

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
In the Court of Common Pleas

Paul M. Burch, Circuit Court Judge
William O. Spencer, Special Referee

Case No. 2017-CP-13-804

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SC Court of Appeals

First Citizens Bank & Trust Company and Sadie M. Murvin, Respondents,

v.

Miranda Libby Murvin, a/k/a Miranda Libby Murvin Zimmerman
and Great American Life Insurance Company, Defendants.

Of whom Great American Life Insurance Company is Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Appellant Great American Life Insurance Company (“GALIC”) failed to respond to the Amended Complaint in a good faith belief that a response was not required due to the fact that the Amended Complaint both alleged an insurance policy that was neither a GALIC policy nor a numeric sequence that GALIC uses in any of its policies, as well as attached as an exhibit an insurance policy printout demonstrating that the alleged policy and contract number was issued by an unaffiliated insurance company. Notwithstanding these patent errors in pleading, Appellees moved below to hold GALIC in default and a default judgment was entered. GALIC quickly and timely sought relief and established a meritorious defense to the underlying claim, while also establishing that no appreciable prejudice would inure to Respondents should this case be remanded for an adjudication on the merits consistent with longstanding South Carolina policy and precedent. In denying GALIC’s motion for relief, the Special Referee applied an incorrect legal standard and disregarded uncontested evidence demonstrating that Appellant acted under a good faith mistake, inadvertence, or excusable neglect in initially failing to appear and respond to the Amended Complaint.

ISSUE: Did the Special Referee abuse its discretion in failing to set aside the entry of default and default judgment against GALIC?

STATEMENT OF THE CASE

Respondents First-Citizens Bank & Trust Company (“First Citizens”) and Sadie M. Murvin (“Beneficiary”) (collectively “Respondents”) commenced the action underlying this appeal on December 12, 2017, in the Court of Common Pleas for Chesterfield County against Miranda Libby Murvin, a/k/a Miranda Libby Murvin Zimmerman (“Murvin”), GALIC. (R.p.) (Original Complaint) On January 17, 2018, Respondents filed an Amended Complaint against the same parties. (R.p.) (Amended Complaint) On January 25, 2018, the South Carolina Department of Insurance (“Department”) accepted service of the Summons and Amended Complaint on behalf of GALIC pursuant to S.C. Code Ann. § 38-5-70 and forwarded the accepted process to GALIC on the same date. (R.p.) (Jan. 25, 2018 Filing Ltr.)

On March 5, 2018, counsel for Respondents filed an affidavit of default, as well as motions for an order of default by the Court and for entry of default by the clerk of court. (R.p.) (Barth Affidavit; Mot. for Order of Default; Mot. for Entry of Default) The Barth Affidavit provided, *inter alia*, that service of the Amended Complaint on GALIC was accomplished on January 25, 2018 via service on the Department, *id.* at ¶4, that more than thirty-five days had elapsed since service, and that GALIC had failed to enter an appearance, file an answer, or otherwise respond to the Amended Complaint, *id.* at ¶5. The Barth Affidavit further requested the entry of default against GALIC, as well as the entry of a sum certain judgment in the amount of \$136,000.00 on Respondents’ breach of contract claim, *id.* at ¶6, as well as the appointment of a special referee pursuant to Rule 53, SCRPC and S.C. Code Ann. §§ 14-11-60 and 15-31-150, for the purposes of taking testimony in the context of a damages hearing under Rule 55, SCRPC on the remaining causes of action, *id.* at ¶7.

Consistent with Respondents' request, the clerk of court entered default against GALIC on March 5, 2018. **(R.p.)** (Entry of Default) Thereafter, on March 22, 2018, the circuit court filed a Form-4 and written order entering a default judgment against GALIC on the breach of contract cause of action in the amount of \$136,000.00. **(R.p.)** (Form-4; Default Judgment Order) The Default Judgment Order determined that a damages hearing on the remaining causes of action should be held and further appointed William O. Spencer, Jr., Esquire, as Special Referee in the matter for the purposes of taking testimony, deciding any motions or other matters that might arise, making conclusions of law and findings of fact, and issuing a final order. *Id.*

Subsequently, counsel for GALIC entered an appearance in this matter on April 12, 2018, **(R.p.)** (Wilbur Johnson Notice of Appearance), and on April 16, 2018, GALIC filed a motion to vacate the Default Judgment Order under Rule 60(b), SCRCP. **(R.p.)** (Mot. for Relief) The Special Referee held a hearing on GALIC's Motion for Relief on July 12, 2018; counsel for both parties appeared at the hearing and presented oral argument. **(R.p.)** (Order Denying Mot. for Relief) Additionally, GALIC submitted a memorandum in support of its Motion for Relief from the Default Judgment Order at the hearing. **(R.p.)** (Memo in Supp.) GALIC's support memorandum was accompanied by an Affidavit of Keith Lindsay, a claims supervisor with GALIC; a letter dated April 21, 2016, from GALIC to First Citizens, and a Proposed Answer. **(R.p.)** (Mot. for Relief Exs. A and B.) On September 13, 2018, the Special Referee entered an order denying GALIC's Motion for Relief from the Default Judgment. **(R.p.)** (Order Denying Mot. for Relief) GALIC received notice of the Special Referee's Order on September 18, 2018, and on October 9, 2018, timely submitted its Notice of Appeal to this Court. **(R.p.)** (Notice of Appeal)

STATEMENT OF FACTS

The facts before the Court demonstrate GALIC's good faith mistake, inadvertence, or excusable neglect in failing to timely respond to the pleadings of this case. These facts compel the conclusion that the Special Referee abused its discretion and further justify this Court's adherence to South Carolina's policy of favoring the disposition of cases on their merits rather than on technicalities. They also only tell half the story, as the circumstances surrounding the underlying claims show that GALIC has a meritorious defense to the underlying claims. Consequently, equity and fairness demand that GALIC should be allowed to present this defense against the unjustified and punitive result sought and achieved by Respondents.

During his life, Lonnie B. Murvin ("Deceased") purchased a single premium deferred annuity contract from GALIC, identified as Policy Number: 07453578 ("Annuity"). (R.p.) (Memo in Supp., Ex. B, GALIC Proposed Answer at ¶5); (Memo in Supp., Ex. A, Lindsay Aff. Ex. A, April 21, 2016 Ltr. to First Citizens) On April 14, 2015, Deceased passed away. (R.p.) (Am. Compl. ¶7) At the time of Deceased's death, the Annuity was in full force and effect. (R.p.) (Am. Compl. ¶7); (GALIC Proposed Answer at ¶7) According to the facts as pled by Respondents in the Amended Complaint, and on information and belief, Deceased also purchased an annuity from Midland National Life Insurance Company ("Midland") (R.p.) (Am. Compl. Ex. A)

Following Deceased's death, Defendant Murvin filed an application for Informal Appointment in the Probate Court requesting her appointment as personal representative of Deceased's estate.¹ (R.p.) (Am. Compl. ¶8) By certificate of appointment dated September 15, 2015 ("Murvin Appointment"), Murvin was appointed by the Probate Court for Chesterfield

¹ Although Murvin and Deceased share the same last name, the precise relationship between the two is unknown to GALIC and unexplained in the pleadings by Respondents.

County to serve as personal representative of Deceased's estate. *Id.* Thereafter, on September 30, 2015, First Citizens filed an Application for Restraint and for Performance, which represented to the Probate Court that it, and not Murvin, had been designated under the Last Will and Testament of Deceased to serve as personal representative of the estate. *Id.* The Probate Court issued a temporary Order of Restraint/Performance on same date, which Order was later extended by written order of the Probate Court dated October 16, 2015 ("Order of Restraint"), (R.p.) (Am. Compl. Ex. B) The Order of Restraint expressly prevented Murvin from undertaking any further actions on behalf of the estate. (R.p.) (Am. Compl. ¶8; Am. Compl. Ex. B)

It is undisputed that GALIC was unaware of above-described proceedings and happenings. In or about April 2016, GALIC was first notified of Deceased's passing. (R.p.) (Lindsay Aff. ¶4, Ex. A) By letter dated April 21, 2016, GALIC wrote First Citizens regarding Deceased's passing, notified it of the Annuity (including the applicable policy number), the beneficiary of record, as well as the options for disbursement of the policy. *Id.* GALIC's letter also requested that First Citizens provide it with (1) a certified copy of the court-issued Letters of Testamentary that identify the executor(s); and (2) a completed Form W-9 (enclosed) that contained the Estate's tax identification number. *Id.* First Citizens did not respond to GALIC's letter. (R.p.) (Lindsay Aff. ¶5) Thereafter, GALIC sent four (4) follow-up letters to First Citizens requesting the same information on May 23, 2016, June 23, 2016, July 25, 2016, and August 30, 2016. *Id.* at ¶6.

Receiving no response from First Citizen to any of its five letters, GALIC sent similar letters requesting identical information about the estate to the "Murvin Family" (a.k.a. the family of Deceased), and to Murvin. These additional letters were dated September 30, 2016, October 31, 2016, November 30, 2016, January 4, 2017, and February 7, 2017, respectively. *Id.* at ¶7. On February 15, 2017, GALIC received a response from C. Anthony Harris, Jr., Esquire, which letter

represented that Harris was counsel for First Citizens. *Id.* at ¶8. In his letter, Harris made no mention of Murvin's previous appointment or the Order of Restraint, represented that no person or entity had been appointed to act on behalf of the estate of Deceased, and indicated that the estate would like to claim the Annuity as an asset of the estate once the personal representative is appointed. *Id.* On March 28, 2017, GALIC sent a "follow-up request" letter to Harris requesting the identical information requested in GALIC's prior letters to First Citizens, the Murvin Family, and Murvin. *Id.* at ¶9. Harris responded by letter dated April 17, 2017, and among other things, repeated the statement that no personal representative had been appointed for the estate. *Id.* at ¶10.

On June 19, 2017, GALIC received a response from Murvin. *Id.* at ¶11. In her communication, Murvin submitted to GALIC the documents it had requested of her (as well as First Citizens and the Murvin Family), including the September 15, 2015 Murvin Appointment issued by the Probate Court for Chesterfield County to Murvin to serve as personal representative of Deceased's estate. *Id.* Murvin did not disclose to GALIC that her appointment had been rescinded or that the Probate Court had thereafter specifically enjoined Murvin from undertaking any further actions on behalf of the estate.

On July 13, 2017, and in accordance with the documents submitted by Murvin evidencing her authority, GALIC processed payment and issued the proceeds of the Annuity to "The Estate of Lonnie Murvin c/o Miranda Murvin, Personal Rep." *Id.* at ¶12. At no time prior to the processing of the payment and issuance of the proceeds was GALIC given notice of, provided with, or otherwise made aware of, any Order of Restraint issued by the Probate Court for Chesterfield County preventing Murvin from undertaking any action related to the Deceased's estate. *Id.*

First Citizens was thereafter formally appointed personal representative of Deceased's estate on August 8, 2017, nearly one month after GALIC's disbursement. **(R.p.)** (Am. Compl. ¶9;

Am. Compl. Ex. C) Murvin attended the hearing during which First Citizens was so-appointed and was served with a copy of the Order and certificate of First Citizens' appointment ("First Citizens Appointment"). (Am. Compl. ¶ 9) On August 17, 2017, GALIC received a letter from Harris indicating that First Citizens had been appointed personal representative of the estate. (Lindsay Aff. ¶13) Harris's letter further stated that First Citizens would be contacting GALIC regarding the completion of a claim form and other necessary papers related to the Annuity. *Id.* By letter dated August 25, 2017, GALIC notified First Citizens that a claim on the Annuity had already been processed on July 13, 2017, and payment processed by check made payable to The Estate of Lonnie Murvin c/o Miranda Murvin, Personal Rep. *Id.* at ¶14.

On information and belief, upon receipt of the processed payment from the Annuity, Murvin deposited the check into an account in the name of the "Estate of Lonnie B. Murvin," which Murvin opened on July 26, 2017, for the sole purpose of depositing the check and giving herself access to the funds. **(R.p.)** (Am. Compl. ¶10) In issuing the Annuity proceeds to Murvin, GALIC justifiably relied upon an entered order of the Probate Court and had no reason to dispute its authenticity. Although First Citizens had indicated through Harris's letter that it had been named under the will of the Deceased, First Citizens also represented to GALIC that no person or entity had been formally appointed as personal representative and had the authority to make such an election. This is confirmed by the allegations of the Amended Complaint, *see* ¶11, wherein First Citizens notified GALIC that the Annuity should be held until such time as the personal representative is formally appointed and authorized to make a claim on the Annuity, and that GALIC would be notified once the personal representative was appointed.

As it turns out, Murvin perpetrated a fraud upon GALIC, First Citizens, and Beneficiary. This is further confirmed by the fact that First Citizen, according to its own allegations, was not

formally appointed as personal representative until August 8, 2017, almost a full month after GALIC had processed payment to the estate according to the documentation submitted by Murvin. **(R.p.)** (Am. Compl. Ex. C, First Citizens Appointment) But despite GALIC's justifiable reliance on the information and legal documents submitted by Murvin, Respondents brought this action against GALIC asserting claims for breach of contract and the covenant of good faith and fair dealing, insurance bad faith claim or deceptive practices, and conversion.

Following Respondents' service of process on the Department on January 25, 2018, GALIC first received a copy of the Amended Complaint on January 30, 2018. **(R.p.)** (Memo in Supp. at 1-2) Respondents attached three exhibits to the Amended Complaint: (1) a largely unreadable and incomprehensible online policy printout, pertaining to an annuity policy with Midland owned by Deceased, which references a non-GALIC contract number listing "First Citizens Investor Services, Inc." as an agent, **(R.p.)** (Am. Compl. Ex. A);² (2) the October 16, 2015 Order of Restraint, **(R.p.)** (Am. Compl. Ex. B); and (3) the August 8, 2017 First Citizens Appointment, **(R.p.)** (Am. Compl. Ex. C) The Midland policy Respondents appended to the Amended Complaint appears to contain the same contract number and "Accumulation Value" that Respondents referenced in the body of the Amended Complaint itself. **(R.p.)** Am. Compl. ¶ 5; Am. Compl. Ex. A)

Upon receipt of the Amended Complaint, GALIC undertook a review of the allegations and exhibits. **(R.p.)** (Memo in Supp. at 2) Immediately, GALIC noted that the alleged contract

² Little on Exhibit A is legible, but one can make out the name "Midland National Life Insurance Company," portions of the names of some individuals, the format of the contract number, and the website address at the bottom of the page. Midland is not affiliated with GALIC, and the indecipherability of the remaining text of Exhibit A makes it difficult to discern with any degree of certainty the purported policy details or confirm the same from the allegations of the Amended Complaint.

number for the Deceased's policy set forth in the Amended Complaint did not match any GALIC policy number. *Id.* Further, GALIC noted that the alleged contract's numeric sequence was not one used by GALIC in any policy. *Id.* Moreover, GALIC observed that the alleged contract, **(R.p.)** (Am. Compl. Ex. A), was not a GALIC policy at all but was instead a statement of Midland, which often goes by the acronym "MNL" in the industry.³ **(R.p.)** (Memo in Supp. at 2) Believing in good faith that it had been mistakenly named as a party in this lawsuit, the Amended Complaint was not processed as a claim against GALIC within its legal department; consequently no answer or other responsive pleading was timely filed on GALIC's behalf.

As set forth above, on March 5, 2018, Respondents moved for an order of entry of default and for a default judgment, which order and judgment was entered by the circuit court at March 22, 2018. Thereafter, upon receipt of the notice of default and default judgment, and only 12 days after entry of same, GALIC notified counsel for First Citizens on April 3, 2018 that it intended to seek relief from the entry of default and default judgment. **(R.p.)** (Memo in Supp. at 2) On April 16, 2018, GALIC filed the Motion for Relief, **(R.p.)** (Mot. for Relief), and on September 13, 2018, the Special Referee denied GALIC's motion over Respondents' opposition. **(R.p.)** (Order Denying Mot. for Relief)

In light of the entry of default judgment against it, and First Citizens' opposition to GALIC's motion for relief from same despite its own culpability in the circumstances surrounding the disbursement of the Annuity proceeds, GALIC — an innocent party under these circumstances — is faced with not only double payment of the Annuity proceeds, but also at risk of being

³ GALIC has a subsidiary company named Manhattan National Life, which also often goes by the acronym "MNL." **(R.p.)** (Memo in Supp. at 2) In the past, GALIC and Manhattan National Life have been mistakenly named as defendants in actions in lieu of Midland due to confusion over the acronym "MNL." *Id.*

subjected to additional damages, including punitive damages, under the frivolous additional causes of action.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies within the sound discretion of the trial judge. *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902–903 (1989). The trial court’s decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct. App. 1988). “An abuse of discretion in setting aside [or failing to set aside] a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

ARGUMENT

- I. **The Special Referee abused its discretion in failing to set aside the entry of default and default judgment against GALIC based on its timely showing of a good faith mistake, inadvertence, or excusable neglect for its failure to appear and respond to the Amended Complaint.**

GALIC explained to the Special Referee the good faith basis for its mistake, inadvertence, or excusable neglect in failing to timely appear and respond to the Amended Complaint. In denying GALIC’s motion, the Special Referee committed an error of law by imposing, *sua sponte*, additional conditions and standards for GALIC to show mistake, inadvertence, or excusable neglect that do not comport with South Carolina law or this Court’s precedent. In addition, the Special Referee’s conclusion is without evidentiary support in this regard, as it simultaneously disregarded the uncontested evidence advanced by GALIC in factual support of its demonstration

of a good faith basis for its actions. On this record, the Special Referee abused its discretion in failing to afford GALIC the relief it sought.

Once a default judgment has been entered, a party seeking to be relieved therefrom must do so under Rule 60(b), SCRCF. “In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party.” *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008), *aff’d*, 395 S.C. 85, 716 S.E.2d 887 (2011); *see also Micronics, Inc. v. S.C. Dep’t of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct. App. 2001); *Tobias v. Rice*, 379 S.C. 357, 366, 665 S.E.2d 216, 221 (Ct. App. 2008). The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the “good cause” standard established in Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). The rule requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or “other misconduct of an adverse party.” Rule 60(b), SCRCF; *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle it to relief. *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). “[Rule 60(b)(1)] is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met.” *Hillman v. Pinion*, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001).

In denying the Motion for Relief, the Special Referee did not even cite, much less apply and analyze, the complete standard imposed upon trial courts for reviewing motions for relief under Rule 60(b). **(R.p.)** (Order Denying Mot. for Relief) (failing to cite the four-part test articulated above) A Court’s failure to cite to and use the correct standard of review to a party’s

motion is sufficient grounds alone to reverse and remand for further proceedings. *E.g., Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (noting that “the court of appeals failed to observe th[e correct] standard for appellate review”); *id.* at 322, 815 S.E.2d at 441 (James, J., concurring) (“While the court of appeals *articulated* the correct standard of review, its analysis is proof it did not *apply* the correct standard of review in reversing the PCR court.”) (emphasis in original); *see also Micronics*, 345 S.C. at 510, 548 S.E.2d at 225 (finding the lower court erred in its discussion and application of the wrong standard in considering a motion for relief). Rather than apply the complete four-part test, the Special Referee jumped to and focused exclusively upon the sufficiency of GALIC’s particularized showing of mistake, inadvertence, or excusable neglect. However, all of the factors for setting aside the entry of default and default judgment against GALIC are present in this case and the Special Referee’s decision not to grant GALIC relief from that order and judgment should be reversed.

A. GALIC has put forward a good faith basis for its failure to act based on its mistake, inadvertence, or excusable neglect and the Special Referee committed an error in law in imposing additional conditions and standards under Rule 60(b)(1) that do not comport with South Carolina law or this Court’s precedent.

1. *The Special Referee applied a heightened legal standard to determine whether GALIC acted under a good faith mistake, inadvertence, or excusable neglect.*

Without basis in the law and contrary to this Court’s precedent, the Special Referee imposed, *sua sponte*, an additional condition to GALIC’s satisfaction of its burden under Rule 60(b)(1). Specifically, the Special Referee first applied a sophistication test to GALIC, stating that “Great American is an insurance company and should have been diligent enough to recognize that the insured referenced in the Amended Complaint was their insured and that Great American was a proper party to this lawsuit.” (R.p.) (Order Denying Mot. for Relief at 5-6) In other words, the Special Referee determined that GALIC was too sophisticated as an insurance company to have

made a mistake in its analysis of the Amend Complaint and should have recognized its error. But contrary to the Special Referee's view that GALIC should not have made the mistake of failing to respond to the Amended Complaint by inadvertence or neglect, Rule 60(b)(1) requires only that any entity show a mistake made in good faith to be relieved from a default judgment.

Compounding its error, the Special Referee also imposed the additional condition to relief under Rule 60(b)(1) that the requesting party's mistake is not permitted to be "careless" in the eyes of the court. **(R.p.)** (Order Denying Mot. for Relief at 6) (describing GALIC's actions as "careless" and stating that "I find that Great American certainly should not be rewarded for such careless behavior.") Of course, seeking relief from a default judgment is not a "reward." Moreover, imposing the additional condition precedent to relief under Rule 60(b)(1) that the moving party's actions may not be deemed "careless" in the eyes of the court is arbitrary and capricious and finds no support in the law.⁴

Finally, the Special Referee erred as a matter of law by finding GALIC's failure to adhere to "the proper method for addressing the matter" precluded it from seeking relief under Rule 60(b)(1). **(R.p.)** (Order Denying Mot. for Relief at 6) A party's failure to act "in the most prudent or procedurally correct manner" is not a bar to relief from default judgment. *Williams v. Watkins*, 384 S.C. 319, 325, 681 S.E.2d 914, 917 (Ct. App. 2009). That GALIC could have taken different

⁴ Likewise, the Special Referee's reliance on *Ledford v. Pennsylvania Insurance Company* as "very similar" to the facts of this case was misguided. 267 S.C. 671, 230 S.E.2d 900 (1976). There, the Supreme Court reversed the circuit court's grant of relief from default judgment because there was no factual basis to support in-house counsel's mistaken assumption that the case had been referred to outside counsel. *Id.* at 676-77, 230 S.E.2d at 903. That bears no similarity to the facts here, which are uncontested and show that GALIC's mistake was based on a factual matter incident to the allegations contained in the complaint and its supporting exhibits, which irrefutably demonstrate that the policy at issue was not written by GALIC but by another company GALIC is commonly confused with being related to. The operative facts of *Ledford* are thus inapposite to those in this case, and the Special Referee's reliance on *Ledford* is itself a "mistake" that should be disregarded by the Court.

or perhaps more prudent steps after receiving the Amended Complaint therefore does not prevent it from also acting under a good faith mistake, inadvertence, or excusable neglect.

The Special Referee's conclusion is therefore affected by errors of law that constitute an abuse of discretion warranting reversal, relief from the entry of default and default judgment, and a remand for a hearing on the merits.

2. The Special Referee's heightened legal standard disregarded the uncontested evidence in the record.

By viewing this case through an improper lens, the Special Referee ignored the undisputed facts before it demonstrating a good faith mistake, inadvertence, or excusable neglect. As set forth above, following GALIC's receipt of the Amended Complaint, GALIC undertook a review of the allegations contained the Amended Complaint after receiving it. **(R.p.)** (Memo in Supp., Lindsay Aff.) This process was made difficult based on three primary factors: first, attached to the Amended Complaint was an exhibit consisting of a nearly illegible online printout from Midland, **(R.p.)** (Am. Compl. Ex. A), which made verification of GALIC's involvement with the policy in question difficult to decipher; second, the alleged contract number for the Deceased's policy set forth in the allegations of the Amended Complaint did not match any GALIC policy number, and also was not a numeric sequence that GALIC uses in any of its policies; and third, the alleged contract, **(R.p.)** (Am. Compl. Ex. A), was not a GALIC policy at all but was instead a statement of Midland, whose "MNL" acronym and initials have, in the past, been mistaken for a GALIC subsidiary Manhattan National Life, resulting in Manhattan and GALIC having been mistakenly named as defendants in actions in lieu of Midlands over such confusion, **(R.p.)** (Memo in Supp. at 2).

Notably, there is no mention at all of any GALIC-issued policy in the Amended Complaint. The Amended Complaint instead sought payment under an apparent separate life insurance policy

with Midland that was in force at the time of Deceased's death. The Midland policy attached to the Amended Complaint references the non-GALIC contract number, Deceased, and First Citizens. Moreover, the printout names Midland instead of GALIC, the accumulated and surrender values of the policy both appear to be greater than the \$136,000 claimed by Respondents against GALIC, and neither the contract number nor its number sequence match any policy of record of GALIC—all of which suggests that GALIC was not the proper defendant in this case. **(R.p.)** (Am. Compl. Ex. A) Although GALIC admits that it also issued a separate annuity contract to Deceased, and paid the proceeds of same as further admitted herein, the details of GALIC's policy do not appear in the Amended Complaint and Respondents only attached, incorporated, and referenced the printout from a different insurance policy issued by a different company.

Thus, GALIC's good faith mistake in evaluating the "allegations" of the Amended Complaint is even more justifiable in light of the fact that Respondents appear to have made their own fatal evidentiary mistake in pleading claims of a different insurance policy against GALIC. That Respondents attempted to double-down on their mistake by opposing GALIC's motion for relief and seeking punitive damages against GALIC in addition to the judgment only further emphasizes the fact that the entry of default and default judgment was improper, and the underlying claims against GALIC of such a frivolous nature that they should not be countenanced by this Court.

Believing in good faith that it had been mistakenly named as a party in this lawsuit, the Amended Complaint was not processed as a claim against GALIC within its legal department and consequently no answer or other responsive pleading was timely filed on its behalf. But contrary to the Special Referee's finding, GALIC did not "[i]gnor[e] the matter altogether." (Order Denying Mot. for Relief at 6.) GALIC investigated the matter and determined it was incorrectly named in

light of the non-GALIC contract number and policy printout advanced by First Citizens, as had happened in the past as between Midland and Manhattan National Life. The foregoing facts provide sufficient justification for a finding of mistake, inadvertence, or excusable neglect for GALIC's failure to timely respond to the Amended Complaint, and Respondents have introduced no contrary evidence or arguments to GALIC's showing. This Court has held that "where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief [under Rule 60(b)(1)]." *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). In light of GALIC's satisfaction of its burden on the remaining 60(b)(1) factors, as discussed below, GALIC's showing as to its good faith mistake should have been sufficient for the Special Referee to provide it relief from the entry of default and default judgment

3. *The circumstances presented in this appeal are similar to other cases in which this Court has sided with the disposition of claims on their merits and found abuses of discretion for the lower courts' respective failures to provide relief under Rule 60(b)(1), SCRPC.*

In addition to independently meeting the Rule 60(b)(1) requirements, this case is also similar to other cases in which this Court hewed to its policy of favoring disposition of claims on their merits. In *Columbia Pools*, *Micronics*, and *Williams*, respectively, the Court found that the party seeking relief from a default judgment had met its burden under Rule 60(b)(1), SCRPC.

In *Columbia Pools*, a party was held in default and had a default judgment entered against it based on its delivery of its answer and counterclaims to the underlying complaint one day late as a result of a miscommunication between the party and his counsel. 288 S.C. at 60 339 S.E.2d at 524-25. The circuit court denied the party's motion⁵ for relief from the default judgment on the

⁵ The party's motion was filed under S.C. Code Ann. § 15-27-130 (1976), which was later repealed and replaced by Rule 60, SCRPC, see *Sijon v. Green*, 289 S.C. 126, 127, 345 S.E.2d 246, 247 (1986), and which provided the same bases for relief at issue here.

basis that there was no excusable neglect. *Id.* at 60-61, 339 S.E.2d at 525. This Court found that the trial judge erred in limiting the requisite grounds for relief to a showing of excusable neglect and further analyzed the merits of the party's motion, holding that the facts qualified as a mistake and the circuit court abused its discretion in refusing to grant the motion to set aside the default judgment. *Id.* This Court held that "where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief," and further reaffirmed the Court's policy that "[w]e favor trial of issues on merit over securing judgment by slight technicalities." *Id.* at 61, 339 S.E.2d at 525.

In *Micronics*, this Court considered an appeal from a taxpayer whose contested case hearing before the Administrative Law Court ("ALC") had been dismissed after it had failed to appear at a scheduled hearing.⁶ The taxpayer moved to reopen the contested case under Rule 29(D), RPALC, which at the time provided that such motion for "reconsideration" would be subject to the grounds set forth in Rule 60(b), SCRCF. *Id.* at 510, 548 S.E.2d at 225. The ALC denied the motion to reopen, but the circuit court, sitting in an appellate capacity,⁷ reversed the ALC based on a finding that it had abused its discretion in applying the incorrect standard to the taxpayer's

⁶ Under the Rule 23 of the Rules of Procedure for the Administrative Law Court (RPALC), a party may be deemed "in default" and the action dismissed for, *inter alia*, failing to prosecute or appear at a hearing. Although this adverse disposition is termed a "default," its use in that context is different than its ordinary usage in the context of a party-defendant being held in default of the allegations of a complaint, or a plaintiff likewise held in default of allegations advanced in a counterclaim. Instead, Rule 23, RPALC is similar to Rule 41(b), SCRCF, which permits the involuntary dismissal of advanced claims for failure to prosecute same or otherwise comply with the rules or an order of the Court.

⁷ The administrative appeals process of contested cases was amended in 2006 to reflect a restructuring of the order in which cases progress. Prior to 2006, appeals from an ALC contested case hearing were lodged with the circuit court as the initial appellate level. Post-restructuring in 2006, appeals from the ALC are taken directly to the Court of Appeals. *See* S.C. Code Ann. §§ 1-23-500, *et seq.*

motion to reopen and remanded the matter to the ALC for a hearing on the merits. *Id.* at 509, 548 S.E.2d at 224-25.

Upon subsequent appeal by the Department of Revenue, this Court initially disagreed with the circuit court's application of the Rule 55, SCRCF's "good cause" standard for setting aside the entry of default, instead deciding that the more stringent standard required by Rule 60, SCRCF was applicable based on RPALC Rule 23's reference to Rule 60. *Id.* at 510, 548 S.E.2d at 225. Notwithstanding, this Court looked beyond the circuit court's application of the incorrect standard and found that the taxpayer had met its burden in demonstrating "mistake, inadvertence, surprise, or excusable neglect" under Rule 60(b)(1), SCRCF, and affirmed the circuit court's reversal of the ALC and remand for a hearing on the merits. *Id.* at 510-11, 548 S.E.2d at 225-26. In particular, this Court found relevant the fact that the taxpayer had immediately sought relief upon receiving notice of the dismissal, the fact that the taxpayer presented a meritorious defense to the underlying claims, as well as the fact that the Department of Revenue would suffer no prejudice if the case were determined on the merits. *Id.* at 511-12, 548 S.E.2d at 226. This Court also noted that such a result would be consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities. *Id.* (citing *Columbia Pools*, 288 S.C. at 61, 339 S.E.2d at 525).

More recently in *Williams*, this Court found an abuse of discretion by the circuit court for refusing to acknowledge a party's good faith mistake of fact that led to it having a default judgment entered against it. 384 S.C. 319, 681 S.E.2d 914. In *Williams*, an unrepresented party relied on its receipt of a roster from the court indicating that its trial had been continued beyond the previously-scheduled date certain trial, when it had not been continued. 384 S.C. at 323, 681 S.E.2d at 916. Trial proceeded in the party's absence and judgment was entered against it. *Id.* The lower courts denied the party's motion for relief under Rule 60(b)(1). *Id.* at 323-324, 681 S.E.2d at 916. This

Court acknowledged that the party “did not act in the most prudent or procedurally correct manner when notifying the magistrate court of his conflict and requesting a continuance,” *id.* at 325, 681 S.E.2d at 917; however, it nevertheless deemed the party’s mistaken actions to have been made in good faith and reversed the circuit court. *Id.* This Court further found the remaining factors entitling a party to relief under Rule 60(b)(1) were present, including the timeliness of the request, the prima facie showing of a meritorious defense, and the limited prejudice to be suffered by the opposing party with a trial on the merits. *Id.* at 326-27, 681 S.E.2d at 917-18.

The facts of this case align with each of the situations presented in *Columbia Pools*, *Micronics*, and *Williams*. As discussed above, the facts and evidence put forward by GALIC in support of its Motion for Relief demonstrate the existence of mistake, inadvertence, or excusable neglect based on GALIC’s good faith confusion as to its involvement with the insurance contract and policy number cited in the Amended Complaint and supporting exhibits. Under the precedent of the preceding cases, and where GALIC is not attempting to thwart the justice system, relief from the entry of default and default judgment is warranted and this Court should reverse the Special Referee under circumstances similar to those in *Columbia Pools* and *Williams* in which the Court also reversed on a finding of an abuse of discretion. This is true even though, similar to *Williams*, GALIC may not have “act[ed] in the most prudent or procedurally correct manner” in failing to respond to the Amended Complaint.

B. GALIC timely filed its motion for relief under Rule 60(b)(1), SCRCP.⁸

Under Rule 60(b), the time period deemed *per se* reasonable for filing a motion for relief under subsection (1) is one year. (“The motion shall be made within a reasonable time, and for

⁸ Because the Special Referee did not address the remaining factors of the Rule 60(b) four-part test, the Order Denying the Motion for Relief does not contain holdings articulating the Special

reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.”). In this case, GALIC more than complied with Rule 60(b)’s standard for reasonableness. As provided above, the circuit court entered a default judgment against GALIC on March 22, 2018. **(R.p.)** Less than two weeks later, GALIC notified counsel for First Citizens that it intended on seeking relief from default, and a mere 25 total days after the judgment was entered, GALIC’s Motion for Relief had been filed with the clerk of court. Even if the Respondents had challenged the timeliness of GALIC’s motion, which they have not,⁹ the record demonstrates that GALIC acted promptly under Rule 60(b) in seeking relief from the judgment and has fulfilled the first 60(b)(1) factor.

C. GALIC has advanced a meritorious defense to liability.

To establish a meritorious defense, a party is not required to show an absolute defense.

Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989).

[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry

Referee’s analysis of those issues. GALIC’s arguments nevertheless are preserved for this Court’s review notwithstanding the lack of analysis by the Special Referee, based on GALIC’s articulation and discussion of the proper standard in its Motion and Memo in Support of Relief from Default. **(R.p.)** (Mot. for Relief); **(R.p.)** (Memo in Supp.); *see also Pye v. Estate of Fox*, 369 S.C. 555, 565-66, 633 S.E.2d 505, 510 (2006) (holding that a successive post-trial motion is not required where the grounds would be identical to the grounds raised to but not ruled upon by the trial court in the initial post-trial motion) (citing *Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999)). In the interest of judicial economy, GALIC will discuss its satisfaction of each of the factors in this appeal, although those factors were uncontested by Respondents below.

⁹ Having failed to file or otherwise articulate any opposition to GALIC’s Motion for Relief, in particular the three factors left undiscussed by the Special Referee’s Order denying same, and having been successful in that strategy below, Respondents are judicially estopped from taking a contrary position in this appeal, *see, e.g., Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997), and such an opposition to the sufficiency of GALIC’s demonstration of the remaining three factors has been abandoned or waived in any event by Respondents’ failure to respond to GALIC’s motion before the Special Referee, *see Fields v. Melrose Ltd. P’ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (“An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.”).

because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978). Here again, GALIC met its burden of putting forward prima facie evidence and facts showing a meritorious defense to the underlying claims of Respondents that it breached its contract with Deceased, converted the assets of the estate, or acted in bad faith in paying the proceeds of the Annuity under the facts and circumstances presented.

As set forth and discussed above, in responding to the entry of default and default judgment, GALIC filed a Motion for Relief, supporting memorandum of law, an affidavit of the Supervisor of Claims for GALIC, an example of its correspondence with First Citizens, and a conditionally filed Proposed Answer to the Amended Complaint. Collectively, these documents more than met the standard enunciated in *Thompson* and *Graham*. Rather than a breach of GALIC's obligations under the contract or actions taken in bad faith and in violation of the implied covenant of good faith and fair dealing, the defenses advanced by GALIC through these filings show a company acting in good faith and undertaking its best efforts to obtain the necessary information from Respondents in order to fulfill the benefit of Deceased's bargain and GALIC's contractual obligations to the estate.

Upon learning of Deceased's passing, GALIC made multiple efforts to engage Respondents, requesting the information and documentation required to process payment of the Annuity to the estate. **(R.p.)** (Memo in Supp.; Lindsay Aff.) Specifically, Mr. Lindsay's affidavit recounts GALIC's sending of at least ten letters to Respondents prior to any return communication in an effort to obtain the requisite information and documentation regarding Deceased's estate. **(R.p.)** (Lindsay Aff. at ¶¶4-7) GALIC did not receive a response from any of Respondents until after the tenth letter. However, Mr. Harris's belated response did not provide the information or

documents that GALIC had requested. **(R.p.)** (Lindsay Aff. at ¶¶6-8) Instead, Mr. Harris simply claimed that no one had been appointed to serve as the personal representative of Deceased's estate—omitting the pertinent facts that Murvin had been appointed and First Citizens obtained an order restraining her powers. **(R.p.)** (Lindsay Aff. at ¶8)

Murvin, on the other hand, did respond to GALIC's letters and multiple requests for information. **(R.p.)** (Lindsay Aff. at ¶¶11) In fact, Murvin submitted documents which purported to be all of the information and documentation requested by GALIC that was required for the processing of the Annuity's payment. *Id.* GALIC did not know at the time, nor could it have under the circumstances, that the information submitted by Murvin was incorrect and no longer valid. In reality, Murvin perpetuated a fraud, not only on GALIC, but also First Citizens and the beneficiaries of Deceased's estate.

First Citizens faults GALIC for its justifiable reliance on these documents in the face of their own failure to fully respond to GALIC's repeated requests for information, even going so far as to suggest that GALIC's actions were somehow intentionally in bad faith, or designed to unfairly and deceptively prevent payment of the Annuity funds to the proper beneficiary of Deceased. **(R.p.)** (Am. Compl. ¶¶ 17-31) Nothing could be further from the truth, however, as demonstrated by the affidavit, example correspondence, and Proposed Answer submitted by GALIC in support of its bid for relief from the default judgment. The evidence submitted by GALIC conclusively defends against Respondents' assertions of liability against it under the specific and unique circumstances surrounding the payment of the Annuity. *See* discussion, *supra*, at pp.14-16. At a minimum, however, GALIC's submissions are "worthy of a hearing or judicial inquiry because [they] raise[] a question of law deserving of some investigation and discussion or a real controversy

as to real facts arising from conflicting or doubtful evidence.” *Graham*, 272 S.C. at 453, 248 S.E.2d at 599.

Consequently, GALIC has met its burden in putting forward prima facie evidence and facts showing a meritorious defense to the allegations of the Amended Complaint and, even if the Respondents had challenged the sufficiency of GALIC’s defense, which they have not, the record demonstrates that GALIC has fulfilled the third Rule 60(b)(1) factor.

D. Respondents will suffer no prejudice from a hearing on the merits, which will comport with South Carolina’s policy of favoring disposition of issues on their merits.

In South Carolina, courts “favor trial of issues on merit over securing judgment by slight technicalities.” *Columbia Pools*, 288 S.C. at 61, 339 S.E.2d at 525; *see also McClurg*, 380 S.C. at 580, 671 S.E.2d at 96 (Hearn, J., dissenting) (“[T]he law favors the resolution of disputes based upon all parties having their day in court.”). This is particularly true where, as here, relief from the default judgment and a hearing on the merits would result in very little and more likely no prejudice to Respondents. GALIC had been in default for a period of only 25 days prior to filing its Motion for Relief, and Respondents provided no indication that prejudice would result from a resumption of the case on the merits. In fact, similar to the first and third factors used in considering a Rule 60(b)(1) motion, Respondents made no argument or showing that they would be prejudiced if the entry of default and default judgment were set aside and the matter remanded to the Special Referee for a hearing on the merits. Respondents have therefore waived or alternatively abandoned such arguments regarding prejudice for the purposes of this appeal. *See Fields*, 312 S.C. at 106, 439 S.E.2d at 285.

In any event, similar to the Department of Revenue in *Micronics*, First Citizens does not have a stake in the windfall of the default judgment, other than continuing to advance its pleading and evidentiary mistakes which caused the confusion in this case in the first instance, and the

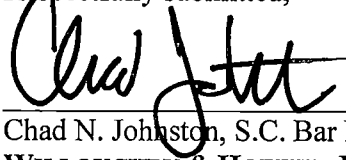
resolution of the case on its merits has not been substantially delayed by GALIC's actions, nor would it be if the matter were remanded for a trial. 345 S.C. at 512, 548 S.E.2d at 226. Consequently, GALIC has met its burden in demonstrating a lack of prejudice to Respondents should it be granted relief from the Special Referee's order and has therefore fulfilled the fourth Rule 60(b)(1) factor.

CONCLUSION

In sum, given GALIC's mistake, inadvertence, or excusable neglect in relying in good faith upon the incorrect contractual and policy information contained in the Amended Complaint as a basis for its failure to respond, its subsequent swift action to try to remedy the situation following the entry of default and default judgment, its conclusive showing of a meritorious defense, and the lack of prejudice to First Citizens and Beneficiary, the Special Referee abused its discretion in denying GALIC's request for relief from the judgment. *See Williams*, 384 S.C. at 327, 681 S.E.2d at 918 ("Given [plaintiff's] good faith mistake, its swift action to try to remedy the situation, the existence of a meritorious defense, and the lack of prejudice to [the defendant], we find the [Administrative Law Judge] abused his discretion by refusing to reopen the case.") (quoting *Micronics*, 345 S.C. at 512, 548 S.E.2d at 226). The Order Denying the Motion for Relief should be reversed and this matter should be remanded to the Special Referee for a hearing on the merits.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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December 10, 2018
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
In the Court of Common Pleas

Paul M. Burch, Circuit Court Judge
William O. Spencer, Special Referee

Case No. 2017-CP-13-804

RECEIVED
DEC 10 2018
SC Court of Appeals

First Citizens Bank & Trust Company and Sadie M. Murvin, Respondents,

v.

Miranda Libby Murvin, a/k/a Miranda Libby Murvin Zimmerman
and Great American Life Insurance Company, Defendants.

Of whom Great American Life Insurance Company is Appellant.


PROOF OF SERVICE

This is to certify that I, a paralegal with the law firm Willoughby & Hoefler, P.A., have caused to be served this day one (1) copy of the **Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal** by depositing the same in the U.S. Mail to the following:

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A handwritten signature in black ink that reads "Laura Lee Andrews". The signature is written in a cursive style with a large initial "L".

Laura Lee Andrews

Columbia, South Carolina
This 10th day of December 2018

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DEC 10 2018

SC Court of Appeals

December 10, 2018

VIA HAND DELIVERY

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *First-Citizens Bank & Trust Company et al. v. Miranda Libby Murvin et al.*,
Appellate Case No. 2018-001808

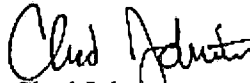
Dear Ms. Kitchings:

Enclosed for filing, please find the original and one (1) copy of the **Initial Brief of Appellant Great American Life Insurance Company and Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter. I would appreciate your acknowledging receipt of these documents by file stamping the enclosed extra copy and returning it to me via our courier.

By copy of this letter, I am serving counsel of record and enclose a Proof of Service to that effect. If you have any questions or if you need any additional information, please do not hesitate to contact me. With best regards, I am,

Respectfully,

WILLOUGHBY & HOEFER, P.A.


Chad Johnston

The Honorable Jenny A. Kitchings
December 10, 2018
Page 2 of 2

Enclosures.

cc: Kevin M. Barth, Esquire (via U.S. Mail w/ enclosures)
Warren C. Powell, Jr., Esquire (via U.S. Mail w/ enclosures)
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