[Cite as *Adams v. Pitorak & Coenen Invests., Ltd.*, 2010-Ohio-3359.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

KENNETH J. ADAMS,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
- vs -	:	**CASE NOS. 2009-G-2931 and 2009-G-2940**
PITORAK & COENEN INVESTMENTS, LTD., et al.,	:	
Defendants,	:	
CLEMSON EXCAVATING, INC.,	:	
Defendant-Appellee.		

Civil Appeals from the Court of Common Pleas, Case No. 08 M 000868.

Judgment: Affirmed in part, reversed in part, and remanded.

James A. Sennett and *Laura A. James*, Cowden & Humphrey Co., L.P.A., 4600 Euclid Avenue, Suite 400, Cleveland, OH 44103 (For Plaintiff-Appellant).

David J. Fagnilli, *Megan D. Novinc*, and *Beverly A. Adams*, Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114-2654 (For Defendant-Appellee).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Kenneth J. Adams, appeals the judgment entered by the Geauga County Court of Common Pleas. The trial court granted a motion for summary judgment filed by appellee, Clemson Excavating, Inc.

{¶2} Adams has a bachelor of science degree in chemical engineering, although he is not a professional engineer ("P.E."). Adams states that he does "environmental engineering," which he describes as informing clients of the best locations, sizes, and characteristics for the installation of ponds on their properties. Adams estimates that he has consulted on the installation of 20 to 75 ponds.[1]

{¶3} Adams owns five acres of real property on Pekin Road in Novelty, Ohio. Adams has resided in a residence at this location since the 1970s. A small pond is located on Adams' property. This pond is fed by natural springs and precipitation runoff. In 1992, Adams modified the pond, increasing its depth from about one foot to approximately ten feet. The pond is currently about .2 acres in area. In 1994 or 1995, Adams stocked the pond with several species of fish.

{¶4} In 2003, plans were initiated to develop a neighboring piece of property into the Heather Hollow subdivision. This parcel is located uphill from Adams' property.

{¶5} Clemson Excavating was hired as the general contractor for the subdivision project. Clemson Excavating conducted the majority of its work on the project in 2004. Specifically, it removed trees from the property, demolished existing structures, constructed a sub-base for the roadways, installed culvert pipes and catch basins, and dug ditches and trenching for electrical lines. Also, Clemson Excavating was responsible for erosion control measures on the property.

{¶6} In addition, Clemson Excavating constructed a retention pond on the Heather Hollow property. It dug out the pond and built an earthen dam to form the downhill barrier to the pond. Clemson Excavating installed an overflow structure at the

1. Despite his education and profession, Adams stated in his deposition that he does not consider himself an "expert" in relation to any of the aspects of this case.

edge of the pond. When necessary, water enters the overflow structure, is piped about 60 feet away from the pond, and is permitted to run off the property. Eventually, this water enters Adams' property. On at least one occasion in 2004, the retention pond overflowed, resulting in an excess amount of water entering Adams' property.

{¶7} Clemson Excavating incorrectly installed a culvert at station 850 of the project. Specifically, it laid rip rap[2] directly on the clay instead of on fabric. Upon the request of the Geauga County Soil and Water Conservation District, Clemson Excavating corrected the problem by removing the rocks, installing the fabric, and doubling the size of the rip rap. Also, upon the direction of the Geauga County Soil and Water Conservation District, Clemson Excavating installed "combination barriers," consisting of hay bales and silt fencing, in an effort to control erosion from the development's property.

{¶8} In addition, the Ohio Environmental Protection Agency ("Ohio EPA") instructed Clemson Excavating to install an additional standpipe in the retention pond in an attempt to control sedimentation.

{¶9} During the construction phase of the project, Adams reported erosion problems as a result of the development. Adams claims the amount of runoff onto his property has increased since construction started on the Heather Hollow subdivision. In addition, he claims the amount of sediment in the runoff has also increased. Adams describes the runoff as varying in color from "dark brown, light tan, lime green, [to] a brownish tea with scum color." Adams contends this additional runoff has resulted in

2. Rip rap is described as large rocks.

damage to his pond, including killing fish and other wildlife. Further, Adams asserts the additional runoff has flooded his driveway at least 50 times.

{¶10} In August 2008, Adams filed a complaint alleging interference with surface water, nuisance, and trespass against several defendants, including: Pitorak & Coenen Investments, Ltd.; Pitorak & Coenen Investments, LLC; William R. Gray Associates, Inc.; Clemson Excavating, Inc.; Richard Jaynes; Larry and Loretta Pitorak; Mijo Peldich; and Debra Kackley.[3] The complaint indicated the instant action was the refiling of a prior lawsuit filed in 2006, which was voluntarily dismissed without prejudice by Adams in 2007.

{¶11} Clemson Excavating filed an answer to the complaint.

{¶12} Adams filed a motion to amend his complaint by adding a defendant, asserting the additional claim of "temporary damage to real property," and seeking an order abating the nuisance. Clemson Excavating filed a brief in opposition to Adams' motion to amend the complaint. The trial court granted Adams' motion by writing "it is so ordered" on the motion itself.

{¶13} Clemson Excavating filed a "motion for summary judgment, or in the alternative, motion for partial summary judgment." Clemson Excavating attached several items to its motion, including an affidavit of Scott Vura, a professional engineer.

{¶14} Adams filed a brief in opposition to Clemson Excavating's motion for summary judgment or partial summary judgment. Adams attached his own affidavit to his brief in opposition. Also, he attached the affidavit and report of Doyle Hartman, a professional engineer.

3. Only Adams' claims against Clemson Excavating are currently before this court.

{¶15} In addition to the parties' written submissions and attached exhibits, the depositions of Adams; Daniel Gerson, formerly of Grey & Associates, Inc.; and Carl Clemson, the President of Clemson Excavating, were filed for the trial court's consideration.

{¶16} On October 6, 2009, the trial court issued a judgment entry granting Clemson Excavating's motion for summary judgment. This judgment entry included language pursuant to Civ.R. 54(B) that "[t]here is no just cause for delay."

{¶17} On October 30, 2009, Adams filed a "motion to vacate" the trial court's entry of summary judgment in favor of Clemson Excavating, pursuant to Civ.R. 60(B).

{¶18} On November 4, 2009, Adams filed a notice of appeal of the trial court's entry of summary judgment in favor of Clemson Excavating. This appeal was assigned case No. 2009-G-2931.

{¶19} On November 6, 2009, the trial court issued a judgment entry denying Adams' Civ.R. 60(B) motion, because the court was divested of jurisdiction to consider the motion in light of the appeal in case No. 2009-G-2931. Adams filed a notice of appeal of the trial court's judgment entry denying his Civ.R. 60(B) motion, and this matter was assigned case No. 2009-G-2934.

{¶20} While these appeals were pending, upon Adams' motion, this court remanded the matter to the trial court for it to rule on the merits of Adams' Civ.R. 60(B) motion. Pursuant to this court's remand, the trial court considered the merits of Adams' Civ.R. 60(B) motion and issued a judgment entry denying the motion. Adams' filed a notice of appeal of the trial court's judgment entry denying his Civ.R. 60(B) motion, and

this matter was assigned case No. 2009-G-2940. This court consolidated case Nos. 2009-G-2931, 2009-G-2934, and 2009-G-2940 for purposes of briefing and disposition.

{¶21} Adams filed a motion to dismiss case No. 2009-G-2934, since it was moot in light of the trial court's subsequent denial of his Civ.R. 60(B) motion on its merits. This court granted Adams' motion and dismissed case No. 2009-G-2934.

{¶22} Adams raises three assignments of error. His first and second assignments of error are:

{¶23} "[1.] The Trial Court erred in its grant of summary judgment for Appellee Clemson Excavating, Inc., because said Appellee failed to meet the burden put on a Rule 56 movant.

{¶24} "[2.] The Trial Court erred in its grant of summary judgment in favor of Appellee Clemson Excavating, Inc., because Appellant Kenneth J. Adams' evidence contra to Appellee's summary judgment motion, when construed most strongly in Appellant's favor, created genuine issues of material fact upon which reasonable minds could conclude favorably to Appellant."

{¶25} In order for a motion for summary judgment to be granted, the moving party must demonstrate:

{¶26} "(1) [N]o genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385. (Citation omitted.)

{¶27} Summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of facts, if any, *** show that there is no genuine issue as to any material fact ***." Civ.R. 56(C). Material facts are those that might affect the outcome of the suit under the governing law of the case. *Turner v. Turner* (1993), 67 Ohio St.3d 337, 340, quoting *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248.

{¶28} If the moving party meets this burden, the nonmoving party must then provide evidence illustrating a genuine issue of material fact, pursuant to Civ.R. 56(E). *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Civ.R. 56(E) provides:

{¶29} "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

{¶30} Summary judgment is appropriate pursuant to Civ.R. 56(E) if the nonmoving party does not meet this burden.

{¶31} Appellate courts review a trial court's entry of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. "*De novo* review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶32} The applicable statute of limitations for damage to real property is four years pursuant to R.C. 2305.09(D). *Sexton v. Mason*, 117 Ohio St.3d 275, 2008-Ohio-858, at ¶19, quoting *Harris v. Liston* (1999), 86 Ohio St.3d 203, paragraph one of the syllabus. In light of Adams' prior Civ.R. 41(A) voluntary dismissal, Adams' claims against Clemson Excavating are timely asserted. See, e.g., *King v. Ricerca Biosciences, LLC*, 11th Dist. No. 2005-L-068, 2006-Ohio-2146, at ¶9-11. (Citations omitted.)

{¶33} In this matter, Adams advanced claims of trespass, nuisance, and interference with surface water rights.

{¶34} "'A common-law tort in trespass upon real property occurs when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another whereby damages directly ensue ***.'" *Apel v. Katz* (1998), 83 Ohio St.3d 11, 19, quoting *Linley v. DeMoss* (1992), 83 Ohio App.3d 594, 598, and citing *Chance v. BP Chemicals, Inc.* (1996), 77 Ohio St.3d 17, 24. Regarding trespass in the context of surface water interference, there are generally two categories of trespass—permanent and continuing. *Sexton v. Mason*, 117 Ohio St.3d 275, 2008-Ohio-858, at ¶28. A continuing trespass occurs "when there is some continuing or ongoing allegedly tortious activity attributable to the defendant." Id. at ¶45. "A permanent trespass occurs when the defendant's allegedly tortious act has been fully accomplished." Id.

{¶35} The Supreme Court of Ohio has recently addressed the difference between these types of trespasses. Id. In *Sexton v. Mason*, the plaintiffs were property owners, who initiated an action against the developer and the engineering firm of an

adjoining property. Id. at ¶4. Following the completion of a subdivision on the adjoining property, the plaintiffs experienced excess water and flooding on their property, despite having no prior water problems. Id. at ¶5. The Supreme Court of Ohio classified the alleged trespass in *Sexton v. Mason* as a permanent, rather than continuing, trespass. Id. at ¶44-45. The court noted that once the engineering firm completed its work on the stormwater drainage system and the developer finished its work on the entire project, neither exerted ongoing control over the property. Id. at ¶55. Similarly, in the case sub judice, Clemson Excavating has not exercised any control over the project since 2005, when it completed some minor remedial work. Thus, we consider the alleged trespass in this matter a permanent, rather than continuing, trespass.

{¶36} Adams also advances a claim for nuisance. Since Adams contends that Clemson Excavating interfered with the use and enjoyment of his land, he is asserting a private, rather than a public, nuisance. *Guarino v. Farinacci*, 11th Dist. No. 2001-L-158, 2003-Ohio-5980, at ¶14. See, also, *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, at ¶8. (Citation omitted.) There are two types of private nuisance—a qualified nuisance and an absolute nuisance. *Guarino v. Farinacci*, 2003-Ohio-5980, at ¶15. The Supreme Court has explained the difference between these two varieties as follows:

{¶37} "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. A qualified nuisance is essentially a tort of negligent maintenance of a condition that creates an unreasonable risk of harm, ultimately

resulting in injury." *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, at ¶59.

{¶38} This court has held that actions affecting the natural drainage of water as a result of regrading or excavation generally fall into the category of a qualified nuisance. *Guarino v. Farinacci*, 2003-Ohio-5980, at ¶17-18. In this matter, we consider the alleged conduct of Clemson Excavating in the context of a qualified nuisance, which is based on negligence. Id. at ¶18. The Supreme Court of Ohio has held that "in order to establish a cause of action for negligence, the plaintiff must show (1) the existence of a duty, (2) a breach of duty, and (3) an injury proximately resulting therefrom." *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, at ¶8, citing *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77.

{¶39} Finally, regarding Adams' claim of interference with surface water, this court has previously adhered to the following holding from the Supreme Court of Ohio:

{¶40} "'In resolving surface water disputes, courts of this state will apply a reasonable-use rule under which a possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and cause some harm to others, and the possessor incurs liability only when his harmful interference with the flow of surface water is unreasonable.'" *Guarino v. Farinacci*, 2003-Ohio-5980, at ¶36, quoting *McGlashan v. Spade Rockledge Corp.* (1980), 62 Ohio St.2d 55, syllabus.

{¶41} While Adams has asserted various causes of action against Clemson Excavating, all of Adams' claims are based on the same alleged conduct of Clemson Excavating—that Clemson Excavating has caused increased runoff and runoff containing silt, chemicals, and pollutants to enter his property. Accordingly, for the purposes of this appeal, we will address Adams' claims in a consolidated analysis.

{¶42} Again, this appeal only concerns the potential liability of Clemson Excavating, the general contractor. Neither party addresses Clemson Excavating's liability as compared to the other defendants. Clemson Excavating, through specific acts or omissions, may have caused excess water and/or water containing silt or debris to enter Adams' property. This analysis will only concern those acts and/or omissions. To the extent that Adams is arguing that the Heather Hollow subdivision, in its developed state, contributes additional water to his property than it did in its prior, undeveloped state, he may have successful claims against the other defendants in this action. However, this appeal only concerns the specific acts and/or omissions of Clemson Excavating that give rise to liability on its part.

{¶43} First, we address whether Clemson Excavating met its initial burden of setting forth evidence demonstrating there is no genuine issue of fact regarding Adams' claims that it unreasonably interfered with the surface water and caused damage to Adams' property *during* the construction of the Heather Hollow subdivision.

{¶44} In his affidavit, Clemson Excavating's expert, Scott Vura, offers the following opinion:

{¶45} "[T]he quantity and quality of storm water runoff from the Heather Hollow Subdivision which has crossed [Adams'] property *since the completion of the project on*

October 3, 2005, is the same runoff which crossed [Adams'] property prior to the commencement of the project." (Emphasis added.)

{¶46} In addition, Vura opines:

{¶47} "*Since the completion of the project*, there are no visible indications, nor do I have any reason to believe that erosion has taken place due to the construction of the Heather Hollow Subdivision.

{¶48} "There are currently no apparent indications that there has been an increase in the volume of *post-construction sedimentation*." (Emphasis added.)

{¶49} In his complaint, Adams alleged that Clemson Excavating's conduct caused additional runoff, containing "various chemicals and other pollutants," to enter his property from July 2004 to the date the complaint was filed.

{¶50} It is important to note that Clemson Excavating moved for summary judgment, "or in the alternative," for partial summary judgment. In its motion, Clemson Excavating argued:

{¶51} "In the alternative, Clemson requests partial summary judgment in its favor because [Adams'] alleged damages are limited to those damages which occurred between July of 2004 and October 3, 2005. Indeed, the quantity and quality of water runoff which has crossed [Adams'] property since the completion of the project on October 3, 2005 is the same as the runoff which crossed [Adams'] property prior to the commencement of the project. *** Further, since the completion of the project, no erosion has taken place and there has been no increase in the volume of post-construction sedimentation. *** The ground is stabilized."

{¶52} Clemson Excavating, through Vura's affidavit, has not addressed Adams' contention that additional runoff occurred *during* the construction phase of the project in 2004-2005. Thus, Clemson Excavating did not meet its burden of demonstrating no genuine issue of material fact existed as to whether it caused damage to Adams' property during the construction of the project.

{¶53} In fact, when viewed most strongly in Adams' favor, the evidence presented by Clemson Excavating suggests that its actions may have contributed to additional runoff and/or runoff with additional sediment. In his deposition, Carl Clemson stated that the retention pond Clemson Excavating constructed overflowed on at least one occasion. He recalled walking to Adams' pond with several individuals for a meeting to address this situation. In addition, he listed the remedial measures that Clemson Excavating undertook, upon the request of the Ohio EPA and the Geauga County Soil and Water Conservation District, following the overflow of the retention pond, which included: installing an additional standpipe in the retention pond, installing combination barriers, and correcting the culvert at station 850 by laying fabric and doubling the size of the rip rap.

{¶54} Moreover, evidence presented by Adams also demonstrates that there are genuine issues of material fact for trial. In Adams' deposition, he stated that he spoke to Chris McCarthy, an employee of Clemson Excavating, who informed him that the retention pond was too small to handle the stormwater and it could not retain the silt.[4]

4. While McCarthy's statement to Adams may be hearsay, it apparently, by definition, is not hearsay as it is an admission by a party-opponent or, alternatively, is admissible as a statement against interest. See Evid.R. 801(D)(2) & 804(B)(3).

{¶55} Also, Adams presented the affidavit and report of his expert, Doyle Hartman. The trial court stated that Hartman's affidavit made generalized statements and did not specifically state that Clemson Excavating caused the damage to Adams' property. Hartman's affidavit does not specifically mention Clemson Excavating. However, it states, "the approved stormwater pollution prevention plan was not always implemented properly or in a timely manner *during construction*." (Emphasis added.) It is readily apparent from other evidence in the record, including Carl Clemson's affidavit, that Clemson Excavating was responsible for constructing the erosion-control measures at Heather Hollow subdivision. Therefore, the failure of Hartman's affidavit to specifically name Clemson Excavating does not negate the affidavit's evidentiary value on the issue of construction-phase damages in the context of this specific sentence.

{¶56} The trial court did not consider Hartman's report, finding that it was based on hearsay and not properly incorporated into his affidavit.

{¶57} We note that an "*unsworn* expert report is 'irrelevant for a summary judgment determination.'" *Garland v. Simon-Seymour*, 11th Dist. No. 2009-G-2897, 2009-Ohio-5762, at ¶51, citing *Diakakis v. W. Res. Veterinary Hosp.*, 11th Dist. No. 2004-T-0151, 2006-Ohio-201, at ¶22. (Emphasis added.) Instead, the "'proper procedure for the introduction of evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate the material by reference into a properly framed affidavit.'" *Cutcher v. H.B. Magruder Mem. Hosp.*, 6th Dist. No. OT-05-013, 2005-Ohio-6135, at ¶17. (Citation omitted.)

{¶58} In this matter, Hartman properly incorporated his report into his affidavit.

{¶59} In his report, Hartman references several documents he reviewed in conducting his investigation, including various correspondence and site inspections by the Geauga County Soil and Water Conservation District and the Ohio EPA. Hartman's report indicates he reviewed 38 separate documents as part of his analysis. In addition, Hartman indicated his report was based on an on-site visit in July 2009.

{¶60} Clemson Excavating claims Hartman's report does not meet the qualifications of expert testimony as set forth in *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023. *Terry v. Caputo* concerned the necessity of expert testimony regarding causation in a mold-exposure case. Id. at ¶1. The Supreme Court of Ohio concluded that the expert's testimony was unreliable on the issue of specific causation. Id. at ¶30. This case is distinguishable from *Terry v. Caputo*, as Hartman was testifying to the cause of excess water runoff as an engineer, not offering a medical opinion as to the specific cause of a medical ailment.

{¶61} Clemson Excavating argues that Hartman did not do any testing. We note that scientific testing is not *required* for expert testimony under Evid.R. 702, which provides, in part: "*[t]o the extent* that the testimony reports the result of a procedure, test, or experiment, ***." (Emphasis added.) Instead, a witness may testify as an expert if: (1) the subject matter of the testimony is beyond a lay person's knowledge or experience; (2) the witness is qualified as an expert; and (3) his or her "testimony is based on reliable, scientific, technical, or other specialized information." Evid.R. 702.

{¶62} In this matter, Hartman's report was based at least in part on what could be characterized as scientific or specialized information, beyond what a lay person would typically experience, and adequately set forth what information he relied upon in

making his conclusions. While the report may be subject to attack for its reliability or weight, it should not be excluded from consideration in a summary judgment exercise.

{¶63} Since Clemson Excavating failed to meet its burden to demonstrate no genuine issue of material fact existed as to whether it caused damage to Adams' property during the construction of the project, the burden never shifted to Adams. As a result, the trial court erred in entering judgment in favor of Clemson Excavating in relation to this time period.

{¶64} Next, we address the evidence presented in relation to the post-construction runoff. Clemson Excavating, through Vura's affidavit, has supplied evidentiary material sufficient to shift the burden of demonstrating no genuine issue of material fact existed as to whether it caused damage to Adams' property following completion of the project. Accordingly, pursuant to *Dresher v. Burt*, the burden shifted to Adams to present evidence demonstrating there is a genuine issue of material fact for trial in relation to this time period.

{¶65} In his affidavit, Adams states that his driveway has flooded 50 times since 2004 and that the flooding, erosion, and tree and habitat loss continue "to the present time."

{¶66} In addition to Adams' affidavit and deposition, he submitted the affidavit and report of his expert, Doyle Hartman. In his affidavit, Hartman states:

{¶67} "The increase in the discharge of sediment/silt into Adams' pond resulting from the increased volume of the surface water runoff and the increased quantity of the sediment/silt in the surface water runoff from the Heather Hollow Subdivision area, during the period of construction of the Heather Hollow Subdivision, as well as

subsequent to that time, was, and is, unreasonable, and it was, and is, these changes which have caused damages complained of by Kenneth J. Adams in the above-referenced Complaint."

{¶68} Hence, Hartman's affidavit concludes that the conditions of the Heather Hollow Subdivision continue to affect Adams' property.

{¶69} Neither Hartman's affidavit or Adams' deposition or affidavit advance any evidence linking Clemson Excavating to the alleged problems that have occurred since the completion of the construction project. Instead, these evidentiary materials make general statements regarding the problems that have occurred subsequent to Clemson Excavating's involvement in the project. Again, Adams *may* have redress against the other defendants for these alleged damages, but those issues are not before this court at the present time.

{¶70} Adams has not met his reciprocal burden of demonstrating that a genuine issue of material fact existed as to whether Clemson Excavating caused damage to his property through continued excess runoff following completion of the project.

{¶71} The trial court did not err in granting Clemson Excavating's motion for summary judgment in relation to the post-construction time period.

{¶72} Adams' first and second assignments of error have merit to the extent indicated.

{¶73} Adams' third assignment of error is:

{¶74} "The trial court abused its discretion when it denied Plaintiff-Appellant's Civil Rule 60(B) Motion to Vacate."

{¶75} "A reviewing court reviews a trial court's decision on a motion for relief from judgment to determine if the trial court abused its discretion." (Citations omitted.) *Bank One, NA v. SKRL Tool and Die, Inc.*, 11th Dist. No. 2003-L-048, 2004-Ohio-2602, at ¶15. See, also, *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" See *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶62, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶76} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶77} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Civ.R. 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment."

{¶78} Regarding the moving party's obligations for a Civ.R. 60(B) motion, the Supreme Court of Ohio has held:

{¶79} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is

granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶80} Following the trial court's granting of Clemson Excavating's motion for summary judgment, Adams filed a "motion to vacate," pursuant to Civ.R. 60(B). Therein, Adams responded to the trial court's conclusion that Hartman's affidavit did not specifically mention Clemson Excavating as the responsible party for the alleged damages to Adams' property. Adams claimed that due to mistake, inadvertence, or excusable neglect, Hartman's affidavit omitted reference to Clemson Excavating. Adams attached a second affidavit from Hartman, wherein he specifically names Clemson Excavating as a responsible party for the damages to Adams' property, both during and subsequent to the construction phase of the project.

{¶81} First, we note that Adams' Civ.R. 60(B) motion was timely, since it was filed only 24 days after the trial court's judgment entry.

{¶82} In addition, Adams has also presented a meritorious claim, in that Hartman's second affidavit presented evidence linking Clemson Excavating to the alleged post-construction phase damages to his property. If properly submitted, this may have been sufficient to preclude summary judgment on this issue.

{¶83} However, Adams has not set forth a sufficient showing of the presence of one of the Civ.R. 60(B) factors. Adams argues that due to mistake, inadvertence, or

excusable neglect, Hartman's initial affidavit omitted reference to Clemson Excavating. As the trial court held:

{¶84} "[Civ.R. 60] does not authorize relief from a judgment where a party has failed to submit evidence or has failed to submit evidence in an appropriate manner in accordance with Civ.R. 56. Civ.R. 60(B)(1) is not a rule that offers the opportunity for 'do-overs.' *** Plaintiff cannot be permitted to say that if what [was] originally submitted doesn't suffice, then let him try again."

{¶85} We agree with the trial court's analysis. To hold otherwise would be to permit the nonmoving party potentially unlimited opportunities to submit additional evidence to the trial court in an attempt to defeat the motion for summary judgment—essentially asking the court each time, "is this enough." Such "second bites at the apple" are not authorized by the Rules of Civil Procedure.

{¶86} The trial court did not abuse its discretion by denying Adams' Civ.R. 60(B) motion for relief from judgment.

{¶87} Adams' third assignment of error is without merit.

{¶88} The judgment of the Geauga County Court of Common Pleas is affirmed in part and reversed in part. This matter is remanded for further proceedings consistent with this opinion.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.