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

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 REPLY BRIEF OF APPELLANT

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INTRODUCTION

The brief of Respondents First-Citizens Bank & Trust Company ("First-Citizens") and Sadie M. Murvin (collectively "Respondents") is long on hyperbole, feigned indignation, and haughty pronouncements of chastisement for Appellant Great American Life Insurance Company's ("GALIC") mistake, inadvertence, or excusable neglect in failing to timely respond to the underlying complaint. Noticeably absent from the brief, however, is any meaningful discussion of the salient underlying facts demonstrating First-Citizen's prominent role in this matter. That role extends not only to the alleged mistaken payment of the annuity proceeds at issue in the case, but also to misstating material facts in the Amended Complaint and misrepresenting the relevance of incorrect documents attached to the pleading, all of which contributed to the procurement of the default judgment against GALIC.

Critically, however, Respondents now admit in their brief that the policy number referenced in the Amended Complaint, *see* **(R.p.)**, along with the corresponding policy printout attached to the Amended Complaint, *see* **(R.p.)**, were for a policy from another insurance company altogether—not GALIC. *See* Resp. Br. at 13 n.1 ("[T]he Amended Complaint included an incorrect policy number and attached a policy from another insurance company.") Indeed, a cursory review of Respondents' Exhibit A to the Amended Complaint, *see* **(R.p.)**, leaves Respondents with no choice but to concede the fact that 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 seek 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, SCRCP. In 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, *see* **(R.p.)** (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.

Id. at ¶3 (emphasis added) **(R.p.)** This representation was false, however, as is evident from a plain reading of the exhibit referenced in Ms. King's affidavit (Ex. A to the Complaint, **(R.p.)**) and Respondents' admissions before this Court.

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 revelation also supports relief from default under Rule 60(b)(2) and (3), SCRCP (providing an avenue 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"). In the interest of judicial economy, this Court would be justified in affording GALIC relief from the default judgment for these additional Rule 60(b) grounds. *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)).[1]

Regardless, Respondents' admission warrants this Court finding a justifiable mistake on GALIC's part resulting in neglect that is *per se* excusable under the circumstances. The Court should not countenance Respondents' cavalier attitude towards the veracity of their pleading and filing obligations, and because the underlying default judgment was obtained on the basis of demonstrated misrepresentations, the underlying entry of default, default judgment, and the Special Referee's order are likewise all without verifiable evidentiary support and, thus, all are an abuse of discretion. *In re Estate of Weeks,* 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997) ("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.").

ARGUMENT

I. Respondents' contentions regarding the Court's consideration of "arguments of counsel" are unpreserved for review as Respondents made no contemporaneous oral or written objection to the Special Referee's consideration of that evidence and the Special Referee expressly cited to and considered GALIC's arguments below.

In an effort to avoid the arguments advanced by GALIC below to the Special Referee and to this Court regarding its mistake, inadvertence, or excusable neglect in failing to timely process the misrepresented facts of the Amended Complaint as a claim within its legal department,

[1] In order to assure that this new information is appropriately considered, GALIC has concurrently filed a supplemental motion for relief from default under Rules 55(c) and 60(b)(2) and (3), SCRCP, with the appointed Special Referee. GALIC acknowledges that subsections (b)(2) and (3) of Rule 60 were not advanced in GALIC's prior motion for relief; however, 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, and any assertion of waiver of an argument that was unknown to GALIC at the time of its original Rule 60(b) motion is meritless.

Respondents attempt to employ new evidentiary hurdles to the Court's consideration of GALIC's arguments for the first time on appeal. Throughout the brief, Respondents contend that GALIC's justifications for relief from default judgment should be disregarded by this Court as mere "arguments of counsel" that are insufficient to amount to documentary evidence which would justify relief. Aside from being incorrect on the merits, Respondents' arguments suffer from two clear procedural defects.

First, the Supreme Court has addressed this type of argument head on in admonishing parties of the need for a contemporaneous objection to the admission of evidence—even supposed arguments of counsel—in order to preserve those arguments for a later appeal. In *Lesley v. American Security Insurance Co.*, the Supreme Court considered an appellant's contention that certain arguments advanced to the jury by the respondent's counsel should have been excluded as arguments of counsel. 261 S.C. 178, 185, 199 S.E.2d 82, 85 (1973). The Court rejected the argument out of hand on the basis that no objection to the supposedly improper arguments appeared in the record. *Id.* The Court went on to note that a trial judge is afforded

> considerable latitude [in] allow[ing] counsel [to] draw[] inferences and deductions from the evidence and in arguing the same to the jury. Arguments of counsel, and objections addressed thereto, of necessity have to be left largely to the sound discretion of the trial judge who is on the scene and in much better position than an appellate court to judge as to what is improper argument under the circumstances.

Id. at 185, 199 S.E.2d at 85-86 (citations omitted). In this case, Respondents made no contemporaneous objection to the admission of this evidence.

Thus, even assuming that GALIC's factual recitation of its support for relief could fairly be criticized as mere "argument of counsel," which GALIC disputes,[2] Respondents' failure to

[2] In truth, Respondents' argument in this regard is part and parcel of its strategy to criticize GALIC for what it has *not* argued rather than address GALIC's factually accurate recitation of what led to its good faith mistake, inadvertence, or excusable neglect.

object is fatal to their presentation of this issue on appeal and the admission of that evidence below was left to the sound discretion of the Special Referee. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009) (holding admission of evidence is within the discretion of the trial court). A contemporaneous objection to the admission of any type of potential evidence is required under our case law in order to preserve for appeal an argument against the admission of said evidence. Below, however, Respondents made no such contemporaneous objection to GALIC's "arguments of counsel," either orally or in writing.[3] Consequently, Respondents' arguments as to both the type of evidence and the manner in which GALIC presented it below are unpreserved for this Court's review. *See, e.g., Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) ("A contemporaneous objection is required to properly preserve an error for appellate review. The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object.") (citations omitted).

Moreover, beyond Respondents' failure to timely object to the Special Referee's consideration of GALIC's grounds for relief, it is undisputed that, under a plain reading of the order, the Special Referee actually admitted and considered the very evidence of which Respondents now complain, *see* Order **(R.p.)**, a fact which Respondents acknowledge in their brief. *See* Resp. Br. at 12 ("Despite a total lack of relevant record evidence, the Special Referee

[3] As GALIC explained in its initial brief, although the Special Referee held a hearing regarding GALIC's motion for relief from the entry of default and default judgment at which counsel for both parties were present, no transcript of the hearing was recorded. In addition, although the Special Referee's order reflects the fact that Respondents appeared and argued in opposition to GALIC's motion, Respondents did not file a written opposition to GALIC's motion for relief. Neither does the Special Referee's indicate that Respondents lodged an objection at the hearing. Consequently, the record before this Court reflects the fact that Respondents did not oppose the Special Referee's consideration of GALIC's "arguments of counsel," even assuming such a characterization is appropriate.

chose to consider Great American's arguments of counsel and still determined Great American failed to demonstrate excusable neglect."). Because Respondents did not lodge an objection with the Special Referee regarding this evidence, and because the Special Referee considered and rejected the evidence, consideration of this evidentiary issue as a matter of first impression by this Court[4] would be improper in any event; thus, it is unclear what purpose Respondents' throat clearing is intended to accomplish, other than to waste this Court's time.

For all of these reasons, Respondents' attempt to overcome or shade this Court against the evidence presented by GALIC by characterizing it as "arguments of counsel" is unpreserved for this Court's review, and incorrect in any event; thus, all of the grounds advanced and relied upon by GALIC for relief from default judgment are properly before the Court.

II. 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.

A. Respondents concede that the Special Referee looked to factors other than whether GALIC's failure to act was based on its mistake, inadvertence, or excusable neglect in declining to provide it relief from default.

As argued in its opening brief, GALIC submits that the Special Referee abused its discretion in applying a heightened legal standard to its determination of relief under Rule 60(b)(1), SCRCP, which allowed it to disregard GALIC's uncontested evidence of mistake, inadvertence, or excusable neglect. Although this Court has determined that "[Rule 60(b)(1)] is an appropriate

[4] As the "winning" party below, Respondents were not required to cross appeal the special referee's admittance and consideration of this evidence; however, even under the most expansive reading of Rule 220(c), SCACR, *see, e.g., I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000), an appellate court may only use Rule 220(c) to *sustain* a ruling of the lower court, not *reverse* an adverse evidentiary ruling, which is effectively what Respondents are attempting to do here in advancing an unargued ground for post-hoc exclusion of evidence on appeal.

remedy for good faith mistakes of fact if all other applicable factors are met," *see Hillman v. Pinion*, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001), the Special Referee applied additional layers of scrutiny to the evidence of GALIC's mistake and neglect that constituted an error of law. *See* App. Br. at pp.12-14.

In their brief, Respondents acknowledge the heightened standards employed by the Special Referee to justify its disregard of GALIC's mistake, *see* Resp. Br. at 9, yet they explain away these extra-Rule 60(b) requirements that insurance companies should be held to an additional "diligence" standard[5] and that a good faith mistake not also be "careless,"[6] as merely "applying facts to a legal standard," *id.* But the requirements that a party in default be deemed "diligent" in the eyes of the court, and not "careless," do not appear in Rule 60(b) or any reported appellate case. Application of these morality-based qualifiers would be inherently arbitrary and capricious, hence their exclusion from the Rule. Moreover, the Order's assertion that corporate entities, as opposed to individuals, *and insurance companies in particular*, *see* **(R.pp.)**, Order at 5, must adhere to a higher standard to qualify for relief under Rule 60(b) is not only incorrect under the law and contrary to the Rule's plain language, but also potentially violative of equal protections afforded all citizens – be they corporations or individuals – under the State and federal constitutions. Additionally, Respondents fail to address altogether the Order's particularly egregious assertion that relief from a default judgment is a "reward," *see* **(R.pp.)**, Order at 6, even though such a pronouncement plainly contradicts South Carolina's policy of favoring disposition

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[5] *See* **(R.pp.)**, Order at 5-6 ("Great American is an insurance company and should have been diligent enough to recognize that the insured referenced in the Amended Complaint was their incurred and that Great American was a proper party to this lawsuit."). Which conveniently relieves First-Citizens, a bank, from its own "diligence" obligations of pleading, and testifying in affidavits, to true and correct facts.

[6] *See* **(R.pp.)**, Order at 5-6 ("I find that Great American certainly should not be rewarded for such careless behavior.").

of issues on their merits rather than on technicalities. *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986).

Undeterred, Respondents then compound the Special Referee's error by urging this Court to apply a yet even higher burden to show good faith mistake, inadvertence, or excusable neglect. Respondents postulate that an individual receiving a complaint but not understanding a response is required, or an employee receiving a complaint directed to his employer but then quitting his job without informing anyone, "would be unlikely to support a finding of excusable neglect." Resp. Br. at p. 12.

Respectfully, Respondents' hypotheticals are textbook examples of when Rule 60(b) affords relief from a default judgment. For instance, in *Stearns Bank National Association v. Glenwood Falls, LP*, this Court reviewed the Supreme Court's prior "instructive" decision in *Graham v. Town of Loris*. 373 S.C. 331, 343, 644 S.E.2d 793, 799 (2007) (citing *Graham*, 272 S.C. 442, 248 S.E.2d 594). In *Graham*, the Town of Loris's city attorney resigned without informing any town official of an impending hearing on a motion for summary judgment. *Id.* When no one appeared, the circuit court entered summary judgment against the town. *Id.* The circuit court thereafter granted the town relief from the judgment and the Supreme Court affirmed, finding the circumstances of the case precluded the imputation of the attorney's knowledge to the town. *Id.* While *Graham* specifically discussed the abandonment of a case by an attorney, the premise is the same: the town was unaware of the hearing due to the resignation and the circumstances depriving it of that notice were beyond its control. *Graham*, 272 S.C. at 452-53, 248 S.E.2d at 599. Thus, our Supreme Court has rejected the very premise Respondents advance—and this court acknowledged that holding in a case on which Respondents rely.

At bottom, the Special Referee's application of what amounted to an additional sophistication test to GALIC's conduct is unsupported by Rule 60(b) and the reasoned case law of this Court. While the Special Referee may not have agreed with the manner in which GALIC investigated the Amended Complaint and processed it as a claim on a GALIC insurance product, a party's status as an insurance company and its 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). While adherence to the "proper method for addressing the matter," *see* Order at p.6 **(R.p.)**, is understandably preferred, Rule 60(b) exists because parties do not always live up to that standard. *C.f. State v. Sweat*, 379 S.C. 367, 377, 665 S.E.2d 645, 651 (Ct. App. 2008) (discussing language in a statute and holding "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous"), *aff'd,* 386 S.C. 339, 688 S.E.2d 569 (2010). It expressly provides an avenue for relief should a party fail to rise to the level of perfection described in the Order. The Special Referee's legal error in looking beyond Rule 60(b) to apply a heightened level of scrutiny to GALIC's mistake, inadvertence, or excusable constitutes an abuse of discretion warranting a reversal and remand of the action for a hearing on the merits.

B. The inaccuracies of the factual assertions contained in the Amended Complaint and its exhibit, along with Respondents' misrepresentation in applying for default, support a finding of mistake, inadvertence, or excusable neglect.

Respondents' indifference to the Order's application of a heightened standard under Rule 60 is further highlighted by their insistence on misrepresenting even basic facts surrounding GALIC's motion for relief.[7] For instance, throughout their brief, Respondents falsely state that the

[7] GALIC does not intend on fully restating the factual grounds and arguments from its initial brief that it contends supports reversal of the Order and relief from the entry of default and default judgment. It should be noted that Respondents do not attempt to rebut the majority of GALIC's arguments either, relying principally on the waived and unpreserved contention

basis for GALIC's mistake is its unwillingness to acknowledge the existence of a GALIC insurance annuity in the name of the deceased, Lonnie Murvin. *E.g.*, Resp. Br. at p.4 ("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."), p.8 ("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."), p.12 ("Great American states . . . that it believed it did not have an insurance policy with Lonnie Murvin."), and p.15 ("Great American claims that it believed it did not have a policy with Lonnie Murvin.").

This repeated representation by Respondents demonstrably misrepresents the record, which is shown simply by reference to GALIC's opening brief and proposed pleading below.[8] While Respondents' repeated misrepresentation of GALIC's position is not factual, it certainly appears to be strategic: couching GALIC's mistake,[9] inadvertence, or neglect as resulting from a

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regarding "arguments of counsel," as discussed herein *supra*. Respondents' arguments in this regard are likely an attempt to overcome the fact that they failed to file any written opposition to GALIC's motion for relief or otherwise object to the evidence that GALIC presented; thus, the factual basis for GALIC's arguments are uncontested on the record before this Court. Notwithstanding the lack of any meaningful response, GALIC expressly incorporates and restates the uncontested facts and evidence of record supporting a finding of mistake, inadvertence, or excusable neglect by GALIC, as well as a misrepresentation made by First-Citizens in procuring default, from its initial brief. *See* App. Br. at pp.14-24.

[8] *See* Initial Br. at p.15 ("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."); *see also* **(R.p.)**, Proposed GALIC Ans. to Am. Compl. at ¶5 ("Defendant admits, on information and belief, so much of the allegations contained in Paragraph Five of the Amended Complaint as allege that [GALIC] sold to Lonnie B. Murvin a single premium deferred annuity contract. However, [GALIC] denies that the annuity contract sold to Lonnie B. Murvin is number 8500457055.").

[9] In fact, in their zeal to discount the evidence of mistake, inadvertence, or excusable neglect advanced by GALIC, Respondents' brief contains a Freudian slip of its own: in discussing GALIC's failure to process the Amended Complaint as a claim on a GALIC insurance policy,

lack of initiative by GALIC allows Respondents to wholly avoid the patent errors in pleading caused GALIC's understandable confusion and mistake in the first place, and the clear misrepresentation of the First-Citizens affidavit in procuring default.

Notably, the Amended Complaint is devoid of any reference to a GALIC-issued insurance policy. The contract number for the insurance policy referenced in the Amended Complaint did not match a GALIC-issued policy, and the number sequence of the contract does not match any policy of record of GALIC—all of which suggested to GALIC that it was not the proper defendant in this case. Moreover, the attachment to the Amended Complaint, while nearly illegible, is at least identifiable as an online policy printout for a Midland National Life Insurance Company, a third-party insurance company unaffiliated with GALIC, and whose "MNL" acronym and initials have, in the past, been mistaken for a GALIC subsidiary Manhattan National Life. **(R.p.)** (Memo in Supp. at 2) While GALIC readily acknowledges in hindsight that it could have taken different or perhaps more prudent steps in processing the mistake-laden Amended Complaint, its mistaken actions and neglect are not a bar to relief from the resulting default judgment. *See Williams*, *supra.*

GALIC respectfully contends that its mistake in neglecting to process the Amended Complaint as a claim on a GALIC insurance policy was reasonable and excusable under the circumstances in light of the admitted errors in pleading by First-Citizens. *See Columbia Pools*, 288 S.C. at 61, 339 S.E.2d at 525 ("[W]here there is a good faith mistake of fact, and, no attempt

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Respondents call GALIC failure to timely respond "*a critical mistake.*" Resp. Br. at 4 (emphasis added). *GALIC agrees.* Intentionally or not, Respondents' "mistake" in acknowledging GALIC's mistake directly, or at a minimum implicitly, acknowledges the Special Referee's error in applying a heightened standard of review to GALIC's motion. Once a good faith mistake is identified, or the party in default's neglect is deemed to be colorably excusable under the facts, then the reviewing court is obligated to evaluate the evidence on the remaining elements or factors or Rule 60(b). Below, however, the Special Referee undertook no such analysis despite the evidence presented by GALIC on all of the Rule 60(b)(1) elements or factors.

to thwart the judicial system, there is basis for relief [under Rule 60(b)(1)]."). The appropriate question is whether GALIC's mistake was made in good faith and whether GALIC's neglect was excusable in light of the demonstrated—and now admitted—errors in pleading by Respondents that contributed to GALIC's mistake, inadvertence, or neglect.[10] GALIC's demonstration of a good faith mistake and excusable neglect based on uncontested evidence necessitated that the Special Referee provide GALIC relief from the entry of default and default judgment, and the failure to do so constitutes an abuse of discretion.

C. Respondents misapprehend and misconstrue the case law on default.

Respondents cite four cases that they contend "justif[y] the Special Referee's decision and highlight[] a critical distinction between successful and unsuccessful motions to vacate." Resp. Br. at 13. This so-called "distinction" does not exist under these cases.

The sole case Respondents cite in support of a "successful" motion to vacate is *Williams, supra.* As GALIC explained in its opening brief, although the *Williams* Court believed an unrepresented party "did not act in the most prudent or procedurally correct manner when notifying the magistrate court of his conflict and requesting a continuance," this Court nevertheless deemed the party's mistaken belief a continuance had been granted to have been made in good faith and reversed the circuit court. *Id.* at 325, 681 S.E.2d at 917. The same is true in this case: although GALIC may not have "act[ed] in the most prudent or procedurally correct manner," it did so under a good faith belief it had been improperly named (a belief formed from the pleading errors

[10] Which was compounded by the complete lack of responsiveness demonstrated by First-Citizens to GALIC's multiple attempts to process payment of GALIC's insurance policy in the first place, which likewise contributed to GALIC's inducement to mistakenly pay its policy to Miranda Murvin in the first place. *See* App. Br. at pp.5-8 (discussing the multiple letters sent by GALIC to First-Citizens and representatives of Lonnie Murvin's family in order to fulfill its contractual obligation of payment of the annuity proceeds upon the deceased's death).

Respondents seek to exploit before this Court). Conspicuously absent from Respondents' brief is any attempt to distinguish the other cases GALIC cited in support of reversal, including *Columbia Pools*. For the reasons previously explained, those opinions provide the framework for finding good faith mistake, inadvertence, or excusable neglect here. *See* App. Br. at pp. 16-19.

The three "unsuccessful" cases Respondents argue justify the result reached in the Order have no bearing on the issue before this Court and thus serve as nothing more than a continued distraction. The first case Respondents cite is *Tri-County Ice & Fuel Company v. Palmetto Ice Company*, 303 S.C. 237, 399 S.E.2d 779 (Ct. App. 1990), which Respondents summarily argue affirmed the denial of a motion to vacate a default judgment "when the party 'chose to ignore' a party name misnomer and attack the validity of the judgment on that basis." Resp. Br. at 14. That is bold a misrepresentation of both the facts and holding of *Tri-County Ice.*

In point of fact, Tri-County Ice sued Palmetto Ice for conversion. *Tri-County Ice*, 303 S.C. at 238, 399 S.E.2d at 780. Palmetto Ice did not answer, and the circuit court ultimately entered judgment against Palmetto Ice. *Id.* Palmetto Ice therafter sought to vacate the default judgment on two independent grounds: (1) Palmetto Ice Company is not a legal entity, but rather a trade name used by P & H Company; and (2) mistake, inavertence, or excuseable neglect because Palmetto Ice's principal has been suffering from medical issues at the time of service.

As to the first ground for relief, this Court found George Helmly, P & H Company's principal shareholder and president, was properly served with the summons, complaint, and all other notices, and "clearly knew that Tri-County intended to sue the corporation, P & H Company, but that Tri-County was under a misapprehension as to the identity of Palmetto Ice Company." *Id.* at 240-41, 399 S.E.2d at 782. Critically, Helmly "was also aware that Tri-County had no way of ascertaining that Palmetto Ice Company was a trade name, as P & H Company, Inc. had not

registered this assumed name with the Secretary of State." *Id.* at 241, 399 S.E.2d at 782. Instead of correcting the error, P & H Company stayed silent and determined to attack any judgment against it on that basis. *See id.* Finding P & H Company and Helmly had "not been misled to their prejudice as to the nature of the lawsuit," this Court permitted an amendment to the judgment to correctly name P & H Company.[11] *Id.* These facts are remarkably different from those present here, where Respondents' complaint cited to, attached, incorporated, and sought to enforce an annuity policy GALIC never issued. Unlike P & H Company, Respondents' conduct actively misled GALIC to its prejudice as to the nature of the lawsuit.

As to the second ground for relief, Helmly claimed his neglect in failing to respond "was due to the fact that he suffered from various illness around this time period." *Id.* at 242, 399 S.E.2d at 782. This Court surveyed the evidence submitted and found it did not support, and actually contradicted, Helmly's claim that medical issues prevented him from responding. *Id.* at 242-43, 399 S.E.2d at 782-83. Contrast *Tri-County Ice* with this case, where Respondents have proffered no evidence to contradict GALIC's good faith yet mistaken belief. As explained in detail herein, the genesis of this belief is Respondents' own errors and conduct. There are zero similarities between the facts of *Tri-County Ice* and the facts of this case.

Respondents next cite *Sundown Operating Co. v. Intedge Industries, Inc.* Following a fire that destroyed Sundown's restaurant, Sundown sued the contractor retained to install, maintain, inspect, and service the building's fire extinguishing and suppression systems. *Id.* 383 S.C. 601, 604, 681 S.E.2d 885, 886-87 (2009). Sundown served the summons and complaint on Intedge on August 28, 2001. *Id.* at 605, 681 S.E.2d at 887. Intedge's vice-president notified its insurance agent of the lawsuit on September 14, but did not forward the complaint to the insurer until October 1.

[11] This Court did not decide this question under Rule 60(b).

Id. The insurance agent called Sundown's counsel to request an extension of time to respond on October 2 and learned that Sundown had already had moved for entry of default. *Id.* The clerk entered default, and the court thereafter denied Intedge's motion to set aside the default and entered judgment against Intedge following a series of hearings. *Id.* at 606-07, 681 S.E.2d at 887.

On appeal, Intedge sought to lay blame at the feet of its insurance agent. The Supreme Court first observed that "the law is clear that an attorney or insurance company's misconduct is imputable to the client" and consequently "a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent." *Id.* at 609, 681 S.E.2d at 889. The court further observed that Intedge itself shouldered some responsibility, as it did not forward the complaint its insurance agent until two weeks after it notified the agent of the suit *and* after the deadline to answer had passed. *Id.* Intedge offered no explanation for why it tarried. *Id.* In contrast, GALIC promptly investigated the complaint and explained its belief and the basis for it without impeachment by Respondents. The facts and holdings of *Sundown Operating Co.* therefore provide no help for this case.

Finally, Respondents rely on *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (Ct. App. 2011). A company owned by John Crerar took out a promissory note to refinance a loan on an ice-skating rink he and his son owned in Augusta, Georgia. *Id.* at 489, 713 S.E.2d at 336. His wife, appellant Alice Crerar, signed a guaranty of the note. *Id.* After Mr. Crerar died, the company became delinquent on the note. *Id.* ITC, the holder of the note, filed suit against Mrs. Crerar on her guaranty. *Id.* Mrs. Crerar thereafter made some payments on the note but failed to pay it in full. *Id.* at 489-90, 713 S.E.2d at 336. ITC then sought entry of default and default judgment on its complaint, which the court granted. *Id.* at 490, 713 S.E.2d at 336.

Mrs. Crerar argued she was entitled to relief under Rule 60(b)(1) for a litany of reasons, including, as is relevant here, that she was unaware of the lawsuit, her age and mental status "prevented her from understanding the situation," and that ITC allegedly engaged in misconduct. *Id.* at 494-95, 713 S.E.2d at 339. This Court rejected her argument because the sheriff's office served her at home and she acknowledged receipt of a letter notifying her of the suit, Mrs. Crerar failed to present evidence that she had a diminished capacity, and there was no evidence that ITC engaged in any misleading conduct. *Id.* at 495, 713 S.E.2d at 339. The issue in *ITC Commercial Funding* was a total failure of proof, not the application of some newfound heightened standard designed to defeat the defaulting party's arguments. Just as with *Tri-County Ice* and *Sundown Operation Co.*, this case simply is inapposite.

Respondents have therefore failed to cite a single case affirming the denial of a motion to vacate a default judgment on facts and law similar to those present here. As the foregoing reveals, Respondents falsely claim that in each of these three cases "the party seeking to vacate a default judgment under Rule 60(b) offered a factual basis for finding excusable neglect." Resp. Br. at 14. In each, the appellate courts explicitly found *no factual basis* to support the claim. Respondents' distortion of the extant case law to enforce a default judgment emanating from their own errors cannot stand.

III. GALIC's demonstrations of evidence as to the remaining elements of its motion for relief under Rule 60(b), SCRCP are uncontested by Respondents.

In its opening brief to this Court, GALIC detailed the evidence it put forward to the Special Referee on all four elements or factors required of a party seeking to be relieved from the entry of default and default judgment under Rule 60(b), SCRCP, notwithstanding the fact that the Special Referee neither cited to nor analyzed the evidence other than GALIC's reasons for its failure to act promptly. *See* App. Br. at pp.19-24; Order **(R.p.)**; *see also McClurg v. Deaton*, 380 S.C. 563, 573,

671 S.E.2d 87, 93 (Ct. App. 2008) ("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."), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011); *Bowers v. Bowers,* 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991) (holding that a party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle it to relief); *Hillman*, 347 S.C. at 256, 554 S.E.2d at 429 ("[Rule 60(b)(1)] is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met.").

Notwithstanding GALIC's presentation of evidence, Respondents do not attempt to challenge or otherwise contradict GALIC's assertions that it timely filed its motion for relief, that it has advanced a meritorious defense to liability, and that Respondents will suffer no prejudice from a hearing on the merits of the underlying claims. In fact, rather than attempt to refute the evidence presented by GALIC, Respondents instead dedicate an entire section of their brief (Resp. Br. at pp.15-16, Section II) to confirming that no contrary arguments have or will be advanced. Respondents instead attempt to excuse the Special Referee's failure to evaluate all of the presented evidence by citing only to appellate court opinions which resolve a dispositive issue and thereafter decline to address any remaining issues in the appeal. *E.g. Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating appellate court need not address remaining issues when disposition of prior issue is dispositive). Left unaddressed, however, is a trial court's obligation and directive to consider all of the elements or factors established by our appellate courts, prior to going against the clearly articulated policy of "favor[ing] trial of issues on merit over securing judgment by slight technicalities." *Columbia Pools*, 288 S.C. at 61, 339 S.E.2d 525.

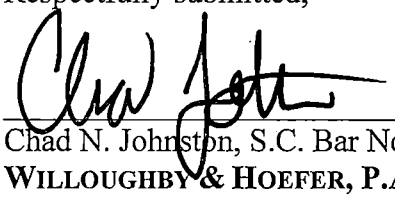
In light of the fact that Respondents did not challenge GALIC's presentation of evidence on the remaining Rule 60(b) factors below and have conceded these issues on appeal, judicial economy supports this Court's confirmation of the sufficiency of GALIC's evidence on those factors and a determination that it is entitled to relief from judgment. *See S.E. Hous. Found.*, 380 S.C. at 636, 670 S.E.2d at 688 (invoking judicial economy to address the merits of the arguments challenging the grant of a Rule 60(b) motion "in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)") (quoting *Edge*, 366 S.C. at 517, 623 S.E.2d at 390).

CONCLUSION

As explained above, Respondents' brief provides 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. In addition, Respondents' attempt to prevent this Court's consideration of GALIC's evidence of mistake, inadvertence, or excusable neglect is unavailing, as no contemporaneous objection to the Special Referee's consideration of the evidence was lodged, and the Rules do not contemplate allowing a winning party to advance new arguments on appeal to reverse a trial court's evidentiary decisions below. Further, the Special Referee's application of a heightened legal standard to its determination of relief under Rule 60(b) was improper as a matter of law, as it imposed additional arbitrary and capricious hurdles to its consideration for relief, while also employing a sophistication test against GALIC based on its status as an insurance company. Finally, GALIC's evidence of mistake, inadvertence, or excusable neglect was uncontested, including its evidence as to all of the elements or factors for relief under Rule 60(b); consequently, the Special Referee

abused its discretion in failing to provide GALIC relief from default and the Order should be reversed and this matter should be remanded to the Special Referee for a hearing on the merits.

Respectfully submitted,



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March 1, 2019
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

Appellate Case No. 2018-001808
Trial Court Case 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 Which Great American Life Insurance Company is..... Appellant.

PROOF OF SERVICE

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Initial Reply Brief of Appellant Great American Life Insurance Company** by depositing the same in the U.S. Mail to the following:

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March 1, 2019

VIA HAND DELIVERY
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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 Reply Brief of Appellant Great American Life Insurance Company** in the above-captioned matter. 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 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

Enclosures

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