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

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

v.

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

Ex parte: Nationwide Mutual Fire Insurance Company, Appellant.

INITIAL BRIEF OF RESPONDENT

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II. Was the Special Referee's denial of Nationwide's Motion to Set Aside Default Judgment or Entry of Default an appropriate exercise of his discretion after Nationwide was not permitted to intervene, and, regardless, Nationwide cannot meet the requirements of Rule 60(b), SCRCP, or Rule 55, SCRCP, as those have been interpreted by binding precedent, when Nationwide's agent admits Nationwide received the summons and complaint but failed to retain counsel or file an answer on behalf of its insured?

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STATEMENT OF THE CASE

This appeal is brought by non-party, putative intervenor Nationwide Mutual Fire Insurance Company ("Nationwide"). Nationwide appeals the denial of its Motion to Intervene in this tort suit brought against its insureds after a default judgment was entered against its insureds.

On November 10, 2014 Respondent Anna Angelacci, as guardian of K.B., a minor (hereinafter "Respondent") filed a Summons and Complaint in the Berkeley County Court of Common Pleas against E.U., a minor, Travis Felkel and Ginger G. Ulery, Defendants. See Summons and Complaint. The Complaint alleged that

Respondent sustained a traumatic brain injury as a result of the negligent and/or grossly negligent acts of Defendants. See Complaint. The Complaint was served on the three defendants on December 2, 2014. See Affidavits of Service. Shortly thereafter, Travis Felkel personally delivered the Summons and Complaint to his homeowner's insurance Nationwide Agent John Herndon. *See* Herndon Depo., p.30, lines 4-7. Herndon admits he was the designated agent to accept service of the lawsuit by Nationwide and that received the lawsuit, and made a copy of the lawsuit papers. *See* Herndon Depo., p.30, lines 4-7. The Defendants failed to Answer or otherwise respond to the Complaint within 30 days of service. See Affidavit of Default and Motion for Entry of Default and Referral. As a result, the Clerk of Court for Berkeley County entered default on February 4, 2015, and issued an Order of Reference appointing Clay McCullough, Esquire as Special Referee. See Entry of Default and Order of Referral. The Special Referee held a damages hearing on April 21, 2015, and issued an order of Default Judgment in the amount of $5,150,000.00 against Travis Felkel and Ginger G. Ulery. See Motion for Default Judgment and Order of Default Judgment for Felkel and Ulery.

On June 8, 2015, the Special Referee appointed Shannon Jones, Esquire to act as guardian ad litem, for the Minor Defendant E.U. See Order of Appointment. On June 9, 2015, Respondent filed a Motion for Default Judgment against E.U., and served that motion and a Notice of Hearing on the guardian ad litem. See Motion for Default Judgment against E.U. and Notice of Hearing. On June 25, 2015, the Special Referee then issued an Order of Default Judgment as to E.U. See Order of Default Judgment against E.U.

Approximately four months later, on October 1, 2015, Nationwide filed a Motion to Intervene and a Motion to Set Aside Default. On November 4, 2015, Nationwide filed a motion to remove the case from the Special Referee. Respondents filed Memoranda in Opposition to Nationwide's Motion to Intervene and Motion to Set Aside Default on December 4, 2015. See Respondents' Memoranda in Opposition. On December 7, 2015, the Special Referee held a hearing on Nationwide's Motion to Intervene and Motion Set Aside Default. During the hearing, the Special Referee also denied Nationwide's Motion to remove the case from Special Referee. See Order Denying Motion to Remove Case from Special Referee. After taking the remaining two motions under advisement, the Special Referee issued written orders denying Nationwide's Motion to Intervene and Motion to Set Aside Default. Order Denying Nationwide's Motion to Intervene and Set Aside Default. On January 11, 2016, Nationwide filed a Notice of Appeal of the Special Referee's denial of its Motion to Remove Case from Special Referee. See Notice of Appeal. Nationwide filed a Rule 59(e) Motion to Reconsider the Special Referee's Order Denying Nationwide's Motion to Intervene and Motion to Set Aside Default Judgment. See Nationwide's Motion to Reconsider. On January 14, 2016, the Special Referee denied Nationwide's Motion to Reconsider. *See* Order Denying Nationwide's Motion to Reconsider. Nationwide filed a Notice of Appeal of the denial of its Motion to Intervene and Motion to Set Aside Default Judgment. On February 9, 2016, the Court of Appeals consolidated the two appeals.

STATEMENT OF FACTS

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. See Complaint. The Ulery-Felkel Defendants were insured by Nationwide through a homeowners insurance policy sold to them by John Herndon at the Herndon Insurance Agency. See Nationwide Homeowners Insurance Policy. Herndon was a captive agent for Nationwide, and was named in the Policy as Nationwide's agent, to whom notice of claims could be provided by the insured. *See* Deposition of John Herndon, III, p.14, lines 18-19 and p. 81, lines 19-22.[1]

The Ulery-Felkel Defendants were served on December 2, 2014. See Affidavits of Service, Affidavit of Mike Lamont and Affidavit of Travis Felkel. Shortly thereafter, Travis Felkel personally delivered the Summons and Complaint to John Herndon at his Charleston office. See Herndon Depo., p.30, lines 4-7 and Affidavit of Felkel. Herndon admits he received the lawsuit, and made a copy of the lawsuit papers. *Id.*

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, an entry of default and referral to a special referee was ordered. See Entry of Default and Order of Reference. On April 21, 2016 and June 25, 2016 damages hearings were held and default judgments were entered against each of the three defendants, jointly and severally, in the amount of $5,150,000 in favor of Respondent. See Judgments.

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

[1] In at least three places in the Policy documents and declarations, Nationwide lists John Herndon as "your Nationwide agent" or "your Nationwide representative" and provides Herndon's Charleston telephone number as the contact point for Nationwide. Moreover, Herndon admits he was Nationwide's agent and that he was authorized by Nationwide to accept notice of a lawsuit from an insured. See Herndon Depo., p. 39, lines 19-25; *See* Homeowner Policy, at Customer Notice and Declarations.

lawsuit to the Plaintiffs in the underlying action in exchange for a stay of execution of the judgments and the possibility of having the judgments vacated if satisfied by Nationwide. See Felkel, Ulery, and Minor E.U. Assignments. 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.[2] Nationwide was served with this bad faith lawsuit on July 28, 2015. Instead of immediately moving to intervene, set aside default, and file an answer, Nationwide waited two months to address the default judgments. First, Nationwide sent a full reservation of rights letter to its insureds. See ROR letter dated September 2, 2015. Then, after another month had passed, on October 1, 2015, Nationwide filed these motions to intervene and set aside default. See Motions. Nationwide never filed a motion for leave to extend time to file a late answer. The Defendants (Insureds) have never moved to set aside the entry of default or default judgment.

ARGUMENT

I. THE SPECIAL REFEREE'S DENIAL OF NATIONWIDE'S MOTION TO INTERVENE SHOULD BE AFFIRMED BECAUSE NATIONWIDE LACKS A SUFFICIENT "INTEREST" IN THIS LITIGATION AND INTERVENTION WOULD RISK INJECTION OF ISSUES OF INSURANCE COVERAGE INTO THIS UNDERLYING TORT LITIGATION.

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[2] *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.

Nationwide is not a party to this action. After this action was commenced against them, Nationwide's insureds hand-delivered a copy of the lawsuit to Nationwide's agent, John Herndon, but Nationwide failed to hire counsel or file an Answer to protect its insureds. *See* Depo of Herndon and Affidavit of Felkel. Nationwide's failure to take any action resulted in entry of default and default judgment against Nationwide's insureds. See Entry of Default and Orders of Judgment. As a non-party, Nationwide has no standing to challenge this default and so it has moved to intervene in the action. Based on a long line of precedent, however, the Special Referee denied Nationwide's motion to intervene in this action, and his Order should be affirmed.

A. The Special Referee's Order Must Be Reviewed Under The Highly Deferential Abuse Of Discretion Standard Of Review.

As a preliminary matter, the decision to grant or deny a motion to intervene in an action pursuant to Rule 24, SCRCP, "lies within the sound discretion of the trial court." *Government Employee's Ins. Co., Ex Parte,* 373 S.C. 132, 135, 644 S.E.2d 699, 701 (2007). This form of review is highly deferential to the trial court. *See, e.g. State v. Lyles,* 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008). Indeed, the Supreme Court has held that it "will not disturb the lower court's decision on appeal unless a manifest abuse of discretion is found, resulting in an error of law. Moreover, the error of law must be so opposed to the lower court's sound discretion as to amount to a deprivation of the legal rights of the party." *Jeter v. S.C. Dept. of Transp.,* 369 S.C. 433, 633 S.E.2d 143, 146 (2006).

B. The Special Referee Did Not Abuse His Discretion In Finding That Nationwide Is Not Entitled To Intervene As Of Right Under Rule 24(a).

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 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. 1 *Law and Prac. of Ins. Coverage Litig.* § 12:17 (2015) ("Courts are loathe to recognize intervention as a matter of right because other mechanisms, like declaratory judgment actions, exist to protect the parties' rights vis-à-vis coverage issues.").

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 Supreme 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). *Government Employee's Insurance Company* ("GEICO"), 373 S.C at 138, 644 S.E.2d at 702 (citing *Bailey v. Bailey,* 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)).

In that case, GEICO wished 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.* 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 rationale behind 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, 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,[3] 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 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 business 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

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

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 (emphasis added). As it was merely contingent, the First Circuit found it was "not cognizable for the purposes of Rule 24(a)(2)."[4] *Id.*

Recently, the District of South Carolina followed the rationale of this line of cases when it denied an insurer's motion to intervene in an underlying tort suit 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. The district court found that interest was not cognizable for purposes of Rule 24. *Id.*

In his Order, the Special Referee found that Nationwide is situated similarly to the insurers in the cases described above. See Order Denying Motion to Intervene, at p. 8. "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

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[4] 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 they are for an insured in default. *Id.* The "contingency" lies in whether or not the insurer who has reserved their rights to deny coverage, will be obligated to pay those damages under the terms of the its policy, and that question is appropriately addressed in separate coverage litigation, not in the underlying tort suit. *Id.*

in the amount it may have to pay ***if*** its insureds prevail in the bad faith litigation." *Id.* The Special Referee went on to find, "[b]ecause 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 insurer's interest was contingent in *Travelers*, where the insurer had reserved its right to deny coverage." *Id.* Here, Nationwide has not only reserved its right to deny coverage but has filed a counterclaim in the bad faith litigation seeking a declaration that the judgment at issue in this case is not covered under its Policy, and that Nationwide has no duty to defend or indemnify any of the Defendants in this case. *See* Bad Faith Complaint and Nationwide's Amended Answer and Counterclaim.

Significantly, as noted by the Special Referee, 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. *See* Special Referee's Order, at p. 8, fn. 3. Before the Special Referee and in its Brief to this Court, Nationwide relies on *McClurg v. Deaton,* 380 S.C.563, 671 S.E.2d 87 (Ct. App. 2008) for the proposition that the "defendant's ***carrier*** was permitted to intervene in a personal injury action involving its insured," but it was the defendant's vicariously liable ***employer***, not its insurer, who was permitted to intervene in that case. See Appellant's Brief at p. 13 (emphasis added). In that case, the ***employer*** of the individual defendant (not the "carrier" as stated in Nationwide's brief) 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. *McClurg*. This is a significant distinction; unlike an insurer who has reserved its right to deny coverage altogether, the employer had a direct, non-contingent

interest in the outcome of the tort suit. Accordingly, the employer's position in *McClurg* is not akin to that of Nationwide here, who is merely an insurer who has denied coverage for the negligent acts of its insureds, not an employer with liability for its employee's negligence.[5]

Based on the South Carolina authority and authority from the federal courts cited, as well as the dearth of authority that supports intervention under these factual circumstances, the Special Referee was well within his discretion in finding that Nationwide had not established a sufficient interest in the subject matter of this tort litigation to support intervention of right under Rule 24(a)(2). In addition, pursuant to Rule 220(c), SCACR, this Court may affirm the Special Referee's Order "upon any ground(s) appearing in the Record on Appeal." Moreover, Nationwide finds itself in the unhappy position of trying to intervene in an action in which it has already squandered an opportunity to participate and offer a defense by hiring counsel for its insured when its insured provided Nationwide with a copy of the lawsuit before the Answer was due. Under these circumstances, Nationwide's complaint that its interests are not adequately represented by the insured, who is in default solely because of the negligence of Nationwide, rings hollow.

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[5] The employer in *McClurg* was insured by Zurich North America, but Zurich did not attempt to intervene. *Id.* In addition to *McClurg*, Appellant cites to a case out of the Northern District of California: *Utica Mut. Ins. Co. v. Hamilton Supply Co.*, (N.D. Cal. Nov. 5, 2007). Although this case, unlike *McClurg*, does involve an insurer seeking to intervene, it is ***not*** analogous to this case because it analyzes the rights of one insurer to intervene into ***coverage litigation, not an underlying tort suit,*** which was initiated by another insurer against the defendant, who was insured by both the plaintiff insurer and the intervening insurer. *Id.* The interest of the intervening insurer was not "contingent" on the outcome of coverage litigation as Nationwide's interest in this case is, and, therefore, this case has no application to the facts presented here.

C. The Special Referee Did Not Abuse Its Broad Discretion In Denying Nationwide's Motion For Permissive Intervention Under Rule 24(b), SCRCP

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, the Special Referee found that 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. See Bad Faith Complaint. Indeed, Nationwide is seeking a declaratory judgment by way of a counterclaim in the bad faith litigation that it owes no duty to defend or indemnify Defendants in this tort action. See Amended Answer and Counterclaim. As discussed above, Nationwide's interest in this tort litigation is a peripheral, financial one, and does not present a common question of law or fact to the underlying tort claims. When faced with the analogous scenario in *Travelers*, the First Circuit affirmed the district court's refusal to allow permissive intervention on the same grounds that it had denied intervention of right. *Travelers,* 884 F.2d at 633 (affirming the district court based on the district court's broad discretion in making determinations regarding permissive

intervention). As the First Circuit exercised its discretion to deny permissive intervention, so did the Special Referee here when faced with an analogous scenario.

In addition, the Special Referee found that 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 could be motivated to contest their factual assertions to the extent those assertions impacted the insurer's coverage. *See Excel Mechanical*, at p. 4 (citing *Restor-A-Dent,* 725 F.2d 871, 877 ("Allowing the insurer to intervene...might, as a practical matter, ... exacerbate a potential conflict of interest for the attorney furnished by [the insurer] to represent [the insured]."). In order to avoid this possibility as well as the injection of issues of insurance coverage into this underlying action, the Special Referee exercised his discretion to deny permissive intervention as the courts did in *Travelers* and *Excel Mechanical* when faced with similar factual scenarios.[6]

As the Special Referee's decision is subject to the highly deferential abuse of discretion standard of review, in order to be reversed, his decision must have been controlled by an error of law or based on a factual finding lacking evidentiary support.

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[6] Notably, before the Special Referee, Nationwide failed to identify what the common question of law or fact is between this tort litigation and the coverage dispute. Now, in its brief, it relies on a general statement that commonality exists when the intervenor's claims and the main action arose out of the same transaction. Appellant's Br. at p. 18. Nationwide cites *TPI Corp. v. Merchandise Mart of South Carolina, Inc.*, 61 F.R.D. 684, 689 (D.S.C. 1974) for support. Once again, however, Nationwide's reliance on this case is misplaced as it deals with a breach of contract dispute in which the court allowed sister corporations of the defendant to intervene to raise their defenses to the breach of contract action. *Id.* In *TPI,* the intervenors were permitted to intervene because their claims against the plaintiff were based on the same contractual, transaction as the plaintiff's claims against the existing defendants. *Id.* There is no analogy between the factual scenario presented in *TPI* and the tort litigation at issue here.

Travelers, 884 F.2d at 641 (citations omitted); *Wilson v. Dallas,* 403 S.C. 411, 743 S.E.2d 746 (2013). Indeed, reversal of the trial court on the issue of permissive intervention would be "so unusual as to be unique." As it is both well-supported by legal authority and the factual record, the Special Referee should be affirmed. Further, as permitted by Rule 220, SCACR, the appellate court may affirm any ruling, or judgment upon any ground appearing in the record on appeal.

II. THE SPECIAL REFEREE ACTED WITHIN HIS BROAD DISCRETION WHEN HE DENIED NATIONWIDE'S MOTION TO SET ASIDE DEFAULT WHEN NATIONWIDE'S AGENT ADMITS NATIONWIDE RECEIVED THE SUMMONS AND COMPLAINT BUT FAILED TO RETAIN COUNSEL OR FILE AN ANSWER ON BEHALF OF ITS INSURED.

In light of his ruling denying Nationwide's Motion to Intervene, the Special Referee held that Nationwide had no standing to file a motion to set aside default, and denied Nationwide's Motion to Vacate Default on that basis. See Order Denying Motion to Intervene and Set Aside Default, at p. 10. The Special Referee's ruling is supported by *Narruhn v. Alea London Ltd.,* 404 S.C. 337, 745 S.E.2d 90 (2013), which held that an insurer had no standing to raise Rule 60(b) motion when it was not a party. As such, if this Court affirms the Special Referee's Order Denying Nationwide's Motion to Intervene, it should deny Nationwide's Motion to Set Aside Default on grounds that Nationwide, as a non-party, has no standing to move to set aside default. *See Narruhn.*

Although it was not necessary, for the sake of judicial economy, the Special Referee went on to consider the default motion on the merits. After reviewing the briefs of both parties and hearing each party's oral arguments on the motions, he found that Nationwide had not met the standard for setting aside the default judgment under Rule

60(b), SCRCP, or even the lesser standard for entry of default under Rule 55(c). See Special Referee's Order, at p. 10. The "decision whether to set aside an entry of default or a default judgment lies within the sound discretion of the trial court," and "[t]he trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Richardson v. P.V., Inc.,* 383 S.C. 610, 682 S.E.2d 263, 265 (2009)(citations omitted). Therefore, should this Court find that the Special Referee abused his discretion in denying Nationwide's Motion to Intervene, it should affirm the denial of Nationwide's Motion to Set Aside Default on the merits, reviewing his decision under the abuse of discretion standard.[7]

A. Nationwide Cannot Meet the Rigorous Rule 60(b)(1) Standard Or Rule 55(c)'s Lesser "Good Cause" Standard For Setting Aside Default Judgment When Its Agent Received The Summons And Complaint But Failed To Take Any Action To Protect Its Insureds.

Once a default judgment has been entered, as it was in the present case, 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,*

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[7] While there is abundant factual evidence and legal authority in the record on which this Court could affirm the Special Referee's Order denying of the Motion to Set Aside Default on the merits, there is additional evidence that has come to light since the Special Referee's Order. This evidence relates to the timing of Nationwide's knowledge of the lawsuit, and contradicts the statements made by Nationwide in this brief regarding its knowledge of this lawsuit. Most significantly, this evidence provides further support for the Special Referee's denial of Nationwide's Motion to Set Aside Default. As this evidence came to light after the Special Referee issued his Order, it was not presented to the Special Referee, but should be considered before the decision of the Special Referee denying the motion to set aside default is reversed. Accordingly, if this Court decides not to Affirm the Special Referee's Order on default, Respondent respectfully requests that this Court remand the default issue so that this additional evidence can be considered by the trial court.

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, 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.* (emphasis added). 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.*

In *Sundown*, the corporate defendant was served on August 28, 2001. The defendant then verbally notified its insurance agent of the lawsuit on September 14, 2001,

but didn't send him a copy of the lawsuit on October 1, 2001. *Id.* 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. *Id.* 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. *Id.* (citing *Wham* factors). The Supreme Court denied Defendant's motion to set aside the 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 Supreme 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, the Special Referee was well within the broad discretion granted him in holding that the insurer's conduct was "at least as deficient" as the defendant's conduct in *Sundown. See* Special Referee's Order, at p. 12. 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. *Sundown.* Here, the Special Referee made a factual finding that the insured hand-delivered a copy of the lawsuit to his Nationwide insurance agent John Herndon in December 2014, a week or more before the Answer was due. *See* Special Referee's Order, at p. 12, fn. 4 (stating that the factual findings in this section of his Order were based on the deposition testimony of John Herndon); *See also* Herndon Depo., p.29, lines 18-25, p.30, lines 1-7, p. 31- lines 3-10. The Special Referee went on to find that Mr. Herndon admitted 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. Special Referee's Order, at p. 12; Herndon Depo., p. 30, lines 4-23, p. 32, lines 1-6, p. 33, lines 12-25, p. 39, lines 19-25. The Special Referee also found that Mr. Herndon admitted that "Nationwide owed separate duties to each of the insureds under the Severability clause of the policy and that after being served with the lawsuit on behalf of the three 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." *See* Special Referee's Order, at pp. 12-13; Herndon Depo., p. 34, lines 1-8, p.35, lines 13-16, p. 44, lines 17-24.

Nationwide has not attempted to provide an explanation for its agent's failure to ensure the Complaint was answered, perhaps because there is no satisfactory one, and confuses the test for relief from judgment with the test for relief from entry of default by failing to make a "particularized showing of mistake, inadvertence, excusable neglect."[8] 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, the Special Referee in this case found 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.*" *See* Special Referee's Order, at p. 13; Herndon Depo., p. 81, lines 3-22. The Special Referee went on to hold that "[a]s 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."[9] *See* Special Referee's Order, at p. 13.

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[8] Nationwide argues that default should be lifted based on the excusable neglect of Nationwide by arguing that the negligence that caused the default was that of its insured for failure to notify Nationwide of the Complaint in a timely fashion. See Nationwide's Brief at pp. 41-45. Nationwide's argument ignores what has now been admitted by Nationwide's agent John Herndon: Defendant Travis Felkel hand-delivered a copy of the summons and complaint to Nationwide agent John Herndon a week or more prior to the date the Answer was due, thereby, placing Nationwide on notice of the lawsuit in a timely fashion. Herndon Depo., p.29, lines 18-25, p.30, lines 1-7, p. 31- lines 3-10. Given this fact, and the long-established rule that the negligence of the insurance agent is imputed to the insured for purposes of default, this argument does not further Nationwide's cause in any way.

[9] Nationwide attempted to show "surprise" by arguing that S.C. Code Ann. § 63-5-60 limits recovery against parents of a minor who causes personal injury to $5,000. The Special Referee found this argument to be without merit, finding the Code section to be applicable to malicious and willful conduct of minors and not negligent acts of minors

Based on this analysis and the properly supported factual findings of the Special Referee, his Order denying set aside under either Rules 60(b)(1) or 55(c) must be affirmed, particularly when his decision denying the motion to set aside default "will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Richardson.,* 383 S.C. 610 , 682 S.E.2d 263, 265 (citations omitted).

B. Nationwide Is Not Entitled To Relief Under Rule 60(b)(4) Because the Judgment Is Not Void When The Defendants Were Properly Served And Afforded Due Process.

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). These issues were fully briefed and argued before the Special Referee, and he found each one to be without merit.

1. Minor Defendant E.U. Was Properly Served And The Court Had Personal Jurisdiction Over Him.

After hearing Nationwide's arguments regarding service, the Special Referee correctly found that "the minor was served on December 2, 2014." *See* Order of Special Referee, p. 14. Rule 4, SCRCP serves at least two purposes: "'It confers personal

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and their parents as it relates to the supervision of their children. "The acts of negligence alleged in Paragraphs 9 and 10 against all three defendants are deemed admitted by default and, therefore, are sufficient to sustain these judgments." *See* Order of Special Referee, at p. 13, fn 5.

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 officers 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, the Special Referee found that service was perfected on Defendant Minor E.U. pursuant to both Rule 4(d)(1) and (2) when the summons and complaint was made by personal service on 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. *See* Order of Special Referee, at p. 15. Indeed, Nationwide does not dispute that service

was proper on both Travis and Ginger on December 2, 2014. Nationwide also does not dispute that Ginger is the parent and legal guardian of Minor E.U. Accordingly, as 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, the portion of Rule 4(d)(2) that requires that a parent or guardian of a minor between the ages of 14 and 18 be served with a copy of the summons and complaint, is met. Travis Felkel has stated that both his wife and step-son were home when he was served with the Complaint, and he was a person of suitable age and discretion to accept service on his wife's behalf. *See* Affidavit of Felkel. Accordingly, Minor Defendant E.U.'s parent or guardian was served for purposes of Rule 4(d)(2).

Nationwide's only remaining argument regarding service is that Minor Defendant E.U. did not "live" with his parent or guardian at the home where his mother was served. Nationwide's argument is based entirely on the statement of Mrs. Ulery-Felkel at the damages hearing that her son started living with his grandmother following this incident. The damages hearing occurred on April 21, 2015, almost six months after the date of service, and Ms. Ulery-Felkel's statements were less than clear as to dates; she first said that her son moved out in September, then she said October, and Mr. Felkel never said when the minor moved out. Mr. Felkel has now clarified by affidavit that the minor was home when he was served on December 2nd, and that both the minor and his mother looked at the lawsuit that night after Mr. Felkel accepted service of it. Affidavit of Felkel. Moreover, the process server has testified via Affidavit that the minor answered the door at the family home the day before on December 1, 2014. *See* Affidavit of Mike Lamont. Accordingly, contrary to the statements in Nationwide's brief, there is

undisputed evidence in the record is that the minor (1) was present in the home on the date of service and (2) that he received actual notice of the lawsuit on the night it was served on his step-father and mother.

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 dwelling home. *Id.* The present case is even weaker than *Fassett,* as there is no testimony from the minor defendant himself saying he no longer resided at his parent's home or to contradict his step-father's Affidavit stating that E.U. was home at the time of service and received actual notice of the lawsuit that night. Affidavit of Felkel. Instead, 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. *See Fassett.*

Accordingly, the Special Referee's finding that the minor was served on December 2, 2014 should be affirmed.

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. The Special Referee found, however, that Nationwide's reliance on this Code section is misguided, as this section applies to custody and visitation proceedings in family court. See Special Referee's Order, at p. 17. Section 63-3-810 makes clear that this Article of the Code 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.[10]

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 incompetent persons 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. Ms. Jones sent minor made numerous attempts to reach the minor E.U. through his mother and step-father, and actually appeared at the damages hearing on his behalf, which is

[10] 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).

what Rule 55(b)(2) requires. Transcript of Motion to Set Aside Default Hearing, at pp. 65-67. Accordingly, the requirements of Rule 55(b)(2) were met in 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").

Nationwide also argues that the judgment against minor defendant E.U. should be set aside because he did not receive proper notice of the damages hearing. This argument, like Nationwide's argument regarding improper service on E.U., is based on the allegation that E.U. did not live with his parents at the time the notice was provided. Significantly, notice was provided to E.U. through his mother and natural guardian, Ginger Ulery, prior to the damages hearing at his last known address, which was his mother's home at 339 Holly Drive in Goose Creek, South Carolina. See Letter and Notice to Ginger. Rule 55(b)(2) requires that notice be given to defaulting defendants prior to a hearing on unliquidated damages "by first class mail to the last known address" of the party. The plaintiffs had no address for minor defendant's grandparents and there is no evidence in the record that he was still living with his grandparents at the time notice of the hearings was mailed to him at this mother's home. Finally, there is nothing in the record to indicate that the minor defendant E.U. didn't have actual notice of the damages hearing that occurred on June 25, 2015. As such, the Special Referee found that notice of the damages hearing was provided defendant E.U. in compliance with Rule 55(b)(2) and he should be affirmed.

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 the Special Referee found that Rule 54(b) had 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, states that

> 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. on June 25, 2015. 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. 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)). 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, and the Special Referee's Order denying relief on that basis should be affirmed.

III. THE DENIAL OF NATIONWIDE'S MOTION TO REMOVE CASE FROM SPECIAL REFEREE WAS PROPER AND SHOULD BE AFFIRMED.[11]

The Special Referee's denial of Nationwide's Motion to Remove Case from Special Referee was proper and should be affirmed. The Special Referee denied the Motion on three grounds: (1) Nationwide was not a party and, therefore, had no standing to file the Motion; (2) the Order of Reference appointing the Special Referee states that he is to retain jurisdiction to hear motions to set aside entry of default, default judgment, and any other challenges to the validity of the judgment rendered; and (3) Nationwide failed to cite any caselaw that would support removal. *See* Order Denying Nationwide's Motion to Remove Case from Special Referee.

In its Motion, Nationwide's sole argument was that service was not proper on defendant E.U., and, therefore "the matter was not properly before the Special Referee

[11] In its Statement of Issues and Argument Headings, Nationwide indicates that the trial court made a decision with respect to the removal of the Special Referee, but there is no Order from the trial court regarding Nationwide's motion. Even if there were an order, Nationwide failed to appeal that Order in its Notice of Appeal, and, therefore, it is not preserved.

when it was heard." *See* Motion to Remove Case From Special Referee and Refer Case Back to Circuit Court Judge, at p.1. As discussed at length in Section II of this Brief as well as in the Special Referee's Order, however, service on the minor E.U. was proper and occurred on December 2, 2014. Moreover, Nationwide was not a party to this action at the time it filed this motion, and, therefore, had no standing to file a motion to remove the case from the special referee. Finally, Nationwide has cited no caselaw in which a case has been removed from a special referee under similar circumstances,[12] and Rule 53(c), SCRCP, provides as follows

> Once referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter.

As such, there is no limitation on the Special Referee's authority to adjudicate Nationwide's Motion to Intervene and Motion to Set Aside Default after the case was referred to him for a final disposition pursuant to Rule 53, SCRCP. Accordingly, the Special Referee's denial of Nationwide's Motion to Remove should be affirmed.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court AFFIRM the Order of the Special Referee denying Nationwide's Motion to Intervene and

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[12] In its Brief, Nationwide cites to *Roche v. Young Bros.*, 332 S.C. 75, 504 S.E.2d 311 (1998) suggesting that its Motion should be granted because the Special Referee was not impartial. First, as Nationwide did not raise this authority to the Special Referee, it is prohibited from relying on it now for the first time under the rules of issue preservation. *See McNeely v. S.C. Farm Bureau,* 259 S.C. 39, 190 S.E.2d 499 (1972). Regardless, however, *Roche* does not benefit Nationwide as there is ample evidence and legal authority to support the Special Referee's finding that defendant E.U. was properly served on December 2, 2014. *See* Respondent's Brief, at pp. 21-24 and Order of Special Referee, at p. 15 (citing Affidavit of Mike Lamont, Affidavit of Felkel and *Fassett v. Evans,* 364 S.C. 42, 610 S.E.2d 841 (Ct. App. 2005)(concerning the presumption of proper service and evidence required to establish new "dwelling place.").

Nationwide's Motion to Set Aside Default Judgment, both of which are subject to review under the highly deferential abuse of discretion standard. In addition, Respondent respectfully requests that this Court AFFIRM the Special Referee's Order Denying Nationwide's Motion to Remove Case From Special Referee.

Should the court reverse the Special Referee's Order to grant Nationwide's Motion to Intervene, Respondent respectfully requests that this Court AFFIRM the Special Referee's denial of Nationwide's Motion to Set Aside Default, or, in the alternative, REMAND for further proceedings before the Special Referee in order to allow consideration of new evidence which further supports denial of Nationwide's default motions.

Respectfully submitted,

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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

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

v.

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

Ex parte: Nationwide Mutual Fire Insurance Company, Appellant.

PROOF OF SERVICE OF INITIAL BRIEF OF RESPONDENT

I certify that I have served the Initial Brief of Respondent and Respondent's Designation of Matter to be Included on the Record of Appeal on Defendants and Appellant above-named by depositing a copy of it in the United States Mail, postage prepaid, on June 1, 2016 addressed to their attorneys of record:

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June 1, 2016

The Honorable Jenny Abbott Kitchings
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Re: Ex Parte: Nationwide Mutual Fire Insurance
In Re: Anna Angelacci
Appellate Case No. 2016-000063
Our File No. 14-062

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Respondent's Initial Brief, Proof of Service, and Designation of Matter to be Included in Appeal in the above-referenced matter. Please file the original and return a date-stamped copy of each in the enclosed envelope. Please do not hesitate to contact me with any questions or concerns.

Sincerely yours,

Lydia Blessing Applegate

Enclosures as stated
cc: Samuel R. Clawson, Esquire
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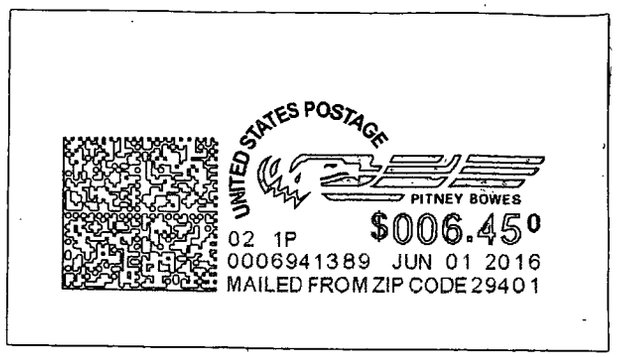

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