[Cite as *Ray v. Dickinson*, 2004-Ohio-3632.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JAMES W. RAY, ET AL.,	)	
	)	
PLAINTIFFS-APPELLEES,	)	CASE NO. 03-BE-29
	)	
- VS -	)	OPINION
	)	
DAROL DICKINSON, ET AL.,	)	
	)	
DEFENDANTS-APPELLANTS.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Case No. 01-CV-79
JUDGMENT:	Affirmed and Remanded
APPEARANCES:	
For Plaintiffs-Appellees:	Attorney Timothy S. Chappars P.O. Box 280 Xenia, Ohio 45385
For Defendants-Appellants:	Attorney William Douglas Lowe REESE, PYLE, DRAKE & MEYER 36 N. Second St. P.O. Box 919 Newark, Ohio 43058-0919
JUDGES:	

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: June 28, 2004

[Cite as *Ray v. Dickinson*, 2004-Ohio-3632.]
DONOFRIO, J.

{¶1} Defendants-appellants, Darol Dickinson, et al., appeal a decision of the Belmont County Common Pleas Court vacating a previous decision which granted summary judgment in favor of them and against plaintiffs-appellees, James W. Ray, et al.

{¶2} Defendants-appellants, Darol Dickinson and Dickinson Cattle Co., Inc., own a cattle ranch in Barnesville, Ohio. Plaintiffs-appellees, James W. Ray and his wife, Rebecca Ray, raised mules for a number of years. At the invitation of appellant Darol Dickinson, appellees visited appellants' ranch in August 1999 and brought with them two of their mules to ride there. On August 23, 1999, while appellees were riding their mules on appellants' ranch, the mule appellee James W. Ray was riding lost its footing and he fell from the mule, suffering serious, permanent physical injuries.

{¶3} On February 22, 2001, appellees filed suit against appellants seeking damages under various theories, including common law claims for premises liability. Extensive discovery followed. Appellants filed a motion for summary judgment and appellees responded with a memorandum in opposition. On February 11, 2003, the trial court filed an opinion which granted summary judgment to appellants. Summary judgment was granted without cause for delay and appellants' counsel was to prepare a judgment entry. On March 4, 2003, the trial court filed a judgment entry granting appellants' motion for summary judgment. On March 12, 2003, the trial court refiled the same judgment entry, this one noting that the entry had been submitted to, but refused by counsel for appellees.

{¶4} Subsequently, on March 28, 2003, the trial court granted reconsideration and allowed appellees thirty days to submit the deposition of an expert. On April 2, 2003, appellants appealed all the aforementioned judgment entries to this court and that appeal was assigned Case No. 03-BE-20. A cross-appeal followed on April 11, 2003.

{¶5} In evaluating our jurisdiction over the appeal in Case No. 03-BE-20, we noted that subsequent action taken by the trial court "arguably" mooted the point. On April 2, 2003 (the same day the appeal was filed), the trial court issued a

"Supplemental Docket Entry" clarifying that its reconsideration was a vacation of the prior entries of March 4, 2003 and March 12, 2003. Appellants also appealed the trial court's April 2, 2003 entry and that appeal was assigned Case No. 03-BE-29. This court determined that the only order ripe for review was the order of April 2, 2003. Accordingly, this court sua sponte dismissed the appeal and cross-appeal in Case No. 03-BE-20. *Ray v. Dickinson* (June 18, 2003), 7th Dist. No. 03-BE-20.

{¶6} To reiterate, the present appeal, Case No. 03-BE-29, involves only the trial court's order of April 2, 2003, in which it vacated its prior entries of March 4, 2003 and March 12, 2003, in which appellants had been granted summary judgment. Appellants raise two of assignments of error. Appellants' first assignment of error states:

{¶7} "The Trial Court Erred by Filing an Entry Vacating its Earlier Grant of Summary Judgment After an Appeal was Pending."

{¶8} Appellants argue that when the previous appeal was pending, the trial court was without jurisdiction except to take action in aid of the appeal.

{¶9} The Ohio Supreme Court has consistently held that while an appeal is pending, the trial court is without jurisdiction except to take action in aid of the appeal. *McCauley v. Smith* (1998), 82 Ohio St.3d 393, 395, 696 N.E.2d 572; *Daloia v. Franciscan Health Sys. of Cent. Ohio, Inc.* (1997), 79 Ohio St.3d 98, 101-102, fn. 5, 679 N.E.2d 1084. However, in this case the trial court vacated the prior orders before appellants filed their appeal in Case No. 03-BE-20, albeit only by hours. Therefore, the trial court still had jurisdiction over the case.

{¶10} Accordingly, appellants' first assignment of error is without merit.

{¶11} Appellants' second assignment of error states:

{¶12} "The Trial Court Erred in Granting Appellees' Motion to Reconsider the Grant of Summary Judgment in Favor of Appellants as There is No Provision Allowing Such Reconsideration in the Ohio Rules of Civil Procedure and any Motion for the Reconsideration of a Final Judgment Must be Considered a Nullity."

{¶13} Citing *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 379-380, 21 O.O.3d 238, 423 N.E.2d 1105, appellants argue that motions for reconsideration of a final judgment in the trial court are a nullity.

{¶14} Civ.R. 60(B) states in part, "[t]he procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules." The Ohio Rules of Civil Procedure do not recognize motions for reconsideration after a final judgment in the trial court. *Pitts*, 67 Ohio St.2d at paragraph one of the syllabus, 21 O.O.3d 238, 423 N.E.2d 1105. The proper vehicle for relief from judgment is a motion to vacate under Civ.R. 60(B). Civ.R. 60(B); *Pitts*, 67 Ohio St.2d at 380, 21 O.O.3d 238, 423 N.E.2d 1105. However, this court has on occasion adhered to the idea that trial courts have been allowed some discretion to treat a motion for reconsideration as a motion to vacate under Civ.R. 60(B). *Uhrin v. City of Campbell* (Sept. 20, 2001), 7th Dist. No. 00 C.A. 53; *Stanley v. First City Co.* (June 6, 2001), 7th Dist. No. 00-JE-27; *Malloy v. Kraft General Foods, Inc.* (June 14, 1999), 7th Dist. Nos. 95-CA-241 and 95-CA-245.

{¶15} The motion for clarification and/or reconsideration filed by appellees on February 25, 2003, can reasonably be construed as a motion for relief from judgment. The Ohio Supreme Court set out the controlling test for Civ.R. 60(B) motions in *GTE Automatic Elec., Inc. v. Arc Industries, Inc.* (1976), 47 Ohio St.2d 146, 1 O.O.3d 86, 351 N.E.2d 113. The court stated:

{¶16} "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." Id. at paragraph two of the syllabus.

{¶17} An appellate court will not reverse a trial court's ruling on a Civ.R. 60(B) motion absent a showing of abuse of discretion. *Cermak v. Cermak* (1998), 126 Ohio App.3d 589, 598, 710 N.E.2d 1191. Abuse of discretion connotes more than an error

in judgment, it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶18} The first requirement under GTE is that appellees must have a meritorious claim to present if relief is granted. *GTE Automatic Elec., Inc.*, supra. To meet this requirement appellees need only to allege a meritorious claim, they need not prevail on the merits. *Moore v. Emmanuel Training Ctr.* (1985), 18 Ohio St.3d 64, 67, 18 OBR 96, 479 N.E.2d 879.

{¶19} In their complaint, appellees alleged claims arising from premises liability and failure to warn. Appellees presented the opinion of an expert suggesting that the dangerous condition of the land was one cause of the incident. Thus, appellees have alleged a meritorious claim and that the summary judgment order in question was premature.

{¶20} The second requirement under *GTE* is that appellees must demonstrate that they are entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5). *GTE Automatic Elec., Inc*., supra.

{¶21} Civ.R. 60(B) states the grounds for relief as follows:

{¶22} "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 Rule 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."

{¶23} Since appellees did not specifically allege any of the grounds for relief listed in Civ.R. 60(B)(1) through (4), if they are entitled to relief it is on the basis of

Civ.R. 60(B)(5). Civ.R. 60(B)(5) gives the court power "to relieve a person from the unjust operation of a judgment." *Caruso Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, 448 N.E.2d 1365, at paragraph one of the syllabus. In this case, it is apparent that appellees found an expert witness who suggested that the dangerous condition of the land was one cause of the incident. The trial court was within its discretion to reconsider summary judgment based on this additional evidence so that the case could be properly decided on its merits.

{¶24} The final requirement under *GTE* that appellees must demonstrate is that they filed their motion within a reasonable time. *GTE Automatic Elec., Inc.*, supra. The trial court filed its original opinion on February 11, 2003. Appellees filed their motion on February 25, 2003, just fourteen days later. Thus, appellees met the timeliness requirement.

{¶25} Moreover, the trial court was within its discretion to vacate the orders of March 4, 2003 and March 12, 2003. The original opinion the trial court filed on February 11, 2003 did not address all of appellees' claims and theories of liability. Therefore, *Pitt* does not apply since there was not a complete and final judgment.

{¶26} Accordingly, appellants' second assignment of error is without merit.

{¶27} The judgment of the trial court is hereby affirmed and this matter is remanded for further proceedings according to law and consistent with this opinion.

Vukovich, J., concurs.
DeGenaro, J., dissents. See dissenting opinion.

DeGenaro, J., dissenting,

{¶28} I cannot agree with the majority's conclusion because the appellees were not entitled to relief from judgment under Civ.R. 60(B). Civ.R. 60(B) is not a substitute for a direct appeal and the arguments the appellees raised in their motion for reconsideration were all issues which could have been raised in a direct appeal. Accordingly, the trial court's decision to vacate its grant of summary judgment should be reversed. The parties did directly appeal from the granting of summary judgment. This Court improvidently dismissed that appeal because of the trial court's subsequent decision vacating its decision. That appeal should be reinstated and the parties should be given the opportunity to address whether or not the trial court properly granted summary judgment in the first place.

{¶29} In this case, the trial court entered an opinion granting summary judgment to the appellants and ordered the appellants' counsel to prepare a judgment entry. The appellees filed a motion for reconsideration of this decision before that judgment entry was prepared and filed. The trial court filed its decision granting summary judgment to the appellants. After the trial court journalized its decision, it held a hearing on the motion for reconsideration. It then granted the motion to reconsider its opinion and vacated its prior entries granting summary judgment to the appellants.

{¶30} This situation is a bit unique due to the peculiar procedure employed by the trial court of issuing its opinion and ordering a party to prepare a judgment entry conforming to that opinion. Thus, when the appellees filed their motion for reconsideration, there was no order for the trial court to reconsider and no need for the appellees to conform their motion to the dictates of Civ.R. 60(B). The trial court set a date to orally hear the motion, but prior to that date it filed the judgment entry granting summary judgment to the appellants. Normally, we would conclude that the trial court implicitly denied the motion for reconsideration when it filed the entry granting summary judgment. *Portofe v. Portofe*, 153 Ohio App.3d 207, 2003-Ohio-3469, ¶16. Accordingly, once the trial court entered judgment, the motion was no

longer pending before it. Civ.R. 60(B) specifically requires that a motion activate it. *Musca v. Village of Chagrin Falls* (1981), 3 Ohio App.3d 192, 194. Since no motion was filed after the trial court entered judgment, the trial court had no basis for exercising its powers under Civ.R. 60(B) and abused its discretion when it granted relief from judgment.

{¶31} However, even if we overlook the fact that the motion was filed before the trial court granted judgment, we cannot affirm its decision to grant relief from that judgment. The Ohio Supreme Court has unequivocally stated that a party may not use a Civ.R 60(B) motion as a substitute for a timely appeal. *Doe v. Trumbull County Children Services Bd.* (1986), 28 Ohio St.3d 128, paragraph two of the syllabus. Accordingly, one cannot directly attack a judgment in a Civ.R. 60(B) motion. *Internatl. Lottery, Inc. v. Kerouac* (1995), 102 Ohio App.3d 660, 668. The appellees' motion for reconsideration argues that the trial court granted summary judgment on an issue not addressed in appellants' motion for summary judgment. Thus, it is nothing more than a direct attack on the trial court's decision. Accordingly, the issues raised in that motion are not a proper basis for Civ.R. 60(B) relief.

{¶32} The majority's opinion brushes over this issue. In their motion for reconsideration, the appellees argued that the appellants' motion for summary judgment did not address whether the land was in a dangerous condition at the time of the accident. They stated that an expert witness opined that it was. The majority states that this is a valid reason for Civ.R. 60(B)(5) relief, which allows a trial court to vacate its judgment for "any other reason justifying relief from the judgment," because "it is apparent that appellees found an expert witness who suggested that the dangerous condition of the land was one cause of the incident." Opinion at ¶23. Clearly, this is not a proper description of what actually happened in the trial court.

{¶33} Finally, even if the appellees did argue that they were entitled to Civ.R. 60(B) relief because they discovered an expert who would testify in their favor on a material issue, this would not constitute grounds for relief under Civ.R. 60(B)(5) since the record demonstrates that the evidence was discovered prior to the court's

journalization of its judgment. "The grounds for invoking Civ.R. 60(B)(5) should be substantial" and only matters of an extraordinary nature fall within its purview. *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph two of the syllabus; *Cuervo v. Snell* (1998), 131 Ohio App.3d 560, 565; see also Staff Note to Civ.R. 60 (B)(5)). Even if this Court has acknowledged that Civ.R. 60(B)(5) should only be used in "rare", "extraordinary", and "unusual" cases. *Sharick v. Sharick*, 7th Dist. Nos. 00CA123, 00CA234, 2001-Ohio-3418, 2001-Ohio-3419; *Binger v. Binger*, 7th Dist. Nos. 493, 509, 2001-Ohio-3349.

{¶34} The facts in this case are neither rare, extraordinary, or unusual. If the appellees' motion is correct, then the trial court erred by granting summary judgment on an issue not before it. This would properly be the subject of a direct appeal and, therefore, not the grounds for relief under Civ.R. 60(B). If the appellees were incorrect and the issue of whether or not the ground was in a dangerous condition was before the trial court, then they made a mistake by not submitting all the evidence at their disposal in response to the appellant's motion for summary judgment. This is not grounds for relief under Civ.R. 60(B)(5). Accordingly, I would reverse the trial court's decision and reinstate the judgment entries granting summary judgment to the appellants.

{¶35} The problem in this case is that this Court dismissed the parties' direct appeal from the decision granting summary judgment because the trial court's decision to vacate its prior judgments "arguably moots" whether those prior judgments were correct. This judge did not sign the dismissal entry. That decision ignored the fact that the grounds for relief under Civ.R. 60(B) must be different than those which could form the basis of a direct appeal. The fact that a trial court has subsequently vacated a final order can never moot a direct appeal from that order. This Court's actions effectively prevented the appellees from ever being able to make the same argument to this Court that they did in their motion for reconsideration. This was improper.

{¶36} Accordingly, in addition to reinstating the trial court's original judgment entries, I would also reinstate the parties' direct appeal from that entry. This Court should not compound one mistake with another.