THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clayton B. McCullough, Esquire, Special Referee

Case No.: 2016-000063

Ex parte: Nationwide Mutual Fire Insurance Company .....Appellant

In Re: Anna Angelacci, as guardian of K.B., a minor ..... Respondent

v.

E.U., a minor, Travis Felkel, and Ginger G. Ulery .....Defendants

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from a personal injury suit and default judgment wherein the Respondent alleges that minor K.B. was injured during a physical altercation with minor E.U. on or about September 8, 2014. Appellant Nationwide Mutual Insurance Company (hereinafter "Nationwide" or "Appellant") seeks to intervene in this action for the purpose of pursuing a Rule 60(b) Motion to Set Aside the Default Judgments.

On November 10, 2014 Plaintiff filed a Summons and Complaint with the Berkeley County Court of Common Pleas. (Ex. A, Compl.). On February 4, 2015, Respondent obtained an Entry of Default Against all Defendants and an Order of Referral to a Special Referee. (Ex. B, Entry of Default & Order of Reference). A damages hearing was held on April 21, 2015. (Ex. C, Transcript of Damages Hearing). On April 23, 2015, the Special Referee issued an Order of Default Judgment against Defendants Travis Felkel and Ginger Ulery and a judgment of Five Million One Hundred and Fifty Thousand Dollars ($5,150,000.00) was entered against them. (Ex. C, Damages Hearing Transcript; Ex. D, Order of Default Judgment). However, because a

guardian ad litem had not been appointed for E.U. as is required by Rule 55(b)(2), the Special Referee held that a damages award as to E.U. be reserved until such time as a guardian ad litem is appointed and appears. (Ex. C, Damages Hearing Transcript; Ex. D, Order of Default Judgment).

On June 8, 2015, Shannon Jones was appointed as E.U.'s guardian ad litem. (Ex. E, Order Appointing GAL). On June 9, 2015, Respondent filed a Motion for Default Judgment against E.U. and Notice of Hearing, which stated that the damages hearing was to occur on June 25, 2015. (Ex. F, Motion for Default Against E.U.). On June 25, 2015, the Special Referee issued a Form 4 Order as to E.U.'s default, which adopted the findings of fact and conclusions of law set forth in the April 23, 2015 Order of Default. (Ex. G, Order of Default as to E.U.). Pursuant to this Order, the Special Referee held that Felkel, Ulery, and E.U. are jointly and severally responsible for the entire judgment of Five Million One Hundred and Fifty Thousand Dollars ($5,150,000.00). (Ex. G, Order of Default as to E.U.).

On July 27, 2015, Respondent, as assignee[1], filed suit against Nationwide Mutual Insurance Company, CP-2015-08-1759. (Ex H, Assignments of Claims; Ex. I, Compl. Against Nationwide). The suit alleges bad faith, amongst other causes of actions, and seeks payment of the $5,150,000.00 judgment, in addition to other damages. (Ex. I, Compl. Against Nationwide). On or about October 1, 2015, Nationwide filed a Motion to Intervene and Motion to Set Aside Default Judgment. (Ex. J, Nationwide Motion to Intervene; Ex. K, Nationwide Motion to Set Aside Default

[1] On April 24, 2015 (one day after the Order of Default Judgment), Defendants Travis Felkel and Ginger Ulery executed an Assignment of Claims on behalf of themselves and minor Defendant E.U. On June 25, 2015 (the same day as E.U.'s damages hearing and Order of Default), GAL Shannon Jones executed an Assignment of Claims and Springing Covenant Not to Execute on behalf of minor Defendant E.U. (Ex. H, Assignments of Claims).

Judgments). On or about November 4, 2015, Nationwide filed a Motion to Remove the Case from the Special Referee. (Ex. L, Nationwide Motion to Remove from Special Referee). On December 7, 2015, the Special Referee held a hearing on Nationwide's Motions and subsequently denied each of the Motions. (Ex. M, Transcript of Motions Hearing; Ex. N, Judge Dennis E-mail; Ex. O, Order Denying Motion to Remove Special Referee; Ex. P, Order Denying Motion to Intervene and Motion to Set Aside). Nationwide then appealed the Motion to Remove the Case from the Special Referee and filed a Rule 59(e) Motion to Reconsider, Alter, or Amend regarding the Order Denying Nationwide's Motion to Intervene and Motion to Set Aside. (Ex. Q, Notice of Appeal; Ex. R, Nationwide Rule 59(e) Motion). On January 14, 2016, the Special Referee issued an Order Denying Nationwide's Rule 59(e) Motion and Nationwide then appealed the denial of its Motion to Intervene, Motion to Set Aside Default Judgment, and Motion to Reconsider, Alter, or Amend. (Ex. S, Order Denying Rule 59(e) Motion; Ex. T, Notice of Appeal). On February 9, 2016, the Court of Appeals consolidated these appeals.

STATEMENT OF RELEVANT FACTS

This case arises from an alleged physical altercation between minor Respondent K.B. and minor Defendant E.U. that occurred on September 8, 2014. (Ex. A, Compl.). Respondent alleges that, on that date, minor Defendant E.U. physically attacked minor Respondent K.B. while at Goose Creek High School during gym class resulting in a head injury. (Ex. A, Compl.; Ex. U, Incident Reports). Shortly after the incident, in approximately late September or early October 2014, minor Defendant E.U. moved out

of mother and stepfather's house at 339 Holly Avenue, Goose Creek, South Carolina, and moved in with his grandmother. (Ex. C, Transcript of Damages Hearing).

At the time of the alleged incident, Nationwide had in place a policy of homeowner's insurance issued to named insured Travis Felkel regarding property located at 339 Holly Avenue, Goose Creek, South Carolina. (Ex V, Nationwide Policy). The policy provided liability coverage in the amount of One Hundred Thousand Dollars ($100,000.00). (Ex V, Nationwide Policy).

On September 18, 2014, Respondent's counsel sent a letter to Defendants Travis Felkel and Ginger Ulery with a request to contact Respondent's counsel regarding this incident. (Ex. W, Letters to Ulery). On October 23, 2014, Respondent's counsel sent a second letter, with a copy of a proposed Summons and Complaint, to Defendants Travis Felkel and Ginger Ulery again requesting that they contact Respondent's counsel regarding this incident. (Ex. W, Letters to Ulery). Felkel and Ulery did not forward these letters to Nationwide or otherwise notify Nationwide of the incident. (See Ex. X, Aff. of Kennedy).

On November 10, 2014 Respondent filed a Summons and Complaint against Defendants Travis Felkel, Ginger Ulery, and minor E.U., with the Berkeley County Court of Common Pleas. (Ex. A, Compl). The Complaint alleges that minor Defendant E.U.'s actions while at Goose Creek High School resulted in bodily injuries to minor Respondent K.B. (Ex. A, Compl.). The only factual allegation as to Defendants Travis Felkel and Ginger Ulery is that they are the parents or natural guardians of minor Defendant E.U. (Ex. A, Compl.).

Respondent alleges that all Defendants were properly served with the Summons and Complaint on December 2, 2014. (Ex. Y, Affidavits of Service; Ex. I, Compl. Against Nationwide). This is disputed, as discussed below. As discussed more fully below, Defendant Felkel claims that, upon being served, he took a copy of the Summons and Complaint to his local insurance agent, John Herndon sometime "before Christmas." (Ex. C, Transcript of Damages Hearing). Felkel claims he provided a copy to Mr. Herndon and that in response, Mr. Herndon "told me I needed to have [E.U.] get on the phone with the corporate office." (Ex. C, Transcript of Damages Hearing). According to Felkel, Herndon stated that he would hold onto the suit papers until Felkel filed the claim with Nationwide's corporate claims office as instructed to do. (Ex. C, Transcript of Damages Hearing). Felkel admits that he "failed to make that happen" and did not take any further action. (Ex. C, Transcript of Damages Hearing).

On February 4, 2015, Respondent obtained an Entry of Default Against all Defendants and an Order of Referral to a Special Referee. (Ex. B, Entry of Default & Order of Reference). On February 12, 2015, a copy of the Entry of Default was mailed to the Defendants. (Ex. ZZ, 2/12/15 Letter to Defendants). They did not notify or communicate with Nationwide at that time.

On April 11, 2014, Defendants Travis Felkel and Ginger Ulery were allegedly served with notice of a damages hearing. (Ex. BB, Aff. of Service of Notice of Damages Hearing). A damages hearing was held on April 21, 2015. (Ex. C, Transcript of Damages Hearing). Nationwide was not provided with any notice of the Entry of Default or the damages hearing. (Ex. C, Transcript of Damages Hearing; Ex. X, Aff. of Kennedy). Felkel and Ulery attempted to attend the damages hearing, but showed up

late. (Ex. C, Transcript of Damages Hearing). On April 23, 2015, the Special Referee issued an Order of Default Judgment against Defendants Travis Felkel and Ginger Ulery. (Ex. D, Order of Default Judgment). In his Order, the Special Referee noted that Rule 55(b)(2) requires that a guardian ad litem be appointed for a minor before a default judgment is entered against him. (Ex. C, Damages Hearing Transcript; Ex. D, Order of Default Judgment). Thus, the Special Referee held that a damages award as to E.U. be reserved until such time as a guardian ad litem is appointed and appears. (Ex. C, Damages Hearing Transcript; Ex. D, Order of Default Judgment). However, the damages hearing against Defendants Travis Felkel and Ginger Ulery proceeded and a judgment of Five Million One Hundred and Fifty Thousand Dollars ($5,150,000.00) was entered against them. (Ex. C, Damages Hearing Transcript; Ex. D, Order of Default Judgment).

During the damages hearing, Defendants Travis Felkel and Ginger Ulery were told repeatedly by both Respondent's counsel and the Special Referee that they needed to communicate with Nationwide and retain counsel. (Ex. C, Transcript of Damages Hearing). The Special Referee was emphatic in his statements to Defendants Travis Felkel and Ginger Ulery that they must contact Nationwide and explain the situation to them. (Ex. C, Transcript of Damages Hearing).

On June 8, 2015, Shannon Jones was appointed as E.U.'s guardian ad litem. (Ex. E, Order Appointing GAL). On June 9, 2015, Respondent filed a Motion for Default Judgment against E.U. and Notice of Hearing, which stated that the damages hearing was to occur on June 25, 2015. (Ex. F, Motion for Default as to E.U). Nationwide was not provided with any notice of this damages hearing. (See Ex. X, Aff. of Kennedy).

Importantly, minor Defendant E.U. was also not provided with proper notice of this hearing, as discussed below. Further, it appears that the guardian ad litem never spoke with E.U. prior to his damages hearing and prior to the time she allowed a substantial judgment to be entered against him without having attempted put up any defense. On June 25, 2015, the Special Referee issued a Form 4 Order, which adopted the findings of fact and conclusions of law set forth in the April 23, 2015 Order of Default. (Ex. G, Order of Default as to E.U.). It is unclear whether a damages hearing as to E.U. actually took place, as the Order regarding E.U. contains no new findings of fact or conclusions of law and there is no transcript of a damages hearing. (Ex. G, Order of Default as to E.U.). In his Order, the Special Referee found that all Defendants are jointly and severally responsible for the entire judgment of Five Million One Hundred and Fifty Thousand Dollars ($5,150,000.00). (Ex. G, Order of Default as to E.U.).

On July 27, 2015, a paralegal employed by Yarborough Applegate, LLC called the Nationwide Sales Solution Agency concerning this suit. (Ex. Z, Aff. Of Rash). This was Nationwide's first notice of this action and its first notice of the default judgments. (See Ex. X, Aff. of Kennedy). It should be noted that Respondent's notice to Nationwide was conveniently, or inconveniently, thirty two (32) days after the default judgment was entered against minor Defendant E.U.

On July 27, 2015, Respondent, as assignee, filed suit against Nationwide Mutual Insurance Company, CP-2015-08-1759. (Ex. I, Compl. Against Nationwide). The suit alleges bad faith, amongst other causes of actions, and seeks payment of the $5,150,000.00 judgment, in addition to other damages. (Ex. I, Compl. Against

Nationwide). This suit alleges that Nationwide is solely responsible for the judgment. (Ex. I, Compl. Against Nationwide).

On or about October 1, 2015, Nationwide filed a Motion to Intervene and Motion to Set Aside Default Judgment. (Ex. J, Nationwide Motion to Intervene; Ex. K, Nationwide Motion to Set Aside). On November 4, 2015, Nationwide filed a Motion to Remove the Case from the Special Referee. (Ex. L, Nationwide Motion to Remove Special Referee). As more fully set forth above, the Special Referee denied all of Nationwide's motions and this appeal follows.

ARGUMENT

I. THE SPECIAL REFEREE ERRED IN DENYING NATIONWIDE MUTUAL FIRE INSURANCE COMPANY'S MOTION TO INTERVENE.

Nationwide seeks to intervene in this action to file a Rule 60(b) Motion to Set Aside the Judgments. Under the circumstances of this case, Rule 24 intervention is Nationwide's only avenue to challenge the judgments and there are serious issues with the judgments that should be closely evaluated. See Narruhn v. Alea London Ltd., 404 S.C. 337, 745 S.E.2d 90 (2013); McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008). Thus, Nationwide should be permitted to intervene in order to file a Rule 60(b) Motion and be given the opportunity to protect its interests.

The South Carolina Supreme Court has recognized that intervention under Rule 24 should be liberally granted. Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). Rule 24 must be liberally interpreted and courts "must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2)." Id. Intervention

may be of right or permissive. SCRCP 24. Intervention of right is governed by Rule 24(a), while permissive intervention is governed by Rule 24(b). Id.

A. Nationwide is Entitled to Intervene as of Right Under Rule 24(a).

Rule 24(a)(2) provides that "[u]pon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." SCRCP 24(a)(2). Thus, a proposed intervenor must: "(1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate 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) demonstrate that its interest is inadequately represented by other parties." Berkeley Elec. Co-op., Inc., 302 S.C. at 189, 394 S.E.2d at 714.

Here, Nationwide requests that the Court recognize that, as the party whose real interests are at stake, Nationwide is entitled to intervene as of right to protect its own interests in light of the circumstances and procedural defects involved in this case. The Order of Default Judgment, the assignment of the insureds' purported claims against Nationwide, and the subsequent suit against Nationwide leave no doubt that Nationwide is an interested party in this litigation – and is arguably, the primary interested party in this litigation. Further, these issues make clear that the Defendants' interests in having the judgments set aside pale in comparison to Nationwide's interests. Because of these issues, intervention is the only mechanism

with which Nationwide can attempt to have a court evaluate and rule upon the defective judgments.

1. Nationwide's Motion to Intervene is Timely

Nationwide's Motion to Intervene is timely. Our courts have set forth a four part test to determine the timeliness of such a motion: (1) the time that has passed since the applicant knew or should have known of his or her interest in the suit;[2] (2) the reason for the delay; (3) the stage to which litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial. Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (reversing trial court's denial of newspaper's motion to intervene for the limited purpose of challenging a protective order and rejecting respondents' contention that the motion was untimely).

Nationwide was not provided with any notice of this suit or the judgments until July 27, 2015. Since learning of the judgment, Nationwide has acted with diligence and promptness in investigating the circumstances of the judgments and bringing the subject motion. Nationwide seeks to intervene to bring a Rule 60(b) Motion to attempt to set aside the judgments against its insureds.

The fact that a default judgment has been granted does not impact the court's ability to allow Nationwide to intervene. See Davis v. Jennings, 304 S.C. 502, 405 S.E.2d 601 (1991) ("the fact that a motion to intervene is filed after judgment may prove relevant to the merits of the intervenor's access claim . . . But the applicant need

[2] The passage of time is not the only factor or the most important factor in deciding whether a motion to intervene is timely. Rather, 'the most important consideration...is whether the delay in moving for intervention...will prejudice the existing parties to the case.'" United States v. Thorson, 219 F R.D. 623, 628 (W.D. Wis. 2003) (citing People Who Care v. O'Brien, 68 F.3d 172, 176 (7th Cir. 1995)).

not plead extraordinary circumstances to how that the intervention motion itself was timely" (quoting Mokhiber v. Davis, 537 A.2d 1100 (D.C. 1988)). Courts in other jurisdictions have allowed intervention even after judgment had been rendered. See, e.g., Redmond v. Devine, 504 N.E.2d 138, 143 (Ill. App. 1987) (affirming the granting of a motion to intervene filed twenty months after entry of a default judgment because it was necessary to protect the intervenor's rights); Morton Regent Enterprises, Inc. v. Leadtec California, Inc., 74 Cal. App. 3d 842, 846 (Cal. App. 1917) (holding that "[a]n aggrieved person may intervene after judgment for the purposes of vacating a default judgment that is void."); Western Heritage Ins. Co. v. Superior Court, 199 Cal. App. 4th 1196 (Cal. App. 2d Dist. 2011) (insurance carrier allowed to intervene when insured was in default). Further, The South Carolina Supreme Court has acknowledged that a motion to intervene is a prerequisite for an insurance company to directly challenge an order under Rule 60(b) arising out of a case against its insured. See Narruhn v. Alea London Ltd., 404 S.C. 337, 745 S.E.2d 90 (2013).

Moreover, Respondent will suffer no cognizable prejudice if Nationwide is allowed to intervene. By this Motion, Nationwide does not seek to deprive Respondent of any substantive rights, or to delay the proceedings. All it seeks is to have the issue of whether this case will be decided upon the merits of the facts and law, or instead based upon forfeiture as Respondent urges, resolved on a full record, which cannot be complete without Nationwide's active participation.

Lack of prejudice in this context has been summarized by a well-known commentator as follows:

> Prejudice is not significant unless it is something greater than would be experienced by the ordinary litigant in being required to litigate on the merits. Some delay will necessarily result when a default is reopened, but delay in gaining judgment is not considered by itself, to be undue prejudice that would justify denying relief.

10 JAMES WM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 55.70[2][c] (3d ed. 2010). Thus, allowing Nationwide to intervene will not result in any valid "prejudice" to Respondent, as Nationwide simply seeks to have this case decided on its merits, which is exactly what Respondent intended when suit was initially filed. However, denial of Nationwide's Motion to Intervene unfairly impedes its ability to protect its interests, as discussed in detail below.

2. Nationwide has a Direct and Substantial Interest Relating to this Action.

Nationwide has a significant financial stake in this litigation, which is a legally protectable interest that will be substantially affected if the default is not set aside. Nationwide's insureds, as well as Respondent, are contending that Nationwide is absolutely and solely liable for the $5,150,000 judgment. Thus, it is clear that Nationwide is the real party in interest in this action. "A real party in interest . . . ordinarily is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." Dockside Ass 'n, Inc. v. Detyens, Simmons and Carlisle, 285 S.C. 565, 568-69, 330 S.E.2d 537, 539 (Ct. App. 1985), aff'd as modified by 287 S.C. 287, 337 S.E.2d 887 (1985).

Our courts have recognized that a "large financial interest" and "possible responsibility for paying the judgment" constitutes sufficient basis for granting intervention. See McClurg v. Deaton, 380 S.C. 563, 570, 671 S.E.2d 87 (Ct. App.

2008) (trial court granted carrier's motion to intervene "recognizing [the carrier's] large financial interest in the action and possible responsibility for paying the judgment."). In McClurg, the defendant's carrier was permitted to intervene in a personal injury action involving its insured for the purpose of filing a Rule 60(b) motion – which is precisely what Nationwide seeks to do in this action. Id.

South Carolina case law on this issue is limited. However, other jurisdictions have recognized, and likewise permitted, intervention where the intervenor has a financial interest at stake. See, e.g., Utica Mut. Ins. Co. v. Hamilton Supply Co., 2007 U.S. Dist. LEXIS 84370 (N.D. Cal. Nov. 5, 2007) (intervention permitted because insurer had sufficient financial interest which was not being adequately protected by parties where insured was in default).

The present case is distinguishable from Ex Parte Government Employee's Insurance Company, 644 S.E.2d 699 (S.C. 2007), the case relied upon by the Special Referee in denying Nationwide's Motion to Intervene. In that case, GEICO sought to intervene into a family court action instituted to obtain a common law marriage determination. Id. A determination of common law marriage had an effect on the amount of coverage GEICO had available for auto accident involving its insured. Id. The South Carolina Supreme Court denied GEICO's Motion to Intervene on the basis that it did not have an "interest relating to the property or transaction which is the subject of the action" under Rule 24(a)(2). Id. At 702. Specifically, the Court found that GEICO did not have a valid interest in the subject matter of the family court action because 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. This was insufficient to allow GEICO to intervene into the family court action. Id. The holding in Ex Parte Government Employee's Insurance Company is clearly distinguishable from the present case. Here, Nationwide is not seeking to intervene into a "peripheral" proceeding such as a family court action, probate action, or even a tangential circuit court action. Rather, Nationwide seeks to intervene into the very action brought against its insureds, which resulted in a multi-million dollar judgment that Nationwide is now being asked to pay. If Nationwide cannot establish a sufficient "interest" in this action, it is unclear when anyone would ever be able to establish an interest in an action for purposes of intervention.

Therefore, Nationwide has a direct and substantial interest in this action and should be permitted to intervene as of right pursuant to Rule 24(a).

3. Denial of Nationwide's Motion to Intervene Impairs and Impedes its Ability to Protect its Interests.

There can be no doubt that denial of the Motion to Intervene impairs and impedes Nationwide's ability to protect its substantial interests in this action. As set forth above, because default judgment has been entered, intervention is Nationwide's only available avenue to attempt to protect its interests. See Narruhn v. Alea London Ltd., 404 S.C. 337, 745 S.E.2d 90 (2013); McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008). There is no other mechanism or procedure by which Nationwide can challenge the jurisdictional and procedural defects in the default judgments against its insureds.

In order to show that its interest will be impaired or impeded, "a party need not prove that it would be bound in a *res judicata* sense by the judgment, only that it would have difficulty adequately protecting its interests if not allowed to

intervene." Berkeley Electric, 302 S.C. at 189, 394 S.E.2d at 714. Here, not only would Nationwide have "difficulty" protecting its interests, it would be absolutely precluded from protecting its interests if not allowed to intervene. Nationwide's substantial interest in having this matter litigated on its merits, rather than through forfeiture, will be set in stone if the denial of its Motion to Intervene is affirmed. It is Nationwide which stands to lose substantial sums of money in that eventuality. That these substantial interests are likely to be impaired without Nationwide's direct involvement in this aspect of the litigation is demonstrated below. Therefore, Nationwide should be permitted to intervene to give Nationwide the opportunity to address the jurisdictional and procedural defects in the judgments against its insureds.

4. Nationwide's Interests Cannot be Adequately Represented by Other Parties.

Nationwide's interests cannot be, and are not, represented by any other party to this action. South Carolina's appellate courts have repeatedly recognized that "South Carolina's policy favor[s] the disposition of issues on their merits rather than on technicalities." Mictronics, Inc. v. South Carolina Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (emphasis added); Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 524 (Ct. App. 1986) (recognizing that "[w]e favor trial of issues on merit over securing judgment by slight technicalities" and reversing the denial of relief from default under the stricter standard for default judgments).

"Factors to consider in determining whether the existing representation is adequate include: (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make

such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceeding that would otherwise be absent. Berkeley Electric, 302 S.C. at 191. "This burden is minimal and the applicant need only show that the representation of his interests may be inadequate." Id.

Here, Nationwide clearly meets this minimal burden. The default judgment could possibly leave Nationwide responsible for a substantial judgment well in excess of its policy limits. In order to attempt to protect itself from this potential exposure, Nationwide must have independent representation. Under the circumstances of this case, there can be no doubt that Nationwide's interests in this action cannot be adequately represented by other parties. First and foremost, the case is in default, Defendants have been unresponsive to Nationwide's request to discuss this matter, and Respondent's interests are clearly adverse to Nationwide. Thus, currently, Nationwide's interests are not being represented in any capacity whatsoever. Second, the insureds/Defendants have executed Assignments of Claims to Respondent. Respondent, as assignee, has brought suit against Nationwide alleging bad faith, among other causes of action. Thus, at this stage, there is a conflict of interest between Nationwide and its insureds/Defendants because they take the position that Nationwide, and Nationwide alone, is responsible for payment of the $5,150,000 judgment. Allowing Nationwide to intervene is crucial in ensuring that Nationwide's interests, which are substantial, are adequately represented.

Other courts have recognized that the potential for a conflict is real and that this alone is justification for intervention by the carrier. Faced with a similar issue, the court in Guaranty Nat'l Ins. Co. v. Pittman, aptly observed:

> It may be true that Hardin also was seeking to set aside the default judgment. In this technical sense the legal interests of GNIC and Hardin were similar. Rule 24, however, as indicated above, mandates sensitivity to practical considerations. The almost certain inability of Hardin to pay a $400,000.00 judgment or any substantial portion thereof -- back on June 26, 1985 -- rendered it highly unlikely that his protection of the common interest of GNIC and himself would be with the same vigor as has been brought to the matter by GNIC, which we assume is quite solvent.

501 So. 2d 377, 385 (Miss. 1987). See also Ross v. Marshall, 426 F.3d 745 (5th Cir. 2005) ("While this interest is also contingent upon an adverse finding in a separate suit, Allstate may minimize or eliminate this exposure by contesting the judgment against Mathews on appeal. In sum, we conclude that Allstate has a sufficient interest in the present suit to merit intervention as of right for the purpose of appealing the judgment against its insured.").

Given the "minimal" burden of demonstrating inadequacy of representation, these reasons clearly show that the representation of Nationwide's interests in this suit "may be inadequate" and the denial of Nationwide's Motion to Intervene should be reversed to ensure that its interests are sufficiently represented. In South Carolina Tax Comm 'n v. Union Co. Treasurer, 295 S.C. 257, 368 S.E.2d 72 (Ct. App. 1988), the court held that the existing representation was inadequate despite the intervenor and the existing party sharing the same goal, where the intervenor pleaded additional defenses and had relevant experience and perspective. The same logic applies with equal, or perhaps greater, force here. Additionally, the public policy of South Carolina, which favors the disposition of issues "on their merits rather than on technicalities," strongly favors Nationwide's intervention as of right for the limited purpose of challenging the default judgments against its insureds. The default judgments at issue are in excess of

$5,000,000 and the Court should allow Nationwide to intervene to ensure that these judgments are properly and fairly vetted.

B. Nationwide Should be Allowed Permissive Intervention.

Alternatively, Nationwide should be allowed permissive intervention pursuant to Rule 24(b)(2), SCRCP. Under Rule 24(b)(2), permissive intervention is appropriate where "an applicant's claim or defense and the main action have a question of law or fact in common" and the intervention does not "unduly delay or prejudice" the rights of the original parties. SCRCP 24(b)(2). The commonality requirement for permissive intervention is satisfied where the "petitioner-intervenor's claims and the main action arose out of the same transaction." TPI Corp. v. Merchandise Mart of South Carolina, Inc., 61 F.R.D. 684, 689 (D.S.C. 1974).

The basis for Nationwide's Motion is the very same occurrence giving rise to Respondent's Complaint, and in particular, the Orders granting the default judgments. Hence, Nationwide's claims and defenses arise from the same transaction that is the subject of this action. Additionally, no existing party will be prejudiced by allowing Nationwide to protect its interests in this matter. Nationwide's intervention will not delay the proceedings or prejudice the adjudication of the rights of the parties. These factors have been clearly demonstrated above.

II. THE SPECIAL REFEREE ERRED IN DENYING NATIONWIDE MUTUAL FIRE INSURANCE COMPANY'S MOTION TO SET ASIDE DEFAULT JUDGMENTS.

Nationwide seeks to set aside the default judgments against all Defendants so that it has the ability to do nothing more and nothing less than what justice requires – to allow the case to be decided on the merits. South Carolina's appellate courts have

repeatedly recognized that "South Carolina's policy favor[s] the disposition of issues on their merits rather than on technicalities." Mictronics, Inc. v. South Carolina Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (emphasis added); See also Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 524 (Ct. App. 1986) (recognizing that "[w]e favor trial of issues on merit over securing judgment by slight technicalities" and reversing the denial of relief from default under the stricter standard for default judgments). Further, it is South Carolina policy that the South Carolina Rules of Civil Procedure ("SCRCP") relating to setting aside default should be "liberally construed to promote justice and dispose of cases on the merits." Dixon v. Besco Eng'g, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995). As Supreme Court Justice Hearn succinctly stated: "the law favors the resolution of disputes based upon all parties having their day in court." McClurg v. Deaton, 671 S.E.2d 87, 380 S.C. 563 (Ct. App. 2008) (Hearn, C.J., dissenting).

Under Rule 60(b), the court may relieve a party from a final judgment, order, or proceeding for the following reasons: "(1) mistake, inadvertence, surprise, or excusable neglect; . . . or (4) the judgment is void." S. C. R. Civ. P. 60(b). "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." Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) (citing New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993)).

A. Nationwide Passes the Rule 60(b) Threshold Tests

The Special Referee should have granted Nationwide's Motion to Set Aside because its Motion was timely, Nationwide can prove the existence of a meritorious defense, and there is no cognizable prejudice to the Respondent.

1. Nationwide's 60(b) Motion to Set Aside is Timely

Nationwide's 60(b) Motion to Set Aside is timely. Such a motion must be made within a reasonable time, but not more than one year after the entry of default judgment if brought pursuant to Rule 60(b)(1), (2), or (3). SCRCP 60(b). Here, the default judgment was entered against Defendants Travis Felkel and Ginger Ulery on April 23, 2015, and was entered against minor Defendant E.U. on June 25, 2015. Nationwide filed its Motion to Set Aside On October 1, 2015, less than six months after judgment against Defendants Felkel and Ulery and approximately three months after judgment was entered against the minor Defendant E.U. Therefore, Nationwide's motion is timely under Rule 60(b).

Additionally, Nationwide's motion is also made within a reasonable time from the standpoint of practicality. Nationwide was not notified of this action until July 27, 2015, but quickly took all necessary actions to gather the requisite information to enable it to file prompt, informed motions. Nationwide has not yet been granted the benefits of formal discovery, but has still been able to, in a very short amount of time, collect enough information relating to the underlying case to educate itself and file appropriate motions relevant to the available legal remedies. Such actions by Nationwide demonstrate not only a thoughtful and deliberate response upon discovery of default by its insureds, but also that this motion was made promptly and within a reasonable time.

See Narruhn v. Alea London Ltd., 404 S.C. 337, 340, 745 S.E.2d 90 (2013) (insurer's motion, pursuant to Rule 60(b), made more than nine months after the order "was clearly timely.").

2. Nationwide and each Defendant has a Meritorious Defense to the Lawsuit.

In order to justify relief under Rule 60(b)(1), "a party must establish that he has a meritorious defense and that the judgment was taken against him by mistake, inadvertence, surprise or excusable neglect." Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d. 900 (1989). "The complainant does not have to establish he would prevail on the merits, but only that his defense is meritorious." Id. "[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978)). Lastly, "an allegation that the amount of damages could be different from what was awarded under the default judgment is sufficient to satisfy the meritorious defense requirement." McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008) (Hearn, C.J., dissenting) (citing numerous supportive cases from other jurisdictions).

a. Defendants Travis Felkel and Ginger Ulery have a Meritorious Defense.

Defendants Travis Felkel and Ginger Ulery have a meritorious defense on the grounds that the Respondent's Complaint fails to allege any facts or causes of action that would entitle Respondents to relief against these Defendants. The South Carolina

Rules of Civil Procedure require that a complaint must contain a "short and plain statement of the facts showing that the pleader is entitled to relief." SCRCP 8(a)(2).

Respondent's Complaint contains no facts showing that they are entitled to relief against Felkel and Ulery. The only time Felkel and Ulery are mentioned or referenced in the Complaint is in paragraph 3 which states "That upon information and belief, Defendants Travis O. Felkel and Ginger G. Ulery are the parents or natural guardians of E.U., a minor, and are residents of Berkeley County, South Carolina." (Ex. A, Compl.). This allegation is entirely insufficient to put Felkel and Ulery on notice of any wrongdoing by them, and is also insufficient to put them on notice of any affirmative defenses they would be required to assert in a responsive pleading. Thus, Defendants Felkel and Ulery have a meritorious defense in that Respondent has not alleged any valid claims against them or any factual wrongdoing by them. Their only involvement in this incident is that Ulery is E.U.'s mother and Felkel is his step-father. If this case is decided on its merits, it is possible, and potentially likely, that a jury would not enter a verdict against them for these reasons.

Furthermore, Plaintiffs failed to meet the requirement of Rule 8(a)(2) that they plead "facts showing that the pleader is entitled to relief" against Defendants Travis Felkel or Ginger Ulery, as discussed in detail below. Accordingly, Defendants Ulery and Felkel meet the threshold requirement of establishing a meritorious defense.

As a further defense, Ulery and Felkel are also entitled to the statutory protections contained within Section 63-5-60 of the South Carolina Code, which provides in pertinent part as follows:

> an individual . . . is entitled to recover damages in an amount not to exceed five thousand dollars in a civil action in a court

> of competent jurisdiction from the parents or legal guardian of the person of a minor under the age of eighteen years and residing with the parents or the legal guardian of the person who maliciously or wilfully causes personal injury to the individual . . . .

S.C. Code Ann. § 63-5-60 (emphasis added). Under this provision, Felkel cannot be held vicariously liable for the acts of E.U. since he is not the parent of E.U. (Ex. C, Transcript of Damages Hearing). Furthermore, based upon the factual allegations of the Complaint, neither Ulery nor Felkel can be liable for any damages which exceed $5,000. This too demonstrates a meritorious defense to the over $5,000,000 judgment entered against them.

b. Minor Defendant E.U. has a Meritorious Defense.

E.U. may have a meritorious defense based on the facts of this incident. The Incident Report from this incident states that, prior to E.U. having allegedly injured the minor Respondent K.B., K.B. "got into [the minor Defendant E.U.'s] face." (Ex. U, Incident Reports). It is certainly possible that E.U. reasonably feared for his safety in that moment and acted in self-defense. Accordingly, self-defense, comparative negligence, and other similar affirmative defenses are all meritorious defenses that E.U. can reasonably assert in this case, satisfying the threshold for justifying relief under Rule 60(b).

Furthermore, as will be discussed in more detail below, Defendant E.U. has the defense that this court lacks personal jurisdiction over him on the grounds of improper service of process, and that therefore all judgments against him are void.

c. Nationwide and All Defendants have a Meritorious Defense as to Damages.

Nationwide, along with all of the Defendants, has a meritorious defense as to the amount of damages awarded to the Respondent. At the time of the damages hearing, minor Plaintiff K.B.'s medical bills relating to this incident totaled a little over Eighty Five Thousand Dollars ($85,000.00). (Ex. D, Order of Default). The damages awarded to the Respondent were Five Million and One Hundred and Fifty Thousand Dollars ($5,150,00.00) – which is approximately 60 times (60x) more than the medical specials in the record at the hearing. (Ex. C, Transcript of Damages Hearing; Ex. D, Order of Default). Respondent presented only approximately thirty (30) minutes of testimony at the hearing, none of which included testimony from K.B.'s treating physicians or nurses, or any experts such as life-care planners, vocational rehabilitation experts, or the like. (Ex. C, Transcript of Damages Hearing). There is simply no testimony or evidence in the record that adequately supports this substantial judgment. This damages award was speculative, arbitrarily decided upon, is unreasonable, and is not supported by sufficient testimony and evidence. Thus, if this case is allowed to proceed on its merits, it is entirely possible, if not probable, that through discovery, the use of experts, and cross-examination, Nationwide and the Defendants can demonstrate that the true amount of damages sustained by the minor Plaintiff is far less than the $5,150,000 judgment.

Therefore, Nationwide and all Defendants have a meritorious defense as to the damages award because it is likely, or at least possible, that the amount of the damages award would be significantly different if this case is ultimately decided on its merits. There can be little doubt that a full, fair opportunity to challenge the damages

award will yield a different result than a hearing that lasted less than thirty (30) minutes and included no medical or expert testimony.

3. There is No Unfair Prejudice to Respondent if the Default Judgments Are Set Aside.

Nationwide must next demonstrate that there is no unfair prejudice to Respondent if the Motion to Set Aside is granted. Nationwide asserts that there simply is no prejudice to Respondent. Lack of prejudice in this context has been summarized by a well-known commentator as follows:

> Prejudice is not significant unless it is something greater than would be experienced by the ordinary litigant in being required to litigate on the merits. Some delay will necessarily result when a default is reopened, but delay in gaining judgment is not considered by itself, to be undue prejudice that would justify denying relief.

10 JAMES WM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 55.70[2][c] (3d ed. 2010). Thus, setting aside the defaults will not result in any valid "prejudice" to Respondent, as Nationwide simply seeks to have this case decided on its merits.

The only "prejudice" that Respondent could possibly point to is that a grant of the Motion to Set Aside would require the Respondent to litigate this case exactly as they expected to when they originally filed suit – which is not sufficient to establish prejudice in this context. This incident occurred only approximately 1.5 years ago, so Respondent would not be in danger of having lost important evidence needed for this litigation. Further, even if Respondent could point to a miniscule amount of prejudice against them, that prejudice would be entirely outweighed by the prejudice Nationwide stands to suffer if the judgments are not set aside. Nationwide only asks that it has a chance to

answer Respondent's Complaint and pursue this litigation as Respondent originally intended when suit was filed. That cannot reasonably be construed as sufficient prejudice to Respondent.

B. Nationwide is Entitled to Relief Under Rule 60(b)(4).

"Rule 60(b)(4), SCRCP provides the court may relieve a party or his legal representative from a final judgment, order, or proceeding if the judgment is void. The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." Linda Mc Co. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010) (citing McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996)).

1. The Judgment Against Minor Defendant E.U. is Void for Lack of Personal Jurisdiction.

"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." Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996). An "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. There is a presumption of proper service when the civil rules on service are followed. Id. It is the plaintiff's burden to show that the court has personal jurisdiction over the defendant. Jensen v. Doe, 292 S.C. 592, 594, 358 S.E.2d 148, 148 (Ct. App. 1987).

According to SCRCP 4, "[s]ervice shall be made as follows: (1) *Individuals.* Upon an individual other than a minor under the age of 14 years . . . 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 delivering a copy to an agent authorized by appointment or by law to receive service of process." SCRCP 4(d)(1). South Carolina has not defined "dwelling house or place of abode." Fassett v. Evans, 364 S.C. 42, 610 S.E.2d 841 (Ct. App. 2005). One's dwelling or place of abode is determined by the particularized facts of each case. Id.

SCRCP also states that "[s]ervice shall be made as follows: (2) *Minors, Incompetents and Persons Confined.* . . . If the individual upon whom service is made is a minor between the ages of 14 and 18, who lives with a parent or guardian, a copy of the summons and complaint shall likewise be served upon said parent or guardian." SCRCP 4(d)(2).

In the underlying action, if the minor Defendant E.U. was not properly served with the Summons and Complaint, then this court never had personal jurisdiction over him. If this court never had jurisdiction over him, any judgment against him is void.

The rule states that IF the minor is between the ages of 14 and 18, AND lives with a parent or guardian, then that minor is properly served by leaving a copy of the summons and complaint with said parent or guardian. Plaintiffs allege E.U. was served by serving the Summons and Complaint on Travis Felkel at 339 Holly Avenue, Goose Creek, SC, 29445. (Ex. Y, Aff. of Service). However, E.U. did not reside at this address at the time of service and Travis Felkel is not E.U.'s parent or guardian. (Ex. C, Transcript of Damages Hearing).

Specifically, here, E.U. was 17 years old at the time Plaintiffs attempted service upon him. However, at the time that Travis Felkel attempted to accept service on behalf of E.U. on December 2, 2014, E.U. did NOT live at 339 Holly Avenue, Goose Creek, SC, 29445, the residence where his mother and Travis Felkel lived. (Ex. C, Transcript of Damages Hearing,; Ex. &, Aff. of Service). According to testimony given by Defendant Ginger Ulery (E.U.'s mother), minor Defendant E.U. moved out of that residence approximately two months prior to the invalid attempt to effect service of process upon E.U. by leaving the Summons and Complaint with Defendant Felkel. (Ex. C, Transcript of Damages Hearing). The testimony indicates that E.U. moved out of that residence after the underlying incident, and that "since he turned 17 . . . he thinks he doesn't have to listen to [Travis Felkel and Ginger Ulery] and he can be on his own." (Ex. C, Transcript of Damages Hearing). E.U. was living with his grandmother at that time of purported service of process. (Ex. C, Transcript of Damages Hearing). Further, Travis Felkel is neither the legal guardian nor a parent of E.U., which is a requirement to accept service for a minor aged 14-18 under the rule. (Ex. C, Transcript of Damages Hearing). Therefore, service under Rule 4(d)(2) was ineffective and improper as to minor Defendant E.U. and, as a result, the judgment against him is void and should be set aside pursuant to Rule 60(b)(4).

Service is improper under Rule 4(d)(1) as well. E.U. was not personally served, nor was service affected by leaving copies of the Summons and Complaint at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. There is no allegation by Respondent or any evidence to suggest that they served E.U. personally, nor that they left copies with his grandmother, with

whom he was living at the time, or anyone else of suitable age at E.U.'s grandmother's address.

The only evidence in the record signifying that E.U. had any notice of this action against him is an Affidavit of Service that was improperly served upon Travis Felkel, but there is nothing in the record to indicate that E.U. had actual notice of this action. Pursuant to South Carolina common law, this lack of evidence requires the judgment to be set aside. See Laurens Trust Co. v. Copeland, 154 S.C. 390, 151 S.E. 617 (S.C. 1930) (In a suit against husband and wife, and despite the presence of an Affidavit of Service upon the wife, when the court was unable to find any testimony in the record that the wife was ever served or that she had any notice that the action was pending against her, the South Carolina Supreme Court directed the trial court to set aside the judgment as to her).

Therefore, because minor Defendant E.U. was not properly served with the Summons and Complaint in this case, the court never had personal jurisdiction over him. Without personal jurisdiction over the minor Defendant E.U., any judgment rendered against him is void. See, e.g., SCRCP 60(b)(4); Linda Mc Co. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010). Accordingly, pursuant to Rule 60(b)(4), Nationwide asks the Court to set aside the judgment against the minor Defendant E.U.

2. Pursuant to Rule 54(b), Default Judgment was Entered Prematurely as to Travis Felkel and Ginger Ulery and Therefore is Void and Must Be Set Aside as to All Defendants.

Pursuant to the terms of South Carolina procedural law, the April 23, 2015 judgment against Travis Felkel and Ginger Ulery was prematurely entered, does not

constitute a final determination, and, thus is void. Accordingly, the judgments against all Defendants should be set aside.

Rule 54(b) of the South Carolina Rules of Civil Procedure—as well as the comparable Federal Rule—permits a court, in cases involving multiple parties, to direct final judgment against "one or more, but fewer than all" parties only upon an express finding "that there is no just reason for delay." SCRCP 54(b) (emphasis added). Specifically, Rule 54(b), SCRCP, with language nearly identical to the Federal Rule, provides:

> **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, 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 and liabilities of all the parties.

SCRCP 54(b) (emphasis added).

The judgment in this matter does not expressly include such a finding that there was "no just reason for delay," and case law interpreting this Rule unequivocally shows that under these facts, there was just reason for delay. An 1872 United States Supreme Court opinion, Frow v. De La Vega, 82 U.S. 552 (1872), is the seminal case on this issue. There, the plaintiff sued 14 defendants alleging each was jointly liable for fraud in connection with a land transaction. All defendants except Frow filed answers denying liability. A final decree was issued against Frow, holding that the plaintiff had proper title

to the land. In a trial against the remaining defendants, however, it was found that no fraud had occurred and title rested with defendants. Frow thus appealed the ruling against him. The Court held it was "unseemly and absurd" to enter a final decree on the merits against one defendant whose alleged liability was joint as to the answering defendants. It held that no final decree should have been issued until the case was disposed of with regard to all of the defendants. Frow, 82 U.S. at 554. Thus, the Supreme Court held that a final decree on the merits could not be made separately against one defendant where a joint charge was still pending against others. Id. It was this rationale expressed in Frow that subsequently gave rise to Rule 54(b) of the states' and Federal Rules of Civil Procedure, permitting a court, in cases involving multiple parties, to direct final judgment against "one or more, but fewer than all," parties only upon an express finding "that there is no just reason for delay."

Frow applies even when co-defendants are alleged to be closely interrelated. United States ex rel. Hudson v. Peerless Ins. Co., 374 F.2d 942 (4th Cir. 1962). As noted by the district court for the Eastern District of Virginia,

> if Frow still stands for anything, it explicates a cautionary warning to the courts: logically inconsistent judgments resulting from an answering defendant's success on the merits and another defendant's suffering of a default judgment are to be avoided. Thus, the avoidance of logically inconsistent judgments in the same action and factually meritless default judgments provide "just reason for delay" within the meaning of Rule 54(b).

Jefferson v. Briner, Inc., 461 F.Supp.2d 430, 434-35 and n.6 (E.D.Va. 2006).

Here, the Order of Default Judgment against Felkel and Ulery does not include an express finding of the Special Referee that there was "no just reason for delay" and, thus, is not in compliance with Rule 54(b), Frow, and its progeny. Indeed, due to the

fact that Felkel and Ulery were named presumptively in this suit in only a vicarious capacity, the danger of potentially inconsistent results was very real in this case. There was no logical, practical, or compelling reason to proceed against Felkel and Ulery and enter judgments against them prior to doing so against E.U. Doing so was, quite simply, premature. Therefore, pursuant to Rule 54(b), the default judgments against Felkel and Ulery on April 23, 2015 are void and should be set aside under Rule 60(b).

Additionally, because the default judgment against E.U. merely adopts all findings of fact and conclusions of law from the judgment against Felkel and Ulery and contains no new findings or conclusions, the default judgment against E.U. is also void and should be set aside. In other words, the judgment as to E.U. simply adopts the Order as to Felkel and Ulery. Thus, to the extent the judgment against Felkel and Ulery is void pursuant to 54(b), the judgment as to E.U. must also be void because the two sentence Form Order as to E.U. is insufficient if the underlying Order of Default that it purports to adopt is void.

Therefore, Nationwide requests that all judgments and damages awards be set aside pursuant to Rule 60(b)(4) on the grounds that they are void.

3. The Judgment as to Minor E.U. is Void Because He Was Not Given Proper Notice of the Damages Hearing.

The Respondent's failure to provide proper notice to minor Defendant E.U. of the June 25, 2015 damages hearing in accordance with Rule 55(b)(2) renders the Order and damages award void. Though South Carolina Rules of Civil Procedure provide that service of a Summons and Complaint may be made by "delivering a copy to an [authorized] agent," its requirement for notice of an unliquidated damages hearing is

different, in that it requires the plaintiff to send notice directly to the party himself who will be affected by the ruling. Pursuant to Rule 55(b)(2), "notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not any such party has appeared in the action."

South Carolina courts require strict compliance with the provisions of this Rule. In a recent case with facts analogous to those presently at issue, the South Carolina Court of Appeals held that the plaintiffs' notice of the damages hearing was insufficient such that the damages award was deemed of no effect. McCall v. IKON, 611 S.E.2d 315 (S.C. Ct. App. 2005). In McCall, the plaintiffs' mailing notice of a default damages hearing in one letter addressed to two different defendants at one address resulted in the matter being sent back for a new hearing. The court held that the requirement that notice be given to each party by mail to its last known address "does not arise from an arcane or highly technical application of the rules. Rather, this requirement serves an essential function—ensuring that notice is properly received by all entitled to it." Id.

In the present matter, no notice was mailed via first class mail to minor Defendant E.U. at his last known address. The Special Referee and the Respondent were aware that E.U. was living with his grandmother at that time and no notice of the damages hearing was mailed to that address. (Ex. C, Transcript of Damages Hearing). Although the guardian ad litem was given notice of the hearing, this is equivalent to delivering to an "authorized agent," which is insufficient to satisfy the requirements of an unliquidated damages hearing, pursuant to rule 55(b)(2). See SCRCP 55(b)(2); McCall v. IKON, 611 S.E.2d 315 (S.C. Ct. App. 2005). Because the Respondent failed to

provide proper notice as required by the Rules of Civil Procedure and associated case law, both the Order and damages award are void and must be set aside.

4. The Judgment Against Minor E.U. is Void for Lack of Due Process.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." The requirements of due process not only include notice, but also include an opportunity to be heard in a meaningful way, and judicial review. Grannis v. Ordean, 234 U.S. 385, 394, 58 L. Ed. 1363, 34 S. Ct. 779 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); S.C. Dep't of Soc. Servs. v. Holden, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).

As noted above, a violation of due process renders a judgment against a Defendant void. Here, minor Defendant E.U. was never given an opportunity to be heard. In fact, it is unclear as to whether he was ever even given notice of the lawsuit against him or notice of the default judgment and damages hearings. The record indicates that E.U.'s guardian ad litem never spoke with him prior to the time of his damages hearing where she allowed a multi-million dollar judgment to be rendered against him without his involvement. The record is completely devoid of any evidence related to the default judgment hearing dated June 25, 2015 other than the 1-paragraph form order written by the Special Referee. (Ex. G, Order of Default as to E.U.). There is no transcript of this hearing, there are no new findings of fact or conclusions of law, and it appears that no court reporter was even present at the hearing. Further, there is no indication that minor Defendant E.U. was in attendance at this hearing or that he was

ever given notice of its existence and his opportunity to be heard before having a $5,000,000 verdict summarily adjudged against him. It is unclear whether a damages hearing as to E.U. ever actually took place.

Additionally, Nationwide submits that the actions and omissions of E.U.'s guardian ad litem ("Guardian") were a direct violation of S. C. Code Ann. § 63-3-830 and, therefore, provide independent grounds for this judgment to be set aside for a lack of due process. Simcox-Adams v. Adams, 408 S.C. 252, 758 S.E.2d 206, (Ct. App. 2014). In Simcox-Adams, the court addressed wife's contention that the guardian's failure to comply with § 63-3-830 was a violation of wife's due process rights. Id. at 264. Although the court declined to decide the issue because wife failed to preserve it for appeal, the South Carolina Court of Appeals recognized that a guardian's failure to comply with her statutory responsibilities can amount to a violation of her ward's constitutional right to due process. Id.

§ 63-3-830 states that (A) The responsibilities and duties of a guardian ad litem include, but are not limited to:

> (1) representing the best interest of the child;
> (2) conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family. An investigation must include, but is not limited to:
>
> > (a) obtaining and reviewing relevant documents . . .
> > (b) meeting with and observing the child on at least one occasion; . . .
> > (d) interviewing parents, caregivers, school officials, law enforcement, and others with knowledge relevant to the case; . . . and
> > (f) considering the wishes of the child, if appropriate;

S. C. Code Ann. § 63-3-830 (emphasis added). Nationwide submits that the Guardian in this case failed to comply with the statutory requirements of § 63-3-830 in violation of minor Defendant E.U.'s constitutional right to due process. The Guardian in this case

could not act in the best interests of E.U. because, upon information and belief, she never met with or spoke with E.U., despite a direct mandate in the statute to do so. Because she did not meet or speak with E.U., it was impossible for her to consider his wishes, which would also evidence what may be in his best interests. Further, to our knowledge, the Guardian did not meet with E.U.'s parents, grandmother, or any other person with knowledge relevant to the case, which would have also provided evidence as to E.U.'s best interests. For the Guardian to act on E.U.'s behalf by allowing a substantial judgment to be rendered against him without ever having spoken with E.U. amounts to a violation of due process.

Again, with reference to the statute's requirement that the guardian represent the best interests of the child, it is Nationwide's contention that she was not acting in E.U.'s best interests when she allowed a default judgment in excess of $5 Million to be entered against E.U. without putting up any type of defense. At the time of the Guardian's appointment, E.U.'s Entry of Default could potentially have been lifted for "good cause" under Rule 55, but the Guardian took no action on behalf of E.U. Further, the Guardian was aware that Nationwide insured E.U. for the underlying claims, that Nationwide had not appeared in any way in this action, and that Nationwide had failed to do so because it was unaware of this action, and yet the Guardian did not notify Nationwide of the impending $5 Million judgment about to be entered against its insureds. Had the Guardian acted with diligence and in the best interests of E.U. prior to his damages hearing, she would have contacted Nationwide, obtained counsel for E.U., and attempted to have the default set aside. To fail to take any of these actions without speaking with E.U. violated E.U.'s right to due process.

Finally, Nationwide submits that if, assuming *arguendo*, the Court decides that it is in the child's best interests to allow a $5 Million default judgment to be entered against him so that he may then immediately assign a bad faith claim to the underlying Plaintiffs (which is denied), then in this case the Guardian still failed to act in E.U.'s best interests because the assignment is not a full release of any claims that the Respondent may have against E.U. for the judgment. (Ex. H, Assignments of Claims). Per the terms and conditions of the assignment, E.U. could be 100% liable to the Respondent for the $5,150,000.00 verdict against him even with the assignment, despite the Guardian's opportunities prior to judgment to take available legal and practical action in the representation of E.U. to prevent this from happening. (Ex. H, Assignments of Claims). Specifically, the assignment makes clear that Respondent will mark the judgment as satisfied and will agree not to execute against E.U.'s personal assets only "if and when, and only if and when, the Defendant's insurance carrier . . . or any other responsible party pays and satisfied the judgment plus any accumulated interest, costs, and fees[.]"(Ex. H, Assignments of Claims). Thus, the protections set forth in the assignment are expressly contingent upon the entire judgment being paid. This does not provide adequate protection to E.U. such that it would be in his best interests to enter into this agreement in lieu of attempting to adjudicate this matter on its merits – particularly when the Guardian could have taken action to attempt to set aside the Entry of Default under the much less stringent standard of "good cause." At the very least, the Guardian could have contacted Nationwide to ensure that E.U. had legal representation in some capacity. However, she failed to do so. To our knowledge, E.U. never had the benefit of legal representation, notice of the damages hearing, notice of the Guardian's plan to not

present a defense, or notice of the Guardian's plan to execute an insufficient assignment of claims. Therefore, due to the lack of due process afforded to the minor Defendant E.U. throughout this action, the judgment against him is void and he is entitled to relief from that judgment, pursuant to Rule 60(b)(4).

5. The Judgments Against Defendants Travis Felkel and Ginger Ulery are Void Because the Judgment Against Minor Defendant E.U. is Void.

Due to the nature of the pleadings in this case, the resolution of the judgments against Felkel and Ulery are inextricably tied to the fate of the judgment against E.U. Felkel and Ulery's alleged liability is assumed to be in a vicarious capacity as no independent basis for their liability is alleged. In circumstances such as this, "the liability of [Felkel and Ulery] depends upon the liability of the child. Therefore, the judgment must be valid against both or it is valid against neither." Jordan v. Payton, 305 S.C. 537, 539, 409 S.E.2d 793, 794 (Ct. App. 1991). In Jordan, a minor and legal guardian were sued for damages caused by the minor driving an automobile. Id. The guardian was joined as a defendant based on allegations that she was the legal guardian of the child and provided him the car for "family purposes." Id. When the judgment against the minor was declared void for a violation of Rule 55(b)'s guardian ad litem requirements, the court set aside the judgment as to the legal guardian as well pursuant to the reasoning described immediately above. Id.; see also Johnson v. Atlantic Coast Line R. Co., 142 S.C. 125, 133, 140 S.E. 443, 445 (1927) ("When the master and the servant are sued together for the same act of negligence or willful tort, and the master's liability rests solely upon the servant's conduct, a verdict against the master alone is illogical and cannot stand."); Medlin v. Church, 157 Ga. App. 876, 278

S.E.2d 747 (1981) (Judgment reversed as to father when judgment against the child was void because of improper service).

Therefore, and because the judgment against minor Defendant E.U. is void for the reasons set forth above, the judgments against Felkel and Ulery should also be set aside on the basis that they are void.

C. Nationwide is Entitled to Relief Under Rule 60(b)(1).

Upon motion, the Court may relieve a party from a final judgment pursuant to Rule 60(b)(1), SCRCP, where the moving party demonstrates the judgment or order was induced by, among other things, mistake, inadvertence, surprise, or excusable neglect. Honorage Nursing Home of Florence, S.C., Inc. v. Florence Convalescent Ctr., Inc., 367 S.C. 108, 623 S.E.2d 853 (Ct. App. 2005).

1. Due to the Insufficiency of the Allegations in the Complaint, Defendants Travis Felkel and Ginger Ulery have Admitted to Nothing More than Being the Parents of E.U. and, Therefore, Any Judgments Against Them Come by Way of Surprise, Mistake, Inadvertence, or Excusable Neglect.

As noted above, Respondent's Complaint merely alleges that Travis Felkel and Ginger Ulery are the parents or legal guardians of E.U. (Ex. A, Compl.). This is the only factual allegation against Felkel and Ulery. (Ex. A, Compl.). Thus, this is the only allegation they are deemed to admit pursuant to an Entry of Default. This allegation is insufficient to put them on notice that they would or could be personally susceptible to a monetary judgment for E.U.'s actions (which occurred at school while E.U. was not under their supervision) because, by defaulting, they have only admitted to being E.U.'s parents. (Ex. A, Compl.). Because the only action committed by these Defendants on the date of the incident was sending their teenage child to high school, something

required by law, pursuant to South Carolina Code of Laws 59-65-10, *et seq.*, these Defendants cannot be reasonably deemed to have been on notice that they would be susceptible to receiving a $5,150,000 judgment against them.

Furthermore, the only theory of liability in South Carolina by which Felkel and Ulery can be held personally responsible for E.U.'s actions in this instance merely for being his "parents or guardians" is pursuant to S.C. Code Ann. § 63-5-60. "Citizens are presumed to know the law," Am. Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181, (Ct. App. 2009). And, as previously discussed, this statute caps the available damages pursuant to a civil action under these circumstances at five thousand dollars ($5,000.00). Therefore, Felkel and Ulery could not have reasonably expected a judgment against them to be one thousand and thirty times (1030 x) greater than the statutorily prescribed limits. Thus, the judgment against Felkel and Ulery should be set aside on the grounds that this issue constitutes surprise, mistake, inadvertence, and/or excusable neglect because it is inconsistent with the allegations set forth in the pleadings and South Carolina law.

Additionally, it should be noted that Travis Felkel, per his admission, is neither E.U.'s parent nor his guardian. (Exhibit C, Transcript of Damages Hearing). At the damages hearing, Felkel testified, "I'm not custodial parent . . . I am his step father by marriage, but I have no custody[.]" (Exhibit C, Transcript of Damages Hearing). Yet, despite this testimony, which is undisputed, a substantial judgment was rendered against Felkel. In addition to the issues set forth above, the judgment against Felkel should be set aside because he is not E.U.'s parent or legal guardian and there is no

theory of liability in South Carolina by which a step-father can or should be held legally responsible for a multi-million dollar judgment due to the actions of his step-son.

Therefore, whether the Court decides that the judgment awarded against these Defendants is relieved by reason of surprise, mistake, inadvertence, or excusable neglect, this judgment was awarded in error and, pursuant to Rule 60(b)(1), should be set aside.

2. The Action (and, More Importantly, Inaction) of Defendants Travis Felkel and Ginger Ulery Constitutes Mistake, Inadvertence, Surprise, and/or Excusable Neglect.

Nationwide did not receive timely notice of this suit due to the actions or inactions of Defendants Felkel and Ulery and such constitutes mistake, inadvertence, surprise, and/or excusable neglect on the part of Nationwide and the Defendants. Upon being served, Defendant Travis Felkel claims that sometime "before Christmas," he took a copy of the Summons and Complaint to his local insurance agent, John Herndon. (Exhibit C, Transcript of Damages Hearing). Felkel claims he provided a copy to Mr. Herndon and that in response, Mr. Herndon "told me I needed to have [E.U.] get on the phone with the corporate office." (Exhibit C, Transcript of Damages Hearing). When questioned whether he ever had E.U. communicate with Nationwide's corporate office, Felkel admitted that he "failed to make that happen." (Exhibit C, Transcript of Damages Hearing). Felkel also failed to communicate directly with Nationwide, despite explicit instructions from Herndon to do so. (Exhibit C, Transcript of Damages Hearing). Herndon made photocopies of the Summons and Complaint when Felkel brought them to him, but Herndon also deliberately and explicitly made clear to Felkel that he was simply going to hold onto them, not do anything with them, and wait until Felkel filed the

claim with the corporate office before acting on this information. (Exhibit C, Transcript of Damages Hearing). Specifically, Felkel testified:

MR. JENNINGS: And you provided him [John Herndon] with a copy of it [Summons and Complaint]?

MR. FELKEL: Yes.

MR. JENNINGS: What did he do in response?

MR. FELKEL: He told me I needed to have Evan get on the phone with the corporate office?

MR. JENNINGS: Did Evan do that?

MR. FELKEL: I failed to make that happen, yes.

. . .

MR. JENNINGS: Did he [John Herndon] ask you to leave a copy [of the Summons and Complaint] with him?

MR. FELKEL: He made copies of the paperwork and told me he would hold onto it and wait until I made the – filed the claim with the corporate office.

(Exhibit C, Transcript of Damages Hearing). (emphasis added). Felkel never contacted Nationwide after being instructed to do so by Mr. Herndon. Thus, the undisputed testimony demonstrates that Mr. Herndon specifically told Felkel that he would hold onto the Summons and Complaint until such time as Felkel notified Nationwide's corporate claims office. It is further undisputed that, despite these instructions, Felkel failed to ever attempt to contact Nationwide's corporate claims office.

As noted above, the first time Nationwide heard a word about this incident and suit was from a paralegal working with Plaintiff's counsel on July 27, 2015. (Ex. X, Aff. of Kennedy; Ex. Z, Aff. of Rash). Nationwide had no notice whatsoever until this date. The testimony and exhibits at the damages hearing suggests that Respondent's counsel

made several attempts to contact Defendants Travis Felkel and Ginger Ulery throughout this process, even before filing suit. (Ex. C, Transcript of Damages Hearing; Ex. W, Letters to Defendants). Multiple letters were sent to them prior to the filing of the action requesting them to contact Respondent's counsel. (Ex. C, Transcript of Damages Hearing; Ex. W, Letters to Defendants). When these attempts to communicate failed, Respondent ultimately brought suit against the Defendants. Thus, not only did Felkel and Ulery fail to notify Nationwide after suit was filed, they had multiple opportunities to do so prior to suit being filed and failed to take any action whatsoever.

Therefore, the following is undisputed and constitutes mistake, inadvertence, surprise, and/or excusable neglect on the part of Nationwide and the Defendants: Felkel and Ulery did not contact Nationwide prior to suit being filed, despite receiving multiple letters from Respondent's counsel. Felkel and Ulery did not contact Nationwide after Herndon explicitly instructed them to. Felkel and Ulery did not retain counsel or contact Nationwide after being served with the Summons and Complaint. Felkel and Ulery did not answer the Complaint. Felkel and Ulery, upon receiving notice of the Entry of Default in the mail, did nothing. Upon being served with notice of the damages hearing, Felkel and Ulery, for the first time, decided to act in this case. Unfortunately, they did not take the action of notifying Nationwide. Instead, they acted too late and arrived late to the damages hearing, thereby losing any chance they had to cross-examine the Respondent and witnesses. At the hearing, Felkel and Ulery, were told repeatedly to contact Nationwide. They, again, failed to act and did not contact Nationwide.

Even at such a late hour in the lawsuit, had Felkel and Ulery contacted Nationwide after their damages hearing, minor Defendant E.U. would have been represented by counsel appointed by Nationwide before his default judgment hearing and before default judgment was entered against him. Surprisingly, they failed to take action even after explicitly being told by the Special Referee to promptly contact Nationwide – an action which could have resulted in the Entry of Default against E.U. being set aside or, at the very least, representation of E.U. at his damages hearing, including an opportunity to cross examine witnesses. Specifically, the relevant testimony is as follows:

> MR. MCULLOUGH: . . . And I do think, again prompt communications with Nationwide to figure out what happened would be warranted here.
>
> MS. ULERY- FELKEL: We should have been more proactive about that.

(Ex. C, Transcript of Damages Hearing) (emphasis added). Incredibly, even after Ulery's admission that she and Felkel should have been "more proactive" in contacting Nationwide, they again failed to contact Nationwide after the April 21, 2015 damages hearing. Instead, Nationwide was not notified of any of this until an inconvenient 32 days after default judgment was entered against E.U. and Nationwide was never notified by Felkel and/or Ulery despite explicit, unambiguous instructions to do so by their agent, Mr. Herndon, and by the Special Referee.

The above clearly establishes mistake, inadvertence, surprise, and/or excusable neglect on the part of Nationwide. Additionally, even if Nationwide is responsible for any neglect in this case, imputed to it through its agent John Herndon (which is denied), this neglect is clearly excusable. At the most, there was a misunderstanding between

Herndon and Felkel, as the undisputed testimony clearly demonstrates that Herndon specifically told Felkel to call the corporate claims office and that Herndon would hold onto the suit papers until such time as Felkel completed this task. Instead, Defendants Felkel and Ulery did everything in their power not to notify Nationwide about this matter, despite being instructed to do so by everyone they talked to about it. And, as discussed above, it remains unclear whether the minor Defendant E.U. ever knew about any of this.

Nationwide submits that the judgments and damages awards should be set aside and that this case be decided on its merits, as the above demonstrates and establishes mistake, inadvertence, surprise, and/or excusable neglect under Rule 60(b)1).

D. Nationwide Meets the Good Cause Requirement of Rule 55(c) with Respect to Setting Aside an Entry of Default.

Rule 55(c) provides that the Court may set aside an entry of default for good cause. S. C. R. Civ. P. 55(c). In comparing the "good cause" standard in Rule 55 to the requirements of rule 60(b), our courts have observed that the "good cause" standard is a "less stringent standard" and that Rule 55(c) should be "liberally construed to promote justice and dispose of cases on the merits." Limehouse v. Hulsey, 2011 S.C. App. LEXIS 124 (Ct. App. 2011); Dixon v. Besco Eng'g, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995).

Therefore, Nationwide submits that because it has met the more "stringent" standard of Rule 60(b) for setting aside the judgment, it has also met the "good cause" standard for setting aside an entry of default under Rule 55(c), and thereby asks the court to set aside the entry of default as to all Defendants.

III. THE TRIAL COURT AND THE SPECIAL REFEREE ERRED IN DENYING NATIONWIDE MUTUAL FIRE INSURANCE COMPANY'S MOTION TO REMOVE CASE FROM SPECIAL REFEREE.

The trial court and Special Referee erred in denying Nationwide's Motion to Remove Case from Special Referee and Refer Back to Circuit Court Judge. By way of background, on February 4, 2015, Plaintiff obtained an Entry of Default Against all Defendants and an Order of Referral to a Special Referee. (Ex. B, Entry of Default & Order of Reference). The Order of Reference was granted by the Clerk of Court and the case was referred to the Special Referee. (Ex. B, Entry of Default & Order of Reference). On November 4, 2015, Nationwide filed a Motion to Remove the Case from Special Referee and Refer Back to Circuit Court Judge. (Ex. L, Nationwide Motion to Remove Special Referee). The purpose of this motion was to attempt to have Nationwide's motions heard and ruled upon by a circuit court judge. On November 16, 2015, counsel for Nationwide sent an e-mail to the law clerk of Judge Markley Dennis requesting that Judge Dennis hear this motion. (Ex. N, Judge Dennis E-mail). On November 20, 2015, Judge Dennis' law clerk sent an e-mail informing the parties that the Special Referee was the person with authority to hear this motion. (Ex. N, Judge Dennis E-mail). On December 7, 2015, the Special Referee held a hearing on all of Nationwide's pending motions and subsequently issued an Order denying Nationwide's Motion to Remove the Case. (Ex. M, Transcript of Hearing; Ex. O, Order Denying Motion to Remove Special Referee).

Pursuant to Rule 53, a case may be referred to a special referee "[i]n an action where the parties consent, in a default case, or an action for foreclosure[.]" S.C.R.C.P. 53(a). Here, Respondent sought referral based upon default, rather than consent of the

parties. When an Order of Reference is based upon default, proper service of the Summons and Complaint is a prerequisite requirement to a valid Order of Reference. Here, the Order of Reference is void because E.U. was never properly served. Specifically, if E.U. was indeed improperly served with the Summons and Complaint, then the Entry of Default and Order of Reference as to claims against E.U. are void. Accordingly, the Special Referee did not and does not have the authority to hear and rule upon any issues concerning the claims against E.U. Thus, the trial court and Special Referee erred in denying Nationwide's Motion to Remove Case from Special Referee and Refer Back to Circuit Court Judge.

Additionally, pursuant to due process, this matter should be removed from the Special Referee and referred back to a circuit court judge. The Fourteenth Amendment to the Constitution as well as Article 1 § 3 of the South Carolina Constitution provides protection from being deprived of life liberty or property without due process of the law. It also provides for a fair and impartial hearing. "[A] defaulting party does not lose its right to have an impartial master or referee, and may still raise an objection based on such grounds." Roche v. Young Bros., 332 S.C. 75, 83, 504 S.E.2d 311, 315, (1998). A special referee's impartiality might reasonably be questioned when his factual findings are not supported by the record. Id.

Here, the Special Referee found that all parties were properly served and this finding is not supported by the record. As set forth above, Defendant E.U. was not properly served and, additionally, did not receive proper notice of his "damages hearing." It further appears as though a damages hearing as to E.U. never took place and that the Special Referee simply entered an Order adopting all prior findings of fact

and conclusions of law without properly vetting these issues with E.U. Because the findings of fact concerning service of process are not supported by the record, due process requires that this case be removed from the Special Referee and referred back to the circuit court to ensure that Nationwide has a full, fair, and impartial opportunity to be heard by a circuit court judge.

CONCLUSION

Based upon the foregoing, the Court should reverse the Special Referee's denial of Nationwide's Motion to Intervene, Motion to Set Aside Default Judgments, and Motion to Remove the Case from the Special Referee and Refer Case Back to Circuit Court.

Respectfully submitted,

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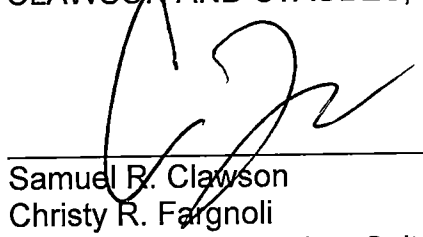

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