

IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON  
June 28, 2022 Session

<p><b>FILED</b> 01/06/2023 Clerk of the Appellate Courts</p>
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**WALTER JOSHLIN, ET AL. v. HOLLIS H. HALFORD, III, M.D., ET AL.**

**Appeal from the Circuit Court for Shelby County  
No. CT-000263-13 Jerry Stokes, Judge**

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**No. W2020-01643-COA-R3-CV**

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This appeal involves a failure to timely move for substitution of parties after the death of one of the two plaintiffs. In a previous appeal, this Court directed the trial court, on remand, to determine whether the plaintiff's response to a motion to dismiss should be construed as a motion for enlargement of time pursuant to Tennessee Rule of Civil Procedure 6.02, and if so, to determine whether the plaintiff's failure to timely move for substitution of the parties pursuant to Tennessee Rule of Civil Procedure 25.01 was the result of excusable neglect. On remand, the trial court determined that the plaintiff's filing should be construed as a motion for an enlargement of time. However, the trial court also found that the plaintiff failed to timely move for substitution due to counsel's misinterpretation of the law, which, the trial court concluded, did not constitute excusable neglect. As such, the trial court granted the defendants' motion to dismiss for failure to timely substitute parties. The plaintiff appeals. We affirm and remand for further proceedings.

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

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and J. STEVEN STAFFORD, P.J., W.S., joined.

Amber Griffin Shaw and J. Houston Gordon, Covington, Tennessee, for the appellant, Vivian Joshlin.

Samantha Erin Bennett and Andrea N. Malkin, Memphis, Tennessee, for the appellee, Hollis H. Halford, III, M.D.

Bruce Anthony McMullen and Aubrey B. Gullede, Memphis, Tennessee, for the appellee, HealthSouth/Methodist Rehabilitation Hospital, LP.

Buckner Potts Wellford, Memphis, Tennessee, for the appellee, Methodist Healthcare-Memphis Hospitals.

## OPINION

### I. FACTS & PROCEDURAL HISTORY

This case began in 2013. Plaintiffs Walter Joshlin and wife, Vivian Joshlin sued three defendants -- Hollis H. Halford, III, M.D., Methodist Healthcare Memphis Hospitals, and HealthSouth/Methodist Rehabilitation Hospital, L.P. -- alleging medical malpractice related to Mr. Joshlin's care in connection with a broken hip. Mrs. Joshlin sought damages for loss of consortium.

On February 25, 2014, Mr. Joshlin died from lung cancer, which was unrelated to the alleged medical malpractice. On March 25, 2014, Plaintiffs' counsel filed a "Notice of Death" that simply stated, "Please take notice that, on February 25, 2014, Plaintiff Walter Joshlin, died in the State of Tennessee." On October 10, 2014, counsel for Dr. Halford sent a letter to Plaintiff's counsel stating, "Where are we and where are we going? Mr. Joshlin died several months ago which means we need a Suggestion of Death *and new plaintiff.*" (emphasis added). In response, Plaintiff's counsel sent a letter attaching the Notice of Death she had previously filed. However, she did not file any motion for substitution of parties or address the need for one in her letter.

Eight months after this exchange, in June 2015, Dr. Halford filed a motion to dismiss pursuant to Tennessee Rule of Civil Procedure 25.01(1), which states:

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process. *Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.*

(emphasis added). Dr. Halford noted that Plaintiffs' counsel had filed a Notice of Death fifteen months earlier, in March 2014, and that no motion for substitution had been filed since. As such, Dr. Halford moved for dismissal with prejudice pursuant to Rule 25.01(1).

Three days later, on June 29, 2015, Plaintiffs' counsel filed a "Motion for Substitution/Motion to Amend." The motion stated that Mr. Joshlin had died on February 25, 2014, and that his wife Vivian and son Jimmy Joshlin had been appointed as co-

executors of the Estate of Walter Joshlin on May 7, 2014. The motion stated that Mr. Joshlin's cause of action did not abate at his death and could be revived by his personal representatives and/or heirs pursuant to Tennessee Code Annotated section 20-5-101, -102, and -104.<sup>1</sup> However, it conceded, "Revivor requires an order of substitution." Thus, the motion to substitute requested substitution of the co-executors pursuant to Rule 25.01, specifically tracking the language of Rule 25.01(1). The proposed amended complaint that was attached to the motion listed the proposed plaintiffs as: "Jimmy Joshlin and Vivian Joshlin, as personal representatives of Decedent, Walter Joshlin, and wife, Vivian Joshlin."

Dr. Halford filed a memorandum in opposition to Plaintiffs' motion to substitute and amend. Noting that Plaintiffs' motion for substitution was filed over a year after the ninety-day window set forth in Rule 25.01 expired, and only after the filing of a motion to dismiss, Dr. Halford asserted that the motion for substitution was untimely and should be denied. Defendant HealthSouth filed a memorandum joining in Dr. Halford's motion to dismiss for failure to comply with Rule 25.01, and it also filed a response in opposition to Plaintiffs' motion to substitute. HealthSouth noted that Plaintiffs had not filed a motion for an enlargement of time under Tennessee Rule of Civil Procedure 6.02, which provides, in part, "[w]hen by statute or by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may . . . 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[.]" Even if such a motion had been filed, HealthSouth suggested that Plaintiffs' failure to move for substitution within the ninety-day period was not the result of excusable neglect. HealthSouth noted that Plaintiffs did not provide "any excuse whatsoever to justify the delay." In the absence of excusable neglect, "or even any request by Plaintiff to seek relief for an enlargement of time to substitute," HealthSouth insisted that dismissal with prejudice was required. Defendant

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<sup>1</sup> Those statutes provide:

**§ 20-5-101. Survival of actions; no abatement**

Actions do not abate by the death or other disability of either party, or by the transfer of any interest in the action, if the cause of action survives or continues.

**§ 20-5-102. Survival of actions; death of party**

No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived; nor shall any right of action arising hereafter based on the wrongful act or omission of another, except actions for wrongs affecting the character, be abated by the death of the party wronged; but the right of action shall pass in like manner as the right of action described in § 20-5-106.

**§ 20-5-104. Revival; heirs**

If no person will administer on the estate of a deceased plaintiff or defendant, the suit may be revived by or against the heirs of the decedent.

Methodist also joined in the motions to dismiss and the opposition to the motion to substitute.

In November 2015, Plaintiffs filed a response in opposition to the defendants' motions to dismiss. In that response, Plaintiffs claimed that they had filed their motion to substitute "out of an abundance of caution . . . in an attempt to appease the Defendants." However, Plaintiffs pointed out that Mrs. Joshlin was "already a Plaintiff in this matter," due to her claim for loss of consortium. Thus, Plaintiffs suggested that the applicable rules did not require her to be substituted because she was Mr. Joshlin's surviving spouse and also a "surviving plaintiff." As authority for this position, Plaintiffs relied on Tennessee Code Annotated section 20-5-106(a) and Tennessee Rule of Civil Procedure 25.01(2). Tennessee Code Annotated section 20-5-106(a) provides:

**§ 20-5-106. Wrongful death; beneficiaries**

(a) The right of action that a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer, in case death had not ensued, shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse and, in case there is no surviving spouse, to the person's children or next of kin; to the person's personal representative, for the benefit of the person's surviving spouse or next of kin; to the person's natural parents or parent or next of kin if at the time of death decedent was in the custody of the natural parents or parent and had not been legally surrendered or abandoned by them pursuant to any court order removing such person from the custody of such parents or parent; or otherwise to the person's legally adoptive parents or parent, or to the administrator for the use and benefit of the adoptive parents or parent; the funds recovered in either case to be free from the claims of creditors.

Tennessee Rule of Civil Procedure 25.01(2) provides:

In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

Construing these two rules together, Plaintiffs suggested that Mr. Joshlin's right of action "automatically passed" to Mrs. Joshlin as his surviving spouse under section 20-5-106(a), and because she was already a named plaintiff, she was a "surviving plaintiff" within the meaning of Rule 25.01(2) such that substitution of parties was not necessary. Plaintiffs contended that Mrs. Joshlin could simply suggest the death upon the record and "proceed"

in the action pursuant to Rule 25.01(2). Thus, Plaintiffs reasoned that there was “no neglect” or error on their part, despite the suggestions by the defendants. Even if Rule 25.01(1) did apply, however, Plaintiffs contended that the defendants were unable to show any harm or prejudice that had occurred due to their failure to timely move for substitution. They also claimed that there was “no inexcusable delay” directly attributable to their failure to timely move for substitution. Plaintiffs claimed that their “good faith” application of Rule 25.01(2) was “excusable” and there was “no inexcusable neglect.” In sum, Plaintiffs argued that dismissal with prejudice was not required.

Dr. Halford filed a supplemental response, pointing out that Plaintiffs had initially acknowledged in their own motion for substitution that “[r]evivor requires an order of substitution,” tracking the language of Rule 25.01(1) with no mention of Rule 25.01(2). Dr. Halford also filed a reply in support of his motion to dismiss, noting that his counsel had mailed a letter to Plaintiffs in October 2014 regarding the need for “a new plaintiff.” Yet, as Dr. Halford pointed out, Plaintiffs did not file a motion for substitution until June 2015, well over a year after the death of Mr. Joshlin, and only after Dr. Halford filed his motion to dismiss. Dr. Halford further noted that, even then, Plaintiffs filed their motion for substitution without filing a motion for an enlargement of time pursuant to Rule 6.02. He disputed the notion that Rule 25.01(2) or Tennessee Code Annotated section 20-5-106 applied. Dr. Halford noted that this was not a wrongful death action because there was no allegation, even in the proposed amended complaint, that the defendants caused or contributed to the death of Mr. Joshlin. Thus, he explained, Mr. Joshlin’s claim was one for personal injuries, and Mrs. Joshlin’s claim was for loss of consortium. As such, he argued, the wrongful death statutes, including Tennessee Code Annotated section 20-5-106, did not apply. Instead, Dr. Halford explained, the procedure was governed by Rule 25.01(1) and Tennessee Code Annotated sections 20-5-101, -102, and -104, as explained by this Court in *Timmins v. Lindsey*, 310 S.W.3d 834 (Tenn. Ct. App. 2009). According to Dr. Halford, Mr. Joshlin’s medical malpractice claim did not “automatically” pass to his wife, and a motion for substitution was required in order to substitute the co-executors of his estate. Additionally, Dr. Halford suggested that Plaintiffs were attempting to rely on the “excusable neglect loophole” in Rule 6.02 even though they had not demonstrated any excusable neglect under Tennessee law. Therefore, he maintained that dismissal was appropriate. The other defendants joined in the reply filed by Dr. Halford.

After a hearing, the trial court entered an order denying the defendants’ joint motion to dismiss on July 25, 2016. The trial court found that pursuant to Tennessee Code Annotated section 20-5-106, Mr. Joshlin’s cause of action “passed” to Mrs. Joshlin as his surviving spouse, and she was already a party plaintiff. As a result, the trial court found no need for her to come into the case as an executrix of the estate. The trial court found that Rule 25.01(2) was thus controlling, and the action could proceed in favor of the surviving “party plaintiff.”

After the denial of their motion to dismiss, the defendants requested permission to

seek an interlocutory appeal to this Court. At a hearing on December 8, 2017, the trial judge acknowledged that he had not initially realized that Mr. Joshlin died of a condition that was not related to the alleged malpractice in this case. He acknowledged that this fact “might make a difference” in the analysis and that the court’s ruling “could well be erroneous.” The trial court entered an order on December 19, 2018, granting Plaintiffs permission to seek an interlocutory appeal to this Court, stating that the appellate court needed to address whether Mr. Joshlin’s personal injury cause of action automatically passed to his surviving spouse without the need for substitution of parties.<sup>2</sup> Thereafter, this Court granted Plaintiffs’ application for an interlocutory appeal and framed the issue as whether the trial court erred in denying the defendants’ joint motion to dismiss by holding that Mr. Joshlin’s claims passed automatically to his surviving spouse without the need to substitute parties pursuant to Tennessee Code Annotated section 20-5-106 and Tennessee Rule of Civil Procedure 25.01(2).

On November 6, 2019, this Court issued an opinion reversing the decision of the trial court. See *Joshlin v. Halford*, No. W2018-02290-COA-R9-CV, 2019 WL 5783482 (Tenn. Ct. App. Nov. 6, 2019) (“*Joshlin I*”). We explained that the issues on appeal were largely addressed by this Court’s decision in *Timmins v. Lindsey*, 310 S.W.3d 834 (Tenn. Ct. App. 2009). *Id.* at \*3. *Timmins* had explained that the general “survival statutes” are codified at Tennessee Code Annotated sections 20-5-101--105 and 114--120; while the wrongful death survival statutes are codified at sections 20-5-106--113. *Id.* (citing *Timmins*, 310 S.W.3d at 840 n.2). *Timmins* had also explained that “in order for the wrongful death statutes to apply, the victim must have died as a result of his or her injuries.” *Id.* (quoting *Timmins*, 310 S.W.3d at 840-41). Following the rationale in *Timmins*, we explained in *Joshlin I* that the trial court erred in relying on the wrongful death statutes, and specifically section 20-5-106, in finding that Mr. Joshlin’s cause of action automatically passed to Mrs. Joshlin as surviving spouse. *Id.* at \*4. We explained that Mr. Joshlin’s lawsuit was pending at the time he died from *unrelated* causes, and therefore, the first part of section 20-5-102 applied, and the action was eligible to be revived. *Id.* at \*5; see Tenn. Code Ann. § 20-5-102 (“No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived[.]”). Section 20-5-104 then provided the proper means of revival. *Id.* It stated, “[i]f no person will administer on the estate of a deceased plaintiff or defendant, the suit may be revived by or against the heirs of the decedent.” *Id.* (quoting Tenn. Code Ann. § 20-5-104). Because an estate *had* been opened for Mr. Joshlin, the co-executors of his estate were the appropriate parties to revive his medical malpractice action. *Id.* (citing *Timmins*, 310 S.W.3d at 840). However, Tennessee Rule of Civil Procedure 25.01 provided “the method in which revival must occur.” *Id.* at \*6. Meaning, unless a motion for substitution was filed not later than ninety

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<sup>2</sup> It is not clear from the record why there was a one-year delay between the motion for permission to seek an interlocutory appeal and the trial court’s hearing on the matter, followed by another one-year delay between the hearing and the trial court’s order granting the motion for interlocutory appeal.

days after the death was suggested on the record, the action was to be dismissed. *Id.* “Mrs. Joshlin could not automatically pursue Mr. Joshlin’s rights and remedies based solely on the fact that she was also a named plaintiff with a separate claim pending in her individual capacity.” *Id.*

We also explained that Plaintiffs’ reliance on Rule 25.01(2) was misplaced. *Id.* To begin with, Mr. Joshlin’s malpractice claim did not “survive” to Mrs. Joshlin individually, as she claimed. *Id.* And in any event, we explained that other courts had rejected similar arguments under Federal Rule of Civil Procedure 25(a)(2) as being based on a misinterpretation of the Rule. *Id.* at \*7. The federal rule provides:

**(2) Continuation Among the Remaining Parties.** After a party’s death, if the right sought to be enforced survives only to or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.

Fed. R. Civ. P. 25(a)(2). A federal district court in Tennessee had considered Rule 25(a)(2) in the context of a case involving husband and wife co-plaintiffs, where the husband died during the litigation and the wife operated under the assumption that Rule 25(a)(2) allowed her to automatically proceed on behalf of her deceased husband without a motion for substitution. *Joshlin*, 2019 WL 5783482, at \*7. (citing quoting *Wentz v. Best Western International, Inc.*, No. 3:05-CV-368, 2007 WL 869620, at \*1-2 (E.D. Tenn. Mar. 20, 2007)). We quoted the following explanation from *Wentz*:

[P]laintiff misinterpreted Federal Rule of Civil Procedure 25(a)(2) in believing that the rule resulted in Mr. Wentz’s causes of action immediately accruing to her. Instead, Rule 25(a)(2) applies in situations where “one of several plaintiffs or one of several defendants dies” and results in the action not abating “with regards to the other parties even if it does abate with regards to the party who has died.” Wright, Miller & Kane, *Federal Practice And Procedure: Civil 2D* § 1954. Here, this would mean that any claims plaintiff herself is asserting are not *ipso facto* terminated on account of Mr. Wentz’s death. It does not, however, mean that plaintiff automatically becomes the representative of Mr. Wentz for the purposes of continuing to assert *his claims* without filing the requisite motion for substitution.

*Id.* at \*7 (quoting *Wentz*, 2007 WL 869620, at \*1) (emphasis added).<sup>3</sup>

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<sup>3</sup> According to Wright and Miller, “If one of several plaintiffs or one of several defendants dies, the action does not abate *with regard to the other parties* even if it does abate with regard to the party who has died. Rule 25(a)(2) speaks to this situation. It provides that the death should be noted on the record and the action will proceed in favor of or against the remaining parties.” *7C Fed. Prac. & Proc. Civ.* § 1954 (3d ed.). See also *Hill v. Jackson*, 669 So. 2d 921, 924 (Ala. Civ. App. 1995) (“[Alabama Rule of Civil Procedure] 25(a)(2) [] provides that, when there are multiple plaintiffs or defendants and the right sought

In summary, we held in *Joshlin I* that the trial court erred in relying on Rule 25.01(2) and Tennessee Code Annotated section 20-5-106. *Id.* at \*8. In closing, we noted Plaintiffs' alternative argument regarding whether their failure to timely move for substitution was due to excusable neglect. *Id.* Even though Plaintiffs had not filed a formal motion for an enlargement of time citing Rule 6.02, we recognized that in some cases, this Court had applied the Rule's excusable neglect standard even in the absence of a formal motion. *Id.* (citing *Maness v. Garbes*, No. M2008-00797-COA-R3-CV, 2009 WL 837707, at \*3 (Tenn. Ct. App. Mar. 26, 2009); *Kenyon v. Handal*, 122 S.W.3d 743, 755-56 (Tenn. Ct. App. 2003)). However, given the limited issue designated for review in the context of the interlocutory appeal, we remanded for the trial court to determine whether Plaintiffs' response to the motion to dismiss should be construed as a motion for enlargement of time, and if so, whether Plaintiffs' failure to act within the prescribed ninety-day period was the result of excusable neglect. *Id.*

On remand, the original trial judge recused himself, and the case was assigned to another judge. The parties then briefed the issues to be addressed on remand. Plaintiffs argued that their response to the motion to dismiss should be construed as a motion for enlargement of time under Rule 6.02. Additionally, they argued that their "good faith misinterpretation" of Rule 25.01 supported a finding of excusable neglect, such that their late-filed motion for substitution should be permitted. Addressing the factors relevant to an analysis of excusable neglect, Plaintiffs argued that there was no delay caused by their failure to substitute, there was no prejudice to the defendants, there was no bad faith involved, and the reason for the mistake should be excusable. They argued that their misplaced reliance on Rule 25.01(2) was not within their "reasonable control." They also argued that "confusion surrounding Rule 25.01" was not limited solely to this case but extended to other attorneys. As support for this assertion, Plaintiffs filed two declarations from other attorneys who were not involved in this case. Both attorneys stated that they had reviewed Rule 25.01 and the opinion of this Court in *Joshlin I* and come to the conclusion that a good faith basis exists "for excusable neglect on the part of the Plaintiffs." The attorneys stated that there was "clearly a good faith misinterpretation" of Rule 25.01 and that the purposes of the Rules of Civil Procedure would be advanced by allowing this case to proceed on its merits. Both summarily stated that the defendants were not prejudiced because "notice of the case and the elements and substance were known by all parties well before the Defendants filed their motion to dismiss." One of the attorneys

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to be enforced survives only as to the surviving parties, the action does not abate, but, instead, proceeds as to the surviving parties. Therefore, even if no party was substituted for [co-plaintiff] Mary Jackson, [her husband and co-plaintiff] Larry Jackson's claim would still continue."); *Wallingford v. Kennedy*, 753 A.2d 493, 493 n.1 (Me. 2000) ("This case was initially brought by Ivan and Dorothy Wallingford, however, Ivan Wallingford has since passed away. Because Ivan and Dorothy Wallingford held title as joint tenants, and Mr. Wallingford's death has been suggested upon the record pursuant to M. R. Civ. P. 25(a)(2), the case proceeds in Dorothy Wallingford's name alone."); *Loven v. Davis*, 783 S.W.2d 152, 154 (Mo. Ct. App. 1990) (citing Missouri's similar Rule and concluding that the death of a husband co-defendant "did not affect the continuation of the action against [his wife]").



included an additional paragraph stating that he likely would have applied Rule 25.01(2) in the same or a similar fashion as Plaintiffs' counsel.

Dr. Halford filed a motion to strike the declarations of the two attorneys on the basis that they had no involvement in this case and were essentially offering an expert opinion on an issue of law. Dr. Halford noted that the attorneys discussed the factors relevant to the analysis for excusable neglect and further opined as to the ultimate issue based on their understanding of the law. The other defendants joined in Dr. Halford's motion to strike. Plaintiffs filed a response, maintaining that the declarations were appropriately submitted. They claimed that the declarations permissibly set forth "facts underlying the actions" of Plaintiffs' counsel in their interpretation of Rule 25.01, in order to show a good faith misinterpretation that would "likely happen . . . with other attorneys."

Dr. Halford also filed a brief as to the issues remaining on remand. He first argued that Plaintiffs' response to the motion to dismiss should not be construed as a motion for enlargement of time because it did not request permission to file a motion for substitution and instead insisted that one was not necessary. As for the second issue, Dr. Halford argued that misinterpretation of the law cannot qualify as excusable neglect. Thus, he argued that Plaintiffs' proffered reason for their mistake was simply not excusable. However, he alternatively argued that even if one were to apply the full four-factor test applicable to claims of excusable neglect, the balance of all the factors still did not warrant a finding of excusable neglect here. Although he did not assert bad faith, he suggested that Plaintiffs' mistake had caused a lengthy delay resulting in the claims being essentially suspended for over a year with no party in place to litigate and that this had resulted in prejudice to the defendants for several reasons. The other defendants also joined in this brief.

After a hearing, the trial court entered an order granting the defendants' motion to strike the declarations of the two attorneys who were not involved in this case. The trial court explained that the issue before it was one of law and was within the province of the court; therefore, a declaration from an attorney who was not involved but attempted to address the issue of excusable neglect was improper. However, the court allowed Plaintiffs an opportunity to submit affidavits of their own attorneys setting forth facts that explained their misinterpretation of Rule 25.01.

In accordance with this order, Plaintiffs filed declarations of Amber Shaw and J. Houston Gordon. Ms. Shaw stated that Mr. Joshlin passed away while this case was pending, due to causes unrelated to the claims in this case. She stated that his widow, Mrs. Joshlin, was already a named plaintiff and was ultimately appointed as the co-executor of his estate. Ms. Shaw stated that "[w]e researched, prior to filing the notice of death, what statutes applied," and concluded that Mr. Joshlin's claim "survived" by looking at Tennessee Code Annotated section 20-5-101. She said that she determined "who Mr. Joshlin's cause of action survived to" by researching sections 20-5-102 and 20-5-106. Ms. Shaw said that the claim "appeared to survive to" Mrs. Joshlin, and she was already a

named plaintiff. Based on this research, Ms. Shaw said she believed that Rule 25.01(2) was the controlling rule and that a motion for substitution was not necessary. Mr. Gordon's declaration similarly described their research and conclusions regarding Tennessee Code Annotated sections 20-5-101, -102, and -106. He said it "seemed straightforward to us." According to Mr. Gordon, the claim "appeared to survive to Mrs. Joshlin," and she was already a plaintiff, so he reasoned that "[her] own claims as well as those of her deceased husband" could proceed under Rule 25.01(2). He said they believed in good faith that Rule 25.01(2) controlled and that a motion to substitute was not necessary.

On November 16, 2020, the trial court entered an order granting the motions to dismiss filed by the defendants. Recounting the procedural history, the trial court found that the Notice of Death started the ninety-day window for filing a motion for substitution. The court found that the motion for substitution filed a year later was "willfully late and filed only after Dr. Halford filed his motion to dismiss." The trial court noted that Plaintiffs later filed a response to the motion to dismiss that mentioned a "good faith interpretation" of Rule 25.01 that was "excusable" under the circumstances. However, the court noted that the response did not expressly seek an enlargement of time under Rule 6.02. Examining caselaw on the issue, the trial court stated that some cases had allowed for consideration of Rule 6.02 relief even when no formal motion for an enlargement had been filed. As such, considering all of Plaintiffs' actions and arguments, the trial court concluded that Plaintiffs sufficiently sought Rule 6.02 relief as an alternative to their position that substitution of parties was not required.

Moving then to the second issue, the trial court addressed whether Plaintiffs' failure to timely move for substitution was the result of excusable neglect. The trial court found that Plaintiffs "mistakenly" relied on Rule 25.01(2) instead of (1), and as a result of this misinterpretation of the law, they failed to timely move for substitution. The trial court acknowledged that caselaw examining the concept of excusable neglect under Rule 6.02 pointed to a "big picture approach" with four factors for consideration, and the court listed those factors. However, the court also noted that the reason why the filing was late is probably the most important factor in the analysis. The court reiterated that Plaintiffs' reason was misapprehension of the law. The trial court found numerous cases holding that misinterpretation of the law was not excusable neglect. It also found *Wentz*, the aforementioned case from the federal district court, persuasive in its discussion of excusable neglect in the context of the parties' similar misinterpretation of the federal rule on similar facts. Moreover, the trial court noted that Plaintiffs had not cited any cases supporting their position that misinterpretation of the law could be deemed excusable neglect. For all of these reasons, the court concluded that Plaintiffs' misinterpretation of Rule 25.01 did not constitute excusable neglect. In the absence of excusable neglect, the trial court applied Rule 25.01(1) and found that dismissal was appropriate where the motion for substitution was not filed within ninety days of the notice of death. The trial court further found that Mrs. Joshlin's claim for loss of consortium could not stand alone and must likewise be dismissed. Plaintiffs timely filed a notice of appeal.

## II. ISSUES PRESENTED

Plaintiffs present the following issues for review, which we quote directly from their brief:

1. As may be necessary to preserve all issues, the Plaintiffs reiterate their initial interlocutory argument, specifically that Tenn. R. Civ. P. 25.01(2) was the correct standard by which Plaintiffs should have acted;
2. Alternatively, should the appellate Court find consistent with its earlier opinion as to Tenn. R. Civ. P. 25.01(2), then upon remand and briefing, the trial court erred in striking the declarations of John Day and Les Jones on September 3, 2020 filed in support of the Plaintiff's brief on remand as to the issue of excusable neglect in support of the mixed question of law and fact, and it incorrectly analyzed excusable neglect only as a matter of law;
3. The trial court erred in its analysis when it failed to analyze all four relevant circumstances of excusable neglect analysis, only listing one relevant circumstance, the reason why the filing was late, and analyzed excusable neglect using one relevant circumstance, solely as a matter of law.
4. In the alternative, the application of Tenn. R. Civ. P. 25.01(2) in the case *sub judice* is an unnecessarily harsh result that punishes the Plaintiff in violation of Tenn. R. Civ. P. Rule 1.

In their postures as appellees, the defendants present the following issues in their brief:

1. Whether this Court should reconsider its decision in the first appeal of this case holding that the trial court erred in denying the Defendants' motion to dismiss on the basis that a motion for substitution of parties was not required to be filed by the Plaintiffs pursuant to Rule 25.01(2) of the Tennessee Rules of Civil Procedure.
2. Whether the trial court abused its discretion when it held that the Plaintiffs' Response in Opposition to the Defendants' Motion to Dismiss should be construed as a motion for enlargement of time under Tennessee Rule of Civil Procedure 6.02 to file a motion to substitute parties.
3. Whether the trial court properly exercised its discretion when it held that the Plaintiffs' failure to timely move to substitute parties pursuant to Tennessee Rule of Civil Procedure 25.01(1) was not the result of excusable neglect where the Plaintiffs' only reason for failing to timely move to substitute parties was misinterpretation and application of Rule 25.01(2) of the Tennessee Rules of Civil Procedure.
4. Whether the trial court properly exercised its discretion when it struck the declarations of two attorneys submitted by the Plaintiffs on the issue of

excusable neglect.

For the following reasons, we affirm the decision of the circuit court and remand for further proceedings.

### III. DISCUSSION

We begin with Plaintiffs' first issue regarding whether Rule 25.01(2) "was the correct standard by which Plaintiffs should have acted." Plaintiffs repeat their same argument from *Joshlin I* that Mr. Joshlin's medical malpractice claim "automatically passed to his surviving spouse" upon his death pursuant to Tennessee Code Annotated section 20-5-106, and pursuant to Rule 25.01(2), she was a "surviving plaintiff" and the case could proceed. Thus, Plaintiffs argue that the trial court's initial decision, prior to the interlocutory appeal, was correct. The defendants, in response, argue that this Court's decision in *Joshlin I* was correct and that it also constitutes the law of the case and should not be revisited in this appeal.

"[W]hen an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand." *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). Thus, "under the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal." *Id.* Simply put, "a court will generally refuse to reconsider an issue that has already been decided by the same court in the same case." *In re Neveah W.*, 525 S.W.3d 223, 236 (Tenn. Ct. App. 2017). There are limited circumstances when redetermination of a previously decided issue may be justified, *see id.*, but Plaintiffs do not argue that any of those exceptions exist here. As such, we decline to reconsider the issues already decided by this Court in *Joshlin I*.

We now address the trial court's rulings on remand. The Tennessee Supreme Court discussed the interplay between Rule 25.01 and Rule 6.02 in *Douglas v. Estate of Robertson*, 876 S.W.2d 95 (Tenn. 1994), so we will begin with an examination of the Court's decision in that case. *Douglas* was a tort action for damages resulting from an automobile accident. *Id.* at 96. While the case was pending, the defendant died, and his attorney filed a suggestion of death. *Id.* However, no one filed a motion to substitute the defendant's estate within ninety days of the suggestion of death pursuant to Rule 25.01. *Id.* After the defendant moved to dismiss, the plaintiffs filed a motion to enlarge time and to substitute parties. *Id.* The trial court denied the motion to dismiss and granted the plaintiffs' motion to enlarge time and substitute the estate. *Id.* The Court of Appeals reversed. *Id.* On appeal to the Tennessee Supreme Court, it explained that Rule 25.01 "sets forth the procedure for the substitution of parties upon a suggestion of death" and

“clearly directs the dismissal of an action if no motion for substitution of parties is made within 90 days after suggestion of death upon the record.” *Id.* at 96-97. However, the Court noted that Rule 6.02 “grants the trial judge broad discretion to enlarge many of the procedural time limitations prescribed by the Rules of Civil Procedure.” *Id.* at 97. Thus, the Court explained that “in instances of excusable neglect *and*, where the opposing party has not been prejudiced by the delay, Rule 25.01 [] should be construed in conjunction with Rule 6.02(2) to allow substitution of parties after the directed 90 days[.]” *Id.* It was the plaintiff’s burden “to show that the failure to take timely action [was] the result of excusable neglect and that no prejudice or harm ha[d] resulted from the procedural delay.” *Id.* However, the trial court was “afforded broad judicial discretion in procedural matters in order to expedite litigation and to preserve fundamental rights of the parties.” *Id.* Therefore, on appeal, it was the defendant’s burden to show an abuse of discretion on the part of the trial judge, and the appellate court was not to reverse the trial court’s discretionary decision unless it affirmatively appeared that such discretion had been explicitly abused to cause great injustice and injury to the party complaining. *Id.* Considering the “wide latitude” the trial judge had under Rule 6.02, the Supreme Court held that the trial court’s grant of the plaintiffs’ motion for an extension of time to substitute parties was a valid exercise of judicial discretion. *Id.* at 98. Accordingly, the Court reversed the Court of Appeals and reinstated the judgment of the trial court. *Id.*

The Supreme Court considered Rule 6.02 again in *Williams v. Baptist Memorial Hospital*, 193 S.W.3d 545 (Tenn. 2006). Citing *Douglas*, the Court explained that “[w]here an enlargement of time is requested after the original time has elapsed, Rule 6.02(2) requires the party requesting the enlargement to show that its failure was due to excusable neglect and that the opposing party has not been prejudiced.” *Id.* at 550 (citing *Douglas*, 876 S.W.2d at 97-98.) The Court quoted “the most authoritative explanation of excusable neglect,” originally derived from *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388 (1993), which stated:

[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.”

*Id.* at 550-51 (quoting *State ex rel Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d 557, 567 (Tenn. Ct. App. 2001)). In order to determine whether neglect of a deadline is excusable, the Court adopted the United States Supreme Court’s “comprehensive framework,” requiring courts to consider:

(1) the risk of prejudice to parties opposing the late filing, (2) the delay and its potential impact on proceedings, (3) the reasons why the filings were late

and whether the reasons were within the filer's reasonable control, and (4) the good or bad faith of the filer.

*Id.* at 551 (citing *Pioneer*, 507 U.S. at 395). However, the Court reiterated that “whether to grant an enlargement of time is left to the discretion of the trial court,” and “[t]he abuse of discretion standard does not permit an appellate court to substitute its judgment for that of the trial court.” *Id.* Applying the *Williams* factors to the facts of the case before it, the Court concluded that “the trial court did not abuse its discretion in denying the plaintiffs’ motion for an enlargement of time under Rule 6.02 after finding that there was no excusable neglect.” *Id.* at 552. The trial court had held an extensive hearing and considered the relevant factors. *Id.*

This Court applied these principles in a case strikingly similar to the one before us, in many respects, in *Cunningham v. Fresenius Medical Care, Inc.*, No. M2021-01087-COA-R3-CV, 2022 WL 2236312 (Tenn. Ct. App. June 22, 2022). *Cunningham* was a negligence action in which the plaintiff died while the litigation was pending, from causes unrelated to the alleged negligence. *Id.* at \*1. The plaintiff’s counsel filed a suggestion of death, but no motion for substitution of the plaintiff was filed within ninety days of the suggestion of death as required by Rule 25.01. *Id.* One hour after the defendant filed a motion to dismiss, the plaintiff’s counsel filed a motion for an enlargement of time pursuant to Rule 6.02. *Id.* In the motion, counsel alleged that a petition to probate the estate of the decedent had been filed, but the earliest hearing date available was the following month. *Id.* Counsel for the plaintiff filed an affidavit explaining that he was initially unable to find the decedent’s heirs and that once he filed the petition to open the estate, the first available hearing date was beyond the ninety-day period for substitution. *Id.* Plaintiff’s counsel believed that he “could not have properly substituted parties until an estate was open.” *Id.* at \*2. Nevertheless, the trial court found no excusable neglect warranting an enlargement of the ninety-day period and dismissed the action pursuant to Rule 25.01. *Id.* at \*1-2. It noted that the plaintiff’s counsel failed to establish when he learned that the hearing would be held after the ninety-day deadline and failed to explain why a motion for enlargement of time was not filed until after the ninety-day window expired. *Id.* at \*4.

On appeal, this Court affirmed. *Id.* at \*1. At the outset, we noted the rules set forth by the Tennessee Supreme Court in *Douglas* and *Williams* and explained that a finding as to whether neglect is excusable is ultimately an equitable determination taking into account all relevant circumstances surrounding the party’s omission. *Id.* at \*2-3. A trial court’s decision to grant or deny an enlargement of time pursuant to Rule 6.02 is reviewed for abuse of discretion. *Id.* at \*3. In *Cunningham*, the trial court “did not identify or discuss all four excusable neglect factors set forth in *Williams*.” *Id.* at \*4. However, we cited another case in which this Court, under similar circumstances, had undertaken “an independent review of the four factors.” *Id.* (citing *Valentine v. Holt*, No. E2019-00186-COA-R3-CV, 2020 WL 373338, at \*3 (Tenn. Ct. App. Jan. 22, 2020)). We followed the same approach. *Id.*

Regarding “the first, second, and fourth factors,” we summarily found “no evidence in the record that the Defendant would be prejudiced by the delay, that the delay would have a significant impact on [the] proceedings, or that Plaintiff was acting in bad faith.” *Id.* However, “[t]he third factor—the reasons why the filings were late and whether the reasons were within the filer’s reasonable control—appear[ed] to primarily be in play (as it usually is)[.]” *Id.* In fact, we noted,

This Court has previously held that “the party’s reason for failing to meet the deadline may be the single most important of the four factors and that the trial court should examine the proffered reason to determine ‘(1) whether the circumstances involved were under a party’s own control . . . and (2) whether the party was paying appropriate attention to the matter in light of the surrounding circumstances.’” *Kenyon v. Handal*, 122 S.W.3d 743, 756-57 (Tenn. Ct. App. 2003) (quoting *Sizemore*, 56 S.W.3d at 569-70). Courts have described granting relief from filing deadlines under Rule 6.02 as “repair work when lawyers have good reasons.” *Kenyon* [ ], 122 S.W.3d at 757 (citing *Day v. Northern Ind. Pub. Serv. Corp.*, 164 F.3d 382, 384 (7th Cir. 1999)).

*Id.* (quoting *Dubis v. Loyd*, 540 S.W.3d 4, 13 (Tenn. Ct. App. 2016)). Examining the reason proffered by the plaintiff’s counsel, we found no explanation for why counsel failed to notify the trial court of the difficulties he was having in contacting the heirs or of the backlog in probate court once he became aware of those facts within the ninety-day period. *Id.* Although the backlog was not within counsel’s control, his failure to file a motion for enlargement of time was. *Id.* Had he filed a motion for enlargement within the ninety-day substitution period, no showing of excusable neglect would have been required under Rule 6.02, but because he filed the motion after the expiration of the ninety-day period, he was required to demonstrate excusable neglect. *Id.* We noted that “‘courts have been reluctant to find excusable neglect in circumstances where called-for action was under the control of the party seeking relief and that party failed to act reasonably to make sure that the act was performed.’” *Id.* at \*5 (quoting *Sizemore*, 56 S.W.3d at 570). We acknowledged that counsel believed that an estate had to be opened and a personal representative had to be appointed before a motion could be filed on the personal representative’s behalf seeking substitution. *Id.* Counsel took the position that he “did not have a party with standing” to file a motion for substitution prior to the expiration of the ninety-day period. *Id.* However, this Court stated that “[t]his position is based on a mistaken view of what Rule 25.01 requires.” *Id.* Rule 25.01 provided that a motion for substitution could be filed by “any party or by the successors or representatives of the deceased party,” and therefore, we did not read into Rule 25.01 “a requirement that an estate has to be opened in order to make the motion.” *Id.*

We concluded with the following helpful discussion regarding whether counsel’s

mistake of law constituted excusable neglect:

Whether a mistake of law qualifies as excusable neglect in the context of applying Rule 6.02 and Rule 25.01 has not been explicitly addressed in any case cited by the parties or that our research has found. However, in the context of declining to grant relief pursuant to Rule 6.02 to extend the statute of limitations in a comparative fault case, this Court has stated that a mistake of law regarding counsel's interpretation of Tenn. R. Civ. P. 6.05 did not provide a basis for relief. *Halstead v. Niles Bolton Assocs.*, No. 01-A-01-9503-CV00113, 1996 WL 50861, at \*3 (Tenn. Ct. App. Feb. 9, 1996). In the context of whether to set aside a final judgment on the basis of excusable neglect pursuant to Rule 60.02, this Court has held that ignorance of the law is not a ground for relief: “[i]t is well established that *ignorance of the law is not excusable neglect* or a proper ground for relief under Tenn. R. Civ. P. 60.02.” *McBride v. Webb*, No. M2006-01631-COA-R3-CV, 2007 WL 2790681, at \*3 (Tenn. Ct. App. Sept. 25, 2007) (citing *Food Lion, Inc. v. Washington Cty. Beer Bd.*, 700 S.W.2d 893, 896 (Tenn. 1985); *Kilby v. Sivley*, 745 S.W.2d 284 (Tenn. Ct. App. 1987)) (emphasis added). We find instructive the following analysis from *Food Lion*, in which the Tennessee Supreme Court considered whether to set aside a final judgment on the basis of excusable neglect pursuant to Rule 60.02:

Carelessness is not synonymous with excusable neglect. Mere forgetfulness of a party to an action is not a sufficient ground for vacating or setting aside a judgment by default. Parties are not justified in neglecting their cases merely because of the stress or importance of their own private business and such neglect is ordinarily not excusable.

46 AM.JUR.2d 874-75 *Judgments* § 718 (1969); *Dudley v. Stiles*, 386 P.2d 342 ([Mont.] 1963).

Therefore, the fact that the defendant board was represented by a busy lawyer is no ground for Rule 60.02 relief. We further hold that if, as the trial court found, “the real reason that relief was not sought . . . before the expiration of 30 days after the judgment was entered” is that defendant’s counsel “was uncertain as to how to proceed” this excuse, too, fails to satisfy the requirements of Rule 60.02 for abrogating a final judgment as was done by the trial court in this case. If this Court were to hold that ignorance of the law is a proper ground



for relief under Rule 60.02, Tennessee Rules of Civil Procedure, it is hard to conceive how any judgment could be safe from assault on that ground.

700 S.W.2d at 896.

In this case, we conclude that counsel's mistaken view of what Rule 25.01 requires does not constitute excusable neglect. Plaintiff's counsel's initial affidavit establishes only that Plaintiff knew that the petition to open Plaintiff's estate would not be heard until after the expiration of the ninety days. Even Plaintiff's counsel's second affidavit does not assist him; it establishes that Plaintiff's counsel knew within the ninety-day period that the probate matter would not be heard and yet still does not explain why he was dilatory in filing the motion to enlarge. His mistaken view of the law does not qualify as excusable neglect, and he has alleged no other facts that would support a finding of excusable neglect. Because excusable neglect was not demonstrated, we discern no abuse of discretion and affirm the trial court's denial of the motion to enlarge.

*Id.* at \*5-6.

We now apply these principles to the case before us. The trial court found that Plaintiffs "mistakenly relied on Rule 25.01(2) of the Tennessee Rules of Civil Procedure rather than Rule 25.01(1)." Thus, it found that Plaintiffs' failure to timely move to substitute parties was a result of their "misinterpretation of the law." The court noted that Tennessee case law regarding excusable neglect under Rule 6.02 "tends to point to a big picture approach by looking at [four] factors in determining whether there's been excusable neglect," including prejudice to the party opposing the late motion, the length of the delay and potential impact on the proceeding, the reason the filing was late, and the filer's good or bad faith. However, the court also noted that the third factor, "[t]he reasons why the filing was late[,] is probably the most important factor for the Court to consider." The trial court found *Wentz* was "persuasive" because it involved "facts very similar to the facts in the case at bar" and a consideration of whether a misinterpretation of Rule 25 of the Federal Rules of Civil Procedure constituted excusable neglect under Federal Rule of Civil Procedure 6. *See Wentz*, 2007 WL 869620, at \*1. As noted above, *Wentz* involved husband and wife plaintiffs and the death of the husband during the litigation, and the wife did not timely file a motion for substitution because she was operating under the assumption that Rule 25(a)(2) "allowed her to automatically proceed in the action on behalf of Mr. Wentz." *Id.* After explaining that the wife had misinterpreted Rule 25(a)(2) in believing that it resulted in the husband's causes of action immediately accruing to her, the district court noted that "multiple courts have expressly held that such misapplication or misunderstanding of Rule 25 does not constitute excusable neglect for the purposes of Rule 6(b)." *Id.* at \*2-3; *see, e.g., Kaubisch v. Weber*, 408 F.3d 540, 543 (8th Cir. 2005) ("the

misapplication or misreading of the plain language of Rule 25 does not establish excusable neglect”). The trial court in this case found *Wentz* “persuasive” on “very similar” facts. The trial court also noted that the defendants had cited several other cases concluding that misinterpretation of the law was not excusable neglect. Ultimately, the trial court concluded that Plaintiffs’ misinterpretation of Rule 25.01(2) was not excusable neglect.

In order to demonstrate an abuse of discretion, Plaintiffs must show that the trial court “applied an incorrect legal standard or reached a decision that is against logic or reasoning that caused an injustice” to Plaintiffs. *Scott v. Roberson*, No. M2011-00016-COA-R3-CV, 2011 WL 3760940, at \*3 (Tenn. Ct. App. Aug. 24, 2011). On appeal, Plaintiffs argue that the trial court erred by failing to analyze all four factors and using only one factor instead. Plaintiffs acknowledge that the third factor, regarding the reason for their delay, does weigh against a finding of excusable neglect. However, they suggest that the other three factors should weigh in favor of a finding of excusable neglect and outweigh the third factor. We choose to apply the same approach that this Court used in *Cunningham*. There, the trial court “did not identify or discuss all four excusable neglect factors set forth in *Williams*,” but on appeal, we undertook “an independent review of the four factors.”<sup>4</sup> *Cunningham*, 2022 WL 2236312, at \*4. Looking to “the first, second, and fourth factors,” we summarily found “no evidence in the record that the Defendant would be prejudiced by the delay, that the delay would have a significant impact on [the] proceedings, or that Plaintiff was acting in bad faith.” *Id.*

Here, the trial court did *identify* all four factors; it simply found one was the most important. Our independent review of the remaining three factors does not lead us to conclude that the trial court reached a decision that was against logic or reasoning or caused an injustice to Plaintiffs. *See Valentine*, 2020 WL 373338, at \*3-4 (finding no abuse of discretion upon consideration of the additional two factors “not referenced or considered by the trial court”). Although there is no allegation of bad faith here, this is not a case in which the movant showed an absence of prejudice or that the delay did not have a significant impact on the proceeding. As this Court has noted,

A court may find prejudice where one side has been harmed by loss of opportunity to present some material aspect of its case. *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999); *Archer v. Archer*, 907 S.W.2d 412, 416 (Tenn. Ct. App. 1995). Prejudice also encompasses other types of harm to parties, such as the expenditure of money or similar detrimental changes of position by one side in reliance on the action or inaction of the other. *Archer*[ ], 907 S.W.2d at 416. In evaluating whether to allow an untimely filing to

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<sup>4</sup> We note that Plaintiffs did not argue that this Court should reverse and remand the trial court’s decision due to its failure to consider all of the factors. Instead, Plaintiffs cited a case in which a trial court considered only one factor and the appellate court considered all four factors on appeal, and Plaintiffs ask this Court to similarly apply the factors and determine whether excusable neglect exists. *See Ferguson v. Brown*, 291 S.W.3d 381, 390 (Tenn. Ct. App. 2008).

be effective, courts may also find prejudice to the non-requesting party where allowing the filing would burden the non-requesting party with more pre-trial discovery, additional trial preparation, and added expense, particularly when only a limited time remains for more gearing up. *TXG Intrastate Pipeline v. Grossnickle*, 716 So.2d 991, 1011 (Miss. 1997).

*Brandon v. Williamson Med. Ctr.*, 343 S.W.3d 784, 791-92 (Tenn. Ct. App. 2010) (quoting *Sizemore*, 56 S.W.3d at 557-58). In *Brandon*, for example, we affirmed a trial court’s finding of no excusable neglect upon considering that “allowing Plaintiff’s claim to proceed would impose additional expenses for pre-trial discovery, trial preparation, and defense costs to defend an action” and that the plaintiff’s omission “delayed both discovery and proceedings on the merits of this case for nearly one year.” *Id.* at 792. In *Pearson v. Koczera*, No. E2017-00258-COA-R3-CV, 2018 WL 2095276, at \*10 (Tenn. Ct. App. May 7, 2018), we noted that “the appellees were harmed” by the appellant’s failure to substitute parties after a suggestion of death because “[i]f [she] had properly and timely arranged for substitution, the appellees would not have had to incur the time and expense of responding to [her] continual court filings, appeals, and litigation of this matter since 2012.”

Again, “[w]here an enlargement of time is requested after the original time has elapsed, Rule 6.02(2) requires *the party requesting the enlargement* to show that its failure was due to excusable neglect and that the opposing party has not been prejudiced.” *Williams*, 193 S.W.3d at 550 (emphasis added). “Excusable neglect must be proved, not merely alleged. Accordingly, a motion seeking an enlargement of time filed after the applicable deadline has expired should be accompanied by an affidavit stating the circumstances that prevented the moving party from acting within the required time.” *Hickman v. Tennessee Bd. of Paroles*, 78 S.W.3d 285, 288 (Tenn. Ct. App. 2001). Plaintiffs failed to show a lack of prejudice here. Unlike some cases involving a deadline missed by mere days or weeks, the late-filed motion for substitution in this case came over a year after the ninety-day window expired and only after Dr. Halford’s motion to dismiss. As the trial court noted, the motion for substitution was filed a year late, and it was “willfully late and filed only after Dr. Halford filed his motion to dismiss.” Therefore, we reject Plaintiffs’ suggestion that consideration of the additional *Williams* factors leads to a finding of excusable neglect.

As in *Cunningham*, “[t]he third factor—the reasons why the filings were late and whether the reasons were within the filer’s reasonable control—appears to primarily be in play (as it usually is)[.]” 2022 WL 2236312, at \*4. Again, this Court has repeatedly recognized that the party’s reason for failing to meet the deadline may be the single most important of the four factors. *Id.*; see, e.g., *Cored, LLC v. Hatcher*, No. M2020-00083-COA-R3-CV, 2020 WL 5944067, at \*8-10 (Tenn. Ct. App. Oct. 6, 2020) (finding no abuse of discretion where the trial court found that the first, second, and fourth factors had “no significant impact” on the analysis and that “the dispositive factor” was the reason why the filings were late); *Scott*, 2011 WL 3760940, at \*5 (“While prejudice to the other party is a

consideration in this context, the trial court must also find the failure to act as mandated was excusable. By concluding the excuse put forward by Mr. Scott's attorney was not in fact excusable, there was no need for the court to address any potential prejudice to the defendants if the motion to enlarge were granted." The reason for Plaintiffs' late filing was her counsel's misinterpretation of Rule 25.01, and that reason was within Plaintiffs' reasonable control. The relevant issues had been largely addressed in *Timmins*, and counsel took no action even after opposing counsel suggested the need for "a new plaintiff." As in *Cunningham*, we conclude that "counsel's mistaken view of what Rule 25.01 requires does not constitute excusable neglect," and they have alleged no other facts that would support a finding of excusable neglect. 2022 WL 2236312, at \*6. "[N]either a lawyer's busy schedule nor his or her ignorance of the proper procedure rises to the level of excusable neglect." *Morson v. Tenn. Dep't of Mental Health & Developmental Disabilities*, No. M2013-01218-COA-R3-CV, 2014 WL 2019268, at \*4 (Tenn. Ct. App. May 14, 2014) (citing *Food Lion, Inc.*, 700 S.W.2d at 896); see also *Brandon*, 343 S.W.3d at 791-92 (finding no excusable neglect when a pro se plaintiff claimed her failure to timely file a certificate of good faith was due in part to her ignorance of the certificate of good faith requirement); *Pearson*, 2018 WL 2095276, at \*10 (concluding the trial court was justified in finding no excusable neglect to warrant an enlargement of time where the appellant claimed "unfamiliarity with the law—that despite having practiced ten years, until this case, she had never heard of a Suggestion of Death, nor the procedure for substitution following a death"); *Neeley v. Grainger Cnty. Gov't*, No. 3:15-CV-180-TAV-HBG, 2017 WL 782897, at \*6 (E.D. Tenn. Feb. 28, 2017) (finding no excusable neglect where the appellant's "misapplication or misunderstanding of Rule 25 was within his reasonable control").

In sum, "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." *Skipper v. State*, No. M2009-00022-COA-R3-CV, 2009 WL 2365580, at \*8 (Tenn. Ct. App. July 31, 2009) (citing *Maness*, 2009 WL 837707, at \*3); see also *Ambrose v. Batsuk*, No. M2006-01131-COA-R3-CV, 2008 WL 1901207, at \*6 (Tenn. Ct. App. Apr. 30, 2008) ("Under Rule 6.02, the decision to extend or not extend the time within which a party is allowed to act always remains within the sound discretion of the trial court."). We discern no abuse of discretion in the trial court's denial of the late-filed motion for an enlargement of time after finding no excusable neglect. See *Valentine*, 2020 WL 373338, at \*4; see also *Mead v. Tucker*, No. M2020-01512-COA-R3-CV, 2021 WL 5149957, at \*7 (Tenn. Ct. App. Nov. 5, 2021) ("On balance, the factors relating to the reasons for Plaintiff's failure to timely file a Rule 25.01 motion for substitution of the parties weigh in favor of the trial court's decision that the delay in filing the motion was not the result of excusable neglect. We conclude that the trial court did not abuse its discretion in denying Plaintiff's motion for an enlargement

of time under Rule 6.02(2) after finding that there was no excusable neglect.”).<sup>5</sup>

The alternative argument raised by the appellees regarding whether the response should have been construed as a Rule 6.02 motion in the first place is pretermitted. *See, Farm Credit Leasing Servs. Corp. v. Daniels*, No. W2020-01576-COA-R3-CV, 2022 WL 16953311, at \*5 (Tenn. Ct. App. Nov. 16, 2022) (finding it unnecessary to decide whether a motion to continue should have been construed as a motion seeking an enlargement of time under Rule 6.02 because, even if the motion was construed as a request for an

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<sup>5</sup> We note the defendants’ argument on appeal that the four *Williams* factors do not apply when the reason for the delay was misinterpretation, misapplication, or misunderstanding of the law. The defendants argue that misinterpretation or ignorance of the law can never amount to excusable neglect. Federal cases addressing this issue since the *Pioneer* decision have reached differing results. *Compare Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 249-51 (2d Cir. 1997) (“Prior to the Supreme Court’s decision in *Pioneer*[,] we adhered to a firm rule that the excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules. . . . [P]er se rules like [this] . . . do not perdure after *Pioneer*. . . . [N]eglect may be excusable where the language of a rule is ambiguous or susceptible to multiple interpretations, or where an apparent conflict exists between two rules. . . . Where [] the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test.”) (quotations omitted); *L.A. Pub. Ins. Adjusters, Inc. v. Nelson*, 17 F.4th 521, 525 (5th Cir. 2021) (“Our court has left open the possibility that some misinterpretations of the federal rules may qualify as excusable neglect, but we have emphasized that such is the rare case indeed.”) (quotations omitted); *Pincay v. Andrews*, 389 F.3d 853, 857-60 (9th Cir. 2004) (“Our circuit’s confusion is not isolated. The authorities interpreting *Pioneer* in a number of circuits are in some disarray. . . . We are persuaded that, under *Pioneer*, the correct approach is to avoid any per se rule.”); *with Deym v. von Fragstein*, 127 F.3d 1102, 1997 WL 650933, at \*2 (6th Cir. 1997) (“In a case decided after *Pioneer*, this Court held that misreading a rule or statute does not constitute excusable neglect. . . . Other circuits have applied *Pioneer* to reach a similar result.”); *Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398, 404 (8th Cir. 2000) (“*Pioneer* did not alter the traditional rule that mistakes of law do not constitute excusable neglect[.]”); *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (“Today, we follow the other circuits and hold, as a matter of law, that an attorney’s misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relieved of the consequences of failing to comply with a statutory deadline. Nothing in *Pioneer* indicates otherwise, and we believe that the law in this area remains as it was before *Pioneer*.”).

We note that *Cunningham* considered all four factors even though it ultimately concluded that the appellant’s misinterpretation of the law was not excusable neglect. We have taken the same approach. *See also Mobley v. Caffa-Mobley*, No. M2011-02269-COA-R3-CV, 2012 WL 5986544, at \*6 (Tenn. Ct. App. Nov. 30, 2012) (concluding that the trial court erred by focusing only on the fact that counsel made a mistake without considering the other factors in the excusable neglect analysis); *State ex rel. Flowers/Newman v. Tenn. Trucking Ass’n Self Ins. Grp. Tr.*, No. M2006-02242-WC-R3-WC, 2008 WL 2510577, at \*6 (Tenn. Workers Comp. Panel June 20, 2008) (stating that courts “should not consider any one factor in isolation” and finding excusable neglect upon consideration of all four factors, even though the reason for the delay was the “attorney’s failure to conduct a minimal amount of research to learn the applicable deadline”). However, it is not necessary to conclusively resolve the issue in this case because we reach the same result here whether we consider one factor or all four. *See Webster v. Pacesetter, Inc.*, 270 F. Supp. 2d 9, 12 (D. D.C. 2003) (noting the differing approaches but concluding that under either interpretation, counsel’s mistake did not amount to excusable neglect). “[I]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect.” *Pioneer*, 507 U.S. at 392.

enlargement of time, the trial court did not abuse its discretion in denying the request).

We discern no reversible error in the trial court's decision to strike the declarations of the two attorneys who were not involved in this case. Essentially, each attorney stated that he had reviewed the facts and come to the conclusion that a "good faith basis" existed for excusable neglect on the part of the Plaintiffs. They stated that there was "clearly a good faith misinterpretation" of Rule 25.01, that the defendants were not prejudiced by the misinterpretation, and that the purposes of the Rules of Civil Procedure would be furthered by allowing this case to proceed on its merits. One of the attorneys also stated that he likely would have applied Rule 25.01(2) in the same or a similar fashion as Plaintiffs' counsel. These declarations did not attest to any *facts* that would establish excusable neglect in this case. *See Scott*, 2011 WL 3760940, at \*4 ("It is notable that the attorney who submitted an affidavit explaining why the motion to substitute was not filed within 90 days after the suggestion of death was not even the attorney of record for Mr. Scott. The attorney of record did not submit an affidavit or explain why he had failed to ensure the motion to substitute was filed in a timely manner. In these circumstances, we believe the trial court was justified in ruling the neglect by Mr. Scott's counsel was not excusable."); *see also J.A.C. by & through Carter v. Methodist Healthcare Memphis Hosps.*, 542 S.W.3d 502, 517 n.11 (Tenn. Ct. App. 2016) ("[E]ven if we assumed that the trial court erred in refusing to consider the two affidavits that the Plaintiffs submitted on the extraordinary cause issue, any such error was harmless. Again, these affidavits did not attest to any facts that would constitute extraordinary cause.").

Finally, Plaintiffs' brief states, "[a]lternatively, the penalty derived from 25.01(2) in this instance is an overly harsh penalty that conflicts with Rule 1, Tenn. R. Civ. P., and the order to dismiss should be reversed so that the case can be substantively resolved on the merits." Plaintiffs ask this Court to "suspend the application of Rule 25.01(1) in this instance" on the basis that dismissal produces an unjust result. We deem this issue waived. *Sneed v. Bd. of Pro. Resp. of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("[W]here a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.").

#### IV. CONCLUSION

For the aforementioned reasons, the decision of the circuit court is hereby affirmed and remanded. Costs of this appeal are taxed to the appellant, Vivian Joshlin, for which execution may issue if necessary.

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CARMA DENNIS MCGEE, JUDGE