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**Sep 28 2023**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

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Appellate Case No.: 2019-001506

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Ex Parte: Trustgard Insurance Company ..... Appellant-Respondent,

In Re:

Terence Graham, ..... Plaintiff,

-v-

Full Logistics, Inc., ..... Defendant,

Of Whom, Terence Graham, is ..... Respondent-Appellant.

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**RESPONDENT-APPELLANT'S PETITION FOR REHEARING**

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ATTORNEYS FOR RESPONDENT-APPELLANT

## ARGUMENT FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Respondent-Appellant Terence Graham (“Graham”) petitions this Court for rehearing of the Court’s decision in *Trustgard Ins. Co. v. Full Logistics, Inc.*, Opinion No. 6027 (S.C. Ct. App. filed Sept. 13, 2023), only as to mootness and intervention. Graham submits that the Court correctly affirmed the lower court’s decision to deny Trustgard’s motion to set aside the default judgment. This petition is necessary in the event the Court reconsiders its decision on Trustgard’s Rule 60(b), SCRCR, motion.

First, the Court overlooked Graham’s mootness argument by failing to address it. Second, as to intervention, the Court misapprehended the law or overlooked the evidence when it affirmed the lower court’s decision to grant Trustgard’s motion to intervene. Graham requests the Court reconsider its decision for the reasons stated in its briefs, and including the following reasons:

**I. The Court erred in failing to rule on Graham’s mootness argument.**

Graham argued that, regardless of Trustgard’s appeal, a final judgment still exists as to Full Logistics because it is not a party to this appeal. (Graham Resp.-App. Br. p. 8). The judgment against Full Logistics is the law of the case. *See Bone v. United States Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) (“The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so.”). Therefore, this appeal is moot as to any relief on a motion to set aside a judgment because Full Logistics did not file a notice of appeal and is not a party to this appeal. To pursue a defense, Full Logistics was required to file a notice of appeal to protect its interests.

The Court erred by failing to address or rule on this argument. It acknowledges in a footnote that Full Logistics did not appeal, but does not rule on Graham’s argument that the absence of Full Logistics makes the appeal moot and the judgment final.

Trustgard is attempting to get multiple bites at the apple through multiple actions in multiple courts. In state court Trustgard is attempting to vacate the judgment when its insured did not appeal the denial of its 60(b) motion. Trustgard simultaneously seeks a declaration in federal court that it does not have a duty to defend or indemnify Full Logistics but is facing a counterclaim for negligence and bad faith for the handling of this action.

Trustgard cannot intervene and appeal an issue for the purpose of later asserting defenses on behalf of another party that chose not to appeal but, instead, to accept the final judgment. The Court should address this threshold argument.

**II. The Court erred in finding Trustgard's position is not the same as Full Logistics' position.**

The opinion states that “Trustgard demonstrated that its position was not the same as Full Logistics” but does not state what the different position is in this case. *Trustgard*, 2023 S.C. App. LEXIS 111, \*34. There is no explanation of how Trustgard's position differs from Full Logistics. Contrary to the Court's opinion, Full Logistics' and Trustgard's arguments in support of the Rule 60(b) motion were identical. (R. pp. 70-74, 130-33). The Court should reconsider its decision for, at a minimum, a lack of clarity on its ruling. It is a published decision that does not explain how Trustgard satisfied Rule 24(b), SCRCF, for permissive intervention.

On the merits, the Court erred because Trustgard and Full Logistics had the same interest in setting aside the default judgment and Trustgard has no cause of action or defense of its own to assert.

Permissive intervention under Rule 24(b), SCRCF, is appropriate only where (1) the applicant shows a claim or defense “involving a question of law or fact in common with the main action,” and (2) the intervention does not “unduly delay or prejudice” the rights of the original parties. *S.C. Tax Com'n v. Union Cnty. Treasurer*, 295 S.C. 257, 368 S.E.2d 72, 75 (Ct. App.

1988). “[P]ermissive intervention should be allowed *only where the prospective intervenor has a cause of action or defense it could bring or assert.*” *Id.* at 263, 368 S.E.2d at 76 (emphasis added).

As to the first requirement, the Court overlooked that Trustgard does not have a cause of action or defense it could assert but, rather, asserts arguments identical to those of Full Logistics. Trustgard does not have a cause of action or defense to assert in this liability action regarding its insured. Trustgard’s sole interest is the one related to coverage that it filed in federal court. Trustgard’s interest in this action is not in determining the liability or damages of Full Logistics but rather the financial implications from its liability policy insuring Full Logistics. The lower court and this Court incorrectly held that Trustgard satisfied permissive intervention.

As to the second requirement, the Court misapprehended that Trustgard’s attempt to vacate the judgment delays this action when Full Logistics did not appeal the denial of its 60(b) motion. Trustgard’s intervention prejudiced Graham by forcing the briefing and argument of this appeal rather than simply addressing the declaratory judgment action in federal court related to coverage – an action that has been stayed since June 15, 2020. As Trustgard’s intervention further delays this action and prejudices Graham, the Court erred in affirming Trustgard’s motion for permissive intervention.

### **CONCLUSION**

In the event the Court reconsiders its decision as to the judgment, it should grant this petition for rehearing to reconsider its absence of a ruling on the mootness argument and its affirmance of permissive intervention.

**[SIGNATURE TO FOLLOW ON NEXT PAGE]**

September 28, 2023  
Hampton, South Carolina

Respectfully submitted,

BARNES LAW FIRM, LLC



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In Re:

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CERTIFICATE OF SERVICE

This is to certify that I, **Megan C. Davis**, with Barnes Law Firm, LLC, Counsel for the Respondent-Appellant, have this date emailed a true and correct copy of **Respondent-Appellant's Petition for Rehearing** to:

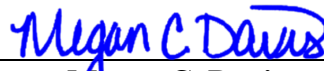
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September 28, 2023  
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