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Case Number 137,2014

IN THE SUPREME COURT OF THE

STATE OF DELAWARE

UNITED SERVICES AUTOMOBILE ASSOCIATION,	:	
	:	No. 137, 2014
Intervenor Below-Appellant,	:	
v.	:	
WILLIAM T. SCHWEIZER, MICHAEL J. LEWIS, and PATRICIA A. SCHWEIZER,	:	
Plaintiffs Below-Appellees.	:	

PLAINTIFF-APPELLEES' CORRECTED ANSWERING BRIEF ON APPEAL

Appeal from a Decision of
The Superior Court of the State of Delaware,
In and for New Castle County
C. A. No. 13C-07-239-MMJ, dated 3/06/14
denying the Intervenor-Appellant's
Motion to Intervene

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NATURE OF THE PROCEEDINGS

This matter arises out of a personal injury action initially filed by the plaintiffs in William T. Schweizer, Michael J. Lewis, and Patricia A. Schweizer Thomas C, Hoffman, Case No. 13C-07-239-MMJ, in the Superior Court of the State of Delaware, in and for New Castle County on 7/16/13. (As Supreme Court Rule 14(e) provides, duplication shall be avoided whenever possible in the Appendices, see USAA's Appendix herein cited as A-24-26). Service was perfected against the individual defendant on 8/06/13. The plaintiffs filed a Motion for Default Judgment on 9/10/13 which was heard and granted by the Superior Court on 10/03/13. The Court then scheduled an inquisition hearing to be heard by a Superior Court Commissioner on 1/07/14.

The plaintiffs notified United Services Automobile Association (hereinafter USAA), the plaintiffs' uninsured motorist carrier, that the tortfeasor was not covered for liability insurance and requested an uninsured motorist claim be opened (A-14). The plaintiffs further notified USAA of the scheduled inquisition hearing on 1/07/14 in their letter to USAA dated 10/31/13 indicating that if it so desired it could participate in the hearing to determine the plaintiffs' damages (A-29). The inquisition hearing was conducted before Superior Court Commissioner Reynolds on 1/07/14. The

plaintiff submitted extensive exhibits (A-31-33). After hearing testimony from the three plaintiffs, the Commissioner reserved his decision. (See plaintiff's Appendix at B-1 hereinafter cited as B-__). USAA filed its Motion to Intervene on 1/15/14 (B-2-13). The plaintiff's filed their response in opposition on 2/14/14 (B-14-37). Commissioner Reynolds decided his recommended judgment for the plaintiffs on 1/30/14 (A-34-40). Following oral argument from the parties the Superior Court denied USAA's Motion to Intervene on 2/27/14. The Court then issued its Order adopting the Commissioner's findings and recommendations for recommended judgment for the plaintiffs on 3/06/14 (A-56-57).

USAA filed its appeal of the Superior Court Order denying its Motion to Intervene to this Court on 3/17/14. USAA filed its Opening Brief on 6/04/14.[1] This is the plaintiff-appellee's Answering Brief on Appeal

[1] Per this Court's notice to the appellant that its Opening Brief did not comply with Supreme Court Rule 14(b)(vi), the appellant filed its Corrected Opening Brief on 6/09/14.

SUMMARY OF THE ARGUMENT

I. **THE SUPERIOR COURT CORRECTLY DENIED USAA'S MOTION TO INTERVENE BECAUSE IT "SAT ON ITS RIGHTS" AND DID NOT TIMELY FILE ITS MOTION PRIOR TO THE INQUISITION HEARING, WITH NO ADEQUATE REASON FOR ITS DELAY.**

THE PLAINTIFFS-APPELLEES HEREBY DENY THE INTERVENOR-APPELLANT'S ARGUMENT I THAT ITS MOTION TO INTERVENE WAS TIMELY FILED WITH THE TRIAL COURT AND, THEREFORE, SHOULD NOT HAVE BEEN GRANTED BY THE TRIAL COURT AS A MATTER OF LAW, REGARDLESS OF WHETHER A FINAL JUDGMENT HAD NOT YET BEEN ENTERED.

FURTHERMORE, THE PLAINTIFFS-APPELLEES HEREBY DENY THE INTERVENOR-APPELLANT'S ARGUMENT II THAT DELAWARE PUBLIC POLICY MANDATES THAT CLAIMS BE DECIDED ON THEIR MERITS WHENEVER POSSIBLE, BECAUSE THEIR MOTION TO INTERVENE WAS NOT TIMELY FILED.

II. **USAA'S ARGUMENTS THAT ITS MOTION TO INTERVENE WAS TIMELY SINCE IT WAS FILED PRIOR TO FINAL JUDGMENT, AND THAT THERE WAS EXCUSABLE NEGLECT SHOULD BE DEEMED WAIVED SINCE THESE QUESTIONS WERE NOT PRESENTED TO THE COURT BELOW.**

STATEMENT OF FACTS

This matter arises out of a motor vehicle accident on 12/04/11 in which the male plaintiffs William Schweizer and Michael Lewis sustained severe personal injuries. The plaintiffs' vehicle was slammed into in the rear by the underlying tortfeasor at a high rate of speed, going between 40-50 m.p.h., with no brakes. The tortfeasor was cited for improper passing, unreasonable speed, inadequate brakes, following a motor vehicle too closely, and reckless driving. USAA was the no-fault personal injury protection (PIP) and uninsured motorist (UM) carrier for the plaintiffs' vehicle. USAA paid its PIP limits to the plaintiff William T. Schweizer and made various other payments to the plaintiff Michael J. Lewis.

Suit was filed on 7/16/13 on behalf of the male plaintiffs and a consortium claim of the female plaintiff Patricia Schweizer (A-24-26). Service was perfected against the defendant Thomas Hoffman. Because an answer was not filed on behalf of the defendant, a Motion for Default Judgment was filed on 9/10/13 and heard and granted by the Superior Court on 10/03/13. This Court then scheduled an inquisition hearing for 1/07/14 before a Court Commissioner to determine the plaintiffs' damages.

The plaintiffs in their letter of 9/10/13 notified USAA that the defendant was not covered for liability insurance for the accident in question

and requested USAA to confirm this was an uninsured motorist claim. A copy of the complaint filed and police report were enclosed. (A-14). In response, in its letter dated 10/18/13, USAA asserted that after completing its review it did not feel it had sufficient documentation to consider the claims under its uninsured motorist coverage. (A-28).

The plaintiffs further notified USAA of the inquisition hearing scheduled for 1/07/14 in their letter of 10/31/13, (by fax, regular mail, and certified mail), indicating that if it so desired it could participate in the hearing to determine the plaintiffs' damages (A-29). The green card was returned showing receipt by USAA (B-38). At no time prior to the inquisition hearing were the plaintiffs contacted by any representative of USAA.

The plaintiffs submitted extensive exhibits on their behalf for the inquisition hearing to Commissioner Reynolds on 12/26/13 (A-31-33).

Despite notification, no representative of USAA attended the inquisition hearing on 1/07/14. The plaintiffs submitted a copy of their letter to USAA dated 10/31/13 to Commissioner Reynolds as an exhibit to confirm they had placed USAA on notice of the hearing. All three plaintiffs testified. Commissioner Reynolds indicated he was reserving decision because of a recent increased case load involving post-conviction criminal

motions and that it would probably take longer than normal for him to issue his decision.

It wasn't until 1/14/14 that plaintiffs' attorney was contacted by USAA's attorney to discuss the matter. It was confirmed that USAA had been aware of the inquisition hearing prior to 1/07/14. USAA filed its Motion to Intervene on 1/15/14. (B-2-13)

Commissioner Reynolds issued his recommended judgment for the plaintiffs decided 1/30/14 awarding $340,509.20 to William T. Schweizer, $24,000.00 to Patricia A. Schweizer, and $25,469.54 to Michael J. Lewis (A-34-40).

Plaintiffs filed their response in opposition to USAA's Motion to Intervene on 2/14/14 (B-14-37). Following oral argument on 2/27/14, the Superior Court denied USAA's Motion to Intervene. The Superior Court then issued its Order dated 3/06/14 adopting the Commissioner's findings and recommendations for judgment for the plaintiffs.

USAA filed its appeal of the Superior Court's Order denying its Motion to Intervene to this Court on 3/17/14. It filed its Opening Brief on 6/04/14. This is the Plaintiff-Appellees' Answering Brief on Appeal.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DENIED USAA'S MOTION TO INTERVENE BECAUSE IT "SAT ON ITS RIGHTS" AND DID NOT TIMELY FILE ITS MOTION PRIOR TO THE INQUISITION HEARING, WITH NO ADEQUATE REASON FOR ITS DELAY.

A. Question Presented

Whether the Superior Court erred as a matter of law in denying the intervenor-appellant's Motion to Intervene in ruling it "sat on its rights" and did not timely file its motion prior to the inquisition hearing, with no adequate reason for its delay in filing its motion.

The claimant below-appellee further denies the argument of the intervenor-appellant that its Motion to Intervene was timely filed and should have been granted because a final judgment had not yet been entered. The plaintiffs further deny that the Motion to Intervene should have been granted based upon its argument that Delaware public policy mandates the claim be decided on its merits.

B. Standard and Scope of Review

The Court applies an abuse of discretion standard in reviewing the decision of a lower Court on a Motion to Intervene. See Cooper v. In re: Application of Connor, 508 A.2d 72 (Del. 1986). Judicial Discretion "is the exercise of judgment directed by conscience and reason, and when a Court

has not exceeded the bounds of reason in view of the circumstances and has not so ignored recognized rules of law or practice so as to produce injustice, its legal discretion has not been abused." To find an abuse of discretion, there must be a showing that the trial Court acted in an arbitrary and capricious manner. See Spencer v. Wal-Mart, 930 A.2d 881 (Del. 2007).

C. Merits of the Argument

a. The Court-below had the discretion to deny USAA's Motion to Intervene pursuant to Superior Court Civil Rule 24.

> Superior Court Civil Rule 24(b) provides:
> "*Permissive intervention.* Upon ***timely*** application, anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. ***In exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of existing parties.***" (emphasis added)

The plaintiffs submit that USAA did not make a ***timely*** application to intervene. As USAA notes, in this Court's holding in Sutch v. State Farm, 672 A.2d 17 (Del. Supr. 1995) the emphasis is on the timing of when a carrier receives notice of a hearing to determine an insured's damages, and when it therefore needs to intervene to protect its interests. (USAA's

Opening Brief at 9). USAA had four months' notice of the uninsured motorist claim from the plaintiffs following their letter to it dated 9/10/13 (A-14). It was notified of the inquisition hearing scheduled for 1/07/14 by the plaintiffs in their letter of 10/31/13 (A-29), almost two and a half months prior.[2] (See Dairyland Insurance v. Clark, 476 S.W.2d 202 (Kent. 1972) where the insured took no action to intervene where it was notified a mere 35 days prior to the inquisition hearing for assessment of damages, the Court denied the insurer's motion.). At no time in between did USAA attempt to intervene or even contact the plaintiffs to discuss the case or request a continuance. Where an uninsured motorist carrier has made a tactical decision not to intervene at an earlier date and *provided no adequate reason for the delay*, it would not be permitted to intervene under Superior Court Civil Rule 24. Peak Property & Casualty Insurance Co. v. Speed, 2010 WL 530072. Where an insurer cannot establish any reason for the delay in filing its Motion to Intervene, its motion should be denied. Saucedo v. Bishop, 2002 W.L.3 31677324. Nowhere in its Motion to Intervene, Oral Argument on its Motion, or in its Opening Brief on Appeal has USAA given a reason as to why it failed and chose not to intervene prior to the inquisition hearing. When asked by the Court below why it did not immediately seek to have the

[2] It wasn't until the end of October 2013 that the Court contacted plaintiffs' counsel to schedule the inquisition hearing following the Entry of Default Judgment on 9/10/13.

inquisition hearing postponed and/or seek to intervene prior, its counsel stated, "I have to admit, I don't know…why they didn't, I'm not sure why." (See appellant's appendix at A-47); "It seems USAA as the carrier should have responded sooner." (A-48); "They understand they were a little tardy in filing their motion, it would have been more convenient if it had been done two months ago." (A-42). To date, it still has not provided a reason why it didn't. As the underlying Court indicated "USAA just sat on its rights, the inquisition hearing was scheduled and they knew about it, and they should have contacted [counsel]…it's just too long. They were on notice at the end of October and they didn't do anything about it." (A-52-53). As Rule 24 provides, in exercising its discretion, the Court below clearly determined that USAA's motion was not timely and its failure to intervene prior to the inquisition hearing caused undue delay and prejudiced the adjudication of the rights of the plaintiffs. Where the appellant did not seek to intervene until after the Superior Court had decided the case, it clearly was not an abuse of discretion to deny a Motion to Intervene. Cooper v. In re: Application of Conner, supra.

USAA asserts the plaintiffs would not be prejudiced in any manner by granting its appeal. This is far from fact for numerous reasons: (1) The plaintiffs spent time and money in securing a Default Judgment, scheduling

and litigating the inquisition hearing with extensive exhibits and testimony. If the plaintiffs were forced to re-litigate the underlying damages claim, all of their efforts would be sacrificed. They have already been through the litigation process once, having to worry about the inquisition hearing for two and a half months, and then having to testify in Court, a harrowing process for anyone. Now USAA is attempting to force them to go through the same process again. There is a strong public policy to avoid duplicative and unnecessary re-litigation of damages; (2) The further time and expense that the plaintiffs will incur (not to mention additional time and expense to the Court); (3) The question of if and when they will be able to collect the award for their injuries and damages, and interest that it would have accrued, to which the Court has already determined they are entitled. The legislative intent and statutory mandate of 18 Del. C. §3902 provides that the victims of motor vehicle accidents be promptly and adequately compensated for their injuries; (4) The inability to actually use the funds awarded by the Court, especially considering that at least one plaintiff, Mr. Schweizer, still has over $41,000.00 in unpaid medical expenses and requires additional future medical care (see A-31-33; A-34-40); (5) Not receiving the benefits they are entitled to from the premiums paid to USAA for their uninsured motorist coverage pursuant to 18 Del. C. §3902. As this Court noted in Sutch, the

plaintiffs are "entitled to be paid for uncompensated bodily injuries up to the policy limits" which they have paid for and would have been entitled from the uninsured tortfeasor. All of the elements of §3902 were satisfied: the insured purchased uninsured motorist coverage; it was agreed that the tortfeasor was an uninsured motorist (B-3-5); and damages have been determined (A-34-40; A-56-57). Sutch v. State Farm, supra; Hurst v. Nationwide, 652 A.2d 10, 13-14 (Del. 1995); (6) And moreover, the borderline unfair claims practices being perpetrated by USAA in both its delay in not intervening prior to the inquisition hearing, when it had two and a half months to do so and giving no reason whatsoever for its delay, as well as the continued delay in paying the plaintiffs for the damages that have already been determined are owed. See 18 Del. C. §2304(16)(b),(f),(g), & (n).

Conversely, USAA has suffered no prejudice that can be reasonably argued. Everything it requested at its Motion to Intervene (i.e. conducting discovery, having a defense medical examination performed) could have been done prior to the hearing or, at least, it could have requested a postponement of the hearing to do so. It is now asking for these things after the fact. The only "prejudice" it may suffer is having to pay the plaintiffs the damages under its uninsured motorist coverage contractually and

statutorily owed. Furthermore, its subrogation rights against the underlying tortfeasor are still protected.

Additionally, USAA's sole reason for attempting to intervene, after the inquisition hearing, was to further investigate the plaintiff William Schweizer's claim and damages: "the issue for the carrier is that Mr. Schweizer had a very significant pre-existing injury and medical condition, and that's what they want to sort through." (A-43-44), (B-2-5). Firstly, nowhere in either its motion or oral argument does USAA contest the awards to Mrs. Schweizer or Mr. Lewis. Again, it is attempting to force re-litigation of claims already owed, in violation of 18 Del. C. §2304. Secondly, and more importantly, by their own admission they were already aware of Mr. Schweizer's pre-existing medical history as reflected in their counsel's statement at the motion as reflected above. If they were so concerned about this, it indicates even more of a reason as to why it should have filed its Motion to Intervene prior to the inquisition hearing. Thirdly, again by their own admission, they are now seeking a second bite of the apple simply because it didn't like of the amount awarded to him: "It's pretty clear Mr. Schweizer suffered injuries and damages as a result of the accident, ***but because of the magnitude of the award here, my client's not so sure it's at that level. And that's what they need to explore."*** (A-44).

Once again, if they were so concerned about the potential award they should have filed their motion sooner rather than later. Now that it didn't like the amount of the award, it wants to re-litigate the claim further. This is not a basis for intervention at this stage. Fourthly, by virtue of the default judgment, the factual allegations as to Mr. Schweizer's injuries outlined in the complaint are to be taken as true. Fifthly, USAA as the PIP carrier had already made numerous payments to his treating physician for the body party (low back) that it now asserts, without any supporting evidence, was a "very significant pre-existing injury." It made those payments without contesting or having a DME scheduled, to the point where they exhausted their own policy limits. The Commissioner, in making his award, determined what damages and injuries were related to the accident in question as compared to any pre-existing history, based upon the extensive evidence and testimony given. He outlined extensive findings of fact to accompany his Order (A-34-40). Sixthly, Mr. Schweizer had other serious injuries that were clearly new and did not constitute a pre-existing condition (including knee and hernia surgeries), which USAA agreed: "It's pretty clear Mr. Schweizer suffered injuries and damages…" (A-44).

Therefore, the Court was well within its discretion in denying USAA's Motion to Intervene, not only for sitting on its rights and being

untimely, but to not prejudice the plaintiffs by re-litigating their damages which the Court has already determined they are owed.

b. USAA is bound by the default judgment and inquisition hearing award, where it had full notice and adequate opportunity to intervene and elected not to do so.

In this Court's decision in Sutch v. State Farm, 672 A.2d 17 (Del. 1995), it held that an [uninsured motorist insurer] will be bound by a ***default judgment*** against the tortfeasor where the insurer had full notice and adequate opportunity to intervene and present any defenses and arguments necessary to protect its position but elected not to do so. Id at 12. The doctrine of collateral estoppel makes the judgment entered by the Superior Court binding upon USAA. Id. at 14. USAA, in its opening brief, attempts to argue that since the Court below's Order adopting the Commissioner's findings and recommendations for the plaintiffs was not decided until after it filed its Motion to Intervene, it was therefore timely. However, this disregards the fact that a Default Judgment had already been entered against the underlying tortfeasor pursuant to Superior Court Civil Rule 55[3]. The

[3] Superior Court Civil Rule 55(b)(2) "By the Court. In all other cases, the party entitled to a judgment by default shall apply to the Court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian, trustee or other representative. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the Court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the Court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute."

matter had already been tried following the inquisition hearing before the Superior Court Commissioner on 1/07/14. Pursuant to Superior Court Civil Rule 54, a Court may direct the entry of a final judgment upon a party only upon an express determination that there is no just reason for delay and upon *express direction for the entry of judgment.* As the Court noted below, USAA sat on its rights and failed to intervene when it knew it had two and a half months to intervene. It failed to do anything. The adoption of the Commissioner's recommendations and entry of judgment was a matter of course. Furthermore, there is nothing under Rule 24 that requires a party to file its Motion to Intervene prior to entry of judgment in order for the Court, in its discretion, to deny the motion.

The cases relied upon in USAA's Opening Brief in Watkins v. Matthew[4] and Jones v. State Farm[5] are distinguishable from the case at bar, as the Court below noted (A52). Both were Superior Court decisions involving post-Sutch awards. As in Sutch, the plaintiffs in Watkins and Jones had not placed their uninsured motorist carriers on notice of the arbitration and inquisition hearing respectfully. Whereas, in the instant case, the plaintiffs put USAA on notice of the inquisition hearing two and a half months prior. Additionally, Watkins was a former Rule 16.1 arbitration

[4]Watkins v. Matthew, 1996 Del. Super. LEXIS 32 at *3 , Graves, J. (Del. Super. Feb. 23, 1996).
[5]Jones v. State Farm, 1997 Del. Super. LEXIS 201 at *8, Babiarz, J. (Del. Super. Apr. 14, 1997).

case. In Watkins, the case was decided by the Superior Court shortly after the Sutch holding. The Court in fact indicated that the insurer there should have intervened prior to the arbitration since it had notice. It did not do so until after the Sutch decision. Although the Court ultimately granted the insurer's Motion to Intervene, requiring it to pay the plaintiff's arbitration expenses and expenses of defending the motion, there is nothing to indicate this Court would hold the same, as the case was not appealed. Jones involved a tortfeasor who failed to give his liability carrier notice of suit where he was named as defendant. Therefore, the Court held that the carrier was allowed to intervene since its insured had breached his policy obligations. In Sutch, interestingly, even though the insured also breached his policy obligations, this Court held that the carrier was not prejudiced and was bound by the judgment. Id at 16. In the case at bar, the plaintiffs did not breach any policy obligations.

In the instant case, as compared to an arbitration, the plaintiff had already obtained a Default Judgment and satisfied all of the requirements of Superior Court Civil Rule 55 in scheduling an inquisition hearing to determine damages. This was a full Court proceeding, tried before a Court Commissioner to determine the plaintiff's damages, with a recommended judgment for the plaintiffs, adopted by the Court, which constituted the

damages the plaintiffs were legally entitled to recover against their uninsured motorist carrier. A Default Judgment has been held to be equivalent to a trial within the statutory language. Johnson v. Hayes Cal Builders, Inc., 60 Cal.2d 572 (Cal. 1963).

USAA further relies upon the Superior Court decision in Jackson v. Phillips, 1999 Del. Super. LEXIS 225, Herlihy, J. (Del. Super., April 6, 1999). However, in this case the insurance carrier's Motion to Intervene was granted to protect its interests on possible future damages since neither a judgment nor award had been entered, unlike the case at bar.

USAA further argues that its motion should have been granted since Delaware public policy mandates that claims be decided on their merits (Opening Brief at 14). However, what it fails to mention is that the case could have been decided on its merits if USAA had chosen to intervene prior to the inquisition hearing and participated to defend its interests. As the Court below noted, it sat on its rights when it chose not to intervene. At the very least, as previously outlined, it could have requested a postponement of the hearing on 1/07/14 in order to conduct discovery or have a defense medical examination performed. Once again, it chose not to do this either.

It keeps making the argument that, because it did not have the plaintiffs' exhibits prior to the inquisition hearing, it could not properly

participate in the hearing on its merits. It relies upon its letter dated 9/18/13 to the plaintiffs. As outlined above, it fails to indicate that this was prior to the plaintiffs notifying USAA of the inquisition hearing on 1/07/14 per their letter of 10/31/13. How can a party send something (exhibits) on an issue that did not yet exist?

It argues excusable neglect and that USAA 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". (Opening Brief at 17). This argument fails yet again. USAA was a sophisticated party as an uninsured motorist carrier (as compared to an individual) which has retained its counsel's firm for many years. Once it received the plaintiffs' letter dated 10/31/13 notifying of the inquisition hearing, it simply needed to contact its counsel at that time as to what needed to be done. It chose not to.

The Court held its hearing to determine the plaintiffs' damages, which USAA knew about well in advance and yet ignored until afterward. It knew it could be bound by the award. The tort judgment establishes conclusively the damages to which the claimant is "legally entitled." Gerdesmeier v. Sutherland, 690 N.W.2d 126 (MINN. 2004). It is now seeking a second bite of the apple after its own inexcusable neglect. In Watson v. Simmons, LEXIS 253 (Del. Super. Apr. 30, 2009), the Court held that a defendant's

motion for relief from a default judgment against it in a personal injury action arising from a motor vehicle accident was denied, as the insurance adjuster's failure to forward the complaint to defense counsel was inexcusable neglect with *no extraordinary circumstances shown*. Similarly, in the instant case, USAA has provided no reason whatsoever as to why it did not have its counsel file its Motion to Intervene prior to the inquisition hearing or, at the very least, seek a continuance. It should not benefit from its own neglect.

USAA argues that the plaintiffs' position that it chose not to participate in the inquisition hearing "mischaracterizes" USAA's response to the developing litigation. (See its Opening Brief at 12). To support this, it refers to its letters to the plaintiffs dated 9/23/13 and 10/18/13 (A- 27-28) that it had not received the additional information or documents requested in these letters and, therefore, was not properly in a position to participate in an inquisition hearing. (See its Opening Brief at 12). This argument fails for numerous reasons. One, it knew this was an uninsured motorist claim and that it ultimately would be responsible for paying the plaintiffs for their damages as far back as December 15, **2011** per the tortfeasor's liability carrier denying coverage and the fact that USAA had a copy of this letter in its file when it provided it to its counsel to file the Motion to Intervene (A-

48). Two, its reliance upon its letter dated 9/23/13 is misguided since this was before the plaintiffs notified USAA of the scheduled hearing for 1/17/14 in their letter to it dated 10/31/13. From that point on it did not request any additional information and, in fact, did nothing until plaintiffs' counsel was contacted by USAA's counsel on 1/15/14. Three, USAA fails to note that in its letter dated 10/18/13 it now took the position that it did not have sufficient documentation to consider the plaintiffs' claims valid ones under its uninsured motorist coverage. (A-28) This was a complete 180 degree turn from its position accepting the plaintiffs' uninsured motorist claims since December 2011 and, despite the fact that for almost two years it had agreed this was a valid uninsured motorist claim. The plaintiffs did send them a copy of the complaint, the police report, and Geico's latest letter denying coverage. Despite this, it now took the position that it was not a valid uninsured motorist claim. (It then admitted it was a valid UM claim). (B-2-5). After the plaintiffs notified it of the inquisition hearing on 1/07/14, it never requested any additional information, medical records, potential exhibits, etc. until after the hearing. Once again, it could have filed its Motion to Intervene prior to the hearing or, at the very least, requested a postponement **so that it would be in a proper position to participate in the inquisition hearing.** With receipt of the complaint versus the

underlying tortfeasor, and notification of the inquisition hearing two and a half months prior, it seems implausible that USAA did not make a reasoned decision to take no action until after the inquisition hearing. If the insurer had contacted counsel to merely file and serve a notice of appearance prior to the inquisition hearing, and the plaintiffs then failed to communicate with USAA's counsel and proceeded to the inquisition hearing, they would have been taking the risk of the award being overturned. See Lenzi v. Redland Insurance Company, 140 Wash.2d 267 (Wash. 2000). However, this was not the case as USAA never contacted counsel until after the hearing.

Superior Court Civil Rule 58(2) provides for entry of judgment upon other verdicts (i.e. inquisition hearing award), whereupon the decision by the Court granting relief or general verdict, the Court shall promptly approve the form of the judgment and the Prothonotary shall thereupon enter it in the judgment docket. The judgment per the Commissioner's inquisition hearing findings had already ripened, and the plaintiffs' interests had accrued, and was in place to be entered in the judgment docket when USAA dilatorily attempted to intervene. See Smith v. Red Barn, Inc., 2002 Del. C.P. LEXIS 82. Pursuant to Superior Court Rule 60(b)(1), the Court may relieve a party from a final judgment for "mistake, inadvertence, or excusable neglect."

USAA never attempted this. Although it does argue "excusable neglect" (see its Opening Brief at 17) it provides no valid basis for such.

USAA further argues that the lower Court's denial of its Motion to Intervene was not supported by any legal authority or analyst or basis for its denial. Once again, USAA's position is incorrect and misplaced. As the Court below noted at the motion: "this case is distinguishable from the ones that have been presented by [USAA]. I do think USAA just sat on its rights, and the inquisition hearing was scheduled and they knew about it, and they should have contacted [counsel]....the judgment is going to have to remain...it's just too long. They were on notice at the end of October and they didn't do anything about it." (A-53).

Clearly, the Court below did not exceed its bounds of reason nor act in an arbitrary or capricious manner, in exercising its discretion in denying USAA's Motion to Intervene.

Therefore, the plaintiff's respectfully submit that this Court affirm the Court below's Order.

ARGUMENT

II. USAA'S ARGUMENTS THAT ITS MOTION TO INTERVENE WAS TIMELY SINCE IT WAS FILED PRIOR TO FINAL JUDGMENT, AND THAT THERE WAS EXCUSABLE NEGLECT SHOULD BE DEEMED WAIVED SINCE THESE QUESTIONS WERE NOT PRESENTED TO THE COURT BELOW.

A. Question Presented

Whether USAA's arguments that its Motion to Intervene was timely since it was filed prior to final judgment, and that there was excusable neglect, should be deemed waived since these questions were not presented to the Court below.

B. Standard and Scope of Review

The Supreme Court reviews questions of law de novo. Judge v. Rago, 570 A.2d 253 (Del. 1990).

C. Merits of the Argument

Supreme Court Rule 8 Questions Which May Be Raised On Appeal provides:

> Only questions fairly presented to the trial Court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

USAA's arguments concerning its motion to intervene was timely since it was filed prior to final judgment, and that there was excusable

neglect, since it was not provided the plaintiffs' inquisition hear exhibits and records prior to filing its motion, should be deemed waived since these questions were not presented to the Court below. Under Supreme Court Rule 14(b)(vi)(A)(1) as to questions presented, the appellant shall state with a clear and exact reference to the pages of the Appendix where a party preserved each question to the trial Court. In USAA's Opening Brief, it only cites to A-55 & 57 for each argument. A-55 is merely the Court's Order denying its motion. A-57 is the Order adopting the Commissioners findings and recommended judgment for the plaintiffs'. As the Court below noted, the Commissioner's findings are not clearly erroneous, are not contrary to law, and are not an abuse of discretion. Nowhere in its order does the Court reference USAA's outlined above arguments.

Therefore, these arguments should be deemed waived and not considered by the Court. As such, the plaintiff's respectfully submit that the Court below's Order should be affirmed.

CONCLUSION

Based upon the aforementioned reasons, the plaintiffs-appellees respectfully request that this Court uphold the lower Court's Order denying the intervenor-appellant's Motion to Intervene.

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