

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

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.

**RESPONSE TO GREAT AMERICAN LIFE INSURANCE COMPANY'S
MOTION FOR LEAVE TO FILE SUPPLEMENTAL RULE 60(B) MOTION
AND MOTION TO REMAND**

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S.C.R.C.P., Rule 60(b)(3)	<i>passim</i>

Respondents First-Citizens Bank & Trust Company (“First Citizens”) and Sadie M. Murvin (together, “Respondents”) hereby respond to Appellant Great American Life Insurance Company’s (“Great American”) Motion for Leave to File Supplemental Rule 60(b) Motion and Motion to Remand. First Citizens and Sadie M. Murvin oppose Great American’s improper attempt to seek to set aside the default judgment against it during the pendency of this appeal on the exact same underlying facts.

STATEMENT OF ISSUES RELEVANT TO MOTION

Great American asks this court to permit it to return to the Circuit Court and, for the second time, seek to set aside the entry of default and default judgment against it. Great American is currently appealing the Circuit Court’s denial of its first Motion for Relief from Default Judgment. Just like it did in its first failed attempt, Great American seeks to justify its errors by pointing out that the operative complaint included an incorrect annuity contract number and contained the printout of the wrong annuity policy. This time, Great American calls it “new information” because Respondents’ brief on appeal acknowledged the incorrect policy number and policy printout. But Respondents have never denied these facts. In fact, the mistaken policy number was acknowledged and discussed by Respondents, Great American, and the Circuit Court in connection with the first Motion for Relief from Default Judgment. Not only that, the same two facts (the mistaken policy number and wrong policy printout) formed the foundation of Great American’s first attempt to seek relief from default judgment. Great American’s attempt to repackage the same information for a redo in the circuit court while its appeal from the first denial is pending should be denied.

ISSUE: Should Great American be permitted to assert additional Rule 60 Motions in the Circuit Court during the pendency of this appeal when the Motions are based on the same facts relied upon in Great American's first Motion for Relief for Default Judgment, which was denied and is currently on appeal before this Court?

STATEMENT OF RELEVANT FACTS

Respondents First-Citizens Bank & Trust Company and Sadie M. Murvin 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, 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, Complaint) (Order Denying Mot. to Vacate, p 2). 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 Service). 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, para. 7.)

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.)

Prior Consideration of Great American's Purported "New" Information

In the Circuit Court, Great American filed a Memorandum in Support of its first Motion to Vacate Default Judgment. (Memorandum in Support of Great American's Mot. to Vacate Default Judgment). In explaining to the Court what contributed to its failure to respond to the complaint, Great American stated that it "thoroughly reviewed the Complaint and noticed several inconsistencies. First, Lonnie B. Murvin's alleged contract number mentioned in ¶5 of the Complaint is not a Great American contract number, nor is the number's numeric sequence one used by Great American. Second, Exhibit A of the Complaint, referred to in ¶5 as a copy of the contract, is in fact a statement from Midland National Life Insurance Company which goes by the acronym "MNL".¹ (Memorandum in Support of Great American's Mot. to Vacate Default Judgment, p. 2). In explaining its "[r]easons for the failure to act promptly," Great American explains it "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 litigant's confusion regarding the acronym "MNL." (Memorandum in Support of Great American's Mot. to Vacate Default Judgment, p. 4).²

¹ Great American's Memorandum does not address why Great American did not raise these issues in a response to the Amended Complaint and instead chose to ignore the Amended Complaint altogether. In fact, through all the briefing and pleadings by Great American, it has never explained its admittedly conscious decision to ignore the lawsuit altogether.

² Contrary to Great American's claim in its Reply Brief, Respondents raised in the lower court Great American's failure to provide any actual evidence of its mistake. See fn. 2 to Memorandum in Opposition to Motion to Set Aside Default Judgment, ("There is NO evidence in the record regarding the allegations that Great American made a 'good faith mistake.' Allegations in a memorandum, unsupported by any evidence, is not a prima facie showing of anything.")

Great American also included a Proposed Answer as an exhibit to its Motion to Vacate Default Judgment. The first time it sought to vacate the default judgment against it, Great American stated “Defendant admits...that Defendant sold to Lonnie B. Murvin a single premium deferred annuity contract [sic]. However, Defendant denies that the annuity contract sold to Lonnie B. Murvin is number 8500457055.” Importantly, Great American addressed the following allegations: “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.” It responded, “Defendant admits, upon information and belief, the allegations contained in Paragraph Fourteen of the Amended Complaint.” (Proposed Answer of Defendant Great American Life Insurance Company, Ex. B to Motion to Vacate Default Judgment, ¶ 14.)

First Citizens and Sadie Murvin submitted a Memorandum in Opposition to Defendant’s Motion to Vacate Default Judgment. It, too, addressed the wrong contract number issue, arguing “[s]imply checking Great American’s computer system and determining that the annuity number was not one of their system’s number, without even bothering to check the name of the insured is careless and should not be used as an excuse to set aside a default judgment.” (Memorandum in Opposition to Defendant’s Motion to Vacate Default Judgment, p. 6.)

The Special Referee’s Order Denying Defendant’s Motion to Vacate Default Judgment likewise focused on the wrong contract number issue, noting that “[t]he Defendant contends that they looked at the Amended Complaint and determined that the referenced annuity was not issued by them, and that they were named as a party Defendant by mistake or confusion....Simply

checking Great American's computer system and determining that the annuity number was not one of their system's number, without even bothering to check the name of the insured is careless and is not an excuse sufficient to set aside a default judgment." (Order Denying Defendant's Motion to Vacate Default Judgment, p. 6.)

With the parties' and the Court's attention on the mistaken policy number and wrong printout attachment to the Amended Complaint, the Special Referee denied Great American's Motion to Vacate Default Judgment under Rule 60(b)(1), and Great American appealed.

ARGUMENT

Great American consciously ignored a civil action filed against it because, according to arguments of its counsel, it did not believe it had a policy with the named Plaintiff. But Great American, through briefing and argument at the trial court and on appeal, has never explained why it believed ignoring a duly served lawsuit was an appropriate response. Without such explanation, the Special Referee denied Great American's Motion to Vacate Default Judgment under Rule 60(b)(1). Unhappy with its loss, Great American appealed the Special Referee's decision. Now, with the appeal pending, Great American asks this Court for leave to present the exact same information to the Special Referee, this time under Rule 60(b)(2) and (3) of the South Carolina Rules of Civil Procedure. Great American's request for leave should be denied.

I. Great American's purported "new information" was previously presented to the trial court.

Great American seeks to reappear in the trial court during the pending appeal on the basis of "new information" purportedly learned in briefing. Not only was this claimed "new information" previously before the trial court, it formed the foundation of Great American's request for relief. Nor was Great American or the Court misled by an honest mistake in an affidavit

submitted by Respondents in support of its motion for default judgment. Finally, even if leave were granted, Great American cannot satisfy the requirements of Rule 60(b)(2) and (3).

a. The purported “admission” in Respondent’s Response Brief is not new information.

Great American claims that Respondents’ acknowledgment of the mistaken policy number and incorrect policy printout in briefing on appeal is “new information.” It is not. Respondents acknowledged the mistaken policy number in their Memorandum in Opposition to Motion to Vacate Default Judgment. Respondents argued, “[s]imply checking Great American’s computer system and determining that the annuity number was not one of their system’s number, without even bothering to check the name of the insured is careless and should not be used as an excuse to set aside a default judgment.” (Memorandum in Opposition to Defendant’s Motion to Vacate Default Judgment, p. 6.)

More importantly, Great American previously based its request for relief under Rule 60(b)(1), SCRCF, on the very information it now claims supports Motions under Rule 60(b)(2) and (3). When it last explained its “[r]easons for the failure to act promptly,” Great American told the Special Referee it “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 litigant’s confusion regarding the acronym “MNL.” (Memorandum in Support of Great American’s Mot. to Vacate Default Judgment, p. 4). This information—that the Amended Complaint contained the incorrect contract number and the attachment of the wrong policy—was the only information or argument offered by Great American in support of claim of mistake and excusable neglect under Rule 60(b)(1). To claim that these facts, or Respondents’ “acknowledgement” of them, are “new information” completely ignores the history of this case, in which Great American relied exclusively on these very facts in the trial court.

b. The King Affidavit contained an honest mistake that did not confuse or mislead the Court or Great American.

Because Great American ignored the lawsuit against it instead of answering and notifying Respondents of the issue, Respondents were not notified of the mistaken policy number and policy printout until those issues were raised by Great American's counsel in its memorandum to the Special Referee. By that time, Respondents had secured the default judgment. Included in its effort to secure a default judgment, Respondents submitted an affidavit of Suzanne King, Esq., that referenced the annuity policy and explained that a copy of the policy was attached to the Amended Complaint. (Affidavit of Suzanne B. King, Esq.) This honest mistake had no bearing or effect on the proceedings or decision by the Special Referee. By the time the Special Referee entered his Order Denying Motion to Vacate, the facts in question had been offered by counsel for Great American in argument in its Memoranda and were discussed in the Special Referee's Order when he noted, "[t]he Defendant contends that they looked at the Amended Complaint and determined that the referenced annuity was not issued by them, and that they were named as a party Defendant by mistake or confusion....Simply checking Great American's computer system and determining that the annuity number was not one of their system's number, without even bothering to check the name of the insured is careless and is not an excuse sufficient to set aside a default judgment." (Order Denying Defendant's Motion to Vacate Default Judgment, p. 6)

Nor was Great American confused or misled. In seeking to vacate the Motion for Default Judgment against it, Great American filed the answer it proposed to file if its motion were to be granted. Importantly, Great American addressed the following allegations: "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.” It responded, “Defendant admits, upon information and belief, the allegations contained in Paragraph Fourteen of the Amended Complaint.” (Proposed Answer of Defendant Great American Life Insurance Company, Ex. B to Motion to Vacate Default Judgment, ¶ 14.)

These documents demonstrate a critical fact—no one, including Great American, read the Amended Complaint and denied the fact that Lonnie B. Murvin had an annuity with Great American with a value of approximately \$136,000.00 payable to the Estate of Lonnie B. Murvin. The Amended Complaint alleged this fundamental fact, and this fundamental fact was true. The mistake in the Amended Complaint—including the wrong specific policy number and attaching the wrong policy printout—did not affect both Great American’s and the Court’s knowledge of this fundamental fact, nor did the corresponding honest mistake in the affidavit of Suzanne King, Esq. Great American’s claims that Respondents engaged in some effort to “profit from the misrepresentation in their pleadings” is completely disconnected from the reality of what occurred.

c. Even if leave were granted, Great American cannot meet the requirements of Rule 60(b)(2) and (3).

Great American tellingly offers no legal support in connection with its claim that purported “new information” justifies a new Rule 60(b)(2) and (3) motion before the trial court during the appeal of the trial court’s denial of its first Rule 60(b)(1) motion. This is understandable given that the rules and case law defeat Great American’s claim that it has any “new information” in the first place.

“Rule 60(b)(2), SCRCP, clearly states new evidence must be that ‘which by due diligence could not have been discovered in time to move for a new trial....’” *Fassett v. Evans*, 364 S.C. 42, 50, 610 S.E.2d 841, 845 (S.C. App. 2005) (holding that Rule 60(b)(2) relief from judgment is

improper where it is based “not on newly discovered evidence, but merely newly presented evidence.”);

Another way of stating Rule 60(b)(2)’s requirements is set forth in the case law. A party moving for relief under Rule 60(b)(2) must establish that the newly discovered evidence “(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.” *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 638, 670 S.E.2d 680, 689 (Ct. App. 2008), citing test from *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005).

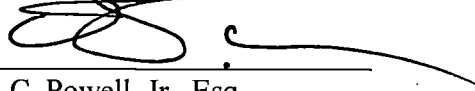
Great American fares no better under Rule 60(b)(3). Rule 60(b)(3) permits relief “only where the misconduct prevented the moving party from fully presenting its case.” *Bowman v. Bowman*, 357 S.C. 146, 153, 591 S.E.2d 654, 657 (Ct. App. 2004) (internal citations and quotations omitted) (noting other cases finding that the questioned behavior must have prevented “the losing party from fully and fairly presenting its case or defense.”)

Here, the two facts that Respondents “admitted” to in briefing on appeal—that the policy number in the Amended Complaint and policy printout attached thereto were incorrect—formed the foundation of Great American’s original Rule 60(b)(1) Motion. Thus, under Rule 60(b)(2), not only could Great American have discovered these facts, it positively did discover those facts and relied on them to seek relief. Considering what is required under Rule 60(b)(3), Great American already fully presented its arguments relying on these two facts to the Court, as noted in its Memorandum in Support of Motion to Vacate. Great American thus has no likelihood of success on its Motion under Rule 60(b)(2) and (3), even if this court permitted it to present its arguments to the Special Referee for a second time.

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. For the reasons set out herein, Great American's request to present the same information to the Special Referee for a second time should be denied.

Respectfully submitted,



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This the 21st day of March 2019

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

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

v.

Miranda Libby Murvin, a/k/a Miranda Libby Murvin Zimmerman and
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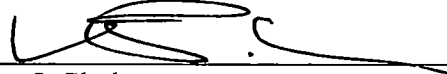
Of whom Great American Life Insurance Company isAppellant.

PROOF OF SERVICE

The undersigned certifies that she has served the **Response to Great American Life Insurance Company's Motion for Leave to File Supplemental Rule 60(b) Motion and Motion to Remand** on Appellant, Great American Life Insurance Company, by depositing a copy of it in the U.S. Mail, postage prepaid, on March 21, 2019, addressed to its attorneys as follows:

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March 21, 2019

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SC Court of Appeals

VIA HAND DELIVERY

Jenny Abbott Kitching

Clerk of Court

S.C. Court of Appeals

1220 Senate Street

Columbia, SC 29201

**Re: 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 the Appellant
Appellate Case No. 2019-001808, Our File No. 3-2951.2**

Dear Madam Clerk:

Please find attached Respondents' Response to Great American Life Insurance Company's Motion for Leave to File Supplemental Rule 60(b) Motion and Motion to Remand, along with a Proof of Service, for the above-referenced matter. Please let me know if you have any questions or concerns.

With my kindest regards, I am,

Sincerely,



Chelsea J. Clark, Esq.

CJC/hos

Enclosures

cc: Chad N. Johnson (by US Mail)
Robert W. Humphrey (by US Mail)