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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 18, 2018

JOHN EDWARDS v. PAULA RENEE HERMAN

**Appeal from the Circuit Court for Campbell County
No. 15898 John D. McAfee, Judge**

No. E2017-01206-COA-R9-CV

In this personal injury action arising from an automobile-motorcycle accident, the trial court granted the plaintiff's motion to enlarge the time allowed to obtain service of process on the defendant upon finding that the plaintiff's failure to timely obtain service of process had been due to excusable neglect. Consequently, the trial court in the same order denied the defendant's motion to dismiss the plaintiff's complaint for lack of service. Upon the defendant's subsequent motion, the trial court granted permission for an interlocutory appeal, as did this Court. Upon review of the issues certified by the trial court, we affirm the trial court's utilization of Tennessee Rule of Civil Procedure 6.02 as a method of enlarging the timeframe for issuance and service of process, pursuant to Tennessee Rule of Civil Procedure 3, when the complaint was timely filed and when excusable neglect can be demonstrated. However, having concluded that the trial court made insufficient findings and conclusions regarding excusable neglect in this matter, we vacate the trial court's determination on that issue and remand this matter to the trial court for further proceedings consistent with this opinion. We also vacate the trial court's determination that the defendant would be estopped from asserting a defense based on the statute of limitations because the parties had no express agreement waiving service of process in this matter.

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court
Affirmed in Part, Vacated in Part; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and CHARLES D. SUSANO, JR., J., joined.

Robert W. Knolton, Oak Ridge, Tennessee, for the appellant, Paula Renee Herman.

Dail R. Cantrell, Clinton, Tennessee, for the appellee, John Edwards.

OPINION

I. Factual and Procedural Background

On April 21, 2015, the plaintiff, John Edwards, filed a complaint against the defendant, Paula Renee Herman, in the Campbell County Circuit Court (“trial court”), seeking damages for personal injuries allegedly caused by Ms. Herman when the parties were involved in an automobile-motorcycle accident that had occurred in Campbell County on May 4, 2014. At the time of the complaint’s filing, the trial court issued original process, and the record indicates that a summons was delivered to the Campbell County Sheriff’s Department for service on Ms. Herman on April 22, 2015. It is undisputed that this original summons was never returned to the trial court and that there is no record of it having been served upon Ms. Herman. Rather, the record demonstrates that on July 21, 2016, the Campbell County Sheriff’s Department sent a letter to the trial court clerk indicating that the summons, although received by the Department, could not be located. In the meantime, the trial court issued an alias summons on May 26, 2016, which was successfully served upon Ms. Herman on June 11, 2016. Such issuance and service of process undisputedly occurred after the one-year deadline contained in Tennessee Rule of Civil Procedure 3.¹

On June 22, 2016, Ms. Herman’s counsel filed a notice of appearance. Ms. Herman subsequently filed a motion to dismiss the complaint on June 30, 2016, asserting insufficient service of process pursuant to Tennessee Rules of Civil Procedure 3 and 4. Ms. Herman contended that because Mr. Edwards had failed to timely cause process to be reissued before the one-year deadline established by Rule 3 had expired, he could not rely upon the original commencement of the action to toll the applicable statute of limitations.² Accordingly, Ms. Herman sought dismissal of the action pursuant to Tennessee Rule of Civil Procedure 12.02(6).

¹ Regarding issuance and service of process, Tennessee Rule of Civil Procedure 3 provides in pertinent part:

If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

² The one-year statute of limitations for personal injury actions is provided in Tennessee Code Annotated § 28-3-104(a)(1)(A).

On August 9, 2016, Mr. Edwards filed a response in opposition to the motion to dismiss and concomitantly filed a motion for an extension of time to obtain service of process pursuant to Tennessee Rule of Civil Procedure 6.02. Claiming excusable neglect, Mr. Edwards attached to the motion for extension affidavits executed by his counsel and his counsel's assistant. Mr. Edwards's counsel, Dail Cantrell, stated in his affidavit in pertinent part:

Sometime in the month of February, 2016, as I was doing a file review, I discovered that I had not yet received a response to the Complaint from the Defendant, despite the fact that I had been in communication with the Defendant's insurance carrier, both by phone and by letter, and despite the fact that I had sent a copy of the lawsuit to the Defendant's insurance carrier.

As a result, I contacted the Office of the Circuit Court Clerk for Campbell County, Tennessee, in order to determine the date process was effectuated.

I spoke to someone in the Clerk's Office, and was told that the Summons had not yet been returned as "served or not served."

I was further told that the Clerk would not Issue an Alias Summons until either (1) the Campbell County, Tennessee, Sheriff's Department returned the Summons to the Circuit Court Clerk, or (2) the Campbell County, Tennessee, Sheriff's Department issued a letter/Affidavit stating that the Summons had been lost.

It was my understanding from speaking with the Clerk's Office that I would be notified as soon as they heard from the Sheriff's Department.

Some time passed and, after not hearing back from the Clerk's Office, I had one of my staff members contact them in May, 2016.

My staff member was told that we could then file the Alias Summons, which led me to believe that the letter/Affidavit, stating that the Summons had been lost, from the Campbell County, Tennessee, Sheriff's Department had been received by the Clerk's Office.

(Original paragraph numbering omitted.)

The affidavit executed by Mr. Cantrell's assistant stated, *inter alia*, that she contacted the trial court clerk's office in May 2016 and was then told that an alias

summons could be submitted in this matter. She likewise affirmed that she had been told numerous times by employees of the trial court clerk's office that an alias summons could not be issued until the previous summons had been returned by the Campbell County Sheriff's Department or the Sheriff's Department had sent a letter stating that the summons was lost.

On August 24, 2016, Ms. Herman filed a response objecting to the motion for extension, arguing, *inter alia*, that the trial court lacked discretion to grant a motion that would essentially enlarge the statute of limitations period when the court had not obtained personal jurisdiction over Ms. Herman within the requisite timeframe due to insufficient service of process. Mr. Edwards subsequently filed a reply, asserting that his motion did not seek extension of the statute of limitations because his complaint was timely filed within one year of the accident. Rather, Mr. Edwards posited that he simply sought an extension of time with regard to the issuance and service of a summons.

Following a hearing conducted on December 7, 2016, the trial court entered an order on February 9, 2017, granting Mr. Edwards's motion "to enlarge the time allowed to obtain service of process upon [Ms. Herman.]" In granting the motion, the court found that Mr. Edwards had established excusable neglect, pursuant to Tennessee Rule of Civil Procedure 6.02, concerning his failure to have a summons reissued and served within one year. In reaching this conclusion, the court relied on the "facts outside of the record" that had been included in the affidavits attached to Mr. Edwards's motion for an extension. The court specifically found in pertinent part:

It appears that, in support of [Mr. Edwards's] motion for extension of time within which to file an alias summons to be served upon [Ms. Herman], facts outside of the record were submitted by [Mr. Edwards] through Affidavit of counsel and his legal assistant, and which facts outside of the record were not denied as such, by [Ms. Herman]. The court, therefore, makes the following findings of fact that occurred outside of the record, which facts are asserted in [Mr. Edwards's] response to the Motion to Dismiss, as well as in [Mr. Edwards's] Motion for Extension of Time, and which facts were not denied by [Ms. Herman]:

- (a) That [Mr. Edwards's] counsel wrote to the liability insurance carrier of [Ms. Herman], advising of his representation of [Mr. Edwards] some time in June 2014.
- (b) Throughout the fall of 2014 and the spring of 2015, [Mr. Edwards's] counsel and the claims representative for the

carrier exchanged information concerning the nature and extent of [Mr. Edwards's] injuries and damages.

- (c) On April 9, 2015, [Mr. Edwards's] counsel sent a letter to the liability insurance carrier's claims representative which included the following language:

“In closing, given that our statute of limitations is quickly approaching, please find enclosed a courtesy copy of the lawsuit that I am filing on behalf of my client. I have no problem giving you an open extension of time to respond in that liability does not appear to be contested.”

There was no written response received from the liability claims representative to [Mr. Edwards's] counsel's letter of April 9, 2015, however, such counsel and the claims representative continued to exchange information and to discuss the claim of [Mr. Edwards], there was no statement made by the claims representative to [Mr. Edwards's] counsel that proper service of process upon [Ms. Herman] would be waived, or that the personal injury statute of limitations otherwise applicable to [Mr. Edwards's] claim, would be waived.

- (d) Counsel for [Mr. Edwards] then filed his Complaint within the one year statute of limitations for personal injury actions.
- (e) The liability carrier of [Ms. Herman] was forwarded a copy of the lawsuit, which lawsuit was assigned to defense counsel shortly thereafter, as was the usual practice of the insurance carrier when suit is filed against their insured.
- (f) Counsel for [Ms. Herman] opened the defense file at that time, however, such attorney was not advised by the claims representative to defer filing an Answer, or to otherwise respond, but, rather the attorney was awaiting proper service of process to be made upon [Ms. Herman] before filing an Appearance and/or Answer on behalf of [Ms. Herman].

- (g) From the aforesated factual circumstances, the court finds that no prejudice has resulted to [Ms. Herman] or her liability insurance carrier in allowing [Mr. Edwards's] motion to enlarge the time within which to obtain service of process.

From the aforesated findings of facts, and in consideration of the motion of [Mr. Edwards] for an extension of time within which to file alias summons and to obtain service of process upon [Ms. Herman], [Mr. Edwards] has established “excusable neglect” as required under Rule 6.02 of the Tennessee Rules of Civil Procedure (motion for enlargement of time), and that his motion for enlargement of time should be granted.

(Additional paragraph numbering omitted.)

The trial court also found that Ms. Herman was “equitably estopped from asserting the expiration of the one year statute of limitation for personal injury actions” In so finding, the trial court relied on this Court’s recent decision in *Clark v. Powers*, No. E2015-02226-COA-R9-CV, 2016 WL 4413348, at *9 (Tenn. Ct. App. Aug. 19, 2016) (affirming the trial court’s finding that the defendant was estopped from asserting the statute of limitations when his insurance carrier had agreed to waive service of process pending negotiations). The trial court denied Ms. Herman’s motion to dismiss, specifically noting that this denial was based upon the grant of the motion for extension. The court also noted in its December 2016 order that it would consider a motion for interlocutory appeal if one were filed. Upon Mr. Edwards’s subsequent motion, the trial court granted permission for interlocutory appeal in an order entered June 8, 2017, as did this Court through an order entered August 7, 2017.

II. Issues Presented

The trial court certified the following issues for our review:³

1. Whether [Ms. Herman’s] Tennessee Rule of Civil Procedure 12.02 motion should have been considered and granted based upon the court record alone, for [Mr. Edwards’s] failure to follow the requirements of Rules 3 and 4 of the Tennessee Rules of Civil Procedure.

³ In entering the order granting interlocutory appeal on August 7, 2017, this Court stated: “The issues on appeal shall be those that are certified by the Trial Court in the order granting review.” *See Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911, 914 (Tenn. Ct. App. 2000) (“For interlocutory appeals, the only issues that can be raised are those certified in the trial court’s order granting permission to seek an interlocutory appeal and in the appellate court’s order granting the interlocutory appeal.”).

2. Whether it was appropriate to grant [Mr. Edwards's] motion for an extension of time under the factual circumstances relied upon by [Mr. Edwards] in seeking Tennessee Rule of Civil Procedure 6.02 relief, and/or whether the liability insurance carrier should be "estopped" from asserting the running of the one-year period of limitations for a personal injury action under such factual findings.

III. Standard of Review

As our Supreme Court has elucidated with regard to motions seeking dismissal of a complaint pursuant to Tennessee Rule of Civil Procedure 12.02(6):

A Rule 12.02(6) motion to dismiss only seeks to determine whether the pleadings state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof, and, therefore, matters outside the pleadings should not be considered in deciding whether to grant the motion. In reviewing a motion to dismiss, the appellate court must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. It is well-settled that a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief. Great specificity in the pleadings is ordinarily not required to survive a motion to dismiss; it is enough that the complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000) (citing Tenn. R. Civ. P. 8.01).

Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 696 (Tenn. 2002).

By contrast, we review a trial court's decision to grant or deny a Tennessee Rule of Civil Procedure 6.02 motion for extension under an abuse of discretion standard. *See Williams v. Baptist Mem'l Hosp.*, 193 S.W.3d 545, 551 (Tenn. 2006) ("[W]hether to grant an enlargement of time is left to the discretion of the trial court."); *Maness v. Garbes*, No. M2008-007907-COA-R3-CV, 2009 WL 837707, at *3 (Tenn. Ct. App. Mar. 26, 2009) ("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."). As our Supreme Court has explained, "a trial court abuses its discretion only when it 'applie[s]"

an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *Williams*, 193 S.W.3d at 551 (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

IV. Consideration of Facts “Outside the Record”

The first issue certified by the trial court concerns whether Ms. Herman’s Tennessee Rule of Civil Procedure 12.02 motion “should have been considered and granted based upon the court record alone, for [Mr. Edwards’s] failure to follow the requirements of Rules 3 and 4 of the Tennessee Rules of Civil Procedure.” The fundamental question implicit in this issue is whether the trial court improperly considered matters outside the record in granting Mr. Edward’s Rule 6.02 motion for extension and subsequently denying Ms. Herman’s Rule 12.02(6) motion to dismiss the complaint.

Ms. Herman posits that because service of process was not properly effectuated, the trial court never obtained personal jurisdiction over her and therefore did not have authority to grant Mr. Edwards’s motion for an enlargement of time in which to effectuate service. *See, e.g., McNeary v. Baptist Mem’l Hosp.*, 360 S.W.3d 429, 436 (Tenn. Ct. App. 2011) (“A court acquires personal jurisdiction over a defendant when the defendant is served with process.”). Ms. Herman argues that the factual findings of the trial court supporting the determination of “excusable neglect” are irrelevant to her Rule 12.02(6) motion, which purportedly should have been determined based on the allegations of the complaint alone. Finally, Ms. Herman asserts that Rule 6.02 cannot be used to extend a statute of limitations and that such an impermissible extension was the effect of the trial court’s grant of Mr. Edwards’s motion.

In support of her argument regarding Rule 6.02 and the statute of limitations, Ms. Herman relies on this Court’s decision in *Redmond v. WalMart Stores, Inc.* No. M2014-00871-COA-R3-CV, 2014 WL 7334889, at *3 (Tenn. Ct. App. Dec. 22, 2014) (mem. op.) (“Because a trial court does not have the authority to enlarge a statute of limitations under Rule 6.02, a finding of excusable neglect is a non-issue here.”). In *Redmond*, the plaintiff filed her personal injury action one year and one day following the date of her injury. *Id.* at *1. Accordingly, the trial court refused to grant relief from operation of the statute of limitations based on Rule 6.02, a decision that was affirmed by this Court. *Id.* at *3. However, *Redmond* is a memorandum opinion, and as such “shall not be cited or relied on for any reason in any unrelated case.” *See* Rule 10 of the Rules of the Court of Appeals of Tennessee.

Mr. Edwards insists that he did not request an extension of the applicable statute of limitations because his complaint was timely filed within one year of the subject

accident. Rather, Mr. Edwards asserts that his request was for the trial court to “extend the twelve (12) month window set forth in Rule 3 of the Tennessee Rules of Civil Procedure, to allow for service of process to be obtained.” We agree with Mr. Edwards’s identification of the issue.

This Court has previously indicated that the deadline for reissuance and service of process contained in Tennessee Rule of Civil Procedure 3 can be extended, pursuant to Rule 6.02, in those instances when the complaint has been filed within the applicable statute of limitations but service of process was not timely effectuated due to excusable neglect. For example, in *Ross v. Shelby Cty. Healthcare Corp.*, No. W2000-01553-COA-R3-CV, 2001 WL 1078266, at *2 (Tenn. Ct. App. Sept. 10, 2001), the “sole issue presented for [this Court’s] review [was] whether the trial court abused its discretion by denying Mr. Ross’[s] motion for enlargement of time to issue new process pursuant to Rule 6.02 of the Tennessee Rules of Civil Procedure.” Although the *Ross* plaintiffs timely filed their complaint, they failed to have process timely issued and served upon the defendants pursuant to Rule 3, and they subsequently filed a motion for enlargement of the time for reissuance of process based on Rule 6.02, alleging excusable neglect. *Id.* at *1. The *Ross* trial court denied the Rule 6.02 motion and dismissed the complaint, determining that excusable neglect had not been demonstrated. *Id.* at *2.

On appeal in *Ross*, this Court concluded that the trial court had not abused its discretion in determining that the plaintiffs had failed to demonstrate excusable neglect. *Id.* at *4. This Court accordingly affirmed the trial court’s dismissal of the plaintiffs’ claims. *Id.* In doing so, however, this Court did not take issue with the proposition that Rule 6.02 could be utilized to expand the time limitation contained in Rule 3 for the issuance and service of process. *Id.* at *3 (“Rule 6.02 of the Tennessee Rules of Civil Procedure grants the trial court broad discretion to enlarge procedural time limitations established by the Rules of Civil Procedure.”).

Likewise, in *Maness v. Garbes*, No. M2008-007907-COA-R3-CV, 2009 WL 837707, at *2 (Tenn. Ct. App. Mar. 26, 2009), a personal injury action with a procedural history similar to the case at bar, this Court upheld the trial court’s grant of a motion to dismiss based upon untimely service of process. *Id.* at *3. The *Maness* plaintiffs timely filed their complaint, but service of process on the defendants was not effectuated within the time constraints contained within Rule 3. *Id.* at *1. An alias summons was not issued until more than one year following the issuance of the original summons. *Id.* The *Maness* defendants consequently filed a motion to dismiss. *Id.* Despite the plaintiffs’ filing of a response in opposition, the trial court granted the motion to dismiss. *Id.* at *3.

Determining that the *Maness* plaintiffs’ response to the motion to dismiss could be construed as a Rule 6.02 motion asserting excusable neglect, this Court determined that

the trial court's denial of the Rule 6.02 motion was within the trial court's discretion. *Id.* Regarding the effect of a successful Rule 6.02 motion concerning an extension of time to issue new summons, this Court explained:

The plaintiffs' complaint was timely filed on July 7, 2006, and process for each defendant was promptly issued. Neither defendant, however, was served within 90 days after issuance of the initial process, and the plaintiffs did not obtain issuance of new process within one year after issuance of the previous process as required pursuant to Tenn. R. Civ. P. 3. Therefore, the plaintiffs may not rely upon the July 7, 2006 filing of the complaint to toll the running of the statute of limitations unless the period within which to issue new process is expanded pursuant to Tenn. R. Civ. P. 6.02 on the ground their failure to act within the proscribed time period was the result of excusable neglect.

Id. at *2 (emphasis added). Therefore, as in *Ross*, the *Maness* Court recognized that Rule 6.02 could be utilized to enlarge the timeframe for service of process if an adequate demonstration of excusable neglect were made. *Id.*; *see also Ross*, 2001 WL 1078266, at *2. We note that in each of these cases, the trial court and this Court considered facts "outside the record" in making a determination concerning the Rule 6.02 motion. *See Maness*, 2009 WL 837707, at *2; *Ross*, 2001 WL 1078266, at *2.

We further note that Tennessee Rule of Civil Procedure 6.02 is almost identical to its federal counterpart, Federal Rule of Civil Procedure 6(b).⁴ As our Supreme Court has previously explained, "[f]ederal case law interpreting rules similar to our own [is] persuasive authority for purposes of construing the Tennessee rule." *Harris v. Chern*, 33 S.W.3d 741, 745 n.2 (Tenn. 2000). A review of federal case law interpreting Federal Rule of Civil Procedure 6(b) reveals that Rule 6(b) has been frequently indicated as a means of extending the timeframe for service of process. *See Wilson v. Kenny*, 941 F.2d

⁴ Federal Rule of Civil Procedure 6(b) provides:

(1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) *Exceptions.* A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

1208 (4th Cir. 1991) (Table of Decisions), 20 Fed. R. Serv. 3d 940, at *1 (explaining that because the deadline for service of process had been extended pursuant to Federal Rule of Civil Procedure 6(b), the defendant had been timely served); *Powell v. Starwalt*, 866 F.2d 964, 965 (7th Cir. 1989) (“Delay in service means that the defendant may be in the dark although the period of limitations has run; 120 days is the normal limit to this delay [in service], although Rule 6(b) holds out the possibility of extension on motion.”); *Dominic v. Hess Oil V.I. Corp.*, 841 F.2d 513, 516 (3d Cir. 1988) (“[A]lthough under Rule 4(j) service should be completed within 120 days the deadline may be enlarged at the discretion of the court pursuant to Rule 6(b)”); *Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 883 (3d Cir. 1987) (“[A] plaintiff may utilize Rule 6(b) to seek enlargement of the time period [for effectuating service] both before and after its expiration.”); *Winters v. Teledyne Movable Offshore, Inc.*, 776 F.2d 1304, 1305 (5th Cir. 1985) (“Presumably, the 120-day period could be extended by the district court ‘in its discretion’ under Fed. R. Civ. P. 6(b) ‘for cause shown,’ but if the extension were requested after the 120 days, a motion and showing that the failure to serve within that time ‘was the result of excusable neglect’ would *also* be required.”) (quoting Fed. R. Civ. P. 6(b)(2)). We find this federal authority persuasive in our construction and interpretation of Tennessee Rule of Civil Procedure 6.02.

Accordingly, we conclude that the trial court could properly utilize Tennessee Rule of Civil Procedure 6.02 to enlarge the timeframe for reissuance and service of process found in Rule 3 when the complaint was properly filed within the statute of limitations and based upon an adequate showing of “excusable neglect.”⁵ See *Maness*, 2009 WL 837707, at *2; *Ross*, 2001 WL 1078266, at *2. In making its determination concerning whether excusable neglect had been demonstrated, the trial court was required to consider facts outside the four corners of the complaint. See *id.* Once the court properly considered and ruled upon the Rule 6.02 motion, the court could then consider the motion to dismiss based on the appropriate standard of review. As this Court explained in *Maness*:

To the extent the [plaintiffs’] response can be construed as requesting relief under Rule 6.02, it is also reasonable to construe the trial court’s grant of the defendants’ motion to dismiss as being based in part upon a determination that the plaintiffs’ failure to obtain issuance of summon within the time period proscribed by Rule 3 was not the result of excusable neglect.

2009 WL 837707, at *3; see also *Trau-Med of Am.*, 71 S.W.3d at 696 (“Such a motion [to dismiss] challenges the legal sufficiency of the complaint . . .”). We therefore

⁵ The issue of whether excusable neglect was properly demonstrated in this matter will be fully addressed in the following section.

conclude that the trial court did not abuse its discretion concerning the procedure it employed when reviewing Mr. Edwards's Rule 6.02 motion for enlargement of time in conjunction with Ms. Herman's Rule 12 motion to dismiss.

V. Excusable Neglect

In the first part of the second certified issue, although not specifically disputing the factual findings underlying the trial court's determination of excusable neglect, Ms. Herman contends that the trial court erred by finding excusable neglect based on those facts. Analyzing the concept of excusable neglect in the context of Tennessee Rule of Civil Procedure 6.02, this Court has explained:

As a general rule, actions to which a deadline has been attached should be completed before the deadline. Co-existing with this general rule is Tenn. R. Civ. P. 6.02's exception that an untimely action may be considered timely where the tardiness is due to excusable neglect. Allowing an untimely action to be effective in certain cases has been characterized as "repair work when lawyers have good reasons." *Day v. Northern Ind. Pub. Serv. Corp.*, 164 F.3d 382, 384 (7th Cir. 1999). Accordingly, our task is to determine whether the trial court properly determined that [the movant] is entitled to some repair work under the facts of this case.

Older authorities held uniformly that inattention to court matters by a lawyer or a party would not be considered sufficient grounds to undo a result. *Totten & Bro. v. Nance*, 3 Tenn. Ch. 264, 266-67 (1877); *Cook v. Dews*, 2 Tenn. Ch. 496, 498-99 (1875). However, with the adoption in 1971 of the Tennessee Rules of Civil Procedure, the focus shifted from condemning inattention to considering excusable neglect. The United States Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) has set out the most authoritative exegesis of the excusable neglect concept, and we incorporate that analysis for our use here.

As the Court pointed out, a party's failure to meet a deadline may have causes ranging from forces beyond its control to forces within its control. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. at 387-88, 113 S.Ct. at 1494. 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.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. at 388, 113 S.Ct. at 1495. Thus, the excusable neglect concept may also apply to situations in which failure to comply with a filing deadline is attributable to a filer’s negligence. *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. at 394, 113 S.Ct. at 1497; *Marx v. Loral Corp.*, 87 F.3d [1049,] 1054 [(9th Cir. 1996)].

Still, not all negligence can be indulged. To do that would read out of the excusable neglect principle the requirement that the neglect must first be found excusable. Finding whether neglect is excusable is an equitable determination “taking account of all relevant circumstances surrounding the party’s omission.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. at 395, 113 S.Ct. at 1498; *Dubuc v. Green Oak Township*, 958 F. Supp. 1231, 1241 (E.D. Mich. 1997). The relevant circumstances envelop the big picture of both causes and effects, including (1) the danger of prejudice to the party opposing the late filing, (2) the length of the delay and its potential impact on proceedings, (3) the reason why the filing was late and whether that reason or reasons were within the filer’s reasonable control, and (4) the filer’s good or bad faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. at 395, 113 S.Ct. at 1498; *In re SPR Corp.*, 45 F.3d 70, 72 (4th Cir. 1995); *In re Nunez*, 196 B.R. 150, 157 (9th Cir. BAP 1996). These circumstances must be weighed both with and against each other because, if considered separately, they may not all point in the same direction in a particular case. *In re Keene Corp.*, 188 B.R. 903, 909 (Bankr. S.D.N.Y. 1995); *In re Nickels Performance Sys., Inc.*, 169 B.R. 647, 651 (Bankr. E.D. Tenn. 1994).

State ex rel. Sizemore v. United Physicians Ins. Risk Retention Grp., 56 S.W.3d 557, 566-67 (Tenn. Ct. App. 2001) (footnote omitted).

The test for excusable neglect articulated by the United States Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993), and embraced by this Court in *Sizemore*, 56 S.W.3d at 566-67, was subsequently adopted by our Supreme Court in *Williams*, 193 S.W.3d at 551. In *Williams*, our High Court addressed a motion for enlargement of time filed pursuant to Rule 6.02 and considered each of the four above-listed circumstantial factors in turn. *See* 193 S.W.3d at 551-553. As explained in *Sizemore*, this determination should “tak[e] account of all relevant circumstances,” and the circumstances “must be weighed both with and against each other because, if considered separately, they may not all point in the same direction in a particular case.” *See* 56 S.W.3d at 567.

In finding that excusable neglect had been demonstrated by Mr. Edwards in the action at bar, the trial court expressly relied upon the United States Supreme Court's decision in *Pioneer Inv. Servs. Co.*, 507 U.S. at 391. The trial court did not, however, consider all of the relevant factors and circumstances. Specifically, the trial court found solely that "no prejudice has resulted to the Defendant or her liability insurance carrier in allowing Plaintiff's motion to enlarge the time within which to obtain service of process." The court made no findings with regard to the other circumstances and factors, including: "(2) the length of the delay and its potential impact on proceedings, (3) the reason why the filing was late and whether that reason or reasons were within the filer's reasonable control, and (4) the filer's good or bad faith." See *Sizemore*, 56 S.W.3d at 567. Because the trial court failed to make the requisite findings regarding the relevant circumstances and failed to weigh those circumstances both with and against each other, we hereby vacate the court's determination of excusable neglect and remand for further proceedings on this issue.

Finally, the trial court included in its second issue certified for interlocutory review whether "the liability insurance carrier should be 'estopped' from asserting the running of the one-year period of limitations for a personal injury action under such factual findings." In its order granting Mr. Edwards's motion for an extension of time, the trial court found that "the Defendant is equitably estopped from asserting the expiration of the one year statute of limitation for personal injury actions" The court specifically stated that this finding was "based upon the authority" of this Court's decision in *Clark*, 2016 WL 4413348.

Clark was a personal injury action wherein this Court concluded that the defendant was estopped from relying upon the statute of limitations as a defense because evidence demonstrated that the plaintiff's counsel and the defendant's insurance carrier had entered into an agreement that service of process upon the defendant would not be required "unless negotiations stopped and the [insurance carrier] hired counsel to begin the litigation process." *Clark*, 2016 WL 4413348, at *9. In contrast, no such express agreement existed in the case at bar. As the trial court noted, Mr. Cantrell transmitted a letter to Ms. Herman's liability insurance carrier on April 9, 2015, in which he stated that he "[had] no problem giving [the insurance carrier] an open extension of time to respond" In his principal brief, Mr. Edwards asserts that this letter was sent in response to the insurance carrier's request for such an extension. However, as the trial court noted, there was no response from the insurance carrier to the above letter, and there was no agreement between the insurance carrier and Mr. Cantrell that service of process upon the insured would be waived.

In his responsive brief, Mr. Edwards also relies on *Clark* in support of his argument that because Ms. Herman's insurance carrier had been informed of the pending

lawsuit by Mr. Edwards’s counsel and had been offered an extension of time to file an answer, Ms. Herman was estopped from raising a defense based on insufficient service of process. However, as Ms. Herman appropriately notes in her reply brief, the defendant’s insurance carrier and the plaintiff in *Clark* had entered into an agreement that service of process upon the defendant would not be required ““unless negotiations stopped and the [insurance carrier] hired counsel to begin the litigation process.”” *See Clark*, 2016 WL 4413348, at *9. The case at bar is factually distinguishable in that no such express agreement waiving service of process existed. We therefore conclude that the trial court’s reliance upon *Clark* is misplaced, and we vacate the court’s determination that Ms. Herman would be estopped from asserting a defense based on the statute of limitations.

VI. Conclusion

For the foregoing reasons, we affirm the trial court’s utilization of Tennessee Rule of Civil Procedure 6.02 as a method of enlarging the timeframe for issuance and service of process, pursuant to Tennessee Rule of Civil Procedure 3, when the complaint was timely filed and when excusable neglect can be demonstrated. Determining that the trial court made insufficient findings concerning relevant circumstances and failed to weigh those circumstances both with and against each other regarding excusable neglect in this matter, we vacate the trial court’s determination on that issue and remand this matter to the trial court for further proceedings consistent with this opinion. We also vacate the trial court’s determination that Ms. Herman would be estopped from asserting a defense based on the statute of limitations because the parties had no express agreement waiving service of process. Costs on appeal are taxed one-half to the appellant, Paula Renee Herman, and one-half to the appellee, John Edwards.

THOMAS R. FRIERSON, II, JUDGE