

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
Case No. 2017-CP-13-00804

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APR 02 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 isAppellant.

**SUPPLEMENTARY RETURN TO GREAT AMERICAN LIFE INSURANCE
COMPANY'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE
SUPPLEMENTAL RULE 60(b) MOTION AND MOTION TO REMAND**

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SUPPLEMENTAL RETURN WITH EXHIBIT

Respondents First-Citizens Bank & Trust Company and Sadie M. Murvin (“Respondents”) file this return to the reply memoranda of Appellant Great American Life Insurance Company (“Appellant”) in support of its Motion for Leave for the sole purpose of demonstrating that Respondents have never misrepresented to this Court the existence of documents or evidence presented to the lower court.¹ The document contested in Appellant’s Reply—the memorandum of Plaintiffs handed up to the special referee in the Rule 60 motion hearing underlying this appeal—is attached hereto as **Exhibit A**.

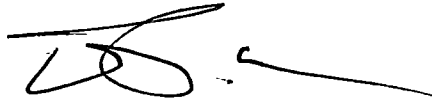
This exhibit is not offered as part of the Record on Appeal. Trial counsel Kevin Barth represents as an officer of the court that this memorandum was provided to the special referee and trial counsel for Appellant during the Rule 60 hearing below. As such, Respondents have not misrepresented the existence of any matter to the Court.² This document was not included in Respondents’ designation of matter, as Respondents are not substantively relying on the memorandum to demonstrate any matter to the Court related to the issues on appeal, but merely bring the memorandum to the Court’s attention for the purposes of Appellant’s Motion for Leave, as it relates to the arguments of counsel for both parties.

[signature page to follow]

¹ Respondents are aware that such a motion return is not provided for in the Court’s rules, but nevertheless respectfully request the Court accept this filing purely to clear any allegations that Respondents misrepresented to this Court that it had handed up a memorandum in opposition to Appellant’s motion to vacate during the hearing before the special referee. This supplemental return contains no argument in regards to the underlying Motion for Leave to file a supplemental Rule 60(b), SCRCF motion, and it does not and is not intended to address Appellant’s underlying argument that the Amended Complaint and Affidavit of Suzanne King allegedly contained misrepresentations. This filing is made with Appellant’s consent.

² Respondents recognize that appellate counsel of Great American may not have been previously aware of the document as it was handed up, rather than formally filed, given that the hearing was before a special referee and prior to the introduction of e-filing in Darlington County.

Respectfully submitted,



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This the 2nd day of April 2019

EXHIBIT A

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD)	CASE NO. 17-CP-13-804
)	
First-Citizens Bank & Trust)	
Company and Sadie M. Murvin)	
)	
Plaintiffs,)	
)	MEMORANDUM IN OPPOSITION
v.)	TO DEFENDANT'S MOTION TO
)	VACATE DEFAULT JUDGMENT
)	
Miranda Libby Murvin, a/k/a)	
Miranda Libby Murvin)	
Zimmerman and Great American)	
Life Insurance Company,)	
)	
Defendants.)	

This action was filed by the Plaintiffs on December 18, 2017 against the above-referenced Defendants. The Complaint alleges causes of action against the Defendant, Great American, for breach of contract, insurance bad faith, breach of covenant of good faith and fair dealing and conversion. It also alleges a cause of action against the Defendant, Murvin, for conversion. Clerical errors were corrected with the filing of an Amended Complaint on January 17, 2018. The Defendant, Murvin, was personally served with the Amended Complaint on January 24, 2018 and has not filed any responsive pleadings nor made an appearance. Defendant, Murvin is thus in default.

The Defendant, Great American, was properly served through the South Carolina Department of Insurance on January 25, 2018. On that same date, the South Carolina Department of Insurance

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mailed a certified letter to Great American notifying them that service had been accepted on their behalf. A copy of that letter was filed with the Clerk of Court for Chesterfield County on February 9, 2018. On March 5, 2018, Plaintiff filed a Motion for Entry of Default by Clerk, which requested that judgment be entered for the liquidated amount outlined in the breach of contract action only. In addition, it was requested that an Order of Default be entered on the remaining unliquidated damage causes of action and that a hearing be set before a duly appointed Special Referee. An Entry of Default was entered by the Clerk and filed on March 5, 2018.

A Judgment for Plaintiffs and Order for Default and for Hearing on Damages was filed by Honorable Paul M. Burch on March 22, 2018. The Judgment on the liquidated amount was against both Defendants in the sum of \$136,000.00, both jointly and severally, and a Special Referee was appointed to conduct a damages hearing on the remaining causes of action.

This Order was mailed to Thomas Higgins, Senior Counsel for the Defendant, Great American. A Motion to Vacate Default Judgment was served upon Plaintiffs' counsel on April 13, 2018. The basis for this Motion, as stated in the Motion, is that the judgment should be set aside upon the grounds that the default judgment was the result of mistake, inadvertence or excusable neglect. The Motion does not detail the nature of the mistake,

inadvertence or excusable neglect nor has it been supported by testimony or the timely filing of an Affidavit.¹

APPLICABLE LAW

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 (2006). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct.App.1988). An abuse of discretion 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).

Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is "good cause." Rule 55(c), SCRPC. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the

¹ Defendant, Great American, served the undersigned with an Affidavit and Memorandum on Tuesday July 10, 2018. Plaintiffs object to the court considering this Affidavit in that it was not filed in a timely manner per S.C.R.C. P. Rule 6(d) which requires Motions supported by Affidavits be filed and served with Affidavit attached.

default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App. 1989).

Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRPC. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App.1987). Rule 60(b) requires a more particularized showing of "mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b), SCRPC. The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default. The Defendant's Motion in this case, as it relates to the judgment that has been entered against them for \$136,000.00, is pursuant to Rule 60(b).

The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief. See 49 C.J.S. Judgments § 297, at 545 (1947) ("The party who seeks to have a judgment opened or set aside must assume the burden of proving the facts essential to entitle him to the relief asked."); 46 Am.Jur.2d Judgments § 780, at 940 (1969) ("The general rule is 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."); cf. 7 J. Moore & J. Lucas, Moore's Federal Practice p 60.24, at 60-217 (1990). 403 S.E.2d 127. Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (1991).

FACTS IN THIS MATTER

The Defendant, Great American, alleges that it should be allowed out of default based upon mistake, inadvertence or excusable neglect. Plaintiff would call to the Court's attention that this Defendant is an insurance company, whose daily business duties include dealing with their involvement in civil litigation. The 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 on the part of the Plaintiff because that has happened in the past. They are an insurance company and should have been diligent enough to recognize that the insured referenced in the Amended Complaint was their insured and that Great American was a proper party to this lawsuit. Even if this Defendant had been named by mistake, the

insurance company and its attorneys should know that the proper method for addressing the matter would be to file an Answer and/or a Motion to Dismiss, not to simply ignore it.

Plaintiffs concede that the Defendant's attorney acted promptly in filing its Motion. However, the fact remains that Great American has simply failed to present a valid reason for its failure to timely file an Answer.,,

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 should not be used as an excuse sufficient to set aside a default judgment. Ignoring the matter altogether is even more careless.² Great American certainly should not be rewarded for such careless behavior. See *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 456 S.E.2d 897 (1995) ("Losing a summons and complaint within the corporation is not a ground to set aside a default judgment"); *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987) (leaving the suit papers in the trunk of defendant's car would not, alone meet the requisite showing for good cause). In-house attorneys for insurance companies deal with litigation every day and should be expected to be fully aware of the consequences of not

² Plaintiffs note that the Affidavit of Keith Lindsay, even if considered by the court, does not allege a reason the Amended Complaint was not answered. It addresses the meritorious defense factor only. There is NO evidence in this 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.

filing responsive pleadings to a summons and complaint even if that attorney believes his company is not the appropriate Defendant. See *Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986) (default upheld where court rejected businessman's claim that he did not know default would be taken against him if he failed to answer).

"[A] party has a duty to monitor the progress of his case." *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct.App.1988). "It is always a matter of regret that a party should not have his day in court. However, ... [where] the appellant was duly served with the summons and complaint, [i]t was his duty to answer the complaint. ... [Therefore,] [h]e must suffer the consequence of his failure to answer." *Williams v. Ray*, 232 S.C. 373, 383-84, 102 S.E.2d 368, 373 (1958); see also *Bissonette v. Joseph*, 170 S.C. 407, 170 S.E. 467 (1933) (refusing to vacate a default judgment on the ground of excusable neglect where the defendant in an automobile collision case forwarded the summons to his insurance carrier which then failed to serve notice of appearance until after the plaintiff had obtained judgment).

"A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court." If the Defendant was properly served with the Summons and Amended

Complaint in a way "that every intelligent person understands (what) is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else." *Griffin v. Capital Cash*, 310 SC 288, 423 SE 2d 143. (Ct. App. 1992).

The case at bar is similar to the facts in *Ledford v. Pennsylvania Insurance Company*, 267 S.C. 671, 230 S.E.2d 900 (1976). In *Ledford*, the Defendant was properly served with the Summons and Complaint. The insurance company admittedly saw the Summons and Complaint but took no action and failed to answer and was subsequently held in default. The Defendant's explanation for "excusable negligence or mistake" is that the Defendant's in-house counsel assumed the matter had been referred to local counsel and that an Answer had been filed. The attorney had reviewed the file and made a mistaken assumption. The Court reversed the granting of the Defendant's Motion to Vacate Default and noted "even a cursory examination of these papers would readily have disclosed the fallacy of the assumption which he made. We are of the opinion that (this conduct) under these circumstances was unreasonable, there being a total absence of any justification for the conclusion he reached". In other words, the court clearly found that the Defendant's mistaken assumption regarding the matter was not a

sufficient excuse to allow the court to set aside a default judgment.

CONCLUSION

Based upon the fact that the Defendant, General American Insurance Company, was duly and properly served with the Summons and Amended Complaint and failed to respond in a timely fashion for no sufficient reason, Plaintiffs request that this Court deny the Defendant's Motion to Vacate Default Judgment.

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By:



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July 11, 2018

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
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v.

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Of whom Great American Life Insurance Company is Appellant.

PROOF OF SERVICE

The undersigned certifies that she has served Respondent's Supplemental Return on Appellant, Great American Life Insurance Company, by depositing a copy of it in the U.S. Mail, postage prepaid, on April 2, 2019, addressed to its attorneys as follows:

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Robert W. Humphrey
Willoughby & Hoefler, PA
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Chelsea J. Clark

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**OF COUNSEL

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April 2, 2019

VIA HAND DELIVERY

Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

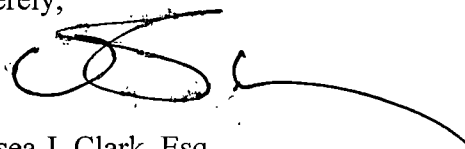
**Re: First Citizens Bank & Trust Company and Sadie M. Murvin, Respondents,
v. Miranda Libby Murvin, a/k/a Miranda Libby Murvin Zimmerman, and
Great American Life Insurance Company, Defendants, Of Which Great
American Life Insurance Company is the Appellant
Appellate Case No. 2019-001808, Our File No. 3-2951.2**

Dear Madam Clerk:

Please find attached Respondents' Supplemental Return to Great American Life Insurance Company's Reply in Support of Motion for Leave to File Supplemental Rule 60(b) Motion and Motion to Remand with Exhibit and Proof of Service. We realize this return is not provided for in the rule on motions; however, we have the consent of the Appellant and request that the return be filed nonetheless. An explanation is included in the filing. Please call me with any questions or concerns. My direct line is 803-744-0639.

With my kindest regards, I am,

Sincerely,



Chelsea J. Clark, Esq.

CJC/hos

Enclosure

cc: Chad N. Johnston (by US Mail and Email)
R. Walker Humphrey II (by US Mail and Email)