STATE OF SOUTH CAROLINA **COUNTY OF FLORENCE** Dennis Robert Mitton, Plaintiff, Vs. Danny James, Defendant.	**IN THE COURT OF COMMON PLEAS** **TWELFTH JUDICIAL CIRCUIT** **C/A # 2018-CP-21-03002** **ORDER**

On March 27, 2020, at 10:00 am a hearing was held to consider Plaintiff's Motion to Vacate this Court's November 19, 2019 Order, and to reinstate the Default Judgment dated August 30, 2019.[1] For the reasons which follow, the Court grants the Plaintiff's Motion to Vacate and reinstates the Default Judgment.

PROCEDURAL BACKGROUND

The present case arises from a motor vehicle/bicycle accident which occurred on May 16, 2018 when Danny James drove his automobile into the rear of the Plaintiff's bicycle. The Plaintiff suffered catastrophic injuries and subsequently filed suit on November 15, 2018. Attorney Louis Nettles was retained by South Carolina Farm Bureau Mutual Insurance Company to

[1] Plaintiff also filed a Motion to Amend his Complaint to allege a cause of action for fraud upon the Court. As this Court grants the Motion to Vacate it is unnecessary to rule upon the Motion to Amend.

represent the Defendant and Nettles filed his Notice of Appearance on December 7, 2018 but did not timely file an Answer or otherwise plead to the Complaint.

On March 27, 2019, Plaintiff's attorney filed an Affidavit of Default, Motion for Default, and a Motion for Reference to ascertain damages. On that day, the clerk entered default. On April 4, 2019, Defendant's attorney filed a Motion for Relief from Entry of Default under Rule 55(c) of the South Carolina Rules of Civil Procedure. Thereafter, Plaintiff's filed a Memorandum in Opposition to Defendant's Motion for Relief from Judgment. Subsequently, on August 7, 2019, Defendant's attorney filed a Memorandum in Support of his Motion for Relief from Entry of Default and also later a Memorandum of Objection to Entry of Money Judgment. A hearing was held before the Court on August 27, 2019 at which time the Court denied Defendant's Motion to Set Aside Entry of Default and after taking testimony from the Plaintiff and spouse and considering deposition testimony of Plaintiff's treating physicians, a judgment was entered on August 30, 2019, on behalf of the Plaintiff against the Defendant in the amount of $4,018,653.37.

Defendant filed a timely Motion to Reconsider pursuant to Rule 59(e) on September 9, 2019, and a hearing was held on this Motion on October 2,

2019. Thereafter, by Order dated November 19, 2019, the Court granted Defendant's Motion to Reconsider and concluded that good cause existed pursuant to Rule 55(c) to set aside the Default because Mr. Nettles was allegedly dealing with serious personal matters relating to the illness and subsequent death of his mother as well as a simultaneous discovery that his brother was suffering dementia and was being placed into a nursing home.

On February 20, 2020, Plaintiff filed a Motion to Vacate the Order dated November 19, 2019 and to reinstate the Order dated August 30, 2019. The basis for this Motion was evidence that came to light during a meeting between Plaintiff's attorneys and new attorneys for James and South Carolina Farm Bureau Mutual Insurance Company. At this meeting, James' new attorney presented for the first time a release signed by James absolving Nettles from his negligence in failing to answer the Complaint. The release was signed by James on August 15, 2019 and he was paid the sum of $6,100.00 on a check drawn on the Nettles Law Firm account at First Citizens Bank and Trust Company. On this date, Nettles was still employed with the Folkens Law Firm as evidenced by his communications with Mitton's attorney during this timeframe. The Folkens Law Firm is not a releasee in the James Release.

Prior to the signing of the release, Attorney Nettles communicated with another attorney on behalf of James. On August 5, 2019, Attorney Nettles was aware that James wanted advice from an independent attorney on whether he should sign the release. At the same time, Attorney Nettles also knew that James' independent counsel was out of state on business and was unavailable to review the release and to then meet and confer with James. In spite of this, Attorney Nettles met with James without his private attorney and obtained James' signature on the release and paid him $6,100.00. All of this took place before the hearings on August 27, 2019 and October 2, 2019 at which Nettles appeared or either offered evidence by way of Affidavit. At no time did Attorney Nettles advise the Court or opposing counsel of his obtaining a malpractice release from James or that James was represented by other counsel. Plaintiff contends that this conduct of Attorney Nettles constitutes a fraud upon the Court and provides a sufficient basis to support Plaintiff's claims for relief.

APPLICABLE LAW

Rule 60(b) SCRCP, provides a mechanism for an aggrieved party to obtain relief from a final judgment, order, or proceeding for the following reasons:

1. Mistake, inadvertence, surprise or excusable neglect;

2. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

3. Fraud, misrepresentation, or other misconduct of an adverse party;

4. The judgment is void;

5. The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

A motion pursuant to Rule 60(b), "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." Moreover, "a party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the relief sought." **Lanier v. Lanier, 364 S.C. 211, 612 S.E.2d. 456 (Ct. App. 2005).** "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." **BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d. 501, 502 (2006).**

ANALYSIS

The Plaintiff contends and the submitted evidence reveals that Attorney Nettles' interaction with the Court lacked candor. Moreover, his pattern of conduct in this case suggests his failure to timely answer the Complaint was not related to his "personal issues". Additionally, his failure

to disclose the release obtained from the Defendant was an intentional act meant to deprive the Court of relevant and material evidence that would have impacted the Court's ruling on the Rule 59(e) Motion.

The case of **Chewning v. Ford Motor Company, 354 S.C. 72, 579 S.E.2d. 605 (2003)**, sets forth our Supreme Court's position on how such conduct should be treated. In **Chewning, *supra***, the Plaintiff sued Ford Motor Company for products liability after suffering injuries in a rollover accident. The jury found in favor of Ford. Years later, Chewning learned that Ford's attorneys had suborned perjury of its expert witness and concealed favorable evidence from the Plaintiff. Chewning then sued Ford alleging its conduct amounted to a fraud upon the Court. ***supra* at p. 76**.

Analyzing Ford's attorney's conduct, the Court stated that their actions in suborning perjury and concealing evidence amounted to extrinsic fraud which it defined as:

> Fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action. ***supra* at p. 81.**

The court then concluded that "where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs." ***supra* at p. 84.**

An examination of the record in this case reveals that Attorney Nettles' conduct amounted to extrinsic fraud and that on occasions when he had a duty to speak candidly with the Court, he remained silent.[2]

At the August 27, 2019, hearing on Defendant's Motion to Set Aside Default, Attorney Nettles represented to the Court and later with an affidavit that he was in the process of admitting his brother to a nursing home and was the only adult family member who could attend to his brother and that because his mother had recently passed away in February, 2019, after a hospitalization in February, he was unable to attend to his law practice, thus, had "good cause" for not answering the Complaint. **(Tr. Pg. 5, l. 14 – Pg. 6, l. 9)**

During this hearing, Mr. Nettles did not reveal to the Court that he had obtained a malpractice release from Danny James on August 15, 2019, nor that this release was obtained when he was aware that his client was represented by independent counsel who was unavailable to review the release in advance of this meeting.

On October 2, 2019, at the Defendant's Rule 59(e) Motion Hearing, when given another opportunity to disclose to the Court the existence of the

[2] A lawyer, being a member of the legal profession is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. **Preamble to Rule 407, SCRCP.**

malpractice release, Mr. Nettles submitted an Affidavit which was silent on his dealings with the Defendant.

On the two occasions which Attorney Nettles either appeared before this tribunal or presented evidence by way of personal affidavit, the impression was created that he was in the midst of personal issues which took his attention away from the practice of law when, in fact, the representations or omissions he made to the Court lacked full and complete candor. Specifically, when Mr. Nettles represented to the Court that he was in the process of admitting his brother to the nursing home and attending to his needs when he was hired by Farm Bureau to represent the Defendant, he did not disclose to the Court that his brother had already been admitted to the nursing home on December 4, 2018, and that Farm Bureau had not retained his services until December 7, 2018.

Furthermore, Mr. Nettles did not disclose to the Court that his brother had an adult child who lived in Florence and was capable of, and did, in fact, attend to her father's needs during the same time that Mr. Nettles contended he was the sole adult who could take care of his brother.

With respect to the Defendant's contention that the conduct of Mr. Nettles in failing to disclose the malpractice release to this Court is not

relevant to the issue of "good cause", Mr. Nettles' pattern of conduct in this case leads this Court to a new and different conclusion.

Even after Mr. Nettles' brother was admitted to the nursing home and his mother was hospitalized in February of 2019 and died that same month, default had not yet been entered by the Plaintiff. In fact, default did not occur until March 27, 2019 yet Attorney Nettles still failed to answer the Complaint or respond to the Plaintiff's Attorney's repeated requests for discovery responses or to schedule the Defendant's deposition. Moreover, when given notice on April 24, 2019, that Plaintiff intended to depose Dr. William Naso on May 7, 2019, Mr. Nettles failed to appear. Likewise, when given one month's notice of the deposition of Dr. Mark Reynolds, Nettles was absent.

This pattern of neglectful behavior exhibited by Mr. Nettles which occurred long after his brother's nursing home admission or the death of his mother reveals evidence which now persuades this Court that the "personal issues" relied upon as "good cause" were not the reasons for Nettles' failure to file a timely answer.

In this Court's Order of November 19, 2019, granting the Defendant's Rule 59(e) Motion, consideration was given to Attorney Nettles' failure to answer Plaintiff's discovery or appear at the noticed depositions of Plaintiff's

treating physicians; however, this conduct was not considered in the context of now having been made aware of his concealment of a malpractice release. It is this evidence which causes this Court to view the claim of "good cause" in a brand new light.

In the Plaintiff's Memorandum Supporting his Motion to Vacate at page 4, he states: "Nettles did not tell the court or opposing counsel of his obtaining a malpractice release from James or that James was represented by other counsel because he knew to do so was a tacit admission that he was negligent and that there was no lawful basis to set aside the entry of default or later grant a Rule 59(e) motion."

In an e-mail to the Defendant's private attorney regarding the malpractice release, Nettles stated: "I have a motion hearing Thursday. If it is successful, it should resolve this issue." **(Exh. 3 to Plaintiff's Motion to Vacate).**

It is reasonable for this Court to conclude that Nettles had no intention of disclosing the malpractice release as he likely believed the default would be set aside.

However, after this Court denied the Motion during the hearing without knowledge of the concealed evidence **(Tr. Pg. 14, ll. 7-9)**, Attorney Nettles was then faced with a dilemma. Does he allow substitute counsel to seek

Rule 59(e) relief on the existing evidence and hope for a change of heart by the Court or disclose the release, satisfy his ethical responsibility to speak with candor to this Court and risk the Court considering the concealed evidence as a "tacit admission that he was negligent and that there was no lawful basis to set aside entry of default or later grant a Rule 59(e) motion."

By choosing to remain silent, Attorney Nettles engaged in fraudulent conduct the Chewning Court said " prevented a party from fully exhibiting and trying his case [such that], there has never been a real contest before the Court on the subject matter of the action." ***supra*, at p. 81.**

While the Defendant argues that the Plaintiff's motion must fail because the Rule 59(e) Order is interlocutory, what he fails to apprehend is that it is the integrity of the August 30, 2019, judgment that Plaintiff is seeking to protect from the fraudulent conduct. By depriving this Court and opposing counsel of the malpractice release, Plaintiff was prevented from "fully exhibiting and trying his case" at the time of the Rule 59(e) hearing. Had this evidence been disclosed, it would have changed the outcome of that hearing and the integrity of the default judgment would have been preserved.

This Court anticipates the Order will be subject to appellate review. Therefore, the Court carefully and thoughtfully reviewed the prior hearing

transcript of the August 27, 2019 hearing where the Plaintiff and his spouse testified on the issue of damages. The Court also carefully reviewed the documentary evidence received at that hearing as well as the deposition testimony of the Plaintiff's treating physicians. In arriving at the verdict amount, the Court was mindful of Attorney Nettles' opinion as to the value of the Plaintiff's claim which he stated was in the range of $2.5 to $3 million. Additionally, the Plaintiff's testimony about his two month stay at the Shepherd Center where he was recovering from the closed head injury was compelling and persuasive. Specifically, his testimony that he was unable to recognize his wife and family and his paranoia that he was going to be killed while at the Shepherd Center underscored the magnitude of the harms and losses suffered by the Plaintiff.

For ease of review, the Court hereby reaffirms the Findings of Fact and Conclusions of Law set forth in the August 30, 2019 Order for Judgment and does hereby restate them now:

1. The Plaintiff is presently 61 years of age and has a life expectancy of 19.85 years.
2. The Plaintiff and Malinda Mitton are married and have seven children.

3. The Plaintiff is college educated and, at the time of the incident, was employed as a nuclear scientist for Duke Energy and earned annually $128,000 with salary, benefits and bonuses.
4. The Plaintiff's intention was to work until age 72, his anticipated age of retirement, and was in overall good health prior to the incident.
5. The Plaintiff was a competitive bicyclist and was in training for an event when the incident occurred.
6. The Plaintiff was physically unable to return to work for a period of 5.4 months following the incident during which time he was capable of earning monthly $8,833.33, for an income loss of $47,699.98.
7. Because of injuries suffered in the incident, Plaintiff was demoted at work with Duke Energy and is presently making $89,000 annually with a $5,000 annual bonus, for a total annual income of $94,000.
8. The Plaintiff's loss of earning capacity is now $34,000 annually and will continue until his anticipated age of retirement of 72 years old, resulting in a loss of earning capacity, present and future, of $408,000.
9. The Plaintiff suffered the following injuries:
    a. Subarachnoid hemorrhage with loss of consciousness of unknown duration;

b. Cerebral edema, traumatic, with loss of consciousness, unspecified duration;

c. Right frontal scalp contusion;

d. Dental fractures and avulsions;

e. Bilateral pulmonary contusions;

f. Fractured clavicle, midshaft, right, closed, displaced;

g. Fractured spine at lumbar 2, anterior compression, closed;

h. Fractured spine at lumbar 4, anterior wedge compression, closed;

i. Facial abrasion;

j. Abrasions of chest wall front and right side, right thigh, right knee, and left lower leg;

k. Acute respiratory failure with chronic hypoxia and hypercapnia;

l. Diffuse axonal injury;

m. Encephalopathy, posttraumatic and post-concussion; and,

n. Deep vein thrombosis of the right lower extremity.

10. The Plaintiff suffers from impaired memory, delayed function and inability to process information as compared to his prior level of functioning.

11. The Plaintiff has incurred present causally related medical expenses, which are both reasonable and necessary:

1. McLeod Occupational Health (DOS: 8/23/18 – 9/27/18)	$8,376.08
2. Dr. Gabor W. Winkler McLeod Vascular Associates (DOS: 10/15/18)	$101.00
3. County of Florence EMS (DOS: 5/16/18)	$621.00
4. Dr. Payal M. Fadia Shepherd Center (DOS: 7/16/18 – 8/15/18)	$29,196.23
5. MRMC CBO Emergency McLeod Regional Medical Center (DOS: 5/16/18)	$620.00
6. McLeod CRNA McLeod Regional Medical Center (DOS: 5/23/18, 6/3/18, & 10/25/18)	$3,480.00
7. Dr. Ford B. Vox Shepherd Center (DOS: 6/12/18 – 7/13/18)	$154,147.00
8. MRMC Hospital Specialist McLeod Regional Medical Center (DOS: 5/28/18 & 5/31/18)	$330.00
9. McLeod MICU McLeod Regional Medical Center (DOS: 5/17/18 – 6/4/18)	$2,340.00
10. Carolina Radiology Associates (DOS: 5/16/18 – 6/5/18)	$3,602.08

11. McLeod Regional Medical Center (DOS: 10/25/18)	$12,605.00
12. McLeod Regional Medical Center (DOS: 5/16/18 – 6/12/18)	$347,535.00
TOTAL:	**$562,953.39**

12. The Plaintiff is no longer able to ride a bicycle due to balance issues and disorientation as a result of the prior head injury.

13. The Plaintiff continues to suffer periods of dizziness, difficulty balancing and is easily fatigued, both physically and mentally.

14. The Plaintiff has suffered and continues to suffer physical pain on a daily basis which prevents him from focusing and which has caused him to feel as if he was “beaten up by a gang of thugs with an iron rod” as he described.

15. The Plaintiff’s relationship with his wife is impaired and that his activities of daily living cannot be performed as they were prior to his injuries.

16. The Plaintiff has suffered a loss of enjoyment of life in the past and is expected to suffer same in the future.

17. The Plaintiff has suffered physical pain and suffering in the past and is expected to in the future.

18. The Plaintiff's previous good health has been permanently impaired.

19. The Plaintiff has suffered lost wages and a loss of earning capacity in the past, present, and future.

20. That when one person is injured by the negligent acts of another, the injured person is entitled to be fully compensated for all injuries directly and proximately resulting from any negligent acts or omissions by the Defendant. In determining the amount of injuries suffered by the Plaintiff as a result of the Defendant's negligence it is proper to consider an award past, present and future damages for: loss of income, loss or impairment of earning capacity, out-of-pocket expenses, medical expenses, including physicians, hospital, medicines, physical therapy expenses, rehabilitation expenses, and transportation expenses connected with medical treatment, any future damages resulting from permanent injuries, disfigurement, loss of family services, deprivation of normal life expectancy, alteration of lifestyle, psychological trauma, mental anguish, mental distress, apprehension, anxiety, emotional injury, psychological injury, depression, sexual dysfunction, pain and suffering, and loss of enjoyment of life.

Ralph King Anderson, Jr., South Carolina Request to Charge – Civil 2002, Section 13-3.

CONCLUSION

Attorney Nettles deceived this Court into believing that his "personal issues" were the "good cause" for this Court in granting relief from the consequences of default and his negligence in representing his client when, in fact, his behavior was emblematic of his routine practice of law in this case and his lack of candor with the Court on multiple occasions undermines his credibility and compels this Court to grant the relief sought by the Plaintiff.

Accordingly, the Plaintiff's request for relief is **granted** and the Order of November 19, 2019, is hereby vacated and set aside and that the Order for Judgment in the amount of $4,018,653.37 entered on August 30, 2019, is hereby reinstated.

AND IT IS SO ORDERED.

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MICHAEL G. NETTLES, JUDGE
COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

Date:_____

_____, SC

Florence Common Pleas

Case Caption: Dennis Robert Mitton VS Danny James

Case Number: 2018CP2103002

Type: Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140