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IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNITED SERVICES AUTOMOBILE ASSOCIATION, Intervenor Below, Appellant, v. WILLIAM T. SCHWEIZER, MICHAEL J. LEWIS, and PATRICIA A. SCHWEIZER Plaintiffs Below, Appellees.	)	No. 137, 2014 Court Below: Superior Court of the State of Delaware in and for New Castle County. C.A. No.: N13C-07-239

APPELLANT UNITED SERVICES AUTOMOBILE ASSOCIATION'S CORRECTED OPENING BRIEF IN SUPPORT OF ITS APPEAL FROM THE DECISION OF THE SUPERIOR COURT

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NATURE OF THE PROCEEDINGS

On December 4, 2011, Plaintiffs below, appellees William Schweizer and Michael Lewis ("the Schweizers") were injured in an automobile accident in New Castle County. The Schweizers' vehicle was insured by United Services Automobile Association ("USAA"). The automobile that struck the Schweizer vehicle was driven by Thomas Hoffman. On July 16, 2013, the Schweizers filed suit for personal injury and damages against Mr. Hoffman in Superior Court in and for New Castle County, C.A. No. N13C-07-239. Mr. Hoffman, a New Jersey resident, was subsequently served under the Long-Arm Statute, and an affidavit of service was filed with the Prothonotary on August 9, 2013. After Mr. Hoffman failed to answer or otherwise plead, the Schweizers filed a motion for default judgment on September 10, 2013. On October 3, 2013, a hearing was held, and the Superior Court granted the Schweizers' motion for default judgment, entered judgment against Mr. Hoffman, and referred the matter to a Superior Court Commissioner for an inquisition hearing to determine damages. The inquisition hearing was scheduled for and heard on January 7, 2014 before Commissioner Michael P. Reynolds. Following the hearing, Commissioner Reynolds reserved decision.

On January 15, 2014, intervenor below, appellant United Services

Automobile Association ("USAA") filed a motion to intervene and stay the inquisition hearing. A hearing date on USAA's motion was set for February 27, 2014. In the meantime, Commissioner Reynolds issued his findings and decision on January 30, 2014, recommending judgment in favor of the Schweizers and against Mr. Hoffman. At the February 27, 2014 hearing on USAA's motion to intervene, the Superior Court denied the motion. In an Order dated March 6, 2014, the court below adopted the Commissioner's findings and recommendation of judgment for the Schweizers and against defendant Hoffman. On March 18, 2014, USAA filed its notice of appeal to the Supreme Court on the lower court's denial of USAA's motion to intervene.

This is USAA's Opening Brief in support of its appeal.

SUMMARY OF THE ARGUMENT

I. USAA's motion to intervene was timely filed with the trial court. The motion should have been granted by the trial court as a matter of course, because a final judgment had not yet been entered in favor of the Schweizers.

II. Delaware public policy mandates that claims be decided on their merits whenever possible.

STATEMENT OF FACTS[1]

The facts are undisputed. On December 4, 2011, appellee William Schweizer was operating a vehicle that was stopped for a traffic light on Airport Road at its intersection with Edinburgh Drive West in New Castle City, Delaware when Schweizer's vehicle was struck from behind by a vehicle driven by Thomas Hoffman. (A, 021). The force of the impact pushed the Schweizer vehicle into a third vehicle that was stopped in front of Schweizer. *Id*. Riding with Schweizer was appellee Michael Lewis. (A, 017). Police and emergency medical services were summoned to the scene. (A, 021). Schweizer and Lewis were later transported by ambulance to the emergency room at Christiana Care Hospital in Newark. *Id*.

The Schweizer vehicle was owned by Jeanette Oborne. (A, 017). Ms. Oborne insured her vehicle with USAA. (A, 005). The Hoffman vehicle was reportedly insured by GEICO, but in a letter to plaintiffs' counsel, dated December 15, 2011, GEICO disclaimed any coverage for Hoffman. (A, 004). On January 3, 2012, USAA acknowledged a potential uninsured motorist claim by the Schweizers. (A, 005-06). In the meantime, Schweizer and Lewis made claims for

[1] References to the record may be found in *Appendix to Appellant's Opening Brief in Support of Its Appeal from the Decision of the Superior Court* and are in the form of "A,___".

medical expenses under the no-fault coverage provided by the USAA policy. (A, 010). As of July 28, 2012, Schweizer and Lewis exhausted the no-fault benefits available under the policy. *Id*. From October 13, 2012 through March 2, 2013, USAA made monthly requests for information regarding claims for uninsured benefits by the Schweizers. (A, 009-13).

On July 16, 2013, William Schweizer and Michael Lewis filed suit in Superior Court against Thomas Hoffman for personal injuries and damages. (A, 024-26). Patricia Schweizer, wife of William, made a claim for loss of consortium. (A, 025). Mr. Hoffman, a New Jersey resident, was served by long-arm statute. (A, 001). An affidavit of return of service was filed with the court on August 9, 2013. *Id*. When Mr. Hoffman failed to answer or otherwise plead, the plaintiffs filed for default judgment, which was granted on October 3, 2013. *Id*.

On September 10, 2013, the Schweizers' counsel sent USAA copy of the second GEICO denial letter. (A, 014, 015). On September 23, 2013, USAA sent a letter requesting all documentation concerning the case, including the Schweizers' medical condition and treatment status. (A, 027). On October 18, 2013, USAA requested additional documentation related to the GEICO denial of coverage. (A, 028). On October 31, 2013, the Schweizers' counsel provided USAA with a notice of default judgment against Hoffman, a copy of the complaint, the police

report, the GEICO denial letter, and notice of the inquisition hearing, which had been scheduled for January 7, 2014. (A, 029, 016-26). No other documentation was provided.

The Inquisition hearing went forward on January 7, 2013 before Commissioner Michael Reynolds. (A, 036). Commissioner Reynolds reserved decision. (A, 002). USAA did not participate, but retained counsel and filed a motion to intervene and stay the hearing on January 15, 2014. (A, 002). USAA did not received copy of the Schweizers' inquisition hearing exhibits until January 23, 2014. (A, 030). Commissioner Reynolds issued his findings with a recommendation for judgment in favor of the plaintiffs on January 30, 2014, which was filed by the Prothonotary on February 10, 2014. (A, 034-40). The court below heard USAA's motion to intervene on February 27, 2014 and ruled from the bench to deny the motion. (A, 055). On March 6, 2014, the court below issued an Order adopting the Commissioner's findings and recommendation for judgment in favor of the Schweizer plaintiffs. (A, 056-57). Thereafter followed this appeal to the Supreme Court. (A, 003).

ARGUMENT

Question Presented

I. Whether USAA's motion to intervene was timely filed with the trial court. The motion should have been granted by the lower court as a matter of course, because a final judgment had not yet been entered in favor of the Schweizers. (Issue preserved at (A, 055) and (A, 057)).

Standard and Scope of Review.

The standard and scope of review is whether the Superior Court erred as a matter of law when it denied USAA's motion to intervene and stay the inquisition hearing.[2] The Supreme Court reviews questions of law decided by the Superior Court *de novo*.[3]

Merits of the Argument.

As a general matter, Delaware law permits a carrier providing uninsured ("UM") or underinsured ("UIM") benefits to intervene in a personal injury suit to test its insured's damages.[4] In *Jackson v. Phillips,* the court recognized that the

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[2] *Schweizer v. Hoffman,* C.A. No. N13C-07-239, Johnston, J. (Del. Super. Feb. 27, 2014)(Order); *Schweizer v. Hoffman,* C.A. No. N13C-07-239, Johnston, J. (Del. Super. Mar. 6, 2014)(Order).

[3] *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 66 (Del. 1993); *Oberly v. Kirby*, 592 A.2d 445, 457 (Del. 1991); *Judge v. Rago*, 570 A.2d 253, 255 (Del. 1990).

[4] *Jackson v. Phillips*, 1999 Del. Super. LEXIS 225, Herlihy, J. (Del. Super. Apr. 6.

carrier had an interest to protect whether it would be liable for UIM payments, where no existing party adequately protected those interests.[5]

The obligations of an uninsured motorist carrier to pay a judgment entered in favor of its insured and against an uninsured tortfeasor was established by this Court in *Sutch v. State Farm*.[6] In *Sutch*, the Court found that under the doctrine of collateral estoppel, a judgment entered by the Superior Court in favor of the insured was binding on the UM carrier where the carrier, although not a party to the arbitration, had received notice of the arbitrator's decision a month before the entry of judgment in Superior Court.[7] The Court held that where the carrier had notice and an opportunity to intervene in the proceedings to protect its interests before the arbitrator's decision had ripened into a Superior Court judgment but elected not to intervene, it had failed to demonstrate any prejudice which would

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1999)(Mem. Op. at *14)(citing Superior Court Civil Rule 24(a)(2) which permits intervention as a matter of right to protect a property interest where the disposition of the action may impede the applicant's ability to protect that interest).

[5] *Id*. at *15-*16. In *Jackson*, none of the parties disputed the timeliness of the carrier's motion to intervene. *Id*.

[6] 672 A.2d 17 (Del. 1995).

[7] *Id*. at 21 (internal citations omitted).

entitle it to litigate the issues.[8] The Court's reasoning followed well-established precedent in other jurisdictions.[9]

In *Sutch,* the Court found that State Farm received notice of the Rule 16.1 arbitration decision more than a month before the entry of judgment in Superior Court. State Farm could have intervened during that period to protect its interests but did not do so. Thus, once the arbitrator's decision ripened into a Superior Court judgment, State Farm became obligated to pay the underinsured benefits to which plaintiff was entitled as a result of the arbitrator's decision.[10]

Delaware courts have followed the *Sutch* ruling and noted its emphasis on the timing of when a carrier receives notice of a hearing to determine an insured's damages and when the carrier must move to intervene in the action to protect its interests. In *Watkins v. Matthews*, the court found that the UIM carrier was aware of the litigation brought by its insured against the tortfeasor, was on notice prior to

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[8] *Id*.

[9] *See, e.g., Champion Ins. Co. v. Denny*, 555 So.2d 137, 139-140 (Ala. 1989); *Zirger v. General Accident Ins. Co.*, 676 A.2d 1065, 1072-73 (N.J. 1996); *Burge v. Mid-Continent Cas. Co.*, 933 P.2d 210, 213-14 (N.Mex. 1996); *Nationwide Mut. Ins. Co. v. Webb*, 436 A.2d 465, 475 (Md. 1980); *see also* 8C APPLEMAN, INSURANCE LAW AND PRACTICE 5089.75, pp.372-373 (1981 and 1994 Supp.)(citations omitted).

[10] *Sutch*, 672 A.2d at 22.

the arbitration that its insured's damages were likely to exceed the liability coverage available to torfeasor, and failed to intervene before the arbitration hearing or before the arbitrator had rendered a decision, but that the carrier's motion to intervene came prior to entry of the arbitrator's decision into a formal judgment. In these circumstances, the court held that although the carrier's motion to intervene came after the arbitration and was tardy, it was not too late.[11] The court permitted the UIM carrier to intervene on the condition that it pay the arbitration expenses of the litigants and the costs of defending the motion.[12]

In *Jones v. State Farm Fire & Casualty Insurance Company*, the court determined that a subrogation action by a plaintiff against the tortfeasor's liability carrier was barred where the carrier had not been given any notice of the claim against its insured until years after suit had been filed and judgment had been entered against the insured.[13] Following the reasoning in *Sutch*, the *Jones* court found that the carrier had been prejudiced as a matter of law because it had not

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[11] 1996 Del. Super. LEXIS 32 at *3, Graves, J. (Del. Super. Feb. 23, 1996) (citing *Sutch v. State Farm*, No. 183, 1995 at 10 and 12 (Del. Dec. 28, 1995).

[12] *Id*.

[13] 1997 Del.Super. LEXIS 201 at *8, Babiarz, J. (Del. Super. Apr. 14, 1997)(Op. and Order).

been given the opportunity to intervene before a default ripened into a Superior Court judgment.[14]

In the present case, on September 10, 2013 the Schweizers' counsel sent USAA a copy of the GEICO letter denying coverage to the tortfeasor, Thomas Hoffman. (A, 014, 015). In response, on September 23, 2013, USAA requested all documentation concerning the case, including the Schweizers' medical condition and treatment status. (A, 027). On October 16, USAA requested all documentation related to the GEICO denial of coverage to confirm the lack of liability coverage for Mr. Hoffman. (A, 028). On October 31, 2013, the Schweizers' counsel provided USAA with a notice of default judgment against Hoffman, a copy of the complaint, the police report, the GEICO denial letter, and notice of the inquisition hearing to determine the Schweizers' damages, which had been scheduled for January 7, 2014. (A, 029). USAA did not receive further notice of the hearing or receive copy of the exhibits that the Schweizers submitted to the Commissioner. On January 15, 2014, USAA moved to intervene and stay the inquisition. The Commissioner did not issue his findings and recommendation until January 30, 2014. The court below did not hear USAA's motion until February 27, and did not enter an order and final judgment on the Schweizers'

[14] *Id*. at *10.

damages until March 6, 2014.

In this chronology, USAA moved to intervene to protect its interests and test the Schweizers' damages before the Commissioner had issued his findings and recommendation and before these findings had ripened into a final judgment on March 6, 2014. Under the criteria established in *Sutch* and restated in *Watkins* and *Jones*, USAA timely moved to intervene in the case before it would be collaterally estopped from doing so.

The Schweizers will argue that USAA chose not to participate in the inquisition hearing. (A, 050). This position mischaracterizes USAA's response to the developing litigation. In the run up to the inquisition hearing, USAA had not receive the requested additional information regarding the GEICO denial of coverage to Hoffman or the documentation requested on the medical condition and treatment status of the Schweizers. (A, 027, 028). USAA was not properly in a position to participate in an inquisition hearing.

The lower court's decision to deny USAA's motion to intervene offered no legal authority or analysis for its denial. The court only observed that USAA had notice of the inquisition hearing two months prior and did not participate. (A, 052-53). Although aware of the *Sutch*, *Watkins* and *Jones* decisions, the court failed to apply their holdings to USAA's motion, except to ask during oral

argument whether USAA would agree to pay the legal expenses and costs incurred by the Schweizers for going forward with the inquisition hearing, as provided in *Watkins*. (A, 042). USAA agreed that it would pay those costs, (A, 043), and that offer remains open.

For the reasons stated above, the lower court's denial of USAA's motion to intervene must be reversed as contrary to the legal standards established by *Sutch* and followed in *Watkins* and *Jones*.

Question Presented

II. Whether Delaware public policy mandates that this claim be decided on its merits. (Issue preserved at (A, 055) and (A, 057)).

Standard and Scope of Review.

The standard and scope of review is whether the Superior Court erred as a matter of law when it denied USAA's motion to intervene.[15] The Supreme Court reviews questions of law decided by the Superior Court *de novo*.[16]

Merits of the Argument.

In its decision below, the court observed that USAA had notice of the inquisition hearing two months prior and did not participate. (A, 053). The court thought USAA waited too long to intervene. *Id*. An analysis of why USAA waited too long or what prejudice the Schweizers may have suffered because of a two-month delay in USAA moving to intervene was not offered by the court. As discussed above, the legal standard established by *Sutch* and its progeny to determine whether a motion to intervene is timely rests on whether the attempt to

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[15] *Schweizer v. Hoffman,* C.A. No. N13C-07-239, Johnston, J. (Del. Super. Feb. 27, 2014)(Order); *Schweizer v. Hoffman,* C.A. No. N13C-07-239, Johnston, J. (Del. Super. Mar. 6, 2014)(Order).

[16] *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 66 (Del. 1993); *Oberly v. Kirby*, 592 A.2d 445, 457 (Del. 1991); *Judge v. Rago*, 570 A.2d 253, 255 (Del. 1990).

intervene occurred before the entry of a final judgment. USAA met that standard.

There is also the matter of whether the Schweizers were prejudiced by USAA's move to intervene a week after the date of the inquisition hearing, as opposed to sometime before. Because the Commissioner had not yet issued his decision and a final judgment had not yet been entered, the Schweizers suffered no detrimental reliance based on the outcome of the inquisition hearing since an outcome did not exist. If USAA had intervened the week before the hearing date, the hearing likely would have been postponed to allow USAA to conduct discovery, test the measure of the Schweizers' damages, and then move toward resolution of the claim on its merits.[17] This process would likely take many months. The process itself would be no different whether USAA moved to intervene before or after the hearing date.

The Commissioner's decision was based solely on the submissions made by the Schweizers. (A, 032-33). There was no assurance that a full record of the Schweizers' injuries and damages was presented. Notably, the exhibits submitted by the Schweizers contained no records regarding their pre-accident medical histories. *Id*. All of the Schweizers' records submitted in the inquisition hearing are dated on or after December 4, 2011, the date of the accident. *Id*. The materials

[17] *Jackson v. Phillips*, 199 Del. Super. LEXIS 225 at *14 (Del. Super. Apr. 6, 1999).

contained in the Schweizers' exhibits, moreover, had not been provided to USAA which had requested this documentation in September 18, 2013, three months before the hearing. (A, 027). USAA finally received these materials on January 23, 2014, a week after counsel entered its appearance for USAA and requested them. (A, 030). Even if USAA had intervened and commenced discovery immediately upon receiving notice of the inquisition hearing, the time required to complete a meaningful investigation into the Schweizers' medical pre- and post-accident history and to develop expert evaluation of their claims would have taken many months beyond the hearing date.

Delaware public policy strongly favors resolution of claims based on a full and fair review of the merits.[18] In the present case, such a review requires the active involvement of the UM carrier in the litigation.

Because USAA did not receive the requested additional information regarding the GEICO denial of coverage to Hoffman or the documentation requested on the medical condition and treatment status of the Schweizers, USAA could not properly prepare to participate in an inquisition hearing. Alternatively,

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[18] *See, e.g., Keener v. Isken*, 58 A.3d 407, 408 (Del. 2013)(noting the strong policy in favor of deciding cases on the merits); *Drejka v. Hitchens Tire Serv., Inc.*, 15 A.3d 1221, 1224 (Del. 2010)(courts are admonished to have cases resolved on the merits).

there was excusable neglect by USAA in not intervening before the inquisition hearing because it lacked the information it needed before it would have been able to meaningfully participate in the hearing.[19] USAA also did not retain counsel until a week after the inquisition hearing at which time it could be informed of the subtleties of Delaware procedural law. The decision on the Schweizers' damages recommended by the Commissioner and adopted by the court below may well have been quite different if the matter had been heard on the merits of a fully developed record.[20] As discussed above, the Schweizers would not suffer substantial prejudice by engaging in a discovery process that fully develops the record.[21]

For the reasons stated above, the lower court's denial of USAA's motion to intervene must be reversed as contrary to the legal standards established in

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[19] Super. Ct. R. Civ P. 60(b)(1); *Keener*, 58 A.3d at 409 (grounds for relief as set forth in Rule 60(b) are liberally construed because of the policy favoring trials on the merits) citing *Tsipouras v. Tsipouras*, 677 A.2d 493, 496 (Del. 1996)); *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011)(excusable neglect exists if the moving party had valid reasons for the neglect – reasons showing that the neglect may have been the act of a reasonably prudent person under the circumstances); *Cohen v. Brandywine Raceway Ass'n*, 238 A.2d 320 (Del. Super. 1968).

[20] *Schrader-VanNewkirk v. Daube*, 45 A.3d 149 (Del. 2012).

[21] *Id*.

Keener, *Drejka* and *Jackson* and their progeny, which mandate that claims be heard on the merits whenever possible.

CONCLUSION

For the reasons discussed above, Appellant United Services Automobile Association requests that the Court reverse the February 27, 2014 and March 6, 2014 decisions of the lower court, vacate the findings of the inquisition hearing, permit USAA to intervene in the case below, and remand the matter for consideration on the merits of a fully developed record.

Respectfully submitted,

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