

A. Yes.

Q. Is there any particular methodology you would use to determine the extent of the ventilation system aside from a visual inspection?

A. You're going to have to say it — I didn't understand what you're asking.

Q. Is there a well-known method for inspecting ventilation systems with a series of steps, a procedure to follow, that you're aware of?

A. As far as leakage or . . .

Q. As far as understanding the extent of the system, inlets, outlets. You can say a yes or no.

Ms. Butler. If you know.

A. I — yeah, I don't know.

Mark Clor dep. at 31-33, ECF No. 74-4, PageID.2143.

Clor's testimony was based on his personal knowledge of what he saw and would be admissible as such. *See* Fed. R. Evid. 602.

Nonetheless, one might characterize Clor's testimony — that the four units in Davis's building have separate ventilation systems — as an opinion. But it is not an "expert" opinion subject to the special eviden-

tiary and discovery rules governing expert witnesses. "Expert" testimony consists of opinions or commentary grounded in "specialized knowledge," that is, knowledge that is "beyond the ken of the average juror." *See United States v. Rios*, 830 F.3d 403, 413 (6th Cir. 2016), *cert. denied sub nom. Casillas v. United States*, 137 S. Ct. 1120 (2017), and *cert. denied,* 138 S. Ct. 2701 (2018); *see also* Fed. R. Evid. 702. It took no special knowledge for Clor to describe what was there in the basement to be seen. The "average juror" would be capable of counting four furnaces, four heat runs, and four cold air return systems in the open basement and see that none of them connected to the others. Clor has specialized knowledge as a heating contractor of 35 years. But he did not have to employ that special knowledge in this case.

Evidence Rule 701 authorizes non-expert witnesses to give opinions that are "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. Clor's testimony touches all these bases. His description of the heating systems in Davis's building "result[ed] from a process of reasoning familiar in everyday life, [instead of] a process of reasoning which can be mastered only by specialists in the field." *United States v. White*, 492 F.3d 380, 401 (6th Cir. 2007) (internal quotation marks and citation omitted).

Davis's objections to Clor's evidence based on rules governing expert witnesses are misplaced.

Third, Clor's evidence is not rendered unreliable by other evidence that contradicts it. Other board

members apparently gave their opinions that some of the units within a building shared ventilation systems. That testimony, however, merely establishes a fact dispute. It does not render Clor's testimony inadmissible, even if it is characterized as expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals., Inc.*, 509 U.S. 579, 595 (1993) (noting that those matters are best reserved for "[v]igorous cross-examination" and "presentation of contrary evidence" to the jury").

Fourth, Davis incorrectly insists that the defendants' pretrial disclosure of Clor's evidence was inadequate. Even if Clor's testimony can be characterized as opinion evidence under Evidence Rule 702, Clor was not required to prepare and sign a report because he was not "retained or specially employed to provide expert testimony in the case" nor did his "duties as the [defendants'] employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). Where a witness's "opinion testimony arises not from his enlistment as an expert but, rather, from his ground-level involvement in the events giving rise to the litigation . . . he falls outside the compass of Rule 26(a)(2)(B)." *Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1, 6 (1st Cir. 2011) (citing *Fielden v. CSX Transp., Inc.*, 482 F.3d 866, 869 (6th Cir. 2007)). Clor plainly qualifies as an "on-the-scene expert" whose information was acquired from personal observations during his maintenance work at Echo Valley. He therefore was not required to prepare a written report under Rule 26(a)(2)(B).

Moreover, the defendants satisfied their disclosure obligation under Rule 26(a)(2)(C) when they filed their expert witness list on March 15, 2018. Their disclosure states that "Mark Clor will testify to

the condition of the HVAC system located in Phyllis Davis' and neighboring units. Mark Clor is expected to testify that that the Davis Unit does not share a ventilation system with the other Connected Units and that each Unit has its own furnace and duct-work. Mark Clor can testify to installation of fresh air system in Ms. Davis' Unit." The defendants satisfied the applicable pretrial disclosure requirements.

Davis's motion to exclude Mark Clor's testimony will be denied.

III.

Davis and the defendants have filed cross motions for summary judgment on all of the liability issues. The fact that they have filed cross motions does not automatically justify the conclusion that there are no facts in dispute. *Parks v. LaFace Records*, 329 F.3d 437, 444 (6th Cir. 2003) ("The fact that the parties have filed cross-motions for summary judgment does not mean, of course, that summary judgment for one side or the other is necessarily appropriate."). Instead, the Court must apply the well-recognized summary judgment standards when deciding such cross motions: the Court "must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party." *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003).

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing the motion record, "[t]he court must view

the evidence and draw all reasonable inferences in favor of the non-moving party, and determine 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Alexander v. CareSource*, 576 F.3d 551, 557-58 (6th Cir. 2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

"The party bringing the summary judgment motion has the initial burden of informing the district court of the basis for its motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts." *Id.* at 558. (citing *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002)). "Once that occurs, the party opposing the motion then may not 'rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact' but must make an affirmative showing with proper evidence in order to defeat the motion." *Ibid.* (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)).

"[T]he party opposing the summary judgment motion must do more than simply show that there is some 'metaphysical doubt as to the material facts.'" *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 564 (6th Cir. 2003) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)) (internal quotation marks omitted). A party opposing a motion for summary judgment must designate specific facts in affidavits, depositions, or other factual material showing "evidence on which the

jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. If the non-moving party, after sufficient opportunity for discovery, is unable to meet her burden of proof, summary judgment is clearly proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Irrelevant or unnecessary factual disputes do not create genuine issues of material fact. *St. Francis Health Care Centre v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). A fact is "material" if its resolution affects the outcome of the lawsuit. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). "Materiality" is determined by the substantive law claim. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). An issue is "genuine" if a "reasonable jury could return a verdict for the nonmoving party." *Henson v. Nat'l Aeronautics & Space Admin.*, 14 F.3d 1143, 1148 (6th Cir. 1994) (quoting 477 U.S. at 248).

A.

Davis argues that she meets the criteria for disability under the FHAA and PWDCRA. She contends that the defendants, aware of her disability, denied her reasonable accommodation when they refused to prohibit smoking at Echo Valley, and therefore she is entitled to a judgment on liability as a matter of law. Defendants Echo Valley and Casa Bella contend that Davis has failed to offer evidence on several elements of these claims. But the key question is whether the accommodation she demands — banning smoking throughout the Echo Valley complex — is reasonable. As a matter of law, it is not.

The Fair Housing Amendments Act prohibits discriminating "against any person . . . in the provision of services or facilities in connection with [a] dwelling,

because of a handicap of . . . that person. . . . " 42 U.S.C. § 3604(f)(2)(a). The PWDCRA provides a "parallel[]" prohibition, and claims under that statute and the FHAA are analyzed similarly. *Bachman v. Swan Harbour Ass'n*, 252 Mich. App. 400, 417, 653 N.W.2d 415, 428 (2002). The PWDCRA prohibits associations "in connection with a real estate transaction . . . [from] refus[ing] to make reasonable accommodations in rules, policies, or services, when the accommodations may be necessary to afford the person with a disability equal opportunity to use and enjoy residential real property." Mich. Comp. Laws §§ 37.1103, 37.1506a(1)(b). The FHAA defines "discrimination [to] include[] . . . a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling. . . . " 42 U.S.C. § 3604(f)(3)(B). To prove a reasonable-accommodation discrimination claim, a plaintiff must produce evidence that (1) she suffers from a disability (as the Act defines it); (2) she requested a reasonable accommodation or modification of the "rules, policies, practices, or services" relating to the use or enjoyment of a dwelling; (3) the housing provider refused the accommodation; and (4) the housing provider "knew or should have known of the disability at the time of the refusal." *Hollis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 541 (6th Cir. 2014).

The reasonable-accommodation element in turn has three "operative" components of its own: "'equal opportunity,' 'necessary,' and 'reasonable.'" *Anderson v. City of Blue Ash*, 798 F.3d 338, 360 (6th Cir. 2015) (quoting *Smith & Lee Assocs. v. City of Taylor, Mich.*, 102 F.3d 781, 794 (6th Cir. 1996)). The court of appeals

has explained that the first two, closely-related elements invoke a causation inquiry, requiring a plaintiff to "show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice." *Smith & Lee Assocs.*, 102 F.3d at 795 (citations omitted). Stated differently, "[e]qual use and enjoyment of a dwelling are achieved when an accommodation ameliorates the effects of the disability such that the disabled individual can use and enjoy his or her residence as a non-disabled person could." *Anderson*, 798 F.3d at 361 (citations omitted).

To establish that the requested accommodation is reasonable, a plaintiff must show that it "imposes no 'fundamental alteration in the nature of the program' or 'undue financial and administrative burdens.'" *Howard v. City of Beavercreek*, 276 F.3d 802, 806 (6th Cir. 2002) (quoting *Smith & Lee Assocs*, 102 F.3d at 794)). Courts must "balance the burdens imposed on the defendant by the contemplated accommodation against the benefits to the plaintiff." *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001) (citing *Smith & Lee Assocs.*, 102 F.3d at 795). In striking that balance, courts consider not only the costs of the accommodation, but also its "functional and administrative aspects" as well. *Ibid.*

On the reasonable-accommodation element, both sides here focus on the demands by Davis's attorney in his April 24, 2017 letter. Those demands escalated from "ensur[ing] that any further smoking in Unit #115 will not escape from Unit #115 into [Davis's] unit or the common element areas of the building" to requiring "the tenants of Unit #115 immediately [to] cease and desist from further smoking in Unit #115

and/or the common elements of the shared building"; and later Davis expanded that request to cover the entire condominium complex.

It is not at all clear that such an accommodation — as extreme as it is — would confer upon Davis the use and enjoyment of her residence in the same manner as a non-disabled person, that is, a person without respiratory hypersensitivities. Davis believes the first two closely related elements are met because without a prohibition on smoking, she does not have the equal opportunity to enjoy living in her unit and breathing without impairment. However, she previously has complained of non-tobacco smell aggravating her respiratory conditions. In January 2015, the plaintiff complained that the smell of her neighbor's cooking nearly caused her an asthma attack. The evidence Davis offers on this point is mostly anecdotal and conclusory. And banning smoking would not "ameliorate[] the effects of [her] disability." *Anderson*, 798 F.3d at 361 At least one federal court has concluded that in cases involving exposure to certain chemicals, including tobacco smoke, expert testimony is necessary to demonstrate "a direct linkage between the proposed accommodation and the equal opportunity to which a person with a handicap is entitled." *Matarese v. Archstone Pentagon City*, 761 F. Supp. 2d 346, 364-65 (E.D. Va. 2011). In *Matarese*, the plaintiff, who suffered from chemical sensitivities to paint fumes, tobacco smoke, and mold, alleged that the defendants violated section 3604(f)(3)(B) when they declined to replace weather stripping around her apartment door to block smoke from entering. *Id.* at 356. In granting the defendants' motion for summary judgment on the reasonable accommodation claim, the

court explained that to meet her burden, the plaintiff must have shown through expert testimony that the proposed accommodation did "not just ameliorate the burdens shared by all individuals exposed to chemicals." *Id.* at 365. The court found that the affidavit of the plaintiff's doctor was insufficient because it merely stated that the proposed accommodation would allow her to avoid exposure to smoke and ameliorate any negative impact on her chemical sensitivities. *Ibid.* ("Plaintiffs have failed to meet their burden in establishing the requisite elements of their claim because this affidavit does not state that the proposed accommodations will ameliorate Ms. Matarese's handicap specifically, such that she would be afforded equal opportunity in housing, as compared to similarly situated individuals.").

Similarly, Davis's reliance on her doctor's letter falls short of establishing that banning smoking will in fact ameliorate her respiratory conditions. In a letter dated June 22, 2017 — approximately two months after the plaintiff requested accommodation from the Lamnins and Echo Valley — Dr. Marisa Abbo, Medical Director of Covenant Community Care, stated:

> Ms. Davis has a history of breast cancer, asthma, and multiple chemical sensitivity disorder which significantly interfere with her ability to breathe.
>
> . . . Due to Ms. Davis' condition, exposure to tobacco smoke is detrimental to her health and increases the risk of Ms. Davis suffering an adverse event such as an asthma attack. I urge you to grant Ms. Davis accommodation request to ban smoking in the common

> areas and make the surround[ing] units non-smoking. This accommodation is necessary to ameliorate the conditions of Phyllis Davis's disability.

Abbo Letter, ECF No. 20-2, PageID.253. The *Matarese* court squarely rejected this type of conclusory opinion as insufficient to show that the proposed accommodation ameliorated the plaintiff's handicap specifically, and not just the burden shared by all individuals exposed to smoke. The plaintiff's complaints about other smells exacerbating her condition does not help her case. Without more, the plaintiff has not shown the accommodation she requested was necessary to afford her equal opportunity to enjoy her unit.

More problematic is the reasonableness element. Davis argues that banning smoking throughout the complex is cost free. That argument, however, ignores the functional and administrative difficulties of such a measure. Davis demands that the Echo Valley Association Board adopt a position that the law does not permit. It is not illegal for an adult property owner to smoke in his or her own home. As noted earlier, nothing in the Echo Valley condominium documents prohibits smoking anywhere in the complex. Michigan's common law allows property owners to impose covenants that restrict a landowner's use of his or her property, but the landowner (or a predecessor in interest) must consent to the restriction. *Eveleth v. Best,* 322 Mich. 637, 641-42, 34 N.W.2d 504, 505 (1948) (holding that a restrictive covenant, which was not imposed by a common grantor of all the lots in the development, was not valid against an

owner absent his consent or the consent of his predecessors in interest).

A person who purchases a condominium becomes bound by the rules and restrictions found in the condominium documents (master deed, bylaws, articles of incorporation, etc.) in effect at the time of the purchase. *See Yarmouth Commons Ass'n v. Norwood*, 299 F. Supp. 3d 862, 86869 (E.D. Mich. 2017). And condominium documents may be amended by the board from time to time without the co-owners' consent *if* the amendments do not materially alter or change the co-owners' rights. Mich. Comp. Laws § 559.190(1). However, a condominium association may not "expand [a] restriction or impose a new burden on the lot owners with less than unanimous consent under the guise of interpreting the restriction." *Conlin v. Upton*, 313 Mich. App. 243, 265, 881 N.W.2d 511, 525 (2015) (citing *Golf View Improvement Ass'n. v. Uznis,* 342 Mich. 128, 130-131, 68 N.W.2d 785, 786 (1955)). And an association may not amend condominium documents outright without "the consent of not less than 2/3 of the votes of the co-owners and mortgagees" when the amendment would materially alter the co-owners' rights. Mich. Comp. Laws § 559. 190(2).

Echo Valley was well aware of these legal limitations when it presented for a vote of the co-owners a proposal to ban smoking throughout the complex, as Davis asked. The proposal did not pass. In the wake of that decision, it is not reasonable to impose upon Echo Valley the administrative burden of implementing a use restriction upon co-owners in a way that violates the law. Imposing a smoking ban on all Echo Valley co-owners, the effect of which would be to

restrict them from engaging in a lawful activity on their own property, cannot be accomplished in this case without a violation of existing law. For that reason alone, Davis's accommodation demand is not reasonable.

Davis's demands have not been ignored. The Association has gone to some lengths to accommodate her concerns, from installing a fresh air filtration system on the plaintiff's furnace ductwork, to administering a complex-wide referendum on her smoking ban proposal. Changing the entire complex from a smoking-permitted to a smoke-free development without the proper consent that Michigan law requires, however, is a bridge too far. Because Davis has not shown that she requested a "reasonable accommodation," her FHAA and PWDCRA claims fail as a matter of law.

B.

The defendants contend that Davis's private nuisance claim in Count III of the amended complaint must be dismissed. In Michigan, a private nuisance, in general terms, consists of an interference with the use and enjoyment of land. *Henry v. Dow Chem. Co.*, 484 Mich. 483, 533, 772 N.W.2d 301, 328 (2009). The Michigan Supreme Court has observed that nuisance claims have addressed a variety of types of harm to landowners, leading to confusion and imprecision in defining the elements of the cause of action. *Adkins v. Thomas Solvent Co.*, 440 Mich. 293, 303, 487 N.W.2d 715, 719-20 (1992). However, "the gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land." *Id.* at 303, 487 N.W.2d at 720. Pollution of the air by the release of contaminants

can constitute a private or public nuisance. 4 Restatement Torts, 2d, § 832, p. 142.

To prove a private nuisance, the plaintiff must show that (1) she has property rights that were interfered with, (2) the invasion results in significant harm, (3) the defendant's conduct was the legal cause of the invasion, and (4) the invasion was either (i) intentional and unreasonable or (ii) negligent, reckless, or ultrahazardous. *Adkins*, 440 Mich. at 304, 487 N.W.2d at 720.

For a defendant to be liable for a private nuisance, however, he or she "must have possession or control of the land.'" *Sholberg v. Truman*, 496 Mich. 1, 6, 852 N.W.2d 89, 92 (2014) (quoting *Wagner v. Regency Inn Corp.*, 186 Mich. App. 158, 163, 463 N.W.2d 450 (1990)). Although Count III of the amended complaint is brought against all the defendants, it appears to have no applicability now that Ms. Rule (the smoker) has moved out of the neighboring unit and the Lamnins have been dismissed from the suit. The remaining defendants cannot be held liable. Under Michigan law, a landlord cannot be found responsible for a nuisance that his tenant creates. *Id.* at 8-9, 852 N.W.2d at 93 (citing *Samuelson v. Cleveland Iron Mining Co.,* 49 Mich. 164, 171, 13 N.W. 499, 502 (1882)). The reason is that "[a] party who has no control over the property at the time of the alleged nuisance cannot be held liable therefor." *Id.* at 13, 852 N.W.2d at 95-96. It logically follows that a condominium association is even farther removed from liability for the legal conduct of a co-owner within his or her own unit, when no bylaw has been violated. Here, the Association has no control over other residents' decision to smoke in their units as smoking is not prohibited by

the condominium bylaws. Absent an amendment to the bylaws, which the owners already have rejected, the Association cannot be considered the legal cause of the "smoking nuisance." Contrary to the plaintiff's position, it is of no significance that the Association has the power to modify the ventilation system — assuming it is shared — as individual residents are the source of the alleged injury. Because no other individual owners or tenants are named in this suit, this claim fails as a matter of law. *Morgan v. Nickowski*, No. 334668, 2017 WL 5759789, at *5 (Mich. Ct. App. Nov. 28, 2017) (finding nuisance claim "meritless on its face" where landlord did not have "any hand in creating the conditions that led to the alleged nuisance.").

Count III of the amended complaint must be dismissed as a matter of law.

C.

In Count IV of the amended complaint, Davis alleges that the defendants breached their contractual duties under Echo Valley's governing documents to enforce the annoyance and nuisance, insurance rate, and safe, clean, and sanitary provisions of the bylaws. In her motion, Davis also seeks to allege a failure to enforce the "unlawful and offensive activity" provision. That latter claim was not pleaded in the amended complaint, Davis has not sought another amendment, and therefore that claim is not properly before the Court. *See Carter v. Ford Motor Co.*, 561 F.3d 562, 568 (6th Cir. 2009); *Tucker v. Union of Needletrades, Indus. & Textile Emps.*, 407 F.3d 784, 787-88 (6th Cir. 2007).

Under Michigan law, condominium association bylaws are considered a "binding contract" between unit owners and the association. *Tuscany Grove Ass'n v. Gasperoni*, No. 314663, 2014 WL 2880282, at *3 (Mich. Ct. App. June 24, 2014) (reasoning that "[t]he Association was formed as a nonprofit corporation. 'The bylaws of a corporation . . . constitute a binding contract between the corporation and its shareholders.' The Bylaws in the case are such a contract.") (quoting *Allied Supermarkets, Inc. v. Grocer's Dairy Co.*, 45 Mich. App. 310, 315, 206 N.W.2d 490 (1973), *aff'd* 391 Mich. 729, 219 N.W.2d 55 (1974)); *see also Tuscany Grove Ass'n v. Peraino*, 311 Mich. App. 389, 393, 875 N.W.2d 234, 236 (2015) ("Condominium bylaws are interpreted according to the rules governing the interpretation of a contract."). Echo Valley's bylaws charge the board of directors with the responsibility for "enforc[ing] the provisions of the Condominium Documents," including the master deed, the bylaws, the articles of incorporation, rules and regulations adopted by the Association, and state law. Article I, Section 4(a)(11), ECF No. 75-3, PageID.2232.

The crux of this count of Davis's amended complaint is based on Article VI of the bylaws, which places certain restrictions on co-owners' use and enjoyment of their units, such as:

> Section 4. No immoral, improper, unlawful or offensive activity shall be carried on in any apartment or upon the common elements, limited or general, nor shall anything be done which may be or become an annoyance or a nuisance to the co-owners of the Condominium, nor shall any unreasonably noisy activity be carried on in any unit or on

> the common elements. No co-owner shall do or permit anything to be done or keep or permit to be kept in his apartment or on the common elements anything that will increase the rate of insurance on the Condominium without the written approval of the Association and each co-owner shall pay to the Association the increased cost of insurance premiums resulting from any such activity or the maintenance of any such condition.
>
> Section 15. Each co-owner shall maintain his apartment and any limited common elements appurtenant thereto for which he has maintenance responsibility in a safe, clean and sanitary condition.

Id. at PageID.2241-42, 2245. Davis alleges that the defendants breached their contractual duty to enforce these provisions to eliminate offensive conduct, specifically smoking.

1.

Davis has not offered any evidence that smoking constitutes an activity that will raise insurance rates, except for the deposition testimony of board member Louise Genovese, who admitted that it is her position that smoking marijuana "could increase the rate of insurance." Genovese dep. at 27 (ECF No. 64-2, Page ID.1833). There is nothing else in the record to support Davis's claim that smoking in fact increases the rate of insurance. The board cannot be faulted for not instituting a no-smoking policy based on the possibility of increased insurance rates. And the plaintiff has not identified any other breach of the

board's contractual duty to enforce the restrictions in the condominium documents.

2.

Similarly, in support of the idea that the board failed to enforce the requirement in section 15 of Bylaw Article VI, Davis offers only Ms. Genovese's testimony that she believed marijuana and cigarette smoke to be both unsafe and unclean and that its distribution through the vents violates Section 15. Although "the author of a party admission need not have personal knowledge of the statements contained in the party admission," *Weinstein v. Siemens*, 756 F. Supp. 2d 839, 853 (E.D. Mich. 2010) (Borman, J.), the plaintiff points to no evidence that cigarette smoke has infiltrated the ventilation system of her unit, or that any of the units have not been maintained in a safe, clean, or sanitary condition. In fact, Davis has not definitively identified any particular source of secondhand smoke at Echo Valley. On April 4, 2018, plaintiff's counsel represented to defense counsel that they were "currently investigating the source of the smoke, and believe it may be coming from unit 114." Apr. 4, 2018 email, ECF No. 75-25, PageID.2403. No updated information since has been presented to the Court. Without more, the defendants cannot be held liable for failing to enforce a restriction on an unknown co-owner.

3.

Finally, Davis has not established that smoking at Echo Valley constitutes an "annoyance or a nuisance" that the bylaws prohibit. The bylaws do not define those terms; however, the parties apparently agree that tort principles supply the appropriate meaning.

Davis relies exclusively on the deposition testimony of board members Genovese and Williams to support her position, but a closer reading of that testimony shows these board members did not admit violations of the bylaws, as the plaintiff attempts to represent. Genovese testified that cigarette smoke "can be" considered a nuisance for those who do not smoke, and Williams answered in the affirmative when asked if cigarette smoke annoyed her. But those acknowledgments about smoking in the abstract alone do not satisfy the plaintiff's burden.

Although Michigan courts have not addressed whether infiltration of secondhand smoke can be considered a nuisance, several courts around the country have weighed in on the issue. Although Davis did not cite any supporting authority in her summary judgment motion papers, she did refer in her motion for preliminary injunction to five decisions in support of her argument that cigarette smoke might be considered a private nuisance. None of them are particularly helpful to her position, since those decisions depend on the facts peculiar to each case, and Davis has not offered similar or analogous facts on this record.

The first case, *Chauncey v. Bella Palermo Homeowners Association*, Case No. 30-201100461681 (Cal. Sup Ct. June 11, 2013), is a not a reported opinion, but a judgment on a jury verdict and a special verdict form that found for the plaintiffs after a trial. The case provides no guidance, as there is no recitation of the facts or indication that this case actually supports the plaintiff's position.

The second case, *Merrill v. Bosser*, Case No. 05-4239 COCE 53 (Broward Cty. Cir. Ct., June 29,

2005), is a memorandum opinion and judgment of a trial court finding that "excessive secondhand smoke" that infiltrated the plaintiff's condominium unit amounted to a trespass, private nuisance, and a breach of the covenant of quiet enjoyment. Judgment was rendered not against the condominium board, but against the plaintiff's upstairs neighbor. The court acknowledged that "common secondhand smoke which is customarily part of everyday life would not be an actionable trespass." *Id.* at 3. However, the court described quantifiable evidence of the "excessive" amount of smoke infiltrating the units of the plaintiff and his other neighbors that took the case beyond garden-variety inconvenience and annoyance. Davis has not offered such evidence here.

The plaintiff also cited *Heck v. Whitehurst Co.*, No. L-03-1134, 2004 WL 1857131 (Ohio Ct. App. Aug. 20, 2004), which is not a nuisance case. There, the plaintiff-tenant complained that "cigarette smoke [was] entering into [his] bedroom and [his] bathroom in extreme volumes" from his neighbor's apartment infiltrated his unit. *Id.* at *1. The plaintiff testified "that the problem was so bad that he had to have his clothes professionally dry cleaned, had to leave his windows open in the middle of winter and had to sleep in the living room." *Id.* at *5. The court found that the weight of the evidence at trial established that the defendant-landlord breached his duty to keep the apartment in a fit and habitable condition by not repairing the window, which allowed smoke to enter from the apartment below. *Id.* at *6.

Davis also cited *Upper East Lease Assocs, LLC v. Cannon*, No. 444409/09, 2011 WL 182091, at * 1 (N.Y. Dist. Ct. Jan. 20, 2011), but that case is inap-

posite because the addendum to the offending tenant's lease specifically addressed the issue of secondhand smoke and required tenants to agree to "take all measures necessary to minimize second-hand smoke from emanating from Tenant's apartment and infiltrating the common areas of the Building and/or into other apartments in the building." No such duty emanates from the condominium documents in this case. Likewise, *Christiansen v. Heritage Hills 1 Condo. Owners Ass'n*, Case No. 06CV1256 (Colo. Dist. Ct. Nov. 7, 2006), provides no support for the plaintiff's position here. Although the court acknowledged that the smell from secondhand smoke constituted a nuisance under the circumstances of that case, the decision addressed the authority under Colorado law of a condominium to amend its bylaws to ban smoking upon the vote of an appropriate number of co-owners. *Id.* at 7-8. As noted above, Echo Valley held a vote on a smoking ban, but the measure was defeated.

Several other courts have concluded that smoking cigarettes in the privacy of one's own home does not amount to an unreasonable interference with a neighbor's use of his or her property. In *Ewen v. Maccherone*, 32 Misc.3d 12, 927 N.Y.S.2d 274 (N.Y. App. Div. 2011), for instance, the court concluded the plaintiffs failed to state a cause of action for private nuisance because, "[c]ritically, defendants were not prohibited from smoking inside their apartment by any existing statute, condominium rule or bylaw. Nor was there any statute, rule or bylaw imposing upon defendants an obligation to ensure that their cigarette smoke did not drift into other residences." The plaintiffs alleged that their neighbors' excessive smoking infiltrated the plaintiffs' walls, causing them personal injuries,

and that the condition was exacerbated by building-wide ventilation. *Id.* at 13, 927 N.Y.S.2d at 275. The court expressed sympathy for the plaintiffs' apparent discomfort, but it could not avoid the conclusion that "the law of private nuisance would be stretched beyond its breaking point if we were to allow a means of recovering damages when a neighbor merely smokes inside his or her own apartment in a multiple dwelling building." *Id.* at 15, 927 N.Y.S.2d at 277. The court accepted the premise that secondhand smoke and the odors it created are "annoying and uncomfortable to reasonable or ordinary persons." *Ibid.* But the court relegated that unpleasantness to "but one of the annoyances one must endure in a multiple dwelling building." *Ibid.* (citations omitted). The court also "recognize the significant health hazards to non-smokers inherent in exposure to secondhand smoke." *Ibid.* (citations omitted). But the court concluded that "in the absence of a controlling statute, bylaw or rule imposing a duty, public policy issues militate against a private cause of action under these factual circumstances for secondhand smoke infiltration." *Ibid.* (citations omitted).

Other courts have reached the same conclusions. S*ee Feinstein v. Rickman*, 136 A.D.3d 863, 864-65, 26 N.Y.S.3d 135, 137 (N.Y. App. Div. 2016) (affirming the lower court's dismissal of the plaintiff's secondhand smoke nuisance claim); *Nuncio v. Rock Knoll Townhome Village, Inc.*, 389 P.3d 370, 374-75 (Okla. Civ. App. 2016) ("We agree with Defendants that no published Oklahoma decision has addressed claims arising out of smoke migrating from a neighbor's use of tobacco in his home. Other states which have addressed these claims have almost uniformly found

no right to relief.") (collecting cases); *Schuman v. Greenbelt Homes, Inc.*, 69 A.3d 512, 520 (Md. App. 2013) ("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.").

Smoking in Michigan, as in many other states, is regulated by the state legislature. The Michigan Clean Indoor Air Act, Mich. Comp. Laws § 333.12601 *et seq.*, prohibits smoking in several public places, including restaurants, places of employment, and health care facilities. The legislature has not yet limited a person's right to smoke in his or her own home.

Here, the plaintiff does not point to any specific evidence of the extent or amount of secondhand smoke being generated at Echo Valley, or any evidence of the extent of harm to her body. She mentions elsewhere in her briefing that other residents have complained about smoking at Echo Valley, but she has not presented that information in such a way that would give the Court a basis to depart from the reasoning of other courts. General observations about smoking at hotels or other residences do not establish that smoking at Echo Valley is so unreasonable as to trigger the Board's enforcement obligation under the bylaws. There is nothing that suggests that the smoking habits of the residents of Echo Valley are unique or that they present any special danger to the plaintiff. It is, of course, possible to imagine an extreme scenario where cigarette smoke could be considered a nuisance or annoyance, as illustrated by some of the cases the plaintiff cited. But without some evidence

that the cigarette smoke concentration and accompanying odors extend beyond "the annoyances one must endure in a multiple dwelling building," Davis cannot show that the secondhand smoke at Echo Valley constitutes an "offensive activity," "an annoyance or a nuisance" that the Board is compelled to eradicate through its contractual enforcement powers.

The defendants, therefore, are entitled to a judgment as a matter of law on Count IV of the amended complaint.

IV.

The plaintiff has not offered sufficient justification to exclude the testimony of Mark Clor. The undisputed material facts establish that the plaintiff is not entitled to relief on any of her claims, and the defendants are entitled to a dismissal of the amended complaint.

Accordingly, it is **ORDERED** that the plaintiff's motion to exclude the testimony of Mark Clor (ECF No. 63) is **DENIED**.

It is further **ORDERED** that the plaintiff's motion for summary judgment (ECF No. 64) is **DENIED** and the defendants' motion for summary judgment (ECF No. 80) is **GRANTED**.

It is further **ORDERED** that, because the motions and responses fully set forth the arguments, and oral argument will not assist in the disposition of the motion, the Court will decide it on the papers, *see* E.D. Mich. LR 7.1(f)(2), and hearing scheduled for November 26, 2018 is **CANCELLED**.

It is further **ORDERED** that the plaintiff's motion for contempt (ECF No. 85) and her second

motion to compel document production (ECF No. 89) are **DISMISSED as moot**.

It is further **ORDERED** that the amended complaint is **DISMISSED WITH PREJUDICE**.

s/David M. Lawson
David M. Lawson
United States District Judge

Date: November 7, 2018

ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (JANUARY 22, 2020)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHYLLIS DAVIS,

Plaintiff-Appellant,

v.

ECHO VALLEY CONDOMINIUM ASSOCIATION; CASA BELLA PROPERTY MANAGEMENT, INC.,

Defendants-Appellees.

Case No. 18-2405

Before: COOK, NALBANDIAN, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND FEDERAL RULES OF PROCEDURE

U.S. CONST. AMEND. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

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42 USCS § 3601

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

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42 USCS § 3604

As made applicable by section 803 [42 USCS § 3603] and except as exempted by sections 803(b) and 807 [42 USCS §§ 3603(b), 3607], it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)

(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

(A) that buyer or renter, [;]

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a

dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes—

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted. [;]

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after the date of enactment of the Fair Housing Amendments Act of 1988 [enacted Sept. 13, 1988], a

failure to design and construct those dwellings in such a manner that—

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance

with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this title shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)

(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 810(f)(3) of this Act [42 USCS § 3610(f)(3)] to receive and process complaints or otherwise engage in enforcement activities under this title.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this title.

(7) As used in this subsection, the term "covered multifamily dwellings" means—

(A) buildings consisting of 4 or more units if such buildings have one or more elevators; and

(B) ground floor units in other buildings consisting of 4 or more units.

(8) Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this title shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this title.

(9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

MCL 559.207
CONDOMINIUM ACT OF 1978

559.207 ACTION TO ENFORCE TERMS AND PROVISIONS OF CONDOMINIUM DOCUMENTS; ACTION FOR INJUNCTIVE RELIEF OR DAMAGES.

Sec. 107. A co-owner may maintain an action against the association of co-owners and its officers

and directors to compel these persons to enforce the terms and provisions of the condominium documents. In such a proceeding, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent that the condominium documents expressly so provide. A co-owner may maintain an action against any other co-owner for injunctive relief or for damages or any combination thereof for noncompliance with the terms and provisions of the condominium documents or this act.

MCL 559.215
CONDOMINIUM ACT OF 1978

559.215 ACTION BY PERSON OR ASSOCIATION ADVERSELY AFFECTED BY VIOLATION OF OR FAILURE TO COMPLY WITH ACT, RULES, AGREEMENT, OR MASTER DEED; COSTS; VIOLATION OF MCL 559.121 OR 559.184A; LIABILITY.

Sec. 115.

(1) A person or association of co-owners adversely affected by a violation of or failure to comply with this act, rules promulgated under this act, or any provision of an agreement or a master deed may bring an action for relief in a court of competent jurisdiction. The court may award costs to the prevailing party.

(2) A developer who offers or sells a condominium unit in violation of section 21 or 84a is liable to the person purchasing the condominium unit for damages.

FED. R. CIV. P. 8(A)(2)
GENERAL RULES OF PLEADING

(a) Claim for Relief. A pleading that states a claim for relief must contain:

[. . .]

(2) a short and plain statement of the claim showing that the pleader is entitled to relief;

FED. R. CIV. P. 10
FORM OF PLEADINGS

(c) Adoption by Reference; Exhibits. A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

PLAINTIFF PHYLLIS DAVIS' FIRST AMENDED COMPLAINT, RELEVANT EXCERPTS (NOVEMBER 14, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

PHYLLIS DAVIS,

Plaintiff,

v.

ECHO VALLEY CONDOMINIUM ASSOCIATION, CASA BELLA PROPERTY MANAGEMENT, INC., MOISEY LAMNIN, ELLA LAMNIN, AND WANDA RULE,

Defendants.

Case No. 2:17-cv-12475

Injunctive Relief Requested

Jury Trial Demanded

[. . .]

17. Upon information and belief, Echo Valley is a community condominium association, organized under the laws of the State of Michigan, responsible for governing and managing approximately eight buildings in a subdivision known as echo valley ("Subdivision"). A true and correct copy of Echo Valley's bylaws ("Bylaws") are attached hereto as Exhibit 1.

[. . .]

29. On information and belief, during the time of her tenancy, Ms. Rule, co-occupants of Unit 115, and/or guests of Unit 115 (collectively "Tenants") have consumed, and continue to regularly consume, tobacco and/or other substances by way of combustion, *i.e.* burning said tobacco and/or other substances, ("Smoking") in Unit 115.

30. On information and belief, the Smoking has produced, and continues to produce, hazardous, toxic, carcinogenic, and irritating gases and particulate matter ("Pollutants").

31. On information and belief, the Pollutants have been dispersed, and continue to be dispersed, throughout the Connected Units and Common Elements, including by way of the Shared Ventilation System ("Smoking Related Nuisances").

38. The Tenants' Smoking is an annoyance and/or nuisance under the Annoyance and Nuisance Provision.

[. . .]

40. On information and belief, permitting Smoking inside condominium units increases the rate of insurance for Echo Valley and/or other co-owners of a properties located within the Subdivision.

43. On information and belief, the Smoking Related Nuisances create unsafe, unclean, and/or unsanitary conditions.

[. . .]

80. The Defendants have control over the Smoking Related Nuisances interfering with Ms. Davis' private

use and enjoyment of Unit 214 and the Common Elements.

81. The Defendants have, and had, a duty to prevent, remedy, and provide relief from, the Smoking Related Nuisances.

82. As described more thoroughly herein, the Defendants breached their duty to prevent, remedy, and provide relief from, the Smoking Related Nuisances by failing to take appropriate preventative and remedial measures.

[. . .]

102. Echo Valley breached its duties under the Condominium Documents, by, among other things, failing to enforce provisions contained in the Condominium Documents, including the Annoyance and Nuisance Provision, the Insurance Rate Provision, and the SCS Provision.

103. Casa Bella breached its assumed duties, by, among other things failing to enforce provisions contained in the Condominium Documents, including the Annoyance and Nuisance Provision, the Insurance Rate Provision, and the SCS Provision.

[. . .]

109. Ms. Davis is entitled to equitable relief, including abatement of the Smoking related annoyances and nuisances as monetary damages are insufficient to compensate Ms. Davis for her injuries.

[. . .]

JURY DEMAND

Pursuant to Fed. R. Civ. P. 38(b), Plaintiff Phyllis Davis hereby demands a jury trial on all issues triable by a jury.

Respectfully submitted,

BROOKS KUSHMAN P.C.

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Attorneys for Plaintiff

Dated: November 14, 2017

CONDOMINIUM BYLAWS, ECHO VALLEY CONDOMINIUM, EXHIBIT A, RELEVANT EXCERPTS

ARTICLE XI

REMEDIES FOR DEFAULT

Section 1. Any default by a co-owner shall entitle the Association of another co-owner or co-owners to the following relief:

(a) Failure to comply with any of the terms or provisions of the Condominium Documents shall be grounds for relief, which may include without intending to limit the same, an action to recover sums due for damages, injunctive relief, fore-closure of lien (if default in payment of assessment) or any combination thereof, and such relief may be sought by the Association, or, if appropriate, by an aggrieved co-owner or co-owners.

(b) In any proceeding arising because of an alleged default by any co-owner, the Association, if successful, shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees, (not limited to statutory fees) as may be determined by the Court, but in no event shall any co-owner be entitled to recover such attorneys' fees.

(c) The violation of any of the provisions of the Condominium Documents shall also give the Association or its duly authorized agents the right, in addition to the rights set forth above, to enter upon the common elements, limited or general, or into any apartment,

where reasonably necessary, and summarily remove and abate, at the expense of the co-owner in violation, any structure, thing or condition existing or maintained contrary to the provisions of the Condominium Documents.

(d) In the event of a default by a co-owner in the payment of any assessment as provided in these Condominium Bylaws or the Rules and Regulations of the Condominium, the Association may impose upon the defaulting co-owner a late charge, which shall be: (1) reasonable in amount and reflective of the expense of the inconvenience incurred, (2) approved and authorized by the Board of Directors on behalf of the Association, (3) set forth in a published notice setting forth the amount and effective date of the late charge which shall be at least thirty (30) days after the date of publishing the notice, and (4) imposed uniformly on all defaulting co-owners for late payment of levied assessments,

Section 2. The failure of the Association or of any co-owner to enforce any right, provision, covenant or condition which may be granted by the Condominium Documents shall not constitute a waiver of the right of the Association or of any such co-owner to enforce such right, provisions, covenant or condition in the future.

**DEPOSITION OF LOUISE GENOVESE,
RELEVANT EXCERPTS
(APRIL 30, 2018)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

PHYLLIS DAVIS,

Plaintiff,

v.

ECHO VALLEY CONDOMINIUM ASSOCIATION, CASA BELLA PROPERTY MANAGEMENT, INC., MOISEY LAMNIN, ELLA LAMNIN, AND WANDA RULE,

Defendants.

Case No.: 2:17-cv-12475

Honorable David M. Lawson

Magistrate Judge Anthony P. Patti

The deposition of LOUISE GENOVESE, taken in the above-entitled cause before Susan E. Castino, (CSR 4856) and Notary Public for the County of Wayne, Michigan, at 1000 Town Center, Southfield, Michigan, on Monday, April 30, 2018, commencing at or about the hour of 2:00 p.m.

[. . .]

Q Memo from Louise Genovese, #136: R/T medical marijuana laws adversely affecting this resident

in her condominium. Health and safety affected by extreme use of this drug with smoke permeating through the air vents from Mr. Casey Nevers, #236-not abiding by Article VI, Section 4 and 8 of Echo Valley Condominium bylaws: (improper). Offensive activity or permit any activity that will increase the rate of insurance.

Is that a correct reading?

A Correct.

[. . .]

Q Was it your position at the time these meeting minutes were created that smoke from marijuana was a health hazard?

A As of evidence, I did, yes -- of search, it is.

Q At the time that those minute meetings were created, did you believe marijuana smoke was a safety hazard?

A Yes.

Q Is your position the same today, that marijuana smoke can be a health and safety hazard?

A Not can be, is. Yes.

[. . .]

Q Is it your position today that marijuana smoke constitutes an offensive activity under the bylaws?

A From my experience, yes.

[. . .]

Q Was it your position that allowing marijuana smoke increased the rate of insurance because it was a fire hazard.

A Correct. It still is.

[. . .]

Q At this meeting, did you take a position as to whether cigarette smoke should be designated as a nuisance?

A Now?

Q Do you have a position?

A Now?

Q Yes.

A As it relates to the other smoking sources -- or smoke sources, I would say yes.

[. . .]

Q Earlier, you indicated that marijuana smoke entered into your unit from other units; is that correct?

A Yes.

Q Where did the marijuana smoke enter into the unit, through the door or through the vents or somewhere else?

A Both.

[. . .]

Q You had a neighbor who left because of the smoke.

A Correct.

[. . .]

Q (By Mr. Gocha) Do you consider marijuana smoke to be safe?

MS. BUTLER: Same objection.

THE WITNESS: I would say no.

Q (By Mr. Gocha) Do you consider cigarette smoke to be safe?

A No.

Q Do you consider marijuana smoke to be clean?

A No.

Q Do you consider cigarette smoke to be clean?

A No.

[. . .]

Q However, you consider marijuana smoke and cigarette smoke to be both safe -- sorry. Let me rephrase. Scratch that.

You consider marijuana smoke and cigarette smoke to both be unsafe and unclean; is that correct?

A Yes.

Q In your opinion, is marijuana smoke or cigarette smoke pumping through the vents from another person's unit a violation of Section 15 on the page that has the Bates Number PD 020?

A Well, on those two, evidence -- I'd say for those two, yes.

DEPOSITION OF DIANA WILLIAMS, RELEVANT EXCERPTS (APRIL 30, 2018)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

PHYLLIS DAVIS,

Plaintiff,

v.

ECHO VALLEY CONDOMINIUM ASSOCIATION, CASA BELLA PROPERTY MANAGEMENT, INC., MOISEY LAMNIN, ELLA LAMNIN, AND WANDA RULE,

Defendants.

Case No.: 2:17-cv-12475

Honorable David M. Lawson

Magistrate Judge Anthony P. Patti

The deposition of DIANA WILLIAMS, taken in the above-entitled cause before Susan E. Castino, (CSR 4856) and Notary Public for the County of Wayne, Michigan, at 1000 Town Center, Southfield, Michigan, on Monday, April 30, 2018, commencing at or about the hour of 10:00 a.m.

[. . .]

Q You're aware of two individuals who moved out of Echo Valley because of smoking?

A Uh-huh.

[. . .]

Q And, earlier, you testified that you raised the issue of smoking; is that correct?

A Yes.

Q And when did you raise this issue?

A I don't remember when. I believe on and off a lot. But recently I got a vent filter because it was intolerable.

Q What was intolerable?

A The smoking coming from another unit.

Q The smoking from another unit entered your unit?

A Uh-huh.

[. . .]

Q But you smell smoke in your unit?

A Yes.

Q And does that come from the door, the vents?

A Vents.

Q How do you know it comes front the vents?

A Because when I'm sitting there in a room watching TV or something, I can smell it coming through the vents.

Q And how often do you smell smoke?

A Almost every day.

[. . .]

Q (By Mr. Gocha) Have you taken a position at a board meeting as to whether cigarette smoke coming through air vents in someone's unit is a health hazard?

A Yes.

Q What was that position?

A It's a health hazard.

Q Is that position the same today?

A Yes.

[. . .]

Q Do you have a position as to whether cigarette smoke can constitute a nuisance to those who do not smoke?

A I never thought of it as a nuisance, per se, that way -- the way you're presenting it, I just know that it can cause health hazard is what I said.

Q When the cigarette smoke was going into your unit --

A Yes.

Q -- did that make you uncomfortable?

A Yes.

[. . .]

Q How did it make you uncomfortable?

A Hard to breathe. Open windows. Coughing.

Q Did it reduce the enjoyment of your unit?

A Yes.

Q How did it reduce the enjoyment of your unit?

A I couldn't sit still and watch a program I was watching. I had to get up and move around.

[. . .]

Q Have you ever taken a position as to whether smoking coming from one unit to another unit is in violation of this particular section?

A It was never presented to me that way to take a position.

Q Do you have a position?

A Yes.

Q What is that position?

A Yes, it's in violation.

[. . .]

Q Have you ever been to a building other than at Echo Valley where you've smelled cigarette smoke coming out of vents?

A No, I haven't. And I've lived in apartments and I haven't.

MINUTES OF THE ECHO VALLEY CONDOMINIUM ASSOCIATION (EVCA) (NOVEMBER 2, 2015)

ECHO VALLEY CONDOMINIUM ASSOCIATION (EVCA)
Minutes
November 2, 2015 6:00 P.M.
Echo Valley Clubhouse
Bylaw Committee Meeting

Meeting Called By
Phyllis Davis Co-Chair

Type of Meeting
Bylaw Committee Meeting - 2

Committee Members
Phyllis Davis, Louise Genovese, Beatrice Jones

Committee Co-Owners
Lisa Gaines, Colleen Markus

Absent
Diana Williams, Ed Buatti

Call to Order
6:10 pm

[. . .]

ARTICLE VI: RESTRICTIONS

Section 1 A & B to do list

1. Recommend review of Farmington Hills city laws relating to:

a. Single family residence limitations

b. Residence number of persons limitation per unit bedroom numbers: one, two and three so as to conform with city occupation laws.

2. Recommend adding a Section 16

a. For health and safety of co-owners and family/occupants of apartment areas and common area restriction.

3. Recommend oral smoking of any plant material, A.K.A. tobacco, marijuana, heroin, etc., be:

a. Restricted to outside private porches or patios only.

b. Restricted from common areas, A.K.A. entry hails, laundry areas, sidewalks, parking area, club house, pool area. Restricted so as to be free of nuisance, offensive, dangerous health and safety activity to all co-owners and personnel in the Echo Valley Condominium complex grounds.

DEPOSITION OF COLLEEN O'ROURKE, RELEVANT EXCERPTS (MAY 2, 2018)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

PHYLLIS DAVIS,

Plaintiff,

v.

ECHO VALLEY CONDOMINIUM ASSOCIATION, CASA BELLA PROPERTY MANAGEMENT, INC., MOISEY LAMNIN, ELLA LAMNIN, AND WANDA RULE,

Defendants.

Case No.: 2:17-cv-12475

Honorable David M. Lawson

Magistrate Judge Anthony P. Patti

The deposition of COLLEEN O'ROURKE, taken in the above-entitled cause before Susan E. Castino, (CSR 4856) and Notary Public for the County of Wayne, Michigan, at 1000 Town Center, Southfield, Michigan, on Wednesday, May 2, 2018, commencing at or about the hour of 10:00 a.m.

[. . .]

Q So around 4:00 in the morning, Phyllis Davis felt it necessary to send you an e-mail regarding the heavy smoke in her condo; is that correct?

A Apparently.

Q And you responded by stating in the second sentence of your paragraph, here: I can put this on the agenda for the March meeting to see if the board would like the attorney' opinion on smoking in a condominium.

Do you see that?

A I do.

[. . .]

Q Do you know if this was put on the board's meeting agenda?

A Yes, it was.

Q Or do you know if the board discussed smoking?

A The board -- she discussed it every meeting. And the board discussed it with her every meeting.

[. . .]

Q So you're aware that she -- she told you that Tony verified with utter surprise the enormous amount of smoke; is that correct?

A Yes.

Q Did you ever go to the unit to verify the smoke for yourself?

A No, I did not.

Q So you never stepped foot in the unit?

A Not in her condo, no.

[. . .]

Q But the only association that you've ever received a complaint for regarding smoking is at Echo Valley, correct?

A Is Echo Valley, yes.

[. . .]

DEFENDANTS' ECHO VALLEY CONDOMINIUM ASSOCIATION (EVCA) MOTION FOR SUMMARY JUDGMENT, RELEVANT EXCERPTS (JUNE 18, 2018)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

PHYLLIS DAVIS,

Plaintiff,

v.

ECHO VALLEY CONDOMINIUM ASSOCIATION, CASA BELLA PROPERTY MANAGEMENT, INC., MOISEY LAMNIN, ELLA LAMNIN, AND WANDA RULE,

Defendants.

ORAL ARGUMENT REQUESTED

Case No. 17-12475

Hon. David M. Lawson

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In support of their Motion For Summary Judgment, Defendants Echo Valley Condominium Association and Casa Bella Property Management, Inc. rely upon the facts and arguments set forth in their Response to Plaintiff's Motion for Summary Judgment and in the attached Brief.

On June 18, 2018, the undersigned counsel participated in a conference call with Plaintiff's counsel seeking concurrence in the requested relief. The undersigned explained the basis for the requested relief, but Plaintiff did not provide her concurrence to the relief requested in Defendants' Motion for Summary Judgment.

STARR, BUTLER, ALEXOPOULOS
& STONER, PLLC

By: /s/ Kay Rivest Butler
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Dated: June 18, 2018

[. . .]

C. Summary Judgment Must Be Granted to Defendants as to the Breach of Covenant Claims in Count IV.

Plaintiff also seeks to hold Defendants liable for an alleged failure to enforce the Bylaw provisions on nuisance, annoyance, offensiveness, increased insurance rates, or safe, clean and sanitary provisions. However, the Complaint is devoid of any claim of breach of covenant as to a Bylaw provision on "Unlawful and Offensive" conduct. Since Plaintiff has not plead that claim, it is not part of her lawsuit and she cannot now attempt to base any claim upon an alleged breach of any Bylaw provision for "Unlawful

and Offensive" conduct. *See Tucker v. Union of Needletrades, Indus., & Textile Emps.*, 407 F3d. 784, 787-88 (6th Cir. 2005).

As to the breach of covenant claims in Plaintiff's Complaint, Plaintiff alleges that Defendants violated their contractual duties to enforce the Bylaws (*see* Amended Complaint, Dkt.#30, PgID 770, para. 93). The gravamen of Plaintiff's claims in Count IV against these Defendants is that Defendants have not discharged their responsibilities by allegedly failing to enforcement the Bylaws against other Co-owners. Such a claim necessarily implicates the business judgment rule as Defendants "enjoy the protection of the business judgment rule in discharging [their] responsibilities." *Adelman v. Compuware Corp.*, 2017 WL 638-9899, at *3 (Mich. Ct. of Appeals, Dec. 14, 2017) (citing *Polk v. Good*, 507 A2d 531, 536 (Del Supr. 1986)). Decisions as to whether smoking in one's unit violates any covenants set forth in the Bylaws and whether to take any enforcement action are subject to the well-established business judgment rule that requires deference to Board decisions, including those for non-profit Associations. *See Ayres v Hadaway*, 303 Mich 589; 6 NW2d 905 (1942); *Reed v Burton*, 344 Mich 126, 131; 73 NW2d 333 (1955). "The [business judgment] rule creates the presumption "that in making a business decision that the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation." *Adelman*, at * 3, citing *Polk*, 507 A2d at 536. Thus, as long as the Association controls its affairs within the limits of the law, matters of business judgment and discretion are not subject to judicial review. *See Reed v Burton*, 344 Mich at 131.

Nothing in Article I, Section 4(a)(11) requires Defendants to take specific action in regards enforcement of Bylaws and Plaintiff cannot dictate otherwise. Here, Defendants installed a fresh air system on Plaintiff's furnace and requested that the Co-Owners of Unit 115 control the smoking in their Unit. Defendants did not have the authority to implement a smoking ban as to what occurs within other Units, regardless of whether such efforts are labeled enforcement of the nuisance, annoyance, insurance increases, or cleanliness Bylaw provisions. Nevertheless, Defendants attempted, albeit unsuccessfully, to obtain such authority through a Co-owner vote to amend the Master Deed.

Plaintiff bears the burden of proof to show that the Board's decisions as to enforcement of these Bylaw provisions falls *outside* the protections afforded by the business judgment rule. *In re Butterfield Estate*, 418 Mich 241; 341 NW2d 453 (1983). Plaintiff has not done so. She cannot do so in light of Defendants' actions in regards to smoking taking place in other Co-owners' Units. Defendants' actions are entitled to deference under the business judgment rule and cannot be second-guessed through a breach of covenant claim. Plaintiff cannot be allowed to circumvent the business judgment rule by bootstrapping contractual claims against other Co-owners against these Defendants.

Even regardless of the extreme deference to be afforded to Defendants' decisions under the business judgment rule, Plaintiff's breach of covenant claims fail. As to the nuisance provision of the Bylaws, Plaintiff's attempt to rely upon the testimony of a few Board members is misplaced because not only does it fail to

establish nuisance or a breach of covenant, but such generalized testimony does not address whether smoking in other Units constitutes a nuisance in Plaintiff's Unit. As set forth above, Plaintiff's claim does not satisfy the requirements of a nuisance.

Nor does Plaintiff present any controlling authority holding that an annoyance is legally actionable so as to support a claim for breach of covenant. Even if she had, she cannot show that Defendants breached any contractual duty to Plaintiff in that regard, especially in light of the business judgment rule and Defendants' actions.

Article VI, Section 4 of the Bylaws prohibits Co-owners from doing anything that "will" increase the insurance rate. Ms. Genovese's testimony in that regard does not support Plaintiff as she only testified that cigarette smoking "could" increase the rate of insurance and there was no foundational support for even that statement (Ex. 2, Genovese Dep. Tr., p. 27). Plaintiff has presented no evidence that smoking actually will increase insurance rates. Her speculation is insufficient to withstand Summary Judgment.

Finally, Plaintiff cannot credibly argue smoking in one's Unit creates a condition that is not safe, clean or sanitary in violation of Article VI, Section 15 of the Bylaws. The record does not contain any evidence from any source as to the condition inside Unit 115 or any other Unit. Without evidence as to the interior of such Units, Plaintiff cannot establish that such Units were not safe, clean or sanitary in violation of the Bylaws.

For the reasons set forth above and in Defendant's Response to Plaintiff's Motion for Summary Judgment,

Defendants request that this Honorable Court grant their Motion for Summary Judgment and Dismiss Counts I, II, III and IV of Plaintiff's First Amended Complaint.

STARR, BUTLER, ALEXOPOULOS
& STONER, PLLC

By: /s/ Kay Rivest Butler
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Dated: June 18, 2018