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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court Of Common Pleas

The Honorable Robin B. Stilwell, Judicial Circuit Court Judge
Trial Court Case No.: 2017-CP-23-00311

Appellate Case No. 2019-001506

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

In Re:

Terence Graham,..... Plaintiff,

v.

Full Logistics, Inc., ...Defendant,

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

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* OF PETITIONER/APPELLANT-RESPONDENT TRUSTGARD INSURANCE COMPANY

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Pursuant to Rules 219(b), 221(a), and 240, SCACR, Petitioner/Appellant-Respondent Trustgard Insurance Company ("Trustgard") requests rehearing or rehearing *en banc* of the Panel's Opinion 6027, filed September 13, 2023 (Howard Advance Sheet No. 36 at 44-66[1]), only as to the Panel's affirmance of the Circuit Court's: (1) refusal to set aside the default judgment against Trustgard's insured Full Logistics, Inc. ("Full Logistics") pursuant to either Rule 60(b)(4), SCRCP, or alternatively Rule 60(b)(1) and (3), SCRCP; and (2) denial of Trustgard's right to conduct discovery on whether the service of process necessary for a valid default judgment was effectuated.[2]

ARGUMENT

Trustgard respectfully submits the Panel overlooked or misapprehended controlling law and the record by affirming the Circuit Court's denial of Trustgard's requests to set aside the default judgment and to conduct service-related discovery, and rehearing or rehearing *en banc* is appropriate.

First, the Panel overlooked or misapprehended both controlling law and the record when it affirmed the Circuit Court's analysis under Rule 60(b)(4) and refusal to set aside the default judgment as void. Two errors of law were overlooked by the Panel – the Circuit Court's failure to void the judgment based on the ineffective proof of service upon which it was based, and the Circuit Court's rehabilitation of an already-void judgment using post-judgment testimony. Additionally, the Panel overlooked the lack of any factual support for the Circuit Court to hinge

[1] Because the Opinion transmitted to the parties is not paginated, citations herein to the Opinion reflect page numbers from the Howard Advance Sheet.

[2] Trustgard submits the Panel correctly affirmed the Circuit Court's decision to permit Trustgard to intervene.

jurisdiction on an entirely new alleged method of service, revealed for the first time five months after the default judgment when Full Logistics' owner Drico Fuller ("Fuller") claimed he had been personally served at some point with the summons and complaint. Any one of these errors warrants rehearing on the Circuit Court's decision not to declare the default judgment void under Rule 60(b)(4).

In addition to the above concerns related to the Panel's consideration of Trustgard's Rule 60(b)(4) arguments, the Panel also misapprehended controlling law requiring the Circuit Court to delay its ruling until Trustgard conducted discovery on Fuller's new claim of personal service—a claim of which Trustgard learned for the first time at the hearing on the motions to set aside the default judgment.

Finally, the Panel overlooked evidence in the record supporting Trustgard's request to set aside the judgment under Rule 60(b)(1) and (3), SCRCP.

For any or all these reasons,[3] rehearing or rehearing *en banc* is warranted.

I. The Panel Overlooked Or Misapprehended Controlling Law And The Record By Affirming The Circuit Court's Refusal To Set Aside The Default Judgment As Void Under Rule 60(b)(4).

Rehearing or rehearing *en banc* is warranted because the Panel erred by affirming the Circuit Court's refusal to set aside the default judgment as void under Rule 60(b)(4), SCRCP. Although the Panel recognized two instances in which the Circuit Court would have abused its discretion by not setting aside the default judgment – "when some error of law controlled the

[3] The Panel did not rule on Trustgard's arguments regarding Full Logistics' meritorious defense (*see* Opinion at 64)("we do not need to reach the issue of meritorious defense") or the lack of prejudice to Graham if the default judgment is set aside (*see* Opinion at 55 (describing the Circuit Court's findings regarding prejudice only in the recitation of facts without mention in later rulings)). To the extent either of these arguments are considered as part of rehearing or rehearing *en banc*, Trustgard relies on its prior briefing.

court issuing the order or when the order, based upon factual . . . conclusions, lacks evidentiary support," (Opinion at 63)(internal quotations/citations omitted) – the Panel overlooked the presence of ***both*** discretionary abuses in the Circuit Court's decision here. Indeed, the Circuit Court's refusal to void the default judgment was controlled by two separate errors of law and one unsupported factual finding – any one of which was an abuse of discretion requiring reversal by the Panel.

A. The Circuit Court's failure to void the judgment based on its ineffective proof of service is an error of law overlooked or misapprehended by the Panel which necessitates rehearing.

Perhaps the most egregious error of law by the Circuit Court was refusing to declare the default judgment void based solely on the ineffective proof of service upon which it was premised. Although this legal error was an abuse of discretion requiring reversal, the Panel, too, overlooked or misapprehended it – focusing instead on service-related testimony given five months *after* the default judgment was entered rather than service-related proof offered to confer jurisdiction *before* the judgment was entered. This error warrants rehearing or rehearing *en banc.*

The law is clear: Jurisdiction for a default judgment is conferred by filing the "imperatively necessary" proof of service, which must detail effective service complying with Rule 4, SCRCP, on the company allegedly in default. *Matheson v. McCormac*, 186 S.C. 93, 195 S.E.2d 122, 129 (1938)("The proof of service must show affirmatively that the service of the process was correctly made" and "[t]his is imperatively necessary to give the court jurisdiction of the person thus sought to be brought into court."); *see also* Rule 4(g), SCRCP("The person serving the process shall make proof of service thereof promptly" and "[t]he affidavit and delivery record and any other proof shall be promptly filed by the clerk with the pleadings and

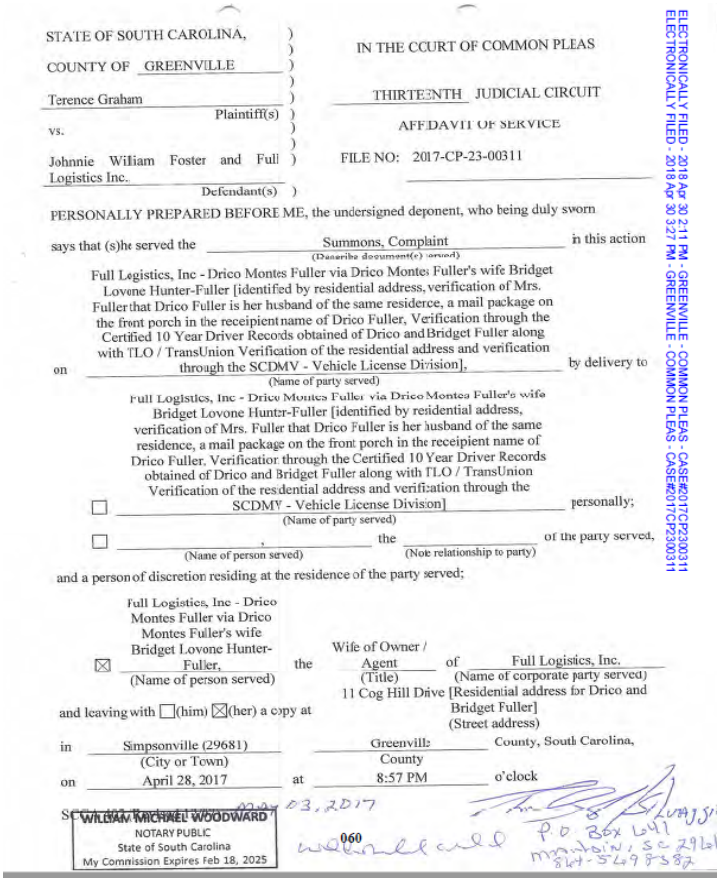
become a part of the record"). This effective proof of service must exist *prior* to the court's entry of judgment, to establish the court's jurisdiction to enter judgment in the first instance. *Singleton v. Mullins Lumber Co.,* 234 S.C. 330, 342, 108 S.E.2d 414, 420 (1959)("[I]t would be presumed that the court that rendered the judgment would not have done so without proper proof of service of the summons in the cause."). Otherwise, "[a] judgment is void if a court acts without personal jurisdiction." *BB & T v. Taylor,* 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) (citing *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)).

Proof of service is imperatively necessary. It is not a mere technicality or formality that later can be cured if ineffective, as both the Circuit Court and Panel seem to conclude. The Panel misapprehended or overlooked both the controlling law and the factual record when it affirmed the Circuit Court's refusal to find the default judgment void on this basis. As described in more detail below, the record reveals the operative proof of service – the very foundation upon which the default judgment against Full Logistics rests – was fatally deficient, requiring reversal of the Circuit Court and warranting rehearing by this Court.

Indeed, there is no legally viable argument the proof of service presented to the Circuit Court prior to entry of the default judgment showed proper service on Full Logistics in accordance with Rule 4, SCRCP. On its face, the Silvaggio Affidavit[4] that comprised the proof

[4] The Silvaggio Affidavit alleges service on "Full Logistics, Inc. – Drico Montes Fuller via Drico Montes Fuller's wife Bridget Lovone Hunter-Fuller" with "a mail package on the front porch" for "her husband of the same residence":

of service Respondent-Appellant Terrence Graham ("Graham") offered in support of default judgment[5] is deficient: It outlines purported service on Fuller's wife at her residence, with no proof of personal delivery to an officer, agent, or person otherwise authorized to accept process



STATE OF SOUTH CAROLINA,)
COUNTY OF GREENVILLE)
Terence Graham Plaintiff(s))
vs.)
Johnnie William Foster and Full Logistics Inc. Defendant(s))

IN THE CCURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
AFFIDAVIT OF SERVICE
FILE NO: 2017-CP-23-00311

ELECTRONICALLY FILED - 2018 Apr 30 2:11 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303311
ELECTRONICALLY FILED - 2018 Apr 30 3:27 PM - GREENVILLE - COMMON PLEAS - CASE#2017CP2303311

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn says that (s)he served the Summons, Complaint (Describe document(s) served) in this action on Full Logistics, Inc - Drico Montes Fuller via Drico Montes Fuller's wife Bridget Lovone Hunter-Fuller [identified by residential address, verification of Mrs. Fuller that Drico Fuller is her husband of the same residence, a mail package on the front porch in the receipient name of Drico Fuller, Verification through the Certified 10 Year Driver Records obtained of Drico and Bridget Fuller along with TLO / TransUnion Verification of the residential address and verification through the SCDMV - Vehicle License Division], (Name of party served) by delivery to

☐ Full Logistics, Inc - Drico Montes Fuller via Drico Montes Fuller's wife Bridget Lovone Hunter-Fuller [identified by residential address, verification of Mrs. Fuller that Drico Fuller is her husband of the same residence, a mail package on the front porch in the receipient name of Drico Fuller, Verification through the Certified 10 Year Driver Records obtained of Drico and Bridget Fuller along with TLO / TransUnion Verification of the residential address and verification through the SCDMV - Vehicle License Division] (Name of party served) personally;

☐ , (Name of person served) the (Note relationship to party) of the party served,

and a person of discretion residing at the residence of the party served;

☒ Full Logistics, Inc - Drico Montes Fuller via Drico Montes Fuller's wife Bridget Lovone Hunter-Fuller, (Name of person served) the Wife of Owner / Agent (Title) of Full Logistics, Inc. (Name of corporate party served)

and leaving with ☐(him) ☒(her) a copy at 11 Cog Hill Drive [Residential address for Drico and Bridget Fuller] (Street address)

in Simpsonville (29681) (City or Town) Greenville County, South Carolina,

on April 28, 2017 at 8:57 PM o'clock

03,2017

WILLIAM MICHAEL WOODWARD
NOTARY PUBLIC
State of South Carolina
My Commission Expires Feb 18, 2025

060

P.O. Box 1491
Mauldin, SC 29662
864-569-8587

(R., p. 060, Silvaggio Affidavit, dated Apr. 28, 2017 and filed Apr. 30, 2018).

[5] The Affidavit of Default, filed almost one year later, relied solely on the Silvaggio Affidavit's description of the purported April 28, 2017 service of process left on the porch of 11 Cog Hill Drive to demonstrate the Circuit Court had personal jurisdiction to enter default against Full Logistics. (R., p. 057, 4/30/18 Aff. of Default). The Order of Default also relied solely on this purported service as its foundation: "In accordance with the Affidavit of Default filed April 30, 2018, Defendant, Full Logistics, Inc. was served the Summons and Complaint on April 28, 2017, and no Answer has been filed on behalf of Defendant, Full Logistics Inc. As such, Defendant, Full Logistics, Inc. is in Default." (R., pp. 006-007, 5/15/18 Default Order).

on behalf of Full Logistics.[6] Although an individual may be served by leaving copies of the summons and complaint with a person of suitable age, a corporation cannot. *Compare* Rule 4(d)(1), SCRCP (outlining the options for service on an individual which includes "leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein"), *with* 4(d)(3) (providing for corporate service "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent" but not with an option to leave a copy with another person), *and* Rule 4(d)(8) (providing for corporate service also via registered or certified mail). *See also New Hampshire Ins. Co. v. Bey Corp*., 312 S.C. 47, 50, 435 S.E.2d 377, 378 (Ct. App. 1993) (holding service of a sole shareholder corporate officer at his place of residence with a person of suitable discretion was improper service under SCRCP 4(d)(3)); *Langley v. Graham*, 322 S.C. 428, 431, 472 S.E.2d 259, 261 (Ct. App. 1996)("An authorized person is "an agent of the addressee who has been specifically authorized in writing by the addressee to receive his mail."(citing 62B Am.Jur.2d *Process,* § 227 (1990))*;* S.C. Code Ann. § 15-9-210 (providing a corporation may be served pursuant to Rule 4(d)(8), SCRCP when the plaintiff is unable to personally serve an authorized agent of the corporation).

Without affirmative evidence Fuller's wife had authority to accept service on behalf of Full Logistics, the requirements of Rule 4(b)(3), SCRCP, were not met. *See Graham Law Firm,*

[6] Although the parties later disagreed whether Fuller's wife was personally served or if the papers were left on her porch as the Silvaggio Affidavit suggests, this is a distinction without a difference. There is no proof in the Silvaggio Affidavit that Fuller's wife was an officer, agent, or otherwise authorized to accept process on behalf of Full Logistics.

P.A. v. Makawi, 396 S.C. 290, 721 S.E.2d 430 (2012).[7] It appears from the Panel's analysis that it overlooked or misapprehended this portion of the record, because the Panel described a legal scenario that simply does not comport with these facts, i.e., when a "'plaintiff substantially complied with the rules'" such that "'exacting compliance with the rules to effect service of process'" is not required. (Opinion at 63 (citing *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 10, 753 S.E.2d 537, 542 (2014)). The evidence of service submitted in support of the default judgment did not even partially comply with Rule 4, much less constitute *White Oak*'s "substantial compliance" that warrants relieving Graham of his burden to meet Rule 4's standards.

Further indication the Panel – like the Circuit Court before it – overlooked this incurable, jurisdictional defect is found in the Opinion's characterization of this issue as solely a "credibility" determination by the Circuit Court about Fuller's testimony (Opinion at 59-60[8]), to which "great deference" must be given (Opinion at 58). Beyond credibility, Fuller's testimony five months after the default judgment was entered is irrelevant when, as here, the foundational proof of service upon which the judgment rested was objectively defective as a matter of law. The judgment was void as a matter of law from the day it was entered, whether Fuller is credible

[7] And not only was the service described in the Silvaggio Affidavit ineffective on its own terms, it also directly contradicted an affidavit of Graham's counsel ***dated one day earlier*** which admitted Graham knew before filing the Silvaggio Affidavit that Fuller was not "her [Bridget Fuller's] husband of the same residence," as the Silvaggio Affidavit alleged, because: (1) a skip trace on Fuller "listed several addresses" including 11 Cog Hill Drive – none of which "were his residence" and (2) Fuller told Graham's representatives he in fact ***did not*** live at 11 Cog Hill Drive. (R., p. 053, 4/27/17 Aff. of Smith). As both of these affidavits were submitted by Graham, they cannot be reconciled.

[8] "Although the circuit court did not make any explicit findings on credibility, it did find Fuller was served based on his own testimony. By such a finding, the circuit court implicitly found Fuller credible." (Opinion at 59).

or not. The Panel overlooked or misapprehended this fatal deficiency that voided the default judgment and required no credibility determination nor deference to the Circuit Court's view of the facts.

B. Rehabilitation of an already-void judgment using post-judgment testimony is a second error of law requiring reversal of the Circuit Court yet overlooked by the Panel.

Moreover, it was an error of law for the Panel's Opinion – and the Circuit Court's order before it – to use Fuller's conveniently-timed testimony to "cure" or rehabilitate an already-void default judgment. The $2.8 million default judgment was issued on July 24, 2018, and Fuller's testimony was offered five months later on January 8, 2019. Graham bore the burden to establish the Circuit Court's jurisdiction over Full Logistics in July 2018 ***prior to*** entry of the default judgment but utterly failed to do so. That failure cannot be cured by Fuller's post-judgment acknowledgment of service. This Court has held "an acknowledgement of service, made by a defendant after judgment has been rendered against him, is not equivalent to personal service upon him." *Langley v. Graham*, 322 S.C. 428, 432, 472 S.E.2d 259, 261 (Ct. App. 1996) (citing *State v. Cohen,* 13 S.C. 198 (1880)).

Decisions by this Court and Supreme Court make clear personal service on Full Logistics must have been shown ***before*** the judgment was rendered, or else it is void. *See Cohen,* 13 S.C. at 202 ("What is termed the voluntary appearance of the defendant on the motion to set aside the judgment, cannot be regarded as equivalent to personal service of the summons…for that, manifestly, has reference to an appearance *before* judgment is rendered, while here what is called the appearance was *after* judgment.").[9] To secure and ensure consistency in these opinions and

[9]Although the Panel's recitation of legal authorities included the law regarding "voluntary appearance" (Opinion at 59), the Panel later declined to address the merits of this

those to come, *en banc* rehearing is necessary.

Nor can failure of effective service prior to entry of judgment be cured by Fuller's post-judgment "revelation" he in fact was personally served using a method: (1) contained in none of Graham's filings regarding service; and (2) described by none of the multiple process servers Graham utilized trying to effectuate service. Fuller's version of service cannot be squared with the proof of service upon which the default judgment rested- they are irreconcilably inconsistent. If Fuller's testimony is credible, the Silvaggio Affidavit upon which the default judgment rests was false (and not merely insufficient to constitute valid service, as outlined above)—and the judgment void because the only evidence of service before the Circuit Court at the time judgment was entered did not confer personal jurisdiction. Similarly, to believe Silvaggio's version of service means Fuller's testimony is not accurate and service was never effective. Either way, jurisdiction over Full Logistics was never conferred. *See Cohen,* 13 S.C. at 202 (where constable "did not serve the summons himself, but that he did not know whether it was

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argument by determining the Circuit Court's "finding of a voluntary appearance was not the only ground for finding that Full Logistics has been served." (Opinion at 64 n. 8) ("Based on our determination the circuit court did not abuse its discretion in ruling Fuller was served based on his testimony, we need not address this argument."). Contrary to the Panel's interpretation, it is more likely from the wording of the Circuit Court's order it believed Fuller's voluntary appearance and acknowledgment of service ***to be one and the same***:

> Fuller testified under oath to the Court on January 8, 2019 that he was personally served…Fuller not only acknowledged service in his testimony but also made a voluntary appearance on January 8, 2019. Rule 4(d), SCRCP ("Voluntary appearance by defendant is equivalent to personal service"). In his testimony on January 8, 2019, Fuller never wavered from his position that he received notice of the lawsuit and did not contest proper service…Based on Fuller's testimony regarding personal service, the Court has personal jurisdiction. The judgment is not void for lack of process….

(R., pp. 028-029, 8/9/19 Order). Regardless, it was error for the Circuit Court to retroactively validate a void default judgment with either—an acknowledgement of service five months later or a "voluntary appearance" five months later.

served by anyone else…it appears upon the face of the proceedings themselves that the trial justice never acquired jurisdiction in the case against the defendants, and that his judgment against them was, therefore, a nullity….").

The Panel misapprehended or overlooked these irreconcilable versions of service, which are mutually exclusive and void the judgment either way.

C. The Panel overlooked the lack of any factual support – either in the record or provided by Fuller himself – for the Circuit Court to hinge jurisdiction on Fuller's bald service assertion.

The Opinion, as previously noted, indicates the Panel gave "great deference" to the Circuit Court's acceptance of Fuller's testimony at face value, which the Panel viewed as a credibility finding by the Circuit Court. (Opinion at 58-60). But this was not a garden-variety credibility finding; it was a decision by the Circuit Court to adopt a conclusory post-judgment statement that service occurred ***even when*** Fuller's other testimony undermined the veracity of that statement, ***even when*** all service-related evidence in the record contradicted that statement, and ***even when*** the described manner of service was previously unknown even to Graham's own attorneys and process servers. The Circuit Court made a decision to hinge the validity of a $2.8 million default judgment on a "factual . . . conclusion[completely] lack[ing] evidentiary support" (*see* Opinion at 63)(internal quotations/citations omitted), and it was an abuse of discretion.

The Panel misapprehended or overlooked the plethora of contradictions between the record evidence regarding service and Fuller's claim of how he was "served." Fuller even unequivocally admitted his version of "service" was completely different from the version of service described in the Silvaggio Affidavit, (R., pp. 345-346, First Motions Hr'g Tr., p. 14, line 10 through p. 15, line 15), and that is borne out when they are compared:

- Fuller stated "I got served, not my wife," *id.* at p. 10, line 18, whereas service in the Silvaggio Affidavit was on his wife (Silvaggio Affidavit);

- Fuller stated "I got served at my place of business," (R., p. 341, First Motions Hr'g Tr., p. 10, lines 21-22), whereas the Silvaggio Affidavit describes service at a residential address. (Silvaggio Affidavit); and

- Fuller described the process server as a white woman in her fifties, (R., p. 341-342, First Motions Hr'g Tr., p. 10, line 23, through p. 11, line 12), whereas Silvaggio is a white male.

And even beyond that, each time Fuller attempted to provide details of this purported personal service, he undermined its veracity. For example, Fuller estimated service to have happened "[a]bout a year, I think," prior to Silvaggio's April 2017 service on his wife, (R., p. 344, First Motions Hr'g Tr., p. 13, line 4), which is unlikely as that would have been in April 2016, long before the complaint was filed in January 2017. Moreover, the materials Fuller brought to court which he claimed proved "service" did not contain copies of the summons and complaint. (R., 344-345, First Motions Hr'g Tr., p. 13, line 12 through p. 14, line 1). Fuller's testimony reveals only confusion about whether and when he was actually served with the summons and complaint.

Even the Circuit Court thought Fuller's testimony regarding service was confusing, noting "none of this is clear;" Fuller "does equivocate pretty significantly;" and "it was difficult to ascertain exactly what his assertions were." (R., p. 350, Second Motions Hr'g Tr., p. 28). These observations during open court cannot be reconciled with the Circuit Court's later statement in the order that Fuller "never wavered from his position that he received notice of the lawsuit and did not contest proper service." (R., pp. 028-029, 8/9/19 Order). The Circuit Court clearly found Fuller's testimony befuddling, and this too is inconsistent with the ruling he eventually issued which found the same equivocating testimony to be so true and certain that it

cured a previously-defective proof of service and validated the default judgment. The Panel misapprehended the Circuit Court's acceptance of Fuller's testimony to be a credibility determination when in fact it was an unsupported factual finding that rose to the level of an abuse of discretion.

II. The Panel Misapprehended Controlling Law Requiring The Circuit Court To Stay Its Ruling Until Trustgard Conducted Discovery On Fuller's New Claim He Was Personally Served.

The Panel misapprehended controlling law which entitled Trustgard to conduct service-related discovery before the Circuit Court ruled on the motions to set aside default judgment. The Panel devoted more than a page of the Opinion to outlining case law giving a party the right to conduct service-related discovery *unless* that party's claim of service is so "'conclusory, frivolous, or attenuated' as to deny the . . . request for discovery." (Opinion at 60-61)(citing *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 300, 721 S.E.2d 430, 435 (2012)). But the Panel never applied it. Instead, after noting Fuller is "an agent of defendant," the Panel relied solely on its prior "determination that the circuit court did not abuse its discretion in finding Fuller accepted service" to conclude "the circuit court did not err in failing to allow Trustgard to conduct discovery to determine if Fuller was actually served." (Opinion at 61-62).

Rehearing or rehearing *en banc* is necessary to correct the Panel's misapprehension of *Graham Law Firm*'s application in this case. Although the party seeking discovery here is Trustgard, not the plaintiff as in *Graham Law Firm*, the discovery nevertheless relates to a new claim of service, *to wit*: a new assertion by Fuller, five months after entry of the $2.8 million default judgment for which Trustgard could be found partially responsible, claiming personal service on Trustgard's insured in a manner irreconcilably different from the manner of service used to justify default judgment in the first place. That the claim of service was made by the

purported "agent" of Trustgard's insured is of no moment: Trustgard was permitted to intervene because the Circuit Court found, and the Panel affirmed, that Trustgard's interests diverged from those of its insured. (Opinion at 66)("Trustgard demonstrated that its position was not the same as Full Logistics."). Fuller had just identified an entirely new method of service that adversely impacted Trustgard's interests, and Trustgard had the right to obtain discovery and respond thereto.

There was no legitimate argument Trustgard sought this discovery to support a "conclusory, frivolous, or attenuated" claim regarding service, which would have permitted the Circuit Court to deny its request. If anything, it was *Fuller's* new version of service that qualified as "conclusory, frivolous, or attenuated" given its complete divergence from the method of service used to justify the default judgment five months earlier. Trustgard occupied the exact scenario contemplated by *Graham Law Firm*, when discovery must be had so Trustgard can "receive a full and fair opportunity to be heard on the matter, because the findings with regard to service of process may determine the merits of the case in chief." (Opinion at 61 (quoting *Graham Law Firm*, 396 S.C. at 300, 721 S.E.2d at 435)). This was not a call for the Circuit Court to make in its discretion: Unless the position Trustgard advocated was "conclusory, frivolous, or attenuated" (which it unquestionably was not), then discovery should have been permitted as *Graham Law Firm* requires.

And to the extent there is any doubt whether clarifying discovery was needed, the Circuit Court's own characterization of Fuller's testimony makes that obvious—"none of this is clear;" Fuller "does equivocate pretty significantly;" and "it was difficult to ascertain exactly what his assertions were." (R., p. 350, Second Motions Hr'g Tr., p. 28). As here "'[w]here important decisions turn on questions of fact, due process often requires an opportunity to confront and

cross-examine adverse witnesses.'" *Graham Law Firm*, 396 S.C. at 299, 721 S.E.2d at 435 (quoting *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970); *S.C. Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 459 S.E.2d 846 (1995) (right to confirmation applies in civil context)). Trustgard was denied this right, even though the Circuit Court recognized Trustgard, as "[t]he ***movant in a Rule 60(b) motion***[,] ***has the burden of presenting evidence*** proving the facts essential to entitle [it] to relief," (R., p. 028, 8/9/19 Order)(emphasis in original)(internal quotation/citation omitted).

Rehearing is warranted because the Panel misapprehended that *Graham Law Firm* required the Circuit Court to allow Trustgard to conduct discovery before ruling on its motion to set aside. *See Graham Law Firm,* 396 S.C. at 302, 721 S.E.2d at 436 (explaining that the circuit court erred in denying the request for discovery because "[o]n this record, it cannot be said that Graham had a full and fair opportunity to be heard on an issue that may be determinative of its legal rights."). To secure and ensure consistency with *Graham Law Firm*, *en banc* rehearing is necessary.

III. The Panel Overlooked Evidence In The Record Supporting Trustgard's Request To Set Aside The Judgment Under Rule 60(b)(1) and (3), SCRCP.

Finally, rehearing is necessary to correct the Circuit Court's denial of Trustgard's motion to set aside the judgment due to mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct—which was an abuse of discretion the Panel overlooked or misapprehended. Although the Panel's Opinion contains a several-page recitation of legal standards applicable to Trustgard's requests to set aside under Rule 60(b)(1) and (3), (Opinion at 62-64), the Panel concluded without analysis that "Graham's counsel Smith's presuit conduct

and failure to notify Trustgard of the default judgment" (*id.* at 62) is not a "sufficient basis for setting aside the default judgment" (*id.* at 64).

The Panel – just like the Circuit Court before it – relied solely on its "determination of the previous issues" to deny this relief (*id.*),[10] overlooking or misapprehending record evidence of two years of pre-suit communications between Trustgard and Graham's attorney (R., p. 116, 4/15/19 Trustgard's Memo) that abruptly came to a halt once Graham filed the complaint and pursued this undefended default judgment (presumably to leverage Trustgard's contribution). It was an abuse of discretion for the Circuit Court to ignore this pattern of conduct which rises to the set-aside level contemplated by Rule 60(b)(1) and/or (3), and rehearing is required because the Panel overlooked or misapprehended this error.[11]

Rehearing *en banc* is required to secure or maintain uniformity of decisions on this issue. The pattern of conduct by Graham's attorney in this case echoes the pattern of conduct by plaintiff's counsel in *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970) (engaging in pre-suit settlement negotiations with the insurer then failing to notify the insurer when suit was filed[12]), requiring the default judgment to be set aside. *Id.* at 283. *See also Lowe's of Georgia,*

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[10] The Circuit Court denied Trustgard relief under Rule 60(b)(1) and (3) ***not because*** it found the evidence Trustgard offered insufficient, but by perfunctorily invoking its determination of previous issues unrelated to the analysis at hand, i.e., "in light of Fuller's sworn testimony regarding personal service and turning everything over to his insurance company." (R., pp. 029, 8/9/19 Order, p. 7).

[11] Even assuming arguendo that an already-void default judgment can be saved under Rule 60(b)(4) by Fuller's surprise testimony five months after default judgment was entered alleging service in a manner previously unknown to everyone in this case (even Graham's own attorneys and process servers), the analysis of whether a default judgment is void under 60(b)(4) is not the same as whether a pattern of conduct by Graham's attorney warrants setting aside the default judgment under the standards applicable to Rule 60(b)(1) and (3).

[12] Although *Edwards* was decided prior to the adoption of the SCRCP, the insurer and

Inc. v. Costantino, 288 S.C. 106, 110, 341 S.E.2d 382, 384 (Ct. App. 1986)(finding no abuse of discretion in setting aside a default judgement for excusable negligence where the defendants believed they were in settlement negotiations and received no notice of the complaint). The Panel's Opinion did not distinguish or even cite *Edwards* and *Costantino*, and the Panel overlooked or misapprehended that those cases required it to set aside the default judgment in this case.

CONCLUSION

For all reasons set forth herein, and for the reasons set forth in its appellate briefs, Trustgard respectfully submits that it is entitled to rehearing and rehearing *en banc* of the Panel's Opinion.

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

By: _____

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Columbia, South Carolina
October 12, 2023

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insured moved to set aside a default judgment entered against the insured on the same bases of mistake, inadvertence, surprise, or excusable neglect that later became Rule 60(b)(1) and (3).

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court Of Common Pleas

The Honorable Robin B. Stilwell, Judicial Circuit Court Judge
Trial Court Case No.: 2017-CP-23-00311

Appellate Case No. 2019-001506

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

In Re:

Terence Graham,..... Plaintiff,

v.

Full Logistics, Inc., ...Defendant,

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

PROOF OF SERVICE BY EMAIL

I certify that on October 13, 2023, I have served the **Petition for Rehearing and Suggestion for Rehearing *En Banc* of Petitioner/Appellant-Respondent Trustgard Insurance Company** by electronic mail – in accordance with § (d)(1) of the Supreme Court's August 25, 2021, Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, Appellate Case No. 2020-000447 on counsel for the Respondent-Appellant, William F. Barnes, III, Esquire, and Brian T. Smith, Esquire; and Dorothy Holley Hogg, Esquire, sent to their AIS-registered email addresses, as follows: wbarnes@barneslawfirmsc.com; bsmith@btsmithlaw.com; dhogg@fulcherlaw.com.

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October 13, 2023

Susan Book

From: Susan Book
Sent: Friday, October 13, 2023 12:47 PM
To: wbarnes@barneslawfirmsc.com; bsmith@btsmithlaw.com; dhogg@fulcherlaw.com
Cc: Shelley Montague; Jessica Laffitte; mdavis@barneslawfirmsc.com; '10006_1 In Re_ Trustgard Insurance Company_Terence Graham_ Johnnie William Foster_ and Full Logistics_ Inc_ Email _10006_1_'
Subject: Ex Parte Trustgard Insurance Company, Case No. 2019-001506 [GWB-IMANMAIN.FID766115]
Attachments: Proof of Service - Petition for Rehearing and En Banc.pdf; Petition for Rehearing and En Banc.pdf

Good Afternoon,

Attached for service upon you is Petitioner/Appellant-Respondent's Petition for Rehearing and Rehearing *En Banc* which is being submitted today for filing in this matter.

Thank you,
Susan

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