SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

JOSEFA IPPOLITO-SHEPHERD, **Plaintiff,** **v.** **ANGELLA FARSEROTU, *et al.*,** **Defendants.**	**Case No. 2020 CA 004616 B** **Judge Ebony M. Scott**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on January 9, 10, 11, 12, 18, 24, and 25, 2023 for a non-jury trial. The parties and Counsel for Defendant Angella Farserotu were present for the duration of trial. The Court heard testimony from Plaintiff Josefa Ippolito-Shepherd, Caterina Ippolito, Mark Vedder, Plaintiff's expert witness James Repace, Katherine Babin, James Farserotu, Defendant's expert witness Paul Burger, and Defendant Thomas Cackett.

Upon assessing the credibility of the witnesses,[1] evaluating all of the evidence before it, and considering the arguments of the parties and their Counsel, the Court makes the below Findings of Fact and Conclusions of Law in Sections II and III *infra*.

I. PERTINENT PROCEDURAL HISTORY

Plaintiff filed her Complaint against Defendants Angella Farserotu and Thomas Cackett on November 5, 2020, alleging Negligence against Defendant Farserotu (Count I); Negligence against Defendant Cackett (Count II); Private Nuisance against Defendant Cackett (Count III); Trespass

[1] *See Bouknight v. United States*, 867 A.2d 245, 251 (D.C. 2005) ("The determination of credibility is for the finder of fact, and is entitled to substantial deference.").

against Defendant Cackett (Count IV); and Injunction against Defendants Farserotu and Cackett (Count V). On November 18, 2020, Plaintiff also filed her first Motion for Temporary Restraining Order, alleging that Defendant Cackett "smokes marijuana 24/7" and that the "foul and pungent odor enters and permeates [her] home, making her violently sick . . . ." *See* Motion for Temporary Restraining Order at 1. The Plaintiff requested, as she would throughout the litigation, that Defendant Cackett be ordered to "immediately cease burning marijuana and other substances in a location and manner that allows the escape of smoke, odors, and fumes into [her] property." *Id*. On November 20, 2020, the Honorable Hiram Puig-Lugo issued an Order setting a Motion Hearing for December 7, 2020 on Plaintiff's Motion for Temporary Restraining Order. On November 23, 2020, Plaintiff filed a Supplement to her Motion for Temporary Restraining Order further illustrating the harm caused by Defendant Cackett's marijuana smoking. On December 7, 2020, at a hearing before Judge Puig-Lugo on Plaintiff's Motion for Temporary Restraining Order, Judge Puig-Lugo denied Plaintiff's Motion and scheduled a Preliminary Injunction Hearing for February 5, 2021.

On December 18, 2020, Plaintiff filed a Second Motion for Temporary Restraining Order. On January 4, 2021, Plaintiff filed a Supplement to her Second Motion for Temporary Restraining Order. On January 24, 2021, Defendant Farserotu filed a Cross-Claim against Defendant Cackett, alleging that she was erroneously named a Defendant in this matter; she is not the proper Defendant for the relief Plaintiff seeks; if any liability is imposed, Cross-Defendant Cackett is liable for all amounts due to Plaintiff and thus, if any liability is found against Defendant Farserotu, then she is entitled to be indemnified for such liability by Cross-Defendant Cackett. *See* Cross-Claim at 1-2.

On February 23, 2021, the Honorable William Jackson issued an Order denying all of the then pending Motions – namely, Plaintiff's Second Motion for a Temporary Restraining Order,

filed on December 18, 2020, Defendant Farserotu's Motion in Limine to preclude evidence at the parties' February 5, 2021 Hearing, filed on February 3, 2021, Defendant Farserotu's Motion for Physical Examination, filed on February 4, 2021, Plaintiff's Motion for Sanctions and Defendant Farserotu's Motion for Sanctions, both filed on February 4, 2021, and Defendant Farserotu's Motion for a Protective Order, filed on February 4, 2021.

On March 5, 2021, the parties appeared before Judge Jackson for a continuation of the February 5, 2021 Preliminary Injunction Hearing and Defendant Cackett provided the Court with the registration number for his medical marijuana card. *See* March 5, 2021 Hearing. Also during this Hearing, Judge Jackson construed the arguments made by Defendant Farserotu in her Motion for Sanctions, as a Motion to Dismiss pursuant to Super. Ct. Civ. R. 12(b)(6) and orally dismissed this case, finding that Plaintiff failed to state a claim on the sole ground that smoking marijuana in one's home is legal in the District of Columbia and therefore cannot constitute an actionable nuisance. On March 12, 2021, Plaintiff filed a Notice of Appeal. On December 23, 2021, the District of Columbia Court of Appeals issued a Memorandum Opinion and Judgment agreeing with the Plaintiff that "a complaint can state an actionable nuisance claim based on conduct that is not inherently against the law." *See Josefa Ippolito-Shepherd v. Angella Farserotu, et al.*, 21-CV-172, Mem. Op. & J., 4 (D.C. Dec. 21, 2021). Relying upon *Carrigan v. Purkhiser*, 466 A.2d 1243 (D.C. 1983), the Court of Appeals held that "conduct resulting in interference with the plaintiff's use and enjoyment of her own property can amount to an actionable private nuisance even if the conduct is confined to the property of the plaintiff's neighbor and is lawful in itself." *Id.* Accordingly, the March 5, 2021 dismissal was reversed and the case was remanded.

On January 14, 2022, the case was reopened. On January 18, 2022, Plaintiff filed a third Motion for Emergency Restraining Order and Preliminary Injunction Preventing the 3005 Ordway

Street Residents and their Guests from Smoking Marijuana or Tobacco Based Products in their Homes or on their Property, and on March 4, 2022, Plaintiff filed a Supplement to her Motion. On February 17, 2022, Plaintiff filed a Motion for Expert Testimony and Witnesses. On March 16, 2022, Plaintiff filed a Motion to Reconsider Emergency Restraining Order Injunction. On July 18, 2022, this Court issued an Order Denying Plaintiff's Motions[2] and Expediting the Non-Jury Trial.[3]

On October 31, 2022, Plaintiff filed a Motion for Restraining and Protective Order against Defendant Cackett. In the Motion, and at the parties' subsequent Pretrial Conference held on November 27, 2022, Plaintiff sought an Order from the Court prohibiting Defendant Cackett from coming onto Plaintiff's property, as she contended that Defendant Cackett illegally trespassed upon her property on October 20, 2022, and among other things, took pictures. At the conclusion of the Pretrial Conference, based upon the testimony of the parties, including Defendant Cackett who admitted that he entered the Plaintiff's property on the day in question and took pictures (although he testified that he did so because he saw a large rat and wanted to take a picture of it and send it to the health department), the Court granted Plaintiff's Motion for Restraining and Protective Order in part, and ordered Defendant Cackett to stay off Plaintiff's property. The Stay Away Order terminated on May 23, 2023. *See* Pretrial Order, December 1, 2022 at 4.

Following the parties' Non-Jury Trial in January of 2023, Plaintiff sent numerous emails to Chambers alleging violations of the Stay Away Order and requesting that the Order be extended.

[2] This Court denied the following Motions: (1) Plaintiff's third Motion for Emergency Restraining Order and Preliminary Injunction Preventing the 3005 Ordway Street Residents and their Guests from Smoking Marijuana or Tobacco Based Products in their Homes or on their Property, filed on January 18, 2022; (2) Plaintiff [sic] Motion for Expert Testimony and Witnesses, filed on February 17, 2022; and (3) Plaintiff's Motion for Reconsideration of Emergency Restraining Order and Injunction, filed on March 16, 2022.

[3] The Honorable William Jackson retired during the pendency of this case. On April 1, 2022, the matter was transferred to the undersigned.

On May 2, 2023, this Court issued a *sua sponte* Order setting a Hearing on Plaintiff's requests. On May 3, 2023, the parties appeared for a Hearing and, based upon the testimony of the parties and the entire record therein, the Court extended the Stay Away to June 5, 2023.

II. FINDINGS OF FACT

1. Plaintiff Josefa Ippolito-Shepherd resides at 3007 Ordway Street, NW, in Washington, D.C. in a duplex/semi-detached property she purchased in June of 1988.
2. Defendants Angella Farserotu and Thomas Cackett are the Plaintiff's neighbors and reside in the adjacent duplex property located at 3005 Ordway Street, NW, in Washington, D.C.
3. The Plaintiff shares a common wall ("the eastern wall") with Defendants Farserotu and Cackett.
4. Defendant Farserotu is the owner of 3005 Ordway Street, NW.
5. Defendant Cackett is a tenant of Defendant Farserotu and has resided in the accessory ground level apartment of 3005 Ordway Street, NW, since February of 2005.
6. The Court heard testimony from Caterina Ippolito, Plaintiff's niece, who testified that on her last visit to Plaintiff's home on October 12, 2022, she witnessed Defendant Cackett smoking marijuana. On this day, she was assisting her aunt cook dinner and could smell the odor of marijuana inside Plaintiff's home. She walked outside to get fresh basil from Plaintiff's plants, and could smell a really strong odor of marijuana. She then saw Defendant Cackett smoking on the adjacent patio near Plaintiff's air vent. The smoke was wafting toward Plaintiff's patio and toward Plaintiff's home.

7. Caterina Ippolito cut short a visit with Plaintiff on one occasion because, after Defendant Cackett smoked marijuana on the outside patio attached to his apartment, Plaintiff began to suffer from a bad headache.
8. As a consequence of Defendant Cackett's marijuana smoking and the effects it has on Plaintiff's health, Caterina Ippolito has not visited her aunt since October of 2022.
9. The Court heard testimony from Marc Vedder, who testified that he has performed gardening work for Plaintiff over the last 17 or 18 years, and usually visited 4 or 5 times a year. He has also performed some work for Defendant Farserotu over the years and knew the Defendants from being at Plaintiff's home.
10. Vedder testified that Plaintiff's home was well-maintained and well-kept.
11. Vedder testified that of the odors he has smelled at the property, he has smelled paint, natural smells, and what he assumed to be marijuana outside.
12. The Court heard testimony from Plaintiff's expert witness, James Repace, who was qualified as an expert in secondhand and thirdhand smoke.[4]

[4] While Repace was qualified as an expert in secondhand and thirdhand smoke, his expert report was deemed inadmissible by this Court. *See, e.g., Presley v. Commercial Moving & Rigging, Inc*., 25 A.3d 873, 893 (D.C. 2011) ("However, while experts may rely on hearsay to form their opinions, their testimony is not a vehicle by which evidence that is otherwise inadmissible may be introduced. The trial court properly applied this rule because the report upon which the expert relied constituted inadmissible hearsay, and thus we can see no abuse of discretion in the trial court's decision to preclude the admission of the accident report."). Included in Repace's report were results of cannabis wipe testing performed in Plaintiff's home by the BEAR Laboratory in Berkeley, CA. This Court held that the wipe tests were not of a type for which the underlying reliability of the data could be sufficiently explored through cross-examination of the testifying expert. *See In re Melton*, 597 A.2d 892, 904-906 (D.C. 1991). The Court noted that even if the Court reached a different conclusion after applying the *Melton* factors, pursuant to Rule 403 of the Federal Rules of Evidence, the exclusion of the Berkeley wipe tests was proper as the probative value of allowing the tests was substantially outweighed by the dangers of unfair prejudice to the Defendants, as there was no independent basis to evaluate the conclusions contained within the report. Additionally, the Court expressed concerns related to the report itself – namely that the

13. Repace holds a Master of Science ("MSc") Degree in physics from the Polytechnic Institute of Brooklyn. He has authored 66 peer-reviewed papers in the scientific literature and has co-authored 3 peer-reviewed publications with the Stanford University Department of Civil and Environmental Engineering regarding secondhand smoke infiltration in multi-unit housing, including row houses, attached houses, and duplex homes.

14. Repace's work experience in environmental health includes 19 years as a senior air policy analyst and staff scientist at the United States Environmental Protection Agency, in the Office of Air and Radiation, Indoor Air Division, and the Office of Research and Development. Repace also served on detail to the Occupational Safety and Health Administration, contributing to proposed rules on environmental tobacco smoke and indoor air pollution.

15. Since 2006, Repace has had 85 clients, including 4 clients in Washington, D.C, with second and thirdhand smoke infiltration problems that reported multiple effects from involuntary exposure to second and thirdhand smoke contamination of their living space, including asthma aggravation, breathing difficulty, headaches, dizziness,

---

date of the report used by Repace during his trial testimony was different from the date of the report proffered for admission by Plaintiff, and that the report contained a minor discrepancy (although the Court notes that this discrepancy did not alter Repace's findings or conclusions). Notwithstanding the above, experts may testify based upon documents not admitted into evidence. Indeed, "'[e]xperts may testify on the basis' of not only personal observation and evidence admitted at trial, but also 'other sources relied upon in their fields or specialties.'" *Presley*, 25 A.3d at 893 (citing *L.C.D. v. District of Columbia ex rel. T.-A.H.D.*, 488 A.2d 918, 921 n.8 (D.C. 1985) (quoting S.W. GRAAE, DISTRICT OF COLUMBIA STATUTORY AND CASE LAW ANNOTATED TO THE FEDERAL RULES OF EVIDENCE ¶ 7.9 (1976))). Therefore, Repace was allowed to testify based upon his personal observations, evidence admitted at trial, other sources relied upon in his field, and his expert report, except he was foreclosed from testifying about any opinions that relied upon the Berkely wipe tests.

coughing, eye/nose/throat irritation, respiratory infections, congestion, bronchitis, mucus secretion, lung irritation, heart problems, choking, allergic reactions, and hospitalization.

16. Repace testified that secondhand smoke is the smoke emitted from the burning end of a cigarette, marijuana joint, or vape pen, while thirdhand smoke consists of the chemical deposits left on surfaces exposed to secondhand smoke that can still emit vapors into the air after the source of smoke has been extinguished.
17. Repace testified that tobacco smoke and marijuana smoke have substantially similar irritating and carcinogenic materials. In addition, the effects on the eyes, nose, and throat are the same.
18. Repace testified that prolonged exposure to secondhand and thirdhand smoke has numerous negative effects in both children and adults. Older adults are especially sensitive, but the effects on all ages are well-known.
19. Repace testified that marijuana smoke emits more smoke than cigarette smoke and that compounds will float from one unit in a duplex to another.
20. Repace did not conduct a site visit at Plaintiff's home, but instead used "modeling," a technique he has previously used to observe concentrations of nicotine in non-smoking hotel rooms that were in the same building as smoking rooms to observe concentrations of nicotine in the non-smoking rooms.
21. Repace applied this modeling methodology to determine that the air in Plaintiff's home was very unhealthy.
22. Repace testified that the concentration of particles within the air of Plaintiff's home while Defendant Cackett is smoking would, based on the modeling, vary significantly.

23. Repace testified that smoke can migrate from one room to another room by a shared wall and that the levels of smoke within both rooms become the same after 90 minutes. Further, it takes 20 minutes with doors open for the smoke to clear.
24. Repace testified that air migration between structures, such as duplex houses, occurs due to inter-unit pressure differences driven by winds, thermal rise, running of exhaust fans, opening and closing windows and doors, and through cracks and holes in the building fabric, as buildings are not airtight.
25. Repace testified that the forces that drive smoke from Defendant Cackett's home into Plaintiff's home can thus be driven by winds that blow from one side of the structure to another, and by the chimney effect whereby smoke transfers horizontally between units.
26. Repace testified that if Plaintiff runs the exhaust fan in her kitchen or bathroom, that would create negative pressure which would draw air from Defendant Cackett's unit into Plaintiff's home.
27. Repace testified that smoking marijuana should be limited to outdoors and at least 25 feet from a building. Smoking within 25 feet of a building will affect the air quality in the building and Defendant Cackett smoking outside, near Plaintiff's backyard, affects the air quality in Plaintiff's home and exposes her to toxic fumes.
28. Repace also testified that the infiltration of marijuana smoke into Plaintiff's home cannot be 100% eliminated or controlled using sealing or ventilation.
29. Repace testified that the health effects of exposure to marijuana smoke could be dizziness, tachycardia, and depression.

30. Repace testified that the pollutants from tobacco and marijuana smoke can stick to terminal bronchioles for days, weeks, or even months.
31. Repace testified that a pipe that burns marijuana, like the type Defendant Cackett uses, produces twice the amount of particles than tobacco.
32. Repace testified that approximately 28.9 million people experience secondhand smoke infiltration in their apartments or homes each year.
33. Repace concluded that the level of smoke in Defendant Cackett's unit has permeated the structure of Plaintiff's unit and has migrated through the wall through whatever openings exist.
34. Repace concluded that air pollution caused by secondhand and thirdhand marijuana smoke emanating from Defendant Cackett's unit and entering Plaintiff's unit exposed Plaintiff to significantly unhealthy air quality and poses a hazard to her physical and mental health.
35. The Court heard testimony from the Plaintiff. She testified that she is a scientist with a Master's degree in Health Education and a Doctorate in Health Education. Plaintiff testified that she did her post-doctorate work in public health.
36. For the past 4 years, Plaintiff has been unable to enjoy her home and has hated coming home due to a fear of smelling marijuana smoke. Plaintiff likened the smell of the smoke to feces or skunk.
37. Plaintiff suffers adverse health episodes when Defendant Cackett smokes marijuana both inside and outside of the property, such as severe headaches, nausea, vomiting, and respiratory issues. Each time Defendant Cackett smokes, Plaintiff begins suffering ill effects within minutes.

38. Plaintiff believes that Cackett's marijuana smoke causes toxic fumes to enter her home, posing health risks to herself and her guests.

39. As a result of Defendant Cackett's marijuana use, Plaintiff has suffered a loss of her ability to work, diminished quality of life, and loss of use and enjoyment of her property.

40. Plaintiff testified that it would be drastic for her to move at this stage of her life.

41. Plaintiff enjoyed a friendly and cordial relationship with both Defendants before all of this occurred. Plaintiff stated that she and the Defendants would even have dinner together on occasion.

42. Plaintiff began to complain about the marijuana smell to Defendants Farserotu and Cackett in late 2018 / early 2019, as indicated in the below email ***exchange on Saturday, October 5, 2019:***

> Hi Tom,
>
> *FYI, kind consideration, and urgent action, today, after a short stay outside the house, upon returning and entering my home, the horrible Cannabis smell was overwhelming, so much so that I got very, very nauseated/sick and started vomiting repeatedly until nothing was left in my stomach.*
> *Soon after, I went to see you... your door was open, with the screen door, and the Cannabis smell emanating from your apt was so potent that again I felt very nauseous. I knocked at your door, and called your name several times, with no response from you.*
> *Please know that I am VERY, very concerned, as I cannot afford to be sick in my own home. The Cannabis smell/odor seems to be spreading throughout the bldg, including my house and permeates everything, especially ALL FABRICS. For the last few weeks I have left my house doors open to refresh the air within my home, to no avail. Know that I have had to wash everything and had to take my coats and others to the dry cleaner to remove the offending Cannabis smell.*
> *Further, I will be away for a few weeks and I am VERY CONCERNED that the Cannabis smell will be trapped in my home, as potent as ever, permeating my clothes, and waiting for my return.*

This is a very difficult situation for me, as for 30 plus years, I NEVER, ever had any issues with Angella (whom I am copying here), but, unfortunately, if the Cannabis odor continues to spread to my home, I will have to take some action, as it severely affects my health and wellbeing.
I do hope that, after receiving this email, Angella talks with you about this serious situation, and you both reach an agreement to a forever, ever NO SMOKING inside the house and/or close to the perimeter of the bldg/houses, as well as a way to remove the current smell from the bldg.
Please know that I wanted to say this in person as I have done in the past, and I did try to find you, but you did not answer to my calling to your door. As I will be leaving soon, I wanted to let you know my concerns and the severity of the situation.
I do hope there is a somple [sic] way to address this issue for the wellbeing of all concerned.
I very much appreciate confirmation of receipt of this email.

Best regards,
Josefa

Pl. Exh. 5 at 198.

43. Plaintiff testified that at one point, Defendant Farserotu offered to pay for an inspection to determine the source of the issue, as illustrated by a ***November 3, 2020 letter sent from Defendant Farserotu to Plaintiff***:

Josefa:

Since 1988 when you moved into your semi-detached, private home at 3007 Ordway St NW, Washington DC, you have been complaining about unpleasant odors entering your home from next door at 3605 Ordway Street. On several occasions I have suggested that you should hire a professional to find the cause of this problem. When I renovated my home in 1994 and 2004, my contractor and his crew checked that the seams in the walls between our duplex houses were air tight. Two firewalls were installed in my kitchen to prevent odors from escaping between our houses.
In order for you to stop harassing me, and in the interest of some neighborly good will, I will help you with defray build engineer inspection expenses not to exceed One Thousand Five Hundred U.S. Dolars [sic] ($1,500.00) to determine the validity and reasonableness of your claim.

Sincerely,
Angella Farserotu

Pl. Exh. 5 at 205.

44. Plaintiff testified that she attempted to resolve the issue and instead was met with hostility and an unwillingness to understand what she was going through as illustrated by the below email exchanges between Plaintiff and Defendants Cackett and Farserotu:

> ***On Tuesday, December 3, 2019, at 1:43 PM, Plaintiff wrote to Defendant Cackett***:
>
> *Tom,*
>
> *I guess you will not stop smoking close to the house … too bad Tom! Very disappointed with your total lack of concern for your neighbors!*
>
> *J*

Pl. Exh. 5 at 200.

> ***At 2:12 PM, that same date, Plaintiff wrote to Defendant Farserotu***:
>
> *Angella,*
>
> *I called 311, and they forwarded my call to the police. The police explained to me that it is NOT LEGAL IN DC to smoke Marijuana in any place outside, ONLY INSIDE A HOUSE.*
> *As you have a NON-SMOKING clause, nobody can smoke inside your house. So either smoking Marijuana inside or outside property, in this case, IS NOT LEGAL, and the police can intervene.*
> *Humbly, one more time, please ask Tom to NOT SMOKE CANNABIS EITHER INSIDE (as per your Lease clause) OR OUTSIDE (as per DC law) YOUR HOUSE.*
> *Next time I get sick/vomit, I will immediately call the police.*
> *Sorry about this matter, but as I have said repeatedly, I cannot be sick in my own [home]. Thanks for your understanding and for having your Tenant/Tom respect your Lease Contract and DC Laws.*
>
> *Josefa*

Id.

At 2:16 PM, that same date, Defendant Cackett wrote to Plaintiff:

Go to hell Do not call me or contact me again. It is because of you I am smoking outside. From this moment on I will smoke inside my home as I have a legal right to. In case you haven't heard smoking marijuana is legal in D.C.

Id.

On Saturday, September 12, 2020, at 8:53 AM, Plaintiff wrote to Defendant Cackett:

Tom,

Your putrid smoking SMELL woke me up and I am violently SICK now. My ENTIRE HOUSE smells!!! You must be smoking inside!!! I just don't know how to ask you any more to PLEASE STOP SMOKING INSIDE OR CLOSE TO THE HOUSE!!! I am VERY SICK !!!!!!
PLEASE, PLEASE TOM, BE A GOOD NEIGHBOOR!!!!!!!

Josefa

Pl. Exh. 5, pg. 202.

On Monday, November 9, 2020, at 5:53 PM, Plaintiff wrote to Defendant Farserotu:

Angella,

Your Tenant smokes continuously, and disregarding my many requests, and you are doing nothing to have him stop smoking, both onside or near the property.
This is negligence and trespassing.
I AM SICK WITH THE FOUL SMELL ALL OVER MY HOME. I cannot cook, I cannot sleep, and I cannot stay in my own home, as the putrid odor is ALL OVER.
I did a lot of work to have a proposal[5] *to identify and remedy the entry points at the shared wall, but you have not had the courtesy to respond at all. Really bewildering and pitiful!*

Josefa

[5] This proposal is reflected in the November 3, 2020 letter sent from Defendant Farserotu to Plaintiff. *See* Pl. Exh. 5 at 205.

Id.

> ***On Tuesday, November 17, 2020, at 3:19 PM, Plaintiff wrote to Defendant Farserotu:***
>
> *Angella,*
>
> *PLEASE, PLEASE, stop this nightmare!*
> *I went out, because I couldn't breathe, and just came back, and the ENTIRE HOUSE smells like FECES. And, it is too cold to open the doors/windows!!!!!!!*
> *Why are you so uncaring?*
> *PLEASE STOP THIS NIGHTMARE ONCE FOR ALL!!!!!!*
>
> *J*

Pl. Exh. 5 at 203.

> ***That same date, at 11:03 PM, Defendant Farserotu wrote to Plaintiff***:
>
> *Your note sent to me at 3:19 pm today and to set the record straight, it is not Tom that is smoking. He has not been here all day. There is more than one person who smokes on Ordway Sttreet [sic]. Go fiind [sic] them.*
>
> *Angella*

Id.

> ***The next day, Wednesday, November 18, 2020, at 8:24 AM, Plaintiff wrote to Defendant Farserotu:***
>
> *Angella,*
>
> *Your note is callous and insulting, to say the least.*
> *I write to you when the odor is extremely strong INSIDE MY HOUSE, especially in the kitchen and bathroom (next to shared wall), and when I get sick because of the pungent and foul smell that expands in my entire home. The scent is from your home, and not from others. At this point (after more than two years), the putrid odor may be embedded on your walls and furniture and as such it invades my home the entire time, even when your Tenant is not smoking. I did a lot of research and calls to get you a specialized business to assess and diagnose the problem, and to give you*

possibilities of remediation to stop the smoke and odor from entering my home.
YOU HAVE DONE NOTHING, and totally disregarded the proposal sent to you, although you wrote that you wanted to resolve the issue.
What goes around comes around Angella!
Your total lack of concern for my health, with your house foul odor invading/trespassing into my home is inconceivable and offensive, and it may also hurt you and your caregiver, as you both inhale these foul odors, 24/7.
Know that your total lack of action, and laissez faire attitude has pushed me to the limit, resulting in a significant emotional turmoil when filing the Civil Suit, as well as significant financial hardship.
I do hope that you seek the appropriate counseling to help you reconsider the facts and to take the necessary actions to remedy whatever is needed to stop invading my home.

Josefa

Id.

On Friday, November 20, 2020, at 6:07 PM, Plaintiff wrote to Defendant Farserotu:

Angella,

For the record, your Tenant is smoking again, filling my entire house with awful odors. Another night sleepless and nauseated!!

J

Pl. Exh. 5 at 204.

That same date, at 7:19 PM, Plaintiff again wrote to Defendant Farserotu:

Angella,

The smoke and odor is so potent, and I just vomited whatever I had in my stomach. It will be another sleepless night! I doubt that you cannot smell it, and if you don't you do have a real olfactory deficiency.
The other day when I hand-delivered the two envelopes, when I opened your storm door & the mail slot, the odor coming out of your

house was asphyxiating ... and you and your caregiver inhale these toxic fumes and odors (like me) 24/7.
Please stop this nightmare, for the health and wellbeing of all concerned.

Josefa

Id.

45. Defendant Farserotu has acknowledged to Plaintiff that she could smell the marijuana herself, as indicated in the below emails:

On Friday, January 17, 2020 at 2:32 PM, Plaintiff wrote to Defendant Farserotu:

Hi Angella,
As you know, I have been sick with a cold for the last three weeks. As result, my breathing ability and lung's capacity are limited, as my lungs are still recuperating.
Today's putrid and offensive smell of Tom's smoking Cannabis made me acutely sick, in addition to the headache and vomiting.
I beg you to assertively address this issue, even if you cannot smell the odor, in my house the smell is potent.
You have the power to resolve this issue once for all, with no if and but, as per your Lease Agreement that you told me has a no-smoking clause.
As per DC Police, my only resource is to file a civil suit against you, and I don't want to have to go this route, but I will, if the putrid and offensive smell continues to permeate my home, as it affects my health and quality of life.
I just hope that the health and wellbeing of your 33+ years neighbors is more important than a non-compliant Tenant.
Regards,
Josefa

Pl. Exh. 5 at 248.

That same day, at 3:47 PM, Defendant Farserotu responded to Plaintiff:

Josefa - I know you are not exerating [sic] about to order [sic]. I've previously experience it myself and it also made [me] sick. And, as I had mentioned to you, the smelling-sensation is one of the first thing that goes for Parkinson's people.
I'll keep you posted on my finding a quick to solve this problem.
Angella

> *PS The police officer did smell the "pot" in your home but not in mine – strange*

Id. (emphasis added).

> ***Plaintiff sent Defendant Farserotu three emails on February 5, 2020 at 10:36 AM, 5:06 PM, and at 9:23 PM, pleading with Defendant Farserotu to make the smell stop immediately, to which Defendant Farserotu replied at 1:43 AM in the early hours of February 6, 2020:***
>
> *I just sent an email to Tom about the smell and how serious this issue is. I know the frustration, as I had a swif [sic] if [sic] it the another [sic] day. I know he has been smoking between my side and Pat's.*

Pl. Exh. 5 at 249 (emphasis added).

46. In a ***May 8, 2020 email sent at 8:34 PM***, Defendant Farserotu also acknowledged that she knew the smell was coming into Plaintiff's home:

> *Hi Josefa — Tom is doing his best to alleviate the smell issue. He is not smoking in the apartment. Yesterday he did say he was cleaning his marijuana pipe and, in spite the fact that the fan and windows were open, the smell was extensive. It took him about 10 minutes to clear the odor out of the apartment. He is sorry for the discomfort and the inconvenience.*
> *We are both sorry that the smell penetrates into your home. I, too, get a swift [sic] of it but it lasts only for a few seconds. It doesn't linger.*
> *As you know, marijuana is legal in DC and Tom has a doctor's prescription for medicinal use.*

Pl. Exh. 5 at 250.

47. As illustrated by the aforementioned emails, the relationship between Plaintiff and Defendants broke down significantly beginning in 2019. Since 2019, Plaintiff has sent over 200 emails to the Defendants pleading with them to cease smoking marijuana on the property.

48. Plaintiff testified that her attempts to remediate the situation were met with unwillingness and downright threats by Defendants.

49. Plaintiff testified that Defendant Cackett smokes and/or burns marijuana in a manner that causes the smoke to enter into Plaintiff's residence.
50. Plaintiff further testified that the smoke has interfered with the enjoyment of her home as the smoke is strong on the first level of her home that she uses to cook, eat, and relax.
51. The Court also heard testimony from Katherine Babin, the niece of Defendant Farserotu. Babin testified that prior to the pandemic, she visited her aunt once a month or once every couple of months and never smelled anything resembling marijuana.
52. The Court also heard testimony from James Farserotu, the nephew of Defendant Farserotu. James Farserotu testified that he visited his aunt for five or six hours every two weeks for the past ten years and smelled marijuana on several occasions, but that the smell was not strong, nor did it bother him.
53. The Court also heard testimony from Defendant Farserotu's expert, Paul Burger, who is a board-certified microbial consultant, and was qualified as an expert in indoor air quality assessments.
54. Burger testified that he has not completed college, but has taken courses in environmental science. Burger has not authored any peer-reviewed articles.
55. Burger testified that on May 24, 2022, he visited Defendant Farserotu's home and was at the property over 2 hours, but did not test for particulate matter because he was charged with determining whether particles had entered Plaintiff's unit.
56. Burger's report was based on observational data and an interview with Defendant Cackett.
57. Burger acknowledged that air cleaning and ventilation repairs can reduce, but not eliminate, smoke intrusion into Plaintiff's home.

58. The Court also heard testimony from Defendant Cackett, who testified that he moved to the property in February of 2005 and signed a lease with Defendant Farserotu.
59. Cackett's lease with Farserotu contains a no-smoking clause which prohibits him from smoking inside of the unit.
60. Cackett is a 73-year-old man, who currently works as a restaurant manager in the District of Columbia and works an average of 50 hours per week.
61. Due to his health problems, Cackett began experimenting with marijuana use in 2015, including attempting to ingest it in other ways, via edibles, oils, and tinctures.
62. Cackett detailed his health issues as having skin cancer on his shin and ankle in 2017, chronic Hepatitis which was treated with an experimental treatment in 2018, sclerosis of the liver, deteriorating left hip, extreme sciatica along his left leg, 2 hip replacement surgeries, a torn rotator cuff in his right shoulder, arthritis in his right hand and fingers on both hands, and partially dislocated disc in his lower back requiring monthly injections for spine pain from 2015 to 2016 as well as physical therapy for 26 weeks.
63. Cackett testified that due to his various health ailments, he spoke with his doctor about several pain medications, including opioids.
64. In 2015, Cackett considered marijuana and upon its decriminalization in the District of Columbia, he began experimenting with ingesting it.
65. Cackett testified that all of the various alternative methods of ingesting marijuana, except smoking, had negative health effects on him, such as upset stomach, and that the response time was too long, and these other forms were not practical for his use.
66. Cackett testified that he smokes at night to alleviate pain and to assist him in going to sleep.

67. Cackett testified that he smokes marijuana 2 – 3 minutes maximum per day, and has never smoked longer than 5 minutes in a 24-hour period.
68. Cackett uses a pipe to smoke marijuana and purchases 3.5 grams of marijuana per week and smokes 2 bowls full of marijuana once per day, taking between 7 and 12 puffs on each occasion.
69. Cackett was issued a medical marijuana card by the Department of Consumer and Regulatory Affairs.[6] Cackett uses this card to purchase medical marijuana from local dispensaries.
70. Cackett testified that the effects of smoking the marijuana, for him, begin within minutes of smoking.
71. Cackett testified that he smokes outside on the patio to abide by the no-smoking clause in his lease, but that in 2016, Defendant Farserotu allowed Cackett to smoke inside when the weather was bad.
72. Cackett testified that he currently smokes inside when there is inclement weather, outside on his patio, or on the other side of his house.
73. Cackett also smokes right at the door of his apartment or by the exhaust fan located in his kitchen above the stove and beneath the microwave.
74. The above-mentioned exhaust fan in Cackett's kitchen has a recirculating vent and is attached to the shared wall with Plaintiff's property. Cackett testified that his kitchen and Plaintiff's kitchen are very close as Plaintiff's kitchen is directly above his.

[6] On October 1, 2022, the Agency split into two agencies – the Department of Buildings and the Department of Licensing and Consumer Protection.

75. Cackett testified that his and Plaintiff's bathroom are next to each other, but he does not know if his bathroom is directly below Plaintiff's.

76. Cackett testified that he recalls that many of Plaintiff's emails to him stated that the smell was coming from Plaintiff's kitchen sink and bathroom**.**

III. CONCLUSIONS OF LAW

On January 18, 2023, after the close of Plaintiff's evidence, the Court heard arguments on Defendants' Motions for Directed Verdict, which were treated as Motions to Dismiss.[7] The Court dismissed Counts II and IV, Negligence against Defendant Cackett and Trespass against Defendant Cackett, finding that the evidence presented was insufficient to support those two Counts. Thus, the Court's analysis will focus on the remaining Counts – namely, whether the Plaintiff has proven, by a preponderance of the evidence, that Defendant Farserotu was negligent, that Defendant Cackett caused a private nuisance, and whether injunctive relief is proper against both Defendants.

A. Negligence – Defendant Farserotu (Count I)

Plaintiff alleges that Defendant Farserotu has a duty to prevent the escape of toxic fumes from her property onto Plaintiff's property. *See* Compl. at ¶¶ 21-25. Plaintiff claims that Defendant Farserotu has known about the intoxicating fumes escaping from her home since July 26, 2019, and since then, Defendant Farserotu has not done anything to mitigate the issue, constituting actionable negligence. Plaintiff further alleges that Defendant Farserotu's breach of her duty to prevent the escape of toxic fumes from her property onto Plaintiff's property has caused

[7] In a nonjury trial, a defendant's motion for judgment at the close of the plaintiff's case is properly treated as a Rule 41(b) motion for involuntary dismissal, not as a subdivision (a) motion for a directed verdict. *See Marshall v. District of Columbia*, 391 A.2d 1374, 1379 (D.C. 1978). When a defendant makes a Rule 41(b) motion in a nonjury trial, or moves for a directed verdict, the court, as trier of fact, need not view the evidence in the light most favorable to the plaintiff. The court, rather, "weighs the evidence and considers credibility the same as it would at the end of the trial." *Warner Corporation v. Magazine Realty Co*., 255 A.2d 479, 481 (1969).

damages to Plaintiff, both physically and mentally, and led to a decrease in the use and enjoyment of Plaintiff's property. Plaintiff also contends that the toxic fumes are the cause of her health issues, to include sleeplessness, stomach pains, nausea, and vomiting.

"The elements of a cause of action for negligence are a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach." *Mixon v. Washington Metro. Area Transit Auth.*, 959 A.2d 55, 58 (D.C. 2008) (citing *Wash. Metro. Area Transit Auth. V. Ferguson*, 977 A.2d 375, 377 (D.C. 2009)). Expert testimony is required to prove negligence when "the subject in question is so distinctly related to some science, profession, or occupation as to be beyond the ken of the average layperson." *District of Columbia v. Billingsley*, 667 A.2d 837, 841 (D.C. 1995) (citing *District of Columbia v. Peters*, 527 A.2d 1269, 1273 (D.C. 1987)).

The District of Columbia Court of Appeals has held that a third party may be liable for damages where the third party's actions caused a "loss of use and enjoyment of [the property owner's] property . . . ." *Gaetan v. Weber*, 729 A.2d 895, 898 (D.C. 1999); *see also Spar v. Obwoya*, 369 A.2d 173 (D.C. 1977) (upholding a jury verdict in favor of plaintiff who alleged that he was injured during a robbery as a proximate cause of defendant landlords' failures to properly secure the common hallway).

The standard of care owed by an owner or occupier of land is "reasonable care under all of the circumstances." *Sandoe v. Lefta Assocs.*, 559 A.2d 732, 738 (D.C. 1988). To recover against either an owner or occupier of land, a plaintiff must show "that the defendant had notice–either actual or constructive–of the present existence of an allegedly dangerous condition." *Croce v. Hall*, 657 A.2d 307, 311 (D.C. 1995). While generally a landlord is not responsible for injuries caused by conditions developing after the lessee takes possession, a third party may recover

against the lessor or landlord of a property leased for public purposes if the party demonstrates that the injury was caused by a "condition existing when the lessee took possession" and that the lessor "knew or should have known of the condition and realized or should have realized the unreasonable risk" involved. *Smith v. Wash. Sheraton Corp.*, 328 U.S. App. D.C. 367, 135 F.3d 779, 782 (1998) (citing Restatement (Second) of Torts § 359 (1965); *see also Daly v. Toomey*, 212 F. Supp. 475, 478-79 (D.D.C. 1963), *aff'd sub nom. Muldrow v. Daly*, 117 U.S. App. D.C. 318, 329 F.2d 886 (D.C. Cir. 1964); *Hilleary v. Earle Restaurant, Inc.*, 109 F. Supp. 829 (D.D.C. 1952). A party who operates the premises but is neither the owner nor the lessee may also have a duty of reasonable care. *See F.W. Woolworth Co. v. Stoddard*, 156 A.2d 229 (D.C. 1959).

"[A]n owner of property has a duty to exercise reasonable care to cure a dangerous condition if (1) he has actual or constructive notice of the condition and (2) he has the right to exercise control over the condition." *Campbell v. Noble*, 962 A.2d 264, 266 (D.C. 2008) (citing *Youssef v. 3636 Corp.*, 777 A.2d 787, 795 (D.C. 2001)); *see also Settles v. Redstone Development Corp.*, 797 A.2d 692, 695-96 (D.C. 2002). Where the owner has ceded "the entire possession and control of the premises" to the tenant, the general rule is that the owner has no liability for incidents arising out of negligent or dangerous conditions on the premises. *Campbell*, 962 A.2d at 266; *see also Karl W. Corby Co. v. Zimmer*, 99 A.2d 485, 486 (D.C. 1953) (noting that at common law, the "tenant was the 'owner' of the premises for the term of his tenancy, and being in control of the premises as a whole, was responsible for its maintenance and upkeep.").

Thus, the general duty of care owed by a landowner in the management of his or her property is attenuated when the premises are leased, because the landlord is not in possession and usually lacks the right to control the tenant and the tenant's use of the property. Consequently, a landlord does not owe a duty of care to protect a third party from a tenant's actions unless the

landlord has actual knowledge of the actions, and the ability to control or prevent the harm. Here, Plaintiff has demonstrated that Defendant Farserotu has the right to control Defendant Cackett's use of the property, actual knowledge of the condition causing the harm alleged by the Plaintiff, and the ability to control or prevent the harm (i.e., by enforcing the no-smoking clause in her lease). The record is replete with evidence that Defendant Farserotu breached this duty. Defendant Farserotu was aware of the marijuana smoke, as well as Plaintiff's complaints of being unable to use and enjoy her home, and the claimed effects the smoking had on Plaintiff's health. Indeed, Defendant Farserotu said so herself in an email dated January 17, 2020 when Farserotu stated that she "previously experience[d] it [herself]" and that it "also made [her] sick." *See* Pl. Exh. 5 at 248. Further, in a subsequent email dated February 6, 2020, Defendant Farserotu told Plaintiff that she "just sent an email to [Defendant Cackett] about the smell and how serious this issue is. I know the frustration, as I had a swif [sic] [of] it the [other] day. I know he has been smoking . . . ." *See* Pl. Exh. 5 at 249. Despite this, Defendant Farserotu took no action to abate the nuisance created by her tenant, thereby breaching her duty to Plaintiff.

As to the third element, namely, whether the breach of duty proximately caused harm to Plaintiff, "[p]roximate cause is a test of whether the injury is the natural and probable consequence of the negligence or wrongful act and ought to be foreseen in light of the circumstances." *Sanders v. Wright*, 642 A.2d 847, 849 (D.C. 1994) (citation omitted). Conduct causes harm if it plays a substantial part in bringing about the harm. In addition, the harm must be either a direct result or a reasonably probable consequence of the conduct. Expert evidence may be required when recovery is sought for permanent injuries or where there are complicated medical questions related to causation of such injuries. *See Jones v. Miller*, 290 A.2d 587, 590 (D.C. 1972); *see also Baltimore v. B.F. Goodrich Co*., 545 A.2d 1228, 1231 (D.C. 1988). Where the causal

connection between an event and the injury is clear, expert testimony is not necessary. *See Jones*, 290 A.2d at 590-91. However, the District of Columbia Court of Appeals has found that, in medically complicated cases, "'a proximate temporal association alone does not suffice to show a causal link' because a mere temporal coincidence between two events does not necessarily entail a substantial causal relation between them." *Lasley v. Georgetown Univ.*, 688 A.2d 1381, 1387 (D.C. 1997) (quoting *Hodges v. Secretary of the Dep't of Health & Human Servs.*, 9 F.3d 958, 960 (Fed. Cir. 1993). In *Lasley*, the United States Court of Appeals for the District of Columbia Circuit certified the case to the District of Columbia Court of Appeals to answer the question of whether a plaintiff in the District of Columbia must present medical opinion testimony on causation to establish a *prima facie* case of negligence. *See id.* at 1381. The Court of Appeals answered this question in the affirmative where there are "medically complicated" issues requiring resolution by a fact-finder. *Id.* at 1385. The *Lasley* court held that the plaintiff's lack of medical expert testimony to prove causation was "fatal" to the plaintiff's claim. *Id.* Indeed, "[t]o allow a jury of laymen, unskilled in medical science, to attempt to answer such a question would permit the rankest kind of guesswork, speculation and conjecture." *Id.* at 1385 (citing *Baltimore v. B.F. Goodrich Co.*, 545 A.2d 1228, 1231 (D.C. 1988)). The Court of Appeals in *Lasley* further held that in medically complex cases, "[if] we were to conclude otherwise - that contemporaneity proved causation - we might inappropriately shift the plaintiff's burden of proof onto the defendant. Instead of requiring the plaintiff to indicate why the injury occurred, we would in effect be forcing defendants to disprove causality." *Lasley*, 688 A.2d at 1387.

Here, Plaintiff's expert, Repace, credibly testified that there are numerous health consequences from exposure to secondhand and thirdhand smoke. Repace also testified that marijuana smoke emits more particles than tobacco smoke and that smoke has penetrated

Plaintiff's unit, thereby exposing her to harmful carcinogens and particles that can cause injury to anyone who breathes them in. Plaintiff herself credibly testified that Cackett's marijuana smoke caused her sleeplessness, stomach pains, and vomiting and details, at length, her suffering in numerous emails to Defendants, many of which demonstrate the close proximity in time between the smell of marijuana and Plaintiff's subjective symptoms of physical injury. *See, e.g.,* Pl. Exh. 1 at 9, 10; Exh. 5 at 198. However, as stated above, contemporaneity is simply not enough, nor is the testimony of an expert in secondhand and thirdhand smoke, to satisfy the Plaintiff's burden of proving the causal connection between Cackett's marijuana smoking and Plaintiff's claimed physical injuries. Plaintiff has not provided the Court with testimony from a medical professional linking Plaintiff's physical symptoms to the marijuana smoking, to a reasonable degree of medical certainty, nor did the Plaintiff successfully admit into evidence medical records tending to prove this requisite element of causation. Although this Court does not doubt that Plaintiff suffered the claimed physical manifestations subsequent to her exposure to Cackett's marijuana smoke, the Court simply cannot take her word for it, alone. Thus, this Court finds that Plaintiff's lack of medical expert testimony to prove causation is "fatal" to Plaintiff's claim of negligence. *See Lasley*, 688 A.2d at 1385.

Given that Plaintiff has failed to satisfy her burden of proving causation, the Court need not consider the element of damages. However, even assuming that Plaintiff had satisfied her burden as to causation, the Court finds that Plaintiff would not meet her burden of proving damages. As to damages, "[i]t is competent for a plaintiff to testify [her]self as to h[er] pain, how [s]he suffered, the extent of h[er] suffering, and its nature and intensity, as well as to h[er] internal condition perceptible to h[er] senses." *Jones*, 290 A.2d 587 at 590. Plaintiff has credibly testified to the injuries she has sustained and Defendant Farserotu herself even acknowledged that the

marijuana odor made her sick. *See* Pl. Exh. 5 at 248. However, even though a third party can recover from a landlord if "loss of use and enjoyment of [the property owner's] property . . . ." has occurred, *see Gaetan*, 729 A.2d at 898, this Court can discern no damages suffered by Plaintiff under a negligence theory. "While damages are not required to be proven with mathematical certainty, there must be some reasonable basis on which to estimate damages." *Romer v. District of Columbia*, 449 A.2d 1097, 1100 (D.C. 1982). Plaintiff has not provided this Court with any cognizable damages (medical records, bills, or receipts) nor a basis upon which the Court may calculate actual monetary damages, despite Plaintiff praying for $500,000 in damages. Thus, an award of damages, under a negligence theory, is unsupported by the record.

B. Private Nuisance – Defendant Cackett (Count III)

"[A]s an independent tort, claims of nuisance have indeed not been viewed favorably by this court," and that "[i]n recent cases[,] we have even said that 'nuisance is a type of damage and not a theory of recovery in and of itself." *Wood v. Neuman*, 979 A.2d 64, 78 (D.C. 2009) (citing *District of Columbia v. Beretta, U.S.A., Corp*., 872 A.2d 633, 646 (D.C. 2005)). However, our jurisdiction has on occasion recognized an "actionable private nuisance." *Id.* (citations omitted). "To be actionable as a nuisance, the offending thing must be marked by 'some degree of permanence' such that the 'continuousness or recurrence of the things, facts, or acts which constitute the nuisance,' give rise to an 'unreasonable use.'" *Id; see also Reese v. Wells*, 73 A.2d 899, 902 (D.C. 1950).

In the District of Columbia, "'[a] private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land' . . . '[N]ot only the interests that a person may have in the actual present use of land for residential . . . and other purposes' are protected, but also 'the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land.'"

Carrigan v. Purkhiser, 466 A.2d 1243, 1243-44 (D.C. 1983) (quoting Restatement (Second) of Torts § 821D and cmts. B, d (1979)). Liability for nuisance "may rest upon intentional invasion of the plaintiff's interests, or a negligent one, or conduct which is abnormal and out of place in its surroundings, and so falls fairly within the principle of strict liability." *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 167 (D.C. 2013).

In *Carrigan v. Purkhiser*, the District of Columbia Court of Appeals reversed the trial court's dismissal of a private nuisance claim where the plaintiff complained of the odor and noise caused by pet dogs belonging to a neighbor in an adjacent property. The trial court in *Carrigan* held that a private nuisance claim had not been stated because "there was no suggestion that the defendant's dogs were permitted to run loose in the neighborhood or to go onto or enter the plaintiff's premises and . . . the barking occurred most frequently from inside the defendant's house . . . at times when the dogs were properly restrained." *Carrigan*, 466 A.2d at 1244 . The Court of Appeals disagreed with the trial court's conclusion and stated:

> The fact that appellee's dogs were restrained on his premises and did not enter appellant's land would be significant if appellant's claim were for trespass. However, since appellant's claim was for a private nuisance, the trial court should have considered the extent to which the smell and noise of appellee's dogs interfered with appellant's reasonable use and enjoyment of her own land, not with her right to the exclusive possession of it.
>
> . . . .
>
> To the extent that the barking and odor of appellee's dogs interfered with appellant's use and enjoyment of her home and backyard, appellant suffered an injury. If she has been obliged to spend money on deodorant sprays because of the odor emanating from the dogs, she has been monetarily damaged.

Id.

The Court of Appeals reversed a verdict for a landlord in *Reese v. Wells*. That case involved a tenant creating a nuisance by lighting a gas stove to cook food and leaving the premises,

endangering the life and property of other occupants of the apartment building. *Reese v. Wells*, 73 A.2d 899, 901 (D.C. 1950). The Court in *Reese* explained that the "[p]ollution of the air by smell and smoke emanating from burning food was not the nuisance claimed" but rather the fire hazard created by the cooking and then leaving the premises. *Id.* The Court further held that in the District of Columbia, there must be "some degree of permanence" as an essential element of a nuisance claim, as well as "a continuousness or recurrence of the things, facts, or acts which constitute the nuisance[.]" *Id.* at 902. Likewise, a nuisance, the Court explained, "must be shown to exist in fact and may not rest in speculation." *Id.*

District of Columbia Courts have not addressed the present situation where a neighboring homeowner (or occupant) with a shared common wall suffered diminution of the full use and enjoyment of her property due to marijuana smoke. However, numerous jurisdictions have upheld private nuisance claims based on noxious odors or fumes onto neighboring properties from otherwise lawful activities.[8] "In the absence of appellate or other authority in this jurisdiction, the Court may be guided by Maryland common law." *Kreuzer v. George Washington Univ.*, 896 A.2d 238, 243 n.3 (D.C. 2006) (quoting *Walker v. Indep. Fed. Sav. & Loan Ass'n*, 555 A.2d 1019, 1022 (D.C. 1989)); *see also Conesco Industries, Ltd. V. Conforti & Eisele, Inc., D.C.*, 627 F.2d 312, 316 (D.C. Cir. 1980) ("[i]t is appropriate in matters concerning the District of Columbia for which there is no District of Columbia law, that the District of Columbia courts should look to the law of

[8] *See, e.g., Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 224 (3d Cir. 2020) (holding that plaintiffs had stated a claim for private nuisance based on noxious odors and air contaminants released by a nearby landfill); *Kriener v. Turkey Valley Cmty. Sch. Dis.*, 212 N.W.2d 526, 536 (Iowa 1973) (holding that maintenance of a sewage lagoon next to plaintiffs' dairy farm constituted an odor-related private nuisance); *Sarraillon v. Stevenson*, 43 N.W.2d 509, 512-513 (Neb. 1950) (holding that nauseating odors and squeals of pain from slaughtering animals on residential property constituted private nuisance); *Johnson v. Drysdale*, 285 N.W. 301, 302 (S. Dak. 1939) (holding that the odors and flies caused by keeping horses on a residential property constituted private nuisance).

Maryland for guidance before it looks to the law of other states."). While Maryland common law may be instructive, it is important to note that to sustain a nuisance suit in Maryland, a plaintiff must demonstrate that the defendant's interference with the plaintiff's property rights is both unreasonable and substantial in order to recover for nuisance, and that the inconvenience created by the interference be one that is "objectively reasonable" to the ordinary person. *Blue Ink v. Two Farms, Inc.*, 96 A.3d 810, 825 (2014) (*citing Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 95 (2013).

The Court of Appeals in Maryland was faced with similar facts present here when it considered *Schuman v. Greenbelt Homes, Inc*., 456, 69 A.3d 512 (2013), a case involving a hyper-sensitive plaintiff. David Schuman lived in a townhome adjacent to Darco and Svetlana Popovic. *Id*. at 456. The Popovics smoked cigarettes, and Mr. Schuman claimed that their cigarette smoke infiltrated his home through the common wall shared by their townhomes. *Id*. Mr. Schuman filed a complaint against the Popovics in the Circuit Court for Prince George's County for breach of contract, nuisance, trespass, negligence, and permanent injunctions. *Id*. After a trial on the merits, the circuit court granted Mr. Schuman's request for a permanent injunction against Mr. Popovic's indoor smoking pursuant to Mr. Popovic's consent; however, the court found in the Popovics' favor on all remaining counts. *Id*. at 459. Mr. Schuman appealed, arguing, *inter alia*, that the circuit court erred in ruling in the Popovics' favor on the nuisance claim. *Id*. at 517-18. The Maryland Court of Appeals explained that in order to identify a nuisance in fact, a court must consider what "'ordinary people, acting reasonably, have a right to demand in the way of health and comfort under all the circumstances'" and that "it is not enough if a particular plaintiff is 'offended or annoyed if he is particularly sensitive.'" *Id*. at 523 (quoting Harper, James & Gray On Torts § 1.25 (3d ed. 2006)). The Maryland Court of Appeals explained:

> While this Court understands that Schuman may have a particular sensitivity to the smell of smoke, *nuisance is not subjective*. The circuit court did not have to

> ignore, and was free to determine, that Schuman did not prove a substantial interference for a reasonable person by a preponderance of the evidence. It was reasonable to find that Mr. Popovic's smoke would not cause physical discomfort and annoyance of persons of ordinary sensibilities, nor would it seriously interfere with the comfort and enjoyment of the average person's home.

Id. at 525 (emphasis added). Because the plaintiff was unable to show that the inconvenience caused by the defendants' smoking was "objectively reasonable," in that an ordinary person would be offended or harmed by the smoke, the Maryland Court of Appeals affirmed the court's ruling on the nuisance claim. However, as stated *supra*, the District of Columbia requires only that, to be actionable as a nuisance, "the offending thing must be marked by 'some degree of permanence' such that the 'continuousness or recurrence of the things, facts, or acts which constitute the nuisance,' give rise to an 'unreasonable use.'" *Wood*, 979 A.2d at 78; *see also Reese*, 73 A.2d at 902.

In the present case, all parties agree and this Court finds, that Defendant Cackett has been smoking marijuana since 2015 both inside of 3005 Ordway Street, NW, and outside of the residence on the patio or the side of the house. Plaintiff testified that she has suffered adverse health effects from Defendant Cackett's smoking as well as an interference with the use and enjoyment of her property. Further, Defendant Cackett's smoking has "some degree of permanence" and "continuousness or recurrence" as acknowledged by Defendant himself when he testified that he smokes each day and has for the last eight years. *See Wood*, 979 A.2d at 78; *see also Reese*, 73 A.2d at 902. While Defendants are correct that Plaintiff did not submit into evidence medical bills or expert testimony on the medical damages claimed by the Plaintiff as a result of Defendant Cackett's marijuana smoking,[9] such evidence is not required to prove that Plaintiff suffered an injury. *See Carrigan*, 466 A.2d at 1244 ("To the extent that the barking and

[9] The Court excluded this evidence prior to trial.

odor of appellee's dogs interfered with appellant's use and enjoyment of her home and backyard, appellant suffered an injury."). Indeed, this Court finds Plaintiff's testimony to be credible that she has suffered an injury as a result of Defendant Cackett's marijuana use – namely, the deprivation of the full use and enjoyment of her home. Further, the Court credits Plaintiff's testimony that Defendant Cackett smokes both inside and outside of his unit more frequently than his proffered regime of once a day for a few minutes. It is doubtful that Defendant Cackett sticks to a rigid schedule of smoking only once a day, at night, and only for 2-3 minutes. Plaintiff's emails to Defendants Cackett and Farserotu detail that for years, she has complained of the smell invading her home, and the resultant diminished use and enjoyment of her home. While small amounts of marijuana consumption in the District of Columbia, with or without a duly licensed prescription, is legal, *see* D.C. Code § 48-904.01(a)(1), it is important to note that Defendant Cackett's use and enjoyment of his marijuana does not supersede Plaintiff's use and enjoyment of her own property. *Cf. Emry v. United States*, 829 A.2d 970, 975 (D.C. 2003) (Plaintiff "makes no showing, however, that the "liberty" to smoke marijuana for medical reasons is one of this country's deeply rooted traditions."). This Court notes that marijuana still remains illegal under the federal laws of the United States. *See United States v. $ 186,416.00 in U.S. Currency*, 590 F.3d 942, 945 (9th Cir. 2010) ("The federal government has not recognized a legitimate medical use for marijuana, however, and there is no exception for medical marijuana distribution or possession under the federal Controlled Substances Act[.]"); *United States v. Scarmazzo*, 554 F. Supp. 2d 1102, 1109 (E.D. Cal. 2008) ("Federal law prohibiting the sale of marijuana is valid, despite any state law suggesting medical necessity for marijuana"); *United States v. Landa*, 281 F. Supp. 2d 1139, 1145 (N.D. Cal. 2003) ("[O]ur Congress has flatly outlawed marijuana in this country, nationwide, including for medicinal purposes."). Thus, the Court finds that

Defendant's consumption of marijuana both inside and outside of his residence has deprived the Plaintiff of the full use and enjoyment of her property, thereby creating a nuisance for which Plaintiff should no longer be forced to endure.

C. Injunctive Relief - Defendants Cackett and Farserotu (Count V)

A permanent injunction requires the trial court to find that there is no adequate remedy at law, the balance of equities favor the moving party, and success on the merits has been demonstrated. *See Ifill v. District of Columbia*, 665 A.2d 185,188 (D.C. 1995) (citations omitted). Additionally, a plaintiff seeking forward-looking relief, such as an injunction, must allege facts showing that the injunction is necessary to prevent injury otherwise likely to happen in the future. *See Ramirez v. Salvaterra*, 232 A.3d 169, 183 (D.C. 2020).

The District of Columbia Court of Appeals has upheld a trial court's granting of a permanent injunction in circumstances similar to the present case. In *Caesar v. Westchester Corp.*, 280 A.3d 176, 192-93 (D.C. 2022), the Court of Appeals ruled that the trial court's permanently enjoining a neighbor from smoking anywhere on their property was proper, and that damages were not an adequate remedy. Further, the Court determined that "[t]he likelihood-of-success-on-the-merits inquiry is unnecessary where, as here, the plaintiff has already succeeded on the merits and seeks permanent relief." *Id.* at 192. Numerous other courts have reached the same conclusion. *See, e.g., Lucy Webb Haynes Nat'l Training Sch. for Deaconesses & Missionaries v. Geoghegan*, 281 F. Supp. 116, 117-18 (D.D.C. 1967) (holding that damages were inadequate and an injunction was warranted where a patient refused to vacate her hospital room, although she was "able and willing to pay whatever the hospital would charge," because permitting her to remain would "allow a diversion of [the hospital's] facilities to purposes for which they are not intended"); *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510

N.W.2d 153, 158 (Iowa 1993) (affirming the issuance of a permanent injunction where the defendants "made no assurances that they would refrain from breaching [a] settlement agreement in the future"); *see also Bd. of Managers of 400 Cent. Park W. Condo. v. Henriquez- Berman,* 2018 NY Slip Op 31397(U), ¶ 6 (Sup. Ct.) ("[T]he plaintiff has demonstrated that irreparable injury, requiring injunctive relief, would result should the smoke condition be permitted to persist . . . .").

Consequently, this Court finds that injunctive relief is appropriate here. Plaintiff's expert James Repace, as well as Defendant Farserotu's expert Paul Burger, both testified that air quality mitigation measures or ventilation abatement would not be 100% effective in preventing Cackett's marijuana smoke from entering Plaintiff's property. However, cessation of the smoking would provide Plaintiff with the relief that she seeks and the Court must weigh this in the balance. As to the balancing of the equities, the record demonstrates that such balancing weighs in favor of Plaintiff who has credibly alleged that she has been deprived of the full use and enjoyment of her home, which she purchased in 1988. There is indeed a likelihood of success on the merits as demonstrated by the Court's ruling on Plaintiff's nuisance count. Certainly, Defendant Cackett has the ability either to refrain from burning/smoking marijuana in his home, or to burn these substances at locations at least 25 feet away from Plaintiff's home. Defendant Farserotu undeniably has the ability, and right, to ensure that her tenant adheres to the no-smoking clause in the lease agreement. Given the long-standing nuisance created by Defendant Cackett's marijuana smoking, more harm will result to Plaintiff from the denial of injunctive relief than to Defendants Farserotu and Cackett from the grant of injunctive relief. Indeed, the public interest is best served by eliminating the smoking nuisance and the toxins that it deposits into the air, toxins that *involuntary smokers* have no choice but to inhale.

Finally, while the Court recognizes that Defendant Cackett possesses a license to purchase medical marijuana from licensed dispensaries in the District of Columbia, he does not possess a license to disrupt the full use and enjoyment of one's land, nor does his license usurp this long-established right. Accordingly, Defendant Cackett shall immediately be permanently enjoined from smoking marijuana, in any form that emits an odor, on the premises of 3005 Ordway Street, NW, Washington D.C., or within 25 feet of 3007 Ordway Street, NW, Washington, D.C. Any violation of this Order will constitute contempt of Court, punishable by criminal and/or civil penalties.

D. Cross Claim

As noted above, on January 24, 2021, Defendant Farserotu filed a cross-claim against Defendant Cackett alleging that she was erroneously named a Defendant in this matter; she is not the proper Defendant for the relief Plaintiff seeks; if any liability is imposed, Cross-Defendant Cackett is liable for all amounts due to Plaintiff and thus, if any liability is found against Defendant Farserotu, then she is entitled to be indemnified for such liability by Cross Defendant Cackett. *See* Cross-Claim at 1-2. At trial, no party presented evidence either in support of or in rebuttal to this cross-claim. Thus, this Court will treat Defendant Farserotu's cross-claim as abandoned and it shall be dismissed. *See Bardoff v. United States*, 628 A.2d 86, 90 n.8 (D.C. 1993) (issues raised but not supported by argument are considered abandoned).

Accordingly, on this **5th day of June, 2023**, it is hereby:

ORDERED that the Court finds **IN FAVOR OF DEFENDANT ANGELLA FARSEROTU** as to **COUNT I**; it is further

ORDERED that the Court finds **IN FAVOR OF PLAINTIFF JOSEFA IPPOLITO-SHEPHERD** as to **COUNT III**; it is further

ORDERED that Defendant Angella Farserotu's **CROSS-CLAIM IS DISMISSED**; it is further

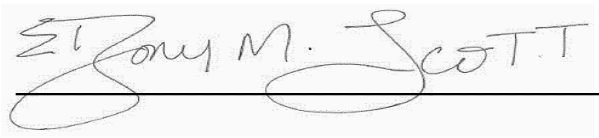
ORDERED that the Court finds in favor of **PLAINTIFF JOSEFA IPPOLITO-SHEPHERD** as to **COUNT V**; it is further

ORDERED that until further Order of this Court, **DEFENDANT THOMAS CACKETT SHALL IMMEDIATELY BE PERMANENTLY ENJOINED FROM SMOKING OR BURNING MARIJUANA, IN ANY FORM THAT EMITS AN ODOR, ON THE PREMISES OF 3005 ORDWAY STREET, NW, WASHINGTON D.C., OR WITHIN 25 FEET OF 3007 ORDWAY STREET, NW, WASHINGTON, D.C.**; it is further

ORDERED that Defendants Angella Farserotu and Thomas Cackett are to ensure that anyone occupying or visiting the premises of 3005 Ordway Street, NW, Washington, D.C, are prohibited from smoking any substance on the premises; and it is further

ORDERED that the instant case is **CLOSED.**

SO ORDERED.



Associate Judge Ebony M. Scott
(Signed in Chambers)

Copies via Odyssey to:

Josefa Ippolito-Shepherd
ippolitoshepherdj@yahoo.com
Pro Se Plaintiff

Harry L. Stone
rustyst@starpower.net
Counsel for Defendant Farserotu

Thomas Cackett
tomc729@hotmail.com
Pro Se Defendant