[Cite as *Scott v. Nameth*, 2015-Ohio-1104.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Andrew P. Scott et al.,	:	
Plaintiffs-Appellants,	:	No. 14AP-630 (C.P.C. No. 13CV-6905)
v.	:	(REGULAR CALENDAR)
George P. Nameth, Jr., et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 24, 2015

Law Office of Brian M. Garvine, LLC, and *Brian M. Garvine*, for appellants.

Stephen H. Dodd, for appellees.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

{¶ 1} Plaintiffs-appellants, Andrew P. Scott, John M. Scott, Anna J. Scott, and Russell T. Scott (collectively "the Scotts"), appeal from a decision and entry of the Franklin County Court of Common Pleas granting the motion for summary judgment of defendants-appellees, George P. Nameth, Jr., Louella P. Nameth, and Melissa R. Nameth (collectively "the Nameths"). For the following reasons, we affirm.

I. Facts and Procedural History

{¶ 2} The Scotts and the Nameths are next door neighbors. Louella Nameth and her daughter Melissa Nameth purchased the property at 3003 Cortona Road in 2000. George Nameth, Louella's son, moved in with his mother and sister in 2004. John and Anna Scott, a married couple, live in the house next door at 3011 Cortona Road. Andrew and Russell Scott are John and Anna's two adult sons who do not live at the 3011 Cortona

Road property with their parents but are at the house frequently to visit and help with yard work.

{¶ 3} Sometime in 2010, the Nameths built a six-foot privacy fence on their property and installed 13 security cameras around the perimeter of their property. The Nameths hired a security company to install the cameras, and the security company recommended the locations of the cameras. The cameras intended to cover the west side of the Nameths' property also capture a small portion of the Scotts' yard, a situation the Nameths describe as "unavoidable." (George Nameth Affidavit, ¶ 7.) Though the Scotts are concerned the cameras can be used to look into their home through the windows, the Nameths deny that any cameras are pointed at the windows of the Scotts' residence. The footage from the cameras automatically and continuously stores on a hard drive and then automatically erases after a certain period of time based on a predetermined cycle to create space for newer video footage.

{¶ 4} Because of the presence of the cameras on the Nameths' property, Anna and John Scott both describe themselves as being "uncomfortable" in their home and yard. (John Scott Affidavit, ¶ 11-12; Anna Scott Affidavit, ¶ 10-11.) They further feel they do not have full use of the inside or outside of their home due to the cameras, and they do not open the blinds or curtains on the side of the house that faces the Nameths' property due to the possibility of being under surveillance. Additionally, John and Anna Scott indicate friends and family members have told them they are uncomfortable visiting in the Scotts' yard due to the presence of the Nameths' cameras, and the Scotts now entertain in their yard infrequently.

{¶ 5} On June 24, 2013, the Scotts filed a complaint against the Nameths asserting claims for civil nuisance and negligence. Specifically, the Scotts allege the Nameths use their security cameras to conduct surveillance on the Scotts property, and to intimidate, harass, and provoke the Scotts. On March 31, 2014, the Nameths filed a motion for summary judgment arguing there were no genuine issues of material fact related to any of the Scotts claims and the Nameths were therefore entitled to judgment as a matter of law.

{¶ 6} In a July 16, 2014 decision and entry, the trial court granted the Nameths' motion for summary judgment. The trial court determined the Scotts had not asserted

two distinct claims for nuisance and negligence, but instead one claim for a private qualified nuisance. Concluding the Scotts failed to demonstrate any damages consistent with those deemed compensable under Ohio nuisance law, the trial court found there remained no genuine issues of material fact related to any of the Scotts' claims. The Scotts timely appeal.

II. Assignment of Error

{¶ 7} The Scotts assign the following error for our review:

> Whether the trial court erred in finding [the Scotts] failed to demonstrate any damages consistent with those deemed compensable under Ohio law for their private qualified nuisance claim.

III. Standard of Review

{¶ 8} An appellate court reviews summary judgment under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is appropriate only when the moving party demonstrates (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 9} Pursuant to Civ.R. 56(C), the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). However, the moving party cannot discharge its initial burden under this rule with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must specifically point to evidence of the type listed in Civ.R. 56(C) affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.*; *Vahila v. Hall*, 77 Ohio St.3d 421, 429 (1997). Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56,

with specific facts showing that a genuine issue exists for trial. *Dresher* at 293; *Vahila* at 430; Civ.R. 56(E).

IV. Discussion

{¶ 10} In their sole assignment of error, the Scotts argue the trial court erred in granting the Nameths' motion for summary judgment. More specifically, the Scotts assert there remain genuine issues of material fact as to whether the Scotts demonstrated any compensable damages for their qualified nuisance claim.

{¶ 11} A "nuisance" is a wrongful invasion of a legal right or interest. *Hamilton v. Hibbs L.L.C.*, 10th Dist. No. 11AP-1107, 2012-Ohio-4074, ¶ 15, citing *Banford v. Aldrich Chem. Co., Inc.*, 126 Ohio St.3d 210, 2010-Ohio-2470, ¶ 17. A plaintiff may recover for a public nuisance, which is an unreasonable interference with a right common to the general public. *Id.*, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶ 8; *Hurier v. Ohio Dept. of Transp.*, 10th Dist. No. 01AP-1362, 2002-Ohio-4499, ¶ 9. Alternatively, a plaintiff may recover for a private nuisance, which is the wrongful invasion of the use and enjoyment of property. *Hamilton* at ¶ 15, citing *Beretta U.S.A. Corp.* at ¶ 8; *Arkes v. Gregg*, 10th Dist. No. 05AP-202, 2005-Ohio-6369, ¶ 43. Here, the Scotts alleged a private nuisance by claiming that the security cameras installed on the Nameths' property interfered with their use and enjoyment of their home and yard.

{¶ 12} Nuisances are further categorized as either absolute or qualified nuisances. *Hamilton* at ¶ 16. "The distinction between absolute and qualified nuisance depends on the conduct of the defendant." *Id.*, citing *Angerman v. Burick*, 9th Dist. No. 02CA0028, 2003-Ohio-1469, ¶ 10; *Hurier* at ¶ 10. " 'An absolute nuisance is based on either intentional conduct or an abnormally dangerous condition that cannot be maintained without injury to property, no matter what care is taken.' " *Hamilton* at ¶ 16, quoting *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, ¶ 59. A qualified nuisance, on the other hand, is the " 'negligent maintenance of a condition that creates an unreasonable risk of harm, ultimately resulting in injury.' " *Id.*, quoting *R.T.G.* at ¶ 59. The Scotts asserted a claim for a private qualified nuisance by alleging that the Nameths negligently used and operated the surveillance cameras.

{¶ 13} The Scotts do not dispute that their two asserted claims of "civil nuisance" and "negligence" are properly construed as one claim for a qualified public nuisance, as

the trial court appropriately concluded. Instead, the Scotts argue there remain genuine issues of material fact as to whether they were able to demonstrate sufficient, compensable damages under a claim for a private qualified nuisance.

{¶ 14} "For there to be an action for nuisance, the injury must be real, material, and substantial." *Banford* at ¶ 17, citing *Eller v. Koehler*, 68 Ohio St. 51, 55 (1903). "Damages for nuisance may include diminution in the value of the property, costs of repairs, loss of use of the property, and compensation for annoyance, discomfort, and inconvenience." *Id.*, citing *Widmer v. Fretti*, 95 Ohio App. 7, 16-17 (6th Dist.1952). The Scotts argue that because both John and Anna Scott averred in their affidavits that they were "uncomfortable" in their home and yard and that they had lost full use of the inside and outside of their home, they alleged sufficient, compensable damages to defeat the Nameths' motion for summary judgment.

{¶ 15} Though John and Anna Scott both describe themselves as being "uncomfortable" in their home and yard due to the Nameths' cameras, it is important to distinguish uncomfortable as an emotion versus being physically uncomfortable. The Supreme Court of Ohio in *Banford* is clear that "[i]t has long been recognized that a nuisance must materially interfere with physical comfort." *Banford* at ¶ 28. The *Banford* court explained physical discomfort to be "offensive physically to the senses," or, in other words, affecting one's sight, sound, smell, hearing, or touch. *Id.* " 'Cases supporting recovery for personal discomfort or annoyance involve either excessive noise, dust, smoke, soot, noxious gases, or disagreeable odors as a premise for awarding compensation.' " *Id.* at ¶ 26, quoting *Widmer* at 18. The Supreme Court then explicitly held that "in order to recover damages for annoyance and discomfort in a nuisance claim, a plaintiff must establish that the nuisance caused physical discomfort." *Id.* at ¶ 28.

{¶ 16} The Scotts have not alleged or demonstrated any damages stemming from physical discomfort, nor do they allege any physical manifestation of discomfort. Nonetheless, the Scotts argue they need not demonstrate physical discomfort if they can establish that their discomfort is connected to the loss of use of their property. In support, the Scotts rely on *Banford*'s mention of *Stoll v. Parrott & Strawser Properties, Inc.*, 12th Dist. No. CA2002-12-133, 2003-Ohio-5717. In *Stoll*, the jury awarded damages for annoyance and discomfort after the plaintiffs experienced loss of use and enjoyment of

their property when it flooded due to work in a nearby development such that the plaintiffs could not leave their property and subsequently had to spend days cleaning up debris in their yard. *Id.* at ¶ 25.

{¶ 17} *Stoll* is distinguishable from the present case. In *Stoll*, the loss of use caused by flooding of the property was a real, physical loss of use. *Banford* at ¶ 30 (noting nuisance "involves a restriction or infringement upon the use and enjoyment of property" and "must cause damages that are real, material, and substantial"), citing *Columbus Gas Light & Coke Co. v. Freeland*, 12 Ohio St. 392 (1861), and *Frey v. Queen City Paper Co.*, 79 Ohio App. 64 (2d Dist.1946). Here, at best, the Scotts allege that they choose not to use portions of their property due to the fear of being under surveillance. There is no physical reason they cannot use their property. Thus, the fear and emotional discomfort the Scotts allege simply is not enough under the controlling standard articulated in *Banford*. Without an allegation of physical discomfort, the Scotts have not alleged or demonstrated actual, compensable damages. We, therefore, agree with the trial court that the Scotts' private qualified nuisance claim fails as a matter of law. Accordingly, the trial court did not err in granting the Nameths' motion for summary judgment, and we overrule the Scotts' sole assignment of error.

V. Disposition

{¶ 18} Based on the forgoing reasons, the trial court did not err in granting the Nameths' motion for summary judgment. Having overruled the Scotts' sole assignment of error, we affirm the decision and entry of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN and BROGAN, JJ., concur.

BROGAN, J., retired, formerly of the Second Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).
