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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

RECEIVED

MAR 11 2019

SC Court of Appeals

Case No. 2017-CP-13-804

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 isAppellant.

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL RULE 60(B) MOTION AND
MOTION TO REMAND**

Appellant Great American Life Insurance Company (“GALIC”) respectfully moves this Court for leave to make a supplemental motion for relief from the entry of default and default judgment with the Fourth Judicial Circuit, in the Court of Common Pleas of Chesterfield County, pursuant to Rules 55(c) and 60(b)(2) and (3) of the South Carolina Rules of Civil Procedure (“SCRCP”). As described herein, the above-captioned matter is currently before the Court pursuant to an appeal instituted by GALIC from the denial of its motion for relief from the entry

of default and default judgment under Rule 60(b)(1), SCRCF.¹ In its initial respondent's brief to this Court, Respondents First-Citizens Bank & Trust Company ("First-Citizens") and Sadie M. Murvin ("Beneficiary") (collectively "Respondents") admitted in their brief for the first time that the policy number referenced in the Amended Complaint in this matter, *see* Ex. 1, Am. Compl. at para. 5, along with the corresponding policy printout attached to the Amended Complaint, *see id.* at Am. Compl. Ex. A, were for a policy from another insurance company altogether—not GALIC. *See* Ex. 2, Resp. Br. at 13 n.1 ("[T]he Amended Complaint included an incorrect policy number and attached a policy from another insurance company.")

In order to ensure that this new information is appropriately considered, GALIC both raised the issue in its reply brief to this Court, as well as concurrently filed a supplemental motion for relief from default under Rules 55(c) and 60(b)(2) and (3), SCRCF, with the appointed Special Referee. In response, and understandably concerned about the implications of its admission of clear and unmistakable misrepresentations to the trial court below (as discussed herein *infra*), Respondents on March 8, 2019, filed a motion to strike GALIC's supplemental motion to the Special Referee, arguing that Rule 60(b), SCRCF requires GALIC to seek this Court's leave to file a supplemental motion for relief on the discovery of new information and for grounds different from those previously advanced. GALIC disagrees with Respondents' limited reading of Rule 60(b) without reference to Rule 241, SCACR; however, out of an abundance of caution, GALIC seeks this Court's leave to proceed with its filed supplemental motion, or to re-file said motion with the Special Referee at the Court's direction.

¹ Initial briefing in this appeal was concluded on March 1, 2019 with the filing of GALIC's initial reply brief. Under Rule 210, of the South Carolina Appellate Court Rules ("SCACR"), the Record on Appeal is due to be filed on April 1, 2019, with final briefs of the parties due April 22, 2019.

In addition, should this Court decide that leave to file the supplemental motion for relief is appropriate, in the interests of judicial economy, this Court would also be justified in retaining jurisdiction over this appeal, but remanding this action to the Special Referee for consideration of GALIC's supplemental grounds for relief.

STATEMENT OF THE CASE

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"), and GALIC. On January 17, 2018, Respondents filed an Amended Complaint against the same parties asserting causes of action for breach of contract and the covenant of good faith and fair dealing, insurance bad faith or deceptive practices, and conversion. 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.

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. ("Barth Affidavit") 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, 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. 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 and 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, SCRCP on the remaining causes of action.

Consistent with Respondents' request, the clerk of court entered default against GALIC on March 5, 2018. In further support of Respondents' motion for entry of default judgment, Respondents submitted an affidavit of a Manager of Respondent First-Citizens' Trust Legal and Compliance division, Suzanne King. *See* Ex. 3, (March 7, 2018 Affidavit of Suzanne B. King), in which she represented the following to the circuit court:

That one of the Estate's assets is the proceeds of a single premium deferred annuity payable to the Estate of Lonnie Murvin and that a copy of the annuity terms was attached to the Amended Summons and Complaint filed in this action.

Ex. 3, King Aff. at ¶3. 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. 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, and on April 16, 2018, GALIC filed a motion to vacate the Default Judgment Order under Rule 60(b)(1), SCRCP. 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. Additionally, GALIC submitted a memorandum in support of its Motion for Relief from the Default Judgment Order at the hearing. On September 13, 2018, the Special Referee entered an order denying GALIC's Motion for Relief from the Default Judgment. 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. As noted above, initial briefs in this appeal have been filed, with the Record on Appeal due to be filed on April 1, 2019, and Final Briefs of the parties on April 22, 2019.

FACTS

A full recitation of the facts of this case is included in GALIC's initial brief to this Court, filed December 10, 2018. Pertinent to this motion are facts which support GALIC's motion for relief from the entry of default and default judgment.² Respondents brought this action against GALIC based on its payment of the Deceased's annuity proceeds to Murvin, despite GALIC's justifiable reliance on the information and legal documents submitted by Murvin. Respondents' complaint asserted 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. 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 ("Midland Policy"), which references a non-GALIC contract number listing "First Citizens Investor Services, Inc." as an agent (Am. Compl. Ex. A);³ (2) an October 16, 2015 Order of Restraint, (Am. Compl.

² The underlying case relates to Respondents' assertion that GALIC paid insurance proceeds from a single premium deferred annuity policy in the name of Lonnie B. Murvin ("Deceased") to an improper party. The facts demonstrate Respondents' complicity in the alleged mistaken payment, along with fraudulent conduct of co-Defendant Miranda Libby Murvin, a/k/a Miranda Libby Murvin Zimmerman (who absconded with the insurance proceeds and never appeared below).

³ 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

Ex. B); and (3) the August 8, 2017 First Citizens Appointment as the personal representative of Deceased's estate, (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, neither of which corresponded to a GALIC policy. (Am. Compl. ¶ 5; Am. Compl. Ex. A).

Upon receipt of the Amended Complaint, GALIC undertook a review of the allegations and exhibits. Immediately, GALIC noted that the alleged contract number for the Deceased's policy set forth in the Amended Complaint did not match any GALIC policy number. Further, GALIC noted that the alleged contract's numeric sequence was not one used by GALIC in any policy. Moreover, GALIC observed that the alleged contract, (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.⁴ 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, and despite the fact that the Amended Complaint contained clear errors in pleading and the exhibit to the complaint was not what it purported to be, Respondents moved for an order of entry of default and for a default judgment, and further asserted that GALIC had acted in bad faith in paying the proceeds of the annuity policy. The trial court entered default and default judgment upon Respondents' representations on March 22, 2018.

degree of certainty the purported policy details or confirm the same from the allegations of the Amended Complaint.

⁴ GALIC has a subsidiary company named Manhattan National Life, which also often goes by the acronym "MNL." 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.*

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. On April 16, 2018, GALIC filed the Motion for Relief under Rule 60(b)(1), SCRPC, on the grounds of mistake, inadvertence, or excusable neglect deriving from the fact that both the Amended Complaint and the policy printout referenced a Midland Policy, rather than a GALIC policy, which contributed to GALIC failing to appropriately process the Amended Complaint.

Rather than admit its mistake in pleading the incorrect insurance policy, both in the body of the Amended Complaint and in the policy printout attachment, Respondents opposed GALIC's motion for relief and further attempted to double-down on their mistake by seeking punitive damages against GALIC in addition to the judgment. On September 13, 2018, the Special Referee denied GALIC's motion over Respondents' opposition. This appeal followed.

DISCUSSION

In their initial brief to this Court, Respondents admitted for the first time that the policy number referenced in the Amended Complaint, *see* Ex. 1 at para. 5, along with the corresponding policy printout attached to the Amended Complaint, *see id.* at Am. Compl. Ex. A, were for a policy from another insurance company altogether—not GALIC. *See* Ex. 2, Resp. Br. at 13 n.1 (“[T]he Amended Complaint included an incorrect policy number and attached a policy from another insurance company.”) Though they only concede this point now, Respondents must have known all along that their Exhibit A to the Amended Complaint contained demonstrably material factual inaccuracies which caused GALIC's mistake, inadvertence, or excusable neglect in failing to process the complaint as a claim on a GALIC annuity product. But rather than acknowledge their error to the circuit court and seek its leave to amend their pleading, Respondents incredibly sought

to profit from the misrepresentation in their pleadings by way of a default judgment and punitive damages against GALIC.

In their effort to capitalize on GALIC's understandable confusion and excusable neglect in processing a misstated claim, Respondents misrepresented the "verified" facts of their claim and thereby ran afoul of Rule 60, SCRCF. In support of Respondents' motion for entry of default judgment, Respondents submitted the affidavit Suzanne King, in which she represented the following to the circuit court:

That one of the Estate's assets is the proceeds of a single premium deferred annuity payable to the Estate of Lonnie Murvin and that a copy of the annuity terms was attached to the Amended Summons and Complaint filed in this action.

King Aff. at ¶3 (emphasis added). Only after this matter was on appeal have Respondents admitted that this statement, made under oath and as part of their efforts to procure a judgment against GALIC, was false. The material significance of this recently discovered fact—made through Respondents' admission—is that the underlying entry of default and default judgment were obtained and supported by admitted factual misrepresentations in the Amended Complaint, along with an affidavit of Ms. King containing a material misrepresentation regarding the veracity of the pleading and the information contained in its supporting exhibit. *See* Rule 60(b)(3) (providing relief from default judgment for "fraud, **misrepresentation**, or other misconduct of an adverse party") (emphasis added). Even now, rather than take ownership of their mistake and misrepresentation, Respondents seek to preclude the Special Referee from considering the falsity of their representations they made in procuring default against GALIC.

In addition to supporting GALIC's argument that the Special Referee committed an abuse of discretion in failing to set aside the default judgment on the basis of GALIC's mistake, inadvertence, or excusable neglect, this newly discovered evidence in the form of Respondents'

admission also supports relief from default under Rules 55(c) and 60(b)(2) and (3), SCRCF (providing avenues for parties to present newly discovered evidence, as well as setting forth three additional disjunctive grounds for relief from default for a showing of “fraud, misrepresentation, or other misconduct of the adverse party”). Respondents’ admission that default judgment was achieved through misrepresentations in pleadings and sworn testimony to the trial court warrants consideration by either the Special Referee or this Court, as it demonstrates both misrepresentations (Rule 60(b)(3)) and a justifiable mistake (Rule 60(b)(1)) on GALIC’s part resulting in neglect that is *per se* excusable under the circumstances. Respondents’ cavalier attitude towards the veracity of their pleading and filing obligations should not be countenanced, and the admission demonstrates that the underlying entry of default, default judgment, and the Special Referee’s order were all without verifiable evidentiary support.

In the interest of judicial economy, GALIC raised Respondents’ admissions regarding their misrepresentations to this Court in its recently-filed initial reply brief as support of its Rule 60(b)(1) argument and as an alternative ground for affording GALIC relief from the default judgment on appeal. *See S.E. Hous. Found. v. Smith*, 380 S.C. 621, 636, 670 S.E.2d 680, 688 (Ct. App. 2008) (invoking judicial economy to address the merits of the arguments challenging the grant of a Rule 60(b) motion, notwithstanding the potential interlocutory nature of the underlying order, stating that consideration of the arguments was appropriate “in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)”) (quoting *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005)). However, in order to ensure that this information was timely raised⁵ and considered by the Special Referee,

⁵ GALIC is still within Rule 60(b)’s time limitation of not more than one year from the date of the entry of default judgment, which occurred on March 22, 2018, but could not wait until

on March 1, 2019 (the same day it filed its initial reply brief with this Court), GALIC also filed a motion with the circuit court for supplemental relief under Rules 55(c) and 60(b)(2) and (3), SCRCF.

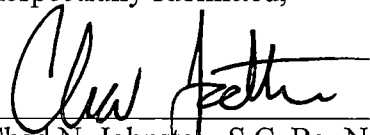
In response, on March 8, 2019, Respondents filed a motion in the circuit court to strike GALIC's supplemental motion on the ground that Rule 60(b) provides that "[d]uring pendency of an appeal, leave to make the motion must be obtained from the appellate court." GALIC submits that the foregoing quotation arguably has no application here, as the new evidence of Respondents' admission advanced in GALIC's supplemental motion to the circuit court was not—and could not have been—addressed in its prior Rule 60(b) motion (the resulting order from which is currently before this Court on appeal); thus, Rule 241, SCACR would suggest that resolution of matters neither raised to nor ruled upon by the Special Referee would not be stayed during the pendency of the appeal, *see id.* (“[t]he lower court ... retains jurisdiction over matters not affected by the appeal ...”). Nevertheless, and out of an abundance of caution, GALIC seeks this Court's leave and direction to the Special Referee to accept GALIC's March 1, 2019 motion under Rules 55(c) and 60(b)(2) and (3), SCRCF (or alternatively permit GALIC to re-file same) for consideration of these newly discovered issues supporting relief from default. In addition, or in the alternative, GALIC submits that a remand of this case back to the Special Referee for consideration of GALIC's supplemental motion would be appropriate, with the current appeal stayed during such remand and consideration by the Special Referee.

the end of this appeal to raise the issue, as it would run the risk of the issue being determined untimely.

CONCLUSION

Because Respondents' initial brief to this Court provided an admission supporting an additional basis for relief from the default judgment entered against GALIC, based on the clear misrepresentations of the factual evidence for entry of default and default judgment by Respondents below, GALIC should be able to raise this evidence to the Special Referee in the form of a supplemental motion for relief under Rule 60(b), SCRPC. To the extent that this Court determines that the Special Referee lacks continuing jurisdiction to consider evidence and grounds not raised previously below and which are subject to the pending appeal, GALIC respectfully requests that this Court direct the Special Referee to accept GALIC's previously-filed March 1, 2019 supplemental motion, or to accept a re-filed motion with a March 1, 2019 effective date (in order to comply with Rule 60(b)'s one year time limit). GALIC further respectfully requests that this appeal be held in abeyance and this matter be remanded to the Special Referee for consideration of the grounds asserted herein.

Respectfully submitted,



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March 11, 2019
Columbia, South Carolina

Exhibit 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE NO. 17-CP-13-804

First-Citizens Bank & Trust)
Company, and Sadie M. Murvin,)
)
Plaintiffs,)

vs.)

Miranda Libby Murvin aka)
Miranda Libby Murvin Zimmerman)
And Great American Life)
Insurance Company,)
)
Defendants.)

SUMMONS

2018 JUN 17 AM 10:43
VICTOR C. BARR
CLERK OF COURT
FOURTH JUDICIAL CIRCUIT

TO DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Amended Complaint on the subscriber at 205 N. Irby Street, Florence, South Carolina, within thirty (30) days from the service hereof, exclusive of the date of such service; and if you fail to answer the Amended Complaint within the time aforesaid, judgement by default will be rendered against you for the relief demanded in the Amended Complaint.

BARTH, BALLENGER & LEWIS, LLP

By: 

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POST OFFICE BOX 107
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Attorney for Plaintiffs

Florence, South Carolina
January 11, 2018

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF CHESTERFIELD) FOURTH JUDICIAL CIRCUIT
) CASE NO. 17-CP-13-804

First-Citizens Bank & Trust)
Company, and Sadie M. Murvin)
Plaintiffs,)

vs.)

Miranda Libby Murvin aka)
Miranda Libby Murvin Zimmerman)
And Great American Life)
Insurance Company,)
Defendants.)

AMENDED COMPLAINT

2019 JUN 17 AM 10:43
Portia C. Hines
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

The Plaintiffs, complaining of the Defendants herein, would respectfully allege and show unto this Honorable Court as follows:

1. That the Plaintiff, Sadie M. Murvin (hereinafter "Murvin") is a citizen and resident of the County of Chesterfield, State of South Carolina and is a beneficiary of the Estate of Lonnie B. Murvin, Deceased. As such, Plaintiff, Murvin, has a stake in the outcome of this litigation as an heir and beneficiary of said Estate and is a proper party to this litigation.

2. That the Plaintiff, First-Citizens Bank & Trust Company (hereinafter First-Citizens) is a North Carolina banking corporation organized and existing under the laws of the State of North Carolina authorized to conduct business in the State of South Carolina. At all times relevant hereto First-Citizens is the duly appointed Personal Representative of the Estate of Lonnie B. Murvin, Deceased, and as such, has the statutory obligation to accumulate all of the assets of said Estate and to

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distribute them to the Estate's lawful heirs and/or beneficiaries.

3. That, upon information and belief, the Defendant, Great American Life Insurance Company (hereinafter "Great American"), is a corporation organized and existing under the laws of one of the states of the United States other than the State of South Carolina, but who maintains agents, employees, and/or servants in the State of South Carolina and who derives substantial financial benefits there from. The Plaintiff is informed and believes that the Defendant is subject to the jurisdiction of this Court.

4. That upon information and belief, the Defendant, Miranda Libby Murvin aka Miranda Libby Murvin Zimmerman (hereinafter "Defendant Murvin") is a citizen and resident of the County of Chesterfield, State of South Carolina.

5. That the Defendant, Great American, sold to the deceased, Lonnie B. Murvin, a single premium deferred annuity, contract number 8500457055. A copy of the annuity contract is attached hereto as Exhibit A and incorporated herein by reference as fully as if set forth herein verbatim. The aforementioned annuity would provide to Lonnie Murvin the sum of \$169,710.00. The annuity was still in full force and effect upon the death of Lonnie Murvin. As a result, the remaining annuity funds would be an asset of the Estate of Lonnie Murvin.

6. That Lonnie Murvin paid all of the required premiums to maintain this annuity policy in full force and effect, and in all manners has complied with the conditions of said annuity policy.

7. That on April 14, 2015, while the annuity was in full force and effect, Lonnie B. Murvin passed away and the annuity then became due and payable to the Estate of Lonnie B. Murvin.

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VMB

8. That upon information and belief, the Defendant Murvin filed an Application for Informal Appointment in the Probate Court asking that she be appointed to serve as Personal Representative of the Estate of Lonnie Murvin. By Certificate of Appointment dated September 15, 2015, Defendant Murvin was appointed to serve. Subsequent to that date, on September 30, 2015, Plaintiff, First Citizens, filed its Application for Restraint and for Performance, indicating that it had been designated under the Last Will and Testament of Lonnie Murvin to serve as Personal Representative of his Estate. The Probate Court for Chesterfield County issued an Order of Restraint/Performance on September 30, 2015. This Order prevented the Defendant Murvin from undertaking any actions on behalf of the Estate of Lonnie Murvin. A copy of this Order is attached hereto as Exhibit B and incorporated herein by reference. Defendant Murvin attended the aforementioned hearing and was served with a copy of this Order on October 4, 2015.

9. The Plaintiff, First Citizens, was later appointed to serve as Personal Representative of the Estate. Again, Defendant Murvin attended this hearing and was served with a copy of the Order and Certificate of Appointment. A copy of this Certificate of Appointment is attached hereto as Exhibit C.

10. Even though the Defendant Murvin was restrained and enjoined from undertaking any actions on behalf of the Estate, she communicated with the Defendant, Great American, regarding the annuity in question. As a result of those communications, Great American issued a check in the sum of \$136,000.00, payable to the Estate of Lonnie B. Murvin and delivered the check to the Defendant Murvin. Upon information and belief, the Defendant

Murvin deposited the check into an account in the name of the Estate of Lonnie B. Murvin opened by Defendant Murvin. Defendant Murvin opened this account on July 26, 2017 at PNC Bank for the sole purpose of depositing this check and giving herself access to these funds. Once opening the account and gaining access to the funds, she spent the entire amount.

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HOB

11. Prior to the issuance of the annuity check to Defendant Murvin, on February 15, 2017, counsel for Plaintiff, First Citizens, notified Great American in writing that First Citizens was named as Personal Representative of the Estate of Lonnie B. Murvin under the terms of his Last Will and Testament and that First Citizens would be making a claim to the annuity proceeds. Counsel additionally notified Great American that the annuity proceeds should be held until such time as First Citizens could be appointed to serve as PR and could formally make a claim to same. On March 28, 2017, the Defendant, Great American, wrote First Citizen's attorney and notified him that for the annuity proceeds to be paid he should provide them with a Certified Death Certificate and a Claimant Statement & Election Request Form. In response to that letter, First Citizens' attorney wrote the Defendant, Great American and indicated that he would notify them once the PR was appointed, and further that "the annuity is, of course, an asset of the Estate of Lonnie Murvin, and as such we have an interest in your maintaining its integrity and safety".

12. Despite having such knowledge, Defendant, Great American, wrongfully issued a check to Defendant, Murvin. As a result, the funds have been completely depleted and the Estate of Lonnie B. Murvin has received none of the funds due to it.

AS A FIRST CAUSE OF ACTION
(Breach of Contract against Great American)

13. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

14. That Lonnie B. Murvin purchased the aforementioned annuity and fully and completely paid the premiums associated with that annuity. The Plaintiff has satisfied all conditions precedent to the full funding of the annuity. The annuity was in full force and effect at the time of the death of Lonnie B. Murvin and had a value of approximately \$136,000.00 that was to be payable to the Estate of Lonnie B. Murvin.

15. That the Defendant, Great American, wrongfully distributed the proceeds of the annuity to the improper party, thus depriving the Estate of the benefit of the annuity Lonnie B. Murvin had purchased and for which it was to be paid. Despite being requested, the Defendant, Great American, fails and refuses to issue the proceeds check to First Citizens as Personal Representative of the Estate of Lonnie B. Murvin.

16. That as a direct and proximate result of the breach of contract by the Defendant, Great American, the Plaintiffs have suffered actual damages and demand a judgement against the Defendant in an amount sufficient to compensate them for those damages.

AS A SECOND CAUSE OF ACTION
(Insurance Bad Faith against Great American)

17. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

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18. That the Plaintiffs are informed and believe that there existed a mutually binding contract for the Defendant, Great American, to provide annuity proceeds to the Estate of Lonnie B. Murvin and its heirs upon demand for payment.

19. That the Plaintiffs complied with all requirements and conditions precedent of the annuity, and have demanded payment to the Estate.

20. By virtue of an insurance annuity contract, a special relationship exists between the insurer and insured which imposes a duty on the parties to deal with each other fairly, honestly, in good faith and to not take any action that will injure the right of the other to receive the benefits of the agreement.

21. That the Defendant, Great American, has refused to provide the benefits due under the contract and has acted in bad faith in the handling of this matter.

22. That the Plaintiffs are informed and believe that the Defendant, Great American's, actions as stated above violate the provisions of S.C. Code § 38-59-20 and S.C. Code § 38-57-10, as the Defendant has failed to act in good faith in their handling and processing of the Plaintiffs' claim for payment.

23. That as a direct and proximate result of the Defendant, Great American's wrongful conduct, the Plaintiffs have suffered damage, financial hardship and other damages to be shown at trial. That the Plaintiffs are informed and believe that they are entitled to an award of actual damages in an amount sufficient to compensate them for those damages, as well as an award of attorney's fees and costs.

24. That the Plaintiffs are informed and believe the Defendant, Great American's bad faith conduct was willful,

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intentional, with malice toward the Plaintiffs and with a reckless disregard for the rights of the Plaintiffs; concomitantly, the Plaintiffs seek an award of punitive damages in an amount to be determined by the jury.

FOR A THIRD CAUSE OF ACTION
**(Breach of Covenant of Good Faith
and Fair Dealing against Great American)**

25. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

26. That the Defendant, Great American, entered into a binding insurance annuity contract with Lonnie B. Murvin to provide annuity proceeds to him and his Estate.

27. That pursuant to this contract, there was an implied covenant of good faith and fair dealing which imposed a duty upon the Defendant, Great American, to act in good faith with the Plaintiffs.

28. That the Plaintiffs are informed and believes that the Defendant, Great American, breached the covenant of good faith and fair dealing by virtue of the conduct specified above. More specifically, Plaintiffs are informed and believe that by issuing a check to Defendant Murvin after being placed on notice of a dispute regarding the issuance of these funds, was in bad faith.

29. That as a result of the Defendant, Great American's, breach of the covenant of good faith and fair dealing, the Plaintiffs have been actually damaged.

30. That the Plaintiffs are informed and believes that they are entitled to an award of actual damages sufficient to compensate them for those damages, as well as an award of attorney's fees and costs.

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KBP

31. That the Plaintiffs are informed and believes that the Defendant, Great American's, bad faith conduct was willful, intentional, with malice toward the Plaintiffs and with a reckless disregard for the rights of the Plaintiffs; concomitantly, the Plaintiffs seek an award of punitive damages in an amount to be determined by the jury.

FOR A FOURTH CAUSE OF ACTION
(Conversion against both Defendants)

32. That each and every allegation contained herein above is reiterated as fully as if set forth herein verbatim.

33. That the Plaintiffs herein are entitled to the use, ownership and possession of the annuity proceeds in the approximate sum of \$136,000.00.

34. That despite such entitlement, the Defendants, jointly and severally, have converted those sums to their own use, thus depriving the Plaintiffs of same.

35. This deprivation occurred after both Defendants were placed clearly on notice that the funds belonged to the Estate of Lonnie B. Murvin and should be held for safekeeping until such time as a proper and appropriate claim for payment could be made.

36. Plaintiffs are informed and believe that they are entitled to a judgment against the Defendants, both jointly and severally, in an amount of actual damages sufficient to compensate them for their damages, and for punitive damages in an appropriate sum.

WHEREFORE, the Plaintiffs having set forth their Complaint against the Defendants herein, would respectfully pray for an Order as follows:

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MMB

1. Granting the Plaintiffs an award of actual damages against the Defendant, General American, in an appropriate sum on their First Cause of Action.
2. Granting the Plaintiffs an award of actual damages against the Defendant, General American, including an award of attorney's fees and costs, and punitive damages in an appropriate sum on their Second Cause of Action.
3. Granting the Plaintiffs an award of actual damages against the Defendant, General American, including an award of attorney's fees and costs, and punitive damages in an appropriate sum on their Third Cause of Action.
4. Granting the Plaintiffs an award of actual damages against both Defendants, both jointly and severally, and punitive damages in an appropriate sum on their Fourth Cause of Action.
5. Granting such other and further relief as this Court may deem just and proper.

BARTH, BALLENGER & LEWIS, LLP

By: 

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Attorney for Plaintiffs

Florence, South Carolina

January 11, 2018

Wanda C. Miles
CLERK OF COURT
FLORENCE COUNTY, S.C.

2018 JAN 17 AM 10:43



(Home)
 Home (<https://www.midlandnational.com>) Agent Home (<https://www.midlandnational.com/group/mnportal/an-agent-homepage>)
 My Business (<https://www.midlandnational.com/group/mnportal/an-app-pending-business>)
 Inforce Contract Information (<https://www.midlandnational.com/group/mnportal/an-app-policy-access>) Inforce Contract Access

Contract Summary

Contract Number	- 888447966	Issue Date	- 02/02/13
Product	- Single Premium Deferred Annuity - Opened Choice	Issue Age	- 68
Contract Status	- Active (Inforce)	Annuitant(s)	- <u>LOUISE MUEYER</u>
Accumulation Value	- \$168,718.88	Owner(s)	- <u>LOUISE MUEYER</u>
Tax Qualification Code	- Non-Qualified	Agent(s)	- <u>TROY L YOUNG</u> <u>FIRST CITIZENS INSURATOR SERVICES INC</u>

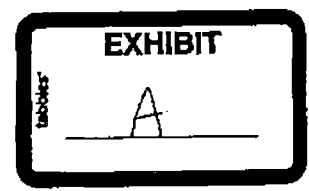
Contract Values (As of 10/14/2018)

Contract Values	Withdrawal Details		
Current Accumulation Value	- \$168,718.88	12/31 Value	- \$167,343.36
Surrender Charge	- \$8,383.84	Cost Basis	- \$154,696.88
Surrender Value	- \$161,196.84	Total Premium	- \$154,696.88
		Total Interest & Index Credits	- \$18,118.88
		Current Interest Rate	- 1.5%

Note

- Values in parentheses indicate a negative value.
- During the surrender charge period, the surrender value may reflect a market value adjustment. In all contract years, the surrender value may also reflect additional guarantees provided by your contract.
- Interest rates displayed in the base interest rate for the Contract.

2018 JAN 17 AM 10:43
 Wanda C. Miles
 CLERK OF COURT
 CHRISTIANBURGH COUNTY, S.C.



2015 OCT 16 PM 9:30
Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.
2018 JAN 17 AM 10:43

STATE OF SOUTH CAROLINA,
CHESTERFIELD COUNTY

IN THE PROBATE COURT

First-Citizens Bank & Trust Company)
Petitioner,)

ORDER FOR RESTRAINT OR PERFORMANCE
OF PERSONAL REPRESENTATIVE

vs.)

CASE NO. 2015-ES-00338

Sadie M. Murvin, Ronald Emanuel)
Murvin, Jonathan F. Murvin, Lonnie)
Lee Murvin, Jr. and Miranda Libby)
Murvin a/k/a Miranda Libby Murvin)
Zimmerman)
Respondent(s).)

TRUE COPY
Chesterfield County
Probate Court

Shail B. Ingram
Probate Judge

This matter was before me on Thursday, October 15, 2015 for a hearing scheduled at 9:00 a.m. at the office of Chesterfield County Probate Court, 2nd Floor, Chesterfield County Courthouse, Chesterfield, South Carolina. Present at the hearing were C. Anthony Harris, Jr., attorney for First-Citizens Bank & Trust Company, and Miranda Libby Murvin, the current Personal Representative of the Estate of Lonnie B. Murvin, deceased.

Miranda Libby Murvin previously filed an Application for Informal Appointment, and she was appointed Personal Representative by this court on September 15, 2015. Subsequently, First-Citizens Bank & Trust Company filed its Application for Restraint or Performance on September 30, 2015, setting forth that Lonnie B. Murvin executed a Will and Trust dated February 21, 1997, in which First-Citizens Bank & Trust Company was named as Personal Representative and Trustee. This court issued its temporary Order of Restraint/Performance dated September 30, 2015, and this Order also scheduled the hearing for October 15, 2015. Miranda Libby Murvin was served with the Application for Restraint or Performance of Personal Representative and temporary Order on October 4, 2015. Subsequently, First-Citizens Bank & Trust Company filed a Summons and Petition for Formal Testacy and Appointment dated October 9, 2015.

The court concludes that it would be in the best interest of the estate for the temporary Order of Restraint/Performance to be continued and to remain in effect pending further order of this court. It is anticipated that a hearing on the Petition for Formal Testacy and Appointment filed by First-Citizens Bank and Trust Company could be scheduled in the relatively near future, and in the

EXHIBIT
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B

meantime there is no prejudice to the estate that no Personal Representative have authority to act, given what everyone believes to be the nature of the assets of the estate.

Conclusions of Law

I find and conclude that this court has jurisdiction of the subject matter and the parties, and that the relief sought by First-Citizens Bank & Trust Company is appropriate and should be granted.

WHEREFORE, IT IS ORDERED That Miranda Libby Murvin is hereby enjoined and prohibited from collecting, transferring, disbursing or otherwise managing any assets of any kind in the decedent's estate, and she is hereby enjoined and prohibited from performing any and all duties in the management of the estate of the decedent, pending further order from this court.

AND IT IS SO ORDERED.



HONORABLE GAIL B. INGRAM
CHESTERFIELD COUNTY PROBATE COURT

October 16, 2015
Chesterfield, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF: CHESTERFIELD

IN THE MATTER OF:
LONNIE B. MURVIN
(Decedent)

IN THE PROBATE COURT

CERTIFICATE OF APPOINTMENT

CASE NUMBER: 2015-ES-13- 00338

This is to certify that

FIRST- CITIZENS BANK & TRUST COMPANY

is/are the duly qualified.

- PERSONAL REPRESENTATIVE
- GUARDIAN
- CONSERVATOR
- TRUSTEE

2018 JAN 17 AM 10:00
 Wanda C. Miles
 CLERK OF COURT
 CHESTERFIELD COUNTY, S.C.

in the above matter and that this appointment, having been executed on the 9th day of August, 2017, is in full force and effect, including authorization to receive monies, income, principal, interest, & dividends of and belonging to said estate.

RESTRICTIONS:

None.

Executed this 9th day of August 2017.

Gail B. Ingram

Honorable Gail B. Ingram, Probate Court Judge

Do not accept a copy of this certificate without the raised seal of the Probate Court.

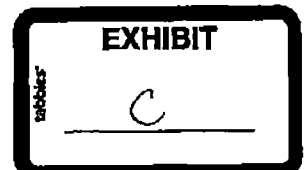


Exhibit 2

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
In the Court of Common Pleas

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

Appellate Case No. 2018-001808
Civil Action No. 2017-CP-13-00804

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 the Appellant.

INITIAL BRIEF OF RESPONDENTS

Warren C. Powell, Jr.
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Attorneys for Respondents

* Motion for *pro hac vice* admission pending.

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 a. The Special Referee did not create heightened legal standards, but properly applied the facts to the applicable legal standard. 8

 b. There is no record evidence of Great American’s purported good faith mistake, inadvertence, or excusable neglect in failing to respond to the Amended Complaint. 10

 c. South Carolina case law confirms that the Special Referee did not abuse his discretion in denying Great American’s Motion to Vacate under Rule 60(b). 13

 II. Because the Special Referee determined there was an insufficient factual basis for finding excusable neglect, he did not need to consider Great American’s purported meritorious defense. 15

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STATEMENT OF ISSUE ON APPEAL

Appellant Great American Life Insurance Company (“Great American”) failed to respond to a duly issued and properly served summons and complaint purporting “a good faith belief that a response was not required.” (Appellant’s Br., p. 1.) Great American offered no evidence to explain how an established insurance company, named as a party defendant in a civil action, could rationally believe it was unnecessary to respond to a properly issued and served summons and complaint. Instead, Great American claimed that because it believed in good faith the company did not hold a particular insurance policy, then it was not required to respond to the lawsuit. Whether Great American did or did not hold a particular insurance policy has no bearing on its legal obligation to respond to a valid lawsuit. Great American’s rationale for failing to respond to a complaint does not constitute a good faith mistake, inadvertence, or excusable neglect. The Special Referee’s decision refusing to vacate the default judgment against Great American is proper.

ISSUE: Did the Special Referee abuse his discretion in refusing to vacate the default judgment against Great American for its failure to respond to a properly issued and served summons and complaint?

STATEMENT OF THE CASE

Respondents First-Citizens Bank & Trust Company and Sadie M. Murvin (together, “Respondents”) filed a Summons and Complaint on December 18, 2017 naming as defendants Great American and Miranda Libby Murvin a/k/a Miranda Libby Murvin Zimmerman (“Miranda Murvin”) in the Court of Common Pleas for Chesterfield County. (Original Summons and Complaint.) Thereafter, on January 17, 2018, Respondents filed a new Summons and Amended Complaint against Great American and Miranda Murvin, correcting clerical errors in the original Summons and Complaint. (Amended Summons and Complaint.; Order Denying Mot. to Vacate p 2.) One week later, the South Carolina Department of Insurance accepted service of the Summons and Amended Complaint and, consistent with its statutory obligations, forwarded the accepted process to Great American via Certified Mail, Return Receipt Requested, requesting in bold font “**You must promptly acknowledge in writing your receipt of this accepted process....**” (Jan. 25 Letter (emphasis in original).) The Amended Complaint sought a sum certain of \$136,000.00 for Great American’s breach of contract for refusal to issue payment to First Citizens, in its capacity as Personal Representative of the Estate of Lonnie B. Murvin, deceased, under a single premium life insurance annuity. The Amended Complaint also sought damages for Insurance Bad Faith, Breach of the Covenant of Good Faith and Fair Dealing, and Conversion. (Amended Complaint pp. 5–9.)

Great American received and reviewed the Summons and Amended Complaint. (Memorandum in Support of Great American’s Mot. to Vacate Default Judgment p. 1–2.) Great American failed to respond to the properly served Summons and Amended Complaint. (Affidavit of Default.) Respondent’s counsel then filed an Affidavit of Default and Motion for Entry of Default by Clerk on March 5, 2018. (Affidavit of Default; Motion for Entry of Default by Clerk.) Respondents further requested a judgment for sum certain of \$136,000.00 as to the Amended

Complaint's breach of contract claim only, and requested appointment of a Special Referee to ascertain damages attributable to the remaining causes of action. (Affidavit of Default p. 2, para. 7.) The Honorable Paul Burch, Circuit Court Judge, found that Respondents were entitled to a judgment against Great American in the sum certain amount of \$136,000.00, including pre-judgment interest at the statutory rate, and that a hearing to ascertain damages on the remaining causes of action was needed. (Judgment for Plaintiffs and Order for Default and for Hearing on Damages pp. 2-7.) The Circuit Court ordered the appointment of William O. Spencer, Jr., as Special Referee to decide any motions or other matters that might arise after the date of the Default Judgment Order. The Circuit Court further ordered "[t]hat jurisdiction of this entire matter shall be vested in the Special Referee...to determine any and all matters that might arise concerning this case thereafter, [including any] motion to set aside the default..." (*Id.* p. 4, para. 6.)

Before a hearing to ascertain damages as to the remaining causes of action could occur, on April 16, 2018, Great American made its first appearance in the case and filed a Motion to Vacate Default Judgment. (Notice of Appeal; Motion to Vacate.) The hearing on Great American's Motion to Vacate Default Judgment occurred on July 12, 2018, during which Respondents and Great American each presented oral argument and a memorandum of law in support of their positions. (Order Denying Motion to Vacate, pp. 1-2.) After considering the oral arguments, memoranda, and related materials submitted by Respondents and Great American, the Special Referee entered an order denying Great American's Motion to Vacate the Default Judgment. Great American filed Notice of Appeal.

STATEMENT OF FACTS

Facts Leading to Default Judgment

Great American received and reviewed the Summons and Amended Complaint. (Memorandum in Support of Great American's Motion to Vacate Default Judgment p. 1–2.) Great American decided, incorrectly, that Lonnie Murvin did not have an insurance policy with Great American, even though the Amended Complaint alleged that he did. (*Id.*; Amended Complaint, pp. 13–16, para. 5.) Great American's next decision was a critical mistake. It consciously chose not to file an Answer or Motion to Dismiss or respond at all to the lawsuit then pending against it. Instead, Great American decided to ignore the lawsuit. Based on Great American's decision to ignore the lawsuit and not file a responsive pleading, Respondents moved for and secured an Entry of Default and Default Judgment against Great American. After receiving the Entry of Default and Default Judgment, Great American finally appeared and sought the Special Referee's permission to vacate the Default Judgment under Rule 60(b), SCRCF. The Special Referee, in the exercise of his discretion, denied Great American's Motion to Vacate in a well-reasoned, eight-page Order. Great American now contends the Special Referee abused his discretion and seeks reversal of the Order denying Great American's Motion to Vacate.

Facts of Underlying Lawsuit Against Great American

Lonnie Murvin died on April 14, 2015. (Amended Complaint p. 2, para. 7.) During his life, he had purchased a single premium, deferred annuity from Great American. (*Id.* p. 2, para. 5.) When he died, the annuity became payable to the Estate of Lonnie Murvin. (*Id.* p. 2, para. 7.)

After Lonnie Murvin's death, Defendant Miranda Murvin filed an application for Informal Appointment in the Probate Court, asking to be appointed Personal Representative of the Estate of Lonnie Murvin. (*Id.* p. 3, para. 8.) By Certificate of Appointment dated September 15, 2015,

Defendant Miranda Murvin was appointed Personal Representative. (*Id.*) Approximately two weeks later, First Citizens filed an Application for Restraint and for Performance, representing that Lonnie Murvin had in fact executed a Last Will and Testament that designated First Citizens as Personal Representative of his Estate. (*Id.*) After learning of the Last Will and Testament, the Probate Court for Chesterfield County issued an Order of Restraint/Performance on September 30, 2015, ordering Defendant Miranda Murvin not to take any action related to the Estate of Lonnie Murvin. (*Id.*) Approximately two years later, First Citizens was appointed Personal Representative of the Estate of Lonnie Murvin on or about August 8, 2017. (*Id.* p. 3, para. 9.)

During the period of time prior to being appointed Personal Representative, counsel for First Citizens wrote a letter to Great American on February 15, 2017 stating that First Citizens had been named the Personal Representative of the Estate of Lonnie Murvin in Lonnie Murvin's Last Will and Testament, and that First Citizens would be making a claim to the annuity proceeds. (*Id.* p. 4, para. 11.) First Citizens requested that Great American hold the annuity proceeds until the date that First Citizens was ultimately appointed by the court to serve as Personal Representative and could thus properly make a claim to the annuity proceeds. (*Id.*) On March 28, 2017, Great American wrote to First Citizens' attorney and requested a list of documents required to process a claim and for the annuity proceeds to be paid to First Citizens. (*Id.*) In response, on April 17, 2017, First Citizens wrote back to Great American, restated that it would inform Great American when the Personal Representative was appointed, and confirmed that "the annuity is, of course, an asset of the Estate of Lonnie Murvin, and as such we have an interest in your maintaining its integrity and safety." (*Id.*; Lindsay Affidavit p. 2, para. 10.)

Unbeknownst to First Citizens, while it was seeking to become qualified as Personal Representative and updating Great American on the process, Great American had been requesting

the same list of documents from many other Murvin family members, including Miranda Murvin. (Lindsay Affidavit p. 2, para. 7.) On June 19, 2017, Miranda Murvin submitted documents to Great American, including a Certificate of Appointment dated September 15, 2015 (nearly two years old), and requested distribution of the annuity proceeds. (*Id.* p. 2, para. 11.) On July 13, 2017, Great American processed the payment and issued the annuity proceeds to The Estate of Lonnie Murvin c/o Miranda Murvin, Personal Rep. (*Id.* p. 3, para. 12.)

A month later, on August 17, 2017, First Citizens sent a letter to Great American stating that First Citizens had finally been appointed Personal Representative of the Estate of Lonnie Murvin and that a First Citizens representative would be in touch regarding completion of the claim form and papers necessary to receive the annuity payment on behalf of the Estate. (*Id.* p. 3, para. 13.) In response, Great American informed First Citizens that it had already processed a claim and issued a check to the Estate of Lonnie Murvin, care of Miranda Murvin. (*Id.* p. 3, para. 14.) Miranda Murvin proceeded to convert the entire \$136,000 to herself personally, to the detriment of the Estate of Lonnie Murvin. (Judgment for Plaintiffs and Order for Default and Hearing on Damages p. 2).

After Great American refused to issue payment to First Citizens as proper Personal Representative of the Estate of Lonnie Murvin, First Citizens, in its capacity as Personal Representative of the Estate of Lonnie Murvin, and Sadie Murvin, as beneficiary of the Estate of Lonnie Murvin, filed a Complaint and Amended Complaint against Great American and Miranda Murvin for breach of contract, insurance bad faith, breach of the covenant of good faith and fair dealing, and conversion. (Amended Complaint.) Great American failed and refused to respond to the Amended Complaint. (Affidavit of Default p. 1, para. 3.) As a result, First Citizens secured

an Entry of Default and Default Judgment. Great American moved to vacate the Default Judgment under Rule 60(b), SCRPC, the Special Referee denied the motion, and Great American appealed.

STANDARD OF REVIEW

“The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge.” *Harbor Island Owners’ Ass’n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006) (quoting *Roberson v. S. Finance of S.C., Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005)). 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, 163, 375 S.E.2d 321, 323 (Ct. App. 1988) (citing *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981)). An abuse of discretion 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) (citing *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)).

Once default judgment has been entered, a party seeking relief must do so under Rule 60(b) of the South Carolina Rules of Civil Procedure. Rule 55(c), SCRPC. The standard for granting relief from a default judgment is more rigorous than the “good cause” that is required to be shown to secure relief from an entry of default. *Ricks*, at 374, 360 S.E.2d at 536 (citing H. Lightsey, J. Flanagan, *South Carolina Civil Procedure*, 82 (2nd Ed. 1985)). Relief from a default judgment requires showing “mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party.” *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 494, 713 S.E.2d 335, 339 (Ct. App. 2011) (quoting *Sundown Operating Co. v. Intedge Industries, Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009)).

ARGUMENT

I. The Special Referee did not abuse his discretion in denying Great American's Motion to Vacate Default Judgment because the facts did not support a finding of good faith mistake, inadvertence, or excusable neglect.

Great American goes to great lengths to explain its purported excusable neglect based on its mistaken belief that Lonnie Murvin did not have an annuity policy with Great American. Yet Great American offered no evidence to explain why and how an insurance company could ever believe it need not respond to a duly served summons and complaint against it. Forced to consider only the arguments of counsel, the Special Referee properly applied the facts to the applicable legal standard for considering a Motion to Vacate Default Judgment under Rule 60(b). Finally, the Special Referee's decision is consistent with South Carolina appellate cases upholding denials of a Motion to Vacate Default Judgment under Rule 60(b) when a party consciously ignored a lawsuit.

a. The Special Referee did not create heightened legal standards, but properly applied the facts to the applicable legal standard.

Rule 60(b)(1), SCRCP, "provides relief to a party from final judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. To obtain relief from a default judgment, the movant must also show a meritorious defense." *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990) (citing *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 375 S.E.2d 321 (S.C. App. 1988)). Where there is "an insufficient factual basis for finding excusable neglect, [the court] need not decide whether [a party] has shown a meritorious defense." *Id.* at 243, 399 S.E.2d 783; *see also Stearns Bank Nat. Ass'n v. Glenwood Falls, L.P.*, 373 S.C. 331, 341, 644 S.E.2d 793, 798 (2007) (holding that because of its ultimate disposition, "we need only address [Defendant's] excusable neglect claim...."). Though South Carolina appellate courts have analyzed Rule 60(b)(1) requests for relief from judgment through the four-

part test articulated by Great American, no court has mandated the four-part test or found error for not explicitly citing it. In fact, in both *Tri-County Ice* and *Stearns Bank Nat. Ass'n*, the South Carolina Supreme Court did not apply the four-part test promoted by Great American in its opening brief.

In challenging the Special Referee's well-reasoned opinion, Great American contends the Special Referee applied a heightened legal standard by opining that "Great American is an insurance company and should have been diligent," and that "Great American should not be rewarded for such careless behavior." (Appellant's Initial Brief p. 12–13). Great American claims this created an unlawful "sophistication test" and an additional condition that mistakes not be "careless." (*Id.*)

Great American confuses applying facts to a legal standard with changing that legal standard. The Special Referee specifically acknowledged the applicable legal standard, noting that "[t]he movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief," and "that no court has authority to open or vacate a judgment without some material evidence to support the claims on which the application for relief depends." (Order Denying Defendant's Motion to Vacate Default Judgment p. 5). The Special Referee also properly explained that Great American sought relief under Rule 60(b) claiming that "the judgment should be set aside upon the grounds that the default judgment was the result of mistake, inadvertence or excusable neglect and that Plaintiff would not be prejudiced by vacating the default judgment." (*Id.* p. 3). Then the Special Referee applied the facts of the case to determine whether the material evidence supported a finding of mistake, inadvertence, or excusable neglect. The Special Referee found that the reasons cited by Great American to attempt to prove mistake, inadvertence, or excusable neglect (the policy number was wrong and an attachment to the

Amended Complaint was incorrect) were insufficient to meet the particularized showing necessary to be afforded relief under Rule 60(b). In explaining that insufficiency, the Special Referee explained the facts that Great American is an insurance company, that Great American acted carelessly, and that Great American should have acted more diligently. Based on these facts, the Special Referee decided that Great American presented an insufficient factual basis for finding excusable neglect. (*Id.* p. 8). A well-reasoned opinion applying facts to law is what is required by a trial judge, and Great American’s challenge to the application of facts to law here should be denied.

b. There is no record evidence of Great American’s purported good faith mistake, inadvertence, or excusable neglect in failing to respond to the Amended Complaint.

Great American relies exclusively on an affidavit of Keith A. Lindsay, Supervisor, Claims with Great American (the “Lindsay Affidavit”), as the evidentiary basis for its Motion to Vacate Default Judgment. However, the facts set out in the Lindsay Affidavit relate *solely* to Great American’s proffered meritorious defense. The Lindsay Affidavit says *nothing* about how a conscious decision to ignore a lawsuit qualifies as excusable neglect.

The South Carolina Supreme Court considered a Rule 60(b)(1) motion seeking to vacate a default judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect in the case of *Tri-County Ice, supra*. The defendant offered evidence of illness and incapacity of the defendant’s principal shareholder as an explanation for why the defendant failed to respond to a summons and complaint. *Id.* at 242, 399 S.E.2d at 782. The Supreme Court considered record evidence of the principal shareholder’s medical history, surgery schedules, daily work habits, and his sons’ assistance in his business affairs. *Id.* at 240–43, 399 S.E.2d at 782–83. In upholding denial of the motion to vacate, the Supreme Court explained, “we agree with the trial judge’s ruling

that [principal shareholder] failed to show excusable neglect as the medical evidence does not support [his] claim that he was incapacitated. *We can find no semblance of a justification for [principal shareholder's] failure to protect his rights.*" *Id.* at 243, 399 S.E.2d at 783 (emphasis added).

Unlike the defendant in *Tri-County Ice*, Great American offers no explanation for its failure to protect its rights. The Lindsay Affidavit details why Great American delivered the annuity proceeds to Miranda Murvin and why Great American blames First Citizens in some way for purportedly contributing to Great American's payment of the annuity proceeds to the wrong person. In other words, it presents Great American's purported defense to the lawsuit. However, the Lindsay Affidavit is silent as to why Great American failed to respond to the duly served Summons and Amended Complaint.

Great American's Memorandum in Support of its Motion to Vacate Default Judgment provides the only insight into Great American's failure to respond to the summons and complaint. Thus, Great American sought to prove excusable neglect exclusively through the arguments of counsel. "It is axiomatic that arguments of counsel are not evidence." *State v. Manning*, 418 S.C. 38, 47 n.8, 791 S.E.2d 148, 152 n.8 (2016) (citing *Sosebee v. Leeke*, 293 S.C. 531, 362 S.E.2d 22 (1987)). The Special Referee could have properly denied Great American's Motion to Vacate on this basis alone. *See Bowers v. Bowers*, 304 S.C. 65, 67–68, 403 S.E.2d 127, 129 (Ct. App. 1991) (noting that "[t]he movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief," and denying the motion to vacate where a defendant relied only on "allegations contained in his unverified counterclaim and the arguments made by his attorney during a hearing on this motion").

Despite a total lack of relevant record evidence, the Special Referee chose to consider Great American's arguments of counsel and still determined Great American failed to demonstrate excusable neglect. Great American argued in its Memorandum in Support of its Motion to Vacate Default Judgment that, "Great American concluded that it had been mistakenly served and therefore did not need to timely answer the Complaint." (Memorandum in Support of Great American Life Insurance Company's Motion to Vacate Default Judgment pg. 2.) It continued, "Great American based its decision on the incorrect contract number and number sequence, the attachment of a statement from an unrelated corporation, and Great American's own past experience regarding previous litigants' confusion regarding the acronym 'MNL.'" (Memorandum in Support of Great American Life Insurance Company's Motion to Vacate Default Judgment p. 4.) But its arguments of counsel offer no explanation of *why* Great American did not respond to the Amended Complaint. For example, there is no testimony or argument of counsel stating that the person receiving the Amended Complaint at Great American did not understand that defendants in lawsuits must file a response. Or that the person receiving the Amended Complaint at Great American quit their job and did not tell anyone about the lawsuit. These proffered excuses would be unlikely to support a finding of excusable neglect. But at least they would be an attempt by Great American to arm the Special Referee with information necessary to consider *any* factual basis to support a finding of excusable neglect.

Here, Great American provides absolutely no factual explanation for its decision not to file a responsive pleading to a duly served summons and complaint. Instead, Great American states (through argument of counsel) that it believed it did not have an insurance policy with Lonnie Murvin. It does not address how Great American made the illogical leap that not having an insurance policy with someone justifies intentionally ignoring a duly served summons and

complaint. Great American attempted to push the Special Referee into making that illogical leap, and now contends the Special Referee abused his discretion in (rightfully) refusing to do so. Because Great American failed to provide *any* evidence justifying its decision to ignore a lawsuit against it, the Special Referee did not abuse his discretion in denying Great American's Motion to Vacate the Default Judgment.¹

c. South Carolina case law confirms that the Special Referee did not abuse his discretion in denying Great American's Motion to Vacate under Rule 60(b).

South Carolina case law justifies the Special Referee's decision and highlights a critical distinction between successful and unsuccessful motions to vacate. In a successful motion to vacate, a litigant almost always shows that it attempted to protect its rights, but by some unfortunate error, it failed. In an unsuccessful motion to vacate, a litigant made a conscious decision to ignore a lawsuit and purposefully did not file a responsive pleading.

In *Williams v. Watkins*, 384 S.C. 319, 681 S.E.2d 914 (2009), a defendant succeeded in overturning a trial court's denial of a motion to vacate a default judgment when he demonstrated a reasonable belief that his case had been continued, when in fact it had not. The Court noted that "Watkins had every reason to believe his case had been continued and that he did not need to appear...." when he had notified the magistrate court that he was unable to appear. *Id.* at 325, 681 S.E.2d at 917. There is a fundamental difference in the *Williams* case, in which a motion to vacate should have been granted, and the following cases, in which a motion to vacate was properly

¹ This argument accepts Great American's claim that it believed in good faith it did not have a policy with Lonnie Murvin because the Amended Complaint included an incorrect policy number and attached a policy from another insurance company. However, Great American could have quickly and easily discovered it *did* have a policy with Lonnie Murvin by searching its records for that name. Great American's failure to search its records for the name "Lonnie Murvin" further demonstrates Great American's indefensible neglect in choosing to ignore the matter altogether.

denied. The difference is a good-faith mistaken belief versus a conscious decision to ignore a legal proceeding.

In *Tri-County Ice, supra*, the Court upheld denial of a motion to vacate default judgment when the party “chose to ignore” a party name misnomer and attack the validity of the judgment on that basis. *Tri-County Ice*, at 241, 399 S.E.2d at 782.

In *Sundown Operating Co., supra*, the court upheld denial of a motion to set aside entry of default when a defaulted party asserted its insurance agent was negligent in failing to answer the complaint. *Sundown Operating Co.* at 609–10, 681 S.E.2d at 889. The Court considered the totality of circumstances leading to the failure to respond, including the insurance agent’s negligence and the defendant’s failure to forward the summons and complaint for two weeks, and held the defendant failed to show good cause as to why the summons and complaint went unanswered. *Id.*

In *ITC Commercial Funding, supra*, the Court upheld denial of a motion to vacate default judgment when a party claimed her age and mental state prevented her from understanding the situation, that she believed the loan referenced in the complaint was current, that she was not aware of the lawsuit, that she thought she was represented by an attorney, and that she had no experience working with attorneys. *ITC Commercial Funding* at 494, 713 S.E.2d at 339. The Court explained the trial court did not abuse its discretion where the record reflected the appellant was served at her home with the summons and complaint, failed to show through medical testimony that she had diminished capacity, and failed to show that her former counsel engaged in any misleading conduct. *Id.* at 495, 713 S.E.2d at 339.

In each of these cases, the party seeking to vacate a default judgment under Rule 60(b) offered a factual basis for finding excusable neglect—the belief that a case had been continued,

the belief that an insurance agent would answer the lawsuit, or age and mental state problems. In this case, Great American offers *no* factual basis for finding excusable neglect, because the Lindsay Affidavit speaks only to Great American's effort to blame First Citizens for Great American paying the annuity proceeds to the wrong person. Considering the arguments of counsel, Great American claims that it believed it did not have a policy with Lonnie Murvin. Even accepting counsel's argument as evidence, Great American still offers no explanation for the illogical leap it now insists the Special Referee should have made. How does not having a particular insurance policy excuse a defendant from the obligation to respond to lawsuit? Great American offers no evidence to explain this.

Great American made a conscious decision to ignore a lawsuit against it, and the Special Referee thus properly denied Great American's motion to vacate.

II. Because the Special Referee determined there was an insufficient factual basis for finding excusable neglect, he did not need to consider Great American's purported meritorious defense.

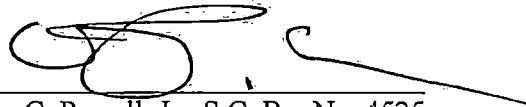
The Special Referee focused his analysis on Great American's proffered reasons for its failure to act and justifiably denied Great American's Motion to Vacate. Where a Court determines that there "an insufficient factual basis for finding excusable neglect, [the court] need not decide whether [a party] has shown a meritorious defense." *Tri-County Ice* at 243, 399 S.E.2d at 783; *see also Stearns Bank*, 373 S.C. at 341, 644 S.E.2d at 798 (holding that because of its ultimate disposition, "we need only address [Defendant's] excusable neglect claim...."); *ITC Commercial Funding* at 496, 713 S.E.2d at 339-40 ("Having concluded the trial court did not abuse its discretion in finding the Appellant was not entitled to relief on any of the grounds specified in Rule 60(b), SCRCPP, we need not address whether the Appellant has a meritorious defense.").

The Special Referee reasonably concluded that Great American failed to offer sufficient factual support for a finding of mistake, inadvertence, or excusable neglect. As a result, the Special Referee rightfully did not decide whether Great American put forth a meritorious defense.


CONCLUSION

The Special Referee considered the arguments presented by Great American claiming to support a finding of mistake, inadvertence, or excusable neglect under Rule 60(b), SCRPC. The Special Referee reasonably concluded that Great American's Motion to Vacate Default Judgment should be denied. Because the Special Referee did not abuse his discretion in denying Great American's Motion to Vacate, the Special Referee's decision should be affirmed.

Respectfully submitted,



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Raleigh, NC 27607
919-781-4000
Admission to Practice Pro Hac Vice Pending

This the 8th day of February 2019

Exhibit 3

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE NO. 17-CP-13-804

First-Citizens Bank & Trust)
Company and Sadie M. Murvin)

Plaintiffs,)

v.)

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

Defendants.)

AFFIDAVIT

Wanda C. Hiles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

2018 MAR 22 AM 11:17

PERSONALLY APPEARED before me, Suzanne B. King, who being duly sworn, deposes and says:

1. That I am employed with First-Citizens Bank & Trust Company ("First Citizens") on a full-time basis as the Manager, Trust Legal & Compliance. I am very familiar with the issues involved in this litigation.

2. That First Citizens is the duly appointed Personal Representative of the Estate of Lonnie Murvin ("Estate") and as such has the statutory duty to gather all of the Estate's assets.

3. That one of the Estate's assets is the proceeds of a single premium deferred annuity payable to the Estate of Lonnie Murvin and that a copy of the annuity terms was attached to the Amended Summons and Complaint filed in this action.

4. That the annuity proceeds check was made payable to the Estate of Lonnie Murvin in the sum of \$136,000.00 and was sent to the Defendant, Miranda Libby Murvin, who was not a duly appointed Personal Representative of the Estate of Lonnie Murvin.

5. That Ms. Murvin opened an account in the name of the Estate of Lonnie Murvin with the annuity proceeds and spent the money on herself as opposed to the Estate.

5. That the annuity proceeds should have been paid to First Citizens in its capacity as Personal Representative of the Estate and that as a result of the wrongfully issued check, First Citizens as the duly appointed Personal Representative for the Estate of Lonnie Murvin is entitled to judgment against Great American Life Insurance Company in the sum of \$136,000.00, plus pre-judgment interest from the date of Mr. Murvin's death.

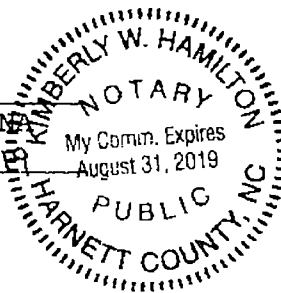
6. That I am authorized to sign this Affidavit on behalf of First-Citizens Bank & Trust Company and that I affirm that the sum of \$136,000.00 is due and owing to First Citizens in its capacity as the Personal Representative of the Estate of Lonnie Murvin and that the annuity proceeds will be deposited into an account for the benefit of the Estate of Lonnie Murvin.

7. That your affiant said nothing further.

James B. King
AFFIANT

Sworn to before me this
7th day of March, 2018

Kimberly W. Hamilton
NOTARY PUBLIC FOR NORTH CAROLINA
My Commission Expires: 8/31/2019



Wanda C. Miles
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

2018 MAR 22 AM 11:18

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
MAR 11 2019
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, Elizabeth Kurtz, a paralegal with the law firm Willoughby & Hoefer, P.A., has caused to be served this day one (1) copy of the **Motion for Leave to File Supplemental Rule 60(B) Motion and Motion to Remand** by depositing the same in the U.S. Mail to the following:

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Warren C. Powell, Esquire
Chelsea J. Clark, Esquire
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Wyrick Robbins Yates & Ponton, LLP
4101 Lake Boone Trail, Suite 300
Raleigh, North Carolina 27607



Elizabeth Kurtz

Columbia, South Carolina
This 11th day of March 2019

WILLOUGHBY & HOEFER, P.A.
ATTORNEYS & COUNSELORS AT LAW

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JOHN M.S. HOEFER
RANDOLPH R. LOWELL**
TRACEY C. GREEN
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JOHN W. ROBERTS
R. WALKER HUMPHREY, II***
ANDREW R. HAND****

ELIZABETH S. MABRY
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**ALSO ADMITTED IN WASHINGTON, D.C.
***ALSO ADMITTED IN CALIFORNIA
****ALSO ADMITTED IN NORTH CAROLINA

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 seven (7) copies of Appellant Great American Life Insurance Company's motion for leave to file a supplemental motion for relief with the trial court under Rule 60(b), SCRPC,¹ as well as its concurrent request for this matter to be remanded to the trial court for consideration of same. I would appreciate your acknowledging receipt of this document 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 for Respondents 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,

¹ Rule 60(b), SCRPC provides that "[d]uring the pendency of an appeal, leave to make the motion must be obtained from the appellate court."

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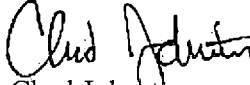
MAR 11 2019

SC Court of Appeals

The Honorable Jenny A. Kitchings
March 11, 2019
Page 2 of 2

Respectfully,

WILLOUGHBY & HOEFER, P.A.


Chad Johnston

Enclosures.

cc: Warren C. Powell, Jr., Esquire (via U.S. Mail w/ enclosure)
Chelsea J. Clark, Esquire (via U.S. Mail w/ enclosure)
Benjamin N. Thompson, Esquire (via U.S. Mail w/ enclosure)
Samuel A. Slater, Esquire (via U.S. Mail w/ enclosure)
Kevin M. Barth, Esquire (via U.S. Mail w/ enclosure)

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SC Court of Appeals

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March 11, 2019

VIA HAND DELIVERY

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South Carolina Court of Appeals
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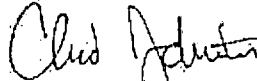
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The Honorable Jenny A. Kitchings
March 11, 2019
Page 2 of 2

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WILLOUGHBY & HOEFER, P.A.


Chad Johnston

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