IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 2, 2021

ROBIN NUNLEY, ET AL. v. JAMES E. FARRAR D/B/A FARRAR BONDING

Appeal from the Circuit Court for Bedford County
No. CC2019-CV-13477 M. Wyatt Burk, Judge

No. M2020-00519-COA-R3-CV

Appellant filed a civil warrant in general sessions court seeking a refund of her payment to Appellee, a bondsman, because the bondee was never released from public custody. The general sessions court granted judgment in Appellee's favor, and Appellant appealed to circuit court. Eventually, Appellee filed a motion for summary judgment, arguing that Appellant was not entitled to a refund. In response, Appellant filed a motion to amend her civil warrant to clarify her theories. The trial court granted Appellee's motion for summary judgment and denied Appellant's motion to amend her civil warrant. Because Appellee's failure to comply with Rule 56.03 of the Tennessee Rules of Civil Procedure prevents meaningful review of its motion for summary judgment, we reverse the trial court's grant of summary judgment. We vacate the trial court's denial of Appellant's motion to amend.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in Part; Vacated in Part; and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which THOMAS R. FRIERSON, II and W. NEAL MCBRAYER, JJ., joined.

Randall W. Morrison, Tullahoma, Tennessee, for the appellant, Bonnie Nunley.

John R. White, Shelbyville, Tennessee, for the appellee, James E. Farrar d/b/a Farrar Bonding.

OPINION

FACTUAL AND PROCEDURAL HISTORY

Robert Ferrell Nunley II ("Mr. Nunley"), the son of Bonnie Nunley ("Appellant"), was arrested on a state law charge on October 16, 2015 in Bedford County, and his blanket appearance bond was set at $300,000.00. Appellant made arrangements with James E. Farrar d/b/a Farrar Bonding ("Appellee") for Appellee to be the surety on the bond. Appellant paid Appellee $15,037.00 (approximately one-half of the $30,000.00 bond premium) on October 29, 2015. Robin Nunley,[1] Appellant, and Appellee signed a security agreement related to the bond on the same day. Appellant and Robin Nunley (collectively, "Plaintiffs") also signed a document on Appellee's letterhead on October 29, 2015, entitled "Agreement for Bail Bond(s),"[2] which includes the following provision pertinent to this appeal ("Paragraph 23"):

> THE FOLLOWING PROVISIONS APPLY TO APPEARANCE BONDS:
>
> * * *
>
> 23. The parties acknowledge, understand and agree that:
>
> > a. The release of [Mr. Nunley] has been obtained by [Appellee] acting as the private jailer for [Mr. Nunley] or [Mr. Nunley's] jailer of choice.
> > b. Even though [Mr. Nunley] is released from public custody, [Mr. Nunley's] release to [Appellee] is a continuance of [Mr. Nunley's] original incarceration and therefore [Appellee] or its duly appointed agent may with necessary copy of bond or capias, seize, arrest and deliver [Mr. Nunley] to the custody of the appropriate public jailer or if that can not be done at once, [Appellee] or its duly appointed agent may imprison [Mr. Nunley] until delivery can be made.
> > c. The company or its duly appointed agent may pursue [Mr. Nunley] into another jurisdiction in order to arrest [Mr. Nunley] and if necessary enter [Mr. Nunley's] house for that purpose.

Additionally, Plaintiffs signed their names below a handwritten statement underneath a copy of the receipt for the $15,037.00 payment to Appellee, again on October 29, 2015. The handwritten statement provided, in pertinent part to this appeal, "There [i]s no [r]efund on [a]ny money."

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[1] Originally, Robin Nunley (of no blood relation to Appellant or Mr. Nunley), was a co-plaintiff in this cause. However, he died on January 23, 2020, and his wife, Sabrina Nunley, was substituted as a plaintiff. Sabrina Nunley filed a notice of voluntary non-suit in the trial court, and the trial court ordered her non-suited without prejudice on February 27, 2020. Therefore, the only remaining plaintiff for purposes of this appeal is Appellant.

[2] There appears to be at least one additional signature on this document, but it is unclear whose signature that is because each copy of this document in the record is cut off at the bottom.

According to another bondsman, Carman Dwight Graham, Appellee procured him to put an ankle monitor on Mr. Nunley in either October or November of 2015.[3] The cost of the ankle monitor was $300.00 per month plus $50.00 for Mr. Graham to put it on Mr. Nunley's ankle, which it appears Appellant paid. According to Mr. Graham, Mr. Nunley only had the ankle bracelet on for five or six days because "[t]he Feds came and got him." According to Appellant, she received a $300.00 refund for the ankle bracelet payment. Though the parties appear to agree that Mr. Nunley was continuously incarcerated in various county jails after his arrest on October 16, 2015, until at least April 18, 2018,[4] it is not clear from the record exactly where he was incarcerated and on what charges. Appellee asserts that on April 18, 2018, it was released of liability on the bond by the Bedford County Circuit Court (the "trial court").

According to Appellant, "immediately after the bond was arranged," she learned that the federal government had a hold on Mr. Nunley that would prevent him from being released from custody on bond. She asserts that Appellee nevertheless promised her that Mr. Nunley could be released, when Appellee knew that was not possible. Appellant asserts that she repeatedly sought a refund directly from Appellee of the payments she had made to Appellee, but Appellee refused her requests. The state charge against Mr. Nunley, for which the $300,000.00 bond was set, was dismissed without costs on April 18, 2018, apparently due to the fact that he was in federal custody.

Appellant filed a civil warrant against Appellee in the Bedford County General Sessions Court on January 22, 2019, seeking a $15,000.00 refund and the "cost of security documentation in the amount of $1,613.47" related to the bond. The general sessions court held a trial on the civil warrant on March 7, 2019, ruling in Appellee's favor with prejudice. Appellant appealed to the trial court on March 13, 2019. The trial court originally set a jury trial for January 13 and 14, 2020, but the parties agreed to a continuance, and the matter was re-set for trial on March 3 and 4, 2020. The trial court judge ordered that "[a]ny dispositive motions" should be filed in time to be heard on February 27, 2020.

On January 10, 2020, Appellant filed a motion to amend the civil warrant pursuant to Rule 15 of the Tennessee Rules of Civil Procedure. Therein, she sought to allege the following additional claims: (1) that she repudiated the bonding contract because she had a legal right to abandon or refuse to perform it since Appellee was unable to perform the terms of it, and/or (2) that the contract was impossible to perform or complete because "no bail bond could be put in effect as agreed upon due to the bondee[']s failure to be released from incarceration," through no fault of Appellant.

[3] On cross-examination during his deposition, Mr. Graham stated that he does not have a clear recollection of everything that transpired in this case.

[4] Appellee asserts that Mr. Nunley was taken into federal custody on this date, but Appellant's deposition testimony suggests that Mr. Nunley was taken into federal custody in January 2019.

On January 16, 2020, Appellee filed a response in opposition to Appellant's motion to amend the civil warrant, along with a motion for summary judgment and statement of undisputed facts. The statement of undisputed facts states, in relevant part, as follows:

> 1. Robert Ferrell Nunley, II, was arrested on October 16, 2015, with a $300,000.00 Blanket Bond made on October 29, 2015, as reflected in Exhibit 1 attached hereto.
>
> 2. [Plaintiffs] signed an Agreement for Bail Bonds dated October 29, 2015, as shown in Exhibit 2 attached hereto.
>
> 3. [Plaintiffs] signed a Security Agreement dated October 29, 2015, as reflected in Exhibit 3 attached hereto.
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> 4. [Plaintiffs] signed a Receipt for $15,037.00 containing the statement "I understand I owe the Bal. of 15,000 on Bond plus attorney fees and all costs. There is no refund on any money. A Note will be made on Deeds of Trust on propty [*sic*] of Robin Nunley and Bonnie Nunley," as reflected in Exhibit 4 attached hereto.
>
> 5. [Plaintiffs] executed a Deed of Trust and Promissory Note to the Defendant dated November 2, 2015, as reflected in collective Exhibit 5.
>
> 6. Various bookings are attached as Exhibit 6 describing additional charges against Robert Ferrell Nunley, II's incarceration in Bedford County Jail, Lincoln County Jail and Grundy County Jail.
>
> 7. Attached as Exhibit 7 is a handwritten note dated 4/18/18 which states "Off the bond" written by Michelle Murray, Bedford County Circuit Court Clerk.
>
> 8. A photocopy of the deposition of Dwight Graham taken on September 26, 2019, is attached as Exhibit 8.
>
> 9. A photocopy of the deposition of Bonnie Nunley taken on July 29, 2019, is attached as Exhibit 9.
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> 10. A photocopy of the deposition of Robin Nunley taken on July 29, 2019, is attached as Exhibit 10.

In its motion for summary judgment, Appellee argued that there was no legal basis entitling Appellant to a refund. Appellant filed an affidavit and response to Appellee's motion for summary judgment and statement of undisputed facts on February 18, 2020, arguing that there were material facts in dispute and addressing each of Appellee's purported undisputed facts.

After a hearing on February 27, 2020, the trial court granted Appellee's motion for summary judgment. In so doing, the trial court found that "[t]he parties do not disagree that [Mr. Nunley] was not released from custody in Bedford County, Tennessee due to a hold stemming from charges levied by U.S. Federal Law Enforcement, separate and apart from the Bedford County criminal charges (the charges to which the Bonding Agreement applied)." Still, the trial court found, inter alia, that Appellee "was not discharged from the

underlying bond until April 18, 2018, when [Mr. Nunley] was taken into federal custody pursuant to a hold prohibiting his release from Bedford County Jail." The trial court also denied Appellant's motion for leave to amend the civil warrant. A final judgment was entered on March 3, 2020. Appellant timely appealed.

ISSUES PRESENTED

The dispositive issues in this case are whether the trial court's decisions to deny Appellant's motion to amend the civil warrant and to grant Appellee's motion for summary judgment should be affirmed. Appellee also raises the issue of whether the appeal should be deemed frivolous and it should be awarded attorney's fees.

STANDARD OF REVIEW

A trial court's "grant or denial of a motion for summary judgment is a matter of law; therefore, our standard of review is de novo with no presumption of correctness." ***Bowers v. Estate of Mounger***, 542 S.W.3d 470, 477 (Tenn. Ct. App. 2017) (citations omitted). Consequently, we "must make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." ***Id.*** (quoting ***Rye v. Women's Care Ctr. of Memphis, MPLLC***, 477 S.W.3d 235, 250 (Tenn. 2015)). In reviewing a summary judgment motion on appeal, "we are required to review the evidence in the light most favorable to the nonmoving party and to draw all reasonable inferences favoring the nonmoving party." ***Shaw v. Metro. Gov't of Nashville & Davidson Cty.***, 596 S.W.3d 726, 733 (Tenn. Ct. App. 2019) (citations and quotations omitted).

DISCUSSION

I.

We begin by addressing the trial court's grant of summary judgment in favor of Appellee. Appellee argues that it is entitled to summary judgment because under controlling caselaw, it was bound on the bond until April 18, 2018, and under "general contract law principles, the [] signed receipt agreement" for the $15,037.00 "represents a binding contractual obligation that [Appellant is] not entitled to a refund of any portion of the bond premium . . . ." Appellant, on the other hand, argues that there is a material issue of fact in dispute as to whether the bonding agreement between the parties, drawn up by Appellee, could be or was fulfilled according to its terms—namely Paragraph 23, which anticipated the physical release of Mr. Nunley on bail—because Mr. Nunley was never released. Thus, Appellant argues there is also a material fact in dispute as to whether she is entitled to a refund of payments she made on an unfulfilled agreement. She also asserts that she attempted to be relieved from and repudiate the bonding agreement because of the impossibility of Mr. Nunley being released from custody.

Rule 56.04 of the Tennessee Rules of Civil Procedure states, in pertinent part, the following:

> *Subject to the moving party's compliance with Rule 56.03*, the judgment sought shall be rendered forthwith if 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. The trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling.

(Emphasis added). Rule 56.03, in turn, states, in pertinent part:

> In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. *Each fact shall be supported by a specific citation to the record*.

(Emphasis added).

"The requirements of Tennessee Rule of Civil Procedure 56.03 are mandatory, and it is not the duty of the court, trial or appellate, to search the record in order to find a material dispute of fact." ***Williams v. Watson***, No. E2005-02403-COA-R3-CV, 2007 WL 187925, at *9 (Tenn. Ct. App. Jan. 25, 2007); *see also* ***Owens v. Bristol Motor Speedway, Inc.***, 77 S.W.3d 771, 775 (Tenn. Ct. App. 2001) (referring to the requirements of Rule 56.03 as "strict"). The purpose of these requirements "is to 'assist the Court in focusing on the crucial portions of the record' in determining whether there is a genuine issue requiring a trial on the merits." ***Owens***, 77 S.W.3d at 774 (quoting Advisory Committee Comment to Tenn. R. Civ. P. 56.03). As this Court has explained,

> the statements of material facts filed by the parties on a motion for summary judgment "are not merely superfluous abstracts of the evidence. Rather, they are intended to alert the court to precisely what factual questions are in dispute and point the court to the specific evidence in the record that supports a party's position on each of these questions. They are, in short, roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information from the record on its own."

Id. at 774 (quoting ***Waldridge v. American Hoechst Corp.***, 24 F.3d 918, 923 (7th Cir.1994)). Our supreme court has

> emphasize[d] the importance of attorneys using Rule 56.03 statements of material facts to their fullest. A trial court should not need to sift through lengthy deposition testimony to find any information that is essential to its summary judgment decision. Nor should an appellate court be required to do likewise when reviewing decisions to grant or deny summary judgment.

Bennett v. Trevecca Nazarene Univ., 216 S.W.3d 293, 299 n.4 (Tenn. 2007).

"Although a trial court may waive the requirements of Rule 56.03 in an appropriate case, we caution trial courts that the nonmoving party in a summary judgment proceeding should be sufficiently apprised of the moving party's asserted basis for summary judgment." ***Bobo v. City of Jackson***, 511 S.W.3d 14, 22 (Tenn. Ct. App. 2015) (citing ***Owens***, 77 S.W.3d at 774). Thus, "[i]f the moving party contends that a particular fact is material to the entry of summary judgment in his or her favor, the nonmoving party should not be deprived of the opportunity to show that there is a genuine issue as to the existence of that fact." ***Id.*** Therefore, a trial court's discretion to waive the requirements of Rule 56.03 is not unbounded. Indeed, we have held that a "trial court erred in granting summary judgment" because "[t]he moving party (defendants herein) failed to comply with Rule 56.03." ***Seals v. Tri-State Def., Inc.***, No. 02A01-9806-CH-00172, 1999 WL 628074, at *3 (Tenn. Ct. App. Aug. 16, 1999).

Here, Appellee's statement of undisputed facts is woefully deficient. Items six through ten on the statement of undisputed facts are not statements of fact at all—rather, they merely state that various documents are attached to the statement, including three depositions. Moreover, there are no specific citations indicating which portions of the attached exhibits Appellee is actually relying upon in its motion for summary judgment. Therefore, Appellee clearly failed to comply with the mandates of Rule 56.03.

By proceeding with the summary judgment hearing nevertheless, the trial court implicitly waived Appellee's obligation to comply with Rule 56.03. In a similar case where a litigant "failed to support many of the facts in its statement of undisputed material facts by citation to the record," we concluded that "the trial court acted well within its discretion to waive full compliance with Tenn. R. Civ. P. 56.03," but only because "the majority of the facts not supported by citation to the record are clearly in reference to particular documents in the record." ***Deutsche Bank Nat'l Tr. Co. v. Lee***, No. M2018-01479-COA-R3-CV, 2019 WL 2482423, at *3 (Tenn. Ct. App. June 13, 2019). We went on in that case to observe that the "purposes [of the statements of undisputed material facts] are not vitiated when, absent a citation, it is nevertheless *certain* which evidence in the record supports a contention that a fact is undisputed." ***Id.*** at n.7 (emphasis added). In another case

where the moving party did not comply with Rule 56.03, our supreme court reached a similar conclusion:

> The trial court correctly noted that the Plaintiffs failed to comply with Rule 56.03 of the Tennessee Rules of Civil Procedure, which requires the moving party to provide "a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial" along with the motion for summary judgment. Tenn. R. Civ. P. 56.03. While we do not sanction this noncompliance, we will not deny summary judgment on this basis because the record clearly establishes that no material facts are in dispute. *See* ***Miller v. Wyatt***, 457 S.W.3d 405, 412 (Tenn. Ct. App. 2014) (granting summary judgment despite noncompliance with Rule 56.03, where the material facts were not in dispute and established that the moving party was entitled to summary judgment as a matter of law), *perm. app. denied* (Tenn. Nov. 20, 2014).

Church of God in Christ, Inc. v. L. M. Haley Ministries, Inc., 531 S.W.3d 146, 162 n.13 (Tenn. 2017); *see also* ***Wyatt***, 457 S.W.3d at 412 ("It was within the trial court's discretion to allow the summary judgment hearing to proceed as scheduled, despite Miller's argument that Wyatt had provided specific citations to the record only two days before the hearing. It would also have been within the court's discretion to allow more time if the court thought it was needed. In this case, where all of the facts pertinent to the dispositive issue of legislative privilege were captured on videotape and provided to the court, there was clearly no error in allowing the hearing to proceed as scheduled.").

Here, unlike in ***Church of God in Christ*** and ***Wyatt***, it is entirely unclear from Appellee's purported statement of undisputed facts what the material facts actually are and whether they are disputed. Indeed, many of the statements that Appellee asserts are facts are nothing of the kind, but merely broad references to attached documents without any indication of what facts within those documents are both material and undisputed. And, unlike in ***Deutsche Bank***, "the majority of the facts not supported by citation to the record" here are not "clearly in reference to particular documents in the record." 2019 WL 2482423, at *3. Rather, Appellee's mere reference to certain attachments in its statement of undisputed facts, including three entire depositions, tells us nothing about what facts the attached documents are supposed to prove and where in those attached documents to locate the alleged proof. For example, the depositions relied on by Appellee in its motion for summary judgment span nearly sixty pages and include multiple objections from Appellant. Likewise, the booking documents cited in statement of undisputed fact #6 include twelve different documents. We are therefore left to guess what facts contained in those documents are material to the question of summary judgment. And Appellant was deprived of an opportunity to dispute those specific facts when she responded to Appellee's motion.

Moreover, our review of the trial court's grant of summary judgment is de novo, and therefore we "must make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." ***Bowers*** (quoting ***Rye***, 477 S.W.3d at 250 (Tenn. 2015)). The first step necessary to assessing a motion for summary judgment anew is to review the documents that the moving party filed in support of its motion. We cannot adequately perform this duty when Appellee did not fulfill its duty to comply with the mandatory requirements of Rule 56.03. In other words, we cannot decide if there is no genuine dispute of material fact, such that Appellee is entitled to judgment as a matter of law, when we cannot ascertain what the undisputed material facts are.

We also note that in making a fresh determination of whether the requirements of summary judgment have been met, we can look to the parties' appellate briefs for assistance. Appellee's brief, however, only compounds the problem presented by its deficient motion. Rule 27(a) of the Tennessee Rules of Appellate Procedure requires that appellant's brief contain, inter alia, "[a] statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record[.]" Tenn. R. App. P. 27(a)(6). As an appellee, Appellee was not required to include a statement of facts in its brief, unless "the presentation by the appellant [was] deemed unsatisfactory." Tenn. R. App. P. 27(b). Appellee chose to include such a statement in its appellate brief. Nearly every single fact in the statement, however, contains the exact same record citation, "(TR at 30-134)[,]" or a span of over one hundred pages of the appellate record. Thus, rather than point to a specific place in the record in which its facts can be found, Appellee cites to every single document it filed in support of its motion for summary judgment, without any specificity of any kind.[5] As we have repeatedly stated, "'[j]udges are not like pigs, hunting for truffles' that may be buried in the record, or, for that matter, in the parties' briefs on appeal." ***Cartwright v. Jackson Cap. Partners, Ltd. P'ship***, 478 S.W.3d 596, 616 (Tenn. Ct. App. 2015) (internal citation omitted) (citing ***Flowers v. Bd. of Professional Responsibility***, 314 S.W.3d 882, 899 n.35 (Tenn. 2010); ***Coleman v. Coleman***, No. W2011-00585-COA-R3-CV, 2015 WL 479830, at *9 (Tenn. Ct. App. Feb. 4, 2015)). As such, it is not this Court's duty to comb through the appellate record to find support for a party's assertions.

In sum, Appellee's motion for summary judgment is woefully deficient, as it not only fails to make specific citations to the record, it leaves this Court to guess at what facts were relied upon in support of the motion for summary judgment. As a result, we are unable to determine whether material facts were in dispute. Moreover, these deficiencies were only compounded by Appellee's failure to properly cite to the record in its appellate brief. And "while [Appellee] prevailed in the trial court, the burden remains on [Appellee] to show that it was entitled to summary judgment." ***Vaughn v. DMC-Memphis, LLC***, No.

[5] Appellee employs the same tactic when discussing the documents attached to its motion for summary judgment in the argument section of its brief.

W2019-00886-COA-R3-CV, 2021 WL 274761, at *7 (Tenn. Ct. App. Jan. 27, 2021) (citing ***Rye***, 477 S.W.3d at 250 (holding that we review a trial court's grant of a summary judgment motion de novo and that in undertaking this analysis we make a "fresh determination" of whether summary judgment is appropriate)). Due to these deficiencies, we simply cannot solider on. The summary judgment procedure is "not in any sense to be viewed as a substitute for a trial of disputed factual issues." ***Kidd v. Dickerson***, No. M2018-01133-COA-R3-CV, 2020 WL 5912808, at *4 (Tenn. Ct. App. Oct. 5, 2020), *perm. app. denied* (Tenn. Feb. 4, 2021) (quoting ***Moore v. City of Clarksville***, No. M2016-00296-COA-R3-CV, 2016 WL 6462193, at *3 (Tenn. Ct. App. Oct. 31, 2016)). As such, we must overrule a motion for summary judgment when "there is uncertainty as to whether there may be such a dispute [of material facts]." ***Id.*** (quoting ***City of Clarksville***, 2016 WL 6462193, at *3). Because Appellee's failure to comply with Rule 56.03 prevents a proper de novo review of the record in order to determine whether Appellee was entitled to judgment as a matter of law, the trial court's order granting summary judgment in favor of Appellee is reversed. *Cf.* ***Cox v. Tennessee Farmers Mut. Ins. Co.***, 297 S.W.3d 237, 244–45 (Tenn. Ct. App. 2009) ("A trial court, acting within its discretion, may waive the requirements of [] Rule 56.03 under certain circumstances. ***Owens***, [77 S.W.3d] at 774–75. There is no indication here that the Trial Court considered or did not address the issue of waiver in its order. The Record shows the Trial Court held there were no issues of material fact, and based on the poor quality and confusing nature of plaintiffs' responses to defendant's statement of material facts and considering the discretionary nature of the decision in the Trial Court's discount of plaintiffs' responses as they did not comport with Rule 56.03, it was not error.").

II.

We will now briefly address the issue of the trial court's decision to deny Appellant's motion to amend the civil warrant, which was filed on January 10, 2020. The original scheduling order, which set the trial for January 13 and 14, 2020, directed that discovery should be completed by November 15, 2019 and dispositive motions should be filed by November 27, 2019. The revised scheduling order, filed on January 7, 2020, stated "[t]hat due to unexpected delays in the construction of the new Bedford County Judicial Center, and by agreement of the parties, a continuance of this trial is necessary," and re-set the trial for March 3 and 4, 2020, also amending the filing deadline for "[a]ny dispositive motions" to February 27, 2020.

In denying Appellant's motion to amend, the trial court emphasized "the timing of the matter," finding that there was "an 'undue delay in seeking the amendment'" because discovery had been completed and the motion was filed after the original trial date. Further, the court found that Appellee "lacked notice of the amendment," and that allowing the amendment would "cause undue prejudice" to Appellee, not only because of the timing, but because the amendment would fundamentally change Appellant's theory of the case, when Appellant could have pursued the new theory from the outset of the litigation.

In the alternative, the trial court held that even if the motion to amend were granted, the amendments, which would add claims for impossibility of performance and repudiation, would be "futile." As to impossibility of performance, that trial court reasoned that

> [i]mpossibility of [p]erformance is a defense that is available to a party to a contract seeking to excuse their individual performance. [Appellee], at this stage, has chosen not to pursue a counter-claim for breach of contract. As such, it would be "futile" to allow an amendment to assert a defense to a cause of action that has not been asserted against [Appellant].

(Emphases in original). As to repudiation, the court also held

> that such amendment is "futile." Any party to a contract has a legal right to abandon or refuse to perform the contract where the other party has (1) actually defaulted, (2) has unequivocally renounced the contract or (3) is completely unable to perform the terms of the contract. Again, the Court determines that there are no facts in dispute that established any of the three (3) above listed conditions. As such, this amendment, if allowed, would have been futile and would not have survived summary judgment.

The trial court, however, cited no law in support of either of the above alternate holdings. Nor did Appellee cite any law in its brief when arguing that these alternate holdings are correct. In fact, Appellee argues, in contrast to what the trial court held, that repudiation, in addition to impossibility of performance, is an "ill-conceived defens[e] by Appellan[t] to nonexistent claims not even filed by [] Appellee."

Setting aside the question of whether Appellant's motion to amend can fairly be characterized as "fundamentally changing the theory" of her civil warrant, and whether there was an undue delay in filing the motion less than one year after the civil warrant was filed and almost two months before trial, more proceedings will now be necessary in this case, given that we are reversing the trial court's grant of summary judgment. Consequently, the trial court's concerns regarding the timing of the motion are now arguably moot. Furthermore, the trial court's holding with respect to impossibility of performance is suspect, because while impossibility of performance is usually a defense, no law has been cited to indicate that it cannot be used offensively. *See* ***Silsbe v. Houston Levee Indus. Park, LLC***, 165 S.W.3d 260, 265 (Tenn. Ct. App. 2004) (emphasis added) (citation omitted) ("In Tennessee, the doctrine of impossibility of performance is *usually* employed defensively, excusing nonperformance of a contract, rather than offensively, in order to reform a contract."). Therefore, the trial court's judgment on the motion to amend is vacated, and the trial court should reconsider the motion upon remand.

III.

The remaining issue, raised by Appellee, is whether this appeal should be deemed frivolous and Appellee should be awarded attorney's fees. This Court may award damages to an appellee when an appeal is frivolous or taken solely for delay. *See generally* Tenn. Code Ann. § 27-1-122. The statute "permits the court, within its discretion, to award fees to a prevailing party." ***Eberbach v. Eberbach***, 535 S.W.3d 467, 475 (Tenn. 2017) (citing Tenn. Code Ann. § 27-1-122). Given our disposition of this case, this appeal is not frivolous, and Appellee is not a prevailing party. Therefore, Appellee's request for attorney's fees and expenses on appeal is respectfully denied.

CONCLUSION

The judgment of the Bedford County Circuit Court is reversed in part and vacated in part, and this cause remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellee James E. Farrar d/b/a Farrar Bonding, for which execution may issue if necessary.

S/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE