MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Thaddeus F. Radziwiecki,
Appellant-Plaintiff,

v.

Gough, Inc.,
Appellee-Defendant

December 20, 2023

Court of Appeals Case No. 22A-SC-2842

Appeal from the Lake Superior Court

The Honorable R. Jeffrey Boling, Magistrate

Trial Court Cause No. 45D09-2205-SC-2567

Memorandum Decision by Judge Crone
Judge Brown concurs.
Judge Felix dissents with separate opinion.

Crone, Judge.

Case Summary

[1] Thaddeus F. Radziwiecki filed a notice of claim against Gough, Inc., in small claims court, alleging that Gough caused damage to his home while constructing a police station across the street. Gough moved for summary judgment on the basis that Radziwiecki's claim was barred by the applicable statute of limitations. After a hearing, the trial court granted Gough's motion. On appeal, Radziwiecki argues that the trial court erred. We disagree and therefore affirm.

Facts and Procedural History

[2] On May 31, 2022, Radziwiecki, pro se, filed a notice of claim against Gough in small claims court. The notice contained the following "brief statement of the nature of [Radziwiecki's] claim" against Gough: "Real Property Damages caused from Heavy Equipment and Activities while in the construction of the Highland Police Station." Appellant's App. Vol. 2 at 6.

[3] On June 27, 2022, Gough filed a motion for summary judgment that reads in pertinent part as follows:

> 1. Defendant began work on the Highland Municipal Police Building in October 2014 and completed construction in December 2015.
>
> 2. After construction completed, Plaintiff alleged that he saw damage to his property due to the vibrations from the equipment used by Defendant during construction.
>
> 3. There is a six year statute of limitations on damage to real

property.

4. The statute of limitations commenced on January 1, 2016, at the latest.

5. Plaintiff filed his claim on May 31, 2022, after the expiration of the statute of limitations.

Id. at 8. Also on that date, the trial court issued an order giving "Defendant [sic]" thirty days to file a response to Gough's motion and setting a hearing on the motion for August 16, 2022. *Id*. at 14.

[4] On August 11, 2022, Radziwiecki, pro se, filed a so-called motion to dismiss Gough's summary judgment motion. The motion states in pertinent part, "Enclosed is a copy of Apex construction estimate dated June 17, 2016. This company was contacted on the day of discovery of numerous cracks and imploded window on June 15, 2016 …. Thus the date of discovery and cause of action is therefore June 15, 2016." *Id*. at 16 (emphasis omitted).[1] Gough did not move to strike Radziwiecki's motion/response as untimely.

[1] The estimate notes that the window to be replaced is on the "second floor of [Radziwiecki's] home." Appellant's App. Vol. 2 at 18. The estimate further notes the presence of cracks "in the second floor ceiling[,]" the "kitchen ceiling on first floor[,]" and "the front room ceiling on main floor." *Id*. at 19. As mentioned below, Radziwiecki admitted at the summary judgment hearing that he did not go up to the second floor and see the crack in the window until June 15, 2016; it was reasonable for the trial court to infer that he should have noticed the cracks in the first floor and main floor ceilings before that date.

[5] On August 16, 2022, the trial court held a hearing on Gough's summary judgment motion.[2] Radziwiecki appeared pro se, and Gough appeared by counsel. At the outset, the court told the parties,

> What I'm gonna do is I'm gonna give [Gough's counsel] an opportunity to present [her] motion. I'll give [Radziwiecki] an opportunity to respond. Um, if I have enough information today, I'll make a decision in court. If I have to look something up or, uh, I will take it under advisement and put it in writing.

Tr. at 5.[3]

[6] Gough's counsel stated, "The construction for the police department started in October of 2014 and was completed in December of 2015. The case-at-hand wasn't filed until May 31st of 2022. And in Indiana, we do have a six-year statute of limitations. So the case was filed after that statute of limitations had

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[2] Gough did not designate any evidence in support of its summary judgment motion. Radziwiecki does not take issue with this on appeal, probably because the relevant facts are undisputed and within his personal knowledge. Also, Gough does not take issue with the tardiness of Radziwiecki's response to its motion. It is well settled that it is not our place to raise arguments on behalf of the parties. *See Gupta v. Busan*, 5 N.E.3d 413, 416 (Ind. Ct. App. 2014) (stating that Court of Appeals "will not become an advocate for a party"), *trans. denied*.

[3] Indiana Small Claims Rule 8(B) provides, "All testimony shall be given under oath or affirmation." The trial court did not administer an oath, presumably because the purpose of the hearing was to present legal arguments on Gough's summary judgment motion. Radziwiecki did not take issue with this below and does not do so on appeal. Regardless, we note that Gough's counsel owed a duty of candor to the tribunal, *Shepherd v. Carlin*, 813 N.E.2d 1200, 1202 n.1 (Ind. Ct. App. 2004) (citing Ind. Professional Conduct Rule 3.3), and that Radziwiecki does not dispute the veracity of his own statements. We further note that "[a]n attorney's clear and unequivocal admission of fact during opening statement constitutes a judicial admission that binds the client[.]" *Collins v. McKinney*, 871 N.E.2d 363, 374 (Ind. Ct. App. 2007) (quoting 13 Robert L. Miller, Jr., *Indiana Evidence* § 801.422 (2d ed. 1995 & 2004 Supp.). We see no reason why this principle would not apply to either an attorney's or a pro se litigant's clear and unequivocal admissions of fact during a summary judgment hearing, such as Gough's counsel's and Radziwiecki's in this case. To conclude otherwise would elevate form over substance and result in a waste of scarce judicial resources, especially for overworked small claims judges who often preside over hearings with pro se litigants on both sides.

expired." *Id*. In response, Radziwiecki reiterated that the construction company "was contacted on the day of discovery for the cracks and the imploded window on June the 15th […]. so the date of discovery is June the 15th, 2016, Your honor." *Id*. at 8.

[7] Gough's counsel replied,

> [That] date is not an indication of when the damage occurred. You, yourself, stated that the damage occurred during the construction of the building which completed in December of 2015. That's when the damage occurred, not in July or June of 2016 as you're trying to claim. That may be when you saw the damage; but, if any damage occurred, it would have been during the construction not afterwards.

Id. at 8-9. Counsel confirmed with Radziwiecki that his "claim [was] that the damage occurred due to the use of the […] construction equipment[,]" and she emphasized that "all equipment was completed and all the construction was done in December of 2015." *Id*. at 9.

[8] The trial court asked Radziwiecki how he discovered the damage, and he replied, "Going upstairs and seeing the cracked window." *Id*. He explained, "[T]here was a crack in the window from the implosion. So that's from the vibration." *Id*. The court asked, "How was that not discovered until June?" *Id*. Radziwiecki replied, "Because you don't - cause we don't go upstairs insofar as that second floor." *Id*. at 10. The court asked, "How do you know that was caused by the construction?" *Id*. Radziwiecki responded,

> Well, that's when we started noticing cracks upstairs along with the imploded window. And that's when I called Apex Construction saying, ah, this is from the damage and - I mean, from the construction being done across the street. Because during the time that there was construction, the whole house was shaking. Uh, there was no cracks during the time of construction. But it was after that time that, as the house settled, that we started noticing cracks, uh, concrete, um, you know, a light that's ba - basically, uh, - porch light that's sagging. It's on a post. So that was not during the actual construction, it was after the construction.

Id. The court stated, "Well you - you just made a statement, no damage was caused during the construction." *Id*. Radziwiecki responded, "No observable damage.[…] There was nothing that I saw while there was construction. It was afterwards, Your Honor." *Id*.

[9] Gough's counsel pointed out that Radziwiecki had "just indicated that the cracks were due to settling of the house not due to the vibrations of the equipment." *Id*. The court asked Radziwiecki, "[H]ow would the settling of the house be contributed [sic] to the construction?" *Id*. at 12. He responded, "I had a structural engineer come out here, Your Honor, insofar as the - see how the vibration was affected insofar as the damage that was done to the house." *Id*. The court asked if the engineer was "here today[,]" and Radziwiecki said that he was not. *Id*. The court asked, "Where's your house in relation to the police station?" *Id*. Radziwiecki said that it was "[r]ight across the street" and a "hundred twenty feet" from the police station. *Id*. The court responded that the

street itself "is probably more than a hundred feet wide." *Id*. at 12-13.[4] Without objection, Gough's counsel provided the court and Radziwiecki with a copy of a "Google map" printout of the area, and the court remarked, "Inspect that. That's a hundred yards." *Id*. at 13.

[10] The court asked Gough's counsel if she had anything to add, and she replied, "[J]ust that we're here for the Summary Judgment Motion and the claim was still filed outside of the statute of limitations." *Id*. The court allowed Radziwiecki to respond, and he concluded his remarks with, "[S]ince there was no ascertainable damage that could be observable during the time of construction, it was the natural settling of the house caused from the vibration that actually we indicated insofar as statute of limitations has not been […] exceeded." *Id*. at 15. The court asked, "[W]hen would the statute of limitations have started to run?" *Id*. He replied, "June the 15th, 2016." *Id*. The court then asked, "But what if you [hadn't gone] upstairs and [seen] that window?" What if you didn't go up for a year?" *Id*. Radziwiecki answered, "That's when it would have started." *Id*. The court queried, "What if you […] didn't go up for two years?" *Id*.

[11] Gough's counsel remarked, "I don't think it - it's reasonable or ordinary for a person to wait six months to walk through their house if they believe that damage was done during the construction of something." *Id*. at 16. Radziwiecki

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[4] Earlier in the hearing, the judge stated that he had done "roving court" at the former town hall next to the police station, Tr. at 6, thus establishing a firsthand familiarity with the area.

replied, "Well, we don't go upstairs. So the only time we do use that - that upstairs is when visitors come. And plus it's in the wintertime too, so why would you want to go upstairs in a fifty degree […] upstairs when you don't need to?" *Id*. The court asked Radziwiecki if the window at issue was concealed, and he stated that it was not. Radziwiecki again mentioned the structural engineer, and the court replied, "I don't think […] we'd even get to that point […] of whether or not that would be the cause of it.[…] Uh, we're here today for whether or not the statute of limitations has run." *Id*. at 17.

[12] After determining that the parties had no further remarks, the court ruled as follows:

> January 1st of 2016 would be the best case scenario date. That's - I believe that's when there was a - a ceremonial move-in if I'm correct at the beginning of the year that uh, the police moved into the, uh, the new building. I don't think it's reasonable six months after the construction to come and say that that's the cause of the window. That was discoverable. It's not something that was hidden. It's a window in plain view from inside and out. Um, what I've heard today, the statute of limitations best case scenario would have started running on January 1 of '16 and ended January 1 of 2022.

Id. at 18. Radziwiecki asked the court, "[H]ow do you get January the 1st?" *Id*. The court responded,

> Because they were occupying the building so the construction would have been completed. The heavy construction would [have] been completed a long time before that.[…] I mean, the - the construction from, uh, the heavy machinery, that would have

> been six, eight months before that at least because then your HVAC, your electricians, your drywallers, your plumbers, […] they all have to go in and do their work which would not have been heavy construction, heavy machinery that would have caused any damage. So that January 1st is best case scenario for looking at you in the best light. So with that said, um, I'm gonna show your uh, claim's barred by the statute of limitations.

Id. at 18-19.

[13] Radziwiecki, by counsel, filed a motion to correct error, and Gough filed a response. After a hearing, the trial court denied the motion. Radziwiecki now appeals.

Discussion and Decision

[14] Radziwiecki asserts that the trial court erred in granting Gough's summary judgment motion. Small claims proceedings are informal and are not "bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise." Ind. Small Claims Rule 8(A). "[T]he sole objective [is] dispensing speedy justice between the parties according to the rules of substantive law[.]" *Id*. "[M]otions for summary judgments may be granted in small claims court actions. The granting of a summary judgment, however, is only proper when there is no genuine issue of material fact." *Bedree v. Sandler & Sandler*, 426 N.E.2d 707, 708 (Ind. Ct. App. 1981).

[15] The trial court granted Gough's summary judgment motion on the basis that Radziwiecki's claim was barred by the statute of limitations. *See* Ind. Code § 34-

11-2-7 ("The following actions must be commenced within six (6) years after the cause of action accrues: … (3) Actions for injuries to property other than personal property[.]"). "The statute of limitations defense is particularly suitable as a basis for summary judgment." *Mann v. Arnos*, 186 N.E.3d 105, 115 (Ind. Ct. App. 2022) (citation omitted), *trans. denied*. "The general purpose of a statute of limitation is to encourage the prompt presentation of claims." *Id*. (citation omitted). "They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Id*. (citation omitted). "They are enacted upon the presumption that one having a well-founded claim will not delay in enforcing it." *Chmiel v. US Bank N.A.*, 109 N.E.3d 398, 408 (Ind. Ct. App. 2018) (citation omitted). "If the undisputed facts establish that the complaint was filed after the running of the applicable statute of limitations, the trial court must enter judgment for the defendant." *Id*. (citation and quotation marks omitted).[5]

[16] "Under Indiana's discovery rule, a cause of action accrues, and the statute of limitations begins to run, when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury has been sustained as a result of the tortious act of another." *Id*.

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[5] The dissent insists that we cannot consider the factual admissions that Radziwiecki made at the summary judgment hearing, citing *Andry v. Thorbecke*, 218 N.E.3d 600 (Ind. Ct. App. 2023). *Andry* stands for the proposition that a party may not belatedly supplement the record with evidence favorable to that party; it does not prohibit a party from making binding admissions against interest at a summary judgment hearing.

> Indiana courts have held that the discovery rule does not mandate that plaintiffs know with precision the legal injury that has been suffered, but merely anticipates that a plaintiff be possessed of sufficient information to cause him to inquire further in order to determine whether a legal wrong has occurred.… As such, a plaintiff has a duty under the discovery rule to exercise reasonable diligence to discover the negligent acts or omissions. The exercise of reasonable diligence means simply that an injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.

Bambi's Roofing, Inc. v. Moriarty, 859 N.E.2d 347, 356 (Ind. Ct. App. 2006) (citations and footnote omitted). "The determination of when a cause of action accrues is generally a question of law." *6232 Harrison Ave. LLC v. City of Hammond*, 181 N.E.3d 379, 385 (Ind. Ct. App. 2021).[6] We review questions of law de novo. *Id*. at 384.

[17] In his notice of claim, Radziwiecki alleged that Gough's "Heavy Equipment and Activities" damaged his home "*while* in the construction of the Highland Police Station." Appellant's App. Vol. 2 at 6 (emphasis added). It is undisputed that the construction was completed by January 1, 2016, at the latest, and that Radziwiecki did not discover the crack in his unconcealed second-floor window

[6] Radziwiecki asserts that "[w]hen application of a statute of limitation rests on questions of fact, it is generally an issue for a jury to decide." Appellant's Br. at 16. There is no jury in a small claims proceeding. The trial court correctly decided that it had sufficient undisputed facts before it to determine when Radziwiecki's cause of action accrued as a matter of law.

(which he himself attributed to an "implosion" caused by construction "vibration") until June 15, 2016. Tr. at 9. The trial court concluded as a matter of law, and we agree, that Radziwiecki's cause of action accrued on January 1, 2016, at the latest, that he did not exercise reasonable diligence to discover the injury that allegedly had been sustained as a result of Gough's tortious act, and that therefore his notice of claim was untimely filed.[7] There was no dispute as to any material fact, and the dissent conflates the court's legal conclusion with a finding of fact. Accordingly, we affirm.

[18] Affirmed.

Brown, J., concurs.

Felix, J., dissents with separate opinion.

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[7] The precise date that the window imploded is unknown, and almost certainly unknowable, but based on Radziwiecki's own theory of the case, it must have happened no later than January 1, 2016. In his motion to correct error, Radziwiecki asserted that, on or about June 15, 2016, he "discovered significant damage to his home, including, but not limited to, cracks in the ceilings, cracks in the walls and windows, significant sloping of the concrete sidewalk and stairs, significant shifting in the ground and soil causing the light pole, fence, and mailbox to lean substantially, and a horizontal crack in the basement wall." Appellant's App. Vol. 2 at 25. Most of this damage was not mentioned either in Radziwiecki's pre-hearing filings or at the hearing itself. In its response to Radziwiecki's motion, Gough pointed out that

> [e]ven if [he] did not go to his second floor until six months after the completion of the construction as he testified at the hearing, he most certainly would have noticed significant sloping of the concrete sidewalk and stairs and/or significant shifting in the ground and soil causing the light pole, fence, and mailbox to lean substantially during the construction period or very shortly thereafter.

Id. at 33. Once it was established as a matter of law that any damage that was contemporaneously caused by construction vibration must have occurred by January 1, 2016, and that Radziwiecki did not exercise reasonable diligence to discover that injury, the burden then shifted to Radziwiecki to establish "the existence of material facts in avoidance of the statute of limitations defense" with respect to any damage that was caused by subsequent settling of the home. *Schnell v. Hayes*, 710 N.E.2d 208, 210 (Ind. Ct. App. 1999), *trans. denied*. Radziwiecki failed to carry this burden.

Felix, Judge, dissenting.

[19] I respectfully dissent. Neither party designated any evidence that the small claims court could properly consider in evaluating Gough's motion for summary judgment. Even assuming that all the information presented by the parties was properly designated, there still remains a genuine issue of material fact, which must be decided by the factfinder. Accordingly, I would reverse and remand for proceedings consistent with this dissent.

Facts and Procedural History

[20] On May 31, 2022, Radziwiecki filed a Notice of Claim pro se in small claims court for damage to his property allegedly resulting from Gough's 2015 construction activities near his property. Gough filed a motion for summary judgment pursuant to Indiana Trial Rule 56, asserting that Radziwiecki's lawsuit was barred by the applicable six-year statute of limitations.

[21] Gough's brief in support of its motion was not supported by any designated evidence. Radziwiecki filed a late response to Gough's motion, which primarily consisted of a copy of a contractor's estimate for repairing the damage to Radziwiecki's house and correspondence from Gough's insurer denying Radziwiecki's insurance claim, neither of which was authenticated. At the hearing on Gough's motion for summary judgment, both parties presented only argument and unverified, unsworn statements.

[22] The small claims court granted Gough's motion for summary judgment and dismissed the case based on the statute of limitations. Radziwiecki then

obtained counsel who filed a motion to correct error. The small claims court denied that motion. This appeal ensued.

Discussion and Decision

[23] Radziwiecki contends that the small claims court erred in granting Gough's motion for summary judgment. Small claims courts dispense justice rapidly and free from many of the constraints of rules of practice and procedure. *Flint v. Hopkins*, 720 N.E.2d 1230, 1231–32 (Ind. Ct. App. 1999); Ind. Small Claims Rule 8(A). However, the informality of small claims court is not limitless. *Johnson v. Hous. Auth. of S. Bend*, 204 N.E.3d 940, 943 (Ind. Ct. App. 2023), *trans. not sought*. Although the method of proof used in small claims proceedings may be informal, "the relaxation of evidentiary rules is not the equivalent of relaxation of the burden of proof. It is incumbent upon the party who bears the burden of proof to demonstrate that it is entitled to the recovery sought." *LTL Truck Serv., LLC v. Safeguard, Inc.*, 817 N.E.2d 664, 668 (Ind. Ct. App. 2004) (internal citations omitted) (citing *Mayflower Transit, Inc. v. Davenport*, 714 N.E.2d 794, 797 (Ind. Ct. App. 1999)). Moreover, judgments in small claims actions are "subject to review as prescribed by relevant Indiana rules and statutes." S.C.R. 11(A). Because Gough filed a motion for summary judgment pursuant to Indiana Trial Rule 56, Gough is bound to comply with

that rule,[8] and we will review the trial court's grant of Gough's motion pursuant to that rule.

[24] As the Indiana Supreme Court has explained, we review summary judgment decisions de novo, which means we apply the same standard as the trial court. *Miller v. Patel*, 212 N.E.3d 639, 644 (Ind. 2023) (quoting *624 Broadway, LLC v. Gary Hous. Auth.*, 193 N.E.3d 381, 384 (Ind. 2022)). Summary judgment is proper only "if the *designated evidentiary matter* shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C) (emphasis added). We may consider only those portions of the pleadings, depositions, and any other matters specifically designated to the trial court by the parties for purposes of the motion for summary judgment. T.R. 56(C) & (H). That is, the movant must designate evidence in support of a summary judgment motion. *See* T.R. 56(C) & (H).

[25] The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Wireman v. LaPorte Hosp. Co.*, 205 N.E.3d 1041, 1045 (Ind. Ct. App. 2023) (citing *Serbon v. City of E. Chicago*, 194 N.E.3d 84, 91 (Ind. Ct. App. 2022)), *reh'g denied* (Apr. 5, 2023), *trans. denied*, 211 N.E.3d 1007 (Ind. 2023). Only if the moving party meets this prima facie

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[8] I could not find any caselaw that holds T.R. 56 requirements are relaxed when used in small claims proceedings. Therefore, I believe all the requirements of T.R. 56 apply in a small claims case.

burden does the burden then shift to the nonmoving party to show the existence of a genuine issue of material fact. *Id.* (citing *Serbon*, 194 N.E.3d at 91).

[26] When a defendant moves for summary judgment asserting that the plaintiff's cause of action is barred by the applicable statute of limitations, the defendant

> must make a prima facie showing that the action was commenced outside the statutory period by identifying "(1) the nature of the plaintiff's action, so that the relevant statute of limitations period may be identified; (2) the date the plaintiff's cause of action accrued; and (3) the date the cause of action was brought, being beyond the relevant statutory period."

City of Marion v. London Witte Grp., LLC, 169 N.E.3d 382, 390 (Ind. 2021) (quoting *McMahan v. Snap On Tool Corp.*, 478 N.E.2d 116, 120 (Ind. Ct. App. 1985)). If the defendant makes this prima facie showing, the burden then shifts to the plaintiff "to establish facts in avoidance of the statute of limitations defense." *Id.* (quoting *McMahan*, 478 N.E.2d at 120).

[27] The parties agree that the applicable statute of limitations here is Indiana Code section 34-11-2-7(3), which states that actions for injuries to property other than personal property must be brought within six years after the cause of action accrues. The parties also agree that Radziwiecki filed his Notice of Claim on May 31, 2022. The only question is when Radziwiecki's cause of action accrued.

1. The complete lack of designated evidence prevents review of the merits.

[28] As previously stated, Trial Rule 56 requires the party filing a motion for summary judgment to designate evidence to the trial court in support of its motion.

> "Unsworn statements and unverified exhibits do not qualify as proper Rule 56 evidence." *Seth v. Midland Funding, LLC*, 997 N.E.2d 1139, 1141 (Ind. Ct. App. 2013). Further, neither arguments of counsel nor allegations in memoranda qualify as evidentiary material for purposes of a motion for summary judgment. *McCullough v. CitiMortgage, Inc.*, 70 N.E.3d 820, 825 (Ind. 2017).

487 Broadway Co., LLC v. Robinson, 147 N.E.3d 347, 353 (Ind. Ct. App. 2020).

[29] Gough did not designate or present any evidence concerning the issue of when the statute of limitations on Radziwiecki's cause of action began to run. In fact, Gough did not designate or present any evidence of any kind. Consequently, none of the information presented and argued by Gough in its motion and at the hearing qualifies as proper Trial Rule 56 evidence.[9] *See 487 Broadway Co.*, 147 N.E.3d at 353 (quoting *Seth*, 997 N.E.2d at 1141) (citing *McCullough*, 70 N.E.3d at 825). Similarly, the information Radziwiecki provided during the hearing does not qualify as proper Trial Rule 56 evidence. *See id.* (quoting *Seth*,

[9] Even if Gough attempted to proffer evidence at the hearing, that presentation would have been inappropriate. A hearing on motions for summary judgment are for the oral presentation of legal arguments to the court; such a hearing is not a time to present witnesses or additional documentary evidence. *See* T.R. 56(C). "The summary judgment process is not a summary trial." *Bird v. Valley Acre Farms, Inc.*, 177 N.E.3d 459, 467 (Ind. Ct. App. 2021) (citing *Hughley v. State*, 15 N.E.3d 1000, 1003–04 (Ind. 2014)).

997 N.E.2d at1141) (citing *McCullough*, 70 N.E.3d at 825). I do not think it is appropriate to consider any of this information in this review. *See* T.R. 56 (C) & (H); *Miller*, 212 N.E.3d at 644 (quoting *624 Broadway*, 193 N.E.3d at 384).

[30] Additionally, a few days before the summary judgment hearing, Radziwiecki attempted to file a response to Gough's motion[10] but did so after the trial court-provided a deadline to do so. We have a bright line rule for dealing with late responses to summary judgment motions: when the nonmovant fails to respond to a motion for summary judgment either within 30 days or by the trial court-imposed deadline, "the trial court ***cannot*** consider summary judgment filings of that party subsequent to" the relevant deadline. *Andry v. Thorbecke*, 218 N.E.3d 600, 603–04 (Ind. Ct. App. 2023) (emphasis added) (quoting *Mitchell v. 10th & The Bypass, LLC*, 3 N.E.3d 967, 972 (Ind. 2014)), *trans. not sought*. Accordingly, the trial court could not consider Radziwiecki's response to Gough's motion or any of the information he provided during the summary judgment hearing. *See id.* (quoting *Mitchell*, 3 N.E.3d at 972). Because we review the trial court's grant of summary judgment de novo, we, too, cannot consider the information that Radziwiecki provided in this case. T.R. 56(C) & (H); *Miller*, 212 N.E.3d at 644 (quoting *624 Broadway*, 193 N.E.3d at 384).

[31] The majority implies that Radziwiecki did not properly preserve the issues of Gough not designating any evidence in support of its motion for summary

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[10] Although Radziwiecki titled his response "Motion to Dismiss Summary Judgment," it was essentially a response brief to Gough's motion, and we will treat it as such.

judgment, *see ante*, at ¶ 3 n.1, or of Gough and Radziwiecki not being under oath during the summary judgment hearing, *see id.* at ¶ 5 n.2. Therefore, the majority implies that it can consider the unverified filings and unsworn statements of the parties. I am unwilling to overlook or disregard these failures and deficiencies. Our de novo review necessarily places us in the same position as the trial court. *See Miller*, 212 N.E.3d at 644 (quoting *624 Broadway*, 193 N.E.3d at 384). At the trial court level, it would have been improper to accept facts inside Gough's unverified brief, *see* T.R. 56(C) & (H), and improper to accept Radziwiecki's unverified responses to the trial court's questions, *see Andry*, 218 N.E.3d at 603–04 (quoting *Mitchell*, 3 N.E.3d at 972). It would therefore be improper for us to consider those unsworn, unverified facts. *See* T.R. 56(C) & (H); *Miller*, 212 N.E.3d at 644 (quoting *624 Broadway*, 193 N.E.3d at 384).

[32] Without any evidence in the record here, Gough did not make a prima facie showing that Radziwiecki filed his notice of claim after the statutory period. Therefore, Gough is not entitled to judgment as a matter of law.

2. Reaching the merits reveals there is a genuine issue of material fact.

[33] Assuming for the sake of argument that all the information presented by both parties can be considered in our de novo review of this case, I would still dissent because there is a genuine issue of material fact regarding whether Radziwiecki exercised ordinary diligence in the discovery of the damage to his property.

[34] The Indiana Supreme Court has cautioned that, although summary judgment may be "a desirable tool to allow the trial court to dispose of cases where only legal issues exist," it can also be a "blunt instrument" by which a "non-prevailing party is prevented from having his day in court." *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014) (quoting *Clipp v. Weaver*, 451 N.E.2d 1092, 1093 (Ind. 1983); *Waterfield Mortg. Co. v. O'Connor*, 361 N.E.2d 924, 927 (Ind. Ct. App. 1977); *Ayres v. Indian Heights Volunteer Fire Dep't, Inc.*, 493 N.E.2d 1229, 1234 (Ind. 1986)). Thus, in reviewing a summary judgment motion, we "draw all reasonable inferences in the non-moving party's favor," *Miller*, 212 N.E.3d at 644 (quoting *Serv. Steel Warehouse Co. v. U.S. Steel Corp.*, 182 N.E.3d 840, 842 (Ind. 2022)), and "give careful scrutiny to assure that the losing party is not improperly prevented from having its day in court," *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016) (quoting *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203 (Ind. 2003)).

[35] The majority's recitation of Indiana's discovery rule is correct. *See ante*, at ¶ 16. However, what the majority did not discuss is that if a determination of whether a cause of action is barred by the statute of limitations hinges upon genuinely disputed facts, it is generally an issue for the factfinder and summary judgment is not appropriate. *Groce v. Am. Family Mut. Ins. Co.*, 5 N.E.3d 1154, 1159 (Ind. 2014) (citing *Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274, 1279 (Ind. 2009)).

[36] The (unsworn, unverified) facts most favorable to Radziwiecki indicate the following:

1. Gough's construction activities caused tremors and vibrations in the ground in and around Radziwiecki's property, Appellant's App. Vol. II at 24–31;
2. There was no observable damage to Radziwiecki's house while Gough's construction activities were ongoing, Tr. Vol. II at 10;
3. The tremors and vibrations resulting from Gough's construction activities caused the ground beneath Radziwiecki's house to settle, *id.* at 15;
4. The settling caused by Gough's construction activities resulted in the damage to Radziwiecki's property, *id.*; and
5. Radziwiecki did not know Gough's construction activities damaged his property until he discovered the cracked window on June 15, 2016, *id.* at 8.

[37] Because Gough argues that any damage its construction activities may have caused would have occurred and been discoverable through ordinary diligence while those activities were ongoing, there are clearly genuine issues of material fact concerning when Radziwiecki, in the exercise of ordinary diligence, should have discovered that Gough's construction activities damaged his house. While it may be alluring to expedite the disposition of this case based upon Radziwiecki's self-serving and highly questionable assertion of not finding an "imploded" window for more than six months after Gough's construction activities allegedly ceased, our Supreme Court's decision in *Hughley v. State*, instructs us to do just the opposite. Instead, we are instructed to let a *factfinder* make that determination at a *factfinding* hearing, not at a summary judgment hearing. *See Hughley*, 15 N.E.3d at 1003–04 (explaining a nonmovant's "self-serving affidavit" can be sufficient to preclude summary judgment because "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims").

[38] The trial court erred in granting Gough's motion for summary judgment based on the statute of limitations. I would, therefore, reverse the entry of summary judgment in favor of Gough and remand for further proceedings.

Conclusion

[39] Because Gough did not designate any evidence in support of its motion for summary judgment and thus failed to meet its prima facie burden, the trial court erred in granting Gough's motion for summary judgment. I would, therefore, reverse the entry of summary judgment in favor of Gough and remand for further proceedings consistent with this dissent.

[40] Accordingly, I dissent.