

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
February 15, 2023 Session

<p><b>FILED</b> 06/05/2023 Clerk of the Appellate Courts</p>
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**LYON ROOFING, INC. ET AL. v. JAMES H. GRIFFITH, JR. ET AL.**

**Appeal from the Circuit Court for Hawkins County  
No. CC-18-CV-29 William E. Phillips, II, Judge**

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**No. E2022-00530-COA-R3-CV**

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This appeal involves the denial of a Tenn. R. Civ. P. 60.02 motion. In the original action, the trial court granted summary judgment to the City of Mount Carmel, Tennessee (“the City”), finding that it had negated an essential element of the plaintiff’s claim against it. In the summary judgment pleadings, the City presented expert evidence concluding that the retaining wall in question was failing due to lateral earth pressure and not a problem with the foundation. In that report, the expert stated that the backfill of the retaining wall was red clay but that regardless of whether the backfill consisted of red clay or crushed stone, the wall would fail. The plaintiff presented no evidence to rebut this opinion. The plaintiff filed a Rule 60.02 motion seeking to be relieved of the grant of summary judgment after discovering that the backfill of the wall was crushed stone and not red clay as stated in the expert’s report.<sup>1</sup> The trial court denied the Rule 60.02 motion upon its determination that even with a backfill of crushed stone, summary judgment still would have been granted. Discerning no error, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed; Case Remanded**

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which JOHN W. MCCLARTY and THOMAS R. FRIERSON, II, JJ., joined.

C. Brad Sproles, Kingsport, Tennessee, for the appellant, James H. Griffith, Jr.

J. Christopher Rose, Kingsport, Tennessee, for the appellee, City of Mount Carmel, Tennessee.

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<sup>1</sup> The plaintiff also made an allegation regarding the foundation of the retaining wall but stated at the hearing that this issue was secondary and presented no evidence to support this allegation.

## OPINION

James H. Griffith, Jr., contracted with Mark Richards and Richards Construction regarding the construction of a building that was to be a grocery store/restaurant in Mount Carmel, Tennessee. Richards Construction had contracted with Lyon Roofing, Inc., to purchase the building supplies needed for the project. Before construction of the building, Mr. Griffith had a retaining wall constructed behind where the building was to be placed. Vince Pishner, the building inspector employed by the City, had concerns regarding the wall “because the retaining wall was pitched toward the street, away from the load.” At some point, Mr. Pishner had provided Mr. Griffith with advice concerning only the foundation of the retaining wall. The wall was not approved, and Mr. Pishner advised Mr. Griffith to have an engineer look at the wall or to obtain an engineer’s report. Mr. Griffith was asked to provide this report before constructing the building on the property; however, construction of the building began without Mr. Griffith providing the requested engineer’s report. Due to Mr. Pishner’s safety concerns, he hired an engineer to examine the retaining wall, and the engineer also had concerns regarding the wall. Thereafter, Mr. Pishner issued a “stop work order” on the property. The “stop work order” would be lifted if Mr. Griffith provided an engineer’s report stating that the wall was safe.

The original plaintiff, Lyon Roofing, Inc., filed an action in the Hawkins County General Sessions Court against the original defendants, James H. Griffith, Jr. and Mark Richards, for “Unjust Enrichment/Quantum Meruit” in February 2017. A default judgment was entered against Mr. Griffith in the general sessions court in January 2018, and Mr. Griffith appealed to the Hawkins County Circuit Court (“Trial Court”).

In the Trial Court, Mr. Griffith filed an “Answer, Cross Claim and Third Party Complaint to Lyons Roofing, Inc., Civil Cause of Action,” wherein he included a third-party complaint against the City of Mount Carmel, Tennessee, as well as Vince Pishner, as the City’s employee and agent.<sup>2</sup> Mr. Griffith alleged in his third-party complaint against Mr. Pishner and the City a breach of implied duty of good faith and fair dealing, misuse of a government position, and negligent and willful misrepresentation.<sup>3</sup> He further alleged that Mr. Pishner and the City were liable for the cost to clean and repair the building. Mr. Griffith stated that although Mr. Pishner initially attempted to stop construction of the building, he had allowed it to proceed. According to Mr. Griffith, Mr. Pishner knew that the retaining wall would be more difficult to fix after completion of the building. Mr.

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<sup>2</sup> The cross complaint filed by Mr. Griffith is not at issue in this appeal and was dismissed by the Trial Court. Mr. Griffith also included third party claims against Jeff Kilby, the owner of Kilby Truss, as well as Mark Richards and Richards Construction as Mr. Griffith’s subcontractor. However, those claims are not relevant to this appeal, and the record reflects those claims were resolved prior to the Rule 60.02 motion.

<sup>3</sup> Mr. Griffith also made allegations regarding the condition of trusses and the existence of mold, as well as Mr. Pishner’s knowing, negligent, and fraudulent reliance on a letter from Kilby Truss stating the materials were to standard. However, these allegations are not included in the Rule 60.02 motion.

Griffith stated that construction was arbitrarily stopped on the building only after the shelves for the grocery store had been installed and the bathrooms had been framed in and completed. Mr. Griffith stated that Mr. Pishner had approved the plans for the building of the retaining wall and directed him to use the wrong rock size, which caused the wall to lean. Mr. Griffith denied that the wall was in danger of falling and argued that if it did fall, it would not injure the building. According to Mr. Griffith, Mr. Pishner harbored personal animosity against Mr. Griffith, which was part of the reason he would not allow the building to be used.

The City and Mr. Pishner filed an answer to the third-party complaint, denying any liability to Mr. Griffith and raising several defenses in response to the complaint. The Trial Court subsequently dismissed Vince Pishner as a party to this action due to qualified immunity. The City remained a party to the lawsuit.

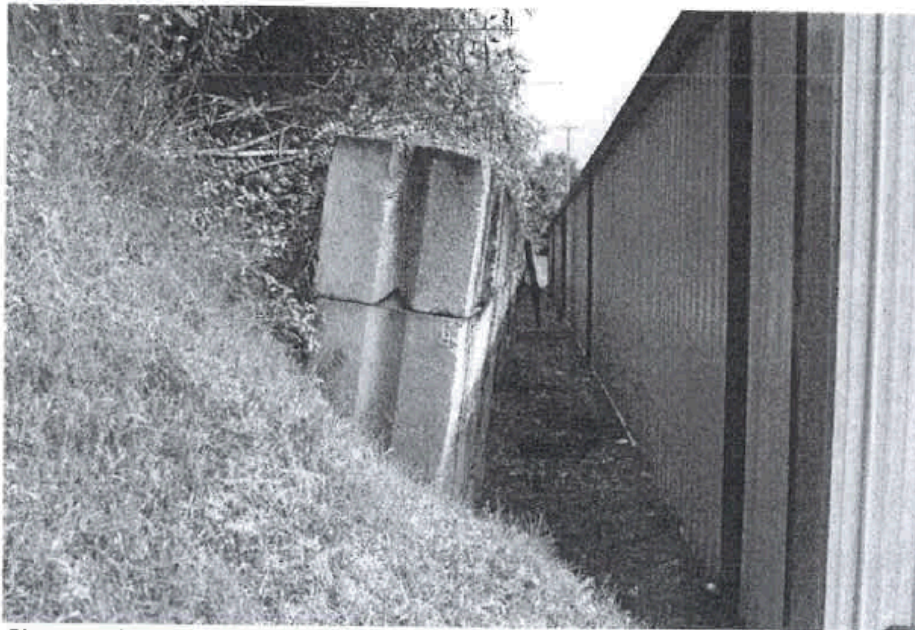
Thereafter, the City filed a motion for summary judgment arguing that there were no genuine issues of material fact. In its motion, the City anticipated Mr. Griffith's argument that Mr. Pishner had provided him with information regarding how to construct the foundation of the retaining wall. The City pointed to Mr. Griffith's testimony in a deposition that Mr. Pishner's advice to him only involved building the foundation of the retaining wall. In response to Mr. Griffith's anticipated argument, the City attached an expert's report from a structural engineer, concluding that the retaining wall would fail regardless of the foundation. Therefore, the City argued that since Mr. Griffith only alleged that Mr. Pishner provided him information regarding the foundation, the City should be dismissed from the lawsuit. The City further argued that it was immune from the lawsuit under the Governmental Tort Liability Act.

The City filed a statement of material facts and attached, *inter alia*, an expert report from Paul D. Tucker, P.E., with Forensic Engineering Technologies, LLC, regarding the condition of the retaining wall. Mr. Tucker performed an on-site inspection of the retaining wall in September 2020 and subsequently issued a report regarding his evaluation of the wall. In his report, Mr. Tucker stated that the backfill behind the retaining wall consisted of clay soil excavated from the building site, instead of the recommended gravels or stone. However, Mr. Tucker stated in his report that the wall was evaluated using the standards for both a gravel backfill and the clay backfill. Ultimately, Mr. Tucker concluded as follows in his report:

1. The design of the gravity retaining wall does not meet the design requirements of the IBC [International Building Code].
2. The construction of the gravity retaining wall does not meet the requirements of the IBC.

3. If the wall were backfilled with crushed stone and had adequate drainage, the wall would still be in a state of failure and would collapse.
4. The condition of the wall is due to the excessive lateral earth pressures and is not a result of the condition of the foundation.
5. The wall is in eminent danger of collapse.
6. The wall poses a threat to the safety of the public.
7. FET [Forensic Engineering Technologies, LLC] recommends that the wall be removed as soon as practicable.

Mr. Tucker attached the following photograph of the retaining wall to his report:



*Photograph 1. Gravity retaining wall leaning towards the building*

Mr. Griffith filed no response to the City's motion for summary judgment or its statement of material facts. The Trial Court subsequently entered an order granting the City's motion for summary judgment and finding as follows in pertinent part:

The actions of the City of Mount Carmel in this case are governed by the Governmental Tort Liability Act, specifically Tenn. Code Ann. § 29-20-205. As such, the Parties stipulated that Mr. Pishner gave advice related to the preparation of the foundation only. The City of Mount Carmel attached the report of Paul Tucker, P.E., who concluded that the problem with the retaining wall was not related to the foundation. Since no countervailing

proof was provided by James Griffith, Jr., to refute the same, the City of Mount Carmel negated an essential element of [Mr. Griffith's] claim and the City of Mount Carmel is entitled to summary judgment on all issues pertaining to the stop work order issued as a result of the retaining wall.

Following a separate motion for summary judgment filed by Lyon Roofing, Inc., the Trial Court entered an order in December 2020, granting summary judgment in favor of Lyon Roofing, Inc., against Mr. Griffith for unjust enrichment and against Mr. Richards for breach of contract.

In November 2021, Mr. Griffith filed a motion in the Trial Court, pursuant to Tenn. R. Civ. P. 60.02, asking that he be relieved of the summary judgment previously granted to the City. In his motion, Mr. Griffith stated that Mr. Tucker had stated in his expert's report that the retaining wall was backfilled with red clay instead of stone and that the Trial Court had relied upon that report in making its ruling on the summary judgment motion. A portion of the retaining wall subsequently had been removed to reveal that the retaining wall at issue was backfilled with stone rather than red clay "in direct contradiction to the engineer's report." Mr. Griffith stated that he had photographic evidence showing the stone backfill instead of red clay. Mr. Griffith further stated that although the expert's report stated that the problem with the retaining wall was not the foundation, partial demolition of the wall had revealed that the foundation of the wall had shifted eight inches on one side demonstrating that the foundation was an issue and that the report was inaccurate in this regard. Mr. Griffith argued that because the Trial Court had relied on the incorrect report, this "would constitute a mistake, inadvertence, excusable neglect, and/or misrepresentation" and that the Trial Court's judgment was no longer equitable such that the judgment should have prospective application, all pursuant to Tenn. R. Civ. P. 60.02. He further averred that the Trial Court may grant relief for any other reason justifying relief also pursuant to Rule 60.02.

The City responded to Mr. Griffith's motion and argued that although Mr. Tucker's report stated that the wall was backfilled with clay, Mr. Tucker analyzed the wall with both a clay and rock backfill and concluded that either way, the wall would fail. Concerning Mr. Griffith's argument that the foundation had shifted eight inches, the City argued that this conclusion came from a lay person and that the only engineer who had examined the wall concluded the foundation was not the reason the wall was failing. According to the City, it found Mr. Griffith's "'Hail Mary' attempt to re-litigate this case interesting considering [Mr. Griffith] did not file any response to the Statement of Material Facts, which was attached to [the City's] Motion for Summary Judgment." The City argued that Mr. Griffith could provide no basis that entitled him to relief and that the judgment granting summary judgment in favor of the City should remain final.

The Trial Court conducted a hearing during which it heard arguments on the Rule 60.02 motion. When discussing why the expert's report had not been contested at the

summary judgment stage of the original proceedings, Mr. Griffith's attorney stated that due to the position of the wall in regard to the building, they did not have access to the wall while the building was still standing.

The Trial Court stated during the hearing that it did not believe the proposed new evidence was necessary because the alleged facts would make no difference with regard to the Trial Court's ultimate conclusion. Mr. Griffith's attorney requested during this hearing to make an offer of proof. Instead, the Trial Court stated that it took as "absolute truth" that the evidence Mr. Griffith was going to present would show that the retaining wall had a rock backfill. The Trial Court stated that it would be willing to consider additional evidence if Mr. Griffith had any. At that point, Mr. Griffith's attorney did not respond, but Mr. Griffith requested to speak. Mr. Griffith began speaking of the previous grant of summary judgment without responding as to whether he had additional evidence to present at the Rule 60.02 hearing. When discussing preparation of the court's order on Mr. Griffith's Rule 60.02 motion and the allegations by Mr. Griffith regarding the shifting of the foundation, Mr. Griffith's attorney stated to the Trial Court that the issue regarding the foundation was "secondary." At the Rule 60.02 hearing, the Trial Court stated that it had taken Mr. Griffith's assertion that the retaining wall was backfilled with stone instead of red clay as the truth, but found that even if the backfill was stone, it would not affect the ultimate outcome.

Following the hearing, the Trial Court entered an order denying Mr. Griffith's Rule 60.02 motion, stating as follows in pertinent part:

On or about October 28, 2021, counsel for James H. Griffith, Jr. filed a Rule 60.02 Motion in which they argued that the report tendered by Paul Tucker, P.E. was incorrect in that the retaining wall at issue was backfilled with stone rather than red clay, and that the foundation of the wall had shifted approximately eight (8) inches to one side.

The Court finds that the report submitted by the Town of Mount Carmel's engineering expert noted the wall was backfilled with clay. Plaintiff proffered pictures and video in court which showed the wall was backfilled with rock rather than clay. The Court accepted, for purposes of considering the Motion, that the offer of proof regarding the pictures was true. However, the Court concludes such proof would not have altered Judge Wright's ultimate summary judgment ruling. Specifically, the Town of Mount Carmel's expert acknowledged in the report the wall would still be in a state of failure if it was backfilled with rock. The expert's ultimate conclusion was the wall was in a state of failure based on design and construction defects due to lateral earth pressure, and at the hearing, James H. Griffith, Jr. provided no evidence to refute that conclusion.

James H. Griffith, Jr.'s Motion also alleged the foundation of the wall moved. However, at the hearing, no photographs or other proof was submitted, so the Court considers that issue moot.

The Court concludes if the wall was backfilled with rock, as it noted at the hearing, it would not have altered the summary judgment ruling because the Town of Mount Carmel's expert addressed the issue in their report attached to the Town of Mount Carmel's Motion for Summary Judgment.

(Paragraph numbering omitted.) Mr. Griffith timely appealed to this Court.

### **Discussion**

Although not stated exactly as such, Mr. Griffith raises the following issue for our review: whether the Trial Court erred by denying Mr. Griffith's Rule 60.02 motion without allowing him to present evidence in support of the motion.

We review a trial court's denial of a party's motion filed pursuant to Tenn. R. Civ. P. 60.02 under an abuse of discretion standard. *Selitsch v. Selitsch*, 492 S.W.3d 677, 681-83 (Tenn. Ct. App. 2015). Regarding the abuse of discretion standard of review, "[a] court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence." *Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020) (internal quotation marks omitted) (quoting *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 305-06 (Tenn. 2020)).

In pertinent part, Tennessee Rule of Civil Procedure 60.02 provides:

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . (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 a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment.

Regarding Rule 60.02, our Supreme Court has explained as follows:

[W]e have characterized relief under Rule 60.02 as an "exceptional remedy," *Nails v. Aetna Ins. Co.*, 834 S.W.2d 289, 294 (Tenn. 1992), "designed to strike a proper balance between the competing principles of finality and

justice,” *Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976). Rule 60.02 provides an “escape valve,” *Thompson v. Firemen’s Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990), that “should not be easily opened.” *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991). We have reversed relief granted under Rule 60.02 where the judgment was “not oppressive or onerous.” *Killion v. Tenn. Dep’t of Human Servs.*, 845 S.W.2d 212, 214 (Tenn. 1992). “[R]elief under Rule 60.02 is not meant to be used in every case in which the circumstances of a party change after the entry of a judgment or order, nor by a party who is merely dissatisfied with a particular outcome.” *Henderson [v. SAIA, Inc.]*, 318 S.W.3d [328,] 336 [(Tenn. 2010)].

A party seeking relief under Rule 60.02 must substantiate the request with clear and convincing evidence. *McCracken v. Brentwood United Methodist Church*, 958 S.W.2d 792, 795 (Tenn. Ct. App. 1997). “Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). “In other words, the evidence must be such that the truth of the facts asserted [is] ‘highly probable.’” *Goff v. Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 187 (Tenn.2009) (quoting *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 341 (Tenn.2005)). In general, “the bar for attaining relief is set very high and the burden borne by the movant is heavy.” *Johnson v. Johnson*, 37 S.W.3d 892, 895 n.2 (Tenn. 2001).

*Furlough v. Spherion Atl. Workforce, LLC*, 397 S.W.3d 114, 127-28 (Tenn. 2013).

Mr. Griffith argues that the Trial Court erred by denying his Rule 60.02 motion without allowing him to present evidence in support of his motion. Upon our review of the record, we disagree with Mr. Griffith’s characterization of the hearing as his being prevented from introducing evidence. Mr. Griffith’s primary argument for the Rule 60.02 motion was that the backfill of the retaining wall consisted of crushed rock instead of red clay as surmised in the expert’s report filed in the original proceedings in support of the City’s summary judgment motion. The Trial Court took that contention as an “absolute truth” that the backfill was crushed stone instead of red clay and offered to allow Mr. Griffith to present additional evidence he may have had to support his claim. Mr. Griffith presented no additional evidence. Despite no evidence being introduced, the Trial Court assumed Mr. Griffith’s evidence would show the backfill was crushed stone. Regarding the allegation made concerning the foundation of the wall shifting, Mr. Griffith’s counsel stated at the hearing that the issue was “secondary” and presented no evidence to support this allegation. We disagree that the Trial Court erred by preventing Mr. Griffith from introducing evidence to support his motion as it did not do so.



The Trial Court denied Mr. Griffith's Rule 60.02 motion upon its determination that the fact that the retaining wall was backfilled with stone rather than clay would not have altered the grant of summary judgment. We agree with the Trial Court's ruling in this regard. The Trial Court found that the expert's report at issue opined that regardless of whether the wall was backfilled with red clay or stone, the wall was failing due to lateral earth pressure. Mr. Griffith had not provided evidence to refute that conclusion in the original proceeding and provided nothing in support of the Rule 60.02 motion other than contradicting the expert's statement that the backfill of the retaining wall consisted of red clay. The expert clearly concluded in his report that the retaining wall was failing due to lateral earth pressure and would be failing regardless of whether the backfill was made of red clay or crushed stone. As the Trial Court ruled, the type of material making up the backfill of the wall would not have changed the grant of summary judgment in favor of the City of Mount Caramel, Tennessee. We hold that the Trial Court did not abuse its discretion in denying Mr. Griffith's Rule 60.02 motion. As such, we affirm.

### **Conclusion**

Based on the foregoing, the Trial Court's judgment is affirmed in all respects. We remand to the Trial Court for collection of the costs assessed below. Costs on appeal are assessed to the appellant, James H. Griffith, Jr., and his surety, if any.

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D. MICHAEL SWINEY, CHIEF JUDGE