THE STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON	)))	IN THE COURT OF COMMON PLEAS FOR THE 4TH JUDICIAL CIRCUIT
Samantha Joanne Carwile, individually and as the Personal Representative of the Estate of Marlayna Joan Carwile, Plaintiff, v. Chris Anderson and Danielle Anderson, Defendants.		C/A No. 2020-CP-16-00299 **ORDER DENYING MOTION FOR RELIEF FROM ENTRY OF DEFAULT**

HEARING DATE: April 13, 2023

SPECIAL REFEREE: Patrick J. McLaughlin, Esq.

PLAINTIFFS' ATTORNEYS: Ryan C. Andrews
David B. Yarborough, Jr.

DEFENDANT'S ATTORNEY: Andrew MacLeod

COURT REPORTER: Q & A Reporting Services

This matter came before me on the Motion for Relief from Entry of Default filed by Defendants Chris Anderson and Danielle Anderson. A hearing was held on April 13, 2023. Having considered the motion and the arguments of counsel, the Court denies the motion.

FACTUAL/PROCEDURAL BACKGROUND

This is a negligence action arising out of an automobile collision that occurred on December 6, 2017, in Darlington County. The collision resulted in the death of Marlayna Carwile, the three-year-old daughter of Plaintiff Samantha Carwile and Justin Baxter.

Plaintiff filed this action on March 17, 2020, and Defendants Chris Anderson and Danielle Anderson were both personally served on April 6, 2020. After Defendants failed to timely serve a responsive pleading, the Court entered Defendants' default on June 15, 2020.

On August 3, 2020, Defendant Danielle Anderson filed an Affidavit (See Exhibit 26) attesting that she had contacted Allstate Insurance Company ("Allstate"), her insurer for the date of loss, immediately after being served, and that Allstate had erroneously informed her to contact her current liability carrier to defend her in the lawsuit. Defendant Danielle Anderson's affidavit also provided that she had retained Thurmond Brooker, Esq., as her counsel due to Allstate's mistaken advice and failure to defend her which caused her to be placed into default.

On May 26, 2021, the original entry of default was set aside, and on June 11, 2021, the Defendants, by and through Mr. Brooker, filed an Answer to the underlying action. After Defendants failed to respond to discovery requests, Plaintiff filed a motion to compel, which the Court granted. After Defendants failed to comply with the Order to Compel, Plaintiff filed a motion for sanctions, which the Court granted. As part of the grant of sanction, the Court struck Defendants' Answer pursuant to Rule 37(b)(2)(C) and (d), SCRCP. *See* Order entered November 17, 2022. In the Order, the Court ruled that Defendants would be placed back into default "upon application by the Plaintiff. *Id.* After Plaintiff filed the application, the Court placed Defendants back into default. *See* Order for Entry of Default entered November 29, 2022.

On February 10, 2023, the Court appointed Attorney Patrick J. McLaughlin as Special Referee pursuant to Rule 53, SCRCP. The Order of Reference provided that the Special Referee "shall have and retain jurisdiction over any motions . . . related to the entry of default. . . ." See Order of Reference to Special Referee entered February 10, 2023.

On March 7, 2023, Plaintiff filed a motion for default judgment pursuant to Rule 55(b)(2), SCRCP, and the hearing for the motion was scheduled for April 13, 2023. Defendants, through new counsel, filed their motion for relief from entry of default on April 12, 2023. The Court heard arguments regarding the Defendants' motion at the default judgment hearing. At the hearing,

Defendants' new counsel informed the Court that he was recently retained by Allstate, and that Allstate purportedly first found out about the underlying matter on March 30, 2023, when Allstate received a subpoena from Plaintiff's counsel. It was also suggested that Defendants' previous counsel's actions caused Defendants to be placed into default. Defendants argued that these reasons constituted good cause to grant Defendants' motion for relief from entry of default and also argued that the *Wham* factors weighed in their favor.

Plaintiff argued that Defendant Danielle Anderson's original position, via her affidavit filed in August of 2020, was that Allstate first received notice of this lawsuit after she was served with the same in 2020. Additionally, Plaintiff argued that pursuant to SCRCP 55(c), the Court must find good cause to set aside an entry of default before even considering the *Wham* factors. Plaintiff noted that the negligence of an attorney or an insurance adjuster is imputed to the defendant and cannot, as a matter of law, constitute good cause for relief from default. Consequently, Plaintiff argued, there can be no finding of good cause to grant Defendants' motion.

In addition, Plaintiff submitted that Rule 55(c) does not actually apply in this case, because Defendants' current default was a result of a Rule 37 sanctions order striking the Defendants' answer to the complaint. Instead, Plaintiff argued that Defendants' only avenue to relief would have been through a timely Rule 59(e) motion for reconsideration and, if unsuccessful, an appeal. Since Defendants did not make the appropriate motions timely, Plaintiff argued they waived any claim that default should be set aside.

LAW/ANALYSIS

Rule 55(c), SCRCP, permits the Court to set aside an entry of default for good cause shown. "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the

interests of justice." *Sundown Operating Co. v. Intedge Industries, Inc.*, 383 S.C. 601, 607 (2009). If a party sets forth an acceptable explanation for default, then "the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607-08 (*citing Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465 (Ct. App. 1989)). However, "[t]he trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause." *Sundown*, 383 S.C. at 609 (citations omitted).

In other words, "a court need only consider the *Wham* factors **once** a party has put forth a satisfactory explanation for the default." *Regions Bank v. Owens*, 402 S.C. 642, 649 (Ct. App. 2013) (quoting *Sundown*, 383 S.C. at 607–08, and further observing, "Because we find the master did not err in finding Owens failed to show good cause for failing to answer the complaint, we need not consider the *Wham* factors.") (emphasis added).

The Defendants have failed to set forth a satisfactory explanation for the default.

Defendants argue that good cause exists to set aside default alleging that Defendants' insurer, Allstate, first received notice of this claim in March of 2023. However, Defendants have previously represented to the Court that Defendant Danielle Anderson placed Allstate on notice about this matter after being served with this lawsuit in April of 2020. *See* June 29, 2020 *Notice and Motion to Set Aside Entry of Default Against Defendant Chris Anderson and Danielle Anderson, Pursuant to Rule 55(C)*, ¶3 and *Affidavit of Danielle Anderson*, executed June 23, 2020 and filed August 3, 2020. Relying in part on those representations made by the Defendants, the Court then set aside the original default. *See* May 26, 2021 *Order*, p.3.

The doctrine of judicial estoppel holds that parties may not "adopt[] a position [of fact] in conflict with one previously taken in the same or related litigation." *Quinn v. Sharon Corp.*, 343

S.C. 411, 414 (Ct. App. 2000). The purpose of this doctrine is "to protect the integrity of the judicial process and the courts." *Id.* (citation omitted).

Pursuant to the doctrine of judicial estoppel, the Defendants cannot successfully maintain these inconsistent positions. It would be fundamentally unfair to allow a party take one position to argue itself out of default, then change that position to attempt to escape default a second time. Therefore, the Court will not consider this argument when determining whether good cause exists.

Further, the Court does not find good cause exists due to any potential negligence of Defendants' prior counsel's in failing to comply with a discovery order that led to Defendants' answer being struck and default being entered against Defendants for a second time. "The courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant." *Roberts v. Peterson*, 292 S.C. 149, 151 (Ct. App. 1987); *see also Richardson v. P.V., Inc.*, 383 S.C. 610, 618-19 (2009) (holding that the "[n]egligence of an insurance company is imputed to a defaulting litigant and cannot constitute good cause to relieve [the defaulting party] from the entry of default") (citing *Roberts*).

Furthermore, this Court finds that by Defendant Danielle Anderson's own admissions that Defendants only retained their prior counsel due to Allstate failing to defend the Defendants in 2020 after being placed on notice of this action. South Carolina law is clear that the negligence of an attorney and an insurer is imputed to the defaulting party and does not establish good cause for relief from an entry of default.

Accordingly, because this Court finds that good cause does not exist to grant relief from an entry of default, it need not and does not consider the *Wham* factors.

Moreover, this Court agrees with the Plaintiff that Defendants' proper request for relief was through a Rule 59(e) motion to alter or amend the judgment, as a "sanction for discovery

violations is within the trial court's discretion." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193 (Ct. App. 1999); *see also QZO, Inc. v. Moyer*, 358 S.C. 246, 252 (Ct. App. 2004) (affirming a trial court's decision to strike an answer and enter a default judgment against a party after the trial court had previously denied a timely filed Rule 59(e) motion by that party). Because the Defendants did not file a Rule 59(e) motion within ten days, the Court finds they have waived the right to contest the striking of their Answer and the entry of default.

IT IS THEREFORE ORDERED that Defendants' Motion for Relief from Entry of Default is **DENIED**.

PATRICK J. MCLAUGHLIN
Special Referee

May 23, 2023
Florence, South Carolina