Dated: February 01, 2013
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
EARL BENARD BLASINGAME and
MARGARET GOOCH BLASINGAME,
Debtors.

Case No. 08-28289-L
Chapter 7

EDWARD L. MONTEDONICO, Chapter 7 Trustee;
CHURCH JOINT VENTURE, A Limited Partnership;
and FARMERS & MERCHANTS BANK, Adamsville;
Plaintiffs,
v.
EARL BENARD BLASINGAME and
MARGARET GOOCH BLASINGAME,
Debtors/Defendants,

Adv. Proc. No. 09-00482

KATHERINE BLASINGAME CHURCH,
EARL BERNARD "BEN" BLASINGAME, JR.,
Necessary Parties,

BLASINGAME FAMILY BUSINESS INVESTMENT TRUST,
BLASINGAME FAMILY RESIDENCE GENERATION SKIPPING TRUST,
and THE BLASINGAME TRUST,
Defendant Trusts,

FLOZONE SERVICES, INC.;
FIBERZONE TECHNOLOGIES, INC.;
BLASINGAME FARMS, INC.;
GF CORPORATION; and
AQUA DYNAMICS GROUP CORPORATION;
Defendant Corporations.

ORDER PROVISIONALLY GRANTING MOTION FOR RELIEF FROM JUDGMENT AGAINST EARL BENARD BLASINGAME AND MARGARET GOOCH BLASINGAME

BEFORE THE COURT is the Motion for Relief from Judgment Against Earl Benard Blasingame and Margaret Gooch Blasingame Pursuant to Bankruptcy Rule 9024 (Dkt. No. 240, the "Motion for Relief from Judgment"), filed by the Defendants Earl Benard Blasingame and Margaret Gooch Blasingame (collectively, "the Blasingames"), seeking to set aside the Judgment entered by this court on February 24, 2011, which granted summary judgment against the Blasingames as to Count IV of the original Complaint, denying their discharge pursuant to Section 727(a)(4) of the Bankruptcy Code ("false oath"), and against Earl Benard Blasingame as to Count V of the original Complaint, denying his discharge pursuant to Section 727(a)(5) of the Bankruptcy Code ("failure to explain loss of assets"). The Blasingames filed a first Motion to Alter or Amend Judgment on March 8, 2011, which was denied by order entered May 9, 2011 (Dkt. No. 154). The Blasingames filed a Notice of Appeal on May 23, 2011, and that appeal is pending before the Bankruptcy Appellate Panel for the Sixth Circuit, Case No. 11-8039.

The Blasingames have obtained new counsel and claim that, pursuant to Federal Rule of Bankruptcy Procedure 9024, which incorporates Federal Rule of Civil Procedure 60(b)(6), "because of the extraordinary circumstances of this case involving a conflict of interest that existed between the Defendants [the Blasingames] and their then counsel leading up to the adverse decisions of this

Court," the prior summary judgment should be set aside. Dft's Proposed Findings of Fact and Conclusions of Law, Dkt. No. 342, p. 2. Specifically, they claim that their prior counsel raised advice of counsel as a defense to the motion for partial summary judgment without consulting them and without properly supporting the defense in the summary judgment record. They claim that counsel failed to give appropriate representation because of their own conflict of interest. The Blasingames also invoke Rule 60(b)(1) "to the extent that some deficiencies were mistakes or the result of inadvertence or excusable neglect." Motion for Relief from Judgment, Dkt. No. 240, p. 7. This claim, however, seems to relate to prior counsels' original preparation of the Debtors' bankruptcy schedules, which is not before the court at this time.

The Plaintiffs filed a Response in opposition to the Motion for Relief on March 26, 2012 (Dkt. No. 247), and evidentiary hearings were conducted on July 25 and August 8, 2012, to consider the Motion for Relief from Judgment. The Debtors and their bookkeeper, Joyce Long, testified at the hearings, but their former counsel did not. At the close of the proof, I asked counsel for the parties to prepare proposed findings of fact and conclusions of law. They have done so, and have filed responses to the proposed findings and conclusions. On December 19, 2012, the parties filed sur-replies to each of the responses. The Motion for Relief from Judgment is now ready for decision.

It is important to keep in mind that the issue before the court at this time is not whether the Debtors would have been entitled to discharge had this case gone to trial. Instead, the issue before the court is whether the Motion for Partial Summary Judgment would have been granted had the Debtors been adequately and properly represented once their attorneys invoked reliance upon advice of counsel in opposition to the motion. Because I find that they could have successfully defended

the motion for partial summary judgment, the Motion for Relief from Judgment should be granted. As an appeal is pending, it will be up to the Debtors to obtain a remand of the proceeding to the bankruptcy court so that a final order vacating the prior judgment can be entered.

I. JURISDICTION

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The determination of the objections to discharge are core proceedings arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(J). Accordingly, the bankruptcy court had authority to enter its judgment granting the Plaintiffs' motion for summary judgment as to the discharge claims subject only to appellate review under section 158 of title 11. 28 U.S.C. § 157(b)(1). The authority to relieve a party from a final judgment pursuant to Federal Rule of Civil Procedure 60(b) rests with the trial court, not the appellate court. *Herring v. Kennedy-Herring Hardware Co*., 261 F.2d 202, 203 (6th Cir. 1958). Even when an appeal is pending, it is appropriate that the trial court consider a motion for relief from judgment. *See Smith v. Pollin*, 194 F.2d 349, 350 (U.S. App. D.C. 1952).

II. STANDARD FOR RELIEF

The Motion for Relief from Judgment is brought pursuant to Rule 60(b)(1) and (b)(6). Those sections provide:

> (b) On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect;
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b), incorporated at Fed. R. Bankr. P. 9024. The motion must be made within a reasonable time, and for reasons (1), (2), and (3) no more than one year after the entry of the judgment or order or the date of the proceeding. Fed. R. Civ. P. 60(c)(1).

The Court of Appeals for the Sixth Circuit has provided guidance for the application of Rule 60(b). For example, the court has said:

> [R]elief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation. This is especially true in an application of subsection (6) of Rule 60(b), which applies only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. This is because almost every conceivable ground for relief is covered under the other subsections of Rule 60(b). Consequently, courts must apply Rule 60(b)(6) relief only in unusual and extreme situations where principles of equity *mandate* relief.

Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefit Fund, 249 F.3d 519, 524 (6th Cir.), *cert. denied*, 534 U.S. 1054, 122 S. Ct. 643, 151 L. Ed.2d 562 (2001), quoted in *McCurry v. Adventist Health System/Sunbelt, Inc*., 298 F.3d 586, 592 (6th Cir. 2002); *see also Taylor v. Streicher*, 469 Fed. Appx. 467, 469, 2012 WL 1700705, *2 (6th Cir. 2012) ("Rule 60(b)(6) applies only 'where principles of equity *mandate* relief'"); *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990) ("Rule 60(b)(6) should apply 'only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule'"). The Debtors argue that they should be granted relief under Rule 60(b)(6) because of the failure of their attorneys to represent them adequately and properly in connection with the Motion for Partial Summary Judgment.

In general, clients are held accountable for the acts and omissions of their attorneys. *See, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 396-97, 113 S. Ct. 1489 (1993) (client bound by attorney's failure to timely file a proof of claim in bankruptcy). The Sixth Circuit, for example, has held that "neither strategic miscalculation nor counsel's misinterpretation of the law warrants relief from judgment" as a "mistake"or "excusable neglect" under Rule 60(b)(1). *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 683-86 (6th Cir. 1999). Moreover, "straightforward claims of attorney error and strategic miscalculation do not satisfy the rigorous standard of Rule 60(b)(6)," which requires proof of exceptional and extraordinary circumstances. *McCurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 596 (6th Cir. 2002).

In rare cases, however, the court of appeals has found a lawyer's failures serious enough to warrant relief under Rule 60(b)(6). For example, in *Fuller v. Quire*, 916 F.2d 358 (6th Cir. 1990), the court held that the district court acted within its discretion to set aside an order of dismissal that resulted from counsel's failure to appear at docket call where the client was diligent in attempting to discover the status of his case and hired alternate counsel as soon as he learned that his case had been dismissed.

In a second case, *Valvoline Instant Oil Change Franchising, Inc. v. Autocare Assocs., Inc.*, No. 98-5041, 1999 WL 98590, at *4-6 (6th Cir. Jan. 26, 1999), the court reversed the refusal of the district court to set aside a default judgment that resulted from an attorney's failure to file counterclaims on behalf of his clients after telling them that he had; failure to file a Rule 26(f) report; failure to appear at scheduled depositions; failure to timely respond to a motion for summary judgment; and failure to file pre-trial conference compliance proceedings with the court. Upon

learning of their attorney's arrest for crimes involving conversion of client funds, Autocare Associates immediately retained new counsel to investigate their attorney's actions and take appropriate action. The court of appeals noted that in a prior decision it had ruled that "Rule 60(b) cannot provide a client relief from a judgment based on the gross negligence of a hired lawyer." *Id.* at *3, citing *Buck v. U.S. Dept. of Agriculture Farmers Home Admin.*, 960 F.2d 603, 608-09 (6th Cir. 1992). Notwithstanding this precedent, the court looked to the decisions of two other circuits in finding that under certain particular facts and circumstances, an attorney's gross negligence may provide his client relief under Rule 60(b)(6). *Id.* at *3-4, citing *L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234, 235-36 (D.C. Cir. 1964), and *United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977). In the cited cases, the attorney's gross negligence resulted from personal problems or mental illness. In *Valvoline Instant Oil Change*, the attorney's gross negligence resulted from an alleged mental illness, criminal conduct, and dishonesty. The attorney misled his clients into thinking that their case had been settled. Of particular significance was the court's finding that there was no evidence in the record that the clients were derelict in defending their case. The court held that these were such exceptional or extraordinary circumstances that could provide the defendants relief under Rule 60(b). The court, however, went further to consider three additional factors: "(1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default." *Id.* at *3, quoting *United Coin Meter Co., Inc. v. Seaboard Railroad*, 705 F.2d 839, 846 (6th Cir. 1983).

Two other cases may be mentioned: *Travelers Cas. & Sur. Co. of Am. v. J.O.A. Constr. Co.*, No. 09-1610, 2012 WL 1547973, at *12 (6th Cir. May 2, 2012) (noting that "courts occasionally deem attorneys' misconduct sufficiently egregious to warrant post judgment relief for their abused

clients," but affirming the district court's denial of relief), and *Doyle v. Mutual of Omaha Ins. Co.*, No. 11-3554, 2012 WL 5382890, at *4 (6th Cir. Nov. 2, 2012) (reviewing cases within the Sixth Circuit and finding that the district court was within its authority to grant relief from judgment under Rule 60(b)(6) where an attorney falsely told the court that his client wished to dismiss his case with prejudice, when in fact the attorney never sought his client's permission to seek dismissal and misled his client into believing that the case was proceeding).

The Debtors rely heavily upon the decision of the United States District Court for the Northern District of Texas, *Ames v. Miller*, 184 F. Supp. 2d 566 (N.D. Tex. 2002). The *Ames* court addressed a Rule 60(b)(6) motion seeking relief from a summary judgment granted to defendants. Certain of the disappointed plaintiffs brought the motion asserting that, "for all practical purposes, the summary judgment was allowed to be granted by default because of lack of motivation by counsel for the then plaintiffs to provide meaningful representation of the interests of the current plaintiffs due to a serious conflict of interest." The district court agreed, finding that the attorneys representing certain plaintiffs who acted as administrators for a joint venture did not adequately defend the summary judgment motions because the interests of their clients were not aligned with those of the investor plaintiffs. After granting the motion for summary judgment, the district court became concerned about counsel's apparent conflict of interest. It permitted two of three attorneys to withdraw from representation of the investor plaintiffs, and directed the third to file an amended complaint on their behalf. The third attorney also filed the Rule 60(b)(6) motion, but was later permitted to withdraw from representation of the investor plaintiffs as well. The investor plaintiffs had not obtained new counsel at the time that the district court considered the Rule 60(b)(6) motion. In deciding to grant the motion, the district court noted that the Fifth Circuit had specifically held

that "[t]he existence of a conflict of interest on the part of the movant's attorney when the judgment was entered can qualify as an extraordinary case justifying Rule 60(b)(6) relief." *Id.* at 566, citing *Gray v. Estelle*, 574 F.2d 209, 214-15 (5th Cir. 1978). The district court found that there was no question that "the interests of the investor plaintiffs were not properly represented by" their attorneys. *Id*. at 577. Further, it found that: "[t]he only items offered as summary judgment evidence in opposition to the motion were patently defective – defects that would be readily apparent to any competent attorney"; that when told of the defects by the magistrate judge, the attorneys took no steps to correct them; and that, "[f]or all practical purposes, [the attorneys] allowed a default summary judgment to be entered in favor of [the defendants]." *Id.* The court concluded that the lack of proper representation when the judgment was rendered constituted an extraordinary circumstance requiring the setting aside of the judgment in order to accomplish substantial justice. *Id.*

The Debtors also rely upon the decision of the District Court for the Eastern District of Tennessee, *United States v. Swafford*, No. 1:04-CR-138, 2004 WL 5575829 (E.D. Tenn. Sept. 15, 2004). Although this is a decision in a criminal case, it is helpful in clarifying the conflicts that may arise when a defendant announces an intention to rely upon an "advice of counsel" defense at trial (or in connection with a motion for summary judgment). As the district judge notes, in order to successfully raise an advice of counsel defense, a litigant must show (1) full disclosure of all pertinent facts to counsel, and (2) good faith reliance on counsel's advice. *Id.* at *4, citing *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994) (other citations omitted). In *Swafford*, defendant's counsel intended to show that his client relied upon advice of other members of his own law firm with respect to the appropriateness of sales of iodine by him and his corporate co-defendant at levels that the government charged were criminal. The charges involved a mental state of knowledge,

intent, or reasonable cause to believe that the iodine would be used in the manufacture of methamphetamine. Although the defendant argued for retention of his chosen attorney, the district court ultimately ruled that counsel was disqualified. Just a brief excerpt from the opinion will illustrate the potential harm that may occur when the very law firm that provided advice relied upon by their client attempts to raise and prosecute an advice of counsel defense:

> Defendant Swafford's present counsel's representation may be materially limited by their own (or their law firm's) interests. Defendant Swafford's present counsel may, at some subconscious level, be motivated by personal loyalty to the attorney witnesses and to their own law firm, and unwittingly make decisions that benefit them to the detriment of Defendant Swafford's defense. This has possibly occurred already in defense counsel's decision not to call the attorney or attorneys to whom Defendant Swafford spoke, even though they could corroborate any testimony Defendant Swafford may give with regard to this defense. Further, if defense counsel proceeds in not calling the attorney or attorneys to whom Defendant Swafford spoke in its case in chief, the Government has indicated that it will call the attorney or attorneys in rebuttal to Defendant Swafford's testimony on this point. Defense counsel would then be required to cross examine that attorney or attorneys, which often requires calling into question the witnesses' credibility. The Court questions whether current defense counsel could, despite its best intentions, cross examine a law partner as vigorously as a witness with whom they have no outside relationship as other, disinterested counsel could do....In addition, depending on what advice the attorney or attorneys gave Defendant Swafford, it is not outside the realm of possibility he could bring a legal malpractice lawsuit against that attorney or attorneys. Again, subconsciously, Defendant Swafford's present counsel may alter their strategy in his defense at trial because of this possibility and how it may affect the attorney or attorneys, and by extension the finances of the law firm of which they are a part.

Id. at *5.

Reading all of these cases together, I believe that the Sixth Circuit does recognize that the actions of an attorney consisting of gross negligence may constitute exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule 60(b). If the gross negligence of counsel results in harm to a client through no fault of his or her own, the trial court may grant relief from a final judgment after considering the additional factors articulated in

United Coin Meter: (1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; and (3) whether culpable conduct of the defendant led to the default.

III. FACTS

In support of their Motion for Relief from Judgment, the Debtors presented their own affidavits and that of their bookkeeper, Joyce Long. In addition, each of them testified at the hearings on the motion. The Debtors presented documentary proof of the information provided to Mr. Fullen in order to enable him to prepare their bankruptcy schedules and Statement of Financial Affairs. This included an "Entity Overview," which gives detailed information about each of the trusts and businesses in which the Debtors are interested. It also included information prepared by Joyce Long to be included in the Statement of Financial Affairs, which contains references to the Old Dominion Account and the assignment of $20,000 held by the McNairy County Circuit Court to Grusin. It also included a Notice of Federal Tax Lien; payroll check stubs, including withholding information; a list of judgments against the Debtors; a copy of an email from the Debtors' accountant containing information about income from wages, interest, dividends and capital gains for the years 2005-07; a reference to "book only" income from Heritage Apartments Ltd., and "the Trust 'deemed' income pass-through"; information about a levy of an account at Community South Bank; and a completed Bankruptcy Case Information form with notes written in Mr. Blasingame's hand concerning expenses. *See* Tr. Exs. 1-5. In addition to these documents, the trial exhibits include documents that were made exhibits to Joyce Long's affidavit which provide detailed information about her use of a "clearing account" to pay expenses of several different persons and entities. *See* Tr. Ex. 6.

The testimony at the hearings was equally important. Both of the Debtors clearly testified that they were told by Mr. Grusin and Mr. Fullen that they need not disclose information about trusts or annuities in which they held an interest. Both Debtors testified about the circumstances surrounding the signing of their bankruptcy papers, saying that there was some rush to get them signed which they thought was related to Mr. Fullen's military service. Both Debtors agreed that they were never given the blank forms for completion of their schedules to review. As a result, they had no opportunity to see for themselves what information was required by those forms. Both Debtors admitted that they did not carefully read the schedules and statement of financial affairs as prepared by Mr. Fullen before signing them, but both felt that they had given him all relevant information and that he was fully informed about the trusts and annuities. Thus, they said that even if they had read the schedules, they would not have been surprised when they did not find references to the trusts or annuities there. Neither could explain why there was no reference to the funds assigned to Mr. Grusin on the eve of bankruptcy, which was clearly known by Mr. Grusin and disclosed to Mr. Fullen in the Statement of Financial Affairs form completed by Ms. Long. Ms. Long testifies in detail concerning her use of the "clearing account" to pay bills for a number of different entities. She also explained the use of Earl Benard Blasingame's name as a "place-holder" for transfers between accounts.

With respect to the filing of the opposition to the Motion for Partial Summary Judgment, each of the Debtors testified that they were not made aware that Mr. Joseph Townsend, an associate of Mr. Fullen, had decided to raise advice of counsel as a defense on their behalf. They said that they were not informed of the potential consequences of doing so, including the potential waiver of the attorney-client privilege, nor were they advised to consult other counsel. Aff. of Earl Benard Blasingame, ¶ 23; Aff. of Margaret Gooch Blasingame, ¶¶ 31-32.

Each of the witnesses appeared to be credible, and the Plaintiffs called no witness to rebut their testimony. I find that the facts are as described by the Debtors and Ms. Long.

IV. ANALYSIS

A. The Prior Motion to Alter or Amend

It is important to understand why the Debtors' should be given a second "bite at the apple" after their prior Motion to Alter or Amend the Judgment was denied. The prior Motion to Alter or Amend was filed by Mr. Townsend and supported by the affidavits of Mr. Grusin and Mr. Fullen. In other words, the Debtors were represented in connection with that motion by the same attorneys who represented them in connection with preparing their bankruptcy papers and in response to the Motion for Partial Summary Judgment.

In the prior Motion to Alter or Amend, counsel made two arguments under Rule 59(e): (1) that the court failed to properly evaluate their advice of counsel defense; and (2) that the court applied an incorrect legal standard in evaluating the motion for summary judgment. The Debtors argued that the court failed to properly evaluate their advice of counsel defense for two reasons: first, because the court failed to comprehend that the Debtors adopted as their own the statements in their Response to the Motion for Partial Summary Judgment; and second, because the court failed to understand their argument (or belief) that they were under no duty to disclose assets that are not property of their bankruptcy estate. With respect to the first reason, I carefully reviewed the record and concluded, again, that the Debtors failed to provide any factual support for their reliance upon advice of counsel defense. The affidavits of their attorneys did not present any evidence that was not available to them in connection with their response to the Motion for Partial Summary Judgment, and affidavits from the Debtors themselves were not supplied.

With respect to the second reason, I pointed to the substantial portion of my original Memorandum devoted to the argument that the Debtors were under no obligation to disclose their interests in property that they or their counsel determined was not property of their bankruptcy estate. Moreover, I noted that even if I agreed with counsels' argument, which I did not, there was more than enough omitted information in the schedules and statement of financial affairs to result in the denial of the Debtors' discharge under Bankruptcy Code section 727(a)(4). These omissions included the UBS account, the Regions Bank account, the Lincoln Financial Group annuity, the SAFECO/Symetra annuity, the Horace Mann annuity account, the Dominion account, significant amounts of personal property held for others, Margaret Blasingame's interest in funds on deposit with the McNairy County Circuit Court Clerk, the transfer of those funds to her attorney on the eve of bankruptcy, and payments and debts owed to several credit card issuers (*see* Dkt. No. 154, p. 9). None of these issues was addressed in the Motion to Alter or Amend.

With respect to the Debtors' assertion that I had applied an incorrect legal standard in evaluating the Motion for Partial Summary Judgment, I reiterated the following statement of the court of appeals:

> Although we must draw all inferences in favor of the non-moving party, it must present **significant and probative** evidence in support of its [position]. "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; **there must be evidence on which the jury [or fact-finder] could reasonably find for the [non-moving party]**."

Hall v. Tollett, 128 F.3d 418, 421-22 (6th Cir. 1997) (internal citations omitted and emphasis added) (Dkt. No. 154, pp. 10-11). I noted that the Debtors had suggested no alternative standard, and reviewed again the lack of evidence produced by the Debtors in opposition to the Motion for Partial Summary Judgment. Specifically, I noted that the Debtors disputed nearly every statement

contained in the Plaintiffs' statement of undisputed facts, even those fully supported by the deposition record. Further, I pointed out that none of the "factual disputes" belatedly raised by the Debtors in their Motion to Alter or Amend was actually necessary to my decision to deny their discharge. That decision did not rely upon the Debtors' failure to disclose their interests in various trusts. Rather, it relied upon the numerous other omissions from the Debtors' schedules and statement of financial affairs. These were sufficient to support the denial of the Debtors' discharge on the basis of false oaths pursuant to section 727(a)(4). The denial of Benard Blasingame's discharge for the additional reason that he failed to satisfactorily explain the loss of substantial assets was also fully supported by the deposition testimony. (Dkt. No. 154, pp. 12-13). Mr. Townsend merely argued that there were factual disputes requiring a trial. He failed to provide proof sufficient to raise a factual dispute.

B. The Present Motion for Relief from Judgment

The pending motion was filed February 22, 2012, more than nine months after the Order Denying Debtors' Motion to Alter or Amend Judgment was entered on May 9, 2011, and almost one year after the Order on Plaintiffs' Motion for Partial Summary Judgment was entered on February 24, 2011. In the interim, I granted Plaintiffs' Motion to Disqualify [Debtors'] Counsel and ruled that attorneys Tommy L. Fullen, Martin A. Grusin, and Joseph T. Townsend were disqualified from representing the Defendants with respect to the remaining counts of this adversary proceeding as the result of their attempts to represent conflicting interests (Dkt. No. 187). In my order I noted that neither Mr. Fullen nor Mr. Grusin nor the Debtors appeared at the scheduled hearing to consider the motion. Subsequent to the disqualification of Fullen, Grusin, and Townsend, David J. Cocke entered his appearance on behalf of the Debtors on December 13, 2011. He filed the Motion for Relief from Judgment on February 22, 2012.

The Motion for Relief from Judgment claims that relief should be granted to the Debtors because of "new developments, requiring reconsideration under Rule 60(b)(6), due to the extraordinary circumstances of this case involving a conflict of interest that arose between the Defendants and their then counsel leading up to the adverse decisions by this Court" (Dkt. 240, p 2). The Debtors admit that some of these conflicts were addressed in connection with the motion to disqualify. The Debtors contend that additional conflicts of interest arose out of counsel's raising of the defense of "reliance on advice of counsel" and counsel's desire to avoid a claim of legal malpractice.[1] These are the additional circumstances that the Debtors assert justify reconsideration of the order denying their discharge.

As noted above under the discussion of the Standard for Relief, in order to prevail the Debtors must show exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule. Ordinary attorney negligence and/or malpractice are covered by the first numbered clause of the rule. Generally, claims for relief from a judgment as the result of attorney malpractice are rejected. In rare cases, however, attorney misconduct may give rise to a claim for relief under Rule 60(b)(6). These are cases in which the attorney hid his or her own misfeasance from the client, and the client was in no way implicated in the granting of the adverse judgment.

Focusing solely on the Motion for Partial Summary Judgment, I am convinced that the motion would not have been granted adversely to the Blasingames but for the failure of their

[1] A complaint for legal malpractice was filed by Church Joint Venture on behalf of Montedonico, Trustee, against Martin A. Grusin, JG Law Firm, Tommy L. Fullen, and Law Offices of Tommy L. Fullen on February 13, 2012, in the United States District Court for the Western District of Tennessee, Case No. 12-02119-STA-dkv. The malpractice complaint was referred to the Bankruptcy Court by order entered June 1, 2012, and assigned Adversary Proceeding No. 12-00454.

attorneys to discuss the advice of counsel defense with them and to advise them to consult and/or engage other counsel to assist them in evaluating that defense. In my Memorandum on Plaintiffs' Motion for Partial Summary Judgment on Discharge Claims, I noted that "[u]nder certain circumstances, reliance upon advice of counsel can show that a debtor lacked the requisite intent required to deny his discharge. *In re Rivera*, 356 B.R. 786, 2007 WL 130415, (6th Cir. BAP 2007), citing *First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1342 (9th Cir. 1986)." Dkt. No. 117, p. 27. I also noted that a debtor relying on the defense of reliance of counsel must have acted reasonably and in good faith. Most importantly, I found that:

> The Debtors have introduced no facts supporting their assertion of reliance upon counsel. The affidavits filed by the Debtors in this case are simply silent as to the process undertaken by them to provide their counsel with the information needed to prepare their schedules and statement of financial affairs. The mere assertion that Debtors relied upon the advice of counsel in determining which assets to disclose and which to omit is insufficient. The Debtors must show that their attorney was fully informed and that his or her advice was reasonable. *In re Oliver,* 414 B.R. 361, 376 (Bankr. E.D. Tenn. 2009).

Dkt. No. 117, p. 27.

The Debtors have now provided unrebutted proof that they provided their attorneys with substantially all of the information that was omitted from their schedules or that they were told not to provide it. For example, they have produced the detailed "Entity Overview" that was provided to their counsel, which included information concerning the trusts and business entities in which they held an interest. They have shown that the draft of their Statement of Financial Affairs prepared by Joyce Long included information about the Old Dominion account and the funds transferred to Mr. Grusin on the eve of bankruptcy. They have produced a memorandum from their accountant that includes references to the Heritage Apartments Limited Partnership and Trust "deemed" pass-through income. They have explained that they were clearly told not to disclose their interests in

trusts and annuity accounts, and that the only bank accounts that they should list were ones opened under their own social security numbers. They have shown that, in connection with her deposition, Ms. Long provided detailed information about the use of the "clearing account" that was not included in the response to the Motion for Partial Summary Judgment. Ms. Long has also explained her use of Earl Benard Blasingame's name as a "place-holder" when she transferred funds from one account to another giving the false impression that substantial funds were transferred to him in the year preceding the bankruptcy filing.

The Debtors have also shown that their reliance upon counsel was reasonable. They have explained that Mr. Grusin had represented them for a number of years and that they reposed confidence in him. They have shown that based upon his recommendation, they reposed similar confidence in Mr. Fullen. The Debtors have said that both Mr. Grusin and Mr. Fullen told them a number of times that their interests in trusts and annuities did not have to be disclosed because they were not property of the bankruptcy estate. The have explained that they were never provided a copy of the forms for the bankruptcy schedules so that they never had an opportunity to review the descriptions of information required to complete those schedules. They have said that they were told not to worry about the Motion for Partial Summary Judgment. Knowing that they had fully disclosed all their financial dealings with counsel, it was reasonable for them to credit this advice. They have said that even after my memorandum opinion was issued, they were again reassured by Mr. Grusin, and told that counsel would file a motion to amend. The Debtors have shown that their reliance upon counsel was reasonable.

All that was required for the Debtors to have avoided the adverse ruling on the Motion for Partial Summary Judgment was to raise a factual issue requiring trial. The advice of counsel defense

should have raised material factual issues. Had it been properly supported, that defense would have resulted in the denial of the motion and setting the case for trial. The Debtors have demonstrated that the required proof was available to their counsel at the time that a response to the motion was required.

Although I have not heard from the Debtors' original counsel on the question of why the appropriate proof was not brought forward, it is not difficult for me to conclude in agreement with the Debtors that their attorneys were so convinced of the correctness of their legal position that they did not think through the possibility that they could be wrong. More importantly, they did not think through the implications of raising the advice of counsel defense or of the proof required to sustain it. The proof that was in their files showed that they had been provided information by their clients that was omitted from the bankruptcy papers. To provide that proof to the court clearly would have been detrimental to their own self-interests. The Debtors have shown that their attorneys' failure to properly support their response to the Motion for Partial Summary Judgment resulted from more than mere mistake or excusable neglect. It resulted from gross negligence caused by counsels' self interest.

C. The Plaintiffs' Arguments

The Plaintiffs argue that the motion should be denied because (A) it is untimely; (B) the advice of counsel defense was previously asserted and overruled; (C) the Debtors are ultimately responsible for their discharge being denied; (D) the alleged malpractice/reliance on advice of counsel is not grounds to set aside the judgment; and (E) there is no Sixth Amendment right to effective assistance of counsel in a civil action. I will consider each of these objections in turn.

1. The Motion is Timely

The Plaintiffs argue that the Motion for Relief from Judgment was untimely because, although it was filed within one year after the denial of discharge, all the facts and documents referenced in the motion were known to the Debtors prior to and shortly after the entry of the discharge judgment. The Plaintiffs claim that "pecuniary decisions" have been made based in part upon the denial of discharge. As a result, they argue that they will be prejudiced in the event that the Motion for Relief from Judgment is granted.

Rule 60(c)(1) requires only that a motion under Rule 60(b)(6) be filed within a reasonable time. The pending motion was filed within one year after the order complained of and within three months after new counsel was engaged by the Debtors. As the acts that are offered by the Debtors in support of their motion were committed by previous counsel, it seems reasonable to consider the time elapsed from the engagement of new counsel. Given the complexity of this case, I do not find the time elapsed between the appearance of Mr. Cocke, December 13, 2011, and the filing of the Motion for Relief from Judgment, February 22, 2012, to be unreasonable. Moreover, the Plaintiffs' claim that they have suffered pecuniary loss in reliance upon the denial of discharge is not supported by the record. I decline to speculate about decisions made by the Plaintiffs in reliance upon my decision which is, in any event, the subject of a pending appeal. The possibility that my decision could be overturned has always been part of the strategic mix confronted by the Plaintiffs. Therefore, it seems unlikely that they relied too heavily upon it.

I find that the Motion for Relief from Judgment was filed within a reasonable time.

2. The Advice of Counsel Defense was Previously Asserted and Overruled but that is not the Issue Presently Before the Court

It is true that the advice of counsel defense was previously asserted and overruled. The Debtors have demonstrated to my satisfaction, however, that this resulted from the gross negligence of their counsel, and that they were in no way implicated in counsels' omissions. They have shown that all of the information needed to factually support the defense was provided to their counsel. They have also shown that they were never made privy to counsel's decision to raise the defense. They were not advised to seek other counsel and they were not asked to provide affidavits addressing their reliance on counsel. Given all of these facts, it is appropriate for the court to consider the advice of counsel defense a second time, and this time in the context of a trial.

3. The Debtors Are Ultimately Responsible for Schedules but Reliance on Advice of Counsel May Prevent Their Loss of Discharge

It is true that the Debtors are ultimately responsible for the accuracy and completeness of their schedules and statement of financial affairs. It is also true, however, that if they can successfully sustain an advice of counsel defense, they can show that they lacked the requisite intent required to deny their discharge. Although their prior counsel raised this defense, they did not properly support it in response to the Motion for Partial Summary Judgment. As a result, the Debtors were never permitted a trial on the question of denial of their discharge. It is not appropriate at this time to attempt to anticipate the outcome of that trial, but it is clear that the Motion for Partial Summary Judgment would not have been granted had the Debtors' prior counsel submitted proof sufficient to raise an issue for trial. The Debtors have shown that this proof was available to their counsel and that for reasons of their own, counsel failed to present it.

4. The Alleged Gross Negligence of Counsel Does Provide Grounds to Set Aside the Judgment

As I have said elsewhere in this opinion, the issue before the court at this time is a narrow one: should the Order Granting Partial Summary Judgment be vacated. It is not appropriate to anticipate the outcome of trial on the issues concerning discharge. Plaintiffs' argument under this heading focuses on the preparation of the schedules and statement of financial affairs. It does not address the presentation of the advice of counsel defense. As I have explained, I am convinced that I would not have granted the Motion for Partial Summary Judgment had I been provided the information provided in connection with the hearings on the pending motion. I would have ordered the case to trial to evaluate the Debtors' reliance upon counsel. I allowed the Debtors to present some of their proof on the underlying issues in order to evaluate their likelihood of success on the merits of those issues, but those issues have not been fully presented and are not ripe for decision. The only thing that I have decided is that the advice of counsel defense was not properly presented in connection with the Motion for Partial Summary Judgment, and that the Debtors should be given an opportunity to do so.

5. There Is No Sixth Amendment Right to Effective Assistance of Counsel in a Civil Action but that is not the Issue before the Court

It is true that there is no right to effective assistance of counsel in a civil action. The Debtors' motion, however, alleges more than that. It alleges that Debtors' counsel were not merely ineffective, but rather that they positively omitted to provide information to their clients concerning the course of action they had adopted in response to the Motion for Partial Summary Judgment and that they did so for reasons stemming from their own self interest. Again, what is being decided in connection with the pending motion is that the Debtors should have been afforded a trial with

respect to the discharge issues. They were not because of the failure of their attorneys to properly support the advice of counsel defense, and that failure was unknown to and could not have been discovered by the Debtors.

V. CONCLUSION

The Debtors have shown that, in connection with the Motion for Partial Summary Judgment, their attorneys were grossly negligent in not informing them that they intended to raise advice of counsel as a defense to the motion, in failing to inform them of the consequences of raising that defense, and in failing to properly support the defense from information that was in their possession. The Debtors have shown that their attorneys' actions resulted not from mere mistake or excusable neglect, but as the result of the conflict of interest that necessarily arose when those attorneys decided to rely upon advice of counsel as a defense to the motion. They have shown that the information that had been provided to their attorneys was adequate to raise one or more issues of fact that would have required a trial on the discharge questions. In doing so, they have shown that they had a meritorious defense to the Motion for Partial Summary Judgment. The Debtors have also shown that they were in no way implicated in not properly supporting the defense of advice of counsel because their attorneys did not inform them of their intention to raise that defense. Although the Plaintiffs claim that they have made pecuniary decisions in reliance on the denial of discharge, they did not support this claim. Moreover, they have always known of the possibility that the summary judgment could be overturned on appeal. Relief from the prior judgment is necessary accomplish substantial justice.

For the foregoing reasons, the Motion for Relief from Judgment is provisionally **GRANTED**. The Debtors are instructed to inform the Bankruptcy Appellate Panel of this

provisional decision. Upon receipt of an order of remand from the Panel, a final order vacating the prior judgment will be entered.

cc: Debtors/Defendants
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Plaintiffs
Attorneys for Plaintiffs
Necessary Parties
Attorneys for Necessary Parties
Defendants
Attorneys for Defendants