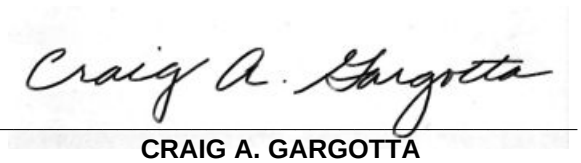
SIGNED this 15th day of January, 2010.



CRAIG A. GARGOTTA
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	§	CASE NO. 01-13827-CAG
	§	
ERIC RED,	§	CHAPTER 7
Debtor.	§	
WILLA BAUM,	§	
	§	
Plaintiff,	§	
	§	ADV. NO. 02-01010-CAG
v.	§	
	§	
ERIC RED,	§	
	§	
Defendant.	§	

ORDER GRANTING MOTION FOR SANCTIONS AGAINST DONALD CHEATHAM AND DEFENDANT ERIC RED

Came on to be considered the Motions for Sanctions against Defendant Eric Red and his counsel, Donald Cheatham. For the reasons stated herein, the Court finds that sanctions are warranted. As such, Defendant Eric Red and his counsel Donald Cheatham are ORDERED

jointly and severally[1] to pay the costs of travel and lodging expended by both Plaintiffs' counsel in the amount of $1,441.62[2] and Defendant and his counsel Donald Cheatham are ORDERED to pay the amount of $13,990.00[3] to Plaintiffs' counsel for attorney's fees in connection with the filing of frivolous and vexatious pleadings with the Court that were filed to harass, humiliate, and injure Plaintiffs.

BACKGROUND

This matter was tried in this Court in 2003 to determine whether Defendant's actions in operating his vehicle such that he drove his vehicle into an eating establishment and killed two innocent patrons rose to the level of willful and malicious injury under 11 U.S.C. §523(a)(6). This Court found that it did and determined that Defendant's conduct had caused a willful and malicious injury to another individual and property. The matter was appealed to both the District Court and Fifth Circuit Court of Appeals where each court affirmed the bankruptcy court.[4]

After the bankruptcy court found that Defendant's conduct had resulted in a willful and malicious injury to Plaintiffs[5] and was non-dischargeable under §523(a)(6), Plaintiffs then filed suit in Los Angeles Superior Court seeking damages against Red for his causing the wrongful deaths of the two Plaintiffs. As a result, the trial court awarded damages against Red in the sum of roughly $500,000.00 for each Plaintiff. The trial court's ruling was subsequently appealed

[1] The Court is ordering sanctions against Defendant and his counsel because the conduct of Defendant and his counsel is indistinguishable. *See Empire State Pharmaceutical Soc., Inc. v. Empire Blue Cross and Blue Shield of Greater New York*, 778 F. Supp. 1253 (S.D.N.Y. 1991); *Driskell v. General Motors Corp.*, No. Civ. A. 04-40224, 2006 WL 901179 (E.D. Mich. Mar. 27, 2006) (when client misrepresented facts and lawyer made legally frivolous arguments, both parties were sanctionable).

[2] Nilda Roos's counsel, Carlos Lloreda, testified costs for air travel of $282.90 and hotel of $489.00. Willa Baum Revocable Trust's counsel, Anthony Rothman, filed a declaration stating costs for air travel of $396.00 and hotel of $273.66. The Court finds the cost of travel and hotel reasonable and commensurate for the cost of airfare from California to Austin and the cost of hotel for Austin.

[3] Carlos Lloreda testified that he had worked a total of 19 hours at a rate of $360.00/hour for attorney fees of $6,840.00. Anthony Rothman's declaration stated he spent 21.3 hours at a rate of $325.00/hour for attorney fees of $7,150.00.

[4] A more detailed rendition of the facts is stated in the Court's Memorandum Opinion. *See Baum v. Red*; Adv. No. 02-1010 (Bankr. W.D. Tex. Feb. 4, 2003) (Doc. #34).

[5] Plaintiffs denote the decedents' estates and families.

and affirmed. Ultimately, after both the bankruptcy and state court's determinations were affirmed on appeal, Defendant, through his insurance company, made payments to the Plaintiff's estate.

Given the protracted litigation in this matter, and, that the Defendant's insurance had made sizeable payments to the Plaintiff's survivors and/or estates, it would be reasonable to assume that this matter had been concluded. This reasoning puts aside the incredible and immeasurable toll this tragedy has had on Plaintiffs' families. The Court could also assume that any person, particularly after having been adjudged in two separate courts and affirmed on appeal of essentially killing two innocent human beings, would have wished for nothing more than to have this matter laid to rest. But not this Defendant or his counsel. While anyone could presume that even the most indecent of persons might have some compassion for the persons who suffered at his own hands, this Defendant and his counsel concocted a scheme to take at least one more opportunity to deny Plaintiffs closure of a terrible tragedy and engage this Court in a travesty of justice. Unfortunately for this Defendant and his counsel, this Court, nor any other court, would countenance such behavior.

THE MOTION TO RELIEF FROM JUDGMENT

On May 5, 2009, more than five years after the Fifth Circuit affirmed the Court's determination regarding the dischargeability of debt under §523(a)(6), Defendant filed his Motion For Relief From Judgment and Order, For Declaratory And Other Relief (Doc. # 67). The Motion was filed under Federal Rules of Bankruptcy Procedure 9024, Federal Rules of Procedure 57 and 60, as well as 28 U.S.C. §2201. The movant suggests that despite this Court's finding of willful and malicious conduct, that the California state court made a finding in the trial that Defendant Red was being held liable on a negligent, not an intentional, theory of liability. Defendant's counsel attaches his affidavit to the Motion to Relief From Judgment arguing that at

trial before the Los Angeles County Superior Court, the Plaintiffs dropped their cause of action based upon intentional wrongful death and sought damages under the theory of negligent wrongful death. Defendant's counsel posits that because Plaintiffs were awarded damages on negligent wrongful death, which counsel suggests is dischargeable in Chapter 7, that this Court can grant Defendant relief from a final judgment of over six years and find that the liability and damages attributable to this Court's finding of non-dischargeability are now dischargeable. Defendant offers no authority for the Court doing so and makes vague, unsupported references to Fed. R. Civ. Proc. 57 and 60, plus 28 U.S.C. §2201. Counsel cites no authority for how these procedural rules and or statutory reference to 28 U.S.C. §2201 support his claim that the underlying judgment should be altered. Further, Defendant's counsel offers no basis as to how this Court would proceed in granting relief from a judgment that is over six years old or how the Court would then adjudicate the matter. It is important to note that this is not a matter of newly discovered evidence or correcting manifest error; rather Defendant's counsel suggests that upon his close study of the file this type of theory would prevail.

The Plaintiffs vigorously opposed the Motion, arguing that the Los Angeles Superior Court granted a motion in limine that required the jury to consider only intentional and not negligent conduct. The Plaintiffs also provided a host of factual and legal reasons for why the Motion should be denied. While the Court could consider those arguments, the fact is that the Defendant withdrew his Motion on the eve of hearing. The Motion for Leave to Withdraw His Motion for Relief from Judgment and Order, For Declaratory and Other Relief, Verified by His Counsel was filed on November 12, 2009 (Doc. #86). The Motion states that Defendant's bankruptcy counsel found a stipulation between Plaintiffs' counsel and Defendant after conducting a further review of the Los Angeles court's files wherein it was noted in a stipulation

that Plaintiffs had waived punitive damages against Defendant but did not waive any other claims against Defendant. Defendant's counsel asserts that the stipulation in question was not in the state court or personal files of Mr. Red when initially reviewed, and, after only a further search of the California court files did counsel find the stipulation. Counsel posits that the file containing the stipulation had been missing as has portions of Defendant' Red's own litigative files.

Further, Mr. Cheatham then acknowledges that based upon the stipulation that he located on the eve of hearing that it would appear that the Plaintiffs' opposition to the Motion for Relief From Judgment would appear to be well based. Of course, Plaintiffs told Mr. Cheatham as much. Further, nowhere in the Motion to Withdraw does Defendant's counsel cite to where he found the missing document or exactly how he retrieved the missing document on the eve of the hearing on Plaintiffs' sanctions motion. Finally, Defendant's counsel fails to explain adequately why he filed the Motion for Relief From Judgment if he did not have a complete file in the first place. The assertions in the Motion for Relief From Judgment raise a number of both factual and legal issues that any prudent attorney would first completely investigate before seeking to overturn a six year judgment involving the wrongful death of two individuals.

THE MOTIONS FOR SANCTIONS

Plaintiff Willa Baum Revocable Trust ("Baum") filed its Motion for Sanctions (Doc. #78) on November 4, 2009. Plaintiff Baum alleges that Defendant and his counsel have made false statements to the Court. Further, Baum cites to a number of proceedings in which Mr. Cheatham has been sanctioned or assessed costs. In this matter, Baum directs the Court to Defendant counsel's assertion that the Superior Court for Los Angeles County had entered final judgments and orders based only on a negligence theory of liability and that Plaintiffs Baum and Roos had dropped their claims for intentional wrongful death. As stated previously herein,

Defendant's counsel has now acknowledged that there was no judgment or order that recited that the Superior Court in Los Angeles had considered a negligent theory of wrongful death. Further, Baum's counsel correctly notes that the legal basis for reopening this adversary proceeding is completely procedurally and factually baseless.

Plaintiff Baum further argues that this Court has the inherent authority to issue sanctions. Baum correctly argues that Fed. R. Civ. Proc. 11 is incorporated in and made applicable to Fed. R. Bankr. Proc. 9011. In particular, Rule 9011 imposes certain requirements a party must meet in order to obtain sanctions against another party. Specifically and in relevant part, subsection (c)(1)(A) of the Rule 11, governing sanctions awarded at the request of a party, states:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected . . .

The Court finds that the Plaintiffs have complied with this provision of Rule 11. Counsel for Baum sent a copy of the proposed motion for sanctions to Cheatham on October 13, 2009 (Doc. #79). He waited the requisite 21 days before filing his motion as indicated in his declaration (Doc. #81).

Creditor-Plaintiff Nilda Roos ("Roos") filed her Motion for Rule 11 Sanctions Against Debtor-Movant, Eric Red and Counsel on November 6, 2009 (Doc. #82). Roos joins the allegations and law stated in Baum's Motion for Sanctions. Roos's counsel attaches a declaration in support of Roos's Motion for Sanctions stating that Roos first served Cheatham a copy of the Motion for Sanctions on October 16, 2009 asking Cheatham to withdraw Red's Motion for Relief as frivolous. Roos further advised Cheatham that she would seek costs and monetary sanctions.

Defendant and his counsel responded to Plaintiff Nilda Roos's and Baum's Motion for Sanctions in two ways. First, Defendant moved to withdraw his Motion for Relief from Judgment (Doc. #86). As noted earlier, Red and his counsel advised the Court on November 12, 2009, roughly six months after filing the underlying motion, that counsel found a stipulation that somehow eluded them until the eve of the hearing on the Motion for Contempt. As such, undeterred by both the facts and the law, Defendant did not withdraw his Motion until he located the stipulation in the state court litigation that stated that the parties agreed that the trial could be tried on the basis of intentional conduct.

Defendant also filed his Response in Opposition to Motion(s) for Sanctions, Verified by Counsel (Doc. #88). Red reiterates his claim that the missing stipulation was not found until shortly before the hearing on contempt. Defendant's counsel then asserts that the withdrawal of the motion was done within days of the expiration of the "safe harbor" period. Counsel then responds to Plaintiffs' assertions stating that he has not previously been sanctioned or that there were mitigating circumstances regarding the imposition of sanctions. This Court does not consider prior alleged misconduct probative of misconduct in this case. Further, Defendant and his counsel argue that at the time the Motion for Relief from judgment was filed, the Motion was filed in good faith because Counsel's reading of the litigation files indicated that judgment in bankruptcy court was based on a negligent conduct. Counsel further posits that the state court jury instructions were silent on the issue of intentionality.

Plaintiff Baum responded to Defendant's withdrawal of his Motion (Doc. #89). As to the effect of Defendant's withdrawal of his Motion, Plaintiff correctly states that once the "safe harbor" period has passed, sanctions are warranted if cause is shown. *See Cooter Gill v. Hartmarx Corp.*, 496 U.S. 384, 398 (1990). Further, the Court agrees with Plaintiff Baum that

Red's supposition that he manifested good faith in filing his Motion because there was no indication the Los Angeles state court action was filed on the basis of willful and malicious conduct is unsupported. Both Plaintiffs told Red and his counsel that the state court action was tried on the basis of willful and malicious conduct. As such, the Plaintiffs put Red on notice when Defendant filed his Motion for Relief from Judgment that there was no basis to the Motion. Further, Rule 11 requires counsel to investigate fully the basis for the pleading prior to, not after, filing.

ANALYSIS

Given the foregoing, the Court must decide if sanctions are warranted and how much. As stated herein, the Plaintiffs have satisfied the procedural requirements of Rule 11. Rule 11 states that:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Therefore, sanctions under Rule 11 may be appropriate if: (1) a document has been presented for an improper purpose (Rule 11(b)(1)), (2) the claims or defenses of the signer are

not supported by existing law or by a good-faith requirement for an extension or change in existing law (Rule 11(b)(2)), or (3) the allegations and other factual contentions lack evidentiary support or are unlikely to do so after a reasonable opportunity for investigation (Rule 11(b)(3 and 4)). *Bynum v. American Airlines, Inc.*, 166 Fed. App'x 730, (5th Cir. 2006).

The Plaintiffs argue that the purpose of the Defendants' filing was to harass Plaintiffs and cause them undue hardship in violation of Rule 11(b)(1). It does not appear that Plaintiffs are arguing a violation of Rule 11(b)(2); but it appears from the record that Plaintiffs are arguing a violation of Rule 11(b)(3). Notably, monetary sanctions can be imposed against the attorney but *not* the client for violations of Rule 11(b)(2). *See* Fed. R. Civ. P. 11(c)(2)(A). Given that there does not appear from the argument of counsel or the record that Rule 11(b)(2) applies, the Court will confine its analysis to Rule 11(b)(1 and 3).

The Court reaches this conclusion because under Rule 11(b)(1) the Plaintiffs have argued that given the lengthy and adversarial history of the litigation and the fact that this Motion was filed years after the matter was resolved on appeal in federal and state court, this Motion could only have the effect of harassing and causing Plaintiffs further emotional distress.[6]

In addition, the Court finds that the Defendant and his counsel have violated Rule 11(b)(3). As noted herein, at the time of the Defendant's filing his Motion for Relief from Judgment, Defendant based his assertions on assumptions that were unsupported by the record; namely that the Plaintiffs sought recovery on a negligent theory of conduct, not intentional conduct. Defendant does not cite to any specific pleading, ruling, or statement in the Court record that supports Defendant's contention that the Los Angeles Superior Court case proceeded on a negligent theory of conduct. Further, Plaintiffs responded at length to Defendant's

[6] The Court notes that not only were there multiple appeals of the state and bankruptcy decision, but there were also malpractice claims that Red made against his bankruptcy counsel.

assertions and told his counsel that they did not seek damages on a negligent theory of recovery. Nonetheless, Defendant persisted on his theory of law even though the record and the law did not support his theory of recovery.

In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 124 (1989), the Supreme Court noted that Rule 11 is to be interpreted literally. "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, *a represented party*, or both, an appropriate sanction...." Fed. R. Civ. P. 11 (emphasis added). This language is reinforced in the Advisory Committee Note to Rule 11: "If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both.... Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client." *citing Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977). Rule 11 clearly allows district courts the discretion in appropriate cases to impose sanctions against non-signing represented parties for violations of the rule by their attorneys. *See, e.g., Jennings v. Joshua Independent School District*, 948 F.2d 194 (5th Cir.1991). In this matter, Defendant was complicit in his attorney's actions. There is nothing in the record or pleadings to suggest that Red was opposed to the relief sought. Rather, Red engaged Cheatham to file the Motion. Further, Red did not even attend the November 18th hearing. As such, both Defendant and his counsel are liable for sanctions. *See* fn. 1.

The Fifth Circuit has previously stated in *Thomas v. Capital Security Serv.*, 836 F.2d 866 (5th Cir. 1988) (*en banc*) that the trial court must address four factors in awarding sanctions. *See also Topalian v. Ehrman*, 3 F.3d 931, 934-35 (5th Cir. 1993). In *Thomas*, the Fifth Circuit said

that the sanction should be tailored to fit the particular wrong; and therefore, reasoned, "the district court should carefully choose sanctions that foster the appropriate purpose of the rule, depending on the parties, the violation, and the nature of the case." *Thomas,* 836 F.2d at 877. The Fifth Circuit has listed factors which the trial court's findings must reflect, the specificity of which is calculated according to *Thomas's* "sliding scale," in ordering sanctions. Those factors are:

(1) *What conduct is being punished or is sought to be deterred by the sanction?* The court must state the sanctionable conduct giving rise to its order. The violation here was the filing of a frivolous pleading in the form of the Motion for Relief from Judgment without an underlying factual basis to do so.

(2) *What expenses or costs were caused by the violation of the rule?* The trial court must demonstrate some connection between the amount of monetary sanctions it imposes and the sanctionable conduct by the violating party. *See Thomas,* 836 F.2d at 879; *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717 (5th Cir. 1974). The costs and expenses here were the costs of air travel, hotel, and attorney time to respond to pleadings and appear for the hearing. For Plaintiff Baum, Rothman's declaration stated $7,819.72, and for Roos, her counsel stated at hearing that the cost of air travel and hotel was $771.90 and the attorney fees incurred were $6,840.00.

(3) *Were the costs or expenses "reasonable," as opposed to self-imposed, mitigatable, or the result of delay in seeking court intervention?* "A party seeking [costs and fees for defending against frivolous claims] has a duty to mitigate those expenses, by correlating his response, in hours and funds expended, to the merit of the claims," *Thomas,* 836 F.2d at 879, as well as by giving notice to the court and the offending party promptly upon discovering the sanctionable

conduct. *Topalian*, 3 F.3d at 937, citing *Chapman & Cole v. Itel Container Int. B.V.*, 865 F.2d 676, 684 (5th Cir. 1989). The Court's findings must reflect some consideration of the reasonableness of the nonviolating party's actions in connection with the sanctionable conduct. *Id*. The costs for time, travel and hotel here are reasonable. Plaintiffs' counsel followed the "safe harbor" provisions of Rule 11 in attempting to get Defendant to retract his pleadings. Plaintiffs' counsel both filed pleadings detailing why Defendant was wrong yet Defendant and his counsel pursued their filings. The costs of airfare and hotel are simply the costs of coming to the hearing. The respective attorney time for both Plaintiffs is reasonable given the time needed to draft correspondence, file responsive pleadings with the Court, and prepare for hearing. The court finds that under *Johnson v. Georgia Highway Express*, that attorney time was tailored to meet the requirements of representing the Plaintiff without excessive time, and that the hourly rate is in line with what attorneys are paid in Austin.

(4) *Was the sanction the least severe sanction adequate to achieve the purpose of the rule under which it was imposed?* In *Boazman v. Economics Laboratory, Inc.*, 537 F.2d 210, 212-213 (5th Cir. 1976), followed in *Thomas*, 836 F.2d at 878, the Fifth Circuit ruled that district courts must demonstrate that sanctions are not vindictive or overly harsh reactions to objectionable conduct, and that the amount and type of sanction was necessary to carry out the purpose of the sanctioning provision. *See also, Akin v. Q-L Investments, Inc.*, 959 F.2d 521, 534-535 (5th Cir. 1992); *Topalian* at 937. The Court finds that having Defendant and his counsel pay for airfare, hotel, and attorney time is the least intrusive measure the Court could impose on Defendant and his counsel.[7] Given the status of this matter, and that it was effectively concluded

[7] The Court did, subsequent to the hearing on sanctions, allow Cheatham to withdraw as counsel to Red. At the November 18th hearing, Cheatham suggested that he would need to withdraw because he could not rely on Red's statements to him. Cheatham's withdrawal does not absolve him of liability for his conduct. *See St. Amant v. Bernard*, 859 F.2d 379 (5th Cir. 1988).

years ago, the Court sees little reason to assess sanctions beyond costs. The Court does not expect any further filings from the parties other than to enforce the Court's order. Also, given Cheatham's affidavit concerning his ability to pay (Doc. #94), the Court sees no basis for assessing costs that Cheatham may not be able to pay.

Therefore it is ORDERED that the Defendant Eric Red and his counsel Donald Cheatham, shall be severally and jointly liable for costs to Nilda Roos in the total amount of $7,611.90, and costs to the estate of Willa Baum in the total amount of $7,819.72.

It is further ORDERED that the Plaintiffs may conduct post-judgment discovery against Defendant and his counsel for the purpose of satisfying payment of this Court's Order.

It is further ORDERED that the assessed costs and attorney's fees herein shall be paid within 90 days of entry of this Order. All other relief is DENIED.