[Cite as *Adams v. Pitorak & Coenen Invests., Ltd.*, 2012-Ohio-3015.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

KENNETH J. ADAMS,	:	**O P I N I O N**
Plaintiff-Appellee/ Cross-Appellant,	:	**CASE NO. 2011-G-3019**
- vs -	:	
PITORAK & COENEN INVESTMENTS, LTD., et al.,	:	
Defendant-Appellant/ Cross-Appellee,	:	
CLEMSON EXCAVATING, INC.,	:	
Defendant-Appellee.		

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

Judgment: Affirmed in part and reversed in part.

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

G. Michael Curtin and *Kimberlee J. Kmetz*, Curtin & Kmetz, LLP, 159 South Main St., Suite 920, Akron, OH 44308 (For Defendant-Appellant/Cross-Appellee).

David J. Fagnilli, Davis & Young, 1200 Fifth Third Center, 600 Superior Avenue, East, Cleveland, OH 44114-2654 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Defendant-appellant/cross-appellee, Pitorak & Coenen Investments, Ltd. ("Pitorak & Coenen"), appeals the judgment of the Geauga County Court of Common

Pleas, after trial by jury, entered in favor of plaintiff-appellee/cross-appellant, Kenneth J. Adams. By its verdict, the jury found for Adams for the loss of enjoyment of his real property, awarding damages for trespass, nuisance, and interference with surface water that occurred due to the runoff of a neighboring uphill subdivision project, owned and developed by Pitorak & Coenen. For the reasons that follow, the judgment is affirmed in part and reversed in part.

{¶2} Adams has resided at a five-acre country lot in Novelty, Ohio, since the 1970s. The property contains a small pond, fed by natural springs and precipitation runoff. In 1992, Adams modified the pond, increasing its depth from one foot to approximately ten feet. Soon thereafter, Adams stocked the pond with several species of fish.

{¶3} In 2003, plans were initiated to develop a neighboring upland parcel into a residential subdivision known as "Heather Hollow." Defendant-appellee, Clemson Excavating, Inc., was hired as the general contractor for work on the subdivision project. Clemson Excavating performed the bulk of its work in 2004, removing trees, demolishing existing structures, constructing a sub-base for roadways, installing culvert pipes, laying catch basins, trenching for electrical lines, and digging ditches.

{¶4} Clemson Excavating constructed a retention pond on the Heather Hollow property. It dug out the pond and built an earthen dam to form a barrier at the downstream side of this pond. Clemson Excavating also installed an overflow structure at the edge of the pond. At times of high volume, water enters the overflow structure, is piped about 60 feet away from the pond, and is permitted to run off the property. Eventually, however, this water entered Adams' property and allegedly caused damage.

{¶5} Clemson Excavating, acting on the directives of the Geauga County Soil and Water Conservation District ("Geauga Soil and Water") and the Ohio Environmental Protection Agency ("Ohio EPA"), installed barriers and additional standpipe in an effort to control erosion and sedimentation from the development's property. Notwithstanding these efforts, Adams continually reported erosion and runoff problems as a result of the development throughout the construction phase of the project. He further claimed that dirty "scum colored" sediment in the runoff had increased since construction, resulting in damage to his pond.

{¶6} In August 2008, Adams filed a complaint alleging interference with surface water, nuisance, and trespass against several defendants, including Pitorak & Coenen, the developer and owner of the property, and Clemson Excavating, the contractor who installed the infrastructure for the development. The complaint indicated the action was a refiling of a prior lawsuit, which was voluntarily dismissed without prejudice by Adams in 2007. The complaint alleged that, in July 2004 and intermittently since that date, runoff from the Heather Hollows subdivision had crossed Adams' property; polluted his freshwater pond and its natural stream; killed the various species of fish in the pond; and caused other, permanent damage to the property. An amended complaint followed which similarly alleged Adams to be the owner of the real property in 2004. Pitorak & Coenen and Clemson Excavating filed answers denying all pertinent allegations set forth in the complaint.

{¶7} After discovery concluded, the trial court entered summary judgment in favor of Clemson Excavating. However, this court reversed and remanded that judgment in *Adams v. Pitorak & Coenen Invests., Ltd.*, 11th Dist. Nos. 2009-G-2931 and

2009-G-2940, 2010-Ohio-3359. In *Adams*, we concluded that Clemson Excavating did not meet its burden in the summary judgment exercise as to whether it caused damage to Adams' property *during the construction* of the project. *Id.* at ¶52. As to any *post-construction* runoff, we determined that Clemson Excavating supplied sufficient evidentiary material to shift the burden to Adams, who ultimately failed to demonstrate that a genuine issue of material fact remained to be litigated as it pertained to the time period after construction. *Id.* at ¶64. The court's entry of summary judgment was therefore affirmed on Clemson Excavating's liability after the end of the construction. *Id.* at ¶71. Thus, we determined Clemson Excavating's potential liability was from April 2004, when construction started, to October 2005, when construction ceased. *Id.* at ¶49-51. The decision in *Adams* pertained exclusively to Clemson Excavating's motion for summary judgment and did not involve the claims against Pitorak & Coenen. *Id.* at ¶10, fn. 3.

{¶8} The matter was set for trial. In anticipation of trial, several motions in limine to seek or limit expert testimony were filed. Specifically relevant to this appeal, the trial court overruled Pitorak & Coenen's motion in limine regarding damages estimates prepared by restoration contractors with OCI Construction, Inc. and Clean Harbors, Inc.

{¶9} A five-day jury trial commenced. On March 3, 2011, during the fourth day of trial, it was discovered that Adams did not own the property in question during the time of development and construction of Heather Hollows. Instead, it was discovered that Adams' wife, who was not a party to the suit, quitclaim deeded the property to Adams in May 2006. Prior to May 2006, Adams did not own the property and was not

listed on the title. Based on the record before us, this is the first time the ownership issue was revealed. The matter surfaced out of the court's own curiosity, after discovering that the real property in question had been transferred to Adams:

> **{¶10}** The Court: Curiosity issue I have, because we have been referencing Geauga Access I have been looking at it. I note that in 2006 there appears to have been a transfer of the real property in question from Jacqueline Adams to Ken Adams. Mr. Adams, did you own the property in 2004? Were you on the title?
>
> **{¶11}** Adams: No, sir.
>
> **{¶12}** The Court: When did you first become on the title in the property?
>
> **{¶13}** Adams: It was May 2006.
>
> **{¶14}** The Court: We'll take our recess.

{¶15} Back in the presence of the jury, Adams' wife, Jacqueline Adams, took the stand and was questioned on the ownership issue. She affirmed quitclaiming the property to her husband in 2006. She was then questioned on whether she also assigned all her rights and interest in all claims and causes of action for damages to the real property to her husband in 2006. This was the first time during the trial that any assignment instrument was mentioned. Over objections, Mrs. Adams affirmed that she did, in fact, assign her rights to her husband on the same day as the quitclaim deed. The assignment instrument was presented to the court while Mrs. Adams was still on the stand, but was not admitted into evidence. Ultimately, the court denied admission of the assignment instrument because Adams had never listed it as an exhibit at any time prior to the trial and failed to explain why it was not listed or attached to any pre-trial

pleadings, including the complaint. Leave was subsequently requested to proffer the exhibit, which the trial court granted.

{¶16} At the close of Adams' case, both Pitorak & Coenen and Clemson Excavating moved for a directed verdict. The parties discussed the basis for their respective directed verdicts at sidebar. The defense explained to the court that Adams affirmatively maintained throughout the entire pre-trial process that he was the owner of the subject parcel. The defense pointed to (1) the complaint which alleged Adams was the owner in 2004, (2) the amended complaint which again alleged Adams was the owner in 2004, (3) the deposition of Adams where he stated that he acquired ownership of the subject parcel in 1973, and (4) the trial testimony of Adams wherein he referred to "his" property back in 2004. While the defense stated it was aware of a quitclaim deed between Mrs. Adams and Adams, it was led to believe that the purpose of the deed was merely to quitclaim Mrs. Adams' interest in the property to Adams. According to the defense, there was no mention of any assignment or that Adams was not on the deed at the time.

{¶17} The trial court granted Pitorak & Coenen's motion for directed verdict in part. First, as to punitive damages, the court explained that Adams did not offer any evidence that Pitorak & Coenen's acts or failures to act demonstrated actual malice such that punitive damages would be warranted. Second, as to compensatory damages, the court explained that Adams' evidence in regards to the cost of repair or remediation of the damage alleged to have been caused by Pitorak & Coenen was, "at best, speculative and remote." Finally, as to the ownership issue, the court held that Adams may maintain claims for nuisance, trespass, and interference with the surface

flow of water during the time he owned the property, but that he cannot maintain them for the period of time his wife owned the property. Thus, the court held that Adams' action against Pitorak & Coenen could still proceed as to any damages claimed for nuisance, trespass, and the loss of enjoyment of his real property occurring after May 2006. As a result, because there was no evidence that any defendant did anything necessitating repair of Adams' property prior to May 2006, the jury was not permitted to consider punitive or compensatory damages for property repair for *any* time period. In addition, the jury was not permitted to consider damages for nuisance, trespass, or the loss of enjoyment for the time period *prior to May 2006*.

{¶18} The trial court granted Clemson Excavating's motion for directed verdict in its entirety, relying on this court's previous decision in *Adams*, *supra*, which determined that Clemson Excavating may only be held liable for those acts beginning with the construction in April 2004 and ending in October 2005 when construction ceased. As Clemson Excavating's motion was granted, it did not present a case and did not make a closing argument.

{¶19} The jury entered a verdict in favor of Adams and against Pitorak & Coenen in the sum of $89,200.00. Shortly thereafter, Pitorak & Coenen filed a motion for "remittitur, judgment notwithstanding the verdict, and/or a new trial." The trial court denied all requested relief.

{¶20} Several other post-trial pleadings were filed, including a motion for sanctions against Adams and a motion to tax costs against Pitorak & Coenen. However, these matters are not part of the instant appeal and are currently being held in abeyance in the trial court pending disposition of the appeal.

{¶21} Pitorak & Coenen timely appeals and assert six assignments of error. Adams has filed a cross-appeal with two assignments of error. Clemson Excavating has filed briefs in opposition to both Pitorak & Coenen and Adams, defending the trial court's granting of its directed verdict motion and seeking to preserve its judgment.

{¶22} As Adams' cross-appeal involves issues dispositive of the entire appeal, it will be addressed first.

{¶23} Adams' first assignment of error in his cross-appeal states:

{¶24} "The trial court erred when it directed a verdict on the cost of repair or remediation of the real property owned by Plaintiff/Cross-Appellant."

{¶25} The trial court granted both Pitorak & Coenen's and Clemson Excavating's directed verdict motions as they pertained to compensatory damages on the cost of repair or remediation. Adams claims this was error because there was sufficient evidence as to the existence of damages from repairs needed to restore the pond.

{¶26} Pursuant to Civ.R. 50(A)(4), a motion for directed verdict should be granted when, after construing the evidence most strongly in favor of the party against whom the motion is directed, "reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party[.]"

{¶27} When a trial court determines whether to grant a motion for directed verdict, it is testing the legal sufficiency of the evidence by examining the materiality of the evidence rather than the conclusions which can be drawn from such evidence. *Eldridge v. Firestone Tire & Rubber Co.*, 24 Ohio App.3d 94, 96 (10th Dist.1985). It is therefore a legal determination which gauges whether only one result can be reached under the theories of law set forth by the opposing party. *Id*. The trial court must give

the opposing party the benefit of all reasonable inferences from the evidence and must not independently weigh the evidence or determine the credibility of the witnesses. *Id*. As the motion for directed verdict presents questions of law and not factual issues, this court employs a de novo standard of review. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108 (1995).

{¶28} In order to recover damages, the injury and resulting damage must be ascertained with reasonable certainty and not left to conjecture and speculation. *D.A.N. Joint Venture III, L.P. v. Med-XS Solutions, Inc.*, 11th Dist. No. 2011-L-056, 2012-Ohio-980, ¶35, quoting *Barker v. Sundberg*, 11th Dist. No. 92-A-01756, 1993 Ohio App. LEXIS 5112, *4 (Oct. 25, 1993). A plaintiff bears the burden of "proving the nature and extent of damages whether an action sounds in tort or contract." *Countywide Home Loans, Inc. v. Huff*, 11th Dist. No. 2009-T-0044, 2010-Ohio-1164, ¶47, citing *Cleveland Builders Supply Co. v. Farmers Ins. Group of Companies*, 102 Ohio App.3d 708, 714 (8th Dist.1995).

{¶29} Here, the existence of damages for repair or remediation was never established. Damages testimony from two restoration contractors, Thomas Zahler and Robert Battisti, though initially permitted, was ultimately stricken from the record by the trial court. Mr. Zahler was dismissed from the stand because the trial court ruled it would not hear any testimony on repair or remediation without first hearing testimony on how much sediment came from the construction and, of that amount, how much was unreasonable. Later in the trial, Mr. Zahler returned to the witness stand and testified over objections that the total cost of remediation was $208,120. Mr. Battisti testified in a similar fashion; his estimate was $80,170 plus "some [unknown] operator expenses." At

the conclusion of the testimony, the trial court struck from the record the damages testimony of both witnesses, as it concluded their calculations were based on the removal of an unproven amount of silt. The trial court explained that "there is absolutely no basis for either witness to assume that there are 1,000 tons of silt that should be removed."

{¶30} Adams suggested the court erred in striking the testimony of Mr. Zahler and Mr. Battisti, though this is not an assignment of error in his cross-appeal and will not be considered.

{¶31} An increase in the amount of surface water onto an adjoining property is not, in and of itself, actionable. However, an unreasonable increase in the amount of surface water runoff may result in liability. That is, one may make reasonable usage of his surface water, incurring liability only when his harmful interference with the flow of that surface water is unreasonable. *Guarino v. Farinacci*, 11th Dist. No. 2001-L-158, 2003-Ohio-5980, ¶36, quoting *McGlashan v. Spade Rockledge Corp*., 62 Ohio St.2d 55 (1980), syllabus.

{¶32} With the testimony of Mr. Zahler and Mr. Battisti stricken, the only damages testimony on the cost of repair or remediation due to silt caused by Clemson Excavating and/or Pitorak & Coenen came from Adams and one Doyle Hartman. However, this testimony was not substantiated. The figures introduced were predicated on an estimated amount of silt to be removed; yet there is no testimony about (1) the amount of silt that resulted from an unreasonable increase in surface water flow nor (2) the amount of silt that accumulated in the pond *subsequent* to May 2006. The trial court therefore properly dismissed this testimony as speculative at best. As noted above, the

injury (the level of unreasonable silt) and resulting damage must be determined with a reasonable degree of certainty and not left to conjecture. As there was no competent testimony to this point, in particular as to the relevant time period, compensatory damages for the cost of repairing the pond were properly dismissed by the trial court.

{¶33} Adams' first assignment of error in his cross-appeal is therefore without merit.

{¶34} Adams' second assignment of error in his cross-appeal states:

{¶35} "The trial court erred when it directed a verdict on damages for nuisance and interference with surface flow of water, which occurred prior to deed ownership of the property by Plaintiff/Cross-Appellant, and when it excluded the instrument assigning all rights and claims involving the property to Plaintiff/Cross-Appellant."

{¶36} In his brief in support of this portion of the second assignment of error in his cross-appeal, Adams fails to refer to a single authority in support of this argument. App.R. 16(A)(7) requires citations to authority on which an appellant relies. This alone justifies finding the assignment of error to be without merit. However, we will proceed to consider the merits of the assignment of error.

{¶37} The trial court granted Pitorak & Coenen's and Clemson Excavating's directed verdict motions as to damages for nuisance, trespass, and the loss of enjoyment for any time period *prior to May 2006*. Adams claims this was error because Mrs. Adams, the property owner prior to May 2006, assigned all rights and interests to the property to Adams. Adams argues that he attempted to introduce the assignment instrument at trial, but the trial court denied admissibility of the document. Adams claims this evidentiary ruling was in error, and had the assignment instrument been

admitted, the court would not have directed a verdict in favor of Pitorak & Coenen for pre-2006 claims.

{¶38} Conversely, Pitorak & Coenen claims the assignment instrument was not properly proffered, and even if it were, the trial court properly excluded it because Adams misrepresented his ownership status and, for the first time in the long history of this litigation, attempted to introduce the assignment instrument near the conclusion of trial, even though it was not listed on the exhibit list.

{¶39} Thus, two issues need to be addressed, as they pertain to the trial court's ruling on the ownership issue: (1) whether Adams properly proffered the assignment instrument thereby preserving any error, and (2) whether the court properly excluded the admission of the assignment instrument.

{¶40} First, Adams properly proffered the assignment instrument after the trial court denied its admission as an exhibit. The assignment instrument was moved to be entered as an exhibit during the testimony of Mrs. Adams on March 3, 2011, the same day the ownership issue first came to light. The trial court denied admission of the instrument. Later that same day, the trial court made a ruling that Adams could not proffer the instrument. He therefore did not proffer the exhibit. However, the trial court later allowed Adams to proffer the evidence. The proffer was made on the last day of trial, on March 4, 2011, via "motion for leave to proffer evidence." The assignment instrument was attached to the motion. The instrument, dated May 24, 2006, was signed by Mrs. Adams and notarized. By proffering the evidence itself, Adams made the assignment instrument part of the record and available to this reviewing court. Thus, Adams has preserved the issue for review.

{¶41} Second, evidentiary rulings fall within the trial court's sound discretion. *Kent v. Atkinson*, 11th Dist. No. 2010-P-0084, 2011-Ohio-6204, ¶42, citing *Peters v. Ohio State Lottery Comm*., 63 Ohio St.3d 296, 299 (1992). As a result, the decision to include or exclude certain evidence will not be disturbed absent an abuse of discretion. *Id*. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting *Black's Law Dictionary* 11 (8th Ed.2004). Here, we cannot determine that the trial court abused its discretion in excluding the assignment instrument.

{¶42} Adams was not the real party in interest and lacked standing to assert any claims prior to the time when he received the quitclaim deed to the property in May 2006. *See Wash Mut. Bank v. Novak*, 8th Dist. No. 88121, 2007-Ohio-996, ¶15. ("If a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action.") Adams was not an owner of the land prior to this period of time. Moreover, there was no joinder or substitution of Mrs. Adams, the property owner, prior to May 2006. Mrs. Adams was not a party to the suit in any capacity. Adams essentially concedes this point because he argues that relief could have nonetheless been granted via the assignment instrument of claims and rights. Thus, he argues his claims can be brought by way of the assignment.

{¶43} However, a review of the record reveals that the assignment instrument was never filed with the trial court prior to trial in any manner. It was not attached to the complaint or the amended complaint. It was not mentioned or referred to in any pre-trial pleadings, including Adams' trial brief. It was not included on an exhibit list. It was not mentioned at trial until the trial court discovered that Adams did not own the property

prior to May 2006. According to Pitorak & Coenen, it was not included in discovery. Rather, the record is replete with affirmative representations throughout the pleading stage that Adams was, in fact, the owner of the subject parcel in 2004, 2005, and part of 2006. These representations continued throughout Adams' deposition and even during his trial testimony.

{¶44} The trial court's ruling was not a result of "failure to exercise sound, reasonable, and legal decision making." Rather, the parties were four days into trial when it was discovered the subject parcel was not owned by the plaintiff seeking to recover damages for much of the time the purported damage occurred. Adams' theory of recovery changed on the fourth day of trial from landowner to assignee. As a result, the defense did not have an opportunity to conduct discovery on this issue, which they were entitled to do. The defense was unable to depose Mrs. Adams on the assignment, inspect the assignment instrument, and research the applicable law on assigning claims and rights to property. If there were questions regarding the validity of the assignment and the actual date it was executed, the defense was denied the opportunity to investigate those potential defenses.

{¶45} Adams claims the quitclaim deed was served to the opposing parties more than two years prior to trial in response to a request for production of documents. The purpose of discovery rules is to prevent surprise and the "secreting of evidence." *Lakewood v. Papadelis*, 32 Ohio St.3d 1, 3 (1987). "The overall purpose is to produce a fair trial." *Id*. The opposing parties were actually misled as to the real party in interest and to a potential issue in the litigation. Adams cannot argue that the defense should have been aware of this assignment when his theory of recovery was premised on him

being an owner, not an assignee. At the very least, days of testimony concerning alleged damage done to the pond in 2004 and 2005 may have been excluded before it reached the jury's ears. Instead, the jury was exposed to significant testimony of damage that happened in 2004 and 2005, when Adams did not own the property.

{¶46} Moreover, Civ.R. 10(D) explains, "[w]hen any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading." Thus, "[a]n assignee of a claim, bringing an action upon the claim in his own name, must allege and prove the assignment of the claim sued upon." *Zwick & Zwick v. Suburban Constr. Co*., 103 Ohio App. 83 (8th Dist.1956), paragraph one of the syllabus. "In other words, in order to prevail, the assignee must prove that it is the real party in interest for purposes of bringing the action. An assignee cannot prevail on the claims assigned by another holder without proving the existence of a valid assignment agreement." *Hudson & Keyse, LLC v. Yarnevic-Rudolph*, 7th Dist. No. 09 JE 4, 2010-Ohio-5938, ¶21, citing *Natl. Check Bur., Inc. v. Cody*, 8th Dist. No. 84208, 2005-Ohio-283. If Adams was to recover by virtue of his status as an assignee, at a minimum, the assignment instrument should have been referenced in the complaint and a copy provided to the defense.

{¶47} Thus, we cannot conclude the court abused its discretion in excluding the assignment instrument. Without the instrument, the only evidence to support Adams' position as an assignee was Mrs. Adams' affirmation that she recalled assigning her rights and interests to the property to her husband sometime in 2006. This testimony is insufficient to establish Adams' pre-2006 rights.

{¶48} Adams' second assignment of error in his cross-appeal is without merit.

{¶49} Pitorak & Coenen in its appeal raise assignments of error concerning the remainder of the court's directed verdict.

{¶50} Pitorak & Coenen's fourth assignment of error in its appeal states:

{¶51} "The trial court erred by refusing to grant Defendant, Pitorak & Coenen's motion for directed verdict."

{¶52} The trial court denied the remainder of Pitorak & Coenen's directed verdict motion, allowing the action to proceed as to damages claimed for nuisance, trespass, and the loss of enjoyment of Adams' real property occurring after May 2006. Pitorak & Coenen argues that there was no evidence as to any damage for these claims after May 2006, when Adams took ownership of the property.

{¶53} Before we assess the damage claims advanced by Adams for the relevant period, we must first address Adams' claim that Pitorak & Coenen waived the ownership issue by not presenting it to the trial court in its oral motion for a directed verdict. Factually, there is no indication that Pitorak & Coenen waived this argument while seeking a directed verdict. Even if Pitorak & Coenen had not argued this ownership issue when requesting a directed verdict, upon a defendant's motion, the trial court has a duty to direct a verdict when no evidence is produced substantiating a material allegation of the action. *Zafires v. Peters*, 160 Ohio St. 267 (1953), paragraph two of the syllabus.

{¶54} The trial court found that Adams could recover damages for interference with water rights, trespass, and nuisance occurring after May 2006. Adams argues that the trial court's ruling allowed him to recover damages for trespass for *any period of*

time. We do not read the court's ruling in this fashion nor does the record indicate this was the court's ruling, especially as the court instructed the jury that trespass may only be proven if Adams held record title. Thus, when examining the sufficiency of the evidence, this court is confined to the evidence presented of damage for the three claims after May 2006.

{¶55} As to the claim for interference with surface water:

{¶56} '[C]ourts 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*, 11th Dist. No. 2001-L-158, 2003-Ohio-5980, ¶36, quoting *McGlashan v. Spade Rockledge Corp*., 62 Ohio St.2d 55 (1980), syllabus.

{¶57} Thus, the principal question is whether there was sufficient evidence to determine that the increase in the amount of runoff entering Adams' pond was unreasonable. To establish the measure of damages in this particular case it is necessary to know the difference between (1) the amount of increased surface water flow that continued after Adams acquired title in May 2006 and (2) the amount of

surface water flow from the time prior to development of the upstream property. It must then be determined if that increase, if any, was unreasonable.

{¶58} After a review of the complete transcript, it is apparent there was no evidence presented as to a quantification of the increase in the amount of runoff entering Adams' pond after he acquired title in May 2006 and, likewise, that any such increase was unreasonable; and if it was, what was the resulting damage.

{¶59} There was no evidence as to the increase in the level of silt caused by the development (versus organic silt that would have accumulated regardless of the construction). Each expert acknowledged that silt accumulation is part of organic pond life. Daniel Bogoevski of the Ohio EPA explained that, even if there were no construction, there would still be silt collecting in the pond and periodic maintenance would be required. That is, without Adams taking certain action, silt would continue to accumulate irrespective of any construction site or surface flow issues. Doyle Hartman opined that the runoff was caused by the Heather Hollows subdivision, but neither he nor any other witness was able to *quantify* the level of silt which came from the site. No expert performed independent calculations in an effort to distinguish how much sedimentation came from the runoff.

{¶60} Second, as there was no evidence as to how much, if any, silt was due to the amount of runoff from the site, it was naturally impossible to determine how much of that (unknown amount of) silt coming from the site was unreasonable. While Doyle Hartman opined that he considered the runoff to be "unreasonable," his entire opinion was predicated on Adams' estimations. Specifically, Adams would periodically venture into his pond, "if not every year, than every two years," with a rope tied to a bucket. He

would then lower the bucket and mark the water line of the rope. Alternatively, Adams would use a pole to similarly make measurements. However, neither one of these techniques employed measure the silt level nor do they designate what silt was produced from the pond and what silt was carried into the pond by the runoff.

{¶61} Third, even if, resolving all doubt in favor of Adams, there was evidence supporting an "unreasonable" finding, there was no evidence which illustrates this unreasonable, harmful runoff occurred after Adams took title in May 2006. No witness was able to differentiate between the level of silt that entered the pond in 2004 and 2005, versus the level of silt that entered after May 2006. This is, of course, critical to the cause of action because Adams can only recover for damages that occurred while he owned the property. As repair measures to restore the pond had yet to be implemented, any silt entering Adams' pond had been accumulating for years.

{¶62} Based on the foregoing, the court erred in not directing a verdict in favor of Pitorak & Coenen on Adams' claim of interference with surface water.

{¶63} As to the trespass claim, it is well founded that "'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*, 83 Ohio St.3d 11, 19 (1998), quoting *Linley v. DeMoss*, 83 Ohio App.3d 594, 598 (10th Dist.1992), and citing *Chance v. BP Chemicals, Inc*., 77 Ohio St.3d 17, 24 (1996).

{¶64} 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, ¶28. "A permanent trespass occurs when the

defendant's tortious act has been fully accomplished, but injury to the plaintiff's estate from that act persists in the absence of further conduct by the defendant." *Reith v. McGill Smith Punshon, Inc*., 163 Ohio App.3d 709, 2005-Ohio-4852, ¶49 (1st Dist.). "In contrast, a continuing trespass results when the defendant's tortious activity is ongoing, perpetually creating fresh violations of the plaintiff's property rights." *Id.*

{¶65} The First Appellate District in *Weir v. E. Ohio Gas Co*., 7th Dist. No. 01 CA 207, 2003-Ohio-1229, highlighted the paramount distinction between permanent and continuing trespass: parties are deemed liable for a continuous trespass when they retain control over the source of the trespass. *Id*. at ¶27. The court, citing its previous line of cases, illustrated the differences. *Id*.

{¶66} Findings of continuing trespass included a case where the defendant had control over a pile of debris that created numerous landslides and another case where the defendant had control over loose, heavy debris that was causing property damage. *Id.* Conversely, findings of permanent trespass included a case where the defendant had no control over a sewage-treatment system it had previously installed and another case where the defendant retained no control over the dredge it placed on the plaintiff's property. *Id.* These findings are similar to the First Appellate District's finding of permanent trespass in *Reith*, where the court concluded that "the allegedly tortious act by [the defendant] was the design of a drainage system that did not account for the eventual outfall of surface water. It is undisputed that [the] design of the system, including even the installation of the system, was completed by 1994, at the latest." *Id*. at ¶50.

{¶67} Here, whether Pitorak & Coenen's alleged trespass is permanent or continuing is important. If the trespass is permanent, then Adams lacks standing to bring the claim because the trespass was caused by systems *installed prior to when he took ownership* that did not control the outfall of surface water. If, however, the trespass is continuous, Adams has standing to bring the claim because damage allegedly continued throughout the weeks before trial and Pitorak & Coenen retained control over the problem.

{¶68} Unfortunately, this pivotal question must remain unanswered because the extent of Pitorak & Coenen's control over the subdivision is not established on this record. Though construction and development on the project has been completed, it is not clear whether the lots have sold and whether Pitorak & Coenen has any continuing involvement. If Pitorak & Coenen had sold all the lots, it is not clear when such transfer occurred. The record indicates that Pitorak & Coenen owned a spec house at the end of the cul de sac, but it is unclear whether it retained ownership. As this court is reviewing a directed verdict claim, it must resolve all doubt in favor of the nonmoving party—Adams. In so doing, though it is likely Pitorak & Coenen has sold the lots and retains no ownership or control over the subdivision, such an important consideration cannot merely be assumed.

{¶69} Similarly, as to the nuisance claim, Adams contends that Pitorak & Coenen interfered with the use and enjoyment of his land; thus, he is asserting a private, rather than a public, nuisance. *Guarino v. Farinacci*, 11th Dist. No. 2001-L-158, 2003-Ohio-5980, ¶14. There are two types of private nuisance—a qualified nuisance and an absolute nuisance. *Id.* at ¶15. 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. *Id.* at ¶17-18.

{¶70} "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, ¶59. The Ohio Supreme Court 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, ¶8, citing *Menifee v. Ohio Welding Prod., Inc*., 15 Ohio St.3d 75, 77 (1984).

> **{¶71}** Much like a continuous trespass, a continuing nuisance arises when the wrongdoer's tortious conduct is ongoing, perpetually generating new violations. Conversely, a permanent nuisance occurs when the wrongdoer's tortious act has been completed, but the plaintiff continues to experience injury in the absence of any further activity by the defendant. *Weir v. E. Ohio Gas Co*., 2003-Ohio-1229, ¶30. *See also Creech v. Brock & Assocs. Constr*., 183 Ohio App.3d 711, 2009-Ohio-3930, ¶17-18 (12th Dist.).

{¶72} For the reasons explained above, it is not clear whether the nuisance claim in this case would qualify as permanent or continuing.

{¶73} However, even if the trespass or nuisance were to be considered "continuing," there is insufficient evidence to determine that Pitorak & Coenen maintained the subdivision in a negligent fashion thereby creating an unreasonable risk of harm. Adams presented no evidence that the harm caused was proximately caused

by any *negligent* operation of the subdivision's containment efforts. In fact, the evidence supports a claim to the contrary. Initially, the site did not comply with regulations and there were several concerns from Geauga Soil and Water about the efforts taken by the site to control sedimentation and runoff in general. However, this evidence all pertains to site conditions in 2004 and 2005. When Adams took title to the property in May 2006, the evidence indicates the retention areas passed all inspections and were in accordance with state and local environmental protection policies. Witnesses from Geauga Soil and Water testified that by the final inspection on October 5, 2005, the subdivision was in full compliance with all requirements. A witness from the Ohio EPA testified that the site was in general compliance with all state regulations. A civil engineer and land surveyor testified the detention basins were acting as designed. No evidence was produced to suggest any negligence such that a trespass or nuisance claim could be properly maintained.

{¶74} In his response brief, Adams does not point to any evidence in the record at trial that supports his claims after May 2006. However, at oral argument, he highlighted several pieces of evidence as sufficient to support claims for trespass and nuisance after May 2006. First, Adams noted his testimony that every time there is a rain event, he sees dirty water entering his pond. Photos were admitted as evidence to support this claim. As to Adams' testimony, the existence of dirty water entering his pond during rain events does not provide support for the claim that Pitorak & Coenen's action (or inaction) proximately caused this to occur. As to the photographs entered into evidence, only one photograph was confirmed to have been taken after May 2006. Other photographs were taken in August 2004, November 2004, April 2005, and

summer 2005. There were also three photographs admitted from spring 2006. Even assuming "spring" to be after May 2006, the photographs merely show muddy water flowing in a stream.

{¶75} Next, Adams pointed to his testimony whereby he details the fish in the pond continually dying after May 2006. Review of this claim was especially difficult because Adams did not refer to any transcript page numbers indicating where this testimony could be found, as required by App.R. 16(A)(7). Nonetheless, a detailed review of the transcript indicates that Adams only testified to the number and type of fish he found dead in 2005. A photograph was entered into evidence showing two dead fish floating in the pond, but again, Adams stated he took that photograph in April 2005. Adams also pointed to his testimony where he discussed trees around the pond continually dying after May 2006. Review of this claim was again difficult because Adams did not refer to the transcript in support of this proposition. Ultimately, after a review of the complete transcript, it is clear this testimony does not exist with regard to the time period after May 2006.

{¶76} Thus, the court likewise erred in not directing a verdict in favor of Pitorak & Coenen on Adams' claim of trespass and nuisance.

{¶77} Based on the law of each respective claim and the evidence presented, the trial court erred in failing to grant Pitorak and Coenen's request for a directed verdict. Pitorak & Coenen's fourth assignment of error is with merit. In so holding, we express no opinion regarding the misrepresentations of ownership as they may apply to the pending sanctions hearings.

{¶78} Pitorak & Coenen's remaining assignments of error are:

{¶79} [1.] The verdict of the jury was against the manifest weight of the evidence and should be reversed where Plaintiff-[Appellee's] recovery was limited, repair and restoration damages were excluded and Defendant-Appellant passed all government inspections.

{¶80} [2.] The trial court erred by permitting testimony from Thomas Zahler and Robert Battisti and the trial court's decision to later strike the testimony did not cure the error inasmuch as the evidence had gone to the jury.

{¶81} [3.] Plaintiff, Kenneth Adams, perpetuated a deception upon the court because he did not own the property which is the subject matter of the litigation yet falsely represented that he did which should have resulted in a directed verdict which the court failed to grant on the issue of ownership of the property.

{¶82} [5.] The lower court erred by refusing to give an instruction on independent contractor status between Clemson Excavating and Defendant-Appellant and committed prejudicial error by virtue of the agency instruction given to the jury thus necessitating a defense verdict or new trial.

{¶83} [6.] The trial court erred by overruling Defendant's motion for remittitur, judgment notwithstanding the verdict and/or motion for new trial.

{¶84} Based on the disposition of the above assignments of error, Pitorak & Coenen's remaining assignments of error are moot.

{¶85} The judgment of the Geauga County Court of Common Pleas is hereby affirmed in part and reversed in part, and final judgment is rendered in favor of defendant-appellant/cross-appellee, Pitorak & Coenen, in accordance with this opinion.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.