STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2014-CP-08-2494
ANNA ANGELACCI, as guardian of K. B., a minor, Plaintiff, v. E. U., a minor, Travis O. Felkel, and Ginger G. Ulery, Defendants.	ORDER DENYING NATIONWIDE MUTUAL FIRE INSURANCE COMPANY'S MOTION TO INTERVENE AND MOTION TO SET ASIDE DEFAULT JUDGMENT

This matter came before me on Nationwide Mutual Fire Insurance Company, Inc.'s ("Nationwide") motion to intervene in this action and motion to set aside the default judgment. Nationwide and Plaintiffs briefed the motions extensively, and I presided over a hearing on December 7, 2015, and heard arguments from counsel for Plaintiffs and Nationwide and considered exhibits submitted by both parties. In addition, the minor defendant's guardian ad litem appeared on his behalf. After considering the written submissions and oral arguments of Nationwide and Plaintiffs, for the reasons set forth below, I find that Nationwide has not established a right to intervene in this litigation, and, therefore, deny its motion to intervene. Although I am denying its motion to intervene, which automatically precludes success on the motion to set aside default judgment and entry of default, for the sake of judicial economy, I have considered that motion on the merits, and find that even if Nationwide were allowed to intervene, it cannot meet its burden to set aside default judgment or entry of default, and, therefore, I deny its motion to set aside default on that basis as well.

FACTUAL BACKGROUND

E.U., a minor over the age of fourteen, Travis Felkel (E.U.'s stepfather) and Ginger Ulery (E.U.'s mother) (hereinafter "Ulery-Felkel family") are the named defendants in this lawsuit. The Ulery-Felkel defendants were insured by Nationwide through a homeowners insurance policy sold to them by John T. Herndon, III at the Herndon Insurance Agency. Herndon was a captive agent for Nationwide, and was specifically named in the Policy as Nationwide's agent, to whom notice of loss claims could be provided by the insured. *See* Deposition of John Herndon.

According to Affidavits of Service that were originally filed with the Affidavit of Default, subsequent Affidavits of Travis Felkel and the process server, the Ulery-Felkel Defendants were served on December 2, 2014. Shortly thereafter, Travis Felkel personally delivered the Summons and Complaint to John Herndon at his Charleston office. Herndon admits that Felkel hand-delivered the lawsuit to him before Christmas, and that he made a copy of the lawsuit papers.

Despite having notice of the lawsuit through its agent John Herndon, Nationwide did not defend or investigate the lawsuit, and failed to advise its insureds that it would not be defending the lawsuit. The lawsuit was never answered, the clerk of court signed an entry of default and referral to a special referee was ordered. The Special Referee entered default judgments against each of the three defendants, jointly and severally, in the amount of $5,150,000 in favor of Plaintiffs Anna Angelacci and K.B., a minor over the age of fourteen.

After default judgments were entered against the Ulery-Felkel defendants, they assigned any and all claims they may have against Nationwide for mishandling of the lawsuit to the Plaintiffs. Thereafter, on July 27, 2015, the Plaintiffs, in their own right and as assignees of Travis Felkel, Ginger Ulery and E.U., filed suit against John T. Herndon, Herndon Insurance Agency, Inc., Nationwide Mutual Ins. Co., and Nationwide Mutual Fire Ins. Co. alleging

negligence, bad faith, breach of contract and misrepresentation arising out of Nationwide's failure to defend its insureds in this action.[1] Nationwide was served with this bad faith lawsuit on July 28, 2015. Nationwide issued a full reservation of rights letter to its insureds and then moved to intervene and set aside default. The individual defendants have not moved to set aside the default judgment nor have they challenged service of process or the validity of the judgments in any way.

LEGAL ANALYSIS

I. MOTION TO INTERVENE

Nationwide is not a party to this action. Nationwide's insureds hand-delivered a copy of the lawsuit to Nationwide's designated agent within thirty days of being served, but Nationwide failed to file an Answer on their behalf. This failure resulted in entry of default and default judgment against its insureds. As a non-party, Nationwide has no standing to challenge this default and so it has moved to intervene in the action.

Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. *Ex Parte Horry County State Bank,* 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004)(citing *Black's Law Dictionary* 826 (7th ed. 1999)). Intervention may be of right or permissive, and is governed respectively by Rule 24(a) and (b), SCRCP, both of which are modeled after the federal rule 24. *Id.* Generally, intervention should be liberally granted, but "this does not mean that intervention should always be granted." *Id.* at 507, 604 S.E.2d at 725. Instead, the court must consider the

[1] *See Anna Angelacci, individually and as guardian of K.B., a minor over the age of fourteen, as assignee of Travis Felkel, Ginger Ulery and E.U., a minor over the age of fourteen, by his Guardian ad Litem Shannon P. Jones v. John T. Herndon, III, Herndon Insurance Agency, INc. Nationwide Mutual Insurance Company, and Nationwide Mutual Fire Insurance Company,* Case No. 2015-CP-08-1759. For ease of reference, this lawsuit will be referred to as the bad faith litigation.

pragmatic consequences of a decision to permit or deny intervention, and must examine each case in the context of its unique facts and circumstances. *Id.* (citing *Berkeley Elec. Coop, Inc. v. Town of Mt. Pleasant,* 302 S.C. 186, 394 S.E.2d 712(1990)). A majority of jurisdictions refuse to allow insurers to intervene in the underlying tort suit against their insureds because other mechanisms, like declaratory judgment actions, exist to protect the insurers' rights vis-à-vis coverage issues. 1 *Law and Prac. of Ins. Coverage Litig.* § 12:17. Based on applicable case law and the specific facts of this case, I find that Nationwide has not established a right under Rule 24, SCRCP, and so deny its motion to intervene.

A. Intervention as of Right Under Rule 24(a)

The courts have established a four-part test for intervention under Rule 24(a)(2). A party must establish each of the following: (1) timely application; (2) an interest relating to the property or transaction which is the subject of the action; (3) that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; ***and*** (4) that its interest is inadequately represented by the parties. *Ex Parte Horry County State Bank.*

The majority of courts that have analyzed the ability of an insurer to intervene in underlying tort litigation pending against their insureds under this test have denied insurers motions to intervene based on the second prong, which requires that the insurer have an "interest" in the litigation. The Supreme Court of South Carolina has followed this trend. In 2007, our Court denied an insurer's motion to intervene in an "underlying suit" on grounds that the insurer could not satisfy the second prong of the above cited test, as it did not have "an interest relating to the property or transaction which is the subject of the action" as required by Rule 24(a)(2). *Ex Parte Government Employee's Insurance Company*, 373 S.C 132, 138, 644 S.E.2d 699, 702 (2007) (citing *Bailey v. Bailey,* 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)).

In that case, GEICO moved to intervene in a family court action instituted to obtain an order validating the common law marriage of an individual, Ronnie Cooper, to a GEICO insured driver, Yolanda Goethe. *Id.* at 134, 644 S.E.2d at 700. Cooper was injured in an accident and sought to stack underinsured motorist coverage provided by Goethe's GEICO policy on grounds that he was a Class I insured as Goethe's common law spouse. *Id.* After GEICO denied Cooper's claim to stack coverage, Cooper filed the family court action seeking an order validating his common law marriage to Goethe. *Id.* Upon review, the Supreme Court denied GEICO's motion to intervene, holding that GEICO "has no real interest in whether Cooper and Goethe have a valid common law marriage." *Id.* at 138, 644 S.E.2d at 702. Significantly, the Court went on to explain, "GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court." *Id.* at 138-39, 644 S.E.2d at 702 (emphasis added). Thus, even though GEICO argued that the decision of the family court "would impact GEICO's ability to protect its interests under the insurance policy issued to Goethe," the Supreme Court found any such interest was not "sufficiently related to the subject matter of the action" to warrant intervention. *Id.* at 134-35, 139, 644 S.E.2d at 700, 703.

The South Carolina Supreme Court's holding in the GEICO case is in line with the majority of federal courts, including the District of South Carolina among others, which have denied insurers the right to intervene in underlying tort suits on grounds that the insurers' interests are not sufficient to support intervention under Rule 24(a)(2), FRCP,[2] particularly where the insurer has reserved the right to deny coverage. *See, e.g., Travelers Indem. Co. v. Dingwell,* 884 F.2d 629 (1st. Cir. 1989); *Restor-A-dent Dental Laboratories, Inc. v. Certified Alloy*

[2] Rule 24, SCRCP, was based on the federal rule, and the language of both rules is identical. *See* Notes to Rule 24, SCRCP.

Products, Inc., 725 F.2d 871 (2d Cir. 1984); Lewis v. Excel Mechanical, LLC, 2013 WL 3762904 (D.S.C. 2013).

In the First Circuit's *Travelers* case, Travelers' insured, Richard Dingwell, owned and operated a plant in the business of cleaning petroleum and chemical storage tanks. Dingwell received a notice from the EPA that his plant was being shut down for illegal dumping at the site. *Travelers,* 884 F.2d at 631. In addition, Dingwell was notified, along with the generators and transporters of the waste to his facility, that he and his customers were Potentially Responsible Parties ("PRPs") under CERCLA, and were strictly, jointly and severally liable for all costs incurred in site investigation and clean up. *Id.* Travelers agreed to pay Dingwell's legal expenses in connection with these administrative proceedings, but expressly reserved their right to deny indemnification for any and all damages. *Id.* To avoid protracted litigation, Dingwell and the other PRPs signed a proposed consent decree with the EPA in which they were obligated to spend roughly $12.5 million in the clean-up effort. Some of the PRPs then sought to negotiate a settlement of their claims for contribution and indemnity against Dingwell. *Id.* Dingwell's insurers refused to participate in the negotiations, and reiterated their reservation of rights to deny coverage. *Id.* at 632. The negotiations went forward and Dingwell and the group of PRPs reached an agreement: Dingwell would assume 65% of the clean-up costs, join the Consent Decree and assign to the PRPs his indemnification rights against his insurers. *Id.* In return, the PRPs agreed to seek satisfaction of Dingwell's obligations solely from assets that might be available under his insurance policies. *Id.*

Subsequently, the PRPs filed suit against Dingwell, and the PRPs moved for consent judgment against him pursuant to the terms of their settlement agreement with him. Dingwell planned to consent to judgment, and the insurers filed a motion to intervene in order to oppose the entry of judgment. *Id.* at 632. The district court denied the insurers' motion to intervene

both as of right and permissively, and the First Circuit affirmed that decision on appeal. In affirming the denial of the motion to intervene, the First Circuit held "[w]e agree with the district court's conclusion that the insurers failed to satisfy the second requirement – an interest relating to the property or transaction which is the subject of the action." *Id.* at 638. Although the court recognized that the insurers had a potential interest in minimizing Dingwell's liability to the PRPs, it was a ***contingent*** interest. "When the insurer offers to defend the insured but reserves the right to deny coverage, . . . the insurer's interest in the liability phase of the proceeding is contingent on the resolution of the coverage issue." *Id.* at 639. As it was merely contingent, the First Circuit found it was "not cognizable for the purposes of Rule 24(a)(2)." *Id.*

Significantly, the First Circuit found the insurers' interest to be "contingent" even though its insured was consenting to judgment and the amount of damages would thereby be fixed, just as damages would be for a party in default. The "contingency" lies in whether or not an insurer, which has reserved its rights to deny coverage, will be obligated to pay those damages under the terms of its policy, and that question is appropriately addressed in separate coverage litigation, not in the underlying tort suit.

Recently, the District of South Carolina followed this line of cases when it denied an insurer's motion to intervene in an underlying tort suit on the same grounds after the insurer reserved its rights to deny coverage, finding that the insurer's interests in the tort litigation were contingent on the outcome of the coverage dispute and thereby insufficient. *Lewis. v. Excel Mechanical, LLC,* 2013 WL 3762904 (D.S.C. 2013).

> Penn National does not have an interest in the subject matter of this action, that is, [Defendant's] allegedly negligent operation of the Boat, that, in turn, led to [Plaintiff's] tort claim for damages against Defendants. Instead, Penn National's interest is in the amount it may have to pay . . . if Plaintiff wins. Stated differently, Penn National's interest is in how much of any future award may be attributable to damages contemplated by the policy.

Id. at 2 (emphasis added). The district court found the above-described interest was not cognizable for purposes of Rule 24.

In this case, I find that Nationwide is situated similarly to the insurers in the cases discussed herein. Nationwide's interest in the underlying tort action is not in the subject matter of that action, which relates to the negligence of its insured that caused injury to the plaintiff, but in the amount it ***may*** have to pay ***if*** its insureds prevail in the bad faith litigation. Because Nationwide has reserved its right to deny coverage altogether, its interest in the underlying litigation is contingent on the resolution of the coverage issue, just as the insurers' interest was contingent in *Travelers,* where the insurer had reserved its right to deny coverage. The fact that the amount of the judgment has been determined here by means of a default does not affect the contingency, just as the fact that the insurer had entered into a consent judgment did not affect the contingency of Travelers' interest in the underlying litigation. Similarly, as GEICO's interest in the *Goethe* case was in the financial implications of the family court's decision to recognize common law marriage, and, as such, was peripheral to the subject matter of the family court action and insufficient to warrant intervention, Nationwide's interest in the financial implications of the underlying suit here is peripheral and insufficient to warrant intervention.[3]

Based on the South Carolina authority and authority from the federal courts cited, Nationwide cannot meet its burden to establish it has a sufficient interest in the subject matter of this tort litigation to support intervention of right under Rule 24(a)(2).

B. Permissive Intervention under Rule 24(b), SCRCP

[3] Significantly, Nationwide has failed to cite a single South Carolina case in which the court has allowed an insurer to intervene in an underlying tort case. Nationwide cites to *McClurg v. Deaton,* 380 S.C.563, 671 S.E.2d 87 (Ct. App. 2008). In that case, the ***employer*** of the individual defendant (not the "carrier") moved to intervene because the employer was vicariously liable for the defendant employee's negligence, and both the employee and the employer then moved to set aside default. Accordingly, *McClurg* does not stand for the proposition that an insurer has a sufficient interest to intervene in an underlying tort suit.

Under Rule 24(b)(2), permissive intervention is appropriate where (1) "an applicant's claim or defense and the main action have a question of law or fact in common" ***and*** (2) intervention does not "unduly delay or prejudice" the rights of the original parties. Rule 24(b), SCRCP. The court has broad discretion in granting or declining to grant permissive intervention, and reversal of a denial of permissive intervention on grounds of abuse of discretion "'is so unusual to be unique.'" *Travelers,* 884 F.2d at 641 (citations omitted); *see also Excel Mechanical,* 2013 WL 3762904 (holding that the court enjoys broad discretion on the issue of permissive intervention).

Here, there is no question of law or fact in the underlying tort litigation that is common to Nationwide's claim that its policy does not cover Plaintiff's injuries. Nationwide is already a party to the bad faith litigation instituted by its insureds and will litigate any coverage defenses it has in that case. Just as its financial interest is "peripheral" to the underlying tort claims, so is any claim that Nationwide shares common questions of law or fact with those raised in the underlying suit.

Moreover, allowing Nationwide to intervene, after liability and damages have already been determined, would prejudice plaintiffs and, potentially, Nationwide's own insureds, as it could force them to oppose the insurer who may be inclined to contest their factual assertions to the extent those assertions impacted the insurer's coverage. *See Excel Mechancial.* In order to avoid this possibility as well as the injection of issues of insurance coverage into this underlying action, I exercise my discretion to deny permissive intervention as the courts did in *Travelers* and *Excel Mechanical* when faced with similar factual scenarios.

II. MOTION TO SET ASIDE DEFAULT

As discussed at-length above, I am denying Nationwide's motion to intervene. In light of that ruling, Nationwide has no standing to file a motion to set aside default, and, accordingly, its motion to set aside default is also denied. As the motion to set aside default was fully briefed and argued, however, for the sake of judicial economy, I have considered that motion on its merits regardless. Based on the facts presented, I find that Nationwide cannot meet the standard to set aside either default judgment under Rule 60(b) or entry of default under Rule 55(c), and, therefore, deny its motion to set aside default judgment and entry of default.

A. Nationwide Cannot Meet The Rigorous Rule 60(b) Standard For Setting Aside A Default Judgment When Its Agent Received The Summons and Complaint But Failed To Hire Counsel Or File An Answer On Behalf of Its Insured.

Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. 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) for an entry of default. *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E. 2d 885 (2009). The Rule 55(c) "good cause" standard for relief from entry of default requires the applicant to provide an explanation for the default and the reasons why vacation of the entry of default 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. *Sundown,* 383 S.C 607-08, 681 S.E.2d at 888.(emphasis added)(citing *Wham v. Shearson Lehman Bros., Inc.* 298 S.C. 462, 381 S.E.2d 499 (Ct.App. 1989)(hereinafter referred to as the "Wham factors"). It is not necessary for the trial court to make specific findings of fact for each factor if there is sufficient evidentiary support for the finding of lack of good cause. *Id.* (citations omitted).

After a default judgment has been entered, however, 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." *Id.* at 608, 681 S.E. 2d at 888-89. Indeed, "the different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default." *Id.* As noted in *Sundown*, if no satisfactory explanation is given, then there is no need to conduct the "good cause" analysis in the case of an entry of default or the more rigorous 60(b) factors in the case of a default judgment. *Sundown.* A motion to set aside default is addressed to the sound discretion of the trial court. *Id.*

In *Sundown*, the corporate defendant was served on August 28, 2001, notified its insurance agent of the lawsuit by phone on September 14, 2001, and sent its agent a copy of the lawsuit on October 1, 2001, after the Answer had become due. On October 2nd, the insurance agent requested an extension of time to respond to the complaint, but he was too late and default was entered that day. The defendant then moved to set aside entry of default, arguing that it had established "good cause" by showing that the default was caused by the negligence of its insurance agent and because (1) it promptly moved for relief; (2) it had a meritorious defense; and (3) plaintiffs would suffer no prejudice if the court set aside entry of default. *Sundown* (citing *Wham* factors).

The Supreme Court denied Defendant's motion to set aside the mere entry of default, holding that the insurance agent's negligence could not be a satisfactory explanation for the default based on the long-standing principle that the insurance company's negligence is imputed to the client: "the law is clear that an insurance company's misconduct is imputable to the client." *Id.* at 609, 681 S.E. 2d at 889. Based on these facts, the Court found that the defendant

did not meet "even the most minimal showing of good cause." *Id.* at 607, 681 S.E.2d at 888. The Court did not make specific findings regarding each of the three *Wham* factors, as a trial court is not required to do so "if there is sufficient evidentiary support [in] the record for the finding of lack of good cause." *Id.* at 608, 681 S.E.2d at 888.

Within a week of deciding the *Sundown* case, in *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E. 2d 263 (2009), the Court re-emphasized its holding that negligence of an insurance company to timely retain defense counsel and answer a complaint is imputed to a defaulting litigant and cannot constitute good cause to relieve the litigant from an entry of default under Rule 60(b). *See also* Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct.App.1987) (observing that the "courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant") and *Williams v. Vanvolkenburg*, 312 S.C. 373, 440 S.E.2d 408 (Ct.App. 1994) (imputing an attorney's negligence to a defaulting litigant).

In the present case, I find the insurer's conduct was at least as deficient as in *Sundown*. In *Sundown*, the insured placed the insurer on verbal notice of the lawsuit but did not provide a copy to the insurer until after the due date for the Answer had passed. Here, the insured hand-delivered a copy of the lawsuit to his Nationwide insurance agent John Herndon after he was served on December 2, 2014 sometime before Christmas, which would have been a week or more before an Answer was due.[4] Mr. Herndon testified that he was Nationwide's agent, that he made a copy of the lawsuit papers, and that delivery of the lawsuit constituted proper notice by the insured under the terms of the policy. He also testified that Nationwide owed separate duties to each of the insureds under the Severability clause of the policy and that after being served

[4] The factual findings in this section are based on the deposition testimony of Nationwide's agent John Herndon, which was made part of the record by Plaintiffs.

with the lawsuit on behalf of all three of the insureds who were living in the household he never took any steps to inform any of them that the lawsuit wasn't being defended or to protect them.

Sundown makes clear that under the circumstances before me, the test for relief is from entry of default, **not** the test for relief from default judgment. ("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.").

Even under the less rigorous standard for motions to set aside entries of default, under facts that are very similar to those of this case, our Supreme Court found the defendant could not establish the good cause necessary to set aside entry of default. *Sundown.* Likewise, I find that Nationwide's failure to answer the Complaint after the Complaint was hand-delivered to its captive agent was negligent, which is imputed to its insured, and that Nationwide has not provided a "satisfactory explanation" for default, as required by Rule 55(c) and *Sundown.* As Nationwide cannot satisfy even Rule 55's lesser "good cause" standard, I find that Nationwide has not established the more rigorous Rule 60(b) standard of "mistake, inadvertence, surprise or excusable neglect."[5]

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[5] In an attempt to show "surprise" under Rule 60(b), Nationwide argues that Defendants Travis and Ginger Ulery-Felkel were "surprised" by the default judgment against them because of language in S.C. Code Ann. 63-5-60, entitled "Parental civil liability for damage to State property." Nationwide argues that this section limits recovery of damages from the parents of a minor who causes personal injury to $5,000. This Code section, however, is very limited in its application as it only applies to malicious or willful conduct by minors and does not encompass the *negligent* actions of the children or of the parents as it relates to the supervision of their children. Indeed, the plain language of this section provides that "[t]he liability of this section is in addition to and not in lieu of other liability which may exist by law." (emphasis added). Plaintiffs' Complaint paragraphs 9 and 10 alone contain sufficient allegations of negligent acts or omissions of "Defendants" which is enough to sustain judgments under a negligence cause of action against all three defendants individually when admitted by default. Accordingly, this argument is without merit.

B. NATIONWIDE IS NOT ENTITLED TO RELIEF UNDER RULE 60(b)(4)

Rule 60(b)(4), SCRCP, allows for relief from a judgment if the judgment is void. "The definition of 'void' under the rule only encompasses judgments from courts which failed to provide due process...or lacked subject matter jurisdiction or personal jurisdiction." *Linda Mc Co. v. Shore,* 390 S.C. 543, 703 S.E.2d 499 (2010). Here, Nationwide argues that the judgment against Minor Defendant E.U. is void for lack of personal jurisdiction, for lack of due process, and pursuant to Rule 54(b). For the reasons explained below, I find that the minor was served on December 2, 2014, and that due process was afforded to the parties.

1. Minor Defendant E.U. was properly served and the court had personal jurisdiction over him.

Rule 4, SCRCP serves at least two purposes. "'It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action.'" *Fassett v. Evans,* 364 S.C 42, 46, 610 S.E.2d 841, 843 (Ct.App. 2005) (citing *Moore v. Simpson,* 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996). "'Exacting compliance with the rules is not required to effect service of process. Rather, inquiry must be made as to whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.'" *Id.* Further, an officer's return of process creates the legal presumption of process that cannot be impeached by the mere denial of service by the defendant. *Id.* (citations omitted); *McClurg v. Deaton,* 380 S.C. 563, 579, 671 S.E.2d 87,96 (2008).

Rule 4(d)(1), SCRCP, provides the method for proper service on individuals.

> **Upon an individual** other than a minor under the age of 14 years or an incompetent person, **by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein**, or by a copy to an agent authorized by appointment or by law to receive service of process.

(emphasis added). **For minors between the ages of 14 and 18, who live with a parent or guardian**, such as defendant minor E.U., Rule 4(d)(2) provides further that **"a copy of the summons and complaint shall likewise be served upon said parent or guardian."** (emphasis added).

In this case, service was perfected on Defendant Minor E.U. pursuant to both Rule 4(d)(1) and (2) when the summons and complaint was hand-delivered to Defendant Travis Felkel on December 2, 2014 at his home, which was also the home of his wife, Ginger Ulery, and step-son Minor Defendant E.U. Indeed, Nationwide does not dispute that service was proper on both Travis and Ginger on December 2, 2014, as Travis Felkel is a person of suitable age and discretion to accept service on his wife and step-son's behalf. Nationwide also does not dispute that Ginger is the parent and legal guardian of Minor E.U. Accordingly, E.U.'s parent, Ginger, was "served" with a copy of the summons and complaint when her husband opened the door and accepted the summons and complaint from the process server. It follows, then, that Minor Defendant E.U.'s parent was "served" for purposes of Rule 4(d)(2).

Nationwide's only remaining argument regarding service is that Minor Defendant E.U. was not served at his "dwelling pace or usual place of abode." As a preliminary matter, this is not a case in which the defendant himself denies service. Rather, Nationwide's argument is based entirely on the statement of Ms. Ulery-Felkel at the damages hearing that her son started living with his grandmother sometime following this incident. The damages hearing occurred on April 21, 2015, almost six months after the date of service. Ms. Ulery-Felkel first said that her son moved out in September, then she said October, and Mr. Felkel never said when the minor moved out. Now, Mr. Felkel has clarified by Affidavit that E.U. was "home" with he and his wife on December 2, 2014, when Mr. Felkel accepted service, and that all three of them

reviewed the lawsuit papers that night. *See* Felkel Affidavit. Moreover, the process server has testified via Affidavit that the minor answered the door at the family home on December 1, 2014, the day before service was effectuated. *See* Lamont Affidavit. Accordingly, the only evidence in the record is that the minor was at home on the day before and day of service, and that he received actual notice of the lawsuit on the night it was served. *See* Felkel Affidavit.

Further, as acknowledged by Nationwide, one's dwelling or place of abode for purposes of Rule 4 is determined by the particularized facts of each case. *Fassett v. Evans,* 364 S.C 42, 610 S.E.2d 841 (Ct.App. 2005). In the *Fasset* case, the defendant claimed he became separated from his wife and had moved out of the marital home shortly before his wife accepted service on his behalf at their marital home. Despite this testimony, the court found that the marital abode remained his usual place of abode for purposes of Rule 4 because of the presumption created when the sherriff's deputy left the complaint with defendant's wife, and the lack of evidence that he had established a new **permanent** dwelling place or that he had no intention to return to the marital home. Similarly, here, there is no evidence that the minor defendant intended to establish a new permanent residence at his grandparents' home or that he had no intention of returning to his parents' home, even if he was even staying with his grandparents at the relevant times. Morevover, there is no testimony from the minor defendant himself to contradict the Affidavit that he was "home" with his mother and step-father at the time of service, or to contradict the statement that he received actual notice of the lawsuit. *See* Felkel and Lamont Affidavits. Nationwide's argument is based entirely on off the cuff testimony at the damages hearing regarding dates, that was not provided by the minor defendant himself, and which has now been clarified by specific testimony in the context of the date of service. This speculation, raised by Nationwide, not the actual defendant who was served, is insufficient to rebut the presumption of

proper service and the presumption that his mother's home remained his "usual place of abode" for purposes of service as that term has been defined by case law. *See Fassett.*

Because service was affected properly on the minor defendant, Nationwide's argument that the judgment against him is void for lack of personal jurisdiction is without merit.

2. All Three Defendants Were in Default and Were Afforded the Due Process To Which They Were Entitled as Parties in Default Who Had Not Appeared in The Action

Nationwide argues that the Guardian-ad-litem appointed for minor defendant E.U. failed to comply with the responsibilities for Guardians provided under S.C. Code Ann. § 63-3-380. Nationwide's reliance on this Code section is misguided, however, as this section applies to custody and visitation proceedings in family court. Section 63-3-810 makes clear that it regulates the appointment of guardians "[i]n a private action before the family court in which custody or visitation of a minor child is an issue." Section 63-3-820 lays out the "Qualifications" for guardians appointed under this Section, and § 63-3-830, upon which Nationwide relies, lists the "Responsibilities" for guardians appointed under this Article. As this action is not pending in Family Court and does not involve the custody or visitation of a minor child, Section 63-3-380 does not apply to this civil suit pending in Circuit Court.[6]

A guardian was appointed for minor defendant E.U. in this case pursuant to Rule 55(b)(2), SCRCP, which requires that a guardian ad litem be appointed to represent minors or incompetents prior to entry of a default judgment. In this case, Shannon Jones, Esquire, was appointed to act as guardian ad litem for defendant minor E.U. and she appeared at the damages hearing on his behalf. Accordingly, the guardianship requirements of Rule 55(b)(2) were met in

[6] Indeed, the only case cited by Nationwide as applying Section 63-3-830 was a child custody dispute in Family Court. *See Simcox-Adams v. Adams,* 408 S.C. 252, 758 S.E.2d 206 (2014).

this case: "no judgment by default shall be entered against a minor or incompetent person unless represented in an action by a guardian ad litem who has appeared herein." (emphasis added).

Nationwide also argues that the judgment against minor defendant E.U. should be set aside because notice of the damages hearing was not mailed to him at his "last known address," which Nationwide argues was his grandparents' house. Nationwide's argument fails, however, for several reasons. First, none of the defendants, including the minor E.U., claim that he did not receive notice of the April or the June hearing. Second, there is no evidence that E.U. was living with his grandparents at the time of the June hearing or that his grandparents' house constitutes his "last known address," or that his grandparents' address was "known" to Plaintiffs. Finally, it is undisputed that notice of the hearing was mailed to the minor's court-appointed guardian ad litem as well as to him at his mother's home, and that his mother attended the April damages hearing on his behalf and that the guardian ad litem attended the June hearing on his behalf.

In support of its argument, Nationwide cites to *McCall v. IKON*, 363 S.C. 646, 611 S.E.2d 315 (2005). The *IKON* case is easily distinguishable from the case at hand, however, in at least two major particulars: (1) the defendant itself asserted that it did not receive notice of the damages hearing; and (2) the defendant did not show up for the damages hearing. *Id.* Here, as stated above, the minor defendant does not assert that he did not receive notice. To the contrary, his step-father has attested that all three defendants received notice of the damages hearing. In addition, and perhaps most importantly, the court-appointed guardian ad litem **appeared** at the damages hearing on the minor defendant's behalf, and this is not a case, like *IKON,* where no one appeared at the damages hearing to represent the defaulting defendant's interests due to lack of notice. As such, I find notice of the damages and default hearings were provided to minor defendant E.U. in compliance with Rule 55(b)(2).

3. Rule 54(b), SCRCP, Has No Application To The Judgments In This Case

Nationwide argues that the default Judgments against Travis Felkel and Ginger Ulery-Felkel and Minor Defendant E.U. are void because they were not all entered on the same day. In support of this argument, Nationwide points to Rule 54(b), but Rule 54(b) has no application in this case where the judgments rendered against all three defendants, each of whom was properly in default, are joint and several and equal. Rule 54(b) is intended to prevent "inconsistent judgments," and there are no inconsistent judgments against the defendants here.

Rule 54(b), SCRCP, provides

> any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights of all the parties.

According to the plain language of Rule 54(b), then, at best, the judgments against Travis Felkel and Ginger Ulery-Felkel, which were filed on April 28, 2015, "did not terminate the action" and were "subject to revision at any time prior to the entry of judgment" against the remaining defendant, minor defendant E.U. While the judgments against Travis and Ginger were arguably subject to revision prior to entry of judgment against their son E.U., consistent, joint and several, judgments against all three defendants in default have now been entered. As noted in Nationwide's own brief, the purpose of this rule is to prevent "logically inconsistent judgments resulting from an answering defendant's success on the merits and another defendant's suffering of a default judgment." *See* Nationwide's Memorandum in Support of Motion to Set Aside Default, at p. 17 (citing *Jefferson v. Briner, Inc.*, 461 F.Supp.2d 430, 434-35 (E.D.Va. 2006)(discussing *Frow v. De La Vega,* 82 U.S. 552 (1872)). Here, with all three defendants in default, and a joint and several judgment existing against all three defendants, there are no

inconsistent judgments or partial judgments to which Rule 54(b) could apply. Accordingly, Rule 54(b) does not provide a basis for relief from the default judgments in this case.

CONCLUSION

For the foregoing reasons, I deny Nationwide's Motion to Intervene, and Nationwide's Motion to Set Aside Default Judgment under Rule 60(b) as well as Entry of Default under Rule 55(c).

IT IS SO ORDERED.

Clayton B. McCullough, Esquire
Special Referee
Ninth Judicial Circuit

1-3, 2016
Charleston, South Carolina