

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
JUNE 23, 2009 Session

HARRY SKIPPER, et ux v. STATE OF TENNESSEE

**Direct Appeal from the Tennessee Claims Commission
No. 20060705 Stephanie R. Reeves, Claims Commissioner**

No. M2009-00022-COA-R3-CV - Filed July 31, 2009

Mr. Skipper filed a claim with the Tennessee Claims Commission, alleging that Tennessee Department of Transportation snow plow operator Dennis Burns crossed the center line, striking him. Mr. Burns became ill with cancer, and his deposition was scheduled three times before it was successfully taken. Following Mr. Burns' deposition, Mr. Skipper failed to advance his claim for a period of one year, and the Claims Commission dismissed his claim pursuant to Tennessee Code Annotated section 9-8-402(b). Mr. Skipper sought relief from the dismissal pursuant to Tennessee Rules of Civil Procedure 6.02, 59, and 60.02. Mr. Skipper's counsel claimed that he failed to act in order to allow Mr. Burns time to recover, so that he could testify live at trial. He further stated that it was his understanding that the State would contact him once such recovery was made. The Claims Commission denied Mr. Skipper relief from the order of dismissal, and Mr. Skipper appealed to this Court. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Claims Commission Affirmed

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Robert L. Huskey, Manchester, TN, for Appellant

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Dawn Jordan, Senior Counsel, Nashville, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

On December 5, 2005, Harry D. Skipper filed a claim with the State of Tennessee Division of Claims Administration, claiming both property damage and personal injuries arising from a December 23, 2004 accident between Mr. Skipper and a Tennessee Department of Transportation (“TDOT”) snow plow. Mr. Skipper’s claim was transferred to the Tennessee Claims Commission (“Claims Commission”) on March 6, 2006. Mr. Skipper filed a complaint with the Claims Commission on March 30, 2006, alleging that TDOT snow plow operator Dennis Burns, in attempting to turn his snow plow into a garage entrance, “hit his brakes [and] lost control of his vehicle and the blade of the snow plow came into [Mr. Skipper’s] lane of traffic and dug in to [Mr. Skipper’s] pick-up truck, striking it about the left front wheelwell.” In addition to the alleged damage to Mr. Skipper’s truck, Mr. Skipper claimed injuries to his head, left shoulder, and left knee. On April 6, 2006, the State of Tennessee (“State”) filed its answer, denying negligence, and alternatively asserting Mr. Skipper’s comparative fault for allegedly traveling too fast for the icy and snowy road conditions.

According to Mr. Skipper, depositions of Mr. Skipper and Mr. Burns were scheduled for April 26, 2007. However, Mr. Skipper states that when the State’s counsel “arrived for the depositions she advised Mr. Skipper and his [c]ounsel that she had just learned that Mr. Burns . . . was in the hospital with [c]ancer and near death.” Mr. Skipper was deposed, but, according to Mr. Skipper, Mr. Burns’ deposition was rescheduled to take place in the hospital; however, Mr. Skipper states that hospital officials refused to allow the deposition. Thereafter, Mr. Burns was successfully deposed at his home on June 12, 2007.

Mr. Skipper’s counsel maintains that when Mr. Burns’ deposition was first scheduled “and we saw him in the hospital in very bad shape, it was anticipated that he probably would not survive and the deposition that we might take would have to be utilized.” However, according to Mr. Skipper’s counsel, “[w]hen [Mr. Burns] improved and got out of the hospital and we saw his improvement . . . it appeared for the first time that his deposition, although still taken to preserve his testimony, would likely not be utilized because he appeared to be recouping and physically appeared to be a world better. At that time, I anticipated that he would most likely be testifying live at the trial.” The State’s counsel, however, maintains that at Mr. Burns’ deposition, it was clear to Mr. Skipper’s counsel that the deposition was being taken for proof, and that there was never any intention to have Mr. Burns testify live at trial. In fact, the State points out that during Mr. Burns’ deposition, Mr. Skipper’s counsel stated “I need to object to leading because you are taking this for proof I understand.”

Mr. Skipper’s counsel states that based on his understanding that Mr. Burns would testify at trial, he explained to Mr. Skipper that “he would more [or] less have to wait a period to allow Mr. Burns to improve and then we could proceed with the trial.” Mr. Skipper’s counsel states that he

“put [Mr. Skipper’s] file on the back burner and waited to hear from the State as to the condition of their witness.”

On August 13, 2008, the Claims Commission entered an “Order to Show Cause” as to why “the clerk’s record reflects no activity in the matter” since the State filed its answer on April 6, 2006. On August 15, 2008, the State filed a “Motion to Dismiss for Failure to Prosecute” pursuant to Tennessee Code Annotated section 9-8-402(b), stating that Mr. Skipper had taken no action to advance his case since the deposition of Mr. Burns on June 12, 2007. Mr. Skipper filed a “Response to Motion to Dismiss and to Show Cause Order” on August 21, 2008. In his response, Mr. Skipper did not argue that he had taken action since June 12, 2007, but instead expressed his dissatisfaction with the State’s motion to dismiss, alleging that he had “fully cooperated” with the State in arranging the deposition of Mr. Burns and that he was accommodating the State by “waiting for [the State’s counsel] to say ‘everything is ready [with Mr. Burns] and we are ready to go on with it[.]’”

The Claims Commission dismissed Mr. Skipper’s claim with prejudice on October 7, 2008. Thereafter, Mr. Skipper filed a motion seeking to alter and amend, seeking a new trial and an en banc review by the Claims Commission under Tennessee Rule of Civil Procedure 59, and also seeking relief pursuant to Tennessee Rules of Civil Procedure 6.02 and 60.02. Said motions were denied on December 5, 2008. Mr. Skipper appealed to this Court on January 2, 2009.

II. ISSUES PRESENTED

Appellant has timely filed his notice of appeal and presents the following issues for review, summarized as follow:

1. Whether the Claims Commission erred in dismissing Appellant’s claim, pursuant to Tennessee Code Annotated 9-8-402(b), when Appellant’s failure to advance the claim resulted from a misunderstanding or miscommunication between counsel; and
2. Whether the Claims Commission erred in denying Appellant relief pursuant to Tennessee Rules of Civil Procedure 6.02, 59, and 60.02.

For the following reasons, we affirm the Claims Commission’s dismissal of Appellant’s claim for failing to take action to advance his case to disposition for one year.

III. STANDARD OF REVIEW

The Tennessee Rules of Appellate Procedure govern appeals of Tennessee Claims Commission judgments. **Tenn. Code Ann. § 9-8-403(a)(1) (Supp. 2008)**. On appeal, the Claims Commission’s factual findings are presumed to be correct, and we will not overturn those factual findings unless the evidence preponderates against them. *Tenn. R. App. P. 13(d) (2008)*; *Waller v. State*, No. M2005-02056-COA-R3-CV, 2006 WL 2956515, at *4 (Tenn. Ct. App. Oct. 16, 2006).

For the evidence to preponderate against such a finding of fact, it must support another finding of fact with greater convincing effect. *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005) (citing *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999)). When the Claims Commission makes no specific findings of fact, we review the record to determine where the preponderance of the evidence lies. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997) (citing *Kemp v. Thurmond*, 521 S.W.2d 806, 808 (Tenn. 1975)). We accord great deference to the Claims Commission's determinations on matters of witness credibility and will not re-evaluate such determinations absent clear and convincing evidence to the contrary. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999) (citations omitted). We review the Claims Commission's conclusions of law under a *de novo* standard upon the record with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

A. *Dismissal Pursuant to Tennessee Code Annotated section 9-8-402(b)*

Tennessee Code Annotated 9-8-402(b) provides that “it is mandatory that any claim filed with the claims commission upon which no action is taken by the claimant to advance the case to disposition within any one-year period of time be dismissed with prejudice.” Mr. Skipper concedes that he failed to advance his claim for a period of one year. However, despite the statutory language, Mr. Skipper contends that “the Claims Commissioner had discretionary authority to . . . waive the period particularly based on the Affidavit of [Mr. Skipper's] Counsel and the reason for the delay which was undisputed.”

On appeal, Mr. Skipper maintains that “[e]quity requires a hearing on the merits in the case at hand.” He also emphasizes his cooperation with the State in this case. He maintains that he accommodated the State by allowing his client to be deposed although Mr. Burns was not available to be deposed and by rearranging his schedule so that Mr. Burns could be deposed at a later date. He also claims that he accommodated the State by “put[ting] [Mr. Skipper's] file on the back burner and wait[ing] to hear from the State as to the condition of [Mr. Burns.]” Mr. Skipper's counsel claims that he “did not try to take advantage of the State[,]” and because “it is clearly better to have you[r] witness live than to have a deposition[,]” he allowed Mr. Burns time “to recoup in order to be able to testify[.]” Mr. Skipper argues that the dismissal of his claim was “unfair,” and that he is being “punished for trying to be fair and not take advantage of the State's situation with the sick driver.”

In his affidavit, Mr. Skipper's counsel states that “I . . . left [the June 12, 2007 deposition in Mr. Burns' home] with a clear impression and I believe it was stated to me, because Mr. Burns was doing better, it was the State's desire and intention to have him testify live at trial, rather than have to use his deposition.” However, in her affidavit, the State's counsel states that

I did not make any statements to [Mr. Skipper's counsel] to the effect that I would like to try to present Dennis Burns live at trial. My understanding is that he has a grave illness, leukemia, and spent much of 2006-2007 in the hospital for that condition. I have had no contact with him since his deposition in June 2007. I had no intent to try to bring him to trial because I was afraid that he might not be able to drive the distance to trial. During the more than one year that the case sat dormant, [Mr. Skipper's counsel] made no attempt to contact me about this case.

Mr. Skipper claims his actions in allowing Mr. Burns time to recover in order to testify at trial were reasonable, because Mr. Burns' deposition would have been inadmissible at trial, as he would not have been "unavailable" as defined by Tennessee Rule of Evidence 804.¹

Finally, Mr. Skipper claims that the Claims Commission has, in the past, overlooked the time period for mandatory dismissal. Specifically, Mr. Skipper relies upon *Waller v. State*, Claim No. 20-100-619, in which he claims the Claims Commission, accepted a "reasonable explanation" for delay, and overlooked a three year period without advancing the case. Although Mr. Skipper has attached the "Order for Status," the "Status Report," and the "Order Transferring Claim to Middle Division" in the *Waller* case, we note that none of these documents bear a file stamp indicating that they were filed by, or with, the Claims Commission. Furthermore, even assuming that such documents were filed, we cannot ignore the plain language of the statute, which mandates dismissal.

Under the clear language of [Tennessee Code Annotated section 9-8-402(b)], . . . unless the claimant has secured the prior written consent of the Commission, if the claimant takes no action to advance the case during a one-year period, dismissal is mandated. . . . We must assume that the statute[] means what it says.

Grissom v. State, No. W2001-03021-COA-R3-CV, 2002 WL 31895712, at *2 (Tenn. Ct. App. Dec. 23, 2002); *see also Jones v. State*, No. M2006-02299-COA-R3-CV, 2007 WL 2198171, at *5 (Tenn. Ct. App. June 29, 2007) ("According to the plain and very specific language of [Tennessee Code Annotated section 9-8-402(b)], dismissal is mandated if no action is taken to advance a claim within any one year time period."). The record includes no indication that Mr. Skipper sought the written consent of the Claims Commission for his failure to take any action whatsoever during the year following Mr. Burns' deposition on June 12, 2007. In fact, according to the affidavit of the State's counsel, "[d]uring the more than one year that the case sat dormant, [Mr. Skipper's counsel] made no attempt to contact [the State] about th[e] case." Following the clear language of the statute, we

¹ Tennessee Rule of Civil Procedure 32.01 provides that depositions "may be used by any party for any purpose if the court finds that the witness is 'unavailable' as defined by Tennessee Rule of Evidence 804(a)." Tennessee Rule of Evidence 804(a) deems "unavailable" witnesses exempt from testifying on the ground of privilege, witnesses persistently refusing to testify, witnesses who have demonstrated a lack of memory, and witnesses who have died, have an existing physical or mental infirmity, whose attendance cannot be procured through process, or who are greater than one hundred miles from the place of the trial. Mr. Skipper does not explain why Mr. Burns would not qualify as "unavailable" due to a "physical infirmity."

affirm the Claims Commission's dismissal of Mr. Skipper's claim pursuant to Tennessee Code Annotated 9-8-402(b).

B. Denial of Relief Pursuant to Tennessee Rules of Civil Procedure 59, 60.02, and 6.02

1. Rule 59

Mr. Skipper raises as an issue on appeal whether the Claims Commission erred in denying him relief pursuant to Tennessee Rule of Civil Procedure 59. However, he provides no argument concerning the rule. Tennessee Rule of Civil Procedure 27(a) provides that an appellant's brief

shall contain . . . [a]n argument, which may be preceded by a summary of argument, setting forth the contention of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on[.]

“The failure of a party to cite to any authority or to construct an argument regarding his position on appeal constitutes waiver of that issue.” *Boggs Kurlander Steele, LLC v. Horizon Commc'ns*, No. M2006-00018-COA-R3-CV, 2008 WL 490628, at *4 (Tenn. Ct. App. Feb. 21, 2008) (citing *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 402 (Tenn. Ct. App. 2006); *see also Rector v. Halliburton*, No. M1999-02802-COA-R3-CV, 2003 WL 535924, at *9 (Tenn. Ct. App. Feb. 26, 2003) (per curiam); *Rhea County v. Town of Graysville*, No. E2001-02313-COA-R3-CV, 2002 WL 1723681, at *7 (Tenn. Ct. App. July 25, 2002)). Because Mr. Skipper has failed to provide the “argument” and “citation to the authorities” required by Tennessee Rule of Appellate Procedure 27(a), we find that Mr. Skipper has waived his right to have the issue considered by this Court.

2. Rule 60.02

Next, Mr. Skipper contends that the trial court erred in refusing to grant him relief from the order of dismissal under Tennessee Rule of Civil Procedure 60.02(1).² The Rule states:

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; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or

² Mr. Skipper cites Tennessee Rule of Civil Procedure 60.02 generally; however, because he states that his failure to advance his claim for a period of one year was due to “excusable neglect,” we consider his argument under Tennessee Rule of Civil Procedure 60.02(1).

other misconduct of an adverse party; (3) the judgment is void; (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. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken.

Tenn. R. Civ. P. 60.02.

Rule 60.02 is designed “to strike a proper balance between the competing principles of finality and justice[.]” *State ex rel. Hickman v. Dodd*, No. W2008-00534-COA-R3-CV, 2008 WL 4963508, at *5 (Tenn. Ct. App. Nov. 21, 2008) (quoting *Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976)), and to act as “an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules.” *Id.* (quoting *Thompson v. Fireman's Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990)). “[B]ecause of the ‘principle of finality,’ the ‘escape valve’ should not be easily opened.” *Id.* (quoting *Banks v. Dement Constr. Co.*, 817 S.W.2d 16, 18 (Tenn.1991)).

However, “[c]ourts construe requests for relief pursuant to Rule 60.02 much more liberally in cases involving default judgment than in cases following a trial on the merits.” *Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003) (citing *Tenn. Dep’t of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985); *Nelson v. Simpson*, 826 S.W.2d 483, 485 (Tenn. Ct. App. 1991)). “A dismissal for failure to prosecute is analogous to a default judgment.” *Id.* “Both dismissals and default judgments are drastic sanctions[.]” *id.* (citing *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983); *Barish v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 627 S.W.2d 953, 955 (Tenn. Ct. App. 1981)), and neither is favored by the courts. *Id.* (citing *Barbee*, 689 S.W.2d at 866; *Mfrs. Consolidation Serv., Inc. v. Rodell*, 42 S.W.3d 846, 864 (Tenn. Ct. App. 2000)). “Dismissals based on procedural grounds like failure to prosecute and default judgments run counter to the judicial system’s general objective of disposing of cases on the merits.” *Id.* (citing *Childress v. Bennett*, 816 S.W.2d 314, 316 (Tenn. 1991)). Accordingly,

A request to vacate a default judgment in accordance with Rule 60.02 should be granted if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits. A request to vacate an order of dismissal pursuant to Rule 60.02 should be granted under the same circumstances. Such liberality is especially warranted when an order of dismissal is entered with prejudice and without such procedural safeguards as notice, considering that Rule 55.01 of the Tennessee Rules of Civil Procedure requires notice to be given before a default judgment is entered.

Id. (citations omitted).

“The denial of a motion to set aside a judgment pursuant to Rule[] . . . 60.02 of the Tennessee Rules of Civil Procedure is reviewed on an abuse of discretion standard.” *Smith v. Shaw*, No. W2004-01772-COA-R3-CV, 2005 WL 1323294, at *2 (Tenn. Ct. App. June 3, 2005) (citing *Howell v. Tucker*, No. W2002-0222-COA-R3-CV, 2003 WL 22213215, at *2 (Tenn. Ct. App. Sept. 24, 2003); *Bowers v. Gutterguard of Tennessee, Inc.*, No. M2002-02877-COA-R3-CV, 2003 WL 22994302, at *2 (Tenn. Ct. App. Dec. 17, 2003)). “The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives.” *Bronson v. Umphries*, 138 S.W.3d 844, 851 (Tenn. Ct. App. 2003) (citing *State ex re. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000)). Under the abuse of discretion standard, we uphold the trial court’s ruling “so long as reasonable minds can disagree as to the propriety of the decision made.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). We do not simply substitute our judgment for that of the trial court. *Id.* (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)).

Because Mr. Skipper seeks relief from a final judgment under Rule 60.02(1), he carries the burden of proving why he was justified in failing to avoid mistake, inadvertence, surprise or excusable neglect. *Hopkins v. Hopkins*, 572 S.W.2d 639, 640 (Tenn. 1978) (citations omitted). On appeal, Mr. Skipper argues that his failure to advance his claim for more than one year was “excusable neglect” as “the delay . . . resulted strictly from [Mr. Skipper’s] consideration of the health condition of [the] State’s driver and [his] accommodation of the State allowing him to recuperate.” Mr. Skipper’s counsel further states that

[Mr. Skipper] did not delay proceeding on the case because he did not want to proceed with the case. He was under advice of counsel that they were waiting until the health of the driver enabled him to be able to come to court and testify; and if counsel made an error in understanding of the situation and relaying it to [Mr. Skipper] then certainly that error is excusable[.]

Generally, the actions taken by an attorney are attributed to his or her client under an agency theory. *World Relief Corp. of Nat’l Ass’n of Evangelicals v. Messay*, No. M2005-01533-COA-R3-CV, 2007 WL 2198199, at *5 (Tenn. Ct. App. July 26, 2007). However, this relationship does not conclusively prevent a client from showing “excusable neglect” under Tennessee Rule of Civil Procedure 60.02 based on the attorney’s negligence. *Id.* “[R]epeated statements in older Tennessee cases” insinuated that “‘mere negligence’ or ‘carelessness’ of an attorney” could not qualify as “‘excusable neglect’ sufficient to set aside a default judgment under Tenn. R. Civ. P. 60.02(1)[.]” *Id.* (citing *Food Lion, Inc. v. Washington County Beer Bd.*, 700 S.W.2d 893, 896 (Tenn. 1985)). However, Tennessee “no longer categorically excludes ‘mere negligence’ or ‘carelessness’ of an attorney from the scope of ‘excusable neglect’ under Tenn. R. Civ. P. 60.02(1) with regard to setting

aside default judgments.” *Id.* (citing *Bowers v. Gutterguard of Tenn., Inc.*, No. M2002-02877-COA-R3-CV, 2003 WL 22994302, at *4 (Tenn. Ct. App. Dec. 17, 2003); *State ex rel. Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d 556, 567 (Tenn. Ct. App. 2001); Robert M. Schoenhaus, “Excusable Neglect” *Warranting Relief from Default Judgment*, in 24 Am. Jur. Proof of Facts 2d § 705, at 719 (1980)). Thus, an attorney’s negligence may qualify as “excusable neglect,” so long as his or her conduct is not willful. *Hayes v. Hayes*, No. M2006-02356-COA-R3-CV, 2007 WL 2580026, at *2 (Tenn. Ct. App. Sept. 6, 2007) *perm. app. denied* (Tenn. Jan. 28, 2008) (citing *Henry*, 104 S.W.3d at 481)). “Wil[l]ful conduct does not include simple negligence or carelessness.” *Id.* (footnote omitted). However, “[i]t does include conduct resulting from ‘deliberate choices’ as well as conduct that is flagrant and unexplained.” *Id.* (footnote omitted).

In *Williams v. Baptist Mem’l Hosp.*, 193 S.W.3d 545, 550-51 (Tenn. 2006), the Tennessee Supreme Court “expressly adopted the following analysis for ‘excusable neglect’ under Tenn. R. Civ. P. 6.02(2) that the United States Supreme Court had set forth for analyzing claims of ‘excusable neglect’ under Fed. R. Civ. P. 6(b)(2)[.]”

A party’s failure to meet a deadline may have causes ranging from forces beyond its control to forces within its control. . . . The former will almost always substantiate a claim of excusable neglect; the latter will not. However, neglect extends to more than just acts beyond a party’s control and intentional acts. It encompasses, “simple, faultless omissions to act and, more commonly, *omissions caused by carelessness.*”

World Relief Corp., 2007 WL 2198199, at *7 (quoting *Williams*, 193 S.W.3d at 551). In *Worldwide Relief Corp. of National Association of Evangelicals v. Messay*, No. M2005-01533-COA-R3-CV, 2007 WL 2198199, at *7 (Tenn. Ct. App. July 26, 2007), the middle section of this Court extended this definition to “excusable neglect” under Tennessee Rule of Civil Procedure 60.02(1). Additionally, in *Henry*, 104 S.W.3d at 481, our Supreme Court applied to orders of dismissal the following factors to be considered in determining whether relief from a default judgment is appropriate under Rule 60.02(1): “(1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted.” *Henry*, 104 S.W.3d at 481 (citing *Barbee*, 689 S.W.2d at 866). These factors, as applied to orders of dismissal, are as follows: “(1) whether the acts giving rise to the dismissal were willful; (2) whether plaintiff has a meritorious claim; and (3) whether the defendants would be prejudiced if relief was granted.” *Chera v. IndyMac, Inc.*, No. M2007-00043-COA-R3-CV, 2008 WL 4657825, at *5 (Tenn. Ct. App. Oct. 21, 2008) *perm. app. denied* (Tenn. Apr. 27, 2009) (citing *Henry*, 104 S.W.3d at 481).

The trial court, or in the instant case, the Claims Commission, is in the best position to assess these factors and to determine whether an order of dismissal should be vacated. *Henry*, 104 S.W.3d at 482. Therefore, this determination is afforded great weight. *Id.* (citing *Barbee*, 689 S.W.2d at 867). In the instant case, the Claims Commission determined that the dismissal of Mr. Skipper’s claim should not be vacated, as it found Mr. Skipper had not demonstrated excusable neglect. In so ruling, it stated

Taken in its best light, [Mr. Skipper's] argument does not demonstrate excusable neglect concerning the failure to advance the case to disposition for more than [one] year following Mr. Burns' deposition. [Mr. Skipper] does not suggest that there was any confusion as to the fact that no action to prosecute the case was being taken or that the failure to act resulted from carelessness. Rather, [Mr. Skipper's] response suggests that the decision not to act was knowingly made based on counsel's belief that the State intended to call Mr. Burns as a witness at trial when he sufficiently recovered and would notify him when that occurred.

Applying the above factors to this case, we find that the Claims Commission did not abuse its discretion in denying Mr. Skipper relief under Rule 60.02(1). As the Claims Commission noted, Mr. Skipper does not suggest that he believed action was being taken to advance his case, nor does he suggest that his counsel was unaware of the dismissal period. Instead, he alleges that the parties agreed to essentially waive the time period, and that the State would contact him once Mr. Burns recovered. We agree with the Claims Commission that Mr. Skipper's "deliberate choice" to defer action on his claim does not constitute excusable neglect. Significantly, we note that the State's counsel, in her affidavit, denied "mak[ing] any statements to [Mr. Skipper's counsel] to the effect that [she] would like to try to present Dennis Burns live at trial" and she further contended that she "had no intent to try to bring [Mr. Burns] to trial because [she] was afraid that he might not be able to drive the distance to trial." Furthermore, although it has not been shown that the State would be prejudiced if relief was granted, it has likewise not been shown that Mr. Skipper would be victorious if allowed to proceed with his claim.

3. Rule 6.02

Finally, Mr. Skipper contends that the Claims Commission erred in refusing to grant him relief from the order of dismissal pursuant to Tennessee Rule of Civil Procedure 6.02, which provides in part:

When by statute or by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done, where the failure to act was the result of excusable neglect

Tenn. R. Civ. P. 6.02 (2008). "Rule 6.02 expressly states that the decision to grant or deny an enlargement of time due to excusable neglect is within the *discretion* of the trial court; therefore, our review of the trial court's decision is subject to the very deferential abuse of discretion standard, which does not permit this court to substitute its judgment for that of the trial court." *Maness v. Garbes*, No. M2008-00797-COA-R3-CV, 2009 WL 837707, at *3 (Tenn. Ct. App. Mar. 26, 2009) (citing *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Myint*, 970 S.W.2d at 927)).

Mr. Skipper, as the party requesting the enlargement of time, must show that his failure to act within the specified time was due to excusable neglect, and that the State has not been prejudiced. *Williams*, 193 S.W.3d at 550 (citing *Douglas v. Estate of Robertson*, 876 S.W.2d 95, 97-98 (Tenn. 1994)). As we stated above, the same meaning of “excusable neglect” applies to both Rule 6.02 and 66.02. *World Relief*, 2007 WL 2198199, at *7 (citing *Williams*, 193 S.W.3d at 545). Therefore, because Mr. Skipper failed to show “excusable neglect” pursuant to Rule 60.02, we necessarily find that he has failed to show “excusable neglect” under Rule 6.02. We find that the Claims Commission did not abuse its discretion in refusing to grant Mr. Skipper relief pursuant to Tennessee Rule of Civil Procedure 6.02.

V. CONCLUSION

For the aforementioned reasons, we affirm the decision of the Tennessee Claims Commission. Costs of this appeal are taxed to Appellant, Harry Skipper, and his surety, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.