[Cite as *Hamilton v. Ebbing*, 2012-Ohio-2250.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

CITY OF HAMILTON, OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-01-001
- vs -	:	O P I N I O N
	:	5/21/2012
JOSEPH P. EBBING, et al.,	:	
Defendants-Appellants.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2009-09-4358

Colleen H. Taylor, 345 High Street, Suite 710, Hamilton, Ohio 45011, for plaintiff-appellee

Joseph P. Ebbing, 3800 Princeton Road, Hamilton, Ohio 45011, defendant-appellant, pro se

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HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Joseph P. Ebbing (Ebbing), appeals pro se from a decision of the Butler County Court of Common Pleas which declared his property a public nuisance and ordered the demolition of buildings located at 419 and 423 Sycamore Street

(rear) Hamilton, Ohio. For the reasons discussed below, we affirm the judgment as modified.

{¶ 2} Plaintiff-appellee, the city of Hamilton (Hamilton), filed suit on September 30, 2009, against several defendants, including Ebbing, alleging that certain property constituted a public nuisance and requested an order to abate this nuisance. The property at issue included Lots 1129, 1130 and 1131, located in the Fourth Ward in Hamilton, Ohio. Lot 1129 is vacant.[1] Lot 1130 contains a single-story vacant structure and is known as 419 Sycamore Street (rear).[2] Lot 1131 contains a two-story vacant structure and is known as 423 Sycamore Street (rear). The properties in question are uniquely situated in that they do not front Sycamore Street, but are located off of Sycamore Street Alley, which is between Fourth Street and Central Avenue in Hamilton, Ohio. Ebbing owns all three lots.

{¶ 3} After answering Hamilton's complaint, Ebbing filed a counterclaim asserting four claims against Hamilton. Ebbing alleged that his counterclaim arose due to Hamilton's failure to reestablish "legal access" to his property after CSX Transportation (CSX), a railroad company, removed an at-grade crossing which terminated all vehicular access to Ebbing's property. He further alleged that Hamilton's actions: caused him to incur a loss of use of his property, loss of rents, and the cost of maintenance (Count One); caused the loss of siding from the property due to theft (Count Two); were done to harass and bully him, and caused intentional infliction of emotional distress (Count Three); and, stripped him of "adequate and lawful access" to his property which the city should appropriate (Count Four). Hamilton subsequently filed a motion for summary judgment on both its nuisance claim and Ebbing's counterclaim. Ebbing filed a motion to strike Hamilton's motion for summary judgment which

1. Although Hamilton's complaint originally included lot 1129 in its description of where 419 and 423 Sycamore Street (rear) were located, it later admitted that lot 1129 did not contain a building.

2. Throughout the proceedings, Ebbing refers to the address as "Sycamore Street Alley" while Hamilton refers to the property as "Sycamore Street (rear)". The judgment entry refers to the property as "Sycamore Street (rear)." For ease of discussion, we will refer to the property as "Sycamore Street (rear).

the court denied. On October 13, 2010, the trial court granted in part Hamilton's motion for summary judgment on Ebbing's counterclaims, finding that Hamilton was entitled to immunity, the claims were barred by the statute of limitations, and Ebbing failed to join CSX as a necessary party. The trial court held in abeyance a decision on the nuisance claim until it conducted a hearing.

{¶ 4} On October 28, 2010, Ebbing moved for leave to file his own motion for summary judgment. The trial court denied this motion on November 2, 2010. Three days later, Ebbing filed a motion for reconsideration of the trial court's decision granting in part Hamilton's motion for summary judgment. The trial court also denied this motion.

{¶ 5} The case proceeded to a hearing on the nuisance claim on November 19, 2010. At the hearing, Hamilton presented testimony from Teresa Jones, a public health sanitarian for the City of Hamilton Health Department. Ebbing testified, but did not present any other witnesses. Following the hearing, the trial court issued a decision finding that lots 1129, 1130, and 1131 were a public nuisance pursuant to R.C. 3797.41. Specifically, the court found "that the property has been neglected almost to the point of abandonment since the year 2000. The property is a menace to the public health, welfare and safety of the community. The property is no longer habitable because of the years of inadequate maintenance. Further, the property is structurally unsafe." The trial court also found that Ebbing had been given proper notice to abate the nuisance "but has not done so." Accordingly, the trial court authorized Hamilton to abate the nuisance by demolition.

{¶ 6} Ebbing filed a notice of appeal on January 3, 2011. That same day, he filed a motion to stay the execution of the judgment entry ordering the demolition of his property pending this appeal; however, he failed to post a supersedeas bond. The trial court denied his request for a stay due to the lack of a supersedeas bond.

{¶ 7} On appeal, Ebbing asserts eight assignments of error challenging the trial

court's rulings on various procedural motions, its decision to grant Hamilton's motion for summary judgment on his counterclaim, and its determination that his property constituted a public nuisance. In the interest of convenience, we will address appellant's assignments of error out of order and combine assignments where the issues overlap.

I. Procedural Motions and Rulings

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO STRIKE [APPELLEE]'S MOTION FOR SUMMARY JUDGMENT.

{¶ 10} In his first assignment of error, Ebbing asserts that the trial court should not have allowed Hamilton's motion for summary judgment because the motion was filed without leave, in violation of Civil R. 56(A), as the court had previously ordered a pre-trial. While it is true that a motion for summary judgment may not be filed without leave of court after a pre-trial has been set, the court had not set this matter for a pre-trial or trial. *See* Civ.R. 56. Rather, the court had only ordered two status report hearings. Therefore, Hamilton's motion for summary judgment was properly and timely filed, and the first assignment of error is overruled.

{¶ 11} Assignment of Error No. 3:

{¶ 12} THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR SUMMARY JUDGMENT.

{¶ 13} In his third assignment of error, Ebbing asserts that the trial court erred by denying his motion for leave to file a motion for summary judgment because Civ.R. 1(A) and Civ.R. 38 required the court to grant his motion for leave. However, he does not explain why the trial court's decision was in contravention of Civ. R. 1(A) or Civ. R. 38. Ebbing instead argues that he had the "right to apply to terminate plaintiff's action by summary judgment." A trial court's decision to grant or deny leave to file a motion for summary judgment is reviewed

for an abuse of discretion. *Gilchrist v. Gonsor,* 8th Dist. No. 88609, 2007-Ohio-3903, ¶ 30; *Cooper v. Valvoline Instant Oil Change,* 10th Dist. No. 07AP-392, 2007-Ohio-5930, ¶ 8.

{¶ 14} Prior to Ebbing's request for leave to file a motion for summary judgment, the trial court had expressly held that Hamilton's nuisance claim could not be resolved by summary judgment. The trial court found that a hearing was necessary to determine if a nuisance existed on the property. Given that the merits of Hamilton's nuisance claim were unable to be resolved by summary judgment, we cannot say the trial court abused its discretion when it denied Ebbing leave to file his own summary judgment motion on Hamilton's nuisance claim. Appellant's third assignment of error is overruled.

{¶ 15} Assignment of Error No. 5:

{¶ 16} THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR RECONSIDERATION OF TRIAL COURT'S DECISION GRANTING [APPELLEE]'S MOTION FOR SUMMARY JUDGMENT.

{¶ 17} In this assignment of error, Ebbing argues that the trial court erred by denying his motion to reconsider the decision granting Hamilton's motion for summary judgment because he had "called to the attention of the court obvious errors in its decision" and raised other issues not considered by the court. A motion for reconsideration following a final judgment in the trial court is a nullity and therefore not appealable. *Pitts v. Dept. of Transp.*, 67 Ohio St.2d 378, 381 (1981). Rather, the party must appeal from the original decision. Here, Ebbing did appeal from the trial court's original decision to grant Hamilton summary judgment. The merits of Ebbing's arguments regarding this decision are discussed below within his second assignment of error. Accordingly, Ebbing's fifth assignment of error is overruled.

{¶ 18} Assignment of error No. 6:

{¶ 19} THE TRIAL COURT ERRED BY DENYING APPELLAN'TS MOTION TO

STRIKE [APPELLEE]'S AFFIDAVITS AND EXHIBITS.

{¶ 20} In the sixth assignment of error, Ebbing argues the court erred in denying his motion to strike Hamilton's affidavits, the exhibits attached to these affidavits, and the exhibits attached to the complaint. Ebbing does not argue that the affidavits and exhibits were improperly considered for purposes of the motion for summary judgment, but rather he requested the trial court strike the affidavits and exhibits "from the record so that it is clear that the following may not be considered by the court at trial or pretrial." As such, it is obvious that Ebbing sought to exclude this evidence from being presented at the hearing. Accordingly, we analyze the motion to strike under the same standard utilized for a motion *in limine*.

{¶ 21} A motion *in limine* is commonly used as a tentative, precautionary request to limit inquiry into a specific area until its admissibility is determined during trial. *Gables v. Gates Mills,* 103 Ohio St.3d 449, 2004-Ohio-5719, ¶ 35, quoting *Dent v. Ford Motor Co.*, 83 Ohio App.3d 283, 286 (9th Dist.1992). A trial court's decision on a motion *in limine* is a tentative, interlocutory ruling and not a ruling on evidence; it therefore does not preserve the issue on appeal. *Gables v. Gates Mills,* 103 Ohio St.3d 449, 2004-Ohio-5719, ¶ 35. An appellate court only reviews a ruling on a motion *in limine* if the claimed error is preserved by a timely objection when the issue is actually reached during trial. *Id.*

{¶ 22} Upon review of the record, Hamilton did not proffer any of the affidavits or the exhibits attached to the complaint, but rather relied upon the evidence and testimony presented at the hearing. Accordingly, we find that the trial court properly denied Ebbing's motion to strike regarding each of the affidavits and the exhibits attached to the complaint, as this issue was not preserved for appeal. Ebbing's sixth assignment of error is overruled.

{¶ 23} Assignment of Error No. 4:

{¶ 24} THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S DEMAND FOR

A TRIAL BY JURY.

{¶ 25} In his fourth assignment of error, Ebbing asserts that the trial court erred by denying his demand for trial by jury. He contends that a nuisance abatement action is a "quasi criminal action" for which he is entitled to a jury trial. We find no merit to this argument.

{¶ 26} The United States and Ohio Constitutions preserve the right to a jury trial in civil cases only for causes of action that were recognized at common law. Seventh Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 5; *Tull v. United States,* 481 U.S. 412, 417, 107 S.Ct. 1831 (1987); *Digital & Analog Design Corp. v. N. Supply Co.*, 63 Ohio St.3d 657, 661 (1992). Both the United States Supreme Court and the Supreme Court of Ohio have found that a nuisance abatement action is not a common law action, but rather a suit in equity. *Cameron v. United States*, 148 U.S. 301, 304, 13 S.Ct. 595 (1893); *State ex rel. Miller v. Anthony*, 72 Ohio St. 3d 132, 136 (1995). Accordingly, there is no right to a jury trial in a nuisance abatement action. *Anthony* at paragraph one of the syllabus; *Mugler v. Kansas,* 123 U.S. 623, 673, 8 S.Ct. 273 (1887); *State ex. rel. Eckstein v. Video Express,* 119 Ohio App. 3d. 261, 271 (12th Dist.1997). Furthermore, a nuisance abatement action is governed by R.C. 3767.41 which requires that a judge, not a jury, "conduct a hearing at least twenty-eight days after the owner of the building and other interested parties have been served with a copy of the complaint and the notice of the date and time of the hearing." R.C. 3767.41(B)(2)(b). Ebbing's fourth assignment of error is overruled.

{¶ 27} Assignment of Error No. 8:

{¶ 28} THE TRIAL COURT ERRED BY DENYING [APPELLANT]'S MOTION FOR A STAY.

{¶ 29} In his eighth assignment of error, Ebbing argues that the trial court should have granted a stay of execution of the judgment pending this appeal as the judgment in this case ordered his buildings to be demolished. He asserts that a supersedeas bond was not

necessary as the stay was not causing harm or delay. We find no merit to this argument.

{¶ 30} An appellate court reviews a trial court's denial of a motion for a stay of execution of judgment and request for bond for an abuse of discretion. *See* Civ.R. 62(B); *Ohio Carpenter's Pension Fund v. La Centre, LLC,* 8th Dist. Nos. 86597, 86789, 2006-Ohio-2214, ¶ 31, citing *Cardone v. Cardone*, 9th Dist. No. 18873, 1998 WL 597704, *2 (Sept. 2, 1998). R.C. 2505.09 provides the requirements for a stay of execution of judgment pending appeal; it states in part: "[A]n appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee." Civ.R. 62(B) provides additional guidance, and states: "When an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond. * * * The stay is effective when the supersedeas bond is approved by the court."

{¶ 31} The record does not indicate that Ebbing took the requisite steps, including posting a supersedeas bond, to stay the execution of the trial court's judgment. Further, Ebbing cites no authority for the proposition that a supersedeas bond is not necessary where the stay is "not causing harm or delay to any person." The trial court did not abuse its discretion when it denied Ebbing's motion for stay based on his failure to post a supersedeas bond. Accordingly, Ebbing's eighth assignment of error is overruled.

II. Ebbing's Counterclaim

{¶ 32} As previously mentioned, Ebbing's counterclaim set forth four claims wherein he sought damages for Hamilton's failure to reestablish "legal access" to his property. In his second assignment of error, Ebbing challenges the trial court's decision to grant Hamilton's motion for summary judgment on his counterclaim.

{¶ 33} Assignment of Error No. 2:

{¶ 34} THE TRIAL COURT ERRED BY GRANTING IN PART [APPELLEE]'S MOTION FOR SUMMARY JUDGMENT.

{¶ 35} Ebbing argues there were genuine issues of material fact to be resolved on each count of his counterclaim which should have precluded the court from granting summary judgment. Ebbing also asserts Hamilton is not immune from his counterclaim because it did not point "to any evidentiary material alleging any immunity available pursuant to R.C. 2744.03." Although difficult to decipher, it appears he is also asserting that his claims are not barred by the statute of limitations because Hamilton's actions are on-going, as "legal access" has not yet been restored. Finally, Ebbing asserts that the trial court improperly relied upon the necessary party defense found in Civ.R. 19 because Hamilton did not raise it in a Civ.R. 12(B) motion.

{¶ 36} This court's review of a trial court's ruling on a summary judgment motion is de novo, which means we review the judgment independently and without deference to the trial court's determination. *Simmons v. Yingling,* 12th Dist. No. CA2010-11-117, 2011-Ohio-4041, ¶ 18, citing *Burgess v. Tackas*, 125 Ohio App.3d 294, 296 (8th Dist.1998). Under Civ.R. 56, summary judgment is appropriate when "(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 and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *Simmons* at ¶ 19, quoting *Zivich v. Mentor Soccer Club, Inc.,* 82 Ohio St.3d 367, 369-370 (1998). The party moving for summary judgment has the initial burden of producing some evidence that affirmatively demonstrates the lack of a genuine issue of material fact. *Dresher v. Burt,* 75 Ohio St.3d 280, 292-93 (1996). The nonmoving party must then rebut the moving party's evidence with specific facts showing the existence of a genuine triable issue; it may not rest on the mere allegations or denials in its pleadings. *Id.*; Civ.R. 56(E). A disputed fact is "material" if it

affects the outcome of the litigation and it is "genuine" if it is supported by substantial evidence that exceeds the allegations in the complaint. *Morris v. Fields Family Ents., Inc.*, 12th Dist. No. CA2010-10-102, 2011-Ohio-3433, ¶ 9.

{¶ 37} We begin with count four of Ebbing's counterclaim as the remaining three counts may be analyzed together. In count four, Ebbing asserts that by failing "to provide adequate and lawful access to [his] real estate," Hamilton should appropriate his property. Essentially, Ebbing asserts that a taking of his property has occurred, and therefore he is entitled to compensation for this taking.

{¶ 38} As the trial court correctly noted, "[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Wasserman v. Fremont,* 131 Ohio St.3d 52, 2012-Ohio-27, ¶ 2, quoting *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, judgment modified in part on other grounds, 96 Ohio St.3d 379, 2002-Ohio-4905. In the present case, Ebbing attempted to assert his taking claim through his counterclaim rather than bringing a mandamus action to compel Hamilton to institute appropriation proceedings. Accordingly, the trial court properly granted Hamilton summary judgment on count four of Ebbing's counterclaim as this was not the proper avenue to assert his taking claim.

{¶ 39} Ebbing's remaining claims, counts one, two, and three of his counterclaim, relate to what he characterizes as Hamilton's failure to either reestablish an at-grade crossing or create "legal access" to his property. These claims involve a "governmental function," namely the use, maintenance, and repair of alleys and roads. R.C. 2744.01(C)(2)(E). R.C. 2744.04 sets forth the applicable statute of limitations for such claims. R.C. 2744.04 states in pertinent part:

> An action against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or

> proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action accrues, or within any applicable shorter period of time for bringing the action provided by the Revised Code.

{¶ 40} The Supreme Court of Ohio has recognized that a cause of action against the government accrues "when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *State ex rel. Doner,* 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 48, quoting *Hopland Band of Pomo Indians v. United States* 855 F.2d 1573, 1577(Fed.Cir.1988). Furthermore, an action for property damage accrues and the statute of limitations begins to run, when the damage is first discovered or through reasonable diligence, should have been discovered. *Harris v. Linston*, 86 Ohio St.3d 203, 207 (1999). Even assuming *arguendo* that Ebbing's other arguments are true, specifically that Hamilton is not entitled to immunity and that Hamilton was the actor who caused the alleged damages, we still find Ebbing's claims are barred as they are untimely.

{¶ 41} Here, the evidence presented demonstrated that Ebbing became aware of the damage to his property, specifically the lack of vehicular access, at the latest, sometime in 2002. Hamilton presented the affidavit of Michael Samoviski, City of Hamilton Public Works Director, wherein he stated that the removal of the at-grade crossing occurred in 2002. Ebbing also acknowledged in his affidavit that he was aware of the removal of the at-grade crossing and vehicular access sometime in 2002, as he had a meeting with both CSX and Hamilton regarding the removal of the at-grade crossing. Therefore, as the trial court properly determined and the parties agreed, vehicular access was terminated, at the latest, in 2002. Accordingly, Ebbing was required to bring any claims against Hamilton for its actions in failing to re-establish vehicular access to his property by 2004. Ebbing did not bring his counterclaim until October 28, 2009, well outside the applicable statute of limitations.

{¶ 42} Ebbing, however, argues that his claims are not barred by the statute of

limitations because Hamilton's actions are continuing in nature as Hamilton has yet to provide vehicular access to his property. As such, he argues his claims were timely filed as the statute has not begun to run.

{¶ 43} Even if this court assumed that Hamilton's acts were "continuing in nature" and thus tolled the statute of limitations, the evidence demonstrates that vehicular access was restored by 2006. According to Samowiski's affidavit: "Currently, there is road access to the properties known as 419-423 Sycamore Street. The City of Hamilton did create [a] gravel access road, specifically for use to the Sycamore Street Alley. This access road [w]as installed sometime in 2006." In a transcript from a 2007 criminal proceeding attached to Ebbing's affidavit, he stated: "No way to get to the property accept [sic] for jumping the curb and then going long through somebody's uh—side yard. Until sometime last year the city * * * they put down—uh—in preparation just poured some gravel." Although Ebbing stated in his affidavit that to his "knowledge, legal access has not been restored," after considering the affidavit as a whole, we find that Ebbing admitted Hamilton had reestablished vehicular access to the property as of 2006. Ebbing simply did not find the gravel road to be satisfactory "legal access."

{¶ 44} In light of this evidence, there was no genuine issue of material fact regarding when vehicular access was restored as both parties presented evidence that it occurred in 2006. Accordingly, even if we assumed that Hamilton's failure to reestablish access to Ebbing's properties tolled the statute of limitations, such tolling ended in 2006 and the statute began to run as of that date. Ebbing's counterclaim accrued, at the latest, in 2008. His counterclaim against Hamilton was not filed until October 2009. Under these circumstances, we conclude that counts one, two, and three of Ebbing's counterclaim against Hamilton were untimely and therefore barred by the statute of limitations.

{¶ 45} Since the trial court properly disposed of Ebbing's counterclaim, we conclude

that it is unnecessary to address Ebbing's remaining arguments in his second assignment of error related to immunity and the necessary party defense. Accordingly, the trial court properly granted Hamilton's partial motion for summary judgment on Ebbing's counterclaim, and the second assignment of error is overruled.

III. Public Nuisance

{¶ 46} Ebbing's remaining assignment of error relates to the trial court's determination that his property located at 419 and 423 Sycamore Street (rear) constituted a public nuisance.

{¶ 47} Assignment of Error No. 7:

{¶ 48} THE TRIAL COURT ERRED BY ENTERING JUDGMENT DECLARING A NUISANCE.

{¶ 49} Ebbing argues in his seventh assignment of error that the court's determination that a nuisance existed was against the manifest weight of the evidence. He also argues that the trial court erred in admitting Teresa Jones' testimony and Hamilton's exhibits because the evidence was not relevant.

{¶ 50} A judgment will not be reversed by a reviewing court as being against the manifest weight of the evidence if it is supported by some competent, credible evidence going to all the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.,* 54 Ohio St.2d 279, 280 (1978). When conducting a review under this standard, an appellate court must presume that the findings of the trier of fact are correct as the trial court is in the best position to weigh credibility because it has the opportunity to hear the testimony and observe the demeanor of the witnesses. *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 24, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶ 51} Under R.C. 3767.41(A)(2)(a), a public nuisance is defined as:

> a building that is a menace to the public health, welfare, or safety; that is structurally unsafe, unsanitary, or not provided with adequate safe egress; that constitutes a fire hazard, is otherwise dangerous to human life, or is otherwise no longer fit and habitable; or that, in relation to its existing use, constitutes a hazard to the public health, welfare, or safety by reason of inadequate maintenance, dilapidation, obsolescence, or abandonment.

{¶ 52} In this case, Jones, a public health sanitarian for the City of Hamilton Health Department testified on behalf of Hamilton. Jones testified that she had been working with this property almost continuously since 2003. Jones explained that she first inspected the property in 2003 and found several city health department violations at 419 and 423 Sycamore Street (rear) including: a pile of brush or tree branches, other debris and a doghouse in the yard that needed to be removed, and overgrown grass, shrubs, and weeds. She sent Ebbing an order to correct these violations. When she re-inspected the property about a month later, she found that Ebbing had not complied with the order. She also found new violations during her second inspection. Jones testified that this pattern of inspection, sending Ebbing an order to correct the violations, and re-inspection continued from 2003 through 2008.

{¶ 53} During an inspection in 2005, Jones testified that she found the following: exterior surfaces that needed to be painted or protected; exterior wood on the property that was peeling away; aluminum siding that was removed from the property; broken and missing windows, rotted window sills to the structure, and a roof that needed repair as it was not in weather tight condition; installation of gutters and downspouts that were necessary; and finally interior ceilings, floors and walls that needed repair due to water damage. Jones testified that she gave Ebbing until May 31, 2005, to correct these violations. Ebbing requested an extension from Jones to correct the violations. The extension was granted for an additional 30 days. Ebbing, however, failed to complete the requisite repairs.

{¶ 54} In 2006, Jones received complaints that the property was unsecure and that people were going in and out of the buildings. Upon inspection, she found the buildings were unsecured at two different window locations and one door, and she was able to view the interior of the property when she secured the door. She observed "a mattress with some bedding, some beverage containers, some beer containers laying in one corner."

{¶ 55} Ebbing was cited and tried in municipal court for violations of Hamilton's housing code. Ebbing's conviction for these violations was upheld. *See Hamilton v. Ebbing*, 12th Dist. No. CA2008-06-135, 2009-Ohio-3674.

{¶ 56} Jones also testified that since 2005, the Health Department has sent Ebbing repeated and numerous letters requesting that a rehabilitation or demolition plan for the property be submitted. Ebbing has failed to submit such a plan.

{¶ 57} Jones further testified that the structures on the property are still vacant and without utilities. Jones also stated that the following items still need repair: roof, gutters and downspouts need to be installed, windows and doors are broken, and siding is loose and cracked. Additionally, Jones explained that she observed wildlife burrowing under the side of the one-story structure. As to the interior of the buildings, a portion of the ceiling is missing, bare wires are hanging loose, there is water damage, and the flooring is not considered "easily cleanable and safe." She also testified that the property was hazardous to neighboring tenants as well as those people going in and out of the property. She explained that this was hazardous "[b]ecause unauthorized people were going into a building that could have been set on fire, they could have been doing prostitution, they could have been doing drugs, any illegal activity. This is a back alley that's not well lit." She opined that this property was not fit for human habitation.

{¶ 58} Ebbing also challenges the court's admission of Jones' testimony in this assignment of error. Ebbing argues that Jones' testimony was not relevant under Evid.R.

401.[3] Essentially, Ebbing made a continuing objection to Jones' testimony asserting that it was not relevant unless she was specifically identifying a condition that constituted a public nuisance. However, the standard for admitting Jones' testimony as relevant only required the evidence have some tendency to make the existence of any fact that is of consequence to the action more or less probable than it would be without the evidence. Evid R. 401. A decision to admit or exclude evidence is within the discretion of the trial court and will not be reversed on appeal absent a showing that the trial court abused its discretion. *Rathert v. Kempker,* 12th Dist. No. CA2010-06-043, 2011-Ohio-1873, ¶ 46. An abuse of discretion is more than an error of law or judgment; it requires a finding that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 59} Jones provided testimony regarding her background, her duties as a public health sanitarian, her observations and inspections of Ebbing's property, and her continued correspondence with Ebbing in an attempt to get him to maintain the property. This testimony tended to show the condition of the property, and was useful in determining whether a public nuisance existed. Accordingly, we find that the trial court did not abuse its discretion in allowing Jones' testimony.

{¶ 60} At the hearing, Hamilton also presented several exhibits including photographs of Ebbing's property depicting both the property's condition and the various City Health Department violations that occurred from 2003 through 2010. Hamilton also presented

3. For the first time on appeal, Ebbing asserts that Jones' testimony was admitted contrary to Evid.R. 301, Evid.R.402, Evid.R. 403, Evid.R. 602, Evid.R. 607, Evid.R. 611, Evid.R. 701, Evid.R. 802, Evid.R. 805, and Evid.R.901. It is well-established that a party cannot raise new issues or legal theories for the first time on appeal. *Lay v. Chamberlain,* 12th Dist. No. CA99-11-030, 2000 WL 1819060, *10 (Dec. 11, 2000). This includes new arguments for the exclusion of evidence not made at trial. *State v. Richcreek*, 6th Dist. No. WD-09-072, 2011-Ohio-4686. Failure to raise an issue before the trial court results in the waiver of that issue for appellate purposes. *State v. Awan,* 22 Ohio St.3d 120, 489 N.E.2d 277 (1986), syllabus. Because Ebbing did not raise these arguments to exclude Jones' testimony at the hearing below, we find he waived these issues on appeal.

correspondence between Ebbing and the City Health Department, including City Health Department Orders which listed the various violations found on Ebbing's property.

{¶ 61} At the hearing and on appeal, Ebbing challenges the court's admission of these exhibits on the basis of relevancy. We find no error in the court's admission of any of these exhibits. Each of the photographs presented at the hearing tended to show both the condition of the premises and whether any remediation took place with respect to these problems. Additionally, the City Health Department Orders and other correspondence were relevant to the determination of whether Hamilton provided notice to Ebbing that he needed to remediate those problems. Because these exhibits were relevant in determining whether the property was a public nuisance and whether Ebbing was given a reasonable opportunity to abate the nuisance, we cannot say that the trial court's decision to admit these exhibits was unreasonable or an abuse of its discretion. Accordingly, the trial court did not err in admitting each of the exhibits.

{¶ 62} When Ebbing testified at the hearing, he admitted that he has not completed any maintenance on the property since 2000 when a tenant moved out. He testified that at some point he would like to rent out the property once again. He also admitted that the structure is not fit for human habitation.

{¶ 63} Ebbing tried to excuse his lack of maintenance and upkeep of the property based on the lack of "legal access" to this property. However, Jones testified that in the many times she visited the property to conduct the inspections over the years, she never had any problem accessing the property. Furthermore, Ebbing admitted that a "curb cut was put in" along with a gravel road. Ebbing failed to present any evidence that this road was not what he termed "legal access." Rather, he relied on his bare assertions that the gravel road did not constitute "legal access." In light of the trial court's finding of a public nuisance, the trial court did not give credence to Ebbing's defense. Furthermore, as described in detail

above, the trial court disposed of the issue of "legal access" in its decision granting Hamilton's motion for summary judgment.

{¶ 64} As the above evidence demonstrates, there is some competent credible evidence that the buildings are a menace to the public health, are structurally unsafe, no longer fit and habitable, and are otherwise hazardous to the public health and welfare by reason of Ebbing's inadequate maintenance. Therefore, we cannot find that the trial court erred in finding buildings located at 419 and 423 Sycamore Street (rear) were a public nuisance as defined in R.C. 3767.41(A)(2).

{¶ 65} Next, Ebbing argues that even if the property is deemed a public nuisance, the trial court erred by ordering the demolition of the buildings as the finding that he was afforded a reasonable opportunity to abate the nuisance was contrary to the evidence presented. Furthermore, Ebbing argues that the procedural requirements were not met in this case in order for the court to order the demolition of his property. We find no merit to these arguments.

{¶ 66} Once a public nuisance is found to exist, if there is an additional finding that the building owner has previously been afforded a reasonable opportunity to abate the public nuisance and has refused or failed to do so, then R.C. 3767.41(C) authorizes a judge to issue an order that is appropriate to abate the nuisance.[4] Further, upon written request of an

4. {¶a} "(C)(1) If the judge in a civil action described in division (B)(1) of this section finds at the hearing required by division (B)(2) of this section that the building involved is a public nuisance, if the judge additionally determines that the owner of the building previously has not been afforded a reasonable opportunity to abate the public nuisance or has been afforded such an opportunity and has not refused or failed to abate the public nuisance, and if the complaint of the municipal corporation, township, neighbor, tenant, or nonprofit corporation commencing the action requested the issuance of an injunction as described in this division, then the judge may issue an injunction requiring the owner of the building to abate the public nuisance or issue any other order that the judge considers necessary or appropriate to cause the abatement of the public nuisance. If an injunction is issued pursuant to this division, the owner of the building involved shall be given no more than thirty days from the date of the entry of the judge's order to comply with the injunction, unless the judge, for good cause shown, extends the time for compliance.

{¶b} "(2) If the judge in a civil action described in division (B)(1) of this section finds at the hearing required by division (B)(2) of this section that the building involved is a public nuisance, if the judge additionally determines

interested party, R.C. 3767.41(E) allows a judge to order a building that constitutes a public nuisance to be demolished because repair and rehabilitation of the building are not feasible.[5]

{¶ 67} The testimony presented at the hearing demonstrated that Hamilton started contacting Ebbing as early as 2003 regarding property repairs and other required maintenance. Ebbing has never submitted a requested rehabilitation or demolition proposal or made any effort to abate any of the conditions that caused the nuisance to exist. Furthermore, this evidence demonstrates that Ebbing is unlikely to make repairs as he had not done so in the past several years, even with pressure from Hamilton and the City Health Department to correct health code violations and to abate the nuisance. As Hamilton provided Ebbing with numerous chances over a period of several years to repair and maintain these buildings, we find there was competent, credible evidence to support the trial court's finding that Ebbing was given a reasonable opportunity to abate the nuisance, but has failed to do so. Furthermore, we find some competent credible evidence that repair and rehabilitation of the property is not feasible. Consequently, the trial court did not err in declaring the property a public nuisance and ordering demolition as a means of abating the nuisance.

{¶ 68} Although we find the trial court did not err in finding the buildings located at 419

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that the owner of the building previously has been afforded a reasonable opportunity to abate the public nuisance and has refused or failed to do so, and if the complaint of the municipal corporation, township, neighbor, tenant, or nonprofit corporation commencing the action requested relief as described in this division, then the judge shall offer any mortgagee, lienholder, or other interested party associated with the property on which the building is located, in the order of the priority of interest in title, the opportunity to undertake the work and to furnish the materials necessary to abate the public nuisance. Prior to selecting any interested party, the judge shall require the interested party to demonstrate the ability to promptly undertake the work and furnish the materials required, to provide the judge with a viable financial and construction plan for the rehabilitation of the building as described in division (D) of this section, and to post security for the performance of the work and the furnishing of the materials." R.C. 3767.41.

5. "Upon the written request of any of the interested parties to have a building, or portions of a building, that constitute a public nuisance demolished because repair and rehabilitation of the building are found not to be feasible, the judge may order the demolition. However, the demolition shall not be ordered unless the requesting interested parties have paid the costs of demolition and, if any, of the receivership, and, if any, all notes, certificates, mortgages, and fees of the receivership." R.C. 3767.41(E).

and 423 Sycamore Street (rear) constitute a public nuisance, the judgment of the trial court declaring Lots 1129, 1130, and 1131 a public nuisance must be modified as a matter of law. By definition, the existence of a public nuisance requires a building. *See* R.C. 3767.41(A)(2)(a). As Lot 1129 does not contain a building, it cannot be a public nuisance under R.C. 3767.41(A)(2)(a). Accordingly, we agree that the structures located on Lots 1130 and 1131, otherwise known as 419 Sycamore Street and 423 Sycamore Street (rear), constitute a public nuisance.

{¶ 69} The judgment finding Lots 1130 and 1131, otherwise known as 419 Sycamore Street and 423 Sycamore Street (rear), to be a public nuisance and the order to demolish the structures located on those lots are hereby affirmed. However, we modify the judgment by vacating the finding that Lot 1129 is a public nuisance. The judgment is affirmed to the extent modified.

RINGLAND and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6 (C), Article IV of the Ohio Constitution.