[Cite as *Hamilton v. Hibbs L.L.C.*, 2012-Ohio-4074.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Edward J. Hamilton et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-1107
v.	:	(M.C. No. 2010 EVH 60197)
Hibbs LLC et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 6, 2012

Plymale & Dingus, LLC, and *M. Shawn Dingus*, for appellants.

Anthony Law, LLC, Michael J. Anthony and *Vincent P. Zuccaro*, for appellee Hibbs LLC.

Maguire & Schneider, LLP, Karl H. Schneider and *Trina Goethals*, for appellee HER, Inc.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶ 1} Plaintiffs-appellants, Edward J. Hamilton and Kenneth J. Satterfield, appeal a judgment of the Franklin County Municipal Court, Environmental Division, that granted summary judgment to defendants-appellees, Hibbs LLC and HER, Inc. For the following reasons, we affirm.

{¶ 2} Plaintiffs own a house at 98 Hosack Street, which is in close proximity to an apartment building located at 1900-1904 Bucher Street. In early April 2010, Hibbs purchased and took possession of the Bucher apartment building. At the time, a tenant named Michelle Hill leased the unit located at 1902 Bucher. Hill and the other residents

of 1902 Bucher frequently threw parties, during which loud music with heavy bass would blast from automobiles parked at the rear of the unit. The music made plaintiffs' windows rattle and shake, and it interfered with Hamilton's ability to sleep.

{¶ 3} Hamilton believed that the Columbus Metropolitan Housing Authority ("CMHA") owned the Bucher apartment building, so he contacted it to complain about the noise. A CMHA employee informed Hamilton that CMHA had sold the Bucher apartment building to Hibbs and gave Hamilton the contact information for HER, the property manager that Hibbs had hired to oversee the Bucher apartment building. On May 14, 2010, Hamilton telephoned HER and, when he did not get a response, left a voicemail message.

{¶ 4} On May 24, 2010, Kim Hall, a HER employee, returned Hamilton's telephone call. After listening to Hamilton describe the situation, Hall asked Hamilton to place his complaints in writing. Hamilton immediately drafted and sent to Hall an e-mail that stated, in relevant part:

> On numerous occasions over the past month, the tenants [at 1902 Bucher Street] and their visitors to your building have been violating Columbus's City Noise Ordinance by allowing loud music from cars being blared at "Unreasonable" levels. I mean so unreasonable that even though I have my windows closed in my home, and my window air conditioners are on, that my windows still rattle from the loud bass from the cars in front and behind your building at all times including Midnight. They also have loud parties that last from 2 Pm through after 10 PM. I have tried to talk to your tenants to no avail.
>
> There are numerous complaints on file with the Columbus City police department regarding the excessive noise issues.
> * * *
>
> There are several senior citizens on this block complaining about the noise. I, for one, will not tolerate it any longer.

Hamilton also threatened to file a lawsuit if the loud noise did not stop within five business days.

{¶ 5} In a letter dated May 27, 2010, Hall informed Hill that HER had received a formal complaint about the noise and activity levels in and outside of her unit. Hall

requested that Hill refrain from making excessive noise and warned Hill that "[f]ailure to do so w[ould] result in further action up to and including eviction from the unit."

{¶ 6} In 2010, Memorial Day was Monday, May 31. On that day, Hamilton sent Hall an e-mail that stated:

> The disturbances and loud music and parties are still occurring from your tenant at 1902 Bucher St.
>
> The police had to be called @ 2:30 Sunday morning to break up a party of over 10 people fighting in the street from a party that originated from your property. * * *
>
> I have had enough.
>
> Since your response was obviously not enough to stop the problems, I will now deal with it. I am filing for an emergency injunction against your property to have it declared a nuisance and to have the tenants evicted.
>
> See you in court.

The next day, plaintiffs, acting pro se, filed a complaint against defendants, alleging a claim for nuisance, along with other claims.[1]

{¶ 7} Meanwhile, defendants worked to address and resolve the noise issue. Christopher L. Guillet, a Hibbs' representative, spoke with neighbors and local police officers to find out if they had experienced problems with the residents or visitors of 1902 Bucher. Although the police officers did not recognize the address, the neighbors confirmed that the residents of 1902 Bucher held loud parties. Guillet also contacted Hamilton to discuss his complaints and communicated with him several times. Guillet kept Hamilton aware of defendants' efforts to control the noise, including the hiring of off-duty police officers to patrol the area.

{¶ 8} In a letter dated June 15, 2010, HER gave Hill a second notice of complaints about the noise and disturbances coming from her unit. The letter requested that Hill voluntarily vacate the unit by June 30, 2010.

{¶ 9} When Hill did not move out by the June 30 deadline, HER posted a "Notice to Leave Premises." This notice—posted July 1, 2010—informed Hill that if she did not

[1] Plaintiffs later voluntarily dismissed all claims except for their nuisance claim.

vacate her unit, an eviction action could be filed against her. HER also returned to Hill the rent check that Hill had submitted for July 2010.

{¶ 10} Despite the eviction notice, Hill remained at 1902 Bucher. Therefore, on July 19, 2010, defendants filed an eviction action against Hill. Finally, on July 27, 2010, Hill moved out.

{¶ 11} Although the excessive noise stopped when Hill left, the lawsuit continued on. After conducting discovery, both Hibbs and HER moved for summary judgment. On November 15, 2011, the trial court issued a decision and entry granting both motions.

{¶ 12} Plaintiffs now appeal the November 15, 2011 judgment, and they assign the following errors:

> 1. The Trial Court erred in granting Appellees' Motion for Summary Judgment because reasonable minds could conclude [t]he Appellees did negligently allow excessive noise to continue on at 1902 Bucher Street.
>
> 2. The trial court erred in granting Appellees' Motion for Summary Judgment because Appellants suffered injury resulting in actual, material, physical discomfort.

{¶ 13} Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 14} By their first assignment of error, plaintiffs argue that the trial court erred in concluding that the evidence did not establish that defendants acted negligently in abating the nuisance created by the tenants and visitors of 1902 Bucher. We disagree.

{¶ 15} A "nuisance" is a wrongful invasion of a legal right or interest. *Banford v. Aldrich Chem. Co. Inc.*, 126 Ohio St.3d 210, 2010-Ohio-2470, ¶ 17. A plaintiff asserting a suit for nuisance may recover for a public nuisance, i.e., an unreasonable interference with a right common to the general public. *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, such a plaintiff may recover for a private nuisance, i.e., the wrongful invasion of the use and enjoyment of property. *Beretta U.S.A. Corp.* at ¶ 8; *Arkes v. Gregg*, 10th Dist. No. 05AP-202, 2005-Ohio-6369, ¶ 43; *see also Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 714 (4th Dist.1993) (when a particular nuisance qualifies as both a public and private nuisance, a plaintiff "may recover either on the basis of the particular harm to her resulting from the public nuisance or on the basis of private nuisance"). Here, plaintiffs alleged the latter type of nuisance by claiming that the noise from 1902 Bucher interfered with their use and enjoyment of their home.

{¶ 16} A nuisance may be further categorized as either an absolute or qualified nuisance. The distinction between absolute and qualified nuisance depends on the conduct of the defendant. *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." *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, ¶ 59. On the other hand, a qualified nuisance is the "negligent maintenance of a condition that creates an unreasonable risk of harm, ultimately resulting in injury." *Id.* Here, plaintiffs asserted a claim for qualified nuisance by alleging that defendants negligently maintained the excessive noise level.

{¶ 17} An action for damages due to a qualified nuisance is premised on a defendant's negligence in allowing a dangerous or bothersome condition to exist. *Allen Freight Lines, Inc. v. Consol. Rail Corp.*, 64 Ohio St.3d 274, 275 (1992). Therefore, a plaintiff must aver and prove negligence in order to prevail. *Id.* at 276. To succeed on a claim for negligence, a plaintiff must establish that the defendant breached an applicable duty of care and that the breach proximately caused the plaintiff injury. *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, ¶ 36. The standard of care is that

care a reasonable person would exercise in preventing or correcting the dangerous or bothersome condition. *Rothfuss v. Hamilton Masonic Temple Co.*, 34 Ohio St.2d 176, 180 (1973); *Kramer v. Angel's Path, L.L.C.*, 174 Ohio App.3d 359, 2007-Ohio-7099, ¶ 23 (6th Dist.).

{¶ 18} Here, the parties do not dispute the operative facts. Within three days of receiving Hamilton's complaint of excessive noise from 1902 Bucher, HER dispatched a warning letter to the tenant. When that did not lessen the noise, Hibbs hired off-duty police officers to patrol the area and authorized HER to send a letter requesting that Hill voluntarily vacate her unit. HER posted an eviction notice after Hill did not move out by the deadline given her. Defendants then filed an eviction action, which finally convinced Hill to leave. Approximately two months after learning of the noise problem, defendants completely eliminated it. Given these facts, reasonable minds could only conclude that defendants acted reasonably in correcting the alleged nuisance.

{¶ 19} In arguing to the contrary, plaintiffs rely on a series of police dispatch reports that indicate that the police received noise and other complaints about activity at 1902 Bucher beginning on April 11, 2010. Plaintiffs contend that defendants acted negligently in not investigating those complaints. However, the record contains no evidence that defendants knew about the complaints to the police. According to Guillet, defendants did not discover that a possible nuisance existed until Hamilton lodged his complaint with HER on May 24, 2010. Therefore, the dispatch reports do not alter our conclusion that a reasonable trier of fact could only find that defendants acted reasonably to ameliorate the nuisance. We thus conclude that the trial court appropriately granted defendants summary judgment, and we overrule plaintiffs' first assignment of error.

{¶ 20} Our ruling on plaintiffs' first assignment of error renders their second assignment of error moot. Accordingly, we will not address it.

{¶ 21} For the foregoing reasons, we overrule plaintiffs' first assignment of error, and we find the second assignment of error moot. We affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.