

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

CYNTHIA A. NITHIANANTHAN, et al.,	:	
	:	CASE NOS. CA2014-02-021
Plaintiffs-Appellees/Cross-	:	CA2014-02-028
Appellants,	:	CA2014-08-114
	:	
- vs -	:	<u>OPINION</u>
	:	4/13/2015
DEBORAH L. TOIRAC, et al.,	:	
	:	
Defendants-Appellants/Cross-	:	
Appellees.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CV74954

Thomas G. Eagle, 3386 North State Route 123, Lebanon, Ohio 45036, for appellees/cross-appellants

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PIPER, P.J.

{¶ 1} Defendants-appellants/cross-appellees, Thomas and Deborah Toirac, appeal a decision of the Warren County Court of Common Pleas, entering judgment in favor of plaintiffs-appellees/cross-appellants, Vijay and Cynthia Nithiananthan. The Nithiananthans also appeal aspects of the trial court's judgment.

{¶ 2} The Toiracs and Nithiananthans are neighbors who have had continual disagreements regarding property boundaries, encroaching landscaping, use of lights, and

trespass onto one another's properties. The disputes began on the first day that the Nithiananthans moved into their home next to the Toiracs. Deborah Toirac confronted the Nithiananthans' daughter, who was in the driveway with her dog, and the relations between the two neighbors continued to decline since that day.

{¶ 3} The Nithiananthans planned on installing a fence to confine their dog, and as a result, ordered a survey of their property. Because of the survey, the Nithiananthans discovered that some of the Toiracs' landscaping was actually located on their property. The survey also revealed that the Nithiananthans needed to move their driveway to respect the true division of property. Stakes were then erected to mark the property line, and both parties made plans to landscape their property along the corrected division line. Once the developer moved the plants and reconfigured the Nithiananthans' driveway, the Nithiananthans planted trees, bushes, and grass to better demarcate the property line. The Toiracs planted trees and bushes inches away from the property line, including a weeping willow tree, so that some of the branches eventually grew over the property line and into the Nithiananthans' property. The Toiracs refused to care for the overgrowth.

{¶ 4} During the Christmas season, the Toiracs' decorative lights were vandalized, and an image of male genitalia was spray painted on their garage. The Toiracs contacted police and suggested that the Nithiananthans were involved. The police questioned the Nithiananthans, but the Toiracs' suspicions were never substantiated.

{¶ 5} The Toiracs called the police about the Nithiananthans approximately 11 times, suggesting to police that the Nithiananthans engaged in nefarious behavior against them, including allowing the dog to defecate on their lawn, vandalizing their property, and causing damage to decorative features of the landscaping. The Nithiananthans were never found to be the perpetrators of any actions against the Toiracs, other than being cited for allowing

their dog to stray from their property.

{¶ 6} Police eventually advised the Toiracs to install security cameras and use lights to illuminate their property in an attempt to deter criminal activity around their home. The Toiracs installed security cameras near windows inside their home and on the exterior of the house. They also mounted some on trees in their backyard. However, several of the cameras were pointed directly into the Nithiananthan home rather than toward the surrounding areas of their own home. One camera in particular was located inside the Toiracs' kitchen window and aimed toward the lower level of the Nithiananthans' home. The Nithiananthans therefore installed landscaping to block the cameras from recording inside the lower-level of their home. After the landscaping was installed, the Toiracs moved the camera from their kitchen to an upstairs location so that the camera was pointed directly into the bedroom of the Nithiananthans' daughter.

{¶ 7} The Toiracs then began using builder-installed lighting to illuminate their house. However, they also pointed some of the lights toward the Nithiananthans' home. The Nithiananthans complained that the lights flooded their home with bright light, and that they needed to use drapes and blinds to block the light so that they could sleep comfortably.

{¶ 8} The Nithiananthans filed a nuisance complaint, complaining of the Toiracs' use of lights and security cameras, encroachment of the Toiracs' landscaping, and the Toiracs' abusive behavior toward them. The Toiracs filed a countersuit, complaining of the Nithiananthans' dog, vandalism of their property, as well as their belief that the Nithiananthans were filming them. After extensive discovery, the parties moved for summary judgment. The magistrate granted judgment in favor of the Nithiananthans on most of their claims and disposed of four of the Toiracs' five claims. The Toiracs filed objections to the magistrate's decision, which were overruled by the trial court.

{¶ 9} A trial was set on the remaining causes of action specific to which, if either, neighbor was causing a nuisance to the other. Before the trial was held, the parties appealed an interlocutory decision of the trial court related to discovery of electronic data. *Nithiananthan v. Toirac*, 12th Dist. Warren No. CA2011-09-098, 2012-Ohio-431. After this court heard the appeal, the matter proceeded to trial.

{¶ 10} During the pendency of the proceedings, the parties also sought civil stalking protection orders against each other. Hearings took place, and a civil protection order was granted to protect the Nithiananthans from the Toiracs for a term of five years. Within the protection order, the Toiracs were ordered not to direct their lights or cameras toward the Nithiananthans or their home, and they were ordered to stay 20 feet away from the Nithiananthans. The Toiracs' request for a protection order was denied.

{¶ 11} The trial on the nuisance issue eventually occurred, lasting three days. The magistrate found in favor of the Nithiananthans, finding that the Toiracs had caused a nuisance through their use of cameras and lighting to harass the Nithiananthans. The magistrate ordered the Toiracs to pay the Nithiananthans \$5,000 in damages, and also granted a permanent injunction to abate the nuisance.

{¶ 12} The terms of the injunction included ordering the Toiracs to not direct their outdoor lighting toward the Nithiananthans' house, to direct their security cameras at their own home or property immediately surrounding their home, and to not capture on video the Nithiananthans' property. The Nithiananthans filed objections to the magistrate's decision, arguing that the injunctive relief and monetary award were too limited in scope and amount. However, the trial court overruled the Nithiananthans' objections. The Toiracs did not object to the magistrate's decision.

{¶ 13} The Nithiananthans moved the court for attorney fees and court costs. The

magistrate granted the motion in part and denied it in part. Both parties filed objections to the magistrate's decision, which were overruled by the trial court. The Nithiananthans then filed a motion claiming that the Toiracs engaged in frivolous conduct by filing their original counterclaim. While this motion was pending, the Toiracs appealed the decisions of the trial court granting judgment in favor of the Nithiananthans.

{¶ 14} Upon receiving the Toiracs' notice of appeal, this court recognized that the Nithiananthans' motion regarding frivolous conduct was pending. This court suspended its jurisdiction and remanded the issue for the limited purpose of allowing the trial court to rule upon the motion for frivolous conduct and decide any issues related to attorney fees and court costs. During the limited remand, the magistrate held a hearing, and determined that the Toiracs engaged in frivolous conduct by making allegations and factual contentions that had no evidentiary support, and that the Nithiananthans were adversely affected by the frivolous conduct. The magistrate then held a hearing to determine attorney fees, and ordered the Toiracs to pay the Nithiananthans \$10,000. Both parties filed objections to the magistrate's decision, which were overruled by the trial court.

{¶ 15} The Toiracs thereafter filed an amended notice of appeal with this court without first asking leave to do so, and did not file the amended notice of appeal with the trial court as the appellate rules require. Even so, this court reassumed its jurisdiction, issued scheduling orders, accepted the parties' briefs, and assigned the case for oral arguments. Within their briefs, the Toiracs challenge the trial court's decisions finding in favor of the Nithiananthans, and the Nithiananthans raise several cross-assignments of error claiming the trial court's order was not broad enough and that they were not awarded enough in damages, costs, and fees. For ease of discussion, we will address the parties' arguments together when appropriate. However, before considering the parties' arguments, we will first address the

jurisdiction of this court.

{¶ 16} According to App.R. 4(B),

If a party files a notice of appeal from an otherwise final judgment but before the trial court has resolved one or more of the filings listed in this division, then the court of appeals, upon suggestion of any of the parties, shall remand the matter to the trial court to resolve the post-judgment filings in question and shall stay appellate proceedings until the trial court has done so. After the trial court has ruled on the post-judgment filing on remand, any party who wishes to appeal from the trial court's orders or judgments on remand shall do so in the following manner: (i) by moving to amend a previously filed notice of appeal or cross-appeal under App.R. 3(F), for which leave shall be granted if sought within thirty days of the entry of the last of the trial court's judgments or orders on remand and if sought after thirty days of the entry, the motion may be granted at the discretion of the appellate court; or (ii) by filing a new notice of appeal in the trial court in accordance with App.R. 3 and 4(A).

According to App.R. 3(F)(2), "an amended notice of appeal shall be filed in both the trial court and the court of appeals."

{¶ 17} The record indicates that the Toiracs filed an amended notice of appeal in this court, but neither requested leave to file the amended notice nor filed the notice of an amended appeal in the trial court. As such, they have failed to abide by the technical aspects of App.R. 3(F)(2) and 4(B). Even so, the Ohio Supreme Court has held that "the only jurisdictional requirement for a valid appeal is the timely filing of a notice of appeal." *Transamerica Ins. Co. v. Nolan*, 72 Ohio St.3d 320 (1995), syllabus. "When presented with other defects in the notice of appeal, a court of appeals is vested with discretion to determine whether sanctions, including dismissal, are warranted, and its decision will not be overturned absent an abuse of discretion." *Id.*

{¶ 18} The purpose of a notice of appeal is to apprise the other party of the taking of an appeal. *Maritime Mfrs. Inc. v. Hi-Skipper Marina*, 70 Ohio St.2d 257, 259 (1982). "If this is done beyond [the] danger of reasonable misunderstanding, the purpose of the notice of

appeal is accomplished." *Id.*

{¶ 19} There is no evidence that the Nithiananthans were prejudiced or taken by surprise by the Toiracs' renewed appeal or any issues argued on appeal, including the trial court's decision regarding frivolous conduct and attorney fees. Both parties were granted continuances for filing briefs, were granted extra pages for their briefs in order to discuss all issues and decisions of the lower court, and eventually submitted extensive briefs. The Nithiananthans filed cross-assignments of error, and both parties submitted reply briefs in response to the first brief of the other party. Both parties were given the opportunity to argue their assignments of error and cross-assignments of error during oral arguments, and the Nithiananthans have shown no prejudice by the Toiracs' failure to file the amended notice of appeal in the trial court.

{¶ 20} Moreover, the language this court used in its entries placed the parties on notice that this court never intended to relinquish jurisdiction over the appeal. Within the entry indicating the instructions on remand, this court noted that the decision regarding attorney fees did not impact the decision appealed from in regard to it being a final appealable order, only that "judicial economy would be served if that motion is resolved before proceeding with the present appeal."

{¶ 21} As such, the Toiracs' notice of appeal was valid and in place at the time we ordered the limited remand for the purposes of judicial economy. In fact, once the trial court issued its orders, this court issued an entry in which we re-assumed jurisdiction. In noting that the trial court had made its orders, we determined "the court hereby re-assumes jurisdiction over this appeal and makes the following orders * * *." As such, there was no prejudice by the Toiracs not asking for leave of this court to file an amended appeal first. By virtue of our entries, this court inherently gave leave to move forward with the appellate

process.

{¶ 22} The record indicates that the parties were aware that this court intended to maintain its jurisdiction, and filed status reports with this court in response to our continuing jurisdiction. In the Nithiananthans' status report, which was filed after the trial court issued a final judgment on the frivolous conduct and attorney fee issue, counsel stated, "it appears to this counsel that all issues have been decided at this time and a scheduling order in these appeals should issue." Counsel, however, did not complain of surprise or prejudice resulting from the Toiracs' failure to file an amended notice of appeal with the trial court.

{¶ 23} We are mindful that "justice is ultimately best served by an attitude of judicial tolerance toward minor errors, made in good faith, which pose no danger of prejudice to the opposing party or to the court's essential functions." *S. Christian Leadership Conference v. Combined Health Dist.*, 191 Ohio App.3d 405, 2010-Ohio-6550, ¶ 11 (2d Dist.). As there is no indication of prejudice or bad faith, we are within our discretion to consider the parties' appeal. *See Am. Chem. Soc. v. Leadscope*, 10th Dist. Frankin No. 08AP-1026, 2010-Ohio-2725, reversed in part on other grounds (finding that appellate court had the discretion to accept a party's amended notice of appeal that did not strictly comply with App.R. 4).

{¶ 24} The purpose of the notice of appeal was fulfilled in that the Toiracs' original notice of appeal and later amended notice of appeal apprised the Nithiananthans of the Toiracs taking an appeal. Despite the minor technical defect, the filing of the appeal was effectuated beyond any danger of reasonable misunderstanding, and without any bad faith on the Toiracs' part. As such, we find that we may exercise our discretion given that the filing of the original notice of appeal was valid and properly invoked the jurisdiction of this court, and the technical deficiency of the Toiracs' filing of the amended notice of appeal did not serve to divest this court of jurisdiction or otherwise prejudice the Nithiananthans. Therefore,

we will now address the parties' arguments on appeal.

{¶ 25} Assignment of Error No. 1:

{¶ 26} THE TRIAL COURT ERRED IN FINDING THE TOIRACS' ACTIONS – USING SURVEILLANCE CAMERAS AND LIGHTS – TO PROTECT THEIR PROPERTY CONSTITUTED A NUISANCE.

{¶ 27} Cross-Assignment of Error No. 1:

{¶ 28} THE TRIAL COURT ERRED IN NOT FINDING THE TOIRACS' ACTIONS OTHER THAN ABUSIVE USE OF LIGHTS AND CAMERAS CONSTITUTED A NUISANCE.

{¶ 29} Cross-Assignment of Error No. 2:

{¶ 30} THE TRIAL COURT ERRED IN NOT GRANTING BROADER INJUNCTIVE RELIEF.

{¶ 31} The Toiracs argue in their first assignment of error that the trial court erred in finding a nuisance, and the Nithiananthans argue in their first two cross-assignments of error that the trial court erred by not finding and abating a broad enough nuisance.

{¶ 32} "Nuisance" is a term used to designate "the wrongful invasion of a legal right or interest." *Brackett v. Moler Raceway Park, LLC*, 195 Ohio App.3d 372, 2011-Ohio-4469, ¶ 15 (12th Dist.). A "private nuisance" is a nontrespassory invasion of another's interest in the private use and enjoyment of land. *Id.* In order for a private nuisance to be actionable, the invasion must be either intentional and unreasonable or unintentional but caused by negligent, reckless, or abnormally dangerous conduct. *Id.* Additionally, the "injury must be real, material, and substantial." *Banford v. Aldrich Chem. Co.*, 126 Ohio St.3d 210, 2010-Ohio-2470, ¶ 17.

{¶ 33} A court can abate a private nuisance through the issuance of injunctive relief. *Id.* at ¶ 17. We review a trial court's issuance of injunctive relief to abate a nuisance for an

abuse of discretion. *Id.* More than mere error of judgment, an abuse of discretion requires that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 34} The Toiracs argue that the trial court erred in finding that their actions constituted a nuisance and by finding that the Nithiananthans' actions did not constitute a nuisance. However, the record indicates that the Toiracs did not object to the magistrate's decision. As such, the Toiracs' arguments are waived on appeal in regard to this issue.¹ *Hamilton v. Digonno*, 12th Dist. Butler No. CA2012-05-108, 2013-Ohio-151.

{¶ 35} In regard to the Nithiananthans' first and second cross-assignments of error, they assert that the trial court did not find that enough of the Toiracs' behaviors constituted a nuisance and that the injunction ordered by the trial court was not broad enough to fully abate the nuisance. However, the record indicates that the trial court did not err in determining either the scope of the nuisance or the proper abatement.

{¶ 36} During the pendency of these proceedings, the magistrate heard ample evidence regarding the parties' dispute. The magistrate heard evidence that the Toiracs pointed their security cameras toward the Nithiananthans' home, rather than recording what was occurring near their own home in regard to any vandalism that may have been occurring. Deborah Toirac also admitted taking several photographs directed at or which captured

1. The record indicates that the Toiracs filed objections to the magistrate's denial of their motion for summary judgment as to whether the Nithiananthans created a nuisance. However, once a trial court denies a motion for summary judgment and the matter proceeds to a full trial on the merits, a trial court's decision regarding summary judgment is rendered moot. *Jackson v Hogeback*, 12th Dist. Butler No. CA2013-10-187, 2014-Ohio-2578. Moreover, Civ.R. 53(D)(3)(b)(iv) provides that "a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, * * * unless the party has objected to *that finding or conclusion* as required by Civ.R. 53(D)(3)(b)." (Emphasis added.) While the Toiracs may have objected to the magistrate's decision dismissing several of their claims on summary judgment, the magistrate did not reach the merits of which neighbor constituted the nuisance at that time. Therefore, the Toiracs must have objected to the magistrate's ultimate decision on the merits in order to preserve their arguments as to that finding or conclusion on appeal.

specific aspects of the Nithiananthans' home. The magistrate also heard evidence that the Toiracs directed lighting at the Nithiananthans' home. The lighting made it difficult for the Nithiananthans to sleep, and they were forced to install blinds and drapery in an attempt to block the light.

{¶ 37} The magistrate properly found these acts constituted the nuisance, and fashioned the terms of the injunction to combat the Toiracs' use of video cameras and lights to harass the Nithiananthans. Even so, the Nithiananthans argued that the magistrate should have found a much broader nuisance to include the Toiracs' landscaping and related abuse of boundaries, and the Toiracs' abusive personal conduct.

{¶ 38} Regarding the landscaping and abuse of boundaries, Deborah Toirac admitted during her testimony that she planted trees and bushes along the property line separating her property from the Nithiananthan property. While Deborah testified that she was unaware of how close the newly-planted trees and bushes were, the evidence demonstrated that the trees and bushes were planted only inches from the property line so that the overhanging branches grew over the Nithiananthans' side of the property boundary. When the Nithiananthans asked the Toiracs to trim the overhang, the Toiracs did not comply, and the Nithiananthans trimmed the overhang on their own.

{¶ 39} The trial court found that the landscaping issues did not constitute a nuisance. While the evidence demonstrated that the Nithiananthans were forced to deal with the landscaping issues, the evidence did not support a finding that such landscaping issues constituted an invasion of the Nithiananthans' interest in the private use and enjoyment of their property.

{¶ 40} The magistrate was aware of the landscaping issue and that both parties spent extensive time and expense on their landscaping. Cynthia asked the magistrate to order the

Toiracs to take care of their own plantings and landscape. However, Cynthia admitted that in order for the Toiracs to take care of their landscaping, they would have to come onto her property. Requiring the Toiracs to care for the overhang may have caused the Toiracs to increase unwanted contact with the Nithiananthans, and perhaps cause more discord between the parties.

{¶ 41} In fact, the trial court expressly noted that requiring the Toiracs to care for the landscaping on the Nithiananthans' property would have likely led to further "duplicitous; protracted litigation." The trial court also recognized the need to balance the Nithiananthans' frustration with the overhang against the fact that the Toiracs, while perhaps being un-neighborly in their refusal to care for the overhang, did have a right to plant trees and make use of their property. The trial court was in the best position to determine the impact the landscaping issue had on the Nithiananthans' own use and enjoyment of their property, and we find no abuse of discretion in the trial court's decision that the landscaping issues did not rise to the level of private nuisance.

{¶ 42} Regarding the abusive personal conduct, the magistrate heard evidence that the Toiracs behaved in such a manner as to make the Nithiananthans uncomfortable or fearful. Cynthia Nithiananthan testified that Thomas Toirac once drove aggressively toward them when she and Vijay were pulling out of their driveway and that she had to accelerate quickly and drive away in order to avoid a collision. Cynthia also testified that every time she is outside, Deborah Toirac will do something to make her feel uncomfortable, such as take pictures, sing loudly, blow kisses her way, or mow the lawn in an odd manner. Cynthia also testified that once when she and her child were leaving their home, Deborah bent over, and swung her rear-end at them. Cynthia also testified that Thomas went into a restaurant where the Nithiananthans' daughter works, and that the encounter upset the daughter.

{¶ 43} While the magistrate did not discount the veracity of Cynthia's testimony that these events caused her discomfort, the magistrate found that the Toiracs' behavior did not constitute a nuisance and did not include abatement orders that the Toiracs take, or not take, any action to stop their abusive behavior toward the Nithiananthans. During the trial, Cynthia testified to the impact the Toiracs' behavior had on her. The trial court, however, did not find that the abusive behavior was enough to constitute an invasion of the Nithiananthans' interest in the private use and enjoyment of their property.

{¶ 44} Cynthia requested that the magistrate combat the gestures and abusive behavior by ordering that the Toiracs could not come within 50 feet of the Nithiananthans. Cynthia also asked the magistrate to tell Deborah to "just stop it," in regard to the abusive behavior. While the trial court did not order the Toiracs to stop their behavior or stay 50 feet away from the Nithiananthans as requested by Cynthia, the court had evidence before it that the protection order granted to the Nithiananthans against the Toiracs required the Toiracs to stay at least 20 feet away from the Nithiananthans. The magistrate specifically addressed the protection order, and noted that while the abusive behavior constituted a pattern of menacing conduct sufficient to issue the protective order, the Toiracs behavior in this regard did not equate to an interference with the use and enjoyment of the Nithiananthans' property.

{¶ 45} Although the protection order is not permanent, the Nithiananthans can ask that the protection order be renewed once it expires, and also request that the terms of the order be modified to include a larger no-contact radius, such as the 50-feet suggested by Cynthia. We do not find that the trial court abused its discretion by not including the abusive behavior in the nuisance finding or by not ordering anything specific in its abatement where the protection order was still in place and could better address the behavior issues than a finding of private nuisance.

{¶ 46} After reviewing the record, we find that the trial court did not err by limiting the nuisance and abatement to the lighting and camera issues. The court took into consideration that the Toiracs had a right to the reasonable use of their own property, including landscaping the property, singing outside, enjoying their outside space, and mowing their lawn. While the testimony and evidence demonstrated that the Toiracs' antics and behavior was often bizarre, awkward, and even abusive, the trial court was within its discretion to allow the terms of the protection order to dictate the consequences of the Toiracs' behavior towards and interactions with the Nithiananthans. Having found no error or abuse of discretion, the Toiracs' first assignment of error and the Nithiananthans' first and second cross-assignments of error are overruled.

{¶ 47} Cross-Assignment of Error No. 3:

{¶ 48} THE TRIAL COURT ERRED IN NOT AWARDING MORE DAMAGES.

{¶ 49} The Nithiananthans argue in their third cross-assignment of error that the trial court erred in not awarding more than \$5,000 in damages.

{¶ 50} Generally, a reviewing court will not reverse a trial court's determination of damages absent an abuse of discretion. *Henry v. Richardson*, 193 Ohio App.3d 375, 2011-Ohio-2098, ¶ 8 (12th Dist.). "There is no precise rule for ascertaining damages in a nuisance action, and it is within the discretion of the trier of fact to determine what sum a complaining party should receive for discomfort and annoyance." *Gulley v. Markey*, 5th Dist. Holmes No. 01COA030, 2003-Ohio-335, ¶ 18. Because the assessment of damages lies so thoroughly within the province of the trier of fact, an appellate court is not at liberty to disturb the trier of fact's assessment of damages absent an affirmative finding of passion and prejudice, or a finding that the award is manifestly excessive or inadequate. *Cox v. Cox*, 12th Dist. Butler

No. CA2008-06-077, 2009-Ohio-1446, ¶ 31.²

{¶ 51} The Nithiananthans argue that they are entitled to a damage recovery of \$100,000, an amount in line with an award given by a jury in *Gulley v. Markey*, 2003-Ohio-335. The jury awarded the Markeys \$101,000 on their counterclaim against the Gulleys on claims involving nuisance, intentional infliction of emotional distress, and trespass. The Markeys and Gulleys were neighbors who had a contentious relationship that resulted in suits being filed against each other. However, in *Markey*, the jury awarded damages for intentional infliction of emotional distress and trespass in addition to the damages for nuisance, and the facts of the nuisance claim were different than what occurred in the case sub judice.

{¶ 52} The *Markey* jury heard evidence that the Gulleys installed an "ungainly" plywood "fence" a few feet away from the Markey home, comprised of large pieces of plywood constructed in a two-story configuration that ran only the distance of the Markey home. *Id.* at ¶ 14. The Gulleys also installed spot lights on top of the "fence" and would bang on the large pieces of plywood throughout the night to disturb the Markeys. The jury also considered that the Gulleys would shoot guns in their yard near the Markeys while glaring at the Markeys. The Gulleys would also host loud parties in their backyard, often containing a bonfire close to the Markey property and some parties went until 4:00 am. The Gulleys also sent the Markeys rude letters, one of which accused Chris Markey of being a "slob" and "paranoid." *Id.* The Gulleys were also charged with criminal trespass for going onto the Markeys' property on multiple occasions, and Chris Markey testified that the Gulleys would follow him while driving.

2. This court and others have also applied the manifest weight of the evidence standard when reviewing an award of damages. See, e.g., *Baird v. Crop Prod. Servs., Inc.*, 12th Dist. Fayette Nos. CA2011-03-003, 2011-04-005, 2012-Ohio-4022. Regardless of what standard is applied, we find that the damage award is proper.

{¶ 53} The facts of the case sub judice, while also involving lighting and landscaping issues, are different from what occurred between the Gulleys and Markeys. Unlike *Markey*, the Nithiananthans *chose* to install a natural fence between their property and the Toiracs, rather than having an unsightly plywood fence forced upon them that ran the length of their home. The photographs indicate that the landscaping is the opposite of "ungainly" and that such landscaping was chosen by Cynthia because she knew it would add to the value of the home. While the primary purpose was to block the Toiracs' use of cameras, the landscaping also enhanced the value of the Nithiananthans' home, and is an attractive feature of their property. Also, and unlike *Markey*, there was no evidence that the Toiracs hosted long or loud parties on a regular basis, or that they would set large bonfires within a short distance of the Nithiananthans' home. Nor is there is evidence that the Toiracs would shoot guns while glaring at the Nithiananthans.³ Given the distinctions, we do not find the *Markey* jury award determinative of the current case.

{¶ 54} The only evidence presented regarding damages was that the landscaping to block the camera cost approximately \$7,100, while at the same time it also increased the value of the Nithiananthans' home. The Nithiananthans did not present any evidence in regard to the shades or drapery, nor did they contend that they incurred any other costs to combat the effects of the Toiracs' nuisance, such as costs associated with psychological or medical treatment. As such, we find no abuse of discretion in awarding the Nithiananthans \$5,000 in damages.

{¶ 55} The Nithiananthans also argue that they should have been awarded attorney fees and punitive damages. However, and as the trial court pointed out, the Nithiananthans

3. There is some evidence in the record that Deborah made some reference to having military training, owning a gun, and believing that she could shoot anyone that came on to her property. However, there is no evidence that she shot her gun in the backyard while glaring at the Nithiananthans.

did not present evidence at trial regarding punitive damages. In tort law, punitive damages require a finding of actual malice on behalf of the defendant. *Creech v. Brock & Assoc. Constr.*, 183 Ohio App.3d 711, 2009-Ohio-3930 (12th Dist.). Actual malice, "is that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge or a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Id.* at ¶ 21.

{¶ 56} The trial court determined, and we agree, that the Nithiananthans did not present evidence to establish that the Toiracs acted with actual malice. Again, and while the actions of the Toiracs may have been bizarre and abusive, such actions did not rise to the level of actual malice required for the imposition of punitive damages.

{¶ 57} The Nithiananthans also argue that they were entitled to attorney fees as an aspect of punitive damages. In addition to the fact that the Nithiananthans were not entitled to punitive damages, Ohio follows the "American Rule," under which a prevailing party may not generally recover attorney fees unless a statute creates a duty, an enforceable contract provision provides for an award of attorney fees, or the losing party acted in bad faith. *Fogel v. Lyonhil Reserve Homeowners' Assn.*, 12th Dist. Butler No. CA2007-06-151, 2008-Ohio-6065, ¶ 31. The Nithiananthans did not prove that any of the aforementioned factors permitted their recovery of attorney fees associated with punitive damages. Instead, the trial court noted that the more appropriate method for recovering fees was to move the court to find that the Toiracs engaged in frivolous conduct. The Nithiananthans moved the court as suggested, and we will address the trial court's decision regarding frivolous conduct in the Toiracs' next assignment of error.

{¶ 58} The magistrate was in the best position, having dealt with the parties and associated litigation for over five years, to assess damages, and we will not disturb that

finding on appeal. As such, the Nithiananthans' third cross-assignment of error is overruled.

{¶ 59} Assignment of Error No. 2:

{¶ 60} THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES BASED UPON A FINDING OF FRIVOLOUS CONDUCT DESPITE ANY TESTIMONY THAT THE ATTORNEYS [SIC] FEES AWARDED WERE ATTRIBUTABLE TO THE CONDUCT.

{¶ 61} Cross-Assignment of Error No. 5:

{¶ 62} THE TRIAL COURT ERRED IN NOT AWARDING MORE ATTORNEY FEES FOR FRIVOLOUS CONDUCT.

{¶ 63} The Toiracs argue in their second assignment of error that the trial court erred in awarding attorney fees after a finding of frivolous conduct, and the Nithiananthans argue in their fifth cross-assignment of error that the trial court erred in not awarding enough attorney fees.

{¶ 64} Reviewing a trial court's decision regarding frivolous conduct involves mixed questions of law and fact. *Lucchesi v. Fischer*, 12th Dist. Clermont No. CA2008-03-023, 2008-Ohio-5935, ¶ 4. A trial court's factual determinations are accorded a degree of deference and will not be disturbed on appeal if there is competent, credible evidence in the record to support them. *State ex rel. Chrisman v. Clearcreek Twp.*, 12th Dist. Warren No. CA2013-03-025, 2014-Ohio-252, ¶ 8. We review, de novo, legal questions, such as a whether a party's conduct satisfies the statutory definition of frivolous conduct. *Dudley v. Dudley*, 196 Ohio App.3d 671, 2011-Ohio-5870, ¶ 11 (12th Dist.).

{¶ 65} According to R.C. 2323.51(B)(1), "at any time not more than thirty days after the entry of final judgment in a civil action or appeal, any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal." As pertinent to

the case at bar, R.C. 2323.51(A)(2)(a)(iii) provides one way to establish frivolous conduct by proving conduct that makes "allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."

{¶ 66} When determining whether conduct is frivolous pursuant to R.C. 2323.51, courts "must be careful not to deter legitimate claims. The statute is not intended to punish mere misjudgment or tactical error, but rather, it is designed to chill egregious, overzealous, unjustifiable, and frivolous action." *State ex rel. Chrisman*, 2014-Ohio-252 at ¶ 10.

{¶ 67} After a hearing on the matter, the magistrate found that the Toiracs had engaged in frivolous conduct by making allegations and factual contentions that had no evidentiary support pursuant to R.C. 2323.51(A)(2)(a)(iii). The magistrate also found that the Nithiananthans had been adversely affected by the Toiracs' frivolous conduct, and scheduled a hearing on attorney fees. After the hearing, the magistrate ordered the Toiracs to pay the Nithiananthans \$10,000 in attorney fees. Both parties filed objections to the magistrate's order, which were overruled by the trial court. After reviewing the record, we find that the trial court did not err in finding frivolous conduct or in ordering attorney fees as it did.

{¶ 68} In regard to the finding of frivolous conduct, the magistrate presided over five years' worth of litigation between the parties, and witnessed firsthand the demeanor of the parties, the claims made during the proceedings, and what evidence the parties presented during the pendency of the proceedings. The magistrate offered several well-supported examples from the record to demonstrate how the Toiracs' allegations or other factual contentions had no evidentiary support.

{¶ 69} The magistrate expressly found that Deborah's testimony lacked credibility, and that her assertions had become more "exaggerated" throughout the pendency of the

proceedings. For example, the magistrate recalled that Deborah testified at one hearing that she did not touch the stakes meant to mark the new boundary line between the parties' property once the survey was completed and the new boundary line established. When pressed, Deborah adamantly denied having touched the lines and denied having strung wire along the stakes. However, the Nithiananthans showed Deborah a photograph of her stringing wire along the stakes. Even when presented with photographic evidence of her stringing the wire, Deborah denied that the photograph depicted her stringing wire.

{¶ 70} Similarly, the magistrate noted that neither Thomas nor Deborah testified at the preliminary injunction hearing, which occurred several years before the final disposition, to ever seeing or having proof of any Nithiananthan vandalizing their property.⁴ However, once she was deposed, Deborah claimed to have seen both Cynthia and the Nithiananthans' daughter in the backyard of the Toirac property damaging the Toiracs' garden and statuary. Despite her previous testimony at the preliminary injunction phase, Deborah testified at her deposition to seeing the Nithiananthans vandalizing her property no less than "half a dozen times." Deborah also claimed during her deposition that the Nithiananthans' dog had escaped onto her property "over half a dozen times" even though she claimed a much lower amount during her preliminary injunction testimony regarding the same timeframe discussed in her deposition. In one entry, the magistrate noted the inconsistencies in Deborah's testimony and concluded, "this Magistrate does not find any of Mrs. Toirac's more recent testimony in support of her complaint for nuisance to be credible. This is a generous understatement."

{¶ 71} The magistrate also noted that Deborah's testimony not only lacked credibility

4. The record indicates that the preliminary injunction hearing was consolidated with the petitions filed by both parties for civil stalking protection orders, and that the hearing was held over two days in 2009-2010.

but also rose to the level of making allegations that "had become so florid as to be fantastical." In support, the magistrate quoted a lengthy section of Deborah's testimony specific to her belief that the Nithiananthans were filming and performing surveillance upon the Toiracs.

You know, we have seen the most bizarre things, you know, the surveillance van sitting in [the Nithiananthans'] driveway for weeks at a time. Cameras that we have seen as we walk in our upstairs. The upstairs in our home we have had cameras flashing. You can see, it's like you know, the amount of surveillance and the money that we [sic] have thrown into, you know, surveilling our activities when we have done absolutely nothing.

* * *

Every time you walk upstairs to the bedroom, you know, you have a flashing light going off in their backyard. You know, the red, green, white, you know flashing. You know that somebody is monitoring your activities. And now the newest thing is there is some huge globe that is floated up above the treeline now and it remains there and, you know, as we walk up the, you know, there are stairs to our bedroom to put our son to bed. It's obviously there for some surveillance purpose because I've seen it lowered, you know, literally and follow me as I move in the house. It's just completely bizarre.

{¶ 72} Despite Deborah's testimony as to the constant surveillance, flashing cameras every time she walked upstairs, and the mysterious orb that followed her, the Toiracs never presented any photographs or other evidence to substantiate the Nithiananthans' alleged surveillance of them. The only evidence submitted regarding recurrent surveillance was that presented by the Nithiananthans of the Toiracs' use of cameras and photographs to track the Nithiananthans.⁵

{¶ 73} During the hearing on the Nithiananthans' frivolous conduct motion, the

5. The magistrate did accept evidence from the Nithiananthans of photographs they had taken of the Toiracs' property to document items for the purpose of litigation. However, there was no evidence presented that the Nithiananthans engaged in constant surveillance in the manner described in Deborah's testimony.

magistrate stated its concern that the prosecution of the Toiracs' claims had been buttressed "if not wholly supported by obviously false testimony" of Deborah. The magistrate also noted that while the Toiracs' nuisance claim survived summary judgment, it was only because the summary judgment standard does not permit a weighing of credibility the way in which a trial on the merits does. The magistrate stated,

just because I read [a] deposition transcript that said Mrs. Toirac personally observed with her own eyes at two a.m. or whenever she said she saw it, Mrs. Nithiananthan and her daughter in her backyard vandalizing garden statuary and other fixtures in the backyard. I read that, I did not believe it as I read it. But that was not the time for me to address credibility. That was not an appropriate time for me to [weigh] the trustfulness of that statement.

Given the magistrate's entries after the summary judgment phase, especially on the nuisance claim and motion on frivolous conduct, the trial court was able to weigh the credibility of the testimony and expressly found that Deborah's testimony lacked credibility and did not provide any evidentiary basis to support the Toiracs' claims.

{¶ 74} The magistrate also found that the Nithiananthans were adversely affected by the frivolous conduct in that they had to defend the Toiracs' counterclaim, motions for summary judgment, and petition for civil stalking protection. As part of their defense of these actions, the Nithiananthans incurred deposition fees, court costs, attorney fees, as well as a prolonged time expenditure resolving the case.

{¶ 75} After reviewing the record, we agree with the trial court that the Toiracs' lack of evidentiary support of their claims and allegations "went beyond the zealous presentation of claims and defenses that a party is entitled to make, impeded the judicial process, and violated fair play." As such, the trial court did not err in finding that the Toiracs engaged in frivolous conduct and were consequently entitled to an award of attorney fees.

{¶ 76} "Where a court is empowered to award attorney fees by statute, the amount of

these fees is within the sound discretion of the trial court." *Kinder v. Smith*, 12th Dist. Warren No. CA2012-05-046, 2013-Ohio-2157, ¶ 16. According to R.C. 2323.51(B)(1), "any party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal." R.C. 2323.51(B)(3) further provides, "the amount of an award made pursuant to division (B)(1) of this section that represents reasonable attorney's fees shall not exceed, and may be equal to or less than, * * * (b) the attorney's fees that were reasonably incurred by a party."

{¶ 77} When calculating the amount of attorney fees, a trial court is guided by a two-step determination. *Lamar Advantage GP Co. v. Patel*, 12th Dist. Warren No. CA2011-10-105, 2012-Ohio-3319, ¶ 46. "The court should first calculate the 'lodestar' amount by multiplying the number of hours reasonably expended by a reasonable hourly rate and, second, decide whether to adjust that amount based on the factors listed in Prof.Cond.R. 1.5(a)." *Id.*, citing *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143 (1991), syllabus. Those factors include the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly, the amount involved and the results obtained, the experience, reputation, and ability of the lawyer or lawyers performing the services, and whether the fee is fixed or contingent. *Ohio Valley Associated Bldrs. & Contrs. v. Rapier Elec., Inc.*, 12th Dist. Butler Nos. CA2013-07-110, CA2013-07-121, 2014-Ohio-1477, ¶ 59.

{¶ 78} The parties stipulated that counsel for the Nithiananthans earned a reasonable rate of \$195 per hour. The magistrate determined that the lodestar amount was \$13,611 for counsel's defense of the Toiracs' counterclaims and prosecuting the frivolous conduct motion. The magistrate then considered the factors cited above and reduced the amount to

\$10,000.

{¶ 79} While the Toiracs argue that the fees awarded should have been limited to \$975, the Nithiananthans argue that the award should have been between \$15,307.50 and \$29,685.99.⁶ Regardless of the other fees suggested by the parties, we find that the trial court was within its discretion in awarding \$10,000 in attorney fees.

{¶ 80} The Toiracs argue that the amount should be limited to \$975 because only a few hours could be directly linked to work counsel had to do in response to the specific instances of frivolous conduct mentioned by the magistrate in its entry granting the Nithiananthans' frivolous conduct motion. Despite the Toiracs' argument, R.C. 2323.51 has been amended, and the amendment alleviated the need to prove that attorney fees were directly related to the frivolous conduct.⁷ Before the amendment, the statute required a showing that attorney fees requested were "both reasonably incurred by a party *and necessitated by the frivolous conduct.*" (Emphasis added.) However, the current version of R.C. 2323.51(B)(3)(b) requires only that the attorney fees be "reasonably incurred by a party" against whom the frivolous conduct occurred. Therefore, any reference by the Toiracs to the attorney fees not being necessitated by the frivolous conduct was disregarded by the trial court, as well as by this court on appeal.

{¶ 81} The trial court was not limited to parceling out which minutes or hours out of the many hours defending or proving the Toiracs' frivolous conduct were specifically connected with Deborah's untruthful testimony or unsupported assertions. The statute does not so require, and this court will not limit the award of attorney fees in the manner suggested by the

6. During the hearing on attorney fees, counsel testified that he had spent over 363 hours on the case, with an invoice exceeding \$70,785.

7. The statute underwent amendments in 1997, 2001, and 2005, well before the current litigation began.

Toiracs.

{¶ 82} Regarding the Nithiananthans' claim that the amount should be higher, the record indicates that the magistrate heard extensive testimony from counsel regarding the amount of time he spent on the different aspects of the case. The magistrate was within its discretion to determine which of the hours were reasonably incurred by the Nithiananthans, and which were not. Moreover, the magistrate was within its discretion to deviate the lodestar downward to \$10,000 where the statute specifically provides that the award of attorney fees may be equal to *or less than* the total amount reasonably incurred by the aggrieved party. R.C. 2323.51(B)(3). Before determining the final award, the magistrate expressly noted that it had considered each of the factors cited above in regard to adjusting a lodestar, and that the \$10,000 award was the proper amount for attorney fees. We find no abuse of discretion in the award, and overrule the Toiracs' second assignment of error and the Nithiananthans' fifth cross-assignment of error.

{¶ 83} Assignment of Error No. 3:

{¶ 84} TRIAL COURT ERRED IN AWARDING REIMBURSEMENT OF COSTS OF THE LITIGATION THAT NEARLY EQUALED THE DAMAGES AWARDED.

{¶ 85} Cross-Assignment of Error No. 4:

{¶ 86} THE TRIAL COURT ERRED IN NOT AWARDING MORE COSTS.

{¶ 87} The Toiracs argue in their third assignment of error that the trial court erred in awarding the Nithiananthans \$4,450.90 in costs, while the Nithiananthans argue in their fourth cross-assignment of error that the trial court did not award enough costs.

{¶ 88} According to Civ.R. 54(D), "except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." The Ohio Supreme Court has recognized that the recovery of costs

provided in Civ.R. 54(D) is not a grant of absolute right for court costs to be allowed to the prevailing party. *State ex rel. Gravill v. Fuerst*, 24 Ohio St.3d 12, 13 (1986). The phrase "unless the court otherwise directs" is interpreted to grant "the court discretion to order that the prevailing party bear all or part of his or her own costs." *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 555 (1992).

{¶ 89} Costs are generally defined as being the statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action, and which the statutes authorize to be taxed and included in the judgment. *Id.* As such, and in order to be taxable as a cost pursuant to Civ.R. 54(D), the expense must be grounded in statute. *Smallwood v. State*, 12th Dist. Butler No. CA2011-02-021, 2011-Ohio-3910, ¶ 10. Whether a litigation expense is a cost contemplated within Civ.R. 54(D) is a question of law and subject to de novo review. *Smith v. Pennington*, 12th Dist. Butler No. CA2010-03-071, 2010-Ohio-4570, ¶ 8. However, an appellate court cannot reverse a lower court's decision regarding the allocation of costs absent an abuse of discretion. *Hendricks v. Evertz Technology Serv. U.S.A., Inc.*, 12th Dist. Butler No. CA2011-10-188, 2012-Ohio-2252, ¶ 7.

{¶ 90} After considering the Nithiananthans' motion for costs, the magistrate awarded \$2,945.25 for transcription fees, \$1,265.65 in deposition fees, and \$240 in videography expenses, for a total of \$4,450.90. Both parties filed objections to the magistrate's decision, which were overruled by the trial court. We find that the trial court did not err in determining which costs were assessable and that it did not abuse its discretion in allocating the costs as it did.

{¶ 91} The magistrate reasoned that R.C. 2303.21 provides statutory authority to award the cost of transcription of depositions when the transcripts are used at trial or when determining the merits of a summary judgment motion. The statute also permits a trial court

to award the costs of transcribing hearings and proceedings when such transcripts are used by the party for evidentiary purposes in future proceedings. Sup.R. 13(D)(2) provides for the cost of recording and playing videotaped depositions. Because the costs assessed by the trial court were permitted by statute or rule, the trial court did not err in its assessment of costs.

{¶ 92} Regarding the allocation of costs, the magistrate specifically addressed the way in which the depositions, transcripts, and videotaped depositions were used, and properly allocated a portion of the total amount of costs to the Toiracs. While neither party is satisfied with the amount allocated, the magistrate was within its discretion to limit and allocate the costs as it did.

{¶ 93} The magistrate did not abuse its discretion in limiting the costs for transcribing the proceedings to \$2,945.25 where that was the cost to transcribe the preliminary injunction hearing, and those transcripts were used as evidence at the final merit trial. The magistrate's award of \$1,265.65 for deposition fees was also proper where the magistrate awarded the cost of the parties' depositions. The magistrate noted that the parties' depositions were the most crucial evidence used during the summary judgment phase, and that the parties' depositions were "necessary" to include in the record. The record also demonstrates that while the Nithiananthans deposed most of the Toiracs' witnesses, many of these witnesses appeared and testified at the preliminary injunction/civil stalking protection order hearing.⁸ The witnesses were subject to cross-examination and the Nithiananthans had the opportunity to elicit information similar to that which was obtained through the depositions without paying deposition fees so that deposing all of the witnesses may have been unnecessary. The fee

8. The record indicates that over twenty witnesses appeared at the hearings. The Nithiananthans then took the depositions of several of the witnesses who appeared on behalf of the Toiracs at the hearing.

for videography was also proper, and limited to two witnesses who had their deposition videoed. The magistrate determined that the cost to record the depositions of these two witnesses was \$240, and awarded those costs.

{¶ 94} Other than the three categories of costs, the magistrate found that the other costs requested by the Nithiananthans were not authorized by statute or were not properly allocated to the Toiracs. The rule provides that costs may be awarded to the prevailing party unless the court directs otherwise, and this section of the rule is interpreted to grant the trial court discretion to order that the prevailing party bear part of his or her costs. As such, the magistrate was within its discretion to order the Nithiananthans to bear a portion of their own litigation costs, especially where it may not have been necessary to transcribe every single proceeding, take depositions of every single witness, or proceed through the litigation in the exact manner in which they did over the five-year litigation period.

{¶ 95} As with the other issues raised on appeal, both parties were dissatisfied with the trial court's decision. The Toiracs assert that their conduct should have been condoned at every turn, while the Nithiananthans argue that the Toiracs' conduct should have been punished to a greater degree at every turn. The litigation between the parties has occurred for over five years, and the contention between the parties has lasted longer than that. As the trial court expressly noted in one of its entries, "both parties are to blame for allowing this controversy to grow into its current state." The court recognized that both parties were responsible for causing additional litigation expenses, and that both sides "exaggerated the nature of the claims."

{¶ 96} The magistrate and trial court were faced with the herculean task of parceling out hundreds of pieces of evidence and mountains of testimony from multiple hearings, as well as reaching decisions on countless motions made during proceedings that are now

entering their sixth year. At every turn, the parties have challenged and disagreed with every decision reached by the magistrate and trial court, yielding no concessions and reaching no compromise along the way. As it applies to the current appeal, the magistrate, and trial court in adopting the decisions of the magistrate, made their decisions within the discretion they are afforded and did not err in deciding the final merits of this lengthy litigation.

{¶ 97} The Toiracs' third assignment of error and the Nithiananthans' fourth cross-assignment of error are overruled.

{¶ 98} Judgment affirmed.

HENDRICKSON and M. POWELL, JJ., concur.