IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DAVID KANE, *et al.,*	)	**CASE NO. CV 11 748673**
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs	)	
	)	
KEVIN L. VAUGHN, *et al*.	)	**JOURNAL ENTRY**
	)	
Defendants	)	

John P. O'Donnell, J.:

This case involves a dispute among neighbors. The defendants have filed motions for summary judgment. Those motions are now fully briefed[1] and this entry follows.

FACTS

Plaintiffs David and Diane Kane have resided at 13572 Stoneridge Trail Drive in Strongsville since 1983. Defendant John Magnus lives two houses east of the Kanes at 13500 Stoneridge Trail. Magnus's back fence abuts the southeastern portion of the Kanes' property. Since 2007, defendant Jennifer Coulter has lived at 18896 Hidden Meadows, directly behind Magnus's fence at the eastern end of the Kane property. Defendant Carol Kovacs is Coulter's next door neighbor at 18864 Hidden Meadows, and that house is also located behind the fence at the eastern end of the Kane property.

In 1990 the Kanes purchased an additional plot at the back of their property. This parcel was undeveloped, and the Kanes bought the property understanding that the eastern 100

[1] To the extent the plaintiffs have actually moved under Civil Rule 56(F) for a continuance of the briefing for discovery that motion is denied. The plaintiffs assert as a reason to delay the briefing the fact that when the motions were filed they had not answered discovery previously directed to them. Yet it is the defendants who no need for discovery from themselves to produce evidence sufficient to defeat a motion for summary judgment.

feet of the property was to remain in its natural state according to a plat restriction. At some point after buying the land, the Kanes installed a batting cage on the eastern 100 feet and did some landscaping. According to the plaintiffs, Magnus complained about the alterations to Strongsville's building inspector, Tony Biondillo. On March 30, 2005, Kane received a letter from the City of Strongsville noting the violations of the plat restriction and requiring him to return the property to its natural state within 60 days of receipt of the letter. Emails ensued between Magnus and Biondillo regarding the condition of the plaintiffs' property. One email in particular included a photo of the plaintiffs' property, which is the basis for plaintiffs' trespass claim against Magnus.

After that, relations between the plaintiffs and their neighbors worsened. Beginning in 2005, the defendants filed numerous police reports that described peculiar conduct by David Kane, including patrolling the streets, name-calling, placing tacks in driveways and voyeurism. One incident led to criminal mischief charges against David Kane for damaging the fence between the Kane and Coulter properties. Kane was fined and put on probation for the offense. On one occasion, an officer noted that Kane appeared "deceitful" and on another occasion unwilling to follow simple instructions regarding filing a police report.

For their own part, since 2003 the Kanes have filed many police reports, alleging problems ranging from improper snow removal by the city to personal property damage. In response t the plaintiffs installed several surveillance cameras and bright lights to illuminate their property. The defendants, believing the cameras are aimed at their properties, have put up their own surveillance cameras and motion sensors. The defendants too are alleged to have engaged in name-calling, posting derogatory signs, and taking pictures of plaintiffs and their property.

On February 15, 2011, the plaintiffs filed this lawsuit against Magnus, Coulter, Kovacs, Kevin Vaughn, and the Hidden Meadows Homeowners' Association. The complaint asserts five causes of action: intentional infliction of emotional distress; nuisance; trespass; invasion of privacy; and libel. The defendants then counterclaimed for the same causes of action except libel, plus a claim for negligent infliction of emotional distress. Since then, the plaintiffs have voluntarily dismissed their causes of action against Vaughn and the homeowners association. The remaining defendants have now moved for summary judgment on all of the plaintiffs' claims.

LAW AND ANALYSIS

I. Intentional Infliction of Emotional Distress

To establish a claim for intentional infliction of emotional distress, the Kanes must prove all of the following elements: (1) each defendant either intended to cause serious emotional distress, or knew or should have known that the actions taken would result in serious emotional distress to the plaintiffs; (2) each defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it would be considered utterly intolerable in a civilized community; (3) the plaintiffs' psychic injuries proximately resulted from each defendant's actions; and (4) the plaintiffs suffered mental anguish that is serious and of a nature that no reasonable person could be expected to endure it.[2]

To constitute intentional infliction of emotional distress a defendant's conduct must be so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim,

[2] *Mosley v. Cuyahoga Cty. Bd. of Mental Retardation* (2011), 8th Dist. No. 96070, 2011-Ohio-3072, ¶77.

'Outrageous!'"[3] Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.[4] Furthermore, a person cannot generally be held liable for intentional infliction of emotional distress for having performed an act they were legally entitled to do.[5]

"Serious" emotional distress is described as emotional injury which is both severe and debilitating, and may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.[6] Ohio recognizes that a non-exhaustive litany of some examples of serious emotional distress would include traumatically induced neurosis, psychosis, chronic depression, or phobia.[7]

To prove serious emotional distress, the plaintiffs must present some guarantee of genuineness in support of their claim to prevent summary judgment in favor of the defendants.[8] While helpful in establishing serious emotional distress, medical expert testimony is not mandatory, and the plaintiffs may submit personal testimony as well as the testimony of lay witnesses.[9] The plaintiffs may not, however, rely solely on their affidavits to provide the "guarantee of genuineness" necessary to survive a motion for summary judgment.[10] Under Ohio law,

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[3] *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of America* (1983), 6 Ohio St.3d 369, 375, 453 N.D.2d 666.
[4] *Id*.
[5] *Morrow v. Reminger & Reminger Company L.P.A.* (2009), 183 Ohio App.3d 40, 63, 915 N.E.2d 696.
[6] *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 78, 451 N.E.2d 759.
[7] *Id*.
[8] *Powell v. Grant Med. Ctr.* (2002), 148 Ohio App.3d 1, 6, 771 N.E.2d 874.
[9] *Stockdale v. Baba* (2003), 153 Ohio App.3d 712, 724, 795 N.E.2d 727.
[10] *Buckman-Pierson v. Brannon* (2004), 159 Ohio App.3d 12, 24-25, 822 N.E.2d 830. See also, *Ford Motor Credit Company v. Ryan* (2010), 189 Ohio App.3d 560, 939 N.E.2d 891 (upholding summary judgment in favor of the appellees where the appellants presented neither medical expert nor lay witness testimony to support their claims for intentional infliction of emotional distress); *Radcliff v. Steen Elec., Inc.* (2005), 164 Ohio App.3d 161, 175, 841 N.E.2d 794 ("[s]elf-

> [a] plaintiff in a case for intentional infliction of emotional distress must present some evidence beyond the plaintiff's own testimony that he or she has experienced emotional distress due to the defendant's actions. Though Ohio is not as strict as some states in that it allows claims to proceed based on lay testimony only, there must still be some additional component to the plaintiff's evidence supporting an allegation of severe emotional distress that provides a "guarantee of genuineness."[11]

The Eighth District Court of Appeals specifically noted "summary judgment is appropriate when the plaintiff presents no testimony from experts *or third parties* as to the emotional distress suffered and where the plaintiff does not seek medical or psychological treatment for the alleged injuries."[12]

Here, the plaintiffs, by their affidavits, attribute various ills and ailments to the actions of the defendants.[13] Yet they have failed to produce the guarantee of genuineness of the existence of damages that the case law requires. Not only that, but even if the plaintiffs could show serious emotional distress they are unable to prove that it was caused by the outrageous conduct of a particular defendant. For these reasons, summary judgment in favor of the defendants on the plaintiffs' claims for intentional infliction of serious emotional distress through outrageous means is warranted.

II. Nuisance

Nuisance is defined as the wrongful invasion of a legal right or interest.[14] "Wrongful invasion" encompasses not only the interest in personal enjoyment of property, but also legal rights and privileges.[15] Nuisance encompasses two separate fields of tort liability: public nuisance and private nuisance.[16]

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[11] *Buckman-Pierson*, 159 Ohio App.3d at 25.
[12] *Crable v. Nestle USA, Inc.* (2006) Ohio App. 8th Dist. No. 86746, 2006-Ohio-2887, ¶56.
[13]
[14] *Taylor v. Cincinnatti* (1944), 143 Ohio St. 426, 432, 55 N.E.2d 724.
[15] *Id*.
[16] *Brown v.Scioto Cty.Bd of Commrs.* (1993), 87 Ohio App.3d 704, 712. 622 N.E.2d 1153.

A public nuisance is an unreasonable interference with a right common to the general public.[17] Unreasonable interference includes "those acts that significantly interfere with public health, safety, peace, comfort, or convenience, conduct that is contrary to a statute, ordinance, or regulation, or conduct that is of a continuing nature or one which has produced a permanent or long-lasting effect upon the public right, an effect of which the actor is aware or should be aware."[18]

A private nuisance is "a non-trespassory invasion of another's interest in the private use and enjoyment of land."[19] A private nuisance, as opposed to a public nuisance, affects only one or a few persons.[20] "For a private nuisance to be actionable, the invasion must be either (1) intentional and unreasonable or (2) unintentional but caused by negligent, reckless, or abnormally dangerous conduct."[21]

Public and private nuisance may further be broken down into absolute or qualified nuisance. An absolute nuisance, to which strict liability applies, is based on intentional conduct or an abnormally dangerous condition that cannot be maintained without injury to property no matter what precautions are taken.[22] A qualified nuisance, on the other hand, is based on negligence in maintaining a condition that creates an unreasonable risk of harm.[23] The allegations of nuisance and negligence therefore merge, as the nuisance claims rely on the finding of negligence.[24] To succeed on any claim of negligence, the plaintiff must show that

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[17] *Thompson v. Argent Mortg. Co., LLC* (2010) Ohio App. 8th Dist. No. 94613, 2010-Ohio-4499, ¶12.
[18] *Id*. at ¶13.
[19] *Ogle v. Ohio Power Co.* (2008), 180 Ohio App.3d 44, 49, 903 N.E.2d 1284.
[20] *Taylor,* 143 Ohio St. at 442.
[21] *Ogle*, 180 Ohio App.3d at 49.
[22] (2007), 174 Ohio App.3d 359, 368, 882 N.E.2d 46.
[23] *Id.*
[24] *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992) 64 Ohio St.3d 274, 276, 595 N.E.2d 855.

the defendant breached an applicable duty of care and that the breach proximately caused the plaintiff's injuries.[25]

The plaintiffs claim that each defendant's filing of police reports and maintaining security cameras constitutes actionable nuisance towards them. While the plaintiffs do not specify the type of nuisance they are claiming, the defendants' actions affect only the plaintiffs and are not inevitably injurious, so the claim must be characterized as one for a private, qualified nuisance.

One need only to observe that homeowners have the right to install security cameras on their property and that citizens have the legal right to make a police report to redress alleged grievances to realize that doing these things, without more, cannot breach a duty owed to the plaintiff. Therefore, summary judgment for the defendants on this cause of action is appropriate.

III. Trespass

Trespass is the unlawful entry onto the property of another.[26] To prove trespass, an owner must show (1) an intentional unauthorized act and (2) entry upon the land of another.[27] The plaintiffs claim that Magnus trespassed onto their property because the angle from which Magnus took certain pictures given to Strongsville's building department shows he had to be on the plaintiffs' property. The plaintiffs have also produced a survey showing that the defendants' fences encroach on the plaintiffs' property. This evidence, viewed in the light most favorable to the plaintiffs, leaves genuine issues of material fact about whether the defendants have committed a trespass and summary judgment on this cause of action is not justified even if the damages might be trivial.

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[25] *Safeco Ins .Co. of Am. v. White* (2009) 122 Ohio St.3d 562, 571, 913 N.E.2d 426.
[26] *Chance v. B.P. Chemicals, Inc.* (1996) 77 Ohio St.3d 17, 24, 670, N.E.2d 985.
[27] *Brown v. Scioto Cty. Bd. of Commrs.* at 716.

IV. Invasion of Privacy

> An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation, to a person of ordinary sensibilities.[28]

The plaintiffs allege that the defendants have invaded their privacy by taking numerous pictures of plaintiffs and their property. Plaintiffs further allege that the defendants have invaded their privacy by recording plaintiffs' property and their comings and goings by means of security cameras placed on the defendants' houses. The plaintiffs claim that the defendants have shared these videos with each other and with the Strongsville police. If true, a reasonable jury could find that such conduct involves the publicizing of the plaintiffs' private affairs or the wrongful intrusion into their private activities. As for damages, the standard of proof needed to defeat summary judgment for the defendant on an invasion of privacy claims is less than that required on a claim for intentional infliction of serious emotional distress, and the available evidence is sufficient to create a question of fact about whether the defendants' actions have caused the plaintiffs mental suffering, shame or humiliation. Hence, summary judgment for the defendants on the invasion of privacy claim is not warranted.

V. Libel

Libel is written defamation whereas slander is spoken defamation. To prove defamation a plaintiff must show (1) the assertion of a false statement of fact, (2) the false statement was defamatory, (3) publication of the statement, (4) the publication proximately caused the plaintiff injury, and (5) the defendant acted with the requisite degree of fault.[29]

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[28] *Housh v. Peth* (1956), 165 Ohio St. 35, at syllabus 2.
[29] *Celebrezze v. Dayton Newspapers, Inc.* (1988), 44 Ohio App.3d 343, 346-347, 535 N.E.2d 755.

Defamation claims are subject to the one-year statute of limitations set forth in section 2305.11 of the Ohio Revised Code.

As to defendant Coulter, the plaintiffs complain about three specific publications: a June 21, 2009 report to the Strongsville police; an April 18, 2010 report to that same agency; and a third police report in June 2011. As to the 2009 report, the statute of limitations expired long before this suit was filed in February 2011. As to the June 2011 report, it was made after this lawsuit was filed and the plaintiffs have not sought to amend their complaint to include a claim of libel based on post-lawsuit statements. And as to any police report, the defense of qualified privilege may be available. The Ohio Supreme Court has described qualified privilege in a defamation context as follows:

> A qualified or conditionally privileged communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.[30]

A plaintiff can overcome a qualified privilege only by showing evidence of actual malice in publishing the defamatory statement.

Examining the police reports at issue here, they were made by Coulter in good faith and on a subject of interest to her to an agency of government she thought should know about the things she described. A qualified privilege therefore exists and the plaintiff has not produced evidence of actual malice to overcome that privilege.

As to defendant Kovacs, the plaintiffs cite as libelous five reports to Strongsville. The first four were made April 14, 2006, November 19, 2007, June 21, 2009 and August 28, 2009. The statute of limitations for defamation claims as to all of these statements expired before this

[30] *Hahn v. Kotten* (1975), 43 Ohio St. 2d 237, 244.

lawsuit was filed. Moreover, like Coulter's statements, the reports are qualifiedly privileged and the plaintiffs have not produced evidence of actual malice. Additionally, the reports of 2006 and 2007 cannot constitute libel because they are oral communications by Kovacs, not written. Finally, the 2006 communication is not even defamatory. The fifth alleged libel was in a July 25, 2011 complaint to the city's building department. Because Kovacs did not create the writing she could not have libeled the defendants by her statement. Putting that aside, the statement did not exist to support a defamation claim when this lawsuit was filed. Beyond that, and assuming the statement isn't true, it is simply not defamatory: Kovacs called to complain that the Kanes were doing loud construction and blocking a driveway with dirt.

As to defendant Magnus, most of the allegedly libelous statements are contained in exhibits C and D to the plaintiffs' September 30, 2011 brief in opposition to Magnus's motion for summary judgment and are bates-stamped with the following numbers: 176, 183, 305, 463, 475, 477-478, and 480. All of these communications were made between March 30, 2005 and February 14, 2007. A defamation lawsuit based on any of them is therefore barred by the one-year statute of limitations. All of the communications are also qualifiedly privileged and all of them, with the possible exception of 176, are not defamatory. Finally, the documents numbered 176, 183, 305, 463 and 475 are not written statements by Magnus.

The last alleged libel by Magnus is claimed to arise from his posting a sign in his own

No evidence was provided about when that sign was posted, so the affirmative defense of statute of limitations may not apply to that writing. However, there is no evidence that any person who saw the sign (other than, perhaps, the co-defendants who already held the Kanes in low esteem) ever connected the sign to either of the Kanes and thought less of them as a result.

For all of these reasons, summary judgment on the libel claims against each of the defendants is appropriate.

VI. Punitive Damages

"Punitive damages may properly be imposed to further the state's legitimate interests in punishing unlawful conduct and deterring its repetition."[31] Punitive damages are intended to deter conduct resulting from a mental state that is so callous in its disregard for the rights and safety of others that society deems it intolerable."[32] "Since punitive damages are assessed for punishment and not compensation, the positive element of conscious wrongdoing is always required."[33] Actual malice requires proof either that the defendant's conduct (1) was characterized by hatred, ill will, or a spirit of revenge, or (2) demonstrated a conscious disregard for the rights and safety of other persons that has a great probability of substantial harm.[34]

Plaintiffs claim that the combination of police reports, picture-taking, name-calling, and videotaping of the plaintiffs' property has risen to the level of malice. This is a question of fact properly left to a jury to decide upon all of the evidence at trial, hence summary judgment on this claim is premature.

CONCLUSION

For all of the foregoing reasons, the defendants' motions for summary judgment are granted and denied in part as follows: summary judgment is granted in favor of all defendants on the causes of action for intentional infliction of serious emotional distress through outrageous means, nuisance and libel; summary judgment is denied as to all defendants on the

[31] *Philip Morris USA v. Williams* (2007), 549 U.S. 346, 352, 127 S. Ct. 1057.
[32] *Ward v. Hengle* (1997), 124 Ohio App.3d 396, 405, 706 N.E. 2d 392.
[33] *Creech v. Brock & Assoc. Constr*., (2009), 183 Ohio App.3d 711, 718, 918 N.E.2d 541.
[34] *Preston v. Murty* (1987), 32 Ohio St.3d 334, 335, 512 N.E.2d 1174.

causes of action for trespass and invasion of privacy, and the plaintiffs are not precluded from seeking punitive damages on those claims at trial.

IT IS SO ORDERED:

_____ Date:_____

CERTIFICATE OF SERVICE

A copy of this journal entry was sent by e-mail on _____ , 2011, to the following:

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