

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Clayton B. McCullough, Esquire, Special Referee

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SC Court of Appeals

Case No.: 2016-000063

Ex parte: Nationwide Mutual Fire Insurance CompanyAppellant

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

v.

E.U., a minor, Travis Felkel, and Ginger G. UleryDefendants

REPLY BRIEF OF APPELLANT

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The issues raised in this appeal were fully briefed in Appellant's Initial Brief. However, please allow the following to serve as a response to certain issues raised in Respondents' Brief.

ARGUMENT

I. NOTICE OF THE LAWSUIT TO NATIONWIDE MUTUAL FIRE INSURANCE COMPANY.

In footnote 7 of their Brief, Respondents state that additional evidence has come to light since the Special Referee's Order, which concerns the timing of Nationwide's knowledge of the underlying lawsuit. Respondents are correct. After the Order was issued by the Special Referee in this matter, information was learned through discovery in Civil Action No. 2015-CP-08-01759 that arguably relates to the issue of when Nationwide received notice of this suit.¹ This information was not part of the record before the Special Referee. The time period at issue was after the entry of default, after the damages hearing, and after Travis Felkel and Ginger Ulery-Felkel had assigned their claims against Nationwide to Respondents. Therefore, this information has no bearing on Nationwide's Motion to Intervene. It also has no bearing or relation to Nationwide's jurisdictional or due process arguments in regard to Nationwide's Motion to Set Aside the Default.

Pursuant to Rule 210, the information referenced in footnote 7 of Respondents' Brief is not part of the record in this appeal. Rule 201, S.C.A.C.R. In light of this issue,

¹ Nationwide would like to clarify that while its Initial Brief states that Nationwide had no knowledge of the lawsuit until July 27, 2015, facts exist that demonstrate that Nationwide employees were made aware of the suit after the Entry of Default, the Damages Hearing, and the execution of the Assignment of Claims by Felkel and Ulery-Felkel and before July 27, 2015. However, Nationwide's Claims Department, the department that would ultimately be responsible for taking action in relation to the suit, had absolutely no knowledge of this suit until July 27, 2015 as set forth in the affidavit of Joy Kennedy.

Appellant respectfully requests that if its Motion to Intervene is granted, and if this Court does not resolve this appeal in favor of Nationwide under its jurisdictional and due process arguments, that this Court remand the case and allow for discovery on issues relating to the timing of Nationwide's notice of and knowledge of this lawsuit to the extent that this may have a bearing on the Special Referee's ruling on the Motion to Set Aside the Default.

II. NATIONWIDE'S MOTION TO INTERVENE SHOULD BE GRANTED BECAUSE ITS INTEREST IN THIS ACTION IS DIRECT AND IS NOT "CONTINGENT."

Respondents take the position that an insurance carrier loses the right to intervene by issuing a reservation of rights letter to the insured as to coverage issues. In support of this position, Respondents cite to Travelers Indem. Co. v. Dingwell, 884 F.2d 629 (1st Cir. 1989); Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc., 725 F.2d 871 (2d. Cir. 1984), and; Lewis v. Excel Mech., LLC, 2013 WL 3762904 (D.S.C. 2013). However, a closer reading of these cases reveals that they do not stand for the blanket proposition that the issuance of a reservation of rights letter bars an insurer from prevailing on a motion to intervene. Nationwide's Motion to Intervene should be granted because its interest is direct and substantial.

In each of the cases cited by Respondents, the carrier sought to intervene to litigate the very coverage issue set forth in its reservation of rights letter. By contrast, here, Nationwide's Motion to Intervene has nothing whatsoever to do with coverage issues. Rather, Nationwide seeks to intervene to attempt to challenge the jurisdictional and procedural defects in the \$5,150,000 default judgments rendered against its insureds.

Respondents rely upon Restor-A-Dent, 725 F.2d 871, in support of its position that Nationwide's issuance of a reservation of rights letter creates a contingency, which precludes intervention. However, Restor-A-Dent and the other cases cited by Respondent do not support the broad conclusion set forth by Respondents. In Restor-A-Dent, the insurance company sought to intervene for the purpose of submitting special interrogatories to the jury resolve coverage issues. Id. at 873. The Second Circuit Court of Appeals found that the carrier's interest was remote and contingent, rather than direct. Id. at 874-76. The Court reasoned that the interest asserted by the carrier was dependent on two contingencies, one of which was a jury verdict against its insured. Id. at 875. Notably, the court contrasted Restor-A-Dent with a case where an insurance company moved to "intervene to set aside a default judgment which would otherwise be binding on it." Id. (citing Lawrence v. Burke, 431 P.2d 302 (Ariz. 1967) (permitting intervention by carrier in default case)). The Court further noted that, unlike Restor-A-Dent, the Lawrence case involved an intervenor that "was already in the position of being directly affected by the litigation" and thus, established a direct interest sufficient for Rule 24 intervention. Id. at 875-76. That is the very situation in this case – Because the \$5,150,000 default judgment has been rendered against its insureds, Nationwide is already in the position of being directly affected by this litigation. Thus, Nationwide has a direct interest in this action and its Motion to Intervene should be granted.

In Travelers, 884 F.2d 629, and Lewis, 2013 WL 3762904, the carriers sought to intervene to effect the underlying action in order to litigation coverage issues. In denying the carriers' motions to intervene in each of these cases, the court focused on the fact that the carriers had other avenues available to assert and resolve their coverage

positions. Here, Nationwide is not seeking to litigate or raise coverage matters, and, moreover, has no other avenue available to assert the positions set forth in its Motion to Set Aside Default Judgments.

In Lawrence v. Burke, 431 P.2d 302, the insurance company moved to intervene to set aside default judgments. In affirming the trial court's granting of the motion, the Arizona Court of Appeals stated that the carrier had "a definite interest in the lawsuit." Id. at 310. The court further noted that where an insurance company can show grounds to set aside default, its remedy is to intervene and move to have the default judgment set aside. Id. This is precisely what Nationwide seeks to do in this case.

Likewise, in Reliance Ins. Co. v. Superior Ct., 84 Cal. App. 4th 383 (Cal. App. 6th Dist. 2000), the court permitted intervention by the insurance carrier in a default case. In so holding, the court stated, "We conclude that intervention by an insurer is permitted where the insurer remains liable for any default judgment against the insured, and it has no means other than intervention to litigate liability or damage issues." Id. at 385; see also Western Heritage Ins. Co. v. Superior Ct., 199 Cal. App. 4th 1196 (Cal. App. 2d Dist. 2011) (the court noted that "insurers have been permitted to intervene when the third party has obtained a default against the insured" and allowed the carrier to intervene); CMS Life Ins. Opportunity Fund, L.P. v. Progressive Cap. Solutions, LLC, 2014 N.Y. Misc. LEXIS 1000 (N.Y. Sup. Ct. Mar. 6, 2014) (holding that a defaulting defendant's insurer had a right to intervene, the court stated "it cannot seriously be argued that [the insurer] is not an interested party.").

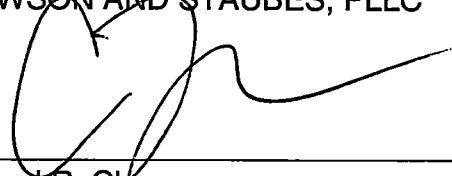
Therefore, Nationwide's has a direct interest in this action. As such, its Motion to Intervene should be granted to allow it to seek to set aside the default judgments against its insureds.

CONCLUSION

Based upon the foregoing and the arguments set forth in Appellant's Initial Brief, 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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