

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 24, 2026 Session

FILED

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Clerk of the
Appellate Courts

JIMMY E. HENDERLIGHT, JR. v. DAVID HENDERLIGHT, ET AL.

Appeal from the Chancery Court for Wilson County
No. 2022-CV-184 Charles K. Smith, Chancellor

No. M2025-00022-COA-R3-CV

This litigation arises from a dispute between cousins who started a business together. During discovery, the trial court found that the plaintiff failed to respond in good faith to the defendants' requests for admission and deemed all requests admitted. Shortly thereafter, the court entered an order granting the plaintiff's attorney leave to withdraw. The defendants/counter-plaintiffs then moved for summary judgment on all claims asserted by and against them, relying on the admissions as well as declarations they submitted. The plaintiff failed to file any response to the motions for summary judgment. However, he did appear pro se at the summary judgment hearing and claimed that he was unaware of the summary judgment motions until two days earlier because he did not know that his email address had been provided to opposing counsel and the court, and he had not checked that email since his counsel withdrew. The trial court allowed the plaintiff to testify as to these facts. However, the court ultimately found that the plaintiff was properly served with the motions and had notice of the hearing date. Considering the evidence submitted by the defendants in support of the motions for summary judgment, in addition to the plaintiff's admissions and his failure to respond to the statements of material facts, the court found that the defendants were entitled to summary judgment on all claims. Thus, the trial court dismissed the claims asserted by the plaintiff and also granted the defendant/counter-plaintiffs damages on their counterclaims. The plaintiff retained counsel and timely filed a motion to alter or amend, asserting that his failure to respond to the summary judgment motions was due to excusable neglect. The trial court denied the motion, finding that the plaintiff's proffered excuse was a tactic for delay, he was not credible, and he acted intentionally. The plaintiff appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which KRISTI M. DAVIS and VALERIE L. SMITH, JJ., joined.

Thomas M. Leveille, Knoxville, Tennessee, for the appellant, Jimmy E. Henderlight, Jr.

Reid D. Leitner and Michael A. Caskey, Brentwood, Tennessee, for the appellees, Elite Ambulance LLC, David Henderlight, and Laura Henderlight.

OPINION

I. FACTS & PROCEDURAL HISTORY

In July 2022, Jimmy E. Henderlight, Jr., filed this lawsuit against his cousin David Henderlight (individually and in his capacity as a member of Elite Ambulance LLC), and Elite Ambulance LLC. According to the complaint, Jimmy had significant experience operating private ambulance businesses, and around 2015, he and his cousin David began to discuss opening a new private ambulance company. The complaint alleged that the parties entered into an agreement setting forth terms related to their new business, Elite Ambulance LLC. Essentially, Jimmy would contribute finances and equipment to assist with “start-up” of the business, while David would be in charge of its day-to-day operations. The complaint described various steps taken by both parties over the next several years in furtherance of the business. Ultimately, however, the complaint alleged that David refused to recognize Jimmy’s right to exercise an option to take majority ownership of the business. According to the complaint, David took the position that the company should be dissolved because it could not be salvaged financially. Jimmy’s complaint set forth claims for a declaratory judgment regarding his ownership interest, breach of contract, unjust enrichment, and injunctive relief. Jimmy was later granted leave to file an amended complaint, which added David’s wife, Laura, as a defendant due to her ownership of a minority interest in the LLC. He added claims against Laura for unjust enrichment, intentional interference with a business relationship, and inducement of breach of contract.

David and Elite Ambulance filed a counter-complaint against Jimmy. They alleged that Jimmy had failed to disclose that he had operated his other ambulance companies “for multiple years [as] an unlicensed ambulance operation.” Specifically, they asserted that Jimmy’s LLC had been administratively dissolved, and yet he continued to apply for licenses listing the LLC as the licensee while operating the business as a sole proprietor. The counter-complaint alleged that David “would not have entered into any agreement with Jimmy [] regarding creation of the ambulance company if Jimmy [] had made this disclosure.” They claimed that Jimmy was not qualified to be the majority owner of a licensed ambulance service because he had been operating an unlicensed service for a decade in violation of state regulations, and therefore, they would not consent to the transfer of a majority ownership interest to him. David and Elite Ambulance also alleged that Jimmy had failed to provide all of the necessary start-up capitalization as agreed, which led to substantial debt obligations. They asserted counterclaims for fraudulent

concealment, breach of contract, and unjust enrichment.

In August 2023, the trial court entered an order finding Jimmy in contempt for failure to produce documents at a January hearing that were properly requested by a subpoena duces tecum. In September 2023, the trial court entered another order finding Jimmy in contempt based on his violation of a temporary restraining order by disposing of business assets. Around this time, Jimmy sought a protective order against the defendants “for propounding an unreasonable number of requests for admissions.” On October 27, the trial court denied Jimmy’s motion and ordered him to answer all admission requests propounded. The court also ordered him to respond to outstanding interrogatories and document requests within thirty days. Notably, regarding scheduling matters, the order provided:

It is further ORDERED that trial in this case is hereby re-set for November 18-22, 2024, in the Chancery Court of Wilson County, Tennessee. The previous trial dates of March 11-14, 2024, are hereby reserved for the prospective summary judgment motion of Laura Henderlight. *Counsel are hereby directed to appear at Court on March 13, 2024, for hearing on the prospective summary judgment motion of Laura Henderlight after the Court’s review of the pleadings on March 11-12, 2024.*

(emphasis added). On November 29, David and Elite Ambulance filed a motion for the court to deem all of their requests for admission admitted, as Jimmy had responded to all 123 with the statement that he was “without knowledge sufficient to admit or deny.” That same day, the defendants also filed a motion to compel responses to their written discovery, as Jimmy had not responded within thirty days as required by the October order. The motion to compel again noted that the court had “reserved” the previous trial dates of March 11-14 for the prospective summary judgment motion of Laura and directed counsel to appear for the summary judgment hearing on March 13 after the court’s review of the pleadings on March 11-12.

Roughly two weeks later, on December 11, Jimmy’s counsel filed a motion to withdraw. The motion was heard on January 26, 2024, and Jimmy did not appear at the hearing. An order was entered on February 6 granting the motion to withdraw as unopposed, and it stated that all deadlines and orders would remain in effect. On February 2, the trial court held a hearing on the motion to deem the requests for admission admitted and on the motion to compel discovery, which had been filed on November 29. Jimmy appeared pro se at the hearing and requested an extension of thirty days to respond to the motions and seek counsel. The trial court denied his request for an extension, noting that his attorney had moved to withdraw in December and that Jimmy failed to appear at the hearing on that motion in January. The court entered an order deeming the requests for admission admitted that same day, noting that the requests had been served in August 2023 and that Jimmy had failed to respond in good faith. Regarding the motion to compel, the

court found that Jimmy had not responded to the discovery as ordered and that the defendants should be granted “a negative inference.” Also during the February 2 hearing, defendants’ counsel requested that David and Elite Ambulance be granted leave to set their own prospective summary judgment motion for March 11 to 14, on the same dates when Laura’s prospective motion was already set to be considered and heard. The trial court found this request to be well taken “in view of [Jimmy’s] prolonged failure to respond to multiple sets of written discovery request[s] . . . as well as [his] failure to answer the Defendants First Set Of Admission Request within the timeframe previously ordered by the Court in the order entered on October 27, 2024.”

On February 9, David and Elite Ambulance filed their motion for summary judgment on all claims, encompassing not only those asserted against them in Jimmy’s complaint but also the counterclaims they asserted against Jimmy. They alleged that Jimmy had approached David to form a new ambulance company as part of a scheme that would allow him to profit from Medicare reimbursements while covering up his wrongdoing with prior companies. They alleged a multiyear operation to defraud not only Medicare but also the Tennessee Department of Health and the Internal Revenue Service. David and Elite Ambulance claimed that Jimmy had taxable income of millions of dollars but did not file any income tax returns for six years. They contended that David would not have entered into any agreement to form the new company if Jimmy had disclosed the nature of his operations. With respect to their “offensive” motion for summary judgment on their counterclaims for fraudulent concealment and breach of contract, they requested damages in amounts equal to various debts owed by Elite Ambulance to creditors, which David allegedly had to guaranty as a result of Jimmy’s failure to capitalize the business. For their “defensive” summary judgment motion, they argued that Jimmy could not prove the elements of his claims for declaratory judgment, breach of contract, or unjust enrichment, so those claims should be dismissed. The motion was supported by numerous documents, including declarations from David and an accountant, as well as Jimmy’s admissions. The motion included a notice of hearing, which stated that the summary judgment hearing would take place on March 13, 2024, after the court’s review of the pleadings on March 11 and 12, as directed in the October order and the court’s ruling on February 2. Laura filed a separate motion for summary judgment the same day, asserting that all of the claims against her in Jimmy’s amended complaint should be dismissed as well. Her motion also included a notice of hearing setting the matter for March 13.

At the summary judgment hearing on March 13, Jimmy again appeared pro se. At the outset, the trial judge addressed Jimmy and stated that he had been informed by his clerks that “you came by and said you did not receive a copy of the motion for summary judgment” because of an issue with his email address. In light of that claim, the judge asked Jimmy how he knew that the court was having a hearing. Jimmy stated that when he was last in court on February 2, “March 11th was the date that was said” so he came to court on March 11. Jimmy explained that when he arrived, he was told that he was there on the wrong day. Jimmy said he also learned that the motions for summary judgment had

been sent to his email address. Jimmy said he explained that was not his “primary e-mail address” and “I hadn’t checked that e-mail address in months, and I wasn’t aware that [defense counsel] or anyone was trying to send me e-mail to that e-mail address that he had.” In response, defense counsel stated that the email address of record that the court clerk had for Jimmy was the same one on the motion to withdraw filed by his former attorney in December 2023. He further stated, “I’ve got copies of everything that his former attorney has filed and served, and on each one, she has that same e-mail address.” Counsel said he expected Jimmy would ask the court for more time to respond, but he asked the court to consider Jimmy’s credibility and the numerous other instances in which he had failed to respond. Counsel asked if the court was inclined to consider evidence on the issue, and the trial judge stated that he would give Jimmy an opportunity to put on any evidence to rebut the presumption that he was properly served with the motions by email. Jimmy was then placed under oath and testified.

Jimmy again explained that he had come to court two days earlier, on March 11, believing that “we were having the court that day.” He said the person who assisted him pulled copies of the filings, which showed his email address on them. Jimmy testified that he had not been accessing that email account because he “didn’t anticipate anything was being sent to that e-mail.” The trial judge then questioned Jimmy about his prior knowledge of the March hearing date, and the following exchange occurred:

THE COURT: How did you know about the court was being held on the 11th? That’s because we told you back in February --

JIMMY HENDERLIGHT: Yes. While we were here.

THE COURT: -- that the motions for summary judgment would be heard on the 11th.

JIMMY HENDERLIGHT: Yes.

THE COURT: And so you knew it, but you didn’t file any response to the material? You see, the law requires in summary judgment under Rule 56 that -- under Rule 56, it’s required that -- read it exactly what it says, as opposed to paraphrasing, “that the person filing the motion shall file a separate, concise statement of material facts.” And he’s done that. And then it gives you no later than five days before the time for the hearing to set to file a response to those, either admit them, denial them, or not state some reason why you have not responded.

But then I’ve talked to my clerks and I’ve looked at the file, and I find no response to these -- to these statements of -- that’s been filed by David and his wife Laura, and -- and you’re required to do that. And also they filed not affidavits, but they filed statements that you’ve not responded to with affidavits at all, either. They were sworn statements that they filed in lieu of affidavits.

How -- why didn’t you do any of that? You knew the motion for summary judgment was coming up. Did you ask the clerk for a copy of it the

day you were –

JIMMY HENDERLIGHT: The day I was here, I asked, I said that wasn't my e-mail address. She -- I'm sorry. I said I hadn't accessed that e-mail address, and she said do you have another e-mail address that she could provide for [defense counsel's] office, and I said yes, and I gave her the e-mail address.

And I didn't -- I didn't know that I was supposed to file something to -- to as you're responding. I mean, my problem is, is obviously I don't have a counsel. I intended to, I tried to, but unfortunately I don't have the funds to be able to retain counsel. So I wasn't aware of that, of, I guess, of the rules of how those are to be done. And so that's -- that's the reason I didn't file it.

. . . I just, I had received things from my attorney through that e-mail address previous, but that's -- I -- but I don't use it for anything except for that. And I haven't had any communication with the attorney in quite a while, and I didn't anticipate any reason that there would be communication from my attorney since they were no longer representing me.

So there was -- there was no reason for me to think that the Court or that [defense counsel] or anyone else would be sending me an e-mail to the address that I hadn't given out to anyone. I didn't provide that e-mail address to the Court or to anyone other than my attorney.

The trial judge then ruled that Jimmy had failed to rebut the presumption that he had been properly served under the applicable rules. The judge noted that Jimmy's email address was not only on the pleadings filed by his former attorney but also other documents in the clerk's office, and he knew that the motions for summary judgment would be heard on March 11. The judge also questioned Jimmy's claim that he lacked the money to afford an attorney given records indicating that he had earned millions in recent years. As such, the judge found that Jimmy had adequate notice of the hearing and ruled that the hearing would proceed.

Turning to the merits of the summary judgment motions, the judge acknowledged that Jimmy had "a hard row to hoe" given that he had not responded to the statements of undisputed material fact or the summary judgment motions.¹ The judge also granted a pending motion to deem a second set of requests for admission admitted in light of Jimmy's failure to respond. The judge then set forth the undisputed facts, examined the claims asserted by or against the defendants, and explained why they were entitled to summary judgment on each one. The trial court entered a written order and judgment for damages against Jimmy on April 5, 2024. David was awarded \$180,000 in damages for payroll taxes that Elite Ambulance owed the IRS, which Jimmy failed to pay, and sums of

¹ See Tenn. R. Civ. P. 56.06 ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.").

\$128,948.40, \$30,701.15, and \$32,095.45 for debts owed to lenders that David had to personally guaranty due to Jimmy's wrongful conduct. All claims asserted by Jimmy were dismissed. Because an issue remained outstanding regarding dissolution of Elite Ambulance, the trial court certified its order as final pursuant to Tennessee Rule of Civil Procedure 54.02.

Jimmy timely filed a motion to alter or amend on May 6, 2024.² He first argued that many of the requests for admission had pertained to legal conclusions rather than facts, which he argued should not be considered when ruling on a summary judgment motion. He also asserted that the facts that were deemed admitted did not establish as a matter of law the elements of the defendants' counterclaims or that his claims should be dismissed. Jimmy contended that, in the event the court allowed him to "withdraw the admitted matters" and respond to the summary judgment motions, he could demonstrate genuine issues of material fact.

Jimmy also submitted a lengthy declaration. He described receiving emails from his attorney on January 26 and January 31, prior to the entry of the order of withdrawal, in which she advised him of the upcoming hearing on February 2. Jimmy's declaration stated that he had not intended to represent himself, but he owed his prior counsel \$48,000 and "did not have sufficient cash" to pay her or retain new counsel. He stated that he made efforts to obtain other counsel but was unable to do so prior to employing his current attorneys. Jimmy stated that when he appeared pro se at the February 2 hearing, "I heard the attorney for the Defendants say that a hearing would be held on a motion for summary judgment on March 11 but I did not know what that meant. I also was not aware of any such motion having been filed." Jimmy also explained that he had used this particular email address to communicate with his previous attorney, but this was "an older email address" that he had stopped using otherwise. He stated that after his attorney advised him on January 31 that the proposed order allowing her withdrawal had been sent to the court, he "completely stopped checking that email address." He said he did not realize that this email address "was on the certificate of service to the Order of Withdrawal" or that it had been provided to defense counsel. Jimmy said he "believed" that he would have at least thirty days to try to retain new counsel. He also described his appearance in court on March 11 when he thought the hearing was scheduled for that day but was informed that it was set for March 13. According to Jimmy, he asked what was set for hearing and was told that it was motions for summary judgment, and when he stated that he had not received any, the individual explained that they had been served to his email address. Jimmy stated that he did not dispute that the matters were emailed by counsel to his email address. However, he insisted that he was not "aware" of the motions until March 11. Jimmy stated,

² The motion was timely filed because the thirtieth day fell on a weekend. *See* Tenn. R. App. P. 4(a) (providing the notice of appeal shall be filed within thirty days for an appeal as of right); Tenn. R. App. P. 21(a) (stating if the last day of a time period designated in the rules of appellate procedure falls on a weekend, the allowable time period extends to the next available day).

“Once I found out about the motions on March 11, 2024, I also was completely without knowledge of how to respond to the Motions.” Jimmy said he appeared at the March 13 hearing pro se but “did not have an understanding of what would happen that day” and “believed that the worst thing that could happen would be that my case against David Henderlight would be dismissed,” but he “did not understand that [he] was in danger of having a large judgment entered against [him].” Jimmy also stated that he had suffered from health issues in 2022 and 2023 that “impacted my ability to assist my lawyer in this litigation” and “fully understand these legal proceedings and to assist my attorney in responding to discovery.” He said he did not have access to many records and admittedly “did not provide my attorney with the information needed to fully respond to the First Set of Requests for Admissions.” His declaration also addressed the merits of the case and his involvement with Elite Ambulance and his prior companies.

The day before the motion to alter or amend was set to be heard, Jimmy’s counsel filed a memorandum in support of his motion arguing, for the first time, that his failure to respond to the motions for summary judgment was due to excusable neglect. He argued that he had meritorious defenses and that the defendants would not be prejudiced by vacating the summary judgment orders and allowing withdrawal of the admissions. At the hearing the following day, the defendants asked the trial court to strike Jimmy’s late-filed memorandum, but the court declined to do so and continued the hearing instead in order to allow the defendants time to respond. In response, the defendants argued that they would in fact be prejudiced if the orders were set aside due to the outstanding debt obligations they owed to creditors. In addition, they submitted documents from simultaneous proceedings pending in tax court and claimed that Jimmy had failed to respond there as well, resulting in a judgment against him for about nine million dollars in unpaid taxes, penalties, and interest. The defendants argued that they were essentially in a race to achieve priority for their judgment over the tax lien. The defendants also noted that the court had already received testimony from Jimmy at the March 13 hearing and concluded that he had notice and the hearing should proceed. They argued that Jimmy’s claim that he did not check his email was suspect given his statement in court at the March 13 hearing that he had not checked that email in “months” and his declaration stating that he had checked it as recently as January 31. Thus, they asserted that Jimmy failed to establish any basis for relief under Rule 59, even assuming that excusable neglect was a proper argument to be made. To the extent that Jimmy sought to raise arguments in opposition to the summary judgment motion in his Rule 59 motion, the defendants argued that such a motion cannot be used to raise previously unasserted legal arguments.³

After a hearing, the trial court entered an order denying the motion to alter or amend. It first found that Jimmy had not shown any of the usual grounds listed as the basis for Rule

³ Jimmy argued that the trial court should apply the factors applicable to motions to set aside *default* judgments. However, the defendants analyzed the motion using the excusable neglect factors found in *Ferguson v. Brown*, 291 S.W.3d 381, 389 (Tenn. Ct App. 2008).

59 relief. It also found that “the record does not show excusable neglect.” The court noted that Jimmy was afforded the opportunity to present proof at the March 13 hearing and failed to rebut the presumption that he was properly served. Despite his statement in court on March 13 that he had not checked that email “in months,” the court found that he later admitted receiving email from his prior counsel on January 31, which, the court said, called his credibility “into substantial doubt.” The court found that the Rule 59 motion was “not well taken in view of the record in this case.” It noted Jimmy’s failure to respond to the requests for admission served on him in August 2023, and in October, while he was represented by counsel, the court had ordered him to respond to discovery by November and reserved the March dates for hearing Laura’s prospective summary judgment motion. The court noted that Jimmy did not respond to the discovery and was again told of the March hearing date at the February 2 hearing. Considering all of the circumstances, the court found that Jimmy’s statement at the March 13 hearing that he did not receive the motions “was a tactic for delay.” Simply put, the court found that Jimmy “is not credible in his statements to the Court, under oath, that he did not receive the summary judgment motion filings at his email address of record with the Court[.]” The court noted that the record contained documents from other cases reflecting instances in which Jimmy did not respond after notice was served, including the proceeding in tax court. The court additionally noted that Jimmy failed to pay federal income taxes for six years, operated ambulance companies without a proper license, and failed to pay payroll taxes, as found in the summary judgment order. The court concluded that Jimmy’s failure to respond to the summary judgment motions “was intentional and willful, not excusable neglect,” as he was properly served with the motions and had actual notice of the hearing date. Finally, the court found sufficient evidence of prejudice to David and Elite Ambulance, noting the lawsuits of creditors and that the damages awarded were due to amounts the defendants owed. Thus, the court denied the Rule 59 motion. Jimmy timely filed a notice of appeal.⁴

II. ISSUES PRESENTED

Jimmy presents the following issues for review on appeal, which we have slightly restated:

1. Whether the trial court erred in denying the motion to alter or amend filed by Jimmy pursuant to Rule 59 based on excusable neglect in failing to respond to the motions for summary judgment;
2. Whether the trial court erred in granting summary judgment in reliance on requests for admission as to legal conclusions that were deemed admitted by the trial court;
3. Whether the trial court erred in its ruling on the motions for summary judgment that Jimmy fraudulently concealed material known facts from the defendants when the facts did not establish that he had a duty to disclose the facts referenced;

⁴ Both sides filed motions to consider post-judgment facts while this case was pending on appeal. Those motions are respectfully denied.

4. Whether the trial court erred in its ruling on the motions for summary judgment that Jimmy breached any asserted duty of loyalty or duty of fair dealing owed pursuant to Tennessee Code Annotated section 48-249-403 when the facts did not establish that Jimmy was a member of Elite Ambulance;
5. Whether the trial court erred in its ruling on the motions for summary judgment that Jimmy breached any written or oral agreement with defendants based on failure to provide start-up funding to Elite Ambulance when the facts did not establish Jimmy had a contractual obligation to provide funding beyond \$500,000 and the vehicles;
6. Whether the trial court erred in granting judgment as a matter of law dismissing the claims of Plaintiff Jimmy Henderlight.

In their posture as appellees, the defendants raise the following issues, which we have restated slightly:

1. Whether all summary judgment motions were properly granted because Jimmy Henderlight failed to file any response to the motions five days before the hearing as required under Tennessee Rule of Civil Procedure 56.03.
2. Whether Jimmy waived his appeal as to all summary judgment motions by not raising below any argument, response, opposition, or objection to any of the motions before the trial court granted the motions.
3. Whether Jimmy waived on appeal the issue of the trial court's finding in the order denying the Rule 59.04 motion to alter or amend that Jimmy's failure to respond to the summary judgment motions was intentional and willful, not excusable.
4. Whether Jimmy's appeal is frivolous and the defendants should be awarded damages under Tennessee Code Annotated section 27-1-122 in the form of attorney fees, costs, interest on the judgment, and/or expenses.

For the following reasons, the decision of the chancery court is hereby affirmed.

III. DISCUSSION⁵

A. Rule 59 Relief

“It is well-settled that a trial court’s ruling on a motion to alter or amend may be reversed only for an abuse of discretion.” *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 305 (Tenn. 2020). According to the Tennessee Supreme Court,

The abuse of discretion standard of review envisions a less rigorous

⁵ As Jimmy notes in his brief, “[i]nstead of certain documents being placed in the record on appeal numerous times, the trial court clerk in several instances referenced back to the original location in the record for those documents.” We appreciate the clerk’s efforts to limit the size of the record on appeal, especially considering that it still spans nineteen volumes.

review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal. It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. Thus, it does not permit reviewing courts to second-guess the court below, or to substitute their discretion for the lower court's. The abuse of discretion standard of review does not, however, immunize a lower court's decision from any meaningful appellate scrutiny.

Discretionary decisions must take the applicable law and the relevant facts into account. An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.

Id. (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)).

“A motion to alter or amend should be granted when the controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice.” *In re March 9, 2012 Order*, 637 S.W.3d 708, 712 (Tenn. Ct. App. 2020) (quoting *U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.*, 410 S.W.3d 820, 826 n.2 (Tenn. Ct. App. 2012)). However, the Tennessee Supreme Court has also “recognized the availability of relief under Rule 59 on the ground of excusable neglect.” *Youree v. Recovery House of E. Tenn., LLC*, 705 S.W.3d 193, 205 (Tenn. 2025). The Court has explained that “Rule 59.04 and Rule 60.02(1) each provide a vehicle for seeking relief from orders entered as a result of ‘mistake, inadvertence, or excusable neglect[.]’”⁶ *Discover Bank v. Morgan*, 363 S.W.3d 479, 492 (Tenn. 2012) (quoting *Ferguson*, 291 S.W.3d at 387). “Rule 59.04 allows a party to seek relief from a judgment within thirty days after being entered; conversely, Rule 60.02 affords a party a means to seek relief from a final, non-appealable judgment.” *Ferguson*, 291 S.W.3d at 387. Here, Jimmy timely filed a motion to alter or amend, so “Rule 59.04 is the applicable rule.” *See id.* (noting that the plaintiff “was seeking relief from the order of summary judgment due to counsel’s mistake, inadvertence or excusable neglect,” and that summary judgment order was not yet final and appealable, so the motion should be construed as a Rule 59.04 motion). Thus, “we construe this motion as a Tenn. R. Civ. P. 59.04 motion to alter or amend the judgment on the basis of mistake or excusable neglect and will review it using standards similar to those used to review Tenn. R. Civ. P. 60.02(1)

⁶ Rule 59.04 provides that “[a] motion to alter or amend a judgment shall be filed and served within thirty (30) days after the entry of the judgment.” Tenn. R. Civ. P. 59.04. Rule 60.02 provides, in pertinent part, “On motion and upon such terms as are just, the court may relieve a party or the party’s legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect[.]” Tenn. R. Civ. P. 60.02.

motions on similar grounds.” *Madu v. Madu*, No. M1999-02302-COA-R3-CV, 2000 WL 1586461, at *5 (Tenn. Ct. App. Oct. 25, 2000).

Here, Jimmy seeks to obtain relief from a summary judgment order pursuant to Rule 59.04 on the basis of excusable neglect. In *Ferguson*, where the plaintiff similarly asserted excusable neglect due to his attorney’s failure to file a response to a summary judgment motion or attend the hearing, we explained:

Not all negligence can be indulged for to do that “would read out of the excusable neglect principle the requirement that the neglect must first be found excusable.” *State ex rel. Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d 557, 567 (Tenn. Ct. App. 2001). An attorney’s mere oversight or negligence, without more, does not automatically amount to excusable neglect. *Madu v. Madu*, No. M1999-02302-COA-R3-CV, 2000 WL 1586461, at *4 (Tenn. Ct. App. Oct. 25, 2000) (citing *State ex rel. Jones v. Looper*, No. M1999-00662-COA-R3-CV, 2000 WL 354404, at *13 (Tenn. Ct. App. April 7, 2000); *Barber & McMurry, Inc. v. Top-Flite Dev. Corp.*, 720 S.W.2d 469, 471 (Tenn. Ct. App. 1986)). In determining whether excusable neglect existed on behalf of the moving party, “the burden is on the movant to set forth, in a motion or petition and supporting affidavits, facts explaining why the movant was justified in failing to avoid the mistake, inadvertence, surprise, or neglect.” *Tennessee Dep’t of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985) (quoting *Tennessee State Bank v. Lay*, 609 S.W.2d 525, 527 (Tenn. Ct. App. 1980)).

Excusable neglect may have causes ranging from forces beyond a party’s control to forces within its control. *Sizemore*, 56 S.W.3d at 567. “It may encompass simple, faultless omissions to act and, more commonly, omissions caused by carelessness.” *Id.* (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 388, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). Accordingly, excusable neglect may apply to certain situations in which failure to comply with a filing deadline is attributable to that party’s negligence. *Id.* (citing *Pioneer Inv. Servs. Co.*, 507 U.S. at 394, 113 S.Ct. 1489; *Marx v. Loral Corp.*, 87 F.3d 1049, 1054 (9th Cir. 1996)).

Whether neglect is excusable is an equitable determination “taking account of all relevant circumstances surrounding the party’s omission.” *Id.* (quoting *Pioneer Inv. Servs. Co.*, 507 U.S. at 395, 113 S.Ct. 1489; *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. 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.

Id. (internal citations omitted).

Ferguson, 291 S.W.3d at 388.⁷ The trial court did not expressly delineate this list of factors in its analysis. However, its findings in support of its decision reflect that it essentially considered the same factors substantively.

The first factor to consider is the danger of prejudice to the party opposing the late filing. *Id.* (citing *Sizemore*, 56 S.W.3d at 567). “Mere delay, or the fact a party has already incurred costs in the prosecution or defense of an action does not constitute prejudice,” nor does “simply having to proceed to trial.” *Id.* Rather, “prejudice connotes unmerited, *substantive harm* to the opposing litigant.” *Id.* at 389. It encompasses types of harm such as “the expenditure of money” or detrimental changes of position by one side in reliance on action or inaction of the other. *Id.*; see, e.g., *Dyer v. Haven*, No. M2024-01364-COA-R9-CV, 2026 WL 2453571, at *6 (Tenn. Ct. App. Aug. 21, 2026) (concluding that loss of a subrogation right was substantive harm). Here, the trial court found prejudice to David and Elite Ambulance in the form of unmerited substantive harm given the “obligations, claims, and lawsuits of creditors” against them. The court noted that the summary judgment order awarded damages to David and Elite Ambulance for amounts owed based on the claims of creditors and that one creditor had filed a notice of filing of foreign judgment. The court concluded that these pending lawsuits constituted evidence of prejudice that weighed against a finding of excusable neglect. We agree.

The second factor is the length of the delay and its potential impact on the proceedings. *Ferguson*, 291 S.W.3d at 389. Specifically, we consider whether a substantial delay would have resulted had the motion to set aside been granted. *Id.* The trial court noted that it had already permitted Jimmy to testify at the beginning of the summary judgment hearing on March 13 and found that he failed to rebut the presumption that he was properly served with the motions. The court entered its summary judgment order on April 5. Jimmy did not retain counsel and file a motion to alter or amend until May 6. He then sought an opportunity to respond to not only the summary judgment motion but also the requests for admission, which had been served on him in August. The trial court found that Jimmy's motion to set aside was “not well taken in view of the record

⁷ Notably, in *Ferguson*, this Court recognized that a party can also seek to set aside a *default* judgment, and we referenced *Henry v. Goins*, 104 S.W.3d 475, 480-81 (Tenn. 2003), “for a discussion of the three factors to be considered when a party seeks relief from a default judgment[.]” *Ferguson*, 291 S.W.3d at 387 n.2. However, we explained that “[t]he matter at issue here did not arise from” a motion to set aside a default judgment. *Id.* at 390 n.4.

in this case with regard to the failure of Jimmy [] to respond to the First Set of Admission Requests which [David and Elite Ambulance] served on August 25, 2023.” The court noted that he had been ordered to respond to discovery while he was still represented by counsel and failed to do so. It found that Jimmy’s claim at the summary judgment hearing regarding service of the motions was “a tactic for delay.” The record supports the trial court’s conclusions as to this factor, and it weighs against a finding of excusable neglect.

The third and fourth factors look to “the reason why the filing was late and whether that reason or reasons were within the filer’s reasonable control” and “the filer’s good or bad faith.” *Id.* at 388. Jimmy maintains that he did not check his email and was unaware of the motions until shortly before the hearing, and he compares his situation to cases in which attorneys neglected to read properly served motions or neglected to check their mail. However, the trial judge found that Jimmy was “not credible in his statements to the Court, under oath, that he did not receive the summary judgment motion filings at his email address of record with the Court[.]” The court noted instances in this case and others in which Jimmy failed to respond. It also noted his failure to pay income taxes and similar behavior. After hearing Jimmy’s live testimony, the trial court expressly found his testimony was not credible. “Because the trial court is able to observe witnesses as they testify, appellate courts afford deference to the trial court’s credibility assessments of live, in-court testimony.” *Trentham v. Mid-Am. Apartments, LP*, 705 S.W.3d 151, 161-62 (Tenn. 2025); *see, e.g., Mead v. Tucker*, No. M2020-01512-COA-R3-CV, 2021 WL 5149957, at *5 (Tenn. Ct. App. Nov. 5, 2021) (noting in its analysis of excusable neglect that “in its findings on the reason for the delay, the trial court made a credibility determination to which we must extend a high degree of deference and which we will not overturn absent clear and convincing evidence to the contrary”) (quotations omitted); *Husk v. Thompson*, No. M2016-01481-COA-R3-CV, 2017 WL 3432686, at *3 (Tenn. Ct. App. Aug. 10, 2017) (“At the hearing on the motion to set aside the default judgment, Mr. Thompson claimed he did not receive a copy of the motion for default judgment. . . . The trial court’s determination of this issue came down to credibility, and the trial court decided against Mr. Thompson. This Court places great weight on a trial court’s credibility determinations.”). The trial court found that Jimmy failed to respond “despite the fact that he had actual notice of the hearing date, and that he was served with the summary judgment filings pursuant to Tenn. R. Civ. P. 5.02.”

Aside from the issue with the email address, we also note that, at the summary judgment hearing, the trial judge asked Jimmy why he still did not file any response to the summary judgment motions when he learned on March 11 that the hearing would be held on March 13 and that the motions had been sent to his email. He responded, “I didn’t know that I was supposed to file something to -- to as you’re responding. I mean, my problem is, is obviously I don’t have a counsel. . . . I don’t have the funds to be able to retain counsel. So I wasn’t aware of that, of, I guess, of the rules of how those are to be done.” Thus, the reason why Jimmy failed to file a response was within his reasonable control. Moreover, “ignorance of the rules, or mistakes construing the rules do not usually constitute

‘excusable’ neglect.’” *Dyer*, 2026 WL 2453571, at *5 (quoting *Joshlin v. Halford*, 680 S.W.3d 187, 206 n.5 (Tenn. Ct. App. 2023)). The trial judge also explained that he had a “problem understanding how” Jimmy could not afford an attorney given the financial records entered in this case. Finally, the trial court pointed out that the summary judgment hearing dates were “reserved” as early as October 2023, and when Jimmy appeared in court pro se on February 2, 2024, “the Court told Jimmy” that the summary judgment motions were set for March 11 to 14.

Given all these considerations, the trial court found that Jimmy’s failure to respond to the summary judgment motions was “intentional and willful, not excusable neglect.” We agree and conclude that these factors -- “the reason why the filing was late and whether that reason or reasons were within the filer’s reasonable control” and “the filer’s good or bad faith” -- weigh against a finding of excusable neglect. Jimmy argues on appeal that the record reflects an “aggressive time schedule” after his attorney was granted permission to withdraw in February, but his attorney had filed the motion to withdraw almost two months earlier, in December. Jimmy did not attend the hearing on that motion either. On February 2, the trial court granted David and Elite Ambulance leave to set their own summary judgment motion for the same date when Laura’s prospective motion was already set to be heard “in view of [Jimmy’s] prolonged failure to respond to multiple sets of written discovery request . . . as well as [his] failure to answer the Defendants First Set Of Admission Request within the timeframe previously ordered by the Court in the order entered on October 27, 2024.” We also note that he was held in contempt for failure to produce documents dating back to January 2023. This is not a case where a party was diligently attempting to protect his rights or where a lone negligent act was the result of extenuating circumstances. *Cf. First S. Fin. Credit Union v. Collierville 385 Motors, LLC*, No. W2024-01084-COA-R3-CV, 2025 WL 883034, at *5 (Tenn. Ct. App. Mar. 21, 2025). Jimmy had established a pattern of failing to respond. After considering the four factors above, we conclude that Jimmy’s actions in this case were not the result of excusable neglect, and the denial of his motion to set aside the summary judgment order was not an abuse of discretion by the trial court.

On appeal and before the trial court, Jimmy has relied on a different set of factors for determining excusable neglect – those applicable to motions to set aside a default judgment. He argues, “Because of the similarity between default judgments and the grant of a motion for summary judgment due to a failure to respond, in determining whether to grant relief from the failure to respond the Courts of Tennessee use the same factors that are used to determine whether a default judgment should be vacated.” We recognize that “regardless of whether relief from a *default judgment* is sought under Rule 54, 59, or 60, the trial court must determine ‘(1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted.’”⁸ *Miller v. Miller*, No. E2019-01511-COA-R3-

⁸ “[T]he analysis of the merits of a Rule 59.04 motion to alter or amend a non-final default judgment

CV, 2020 WL 4383456, at *23 (Tenn. Ct. App. July 30, 2020) (quoting *Discover Bank*, 363 S.W.3d at 492) (emphasis added). However, we disagree with Jimmy’s assertion that the factors that apply in the default judgment context should apply here. Some background information regarding the factors is helpful in explaining why.

In *Campbell v. Archer*, 555 S.W.2d 110, 111-12 (Tenn. 1977), defendants filed motions to set aside judgments, alleging they had no notice of a trial date due to confusion after retaining new counsel. They claimed excusable neglect and alleged that they had a meritorious defense. *Id.* at 112. The defendants also alleged that these judgments were, under the circumstances, “default” judgments requiring five days notice. *Id.* The Supreme Court pretermitted the issue of whether the judgments were default judgments within the meaning of the rules requiring notice and found that the petitioners were entitled to relief under Rule 59 based on excusable neglect. *Id.* The Court emphasized the fact that the clients were not personally at fault but rather their attorney, which suggested excusable neglect rather than a willful failure to appear. *Id.* at 112-13. The Court also noted there was no showing of prejudice if the judgment was set aside. *Id.* However, “*Campbell* did not discuss whether any particular factor was necessary or sufficient.” *Discover Bank*, 363 S.W.3d at 491.

In *Tenn. Dept. of Human Services v. Barbee*, 689 S.W.2d 863, 865 (Tenn. 1985), the Tennessee Supreme Court reviewed the grant of a motion to set aside a *default* judgment. The Court noted that *Campbell*, “in dealing with a somewhat analogous fact situation,” had “emphasized the facts that the defendants were not personally at fault and that no showing had been made that the plaintiffs would be prejudiced if the judgments were set aside and a new trial was awarded.” *Id.* at 867-68. The *Barbee* court “adopted the same test for evaluating Rule 60.02(1) motions for relief from default judgments on ‘excusable neglect’ grounds” consistent with the federal paradigm:

In applying Rule 60(b)(1) [of the Federal Rules of Civil Procedure] in the context of default judgments, courts have gone beyond the bare wording of the rule and established certain criteria which should be considered in deciding whether the designated standards have been satisfied. These criteria ... include (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted.

Discover Bank, 363 S.W.3d at 491 (quoting *Barbee*, 689 S.W.2d at 866) (quoting *Davis v. Musler*, 713 F.2d 907, 915 (2d Cir. 1983)).⁹ However, the *Barbee* court noted that

is ‘equally applicable’ to a Rule 60.02 motion to set aside a final default judgment.” *First S. Fin. Credit Union*, 2025 WL 883034, at *3 n.4 (quoting *Barbee*, 689 S.W.2d at 867).

⁹ In *Barbee*, as in *Campbell*, the Court “did not discuss whether any particular factor was dispositive.” *Discover Bank*, 363 S.W.3d at 492. Later, in *Discover Bank*, the Supreme Court explained that “[w]hile most federal circuits employ a test similar to that of *Barbee* for deciding whether relief from

“[f]ederal courts have made a sharp distinction, in the application of Rule 60, between final judgments and default judgments.” *Barbee*, 689 S.W.2d at 866. It explained that “courts often apply a different standard when faced with a Rule 60 motion in regard to a default judgment,” because “the courts have given it a liberal construction” when applied to default judgments. *Id.* at 866-67. Stated differently, “Rule 60 is construed with liberality to afford relief from a default judgment.” *Id.* at 867. The *Barbee* court noted the federal courts’ recognition that “[t]here is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits.” *Id.* at 866. Thus, the *Barbee* court “relie[d] heavily on the distinction in the application of Rule 60 to default judgments as opposed to other types of judgments.” *Estate of Vanleer v. Harakas*, No. M2001-00687-COA-R3-CV, 2002 WL 32332191, at *6 (Tenn. Ct. App. Dec. 5, 2002) (citing *Barbee*, 689 S.W.2d at 866-67).

In *Donnelly v. Walter*, 959 S.W.2d 166, 167 (Tenn. Ct. App. 1997), a plaintiff sought relief from a summary judgment order two days after its entry, when she and her counsel had failed to appear at the summary judgment hearing and failed to submit any opposing affidavits or other properly verified material in response to the motions. She argued that the failure to appear was inadvertent and due to excusable neglect and relied on *Campbell* “for the proposition that a trial court may grant relief from a judgment in this situation, if the failure to appear is not willful.” *Id.* at 167-68. This Court declined to apply *Campbell* and found it “distinguishable from the instant case.” *Id.* at 168. One “distinguishing feature” was “the failure of Donnelly to submit affidavits or other material identified in Rule 56.03, . . . in opposition to the motions for summary judgment,” so *Campbell* did not support the request for relief. *Id.*

In *Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003), which involved a motion to

a default judgment should be granted on ‘excusable neglect’ grounds pursuant to Federal Rule of Civil Procedure 60(b)(1), many decisions from these circuits do not articulate how the three enumerated factors—willfulness (or culpability), a meritorious defense, and prejudice—should be weighed relatively to one another.” *Id.* The Court ultimately concluded that “the better view is to condition relief from a default judgment, whether final or interlocutory, on a finding that the defaulting party did not act willfully.” *Id.* Thus, the Court explained,

Today we clarify that when a party seeks relief from a default judgment due to “excusable neglect,” whether pursuant to Rule 54.02 (for interlocutory judgments), Rule 59.04 (for final judgments within thirty days of entry), or Rule 60.02 (for final judgments more than thirty days after entry), a reviewing court must first determine whether the conduct precipitating the default was willful. If the court finds that the defaulting party has acted willfully, the judgment cannot be set aside on “excusable neglect” grounds, and the court need not consider the other factors. If the conduct was not willful, however, then the court must consider whether the defaulting party has a meritorious defense and whether the non-defaulting party would be prejudiced by the granting of relief. The court may also consider any other factor that it deems relevant.

Id. at 493-94.

set aside an order of dismissal for failure to prosecute due to excusable neglect, the Supreme Court found it appropriate to “look to cases that decide whether default judgments should be set aside.” The Court explained,

A dismissal for failure to prosecute is analogous to a default judgment. When a defendant fails to answer a complaint, the plaintiff may obtain a default judgment without a hearing on the merits. When a plaintiff fails to prosecute the case, the defendant may receive a judgment of dismissal without a hearing on the merits. Both dismissals and default judgments are drastic sanctions. *See United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983); *Barish v. Metro. Gov’t of Nashville & Davidson County, Tenn.*, 627 S.W.2d 953, 955 (Tenn. Ct. App. 1981). Neither dismissals nor default judgments are favored by the courts. *See Barbee*, 689 S.W.2d at 866; *Mfrs. Consolidation Serv., Inc. v. Rodell*, 42 S.W.3d 846, 864 (Tenn. Ct. App. 2000). Dismissals based on procedural grounds like failure to prosecute and default judgments run counter to the judicial system’s general objective of disposing of cases on the merits. *See, e.g., Childress v. Bennett*, 816 S.W.2d 314, 316 (Tenn. 1991) (observing that “it is the general rule that courts are reluctant to give effect to rules of procedure ... which prevent a litigant from having a claim adjudicated upon its merits”); *Barbee*, 689 S.W.2d at 866 (stating that in the interests of justice, courts express a clear preference for a trial on the merits).

Rule 55.02 of the Tennessee Rules of Civil Procedure permits trial courts to set aside default judgments in accordance with Rule 60.02. Courts construe requests for relief pursuant to Rule 60.02 much more liberally in cases involving default judgment than in cases following a trial on the merits. *See Barbee*, 689 S.W.2d at 866; *Nelson v. Simpson*, 826 S.W.2d 483, 485 (Tenn. Ct. App. 1991). A request to vacate a default judgment in accordance with Rule 60.02 should be granted if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits. *See Nelson*, 826 S.W.2d at 486. A request to vacate an order of dismissal pursuant to Rule 60.02 should be granted under the same circumstances. Such liberality is especially warranted when an order of dismissal is entered with prejudice and without such procedural safeguards as notice, considering that Rule 55.01 of the Tennessee Rules of Civil Procedure requires notice to be given before a default judgment is granted.

Because of the similarity between default judgments and dismissals, we find instructive those factors that are used to determine if a default judgment should be vacated under Rule 60.02(1). Those factors include: (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted. *See Barbee*, 689 S.W.2d at 866. These same factors should apply in cases when relief from an order of dismissal is sought under

Rule 60.02(1).

*Id.*¹⁰ Thereafter, in *Discover Bank*, the Supreme Court explained that it had “extended *Campbell* and *Barbee* to dismissals for failure to prosecute” in *Henry v. Goins*. *Discover Bank*, 363 S.W.3d at 492 n.23 (citing *Henry*, 104 S.W.3d at 481). This Court has also applied the three *Campbell/Barbee/Henry* factors in the context of an order of dismissal under a local rule regarding parties who fail to set their case for trial, deeming it analogous to granting a default judgment. *Metro. Gov’t of Nashville & Davidson Cnty. v. Cuozzo*, No. M2007-01851-COA-R3-CV, 2008 WL 3914890, at *5 (Tenn. Ct. App. Aug. 25, 2008).

Shortly after *Henry*, however, this Court explained that even though *Henry* applied the three default factors to a Rule 60.02 motion, we did not interpret the *Henry* factors “as superseding *Sizemore* and other cases” that had construed Rule 60.02(1). *Bowers v. Gutterguard of Tenn., Inc.*, No. M2002-02877-COA-R3-CV, 2003 WL 22994302, at *6-7 (Tenn. Ct. App. Dec. 17, 2003). We explained,

There is a substantial body of case law interpreting the application of the Rule 60.02(1) reasons. This Court discussed excusable neglect at great length in another context (dealing with excusable neglect under Rule 6.02, Tenn. R. Civ. P.) in *State ex rel. Sizemore v. United Physicians Ins. Risk Retention Group*, 56 S.W.3d 557, 566-571 (Tenn. Ct. App. 2001), and found the following factors (circumstances) pertinent:

[N]ot 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

¹⁰ This Court has observed that *Henry* “concluded that a dismissal for failure to prosecute was [not a] determination on the merits for purposes of considering a Rule 60.02 motion,” and it “applied a standard more favorable to affording relief under 60.02 than would exist if the case had actually been decided on the merits.” *Britt v. Usery*, No. W2022-00256-COA-R3-CV, 2024 WL 195879, at *8 (Tenn. Ct. App. Jan. 18, 2024).

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).

Id. at 567.

Id. at *6-7. We did not believe the Supreme Court intended to “supersed[e] *Sizemore*” or substitute “willfulness, meritorious defense and prejudice” for the Rule 60.02 reasons of excusable neglect, mistake, inadvertence, or surprise. *Id.* at *7. As such, we held that “the Rule 60.02(1) reasons, such as excusable neglect, are still applicable as well as the relevant cases such as *Sizemore*.” *Id.* Examining federal caselaw, we also came to “the realization that courts distinguish when the three *Henry* /Rule 55 factors apply, or do not apply.” *Id.* We also noted that “*Sizemore* factor number one (prejudice) is consistent with *Henry* factor three (prejudice) and *Sizemore* factor number four (good or bad faith) is consistent with *Henry* factor one (willfulness).”¹¹ *Id.* at *8.

In *Ferguson*, 291 S.W.3d at 387-88, as we mentioned above, this Court applied the *Sizemore* factors when reviewing a Rule 59.04 motion for relief from a summary judgment order on the basis of excusable neglect. That is the same procedural posture we have here. *Ferguson* noted the existence of the *Henry* factors in a footnote, describing them as “the three factors to be considered when a party seeks relief from a default judgment,” but we stated that the matter at issue did not arise from a motion to set aside a default judgment. *Id.* at 387 n.2, 390 n.4. This Court has continued to apply the *Sizemore* factors to determine excusable neglect in other contexts as well. See, e.g., *Douglas v. Latimer*, No. M2024-01183-COA-R3-CV, 2025 WL 2480843, at *1-2 (Tenn. Ct. App. Aug. 28, 2025) (considering a Rule 60.02 motion to set aside a final order to allow an untimely motion to alter or amend based on excusable neglect and observing that “[i]n *Sizemore*, this Court set forth the following [factors] related to whether neglect, such as the neglect in this case, was excusable”); *In re Raylan W.*, No. M2020-00102-COA-R3-PT, 2020 WL 4919797, at *5-6 (Tenn. Ct. App. Aug. 20, 2020) (applying the *Sizemore* factors to a Rule 60.02 motion seeking relief on the basis of excusable neglect in not timely filing a notice of appeal); *Stubblefield v. Morristown-Hamblen Hosp. Ass’n*, No. E2017-00994-COA-R3-CV, 2019

¹¹ *Bowers* involved a dismissal for failure to comply with a local rule, analogous to a default judgment. *Id.* at *1. Thus, the *Bowers* Court ultimately considered the *Henry* and *Sizemore* factors -- “the *Henry*/[default] factors along with the Rule 60.02(1) reasons, weighing them with and against each other to obtain a proper perspective, as suggested above and in *Sizemore*, under the umbrella of the general rule that courts are reluctant to give effect to rules of procedure which prevent a litigant from having a claim adjudicated upon its merits.” *Id.* at *7.

WL 2439080, at *3, *6 (Tenn. Ct. App. June 11, 2019) (applying the *Sizemore* factors when considering a motion to alter or amend claiming excusable neglect in failing to file an expert affidavit prior to a summary judgment hearing); *Jackson v. Jackson*, No. M2018-00361-COA-R3-CV, 2018 WL 4896656, at *7 (Tenn. Ct. App. Oct. 9, 2018) (considering the *Sizemore* factors to determine excusable neglect after a husband failed to appear at his divorce trial and sought to set aside the judgment); *Morson v. Tenn. Dep't of Mental Health & Developmental Disabilities*, No. M2013-01218-COA-R3-CV, 2014 WL 2019268, at *4-5 (Tenn. Ct. App. May 14, 2014) (applying the *Sizemore* factors where the party sought Rule 60 relief for failure to timely file a notice of appeal based on excusable neglect); *Figal v. Vanderbilt Univ.*, No. M2012-02516-COA-R3-CV, 2013 WL 5459021, at *6-7 (Tenn. Ct. App. Sept. 27, 2013) (same); *Mobley v. Caffa-Mobley*, No. M2011-02269-COA-R3-CV, 2012 WL 5986544, at *4 (Tenn. Ct. App. Nov. 30, 2012) (applying the *Sizemore* factors to a request to set aside a divorce decree); *see also Warren v. Warren*, No. M2009-02255-COA-R3-CV, 2011 WL 1661771, at *5-6 (Tenn. Ct. App. Apr. 29, 2011) (noting both sets of factors).

This Court has also rejected the notion that the liberality afforded to motions to set aside *default* judgments should apply to a Rule 60.02 motion generally. In *Tomlin v. Baxter*, No. M2014-01746-COA-R3-CV, 2015 WL 7749064, at *4-5 (Tenn. Ct. App. Nov. 30, 2015), we explained:

Defendants contend the trial court abused its discretion in denying their Rule 60.02(1) “Motion to Set Aside Default Judgment.”

Relief under Rule 60.02 is considered an exceptional remedy that is designed to strike a proper balance between the competing principles of finality and justice. *Furlough v. Spherion Atlantic Workforce, LLC*, 397 S.W.3d 114, 127 (Tenn. 2013); *DeLong v. Vanderbilt Univ.*, 186 S.W.3d 506, 511 (Tenn. Ct. App. 2005). “Rule 60.02 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules.” *Welch v. Welch*, 195 S.W.3d 72, 75 (Tenn. Ct. App. 2005) (quoting *Thompson v. Firemen’s Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990)). Due to the importance of the “principle of finality,” however, the “escape valve” should not be easily opened. *Id.* (citing *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991)). The party seeking relief under Rule 60.02 bears a heavy burden of proof to demonstrate that relief is appropriate in light of the equities of the case. *Id.* (citation omitted).

Nevertheless, Rule 60.02 motions are viewed “*liberally* when the movant seeks relief from a *default judgment*.” *Pryor v. Rivergate Meadows Apartment Assocs. Ltd. P’ship*, 338 S.W.3d 882, 885 (Tenn. Ct. App. 2009) (emphasis added). A request to vacate a default judgment in accordance with Rule 60.02 should be granted “if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits.” *Henry*, 104

S.W.3d at 481 (citations omitted) (emphasis added). When a party seeks Rule 60.02 relief from a default judgment for mistake, inadvertence, surprise or excusable neglect, the court considers the following factors: (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted. *Id.*

Defendants contend their Rule 60.02 motion sought relief from a default judgment and, therefore, the liberal standard should apply. However, contrary to the title Defendants gave their “Motion to Set Aside Default Judgment,” the order they seek to set aside, the 2014 final judgment, is not a *default judgment*.

It is important to realize that “[a] party’s lack of attendance at trial does not convert a judgment into a default judgment.” *Schrader v. Schrader*, No. E2005-02641-COA-R3-CV, 2007 WL 27118, at *5 (Tenn. Ct. App. Jan. 4, 2007). For example, in *Schrader*, we were asked to consider whether a judgment from which Rule 60.02 relief was sought was a default judgment. *Id.* In that case, when the husband did not appear at trial during a divorce action, the trial proceeded in his absence, evidence was presented by the wife, and a judgment was entered. On appeal the husband claimed that the trial court erred when it entered a “default judgment” against him. We rejected that argument, stating that a party’s lack of attendance at trial does not convert a judgment into a default judgment. *Id.* We rejected a similar argument in *Sandalwood Properties, LLC v. Roberts*, stating “we were compelled to disagree with the Tenants’ designation of the Circuit Court’s judgment ... as a ‘default judgment.’ It does not follow from the mere fact that the Tenants were absent from the hearing ... that the judgment entered against them was a default judgment.” *Sandalwood Properties, LLC v. Roberts*, No. E2006-01163-COA-R3-CV, 2006 WL 3431939, at *3 (Tenn. Ct. App. Nov. 29, 2006); *see also Harper v. Harper*, No. E2002-01259-COA-R3-CV, 2003 WL 192151, at *4 (Tenn. Ct. App. E.S., filed January 29, 2003) (“Wife’s absence at trial does not magically convert the final judgment into a default judgment. We reject Wife’s argument that a default judgment was entered in this case.”)).

Further, there is a difference between a default judgment and a judgment following a full evidentiary hearing, and the true nature of the judgment is not controlled by an incorrectly titled order. . . .

In this case, Defendants seek to set aside the 2014 final judgment. Although Defendants were not in attendance, this judgment followed the May hearing, which was an evidentiary hearing; therefore, it was not a default judgment. Accordingly, the trial court was not required to “liberally” review Defendants’ Rule 60.02 motion. *See Pryor*, 338 S.W.3d at 885. Instead, Defendants’ motion for Rule 60.02 relief was properly considered under the general Rule 60.02 standard, which recognizes that the relief being

sought was “an exceptional remedy,” an “escape valve” so-to-speak that should not be easily opened, and that Defendants, the parties seeking Rule 60.02 relief, bore a heavy burden of proof to demonstrate that relief was appropriate in light of the equities of the case. *See Furlough*, 397 S.W.3d at 127; *Welch*, 195 S.W.3d at 75; *Thompson*, 798 S.W.2d at 238; *Toney*, 810 S.W.2d at 146.

Id. at *4-5.

Similarly, in *Burstiner v. Boyd*, No. M2025-01241-COA-R3-CV, 2026 WL 1675104, at *7 n.12 (Tenn. Ct. App. June 10, 2026), we noted that at various points in their analysis of a Rule 60 motion, both the parties and the trial court had discussed underlying substantive issues pertaining to whether a meritorious claim existed. We observed:

This question of merit comes from the three-prong test used in considering whether to grant Rule 60 relief from a default judgment or from a dismissal for failure to prosecute. *See Henry*, 104 S.W.3d at 481 (“Because of the similarity between default judgments and dismissals [for failure to prosecute], we find instructive those factors that are used to determine if a default judgment should be vacated under Rule 60.02(1). Those factors include: (1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted.”). Our supreme court has stated that “[t]here is much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits.” *Tenn. Dep’t of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985) (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2857 (1973)). As previously noted, however, despite Mr. Burstiner’s non-attendance at the motion hearing, the trial court’s order granting Appellees’ motion to dismiss clearly involved an adjudication of the merits and was neither a default judgment nor a dismissal for failure to prosecute. *See Harper v. Harper*, No. E2002-01259-COA-R3-CV, 2003 WL 192151 (Tenn. Ct. App. Jan. 29, 2003) (rejecting the defendant’s argument that the final judgment should be considered a default judgment due to her absence at trial).

Ultimately, we had no need to consider whether the trial court’s reliance on the purported lack of a meritorious defense was applicable in that situation, given our resolution of the issues on appeal. *Id.* We did observe, however, that “Mr. Burstiner’s Rule 60 motion does not benefit from the same liberality afforded to those stemming from default judgments.” *Id.* at *9.

Likewise, in *Mayes v. Jamco-KW, LLC*, No. E2005-01425-COA-R3-CV, 2006 WL

468766, at *1 (Tenn. Ct. App. Feb. 28, 2006), which involved a party’s failure to appear at trial, we noted, “The parties on appeal have argued and cited cases relating to setting aside default judgments, and the rule relating thereto. This is simply not a default judgment in the traditional sense.” The plaintiff raised arguments regarding the existence of a meritorious defense and “relie[d] on cases involving default judgments,” but we reiterated that “these cases are inapposite to the case before us.” *Id.* at *2. *See also Dockery v. State*, No. M2006-00014-COA-R3-CV, 2007 WL 2198195, at *4 (Tenn. Ct. App. July 23, 2007) (“*Henry v. Goins* established the standards the courts must apply when construing Tenn. R. Civ. P. 60.02 requests concerning orders that are akin to default judgments. This is not a default judgment situation.”).

In *Fausnaught v. DMX Works, Inc.*, No. M2011-01911-COA-R3-CV, 2012 WL 2087157, at *1 (Tenn. Ct. App. June 8, 2012), a defendant moved to set aside a judgment after failing to appear at trial and argued that the ruling constituted a default judgment so it “should be set aside pursuant to the 3-part test articulated in *Nelson v. Simpson*, 826 S.W.2d 483, 486 (Tenn. Ct. App. 1991),” (which, in turn, discussed the three *Barbee* factors – prejudice, meritorious defense, and willfulness). We explained that the action taken by the trial court was not a default judgment but rather based on evidence presented at the trial. *Id.* “Inasmuch as the trial court did not enter a default judgment,” we explained, “the test articulated in *Nelson* is not applicable to this case.” *Id.* at *1 n.3.¹²

Recently, in *Abdou v. McCool*, No. M2024-00905-COA-R3-CV, 2026 WL 538032, at *7 n.14 (Tenn. Ct. App. Feb. 26, 2026) *perm. app. denied* (Tenn. June 23, 2026), an

¹² *But see Jahen v. AER Express, Inc.*, No. E2022-00344-COA-R3-CV, 2023 WL 3828496, at *2-4 (Tenn. Ct. App. June 6, 2023) (using the *Henry* factors where a party failed to appear at trial); *Miclaus v. Miclaus*, No. E2018-02134-COA-R3-CV, 2019 WL 2578256, at *1-4 (Tenn. Ct. App. June 24, 2019) (considering the *Henry* factors where a party lacked notice of trial due to an incorrect address because, while the judgment was technically not a default, “the effect was the same”); *Obi v. Obi*, No. M2010-00485-COA-R3-CV, 2011 WL 2150733, at *5 (Tenn. Ct. App. June 1, 2011) (same); *Sauer v. Launius*, No. E2010-00477-COA-R3-CV, 2011 WL 334982, at *1-2 & n.2 (Tenn. Ct. App. Jan. 31, 2011) (“Where the party’s failure to act results in a summary entry of judgment or a summary dismissal without a contested hearing on the merits, it is appropriate to analyze the party’s motion to set aside the judgment under the standard of cases that deal with whether to set aside a default judgment. . . . [B]ecause the judgment in *Henry* was entered without a contested hearing on the merits, the Supreme Court looked to cases that decide whether default judgments should be set aside for the appropriate analysis. We will do the same borrowing liberally from the path charted in *Henry*. . . . We are aware that the Supreme Court in *Henry* was dealing with the dismissal of a plaintiff’s claim because of the failure of the plaintiff to prosecute rather than a judgment for a plaintiff without a hearing on the merits due to the failure of the defendant to appear on the date of trial. However, both *Henry* and the instant case deal with a lack of notice to a litigant concerning a critical step in a court proceeding. Therefore, we believe the analysis in *Henry* applies with equal force to the facts now before us.”); *Noah v. Noah*, No. E2005-02511-COA-R3-CV, 2006 WL 1679607, at *4 (Tenn. Ct. App. June 19, 2006) (“Although the Trial Court did not technically enter a Tenn. R. Civ. P. 55 default judgment against Father, its order had the same effect.”); *Williams v. Nat’l Grange Mut. Ins. Co.*, No. C.A. 1222, 1989 WL 9563, at *5 (Tenn. Ct. App. Feb. 10, 1989) (applying “the default judgment criteria, which we think is most applicable under these facts,” when parties were unable to be in court on the day of trial due to illness).

appellant invited this Court to construe his Rule 60 motion liberally because it involved a nonsuit based on what he described as a “procedural” ground rather than a judgment on the merits. We rejected this argument. *Id.* We explained that the *Henry* court, in discussing the need for liberality, “was explicitly addressing default judgments and dismissals for failure to prosecute.” *Id.* We noted the Court’s explanation “that such liberality was called for in the face of a request for Rule 60 relief from these rulings as ‘[b]oth dismissals [for failure to prosecute] and default judgments are drastic sanctions[,]’ running ‘counter to the judicial system’s general objective of disposing of cases on the merits.’” *Id.* (quoting *Henry*, 104 S.W.3d at 481). “From this analysis,” we explained, “we gather that it is not merely the fact that the underlying case was not heard on its merits that warrants a more liberal review of a Rule 60 motion, but rather that the trial court declined to consider the merits of a parties’ claim or defense following some inaction by the parties.” *Id.* We concluded that no such liberality was required in reviewing the Rule 60 motion in that case, as it involved a voluntary dismissal, so “it was not the trial court that prevented the underlying claims from being adjudicated on their merits.” *Id.*

In summary, as these cases reflect, “the nature of the underlying order or judgment” is “[o]f great importance in the examination of the merits of a [Rule] 60.02 petition” because courts construe requests for relief “much more liberally in cases involving default judgments and dismissals than in cases following a trial on the merits.” *Dockery*, 2007 WL 2198195, at *3. Because of this liberality, it is “critical” that courts consider “the type of the underlying judgment or order from which the party seeks relief.” *Walker v. Nissan N. Am., Inc.*, No. M2009-00273-COA-R3-CV, 2009 WL 2589089, at *3 (Tenn. Ct. App. Aug. 21, 2009); *see also Barbee*, 689 S.W.2d at 867 (“courts often apply a different standard when faced with a Rule 60 motion in regard to a default judgment”). “Motions to set aside default judgments are not viewed with the same strictness that motions to set aside judgments after a hearing on the merits are viewed.” *Clark Power Servs., Inc. v. Mitchell*, No. E2007-01489-COA-R3-CV, 2008 WL 2200047, at *2 (Tenn. Ct. App. May 27, 2008). As our Supreme Court explained last year,

In recognition that default judgments are not favored under Tennessee law, our courts construe requests to set aside a judgment “much more liberally in cases involving a default judgment than in cases following a trial on the merits.” *Henry*, 104 S.W.3d at 481. Thus, as a general matter, a trial court ordinarily should exercise its discretion in favor of allowing a case to be heard on its merits. *Parks v. Mid-Atlantic Fin. Co.*, 343 S.W.3d 792, 798 (Tenn. Ct. App. 2011) (citing *Patterson v. SunTrust Bank*, 328 S.W.3d 505, 509-10 (Tenn. Ct. App. 2010)). To that end, this Court has stated that a request to vacate a default judgment “should be granted if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits.” *Henry*, 104 S.W.3d at 481.

Youree, 705 S.W.3d at 203. And, as this Court recently noted,

Specifically with respect to default judgments, whether relief is sought under Rule 59 or Rule 60, additional criteria come into play. *See Discover Bank*, 363 S.W.3d at 491 (noting the same test used for relief under Rule 59 was adopted “for evaluating Rule 60.02(1) motions for relief from default judgments on ‘excusable neglect’ grounds”). Trial courts must consider “(1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted.” *Tenn. Dep’t of Hum. Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985) (quoting *Davis v. Musler*, 713 F.2d 907, 915 (2nd Cir. 1983)). “[W]hether the conduct precipitating the default was willful” is a threshold inquiry. *Discover Bank*, 363 S.W.3d at 493-94. “If the court finds that the defaulting party has acted willfully, the judgment cannot be set aside on ‘excusable neglect’ grounds, and the court need not consider the other factors.” *Id.* at 494.

In Re Brady R., No. M2025-00691-COA-R3-PT, 2026 WL 937461, at *4 (Tenn. Ct. App. Apr. 7, 2026).

Again, “[s]imilar liberality is also applied when the party seeks Rule 60.02(1) relief from a dismissal for failure to prosecute.” *Walker*, 2009 WL 2589089, at *3. “It is a ‘drastic sanction[]’ and is disfavored by the courts.” *Durham v. Tenn. Dep’t of Labor & Workforce Dev.*, No. M2014-00428-COA-R3-CV, 2015 WL 899024, at *9 (Tenn. Ct. App. Feb. 27, 2015) (quoting *Henry*, 104 S.W.3d at 481). “[W]hen considering whether a dismissal for failure to prosecute should be vacated, Tennessee courts borrow the analysis used in determining whether a default judgment should be vacated under Tenn. R. Civ. P. 60.02.” *Evans v. Wintrow*, No. M2003-00788-COA-R3-CV, 2005 WL 2416634, at *3 (Tenn. Ct. App. Sept. 30, 2005).

Here, however, Jimmy asks this Court to apply the default judgment factors and analysis to a motion to set aside a summary judgment order. At the outset, we note that “[s]ummary judgments are not disfavored procedural devices.” *Green v. Green*, 293 S.W.3d 493, 513 (Tenn. 2009) (citing *Eskin v. Bartee*, 262 S.W.3d 727, 732 (Tenn. 2008); *Frugé v. Doe*, 952 S.W.2d 408, 410 (Tenn. 1997)). In addition, “[w]hen a court determines, consistent with the standards in Tennessee Rule 56, that no genuine issue of material fact exists and grants summary judgment, the case *has been decided on the merits*.” *Rye v. Women’s Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 262 (Tenn. 2015).

This Court has considered the *Henry* factors in a few summary judgment cases. In *Fillers v. Collins*, No. E2013-01210-COA-R3-CV, 2014 WL 631239, at *1 (Tenn. Ct. App. Feb. 18, 2014), we considered an attempt to set aside a summary judgment entered after the appellant failed to appear or file a response to the motion. “The trial court granted the motion for summary judgment because Borrowers failed to appear at the hearing date and

still had yet to respond to the motion for summary judgment and attached statement of material facts.” *Id.* The appellant’s motion to set aside asserted excusable neglect, claiming that her attorney inadvertently failed to respond or attend the hearing. *Id.* We took the same approach used by the Court in *Henry* and applied the default judgment factors, with the following explanation:

“[W]e find instructive those factors that are used to determine if a default judgment should be vacated under Rule 60.02(1)” because of the similarity between default judgments and the grant of a motion for summary judgment for failure to respond. *Henry*, 104 S.W.3d at 481. “When a defendant fails to answer a complaint, the plaintiff may obtain a default judgment without a hearing on the merits.” *Id.* (analogizing a default judgment with a dismissal for failure to prosecute). Similarly, when an adverse party fails to respond to a motion for summary judgment, *the motion may be granted without a hearing and without the benefit of opposing affidavits.* Tenn. R. Civ. Pro. 56.06. The factors at issue include: “(1) whether the default was willful; (2) whether the defendant has a meritorious defense; and (3) whether the nondefaulting party would be prejudiced if relief were granted. *Id.* (citing *Tennessee Dep’t of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985)).

Id. at *3 (emphasis added).

In *Howes v. Swanner*, No. M2016-01892-COA-R3-CV, 2017 WL 2192065, at *2 (Tenn. Ct. App. May 17, 2017), defendants and their counsel failed to respond or appear at a summary judgment hearing, and the trial court entered an order with very brief pertinent findings, stating that “Defendants did not respond to the motion for summary judgment, did not respond to the Tenn. R. Civ. P. 56.03 Statement of Undisputed Material Facts, nor did Defendants present counter-affidavits to Plaintiffs’ expert affidavit.” They sought to set aside the order, claiming lack of notice. *Id.* at *3. We stated, “based on *Fillers*, to determine whether a party who fails to respond to a motion for summary judgment and appear at the hearing is entitled to Rule 60.02(1) relief, we apply the same factors used with respect to setting aside default judgments under Rule 60.02(1).” *Id.* at *4. So, we applied “the three-factor Rule 60 analysis regarding ‘excusable neglect’ adopted by the court in *Henry v. Goins* (and quoted above from *Fillers*).” *Id.* We also noted that there is “much more reason for liberality in reopening a judgment when the merits of the case never have been considered than there is when the judgment comes after a full trial on the merits,” and “a motion to vacate a default judgment should be granted whenever there is a reasonable doubt as to the justness of dismissing the case before it can be heard on its merits.” *Id.*

Likewise, in *Berge v. Warlick*, No. M2018-00767-COA-R3-CV, 2019 WL 93281, at *1-3 (Tenn. Ct. App. Jan. 3, 2019), we applied the three *Henry* factors to a situation in

which neither the plaintiffs nor their counsel appeared at a summary judgment hearing, and the trial court summarily dismissed the claims, leading them to seek relief due to excusable neglect. Citing *Howes*, we said, “We consider the same factors when the default judgment results from a party’s failure to respond to a motion for summary judgment and appear at the hearing.” *Id.* at *3. *See also Boeh v. Dial*, No. M2021-00520-COA-R3-CV, 2022 WL 2678594, at *3 & *7 n.4 (Tenn. Ct. App. July 12, 2022) (applying the three factors where “no one appeared to oppose” the summary judgment motion resulting in the trial court summarily dismissing the claims, as “[t]his court has explained that the standard for setting aside a default judgment due to ‘excusable neglect’ applies when the judgment is the result of a party’s failure to respond to a motion for summary judgment and appear at the hearing”).

This case is different, however, because this is not a situation where a party failed to appear at a summary judgment hearing, resulting in summary dismissal. A summary judgment hearing was held. Jimmy attended the summary judgment hearing and appeared *pro se*. He also testified. The trial judge then explained that he was going to “go through” all of the claims and “set forth the legal grounds for me granting each of them.” The trial judge noted that the facts were essentially undisputed because of Jimmy’s admissions and his failure to respond to the statements of material facts. The trial judge then summarized the undisputed facts and discussed each claim asserted by or against Jimmy separately. The trial court entered a 19-page summary judgment order making extensive findings regarding all of the claims asserted. According to that order, the court reviewed “the Third Declaration of David Henderlight; the first Declaration of David Henderlight previously filed in this case; the Declaration of James Bryant, CPA; the Statement of Material Facts filed pursuant to Tenn. R. Civ. P. 56.03 to which there has been no response; the matters deemed admitted by Jimmy E. Henderlight, Jr. in his failure to respond to the First Set of Admission Requests and the Second Set of Admission Requests.” The court also considered “the negative inference previously granted by the Court with regard to Jimmy E. Henderlight, Jr.’s failure to respond to the First Sets of Interrogatories and Document Requests of David Henderlight and Elite Ambulance LLC.” In ruling on Laura’s summary judgment motion, the court stated that it also reviewed “the Second Declaration of Laura Henderlight; the Declaration of James Bryant, CPA; and the Statement of Material Facts filed pursuant to Tenn. R. Civ. P. 56.03 to which there has been no response.” The trial court made extensive findings regarding the nature and operation of the parties’ ambulance businesses. It found that Jimmy billed Medicare for reimbursements to unlicensed ambulance services after they were dissolved, he “received millions of dollars in reimbursements from Medicare for the unlicensed ambulance companies,” and he failed to pay income tax on the reimbursements. The court found that Jimmy contacted David for the sole purpose of creating Elite Ambulance in order to continue to seek such reimbursements. It found that Jimmy never paid the amount he promised to pay for start-up capital, so David had to borrow money from different lenders in order to capitalize Elite Ambulance. The court found that Jimmy failed to disclose that he had been illegally operating ambulance services without proper licensing, and David had no idea that Jimmy

was taking those gains without paying income taxes. The court found that if Jimmy had disclosed any of this, David would have had nothing to do with him with regard to creating and obtaining licensure for Elite Ambulance. The court first considered the counterclaims asserted by David and Elite Ambulance against Jimmy and found that they had proven their claims for fraudulent concealment and breach of contract. The court also examined each of the claims asserted by Jimmy in his complaint – for declaratory judgment, breach of contract, and unjust enrichment – and explained why each was unproven and subject to dismissal. It did the same for the claims asserted against Laura. The trial judge also explained each of the categories of damages it found appropriate to award to David and Elite Ambulance.

Even though many facts were deemed admitted due to Jimmy’s previous admissions and his failure to respond to the statement of material facts, this was not a situation where the trial court summarily dismissed Jimmy’s claims in a manner analogous to a default judgment, without considering their merits. Moreover, this was not a case where a party failed to appear at a summary judgment hearing. Thus, we decline Jimmy’s invitation to apply the factors and liberal construction applicable to motions to set aside default judgments. We deem the *Ferguson/Sizemore* analysis applicable instead. Considering those factors, we discern no abuse of discretion in the trial court’s denial of the motion to set aside the summary judgment order.

B. Remaining Issues

The remainder of the issues Jimmy presents on appeal pertain to the trial court’s entry of summary judgment. Jimmy contends that the defendants failed to satisfy their burden at the summary judgment stage because many of the admissions they relied on constituted legal conclusions, and the remaining facts did not establish their claims as a matter of law. However, in the trial court, Jimmy made no attempt to respond to the summary judgment motion until he filed a motion to alter or amend. Because Jimmy did not properly respond to the summary judgment motions, we deem his arguments raised for the first time in a motion to alter or amend or on appeal to be waived. *See Goetz v. Autin*, No. W2015-00063-COA-R3-CV, 2016 WL 537818, at *7 (Tenn. Ct. App. Feb. 10, 2016) (“Goetz did not argue that the amended complaint states a claim for a civil rights violation until his motion to alter or amend. He therefore waived the issue, and we will not consider it on appeal.”); *Bell v. Eller Media Co.*, No. W2010-01241-COA-R3-CV, 2011 WL 255115, at *4 (Tenn. Ct. App. Jan. 20, 2011) (“A Tenn. R. Civ. P. 59.04 motion should not be used to alter or amend a summary judgment if it seeks to raise new, previously untried legal theories, or to present new, previously unasserted legal arguments. . . . Because this newly-raised rescission theory cannot be advanced to alter or amend the trial court’s grant of summary judgment, we, likewise, find that it should not be considered by this Court in determining whether the trial court correctly granted summary judgment.”) (quotation and alterations omitted); *Thigpen v. First City Bank*, No. 01A01-9603-CV-00095, 1997 WL 351247, at *4 (Tenn. Ct. App. June 27, 1997) (“a Rule 59.04 motion to alter or amend the

judgment cannot be used as a vehicle to assert legal arguments that could have been asserted prior to the grant of summary judgment”). All other arguments are pretermitted.

C. Attorney Fees

The defendants request an award of attorney fees on appeal, contending that Jimmy’s appeal in this matter was frivolous. As our Supreme Court has explained,

Section 27-1-122, Tennessee’s frivolous appeals statute, provides:

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, *the court may*, ... award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn. Code Ann. § 27-1-122 (emphasis supplied).

Thus, if the appellate court determines that an appeal is frivolous, the appellate court may award attorney’s fees pursuant to this statute. Any such award rests in the appellate court’s sound discretion. See Chiozza v. Chiozza, 315 S.W.3d 482, 493 (Tenn. Ct. App. 2009) (“The decision to award damages for the filing of a frivolous appeal [under section 27-1-122] rests solely in the discretion of this Court.”). This discretion is exercised “sparingly so as not to discourage legitimate appeals.” Whalum v. Marshall, 224 S.W.3d 169, 181 (Tenn. Ct. App. 2006).

Eberbach v. Eberbach, 535 S.W.3d 467, 475 (Tenn. 2017). Exercising our discretion, we decline to award the defendants their attorney fees.

IV. CONCLUSION

For the aforementioned reasons, the decision of the chancery court is hereby affirmed and remanded. Costs of this appeal are taxed to the appellant, Jimmy E. Henderlight, Jr., for which execution may issue if necessary.

s/ Carma Dennis McGee
CARMA DENNIS MCGEE, JUDGE