IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 19, 2023 Session

MICHAEL F. THOMAS v. KEN SMITH AUTO PARTS

Appeal from the Circuit Court for Hamilton County
No. 17C720 Ward Jeffrey Hollingsworth, Judge

No. E2022-00591-COA-R3-CV

This appeal concerns breach of contract. In 2012, Michael F. Thomas ("Thomas"), president and owner of CCW Systems, Inc. ("CCW"), completed and signed an open account application ("the Application") with Ken Smith Auto Parts ("Ken Smith"). The one page Application provided that Thomas would personally guarantee all invoices due to Ken Smith, which sold auto parts to CCW. Later on, CCW became delinquent and dissolved. In 2017, Ken Smith filed a civil warrant against Thomas in the General Sessions Court for Hamilton County. This followed two unsuccessful attempts to serve Thomas on previous civil warrants. The General Sessions Court ruled in favor of Ken Smith. Thomas appealed to the Circuit Court for Hamilton County ("the Trial Court"). The Trial Court granted partial summary judgment in favor of Ken Smith, holding that Thomas was personally liable for CCW's debt. After a bench trial, the Trial Court found, *inter alia*, that the four-year statute of limitations had not expired on Ken Smith's breach of contract claim because, in 2013, Thomas promised to pay the debt which served to renew the statute of limitations. Thomas appeals to this Court. 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.

Raymond E. Lacy and Michael R. Franz, Knoxville, Tennessee, for the appellant, Michael F. Thomas.

Gary E. Lester and Justin H. Layne, Chattanooga, Tennessee, for the appellee, Ken Smith Auto Parts.

OPINION

Background

In February 2012, Thomas, the president and owner of CCW, completed and signed the Application with Ken Smith. Under the Application, which was one page in length, Thomas personally guaranteed all invoices due to Ken Smith, which sold auto parts to CCW. Later on, CCW became delinquent and dissolved. The matter was then turned over to attorneys for collection. In July 2013, Thomas told the firm handling the debt collection that he was closing a real estate deal and would "take care" of the debt. However, the debt went unpaid. In December 2015, Ken Smith filed a civil warrant against Thomas in the General Sessions Court for Hamilton County. In February 2016, the civil warrant and summons were returned unserved. That same month, Ken Smith filed its second civil warrant. In March 2016, the second civil warrant and alias summons were returned unserved. In February 2017, Ken Smith filed its third civil warrant. On February 28, 2017, the third civil warrant and pluries summons were served on Thomas.

In June 2017, the General Sessions Court ruled in favor of Ken Smith. Thomas appealed to the Trial Court, where a dispute arose concerning the Trial Court's jurisdiction.[1] This issue eventually went before the Tennessee Supreme Court on appeal. In *Ken Smith Auto Parts v. Thomas*, 599 S.W.3d 555 (Tenn. 2020), the Tennessee Supreme Court affirmed the Court of Appeals in holding that the Trial Court had jurisdiction in this case. The case then returned to the Trial Court, where Thomas and Ken Smith had filed competing motions for summary judgment. As part of his response to Ken Smith's motion for summary judgment, Thomas filed a declaration, in which he asserted:

> 1. I am the defendant in this civil action. I am over the age of eighteen, and I am otherwise competent to make this declaration.
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> 2. I am making this declaration in opposition to the Motion for Summary Judgment in this case filed by Ken Smith Auto Parts.
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> 3. On or about February 7, 2012, I signed an Open Account Application for Ken Smith Auto Parts on behalf of CCW Systems, Inc. I signed the application only in my capacity as President of CCW Systems, Inc., and I indicated this by writing "Pres./Owner" on the line next to the heading "Title."
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> 4. I only signed the Open Account Application once — as President of CCW Systems, Inc. I did not sign the Open Account Application in my individual or personal capacity.

[1] The facts of this jurisdictional dispute are irrelevant to the appeal at bar.

5. Over the years, I have been involved in several businesses in the construction, automobile, and related industries. I am familiar with the process of opening accounts with suppliers, and I have signed many open account and credit applications. In my experience in connection with open account applications, a personal guarantee is ordinarily a separate document which requires a separate signature from the guarantor in the guarantor's personal capacity. At the very least, personal guarantee language is typically set off from the other language in the application and highlighted to draw attention to the fact that the signatory is personally guaranteeing the entity's debt.

6. When presented with Ken Smith Auto Parts' Open Account Application, I glanced at the form quickly. Because everything appeared to be in order, I simply signed the application in my representative capacity as president of CCW Systems, Inc. and returned the form to Ken Smith Auto Parts. I did not notice the single sentence at the bottom of the form that contains personal guarantee language. I was not aware, at the time I signed the application, that I was potentially personally guaranteeing obligations of CCW Systems, Inc, owed to Ken Smith Auto Parts. I never, at any time, intended to personally guarantee any obligations of CCW Systems, Inc.

It is Thomas' position that the applicable four-year statute of limitations began to run no later than October 15, 2012, the date by which Ken Smith demanded payment. According to Thomas, Ken Smith's February 2017 civil warrant—the first to be successfully served upon him—was filed outside of the limitations period.

In September 2021, the Trial Court entered its memorandum order in which it ruled on the parties' competing motions for summary judgment. In its memorandum order, the Trial Court stated, as relevant:

FACTS

Ken Smith opened an account for CCW. Michael Thomas signed the Open Account Application for CCW on February 7, 2012. A representative of Ken Smith signed on February 8, 2012. This is the contract between the parties.

The paragraph above Michael Thomas' signature states, among other things, "I personally guarantee all invoices due Ken Smith Auto Parts, Inc."

Ken Smith provided auto parts to CCW. CCW did not pay. Ken Smith's suit against Thomas started in Sessions Court. That judgment was appealed to this court. After proceedings in this court, the Court of Appeals and the Tennessee Supreme Court, the case was remanded back to this court

for further proceedings. The motions for summary judgment have been pending during all of the appellate proceedings.

Ken Smith's motion

In its motion, Ken Smith argues that this court should find, as a matter of law that Michael Thomas is personally liable for any debt due to Ken Smith under the contract. For the reasons set forth below, that motion is GRANTED.

The language in the contract is clear and unambiguous. As noted previously, the last sentence states "I personally guarantee all invoices due Ken Smith Auto Parts, Inc.". Under the reasoning of the Tennessee Supreme Court's decision in M.L.G. Enterprises, LLC v[.] Richard L. Johnson (Tn. 2016), the fact that Mr. Thomas signed the contract only once and identified himself as president of CCW, does not invalidate the clear personal guarantee in the contract. Therefore, Ken Smith's motion is Granted and it is held that Michael Thomas is personally liable to Ken Smith for all sums owed by CCW under this contract.

Michael Thomas' Motion

Mr. Thomas argues in his motion that the four (4) year statute of limitation in TCA 47-2-725 expired before Ken Smith's law suit was properly commenced in the Sessions Court. Ken Smith argues that the six (6) year statute of limitations applies, because Michael Thomas is being sued on a personal guarantee and not on the initial debt of CCW for payment for the auto parts. The court agrees with Thomas that the four year statute of limitations applies. However, because Ken Smith has produced proof that its right of action against CCW accrued within four (4) years of the commencement of the Sessions Court action, Thomas' motion is Denied.

The undisputed facts are as follows:

1) On February 7, 2012, CCW completed the Open Account Application with Ken Smith which serves as the contract in this case. Michael Thomas signed the personal guarantee on the same date.

2) On October 3, 2012, CCW made its final payment to Ken Smith. As of October 5, 2012, CCW owed Ken Smith $6,222.22.

3) On October 5, 2012, Ken Smith made a demand for payment of the remaining balance by October 15, 2012. CCW did not pay and on October 17, 2012, Ken Smith turned the matter over to the lawyer for collection.

As a result of those facts, Ken Smith's right of action occurred on October 5, 2012 or no later than October 15, 2012.

In response to this motion, Ken Smith submitted the affidavit of Patricia Lester, an employee of Mayfield & Lester, Ken Smith's lawyers. Ms. Lester states in her affidavit that on July 12, 2013, Michael Thomas stated in a phone call that he was closing a real estate deal and would pay the

debt from the proceeds of that sale. On July 31, 2013, Mr. Thomas stated in another phone call, that the real estate deal had not closed but would close soon, indicating again he would pay the money owed to Ken Smith from that sale.

In Graves v[.] Sawyer, 588 SW2nd (Tn. 1979), the Court ruled that the acknowledgment of a debt and the indication of a willingness to pay tolls the running of a statute of limitations. Therefore, there is an issue of fact as to whether the statute of limitations began running on October 5, 2012 or July 12 or July 31, 2013. If the statute began to run in July, 2013, the facts show that the Sessions Court proceeding was commenced on February 28, 2017 at the latest, which is within four (4) years of July, 2013.

Therefore, Michael Thomas' motion for summary judgment is DENIED.

Therefore, it is Ordered that the motion for summary judgment filed by Ken Smith Auto Parts, Inc., be Granted. As a result, it is the ruling of this court that Michael Thomas is personally liable for all sums due to Ken Smith Auto Parts, Inc. from CCW Systems, LLC.

It is further Ordered that the motion for summary judgment filed by Michael Thomas be DENIED.

A question thus remained for trial as to whether the alleged debt was barred by the applicable four-year statute of limitations found at Tenn. Code Ann. § 47-2-725. Following a March 2022 bench trial, the Trial Court found that Ken Smith's claim was not barred by the statute of limitations. In its April 2022 final order, the Trial Court ruled in favor of Ken Smith, awarding it a judgment of $22,280.42. This figure represented the initial balance owed by CCW of $6,222.22 plus interest at 1.5 percent per month as well as attorney's fees calculated as one-third of the amount of the combined principal and interest. In its final judgment, the Trial Court stated, as relevant:

> The Court first heard testimony of a representative from Ken Smith Auto Parts. The Court found that the testimony and documentary evidence put on at trial showed that Michael Thomas personally guaranteed the debt of CCW Systems, Inc[.] to Plaintiff. The proof included invoices, ledgers, and a statement of account which identified $6,222.22 as owed at the time the debt was turned for collection. Additionally, the "Open Account Application" signed by Michael Thomas obligated him to pay attorney fees and bound him to the terms of the invoices which included a 1.5% per month late fee. The amount owing through the date of trial is $16,710.32. After adding a 1/3 attorney fee that the Court finds Plaintiff is entitled to pursuant to its contingency fee arrangement with its attorneys, the total due and owing is $22,280.42.

> The Court next heard testimony from a representative of the collection law firm, Mayfield and Lester. The testimony and documentary evidence showed that Defendant Thomas had spoken with a representative of the law firm on July 12, 2013, and July 31, 2013, and communicated his acknowledgment of the debt as well as his promise to pay the debt from the proceeds of an upcoming real estate closing when he would "take care of [the] bal[ance]." The law firm representative offered testimony as to the protocols at the law firm regarding contemporaneous file notations and how the file is maintained which this Court found credible. Additionally, the Court heard testimony and observed phone records which linked the telephone communications with the file notes.
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> At the close of Plaintiff's proof, Defendant moved that the case be dismissed arguing that the four year statute of limitation had run. The Court denied the motion based on the cases of Graves v. Sawyer, 588 S.W.2d 542 (Tenn[.] 1979) and Ingram v[.] Earthman, 993 S.W.2d 611 (Tenn[.] Ct[.] App[.] 1998) and the communications between Thomas and the law firm.
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> Lastly, the Court heard testimony of Michael Thomas. Mr. Thomas offered testimony that some of the parts had been repossessed by Ken Smith without credit being given. The Court observed return slips identifying part numbers, but Mr. Thomas did not identify how much he was billed for these items or how much credit that he was allegedly due. The testimony was also contradicted by the Ken Smith representative's earlier trial testimony that consignment items are not billed until the items are sold. Mr. Thomas further offered testimony that he did not own any real estate at the time of the communications with Mayfield and Lester. The Court, upon observing the witnesses and considering the documentary evidence presented at trial finds the Plaintiff[']s] proof to be the more credible.
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> Therefore, based on the above findings, it is
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> **ORDERED** that a judgment shall be and is hereby entered against Defendant Michael F. Thomas in the amount of $22,280.42 plus court costs which shall be taxed against Mr. Thomas, Defendant for which execution shall issue if necessary.

Thomas timely appealed to this Court.

Discussion

Although not stated exactly as such, Thomas raises the following issues on appeal: 1) whether the Trial Court erred in granting partial summary judgment in favor of Ken Smith on the issue of Thomas' personal liability for amounts purportedly owed by CCW; 2) whether the Trial Court erred in finding that the four-year statute of limitations

applicable to Ken Smith's claims under Tenn. Code Ann. § 47-2-725 was tolled based on a promise to pay the debt; 3) whether the Trial Court erred in awarding 1.5 percent per month in prejudgment interest on the amount purportedly owed by Thomas to Ken Smith where such interest was not authorized by the parties' written agreement; and 4) whether the Trial Court erred in awarding attorney's fees to Ken Smith equal to one-third of the amount awarded without considering the factors set out in Tenn. Sup. Ct. R. 8, RPC 1.5.

With respect to that portion of the case decided after the bench trial, our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the trial court, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). This case was also decided in part by summary judgment. Regarding the standard of review for cases decided by summary judgment, the Tennessee Supreme Court has instructed:

> Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." Tenn. R. Civ. P. 56.04. We review a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *see also Abshure v. Methodist Healthcare–Memphis Hosp.*, 325 S.W.3d 98, 103 (Tenn. 2010). In doing so, we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013) (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 471 (Tenn. 2012)).
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> [I]n Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material

> facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id*. When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.* [*v. Zenith Radio Corp.*], 475 U.S. [574,] 586, 106 S.Ct. 1348[, 89 L.Ed.2d 538 (1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 250, 264-65 (Tenn. 2015). "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects, Inc. v. The Braxton, LLC*, 578 S.W.3d 879, 889 (Tenn. 2019) (quoting *Rye*, 477 S.W.3d at 265).

We first address whether the Trial Court erred in granting partial summary judgment in favor of Ken Smith on the issue of Thomas' personal liability for amounts purportedly owed by CCW. Thomas cites *84 Lumber Co. v. Smith*, 356 S.W.3d 380, 382-83 (Tenn. 2011) for the proposition that while a signatory to a contract who signs only in a representative capacity may be held personally liable for the debt, a determination of

liability requires a finding that "the clear intent of the contract is to bind the representative." (citations omitted). Further, "[i]n most cases, a representative who signs a contract is not personally bound to the contract." *Id*. at 382 (citations omitted). Thomas also cites *Creekside Partners v. Scott*, No. M2012-00623-COA-R3-CV, 2013 WL 139573 (Tenn. Ct. App. Jan. 10, 2013), *no appl. perm. appeal filed*, in which this Court found that a signatory to a commercial lease who signed the lease only once and only in a representative capacity was not personally liable despite unambiguous personal guaranty language in the lease. This Court stated, as pertinent:

> Having closely examined the relevant language and the placement of that language in the credit application in *84 Lumber* and the relevant language and the placement of that language in the Lease in this case, we find significant differences. In *84 Lumber*, the guaranty provision is in all capital letters, set off from the rest of the text, and is immediately followed by Mr. Smith's signature on the same page of the credit application. Here, the guaranty provision is in the same size font as all the other provisions in the lease and is separated from Mr. Scott's signature by two pages.
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> Furthermore, where Mr. Smith's personal obligation is exceedingly clear in the guarantee language in the *84 Lumber* credit application, Mr. Scott's alleged personal obligation under the Lease is in contradiction to other provisions in the Lease.
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> Finally, page eleven of the Lease provides that, "[n]otices to any guarantor shall be deemed sent when sent to the address shown on the signatory page hereof," yet no addresses for guarantors are listed. Indeed, of the nineteen pages and 1,267 lines of text that comprise the Lease, only once does Mr. Scott's name appear in relation to the words "guarantee" or "co-tenant" and that is on line 826.
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> [W]e find the facts of this case distinguishable from *84 Lumber* and conclude that the Lease does not show a clear intent that Mr. Scott was contracting as an individual guarantor of NTS's obligations. Therefore, we affirm the decision of the trial court.

Creekside Partners, 2013 WL 139573, at *5-6 (citations and footnote omitted).

According to Thomas, the personal guarantee language in the Application was "inconspicuous" and buried within the document. He notes that it was non-bolded, and of the same font and style of a paragraph of unrelated provisions. Thomas asserts that he never intended to make himself personally liable. Having reviewed the Application, we conclude that the facts of this case are distinct from those of *Creekside Partners*. In *Creekside Partners*, the document at issue was nineteen pages long with 1,267 lines of text. *Creekside Partners*, 2013 WL 139573, at *5. Here, the Application is only one page in length including the signature lines, and the contract language appears in a single paragraph; it is a very brief document. In his declaration filed below, Thomas asserted that he "glanced at the form quickly." Respectfully, if he had read the document, it would have been clear that he was agreeing to make himself personally liable to Ken Smith for unpaid invoices. This is not a case where the personal guarantee language was buried within a lengthy or confusing document. The provision was easy to spot in the one-page document. As Ken Smith points out, Thomas' signature almost touches the word "personally" directly above the signature line. We therefore affirm the Trial Court's determination that Thomas agreed to make himself personally liable to Ken Smith for unpaid invoices.

We next address whether the Trial Court erred in finding that the four-year statute of limitations applicable to Ken Smith's claims under Tenn. Code Ann. § 47-2-725 was tolled based on a promise to pay the debt. The parties agree on appeal that the applicable statute of limitations is four years. Ken Smith demanded payment by October 15, 2012. Four years from that date was October 15, 2016. To recap, Ken Smith filed its first and second civil warrants in December 2015 and February 2016 respectively. Summonses for both were returned unserved. It was only in February of 2017 that Thomas was served with summons in connection with the third civil warrant. Thomas contends that Ken Smith could not rely on its previous attempts to serve him for statute of limitations purposes. He cites Tenn. Code Ann. § 16-15-710, which provides:

> The suing out of a warrant is the commencement of a civil action within the meaning of this title, whether it is served or not; but if the process is returned unserved, plaintiff, if plaintiff wishes to rely on the original commencement as a bar to the running of a statute of limitations, must either prosecute and continue the action by applying for and obtaining new process from time to time, each new process to be obtained within nine (9) months from return unserved of the previous process, or plaintiff must recommence the action within one (1) year after the return of the initial process not served.

Tenn. Code Ann. § 16-15-710.

Thomas notes that some eleven months passed between the return without service of Ken Smith's alias warrant in March 2016 and issuance of the pluries warrant in February

2017. Therefore, per Thomas' argument, Ken Smith's claim was time-barred. Nevertheless, the Trial Court found that Ken Smith's claim was timely filed because of a statement Thomas made over the telephone on July 12, 2013 to an individual at Mayfield & Lester, Ken Smith's law firm, in which he advised that he was closing on a real estate deal soon and he would take care of the balance. The individual Thomas spoke to did not testify. Instead, Patricia Lester, a representative of Mayfield & Lester, relied on account notes in testifying to the conversation.

Thomas contends that the Trial Court erred on this issue concerning the statute of limitations for a variety of reasons, to wit: that the alleged statements by Thomas were inadmissible hearsay; that the individual who spoke to Thomas did not testify; that Ken Smith's sole reliance on notes indicates a lack of trustworthiness of the evidence; that the statement by Thomas, if made, did not amount to a distinct and unconditional promise to pay; that the statute of limitations could not be tolled because any promise allegedly made by Thomas to pay the debt was made in his individual capacity and not as a representative of CCW; and that, even if tolling were justified, the tolling period would have lasted only until August 21, 2013 at most when account notes reflect that Thomas told the firm that he had no money to pay the debt. For its part, Ken Smith states that Thomas' August 2013 statement that he had no money was not a renunciation of his earlier promise to pay, and that it was only on July 24, 2014 when a file note reflects that Thomas said he was not going to pay.

Concerning evidentiary issues, "[t]he appellate court affords the trial court wide discretion regarding the admissibility of evidence and will not overturn the trial court's determination absent an abuse of that discretion." *Goodale v. Langenberg*, 243 S.W.3d 575, 587 (Tenn. Ct. App. 2007) (citation omitted). 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) (citations omitted)). Thomas objected below to the admission of the account notes. The Trial Court overruled the objection, finding that the business records exception applied to allow the evidence. We agree. The Trial Court later found that "[t]he law firm representative offered testimony as to the protocols at the law firm regarding contemporaneous file notations and how the file is maintained which this Court found credible. Additionally, the Court heard testimony and observed phone records which linked the telephone communications with the file notes." The Trial Court further found that "[t]he Court, upon observing the witnesses and considering the documentary evidence presented at trial finds the Plaintiff[']s] proof to be the more credible." We discern no hint of untrustworthiness or unreliability in the account notes.

Thomas' statements to the firm were not offered for the truth of the matter asserted. That is, Thomas' statements were not offered to prove that he really was going to pay the debt. Rather, the statements were offered to show that Thomas made the promise to pay the debt. We also note that the statements by Thomas fit squarely under Tennessee Rule of Evidence 803(1.2) as admission by party-opponent. As to the account notes, which are hearsay, we find no error in the Trial Court's finding that the business records exception applies. *See* Tenn. R. Evid. 803(6). We find no reversible error in the Trial Court's decision to admit the account notes.

With respect to whether Thomas' statement constituted a distinct and unconditional promise to pay the debt, Thomas cites, among other cases, *Alexander v. Muse*, 112 Tenn. 233, 79 S.W. 117 (Tenn. 1904) for the proposition that a "weak" and "indefinite" promise to pay sometime in the future is insufficient to remove the bar of the statute of limitations. However, Thomas' statement that he would "take care" of the balance was not conditioned on anything. He did not say, for example, that there was a chance that the real estate deal would not go through. In other words, it was a matter of when and not if he would pay the debt. He did not link his taking care of the balance to any other condition. While perhaps stated informally, Thomas' statement that he would take care of the balance constituted a distinct and unconditional promise to pay the debt for which he was liable.

Regarding the effect of Thomas' promise on the statute of limitations, both parties discuss the case of *Graves v. Sawyer*, 588 S.W.2d 542 (Tenn. 1979), which also was cited by the Trial Court in its order. In *Graves*, the Tennessee Supreme Court considered whether a voluntary, unconditional payment of interest on a promissory note tolled the statute of limitations to the date of the payment. *Id*. In 1969, the respondents executed a promissory note of $2,500, due 180 days after execution. *Id*. No payments were made on the principal, but the respondents made three interest payments on the note after its due date, with the final coming in 1972. *Id*. at 543. In 1976, the petitioner filed suit to collect the note. *Id*. The respondents relied on the six-year statute of limitations. *Id*. The trial court ruled for the petitioner. *Id*. On appeal, the Tennessee Court of Appeals reversed the trial court. *Id*. Our Supreme Court in turn reversed the Court of Appeals, stating in part:

> [W]e think the affirmative act of a debtor in making a voluntary, unconditional payment on a debt, or interest due on a debt, is such an act that implies "a willingness to pay." What act, short of an unconditional, express promise to pay, could more strongly indicate a willingness to pay than the payment itself?
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> Ultimately, the effect of part payment of a debt or a payment of interest on a debt depends, of course, upon the circumstances in which the payment is made. But in the absence of evidence to the contrary, we hold that such a payment is an acknowledgment of the debt and implies a promise of payment which operates to keep the debt alive for the statutory period from that time.

Graves, 588 S.W.2d at 544.

In *Ingram v. Earthman*, 993 S.W.2d 611 (Tenn. Ct. App. 1998), this Court elaborated on the doctrines of estoppel and revival, stating in part:

> Estoppel and revival are complementary responses to a statute of limitations defense. A defendant will be estopped to assert a statute of limitations defense when it induces a plaintiff to refrain from filing suit during the applicable limitations period. Statements or conduct that support an estoppel claim include representations, made prior to the expiration of the limitations period, that the defendant either would not assert a statute of limitations defense or that the dispute would be amicably resolved without filing suit. Persons who successfully establish the estoppel exception to a statute of limitations defense must file suit within a reasonable time after becoming aware that the debtor will not pay the debt.
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> Similarly, a defendant may revive a plaintiff's remedy that had been barred by the running of a statute of limitations either by expressly promising to pay the debt or by acknowledging the debt and expressing a willingness to pay it. The defendant must make the promise or give the acknowledgment directly to the plaintiff or someone standing in such a close relationship with the plaintiff that it is reasonable to infer that the defendant's statements will reach the plaintiff.
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> The expression of willingness to pay the debt that must accompany the acknowledgment of the debt may be implied from the defendant's words or acts but, in whatever form, the words or acts must amount to a recognition of the continuing obligation. Persons who successfully establish the revival exception to a statute of limitations defense must file suit with the applicable limitations period measured from when the conduct constituting the revival occurred.

Ingram, 993 S.W.2d at 633-34 (footnote and citations omitted).[2]

Our Supreme Court has further discussed the effect of a defendant misleading a plaintiff, and the time in which a plaintiff has to file suit after being misled, as follows:

> Having held that the discovery rule and equitable estoppel are different, we must now decide how long the statute of limitations is tolled when a plaintiff successfully invokes the latter. The answer is clear: the tolling period equals the amount of time the defendant misled the plaintiff. *See Lusk [v. Consol. Aluminum Corp.*], 655 S.W.2d [917,] 920-921 [(Tenn. 1983)]. Equitable estoppel is premised on the defendant's wrongdoing, and, consequently, the plaintiff must be given the time during which the defendant misled the plaintiff so that plaintiff's entitlement to the full statutory time period is preserved. This is similar to the result in discovery rule cases, where the defendant's fraudulent concealment prevents the plaintiff from discovering his cause of action. *See Vance* [*v. Schulder*], 547 S.W.2d [927,] 930 [(Tenn. 1977)] ("[The statute] begins to run as of the time of the discovery of the fraud by the plaintiff."). Any other result would reward the defendant for his deception. As discussed above, Fahrner claims that he missed the time deadline because SW Manufacturing misled him until May 1998. If true—as will be determined on remand—Fahrner would be entitled to a full year from that time, assuming he is entitled to equitable estoppel relief. Since Fahrner filed suit in December 1998, he will have met the deadline.

Fahrner v. SW Mfg., Inc., 48 S.W.3d 141, 146 (Tenn. 2001).

In his reply brief, Thomas discusses *Graves* and *Ingram*, stating that "the distinction drawn in Ingram between the estoppel-based tolling that occurs when a promise to pay is made before the statute of limitations runs out and the revival of the limitations period that

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[2] In *Redwing v. Catholic Bishop for the Diocese of Memphis*, 363 S.W.3d 436, 461 n.25 (Tenn. 2012), our Supreme Court stated as follows regarding *Ingram v. Earthman*:

> On this point, *Fahrner v. SW Mfg., Inc.* [48 S.W.3d 141 (Tenn. 2001)] appears to reverse *Ingram v. Earthman*, 993 S.W.2d at 633 and *Fairway Vill. Condo. Ass'n v. Connecticut Mut. Life Ins. Co.*, 934 S.W.2d 342, 346 (Tenn. Ct. App. 1996) in which the Court of Appeals adopted the majority rule that if the basis for estoppel ends before the statute of limitations has run, the plaintiff must file suit within the original limitations period if reasonable time remains within which to file suit. Likewise, if the basis for estoppel ends after the statute of limitations has run, the plaintiff must file suit within a reasonable time. Because the parties in this case have not joined issue on this point, we need not reconsider it in the present case.

occurs upon a promise to pay made after the statute of limitations expires contradicts [Ken Smith's] argument." (Emphasis in original). We note first that *Graves* is an opinion by the Tennessee Supreme Court, whereas *Ingram* is by the Tennessee Court of Appeals. *Graves* has never been overturned. We must adhere to our Supreme Court's binding precedent. In *Graves*, our Supreme Court stated that "in the absence of evidence to the contrary, we hold that such a payment [on a debt] is an acknowledgment of the debt and implies a promise of payment which operates to keep the debt alive **for the statutory period from that time**." *Graves*, 588 S.W.2d at 544 (emphasis added). The Supreme Court also asked rhetorically, "[w]hat act, short of an unconditional, express promise to pay, could more strongly indicate a willingness to pay than the payment itself?" *Id*. In the appeal at bar, Thomas made an unconditional, express promise in July 2013 to pay the balance for which he was liable. Notwithstanding the discussion on the differences between estoppel and revival contained in *Ingram*, we hold that *Graves* is more directly on point and controls. Thomas' July 2013 promise to pay the balance served to "keep the debt alive for the statutory period from that time." *Graves*, 588 S.W.2d at 544. Thus, the applicable four-year statute of limitations began to run from July 2013.

In addition, Thomas' argument that he could not toll the statute of limitations in his individual capacity is unpersuasive, as well. Thomas cites to *C.A. Hobbs, Jr., Inc. v. Brainard*, 919 S.W.2d 337, 339 (Tenn. Ct. App. 1995) for the proposition that statements made by someone other than the original obligor are insufficient to toll the statute of limitations. ("Only a maker of a note can remove an already existing note from the statute of limitations by expressing a willingness to pay without the execution of a new note."). Thomas states that, since payment of the debt was sought from him in his individual capacity, any alleged conversation he had with Mayfield & Lester could only have occurred in his individual capacity and not in his capacity as a representative of CCW, thus his statements could not serve to toll the statute of limitations. However, Thomas signed the Application on CCW's behalf. CCW acted through Thomas. Thomas also agreed to be personally liable to Ken Smith for unpaid invoices through his signature on the Application. Under these circumstances, Thomas' attempt to compartmentalize his capacities is without merit.

In sum, the Trial Court did not err in admitting the account notes; Thomas' 2013 statement that he would take care of the debt constituted an unconditional promise to pay the debt; and the effect of Thomas' unconditional promise was to keep the debt alive for the statutory period from that time, in accordance with *Graves*. Ken Smith's action against Thomas for breach of contract was timely filed. We affirm the Trial Court as to this issue.

We next address whether the Trial Court erred in awarding 1.5 percent per month in prejudgment interest on the amount purportedly owed by Thomas to Ken Smith where such interest was not authorized by the parties' written agreement. Thomas notes that the

Application itself does not allow Ken Smith to recover any interest or late fees. Instead, it is only on the back of invoices sent by Ken Smith to CCW where it is stated that interest will accrue on unpaid balances at 1.5 percent per month. While the Application states that "I also agree to be bound by any terms listed on an invoice in addition to those on this application," Thomas says that this represents a mere "agreement to agree" and is therefore unenforceable under Tennessee law. He also says that it is an unenforceable consent to allow unilateral modification of a contract. In *Abbott v. Abbott*, No. E2015-01233-COA-R3-CV, 2016 WL 3976760, at *6 (Tenn. Ct. App. July 20, 2016), *no appl. perm. appeal filed*, this Court stated: "Because of the uncertainty implicit in these agreements, agreements to agree are simply not enforceable in Tennessee courts. Similarly, because the provision omits a sales price or a method to determine a sales price, the trial court erred in finding that the provision was enforceable."

Thomas is correct regarding the unenforceability of agreements to agree in Tennessee. This, however, neither was an agreement to agree later on an amount of interest or late fees nor an unenforceable consent to allow unilateral modification of a contract. Rather, Thomas agreed to be bound by whatever terms as to interest or late fees would be listed on an invoice. Here, there were a series of invoices. This shows that Thomas repeatedly made purchases notwithstanding the language in the invoices about interest. If Thomas was dissatisfied with the 1.5 percent interest provision on the invoices, he simply could have stopped making purchases. As it happened, he did not. In short, there was no contractual term left open for future bargaining, and the interest provision in the invoices was not an unenforceable agreement to agree. We affirm the Trial Court's award of interest to Ken Smith.

The final issue we address is whether the Trial Court erred in awarding attorney's fees to Ken Smith equal to one-third of the amount owed, plus prejudgment interest, without considering the factors set out in Tenn. Sup. Ct. R. 8, RPC 1.5. Both the Application and invoices contained attorney's fee provisions. Thomas argues that the Trial Court's award to Ken Smith of attorney's fees must be vacated for failure to apply the relevant factors.[3] "[A] determination of attorney's fees is within the discretion of the trial

[3] As pertinent, Tenn. Sup. Ct. R. 8, RPC 1.5 provides:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;

court and will be upheld unless the trial court abuses its discretion." *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011) (citations omitted). The *Wright* court stated that, in awarding attorney's fees, trial courts should develop an evidentiary record, make findings concerning each factor, and determine a reasonable fee based on the circumstances of the case. *Id*. at 185-86 (citation omitted).

The Trial Court did not apply the factors set out in Tenn. Sup. Ct. R. 8, RPC 1.5. Thomas is correct in that vacating and remanding for the Trial Court to apply the Tenn. Sup. Ct. R. 8, RPC 1.5 factors is an option. However, the Trial Court awarded Ken Smith approximately $5,570 in attorney's fees, a figure representing one-third of the principal amount owed plus prejudgment interest totaling $16,710.32. To put the $5,570 figure in context, this case has lasted for over five years. It has been litigated at the general sessions court level, the circuit court level, twice in this Court, and in the Tennessee Supreme Court. If we were to vacate and remand for a new determination of reasonable attorney's fees applying the Tenn. Sup. Ct. R. 8, RPC 1.5 factors, the amount awarded to Ken Smith would almost certainly be larger than the $5,570 awarded. Thus, while this was error by the Trial Court, it was harmless as to Thomas. Therefore, in the interest of judicial economy, we decline to vacate the Trial Court's award of attorney's fees despite its failure to consider the Tenn. Sup. Ct. R. 8, RPC 1.5 factors. We affirm the judgment of the Trial Court in all respects.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Michael F. Thomas, and his surety, if any.

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D. MICHAEL SWINEY, CHIEF JUDGE

(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) whether the fee is fixed or contingent;
(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
(10) whether the fee agreement is in writing.