THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable Robin B. Stilwell, Circuit Court Judge
Case No: 2017-CP-23-00311

Appellate Case No. 2019-001506

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

In Re:

Terrence Graham,.....Plaintiff

v.

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

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

APPELLANT-RESPONDENT TRUSTGARD INSURANCE COMPANY'S INITIAL BRIEF OF APPELLANT

PETER H. DWORYANYN
pdworyanyn@collinsandlacy.com
S.C. Bar No. 12950
MICHAEL R. BURCHSTEAD
mburchstead@collinsandlacy.com
S.C. Bar No. 73770
COLLINS & LACY, PC
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660

Attorneys for Appellant-Respondent
Trustgard Insurance Company

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2. Did the circuit court err in accepting Fuller's testimony at face value notwithstanding a lack of evidentiary support and factual contradictions between this testimony and the proof of service supporting the default judgment?

3. Did the circuit court err in refusing to permit Trustgard to conduct discovery on the issue of service of process?

4. Did the circuit court err in ruling that the judgment should not be set aside for mistake, inadvertence, surprise, or excusable neglect, or fraud due to Graham's counsel Smith's pre-suit conduct and failure to notify Trustgard of the default judgment?

5. Did the circuit court err in failing to find that Trustgard had presented a meritorious defense?

STATEMENT OF THE CASE

Terence Graham ("Graham") commenced this personal injury lawsuit by filing a summons and complaint on January 23, 2017. (R.*, Compl.). The complaint alleged that Graham was injured in a one vehicle accident on January 29, 2014, while riding as a passenger in a commercial truck driven by Johnnie Williams Foster ("Foster"). (Id.) The truck was insured by Trustgard Insurance Company ("Trustgard"). (R.*, Trustguard's Mot. To Int. and Mot to Set Aside, Feb. 22, 2019). Both Foster and Graham were employees of the owner of the truck, Full Logistics, Inc. ("Full Logistics"). (R.*, Order of Damages by Way of Default, entered July 24, 2018).

An Order of Default was entered against Full Logistics based upon service of process on Bridget Fuller, wife of Drico Fuller, the registered agent of then-dissolved Full Logistics. (R.*, Order of Default Against Full Logistics, entered May 15, 2018); (R.*, Exh. A to Trustguard's Memo Supp. Of Mot. To Intervene and Set Aside, Apr. 15, 2019). After an undefended damages hearing, an Order of Damages by Way of Default granted Graham judgment against Full Logistics in the amount of $2,843,349.73. (R.*, Order of Damages by Way of Default, entered July 24, 2018).

On October 11, 2018, Graham's attorney sent Trustgard a time limited demand seeking policy limits of $1,000,000. (See R.*, Trustgard's Memo, Apr. 15, 2019). Trustgard retained counsel to represent Full Logistics and separate counsel to represent its own interests. Counsel for Full Logistics filed a Motion to Vacate and/or Set Aside the Judgment for Default Damages. (R.*, Mot. to Vacate, Nov. 29, 2018). A hearing was held on this Motion to Vacate. (First Motions Hr'g Tr., Jan. 8, 2019). Drico Fuller, the registered agent for Full Logistics, appeared at the hearing and testified that he – not Bridget – was personally served. (First Motions Hr'g Tr.p. 10, lines 11-19). Ultimately, the hearing was continued. (First Motions Hr'g Tr., p. 16, lines 19-20).

Trustgard filed a Motion to Intervene and a Motion to Set Aside the Default Judgment, followed by a supporting memoranda. (R.*, Trustgard's Motion, Feb. 22, 2019); (R.*, Trustgard's Memo, Apr. 15, 2019); (Trustgard's Supp. Memo, Jun. 28, 2019). A hearing was held on this Motion before the Honorable Robin Stilwell (Second Motions Hr'g Tr., April 24, 2019). Eventually Judge Stilwell notified the parties by letter of his decision to grant Trustgard's Motion to Intervene for the purpose of posing its Motion to Set Aside the Default, but deny Trustgard's Motion to Set Aside the Default. (R.*, Stillwell Letter, dated July 3, 2019). Judge Stilwell requested a proposed order from counsel for Graham. (Id.). Prior to the Order being issued, Trustgard filed a Motion to Stay a Formal Ruling requesting the ability to conduct discovery into the circumstances of service of process. (R.*, Trustgard's Mot. to Stay, Jul. 18, 2019).

The Order *sub judice* was filed by Judge Stilwell granting the Motion to Intervene, denying the Motion to Set Aside the Default, and denying Trustgard's Motion to Stay. (R.*, Order, entered Aug. 9, 2019). On September 6, 2019, Trustgard's Notice of Appeal was timely served and filed.

This brief of Appellant follows.

STATEMENT OF FACTS

I. Relevant Background

At the time of the accident at issue, Full Logistics was operating as a commercial trucking company based in Greenville County. (R.*, Trustgard's Memo, Apr. 15, 2019). It was administratively dissolved by the S.C. Secretary of State's Office on June 22, 2015. (R.*, Exh. A to Trustgard's Memo, Apr. 15, 2019). Drico Fuller was the sole shareholder of Full Logistics, and the company had no other officers or agents. (R.*, Trustgard's Memo, Apr. 15, 2019). The Secretary of State's records reflect that Drico Fuller was the Registered Agent for the company with an address of 213 Westfield Street in Greenville. (R.*, Exh. A to Trustgard's Memo, Apr. 15, 2019).

The single vehicle motor vehicle accident occurred on January 29, 2014. (R.*, Compl.). Trustgard issued a Policy of Insurance to Full Logistics, subject to all terms and conditions, which was in effect at the time of the accident. (R.*, Trustgard's Memo, Apr. 15, 2019). Graham's Complaint alleges he was a "passenger" in a 2000 Volvo Truck owned by Full Logistics and being operated by Foster, which was travelling on Interstate 95 in Dorchester County in wintry weather conditions when it jackknifed off the road and hit a guardrail. (R.*, Compl.). The complaint alleges that Foster was an employee or agent of Full Logistics. (Id.). Although the complaint omits the fact that Graham was also an employee of Full Logistics, (id.), the Order of Damages by Way of Default establishes that Graham was in fact an employee of Full Logistics. (R.*, Order, entered July 24, 2018).

II. Pre-Suit Communication Between Graham and Trustgard

Trustgard was notified of the accident on January 31, 2014, two days after it took place, and immediately began an investigation. (R.*, Trustgard's Memo, Apr. 15, 2019). On or about March 3, 2014, Trustgard received a letter of representation and a spoliation letter from Graham's attorney, Brian Smith. (R.*, Exh. A to Full Logisitic's Memo, Jan. 4, 2019). On or about March 28, 2014, at Smith's request, Trustgard made the tractor available for Smith to inspect. (Id.). For the next two years, representatives of Trustgard had communications with Smith or his office attempting to obtain information. (R.*, Trustgard's Memo, Apr. 15, 2019). Smith failed to provide requested medical documentation of Graham's injuries, or other requested information, including whether Graham was an employee of Full Logistics. (Id.).

On September 4, 2015, Drico Fuller replied to an email from Jon Barrett at Trustgard confirming that Graham was an employee, among other details. (R.*, Trustgard's Memo, Apr. 15,

2019). Barrett then requested documentation confirming Graham's employment status, but Trustgard did not receive any further reply from Fuller. (Id.)

III. Service of Process

The complaint was filed on January 23, 2017, less than a week before the statute of limitations would have expired. (R.*, Compl.). According to an Affidavit of Service, Foster was personally served at his home a week later. (R.*, Aff. as to Foster, filed Apr. 30, 2018). Foster filed and Answer and entered an appearance with privately retained counsel, Matthew Cox. (R.*, Answer, Mar. 15, 2017). Tellingly, neither Foster nor Cox ever tendered the lawsuit to Trustgard or provided notice of the lawsuit to Trustgard.

Graham attempted to serve process on Full Logistics through its registered agent, Drico Fuller. Karen Garrett, a process server hired by Graham's counsel, provided an Affidavit of Nonservice on April 30, 2017, describing unsuccessful attempts to serve "Drico M. Fuller as Registered Agent for Full Logistics, Inc." at 213 Westfield Street in Greenville on January 28, 2017, 31 Badger Street in Greenville on March 23, 2017, and 11 Cog Hill Drive in Simpsonville on March 24, 2017. (R.*, Garrett Aff. of Non-Service, filed Apr. 27, 2017). In another Affidavit of Garrett, attached to her Affidavit of Service and made on April 20, 2017, Garrett stated the following:

1. That on January 28th I attempted to service (sic) at 213 Westfield St. Greenville, SC. This location no longer exited (sic). There was construction here building apartment complex.
2. That on March 23rd, 2017n (sic) I attempted service at 31 Badger St., Greenville, SC. A black female answered the door. I asked her if she knew Drico Fuller, she said that she didn't. that she had been living at this address since October of 2016.
3. I did a skip trace on Drico Fuller. It showed him living at 11 Cog Hill Dr., Simpsonville, SC.
4. I attempted the above address on March 24th 2017. No one came to the door. I left a card on the door.

5. I noticed that there was a mobile phone number listed (864) XXX-XXXX. I called it and Mr. Fuller answered the phone. I asked him if he still lived at 11 Cog Hill Dr. he said that he did not. He told me that he had moved to North Carolina. I asked him where I (sic) NC but he refused to give me an answer. I explained that I was a process server and that I had some legal documents to be served on him as registered agent for Full Logistics, Inc. He told me that he no longer had this company because he wasn't making any money with it. I explained to Mr. Fuller that it didn't matter he still needed to be served this document, because the documents were in reference to when he did own Full logistics, Inc. He told me that he was told he didn't have to worry about this because the company had been dissolved. I assured him that he did need to be served. He then hung up on me.

(R.*, Aff. of Garrett, Apr. 27, 2017).

On April 27, 2017, Graham's attorney Brian Smith filed an Affidavit Seeking Order to Allow Service by Publication on Full Logistics, attaching Garrett's Affidavit of Non-Service April 27, 2017, and her additional Affidavit dated Apr. 20, 2017, describing unsuccessful attempts to serve Full Logistics through Drico Fuller. (R.*, Aff. of Smith, Apr. 27, 2017). In Smith's Affidavit, he describes Garrett's unsuccessful attempts to serve Full Logistics through Fuller and represented to the Court an inability to serve Fuller through traditional means and need for an order to serve Full Logistics by publication. Among other things, Smith's Affidavit states:

4. Brian Garrett,[1] owner of SC Process Service, attempted service on the registered agent for Defendant at the address filed with the Secretary of State's Office, 213 Westfield Street, Greenville, SC 29605 on March 23, 2017, but was unable to complete service because the premises were unoccupied and the address a construction site. *See Exhibit A,* Affidavit of Non-Service.
5. I then had a skip trace run on the registered agent and owner of the business, Drico Fuller. It listed several addresses, but none of them were his residence. *See* Exhibit A, Affidavit of Non-Service.
6. Mr. Fuller, agent and owner of Full Logistics, Inc., was reached by telephone on March 24, 2017, and indicated that he had moved and would not disclose his address.

(R.*, Aff. of Smith, Apr. 27, 2017).

[1] It appears that attorney Smith inadvertently identified Karen Garrett as Brian Garrett.

As a result of Smith's Affidavit, an Order for Service on Full Logistics by Publication was issued stating:

> It further appears that after due diligence, the Graham is unable to make service of the Summons and Complaint in this action upon the Defendant Full Logistics, Inc., and that the aforementioned Defendant cannot be found within this county and this state although diligent efforts have been made.

(R.*, Order for Service by Publication, entered May 1, 2017).

Despite Smith's Affidavit representing that he could not serve Full Logistics through traditional means and that he needed an order to serve by publication, for reasons unknown it does not appear that service by publication was ever attempted.

The Affidavit of Service of Paul Silvaggio ("Silvaggio Affidavit"), on which the default judgment relies, alleges Full Logistics was served through the wife of its registered agent by leaving a copy of the Summons and Complaint at 11 Cog Hill Drive in Simpsonville

> ...via Drico Monte 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 recipient (sic) 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 form the SDMV-Vehicle License Division of Owner/Agent.

(R.*, Silvaggio Affidavit, dated Apr. 28, 2017 and filed Apr. 30, 2018). This purported service was made **one day** after Attorney Smith's Affidavit of Publication stated he could not serve Full Logistics by traditional means and despite his statement in the Affidavit that his skip trace on Fuller "listed several addresses," including 11 Cog Hill Drive,[2] "but none of them were his residence" and Fuller's statement to Garrett (also incorporated into the Affidavit) that he did not live at 11 Cog Hill Drive. (R.*, Aff. of Smith, Apr. 27, 2017). The Silvaggio Affidavit contains no indication that

[2] ¶ 5 of Smith's Affidavit refers to Exhibit A, Garrett's Affidavit of Nonservice, which referenced several addresses including 11 Cog Hill Drive.

the summons and complaint was personally delivered to Bridget nor that she was an officer, agent, or otherwise authorized to accept process on behalf of Full Logistics.

The Affidavit of Default was not filed until almost one year later. Attorney Smith's Affidavit of Default stated:

> 4. That the Summons and Complaint were duly served upon Defendant Full Logistics, Inc. on April 28, 2017 See Exhibit B.
> 5. That they were served via private process server, Paul Silvaggio, as required by South Carolina Rules of Civil Procedure 4(d)(8).
> 6. That more than thirty (3) days has elapsed since the service of said Summons, Complaint and no Answer, Motion, or Notice of Appearance has been made herein, and that said Defendant is now in default.

(R.*, Aff. of Def., dated Apr. 30, 2018). Exhibit B, referenced in ¶ 4, was the Silvaggio Affidavit described above, detailing service purportedly made on Bridget at 11 Cog Hill Drive in Simpsonville. (Id.). Smith's Affidavit of Default also erroneously stated that Foster had not answered and requested default against him, in addition to Full Logistics. (Id.).

After Smith made a correction to request Entry of Default against Full Logistics only, the Order of Default was granted, and stated in part:

> 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.

(Order dated May 15, 2018). Following an uncontested damage hearing at which Graham presented $57,536.85 in medical bills, an Order of Damages by Way of Default granted Graham a default judgment against Full Logistics for $1,843,349.73 in compensatory damages and $1,000,000.00 in punitive damages. (R.*, Order, entered July 24, 2018). This Order states in part that Full Logistics "was served the Summons and Complaint by way of process server on April 28, 2017." (Id.).

IV. Trustgard's Notice of Lawsuit and Attempts to Investigate

Trustgard's first notice of the lawsuit was on October 15, 2018, when it received a time limited demand from Smith seeking policy limits of $1,000,000. (R.*, Moscato Aff., Exh. to Trustgard's Supp. Memo, Jun. 28, 2019). Trustgard retained Collins & Lacy, PC, to investigate the Graham's claims and demand. Michael Burchstead, an attorney with Collins & Lacy, made numerous attempts to contact Drico Fuller regarding the circumstances of service of process and his knowledge of the complaint. (R.*, Burchstead Aff., Exh. D to Trustgard's Memo, Apr. 15, 2019). Burchstead's attempts to contact Fuller using numerous telephone numbers were unsuccessful. (Id.). On October 29, 2018, Burchstead sent an email to Fuller (fulllogistics@hotmail.com) and stated the following:

> I am an attorney in Columbia, SC and my firm has been retained by Grange Insurance in connection with an accident that took place in January 2014 involving one of your trucks and a lawsuit arising out of that accident. I have been trying to reach you to discuss certain matters regarding this accident and lawsuit, but I am unsure if my contact information is correct. Can you please give me a call at (803) 807-XXXX as soon as you are able?

(R.*, Trustgard's Memo, Apr. 15, 2019).

On October 30, 2018 at 12:55 PM, Larry Nelson, a paralegal and investigator employed by Collins & Lacy was able to contact Drico Fuller. (R.*, Nelson Aff., Exh. E to Trustgard's Memo, Apr. 15, 2019). After identifying himself to Fuller, Nelson requested assistance from Fuller with factual information regarding the April 28, 2017, alleged service of the Summons and Complaint on Mr. Fuller's wife at 11 Cog Hill Street in Greenville, SC. (Id.). Fuller informed Nelson that nobody served Bridget, but the papers were left on the porch. (Id.). Fuller also stated that Bridget was not an officer or shareholder at Full Logistics, that she did not have anything to do with the company, and that he did not give her authorization to accept service on behalf of the company. (Id.). As to his location and further communication, Mr. Fuller stated he was not in Greenville, but

in North Carolina, and he would call his attorney and have him call Trustgard's representative. (Id.). Nelson provided Fuller the name and telephone number of attorney Burchstead and asked Fuller to have his attorney contact Burchstead. (Id.). Nelson asked Fuller the name of his attorney, which Fuller advised was Michael Johnson of Charlotte, North Carolina. (Id.). Several minutes later, at 1:08 PM, Nelson received a call from Mr. Fuller, who stated he talked with his attorney who advised him the case was from four years ago, it was over, and it had nothing to do with him. (Id.). Mr. Fuller stated he was not going to have anything to do with the lawsuit and hung up the phone. (Id.).

Following this conversation, Burchstead searched for all attorneys licensed in North Carolina and South Carolina with the name of Michael Johnson, of which there were several possibilities. (R.*, Burchstead Aff., Exh. D to Trustgard's Memo, Apr. 15, 2019). After contacting several of these, Burchstead was unable to make contact or otherwise verify that there was an actual attorney with that name who was representing Fuller. (Id.).

Approximately one month later, on November 28, 2018, at 11:27 AM, Burchstead received a telephone call from Fuller. (R.*, Burchstead Aff., Exh. D to Trustgard's Memo, Apr. 15, 2019). Burchstead describes Fuller's tone as agitated and noted that he interrupted any attempt to ask him questions or otherwise engage in the conversation. (Id.). Fuller stated he was receiving a lot of letters from attorneys regarding this lawsuit and he did not know why and stated, for the first time, he was personally served process and not his wife. (Id.). Fuller refused to answer any questions about the timing and circumstances of the alleged service of process. (Id.). Fuller made a vague comment about being served on or in his truck but would not provide any further detail. (Id.). Fuller was informed of the large default judgment and was asked to cooperate with the defense attorneys assigned to him by Trustgard. (Id.). After the issue of Trustgard's lack of notice of the lawsuit was brought up, Fuller disputed this statement, but when pressed on that statement he would not provide

further details and was evasive. (Id.). After he was asked additional questions, Fuller's tone grew more agitated and he abruptly hung up the telephone. (Id.).

V. Hearing on Motion to Set Aside the Default and Fuller's Testimony

Trustgard retained separate counsel for Full Logistics. On November 29, 2018, a Motion to Vacate and/or Set Aside the Judgment for Default Damages was filed for Full Logistics (Full Logistics' Motion to Vacate, Nov. 29, 2018). On January 8, 2019, a hearing on this Motion was conducted by the Honorable Edward W. Miller. (First Motions Hr'g Tr., Jan. 8, 2019). Counsel for Full Logistics argued why service on Bridget as described in the Silvaggio Affidavit (i.e., by leaving the papers on her porch) was improper under SCRCP 4(d)(3), (First Motions Hr'g Tr., p. 2, line 1 through p. 7, line 1), to which Judge Miller remarked "Why is that proper service? Seems like gutter service to me." (First Motions Hr'g Tr., p. 7, lines 2-3). Attorney William Barnes, recently retained as co-counsel for Graham, represented the following to the Court:

> MR. BARNES: Your Honor, it is not as simple as Ms. Rupert makes it. I would like to hand up some exhibits. This complaint in this action was served by Paul Silvaggio, who formally worked with Greenville County Sheriff's –
>
> JUDGE MILLER: I know him.
>
> MR. BARNES: And I believe his affidavit is Exhibit 2. And basically what he did is he went to the address, 11 Cog Hill Drive, where Mr. Fuller lived. And his wife was there, verified a package. on the front porch that was in the name of Drico Fuller. I think that's where Ms. Rupert may be getting that this was left on the front porch. And he talked to her. We have provided a supplemental affidavit from Mr. Silvaggio setting forth his credentials working for the Greenville County Sheriff's Office and all of that. He talked to her, found out that Drico Fuller lived in the home. They resided together. He asked her about that. That's Exhibit 3. His supplemental affidavit, Ms. Fuller told him, being Mr. Silvaggio, that he was not home and verified that there was a mail package on the home front porch addressed to Drico Fuller. He also asked in his supplemental affidavit, what he attest to, is he also inquired whether Ms. Fuller was an authorized agent of Full Logistics and she replied that she was when the company was operating.
>
> And so what we have here, this was not simply a summons and complaint that was left on the front porch. We have a return -- an affidavit of service, two affidavits

> from Mr. Silvaggio, setting forth the service that he has made in this case. I think the Court is well aware that under our law, an affidavit of service is presumed valid. And Ms. Rupert by the moving party in this case has to put forth extrinsic evidence from a party refuting that. In this record before the Court, there is no affidavit from Mr. Fuller. There is no affidavit from Mrs. Fuller, or anything to that effect. I have in what I have handed up to the Court some orders, the Richardson Construction case, that sets forth a mere denial of service is not effective. I have also handed up some trial court orders. One is an order from Judge Buckner where the defendants actually signed an affidavit stating they weren't served, and the Court found in that case that the mere denial is not sufficient to overcome the presumption that accompanies an affidavit of service. And so what we have here on the service issue is, there is no evidence to rebut Mr. Silvaggio's affidavit that he, in fact, served the wife of Drico Fuller and she was an agent of the company.
>
> So we believe on that issue that service is proper. And Mr. Fuller is obviously here. I don't know what -- he may have gotten the complaint. He may be able to answer some questions. I don't know.

(First Motions Hr'g Tr., p. 7, line 16 through p. 9, line 24).

Subsequently, despite his prior statements to representatives of Trustgard that he wanted nothing to do with the lawsuit and his failure to cooperate with counsel Trustgard had retained for Full Logistics, Drico Fuller asked to be heard, and argued against defense counsel's position that service of process was improper:

> MR. FULLER: I got served. I got the email stating where I sent everything to the insurance company. They dropped the ball. I gave them everything I had. When they served me, I sent it to them. We kept communication going. Then they show up with a private investigator following my wife, trying to get her to sign an affidavit stating that she got served. I got served, not my wife. He left the affidavit paper on the front porch.
>
> JUDGE MILLER: How did you get served?
>
> MR. FULLER: I got served at my place of business.
>
> JUDGE MILLER: Who served you?
>
> MR. FULLER: She gave it to me. She said, are you Drico Fuller? And she gave me the piece of paper. And I sent everything to the insurance company.
>
> JUDGE MILLER: Who was she?

MR. FULLER: I don't remember her name.

JUDGE MILLER: Was she white or black?

MR. FULLER: She was white.

JUDGE MILLER: How old was she?

MR. FULLER: She was an older lady. White SUV, small SUV.

JUDGE MILLER: Well, how old?

MR. FULLER: About 50. In her 50s.

JUDGE MILLER: That ain't old.

MR. BARNES: Your Honor, may I ask some questions?

MS. RUPERT: Your Honor, if I may, the affidavit of service that this default judgment was based on does not say that it was served upon Drico Fuller.

JUDGE MILLER: I understand that. Y'all can sit down. I am talking to Mr. Fuller.

MR. FULLER: I sent everything to the email -- to the insurance company about the wreck.

JUDGE MILLER: What did they give you when this woman served you?

MR. FULLER: She gave me a packet.

JUDGE MILLER: What kind of packet? What was in it?

MR. FULLER: A white packet. She gave it to me.

JUDGE MILLER: Do you remember what --

MR. FULLER: Not right off, your Honor, not right off.

JUDGE MILLER: And do you remember about when that was?

MR. FULLER: No, not right off...

...

JUDGE MILLER: Well, was this before or after the package was left on your front porch?

MR. FULLER: I got served before.

JUDGE MILLER: Do you know how much time passed?

MR. FULLER: Not right off.

JUDGE MILLER: Well, I mean, was it a year, or was it a month, or was it a week, that kind of thing. You don't have to be exact.

MR. FULLER: About a year, I think.

JUDGE MILLER: A year? Okay. So then you sent whatever that was to your insurance company?

MR. FULLER: Yes.

JUDGE MILLER: And I tell you what, you say you got a copy of the email?

MR. FULLER: Yes. I got copies of what we had, communications and everything.

(First Motions Hr'g Tr., p. 10, line 1 through p. 13, line 11).

Subsequently, the attorneys examined various documents which Fuller purported proved he was served, but the record reflects that the Summons and Complaint were not among them:

JUDGE MILLER: Would you show it to these two lawyers and let them look at it. Oh, you got copies of everything? Look at you. I will let them look at it for a minute. You can have a seat while they are looking through it.

MS. RUPERT: Your Honor, I don't see a copy of the lawsuit at all in the papers that were just handed to me. I would also say that when he said that he received -- he was served a year before the package was left on his doorstep, the summons and complaint hadn't even been filed then.

JUDGE MILLER: Hang on. Okay. You had an opportunity to view everything?

MR. BARNES: I have kind of flipped through it quickly, Judge.

(First Motions Hr'g Tr., p. 13, line 12 through p. 14, line 1).

When further pressed by Judge Miller on the precise circumstances of his purported service, Fuller continued as follows:

JUDGE MILLER: Mr. Fuller, what did you do with the package that was left on your front porch?

MR. FULLER: That was the affidavit they wanted me to sign to say that my wife got served.

JUDGE MILLER: There was a package left on your front porch, right?

MR. FULLER: An envelope.

JUDGE MILLER: You got that?

MR. FULLER: I got the affidavit. I got the copy of what he wanted me to sign to say my wife got served, which she didn't get served. I was the one that got served.

JUDGE MILLER: With the package on your porch? There are two different circumstances we are talking about. I am not talking about the one where the woman in the white SUV gave you --

MR. FULLER: Okay.

JUDGE MILLER: The second time.

MR. FULLER: Okay.

JUDGE MILLER: What happened with that package?

MR. FULLER: I am not even sure, your Honor. I don't even remember.

JUDGE MILLER: Did you ever see it?

MR. FULLER: I took it in the house, but I didn't even go through it. It was my understanding my insurance company was handling everything.

JUDGE MILLER: You didn't send that to him?

MR. FULLER: I sent everything to them from the first -- that I got.

JUDGE MILLER: The first time.

MR. FULLER: Yeah.

JUDGE MILLER: But the second time, that second time, you just took it in the house, you don't know what you did with it?

MR. FULLER: No, sir.

JUDGE MILLER: Let me talk to the two lawyers up here, please.
(Off-the-record discussion.)

(First Motions Hr'g Tr., at p. 14, line 2 through p. 15, line 15).

Following Fuller's testimony, Judge Miller continued the hearing. (First Motions Hr'g Tr., p. 16, lines 19-20).). Subsequently, attorneys for Full Logistics filed a Motion to be Relieved as Counsel, which was later granted. Trustgard retained new counsel to represent Full Logistics.

VI. Trustgard's Motion to Intervene and Set Aside Default Judgment

Trustgard filed a Motion to Intervene, either as of right under SCRCP 24(a) or permissively under SCRCP 24(b), and a Motion to Set Aside the Default Judgment. (R.*, Trustgard's Mot., Feb. 22, 2019). Trustgard's argument on the Motion to Set Aside were (1) under SCRCP 60(b)(4) insofar as it was void for improper service of process, or (2) that the judgment should be set aside for mistake, inadvertence, surprise, or excusable neglect, or fraud under SCRCP 60(b)(1) and (3), given that Graham's counsel was engaging in settlement negotiations with the insurer, then failed to notify Trustgard when suit was filed. (R.*, Trustgard's Memo, Apr. 15, 2019). Trustgard also argued the existence of a meritorious defense on the issue of damages, among other defenses, given that at the default damages hearing Graham presented $57,536.85 worth of medical bills and received a judgment of $2,843,349.73. (Id.).

By the time of the hearing on this Motion before Judge Stilwell, counsel for Graham had all but abandoned its previous argument that service had been made under the circumstances described in the Silvaggio Affidavit. (R.*, Plaintiff's Memo. in Opp., Apr. 23, 2019). Instead, counsel adopted a new argument that Fuller's testimony at the January 8, 2019, hearing that he had been personally served was conclusive on the issue of service and could not be controverted by Trustgard. (Id.). On July 3, 2019, Judge Stilwell notified the parties of his decision to grant Trustgard's Motion to Intervene but deny its Motion to Set Aside the Default. (R.*, Stillwell Letter,

dated July 3, 2019). On July 18, 2019, before a formal order had been issued, Trustgard filed a Motion to Stay a Formal Ruling Pending Discovery. (R.*, Trustgard's Mot. To Stay, dated Jul. 18, 2019). Highlighting the inconsistencies between the Silvaggio Affidavit and Fuller's testimony, Trustgard argued:

> While the court recognizes that Fuller's testimony is inconsistent, the court may have overlooked the fact that service of process (and thus the jurisdiction of the court) was originally premised on an Affidavit of Service by Paul Silvaggio, and the Fuller testimony contradicts Silvaggio's assertions. No formal Order has been issued on the Motion to Set Aside the Default. In light of the wildly inconsistent positions taken by Graham on service, the evidence of collusion between Graham and Defendants, the size of the default judgment, $2.8 million, and the injustice in an undefended windfall, if the Court is not inclined to set aside the default it should exercise its discretion to stay entry of the order so that discovery on the issue of service can be conducted.

(Id.)

On August 9, 2019, the Order *sub judice* was filed granting the Motion to Intervene for the purpose of posing its Motion to Set Aside the Default, denying the Motion to Set Aside the Default, and denying that this matter be stayed so that additional discovery can be conducted. (R.*, Order, entered Aug. 9, 2019). Most pertinently, responding to Trustgard's argument that the Order was void under SCRCP 60(b)(4) for lack of personal jurisdiction, the court observed:

> 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....

(Id.). Also, "based on Fuller's sworn testimony [on January 8, 2019] acknowledging service," the court rejected Trustgard's arguments under SCRCP 60(b)(1) and (3), finding "there is no mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct that

warrants setting aside the default judgment." (Id.). Trustgard's argument that discovery should be conducted on the issue of service was denied "in light of Fuller's sworn testimony regarding personal service and turning everything over to his insurance company." (Id.).

Thus, the circuit court premised its denial of relief to Trustgard under SCRCP 60(b)(1), (3), and (4), and its denial of allowing discovery on the issue of service, on Fuller's acknowledgement of service and/or the fact that this testimony constituted a personal appearance in lieu of service, in addition to denying Trustgard had presented prima facie evidence of an affirmative defense. (Id.).

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." Roberson v. Southern Finance of South Carolina, Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005)(citing Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902–903 (1989)). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." Id. (citing Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct.App.1988)). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Id. (citing In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997)).

However, Trustgard's primary arguments on appeal relate to the issue of service of process, namely that Full Logistics was never properly served the summons and complaint. This abuse of discretion standard does not apply to issues regarding service of process, which implicates the personal jurisdiction of the court. See Richardson Const. Co., Inc. v. Meek Eng'g & Const., Inc., 274 S.C. 307, 309, 262 S.E.2d 913, 915 (1980)(where a motion to set aside a default judgment is "grounded upon the court's lack of jurisdiction over appellant by reason of respondent's alleged

failure to serve the Summons,...when warranted, [such relief] is not discretionary but a matter of right."); 49 C.J.S. Judgments § 535 ("[I]f a default judgment is void, the court has no discretion and must set the judgment aside.").

With respect to Trustgard's arguments in support of staying the proceedings to allow discovery, "[t]he circuit court has discretion whether to grant a stay of a matter pending before the court." Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm'n, 367 S.C. 141, 148, 625 S.E.2d 227, 230–31 (Ct. App. 2006), cert. granted, decision rev'd on other grounds by Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm'n, 373 S.C. 96, 644 S.E.2d 681 (2007). "An equitable stay may be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court must weigh competing interests and maintain an even balance." Merritt Brothers, Inc., v. Marine Midland Realty Credit Corp., 307 S.C. 213, 216, 414 S.E.2d 167, 169 (1992).

Yet, the discretionary standard for staying proceedings must be viewed in light of due process considerations. The Supreme Court has held that a litigant requesting discovery as to the legal validity of service of process, thus the existence of jurisdiction, "must 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." Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 300 (2012)(quoting Wetzel v. Woodside Development Limited Partnership, 364 S.C. 589, 615 S.E.2d 437 (2005)).

ARGUMENT

The circuit court's decision should be reversed. Here, the circuit court erred in ruling that Drico Fuller's contradictory testimony at a hearing ***after*** a $2.8 million default judgment had been rendered satisfied the requirements of SCRCP 4. Fuller's testimony was wholly contradictory to

the circumstances of service attested to by Graham's counsel, which had been the foundation on which the action was commenced, and the default judgment was premised. At minimum, the circuit court erred in failing grant Trustgard's request to stay the action for discovery, in light of the unsupported statements made by Fuller in his testimony, that this testimony contradicted the circumstances of service relied upon to support a $2.8 million default judgment, and Trustgard's due process interest in having notice and an opportunity to be heard prior to being held to this default judgment. Additionally, the circuit court erred in ignoring Trustgard's substantive arguments as to the evidence of mistake, inadvertence, surprise or excusable neglect, or fraud, and instead relying on Fuller's testimony to refute that claim. Finally, the circuit court erred in ruling that Trustgard failed to present evidence of a meritorious defense.

I. The circuit court erred in finding that Drico Fuller's testimony satisfied the service of process requirements under Rule 4 of the South Carolina Rules of Civil Procedure.

Motions for relief from default judgments are governed by SCRCP 60, which provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgement, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> ...
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> ...
> (6) any other reason that justifies relief.

Rule 60(b), SCRCP. The issue of service of process is dispositive here. Full Logistics was not properly served the summons and complaint, the court lacked the necessary personal jurisdiction to sustain the default judgment, and the judgment was therefore void. "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). "A court generally obtains personal jurisdiction by the service of a summons." Id. (citing Ex parte S.C. Dep't of Revenue, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002)). "Rule 4, SCRCP, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). See also Williams v. Hipp, No. 2016-002043, 2019 WL 581710, at *1 (S.C. Ct. App. Feb. 13, 2019)("The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.")."

The circuit court's denial of Trustgard's motion for relief from the default was almost solely premised on Fuller's testimony. Despite "recogniz[ing] that [the] testimony was not entirely consistent," in the court's view "[a]ny inconsistencies in the affidavit of service are overcome by Fuller's acknowledgement and acceptance of service." (R.*, Order, entered Aug. 9, 2019). Although the arguments were blended together to some degree, the circuit court adopted two alternative justifications for upholding compliance with SCRCP 4, thus affirming personal jurisdiction: (1) that Fuller "not only acknowledged service in his testimony but;" (2) he "also made a voluntary appearance."

A. Fuller's testimony did not constitute a valid voluntary appearance under SCRCP 4(d).

The law is clear that Fuller's testimony cannot constitute a voluntary appearance to support a default judgment under SCRCP 4(d) because his testimony came after the default judgment had already been rendered, and the circuit court erred in so holding. SCRCP 4(d) provides "[v]oluntary appearance by defendant is equivalent to personal service." However, as this Court has recognized, "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)). The court must have jurisdiction at the time the judgment is rendered. 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.").

The $2.8 million Order was issued on July 24, 2018, and Fuller's testimony was offered on January 8, 2019, at a Motion to Vacate the Default. There is no question that Fuller's testimony was made well-after the default judgment was issued. Under longstanding South Carolina law, these circumstances are plainly insufficient to constitute a voluntary appearance under SCRCP 4(d) that could save the default judgment.

B. Fuller's testimony did not otherwise comply with SCRCP 4.

The circuit court's decision is unclear as to whether it found that Fuller made a voluntary appearance AND an acknowledgement of service, or whether it believed these were one and the same. In any event, Trustgard has demonstrated that the testimony was not a voluntary appearance under SCRCP 4(d). With respect to any argument that Fuller's "acknowledgement" of service was appropriate under SCRCP 4, "in order to establish that service has been properly effected, the Graham need only show compliance with the civil rules on service of process." McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008). "When the civil rules on service are followed, there is a presumption of proper service." Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996).

Graham was not asked by the circuit court to show how he complied with the civil rules in personally serving Drico Fuller in a manner consistent with Fuller's testimony. Graham has adopted Fuller's version of events as to how service was accomplished, despite that Fuller has not provided the date of service, by what method service was accomplished, or what was actually served and by whom (to use a few examples).[3] Even today, nearly a year after Fuller testified that "I got served. I got the email," Graham has not even attempted to fill in the blanks by updating its filings with the court to demonstrate what it now believes to be accurate facts as to service. Here, no question exists as to whether Graham has shown compliance with the civil rules for service - he has not - so there is no presumption of regularity under these circumstances.

Additionally, Fuller's testimony cannot be sustained as an acknowledgement of service without a valid proof of service, and Graham has provided none. "The proof of service must show affirmatively that the service of the process was correctly made. This is imperatively necessary to give the court jurisdiction of the person thus sought to be brought into court." Matheson v. McCormac, 186 S.C. 93, 129 (1938)."[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." Singleton v. Mullins Lumber Co., 234 S.C. 330, 342, 108 S.E.2d 414, 420 (1959).SCRCP 4(g) provides "[t]he person serving the process shall make proof of service thereof promptly and deliver it to the officer or person who issued same." While SCRCP 4(g) also states that "[f]ailure to make

[3] Both after Trustgard received notice of the claim pre-suit and after it was notified of the default judgment, the company and its representatives did attempt to contact Fuller. A review of the transcript of Fuller's testimony makes it unclear whether he was conflating these communications with service. In fact, the transcript provides no clarity as to what Fuller believed to have constituted service at all. This is particularly problematic given that "[c]ompliance with the service of process requirements must be strict," see Jensen v. Doe, 292 S.C. 592 (Ct. App. 1987), and it is not always an easy question for attorneys (let alone laymen) as to what constitutes legally binding service of process.

proof of service does not affect the validity of the service," proof of service is still required under the civil rules. This is the longstanding law in South Carolina. SCRCP 4(j) provides that "no other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney, and delivered to the person making service. The acknowledgement shall state the place and date service is accepted." Construing SCRCP 4(j), this Court has stated that "if the defendant acknowledges service in writing, no other proof is required," which is simply "a recognition of the long standing practice that acknowledgement or acceptance of service is equivalent to personal service." Langley, 322 S.C. at 431-432. Clearly, Fuller's testimony did not comply with 4(j) and even if he had made acknowledgment in writing and provided specific information, this would be insufficient to overturn a default judgment. Still, the statement of the Court in Langley that "no other proof is required" only when service is acknowledged in writing is a clear indication of the court's belief that proof of service is required unless another rule applies which provides an exception to the requirement of proof.

While Graham made a proof of service, this proof was reflected in the Smith and Silvaggio Affidavits, which did not describe service personally made on Drico Fuller in a manner consistent with Fuller's testimony. In case there is any doubt, Fuller's testimony unequivocally states that his "service" was a completely different circumstance than the purported service made on Bridget Fuller. (First Motions Hr'g Tr., p. 14, line 10 through p. 15, line 15). Other significant, irreconcilable differences existed between Fuller's account and the service on Bridget as alleged in the Silvaggio Affidavit. These included but were not limited to the following: (1) Fuller stated "I got served, not my wife," id. at p. 10, line 18, whereas the Silvaggio Affidavit clearly describes that service was attempted on Bridget (Silvaggio Affidavit); (2) Fuller stated "I got served at my place of business," (First Motions Hr'g Tr., p. 10, lines 21-22), whereas the Silvaggio Affidavit clearly describes 11

Cog Hill Drive as a residential address. (Silvaggio Affidavit); (3) Fuller described the process server as a white woman in her fifties, (First Motions Hr'g Tr., p. 10, line 23, through p. 11, line 12), whereas Silvaggio is a white male;[4] and (4) Fuller estimated service to have happened "[a]bout a year, I think," prior to the purported service being made on Bridget, (First Motions Hr'g Tr., p. 13, line 4), although the complaint was filed on January 23, 2017 and the Silvaggio Affidavit attests to purported service on Bridget on April 28, 2017. Moreover, the materials Fuller brought to court which he claimed proved "service" did not contain copies of the summons and complaint. (First Motions Hr'g Tr., p. 13, line 12 through p. 14, line 1).

Taking this all together, Graham has not pointed to a civil rule, nor could he, that could reconcile a default judgment based on one set of facts as to service being upheld by a contradictory set of facts as to service. This is particularly true when Graham can point to no other evidence for service than the uncorroborated testimony of a party which is contradictory of other evidence in the case.

II. The circuit court erred in accepting Fuller's testimony at face value notwithstanding a lack of evidentiary support and factual contradictions between this testimony and the proof of service supporting the default judgment.

As demonstrated above, Graham convinced a court to declare Full Logistics in default based on an attestation to service of process on Bridget Fuller at 11 Cog Hill Drive on April 28, 2017. Both the Order of Default and Order for Damages By Way of Default expressly rely on attorney Smith's Affidavit of Default (referencing the Silvaggio Affidavit) that service of process was made on April 28, 2017, under the circumstances attested to in those affidavits. To be clear, the $2.8 million default judgment secured by Graham would not have possible without this attestation of

[4] For picture and background on Silvaggio, see www.silvaggioinvestigations.com (last accessed on December 9, 2019).

service. Immediately prior to Fuller's testifying at a Motion to Vacate on January 8, 2019, Graham's counsel remained tethered to the argument that "this was not simply a summons and complaint that was left on the front porch. We have a return -- an affidavit of service, two affidavits from Mr. Silvaggio, setting forth the service that he has made in this case." (First Motions Hr'g Tr., p. 8, lines 19-23).

After this previous position became well night impossible by Fuller's testimony, Graham adopted Fuller's position and therefore is now tacitly arguing that service was personally made on Drico Fuller, not under the circumstances advanced by Graham between April 30, 2018 (the date Graham filed the Affidavit of Service and moved for default) and January 8, 2019 (the date of Fuller's contradictory testimony). As it stands, Graham has adopted Fuller's testimony that "I got served. I got the email stating where I sent everything to the insurance company.... I got served, not my wife... I got served at my place of business." (First Motions Hr'g Tr., p. 10, lines 11-22). As stated above, while much in Fuller's testimony is unclear, Fuller's position is very clear that Fuller testified to a different event describing service than Bridget's service described in the Silvaggio Affidavit. Fuller's position is contradictory to the Silvaggio Affidavit, yet it has been adopted by Graham's counsel who is simultaneously relying on the Silvaggio Affidavit to retain the $2.8 million default judgement which is the subject of this appeal.

A. Giving credence to Fuller's testimony necessitates a conclusion that the default judgment is void.

The Silvaggio Affidavit and Fuller's testimony cannot be reconciled. Assuming for the sake of argument Fuller's testimony was true, that at some point papers were left on his front porch, and/or he was served by a lady in an SUV, then Silvaggio's Affidavit of Service is not accurate. In that case, the action was never properly commenced, the court never had personal jurisdiction, and the default judgment is void because the proof of service on which all of this is based does not attest

to proof of service on Drico Fuller. Similarly, to believe Silvaggio means Fuller's testimony is not accurate. 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 served by any one 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....").

B. Judicial estoppel bars Graham from changing his version of facts as to service of process.

There can be no question that by representing to the court the Silvaggio Affidavit was accurate as to the issue of service, Graham should have been bound by its asserted version of events. Initially, this Court has held that "an [officer's] return of process creates the legal presumption of proper service that cannot be 'impeached by the mere denial of service by the defendant.'" Delta Apparel, Inc. v. Farina, 406 S.C. 257, 267, 750 S.E.2d 615, 620 (Ct. App. 2013) (quoting Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct. App.2005)). While this holding has been applied in situations where a defendant is trying to get out of default rather than make his insurance company pay a default judgment, there is no reason why an officer's return of process, which carries a presumption of legal validity, can later be jettisoned without explanation when a party or attorney finds a new, yet inconsistent, theory that better suits its litigation goals.

Judicial estoppel "precludes a party from adopting a position in conflict with one previously taken in the same or related litigation." Quinn v. Sharon Corp., 343 S.C. 411, 414, 540 S.E.2d 474, 475–76 (Ct. App. 2000)(citing Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 489 S.E.2d 472 (1997)). "The purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the

courts." Id. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." Id.

Graham is still realizing the benefit of its attestation that service was made as described in the Silvaggio Affidavit by holding onto a $2.8 million default judgment, while tacitly abandoning the factual underpinning of that default judgment by adopting Fuller's contradictory version of events. This is precisely the situation for which invocation of judicial estoppel is appropriate.

C. Fuller's testimony should not have been considered without appropriate evidentiary support.

Given Fuller's inability to provide evidentiary support for his assertions as to service of process, the circuit court simply should have ignored his testimony. It is implicit in the court's ruling that the testimony of a defendant is sacrosanct and must prevail over evidence to the contrary, even if this testimony contradicts other evidence and all the facts cannot be completely unraveled. However, this is plainly incorrect when a defendant is trying to argue *against* service of process. See Delta Apparel, 406 S.C. at 267 ("return of process creates the legal presumption of proper service that cannot be 'impeached by the mere denial of service by the defendant.'"), Trustgard is aware of no authority that necessitates the opposite conclusion when a defendant tries to argue he was properly served when this assertion contradicts the proof of service.

Had the circuit court properly ignored the patently unreliable evidence from Fuller, its evaluation should have been made on the basis of the reliable evidence (at least as to the ***facts*** of purported service), which was contained in the Silvaggio Affidavit. This would have necessitated a conclusion that the judgment is void for invalid service. SCRCP 4(d)(3) provides that service of process on a corporation must be accomplished by "delivering a copy of the summons and complaint to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . ." Though the parties would later disagree

on whether Bridget was personally served or if the papers were left on her porch, the Silvaggio Affidavit reveals no indication that service was made on Bridget, nor that she was an officer, agent, or otherwise authorized to accept process on behalf of Full Logistics. Without such evidence as to Bridget's authority with respect to Full Logistics, the requirements of SCRCP 4(b)(3) are not met. See Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 721 S.E.2d 430 (2012). Further, this Court has held that held that 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). See New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47 (Ct. App. 1993). See also 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)). Additionally, the South Carolina Reporters' Comments to S.C. Code § 33-14-105 indicate that the only method of service on dissolved corporations is through their registered agent or pursuant to statute:

> One noteworthy change is that dissolution does not terminate the authority of the registered agent. New Section 33-14-105(c)(5) provides...that dissolution does not prevent commencement of a proceeding against a corporation in its corporate name. Therefore, a suit may be brought against a dissolved corporation by serving its registered agent. If the registered agent cannot be served, new Section 15-9-210(b) allows service by certified or registered mail addressed to the corporate secretary at the principal office listed in the last annual report filed by the corporation.

There is no dispute that Drico Fuller was the registered agent of Full Logistics. If Fuller could not be found, the other option would be to proceed pursuant to Section 15-9-210(b), which clearly was not done by Graham. Accordingly, even ignoring the obvious issues with Fuller's testimony, there is no valid alternative argument that service on Bridget was in any way proper, and thus the judgment was void

III. The circuit court erred in refusing to permit Trustgard to conduct discovery on the issue of service of process.

Trustgard submits it presented sufficient legal authority and factual evidence through which the circuit court should have ruled that proper service was not made and dismissed the action. After the court issued its ruling to the contrary, Trustgard filed a Motion to Stay and requested the court to allow it to conduct limited discovery into the circumstances of service of process. The circuit court rejected these arguments and it was error for it to do so.

Graham Law Firm, P.A. v. Makawi, 396 S.C. 290 (2012), is dispositive on the issue of Trustgard's entitlement to discovery under these circumstances. In that matter, which also involved a dispute following a default judgment, the parties argued as to whether an alleged agent of a corporation had the actual authority to sign for process under SCRCP 4(d)(8). Id. The Supreme Court held that "the court erred when it denied [Graham] an opportunity to fully explore the factual issues involved through further discovery and cross-examination of witnesses." The court found that "When the Plaintiff can show that discovery is necessary in order to meet defendant's challenge to personal jurisdiction, a court should ordinarily permit discovery on that issue unless Graham's claim appears to be clearly frivolous." Id. at 299 (quoting Sullivan v. Hawker Beechcraft Corporation, 397 S.C. 143, 723 S.E.2d 835, 839–40 (Ct.App.2011)).

Here, Trustgard finds itself in a strikingly similar situation to the Plaintiff in Makawi, who was seeking to conduct discovery into the scope of an employee's agency, except here neither Graham nor Fuller have provided Trustgard ***any information*** into the circumstances of service, not even the date Fuller was allegedly served or what papers he was purportedly handed. Yet, Graham and Fuller are trying to force Trustgard to pay for a $2.8 million default judgment. In Makawi, the court ultimately found that Plaintiff "made a sufficient showing to entitle it to discovery on the issue of jurisdiction, but it must 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." Id. at 300 (citing Wetzel v. Woodside Development Limited Partnership, 364 S.C. 589, 615 S.E.2d 437 (2005)). While the above argued issues should be dispositive as to service of process, and thus the lack of personal jurisdiction, if these arguments are unavailing, clearly Trustgard's need for discovery is not "frivolous" and Trustgard should also be provided a full and fair opportunity to conduct discovery.

IV. The circuit court erred in ruling that the judgment should not be set aside for mistake, inadvertence, surprise, or excusable neglect, or fraud due to Graham's counsel Smith's pre-suit conduct and failure to notify Trustgard of the default judgment.

In its Motion, Trustgard argued that the judgment should be set aside for mistake, inadvertence, surprise, or excusable neglect, or fraud under SCRCP 60(b)(1) and (3), given that Graham's counsel was engaging in settlement negotiations with the insurer, then failed to notify Trustgard when suit was filed. The circuit court ruled against Trustgard solely "in light of Fuller's sworn testimony regarding personal service and turning everything over to his insurance company."

While the issue of Fuller's personal appearance has been amply addressed, Trustgard still desires to address the substance of its issues under SCRCP 60(b)(1) and (3). Two days after the accident, Trustgard was informed of the accident and began its investigation. (R.*, Trustgard's Memo, Apr. 15, 2019). Approximately one month after the accident, on or about March 3, 2014, Trustgard received a letter of representation and a spoliation letter from attorney Smith. (R.*, Exh. A to Full Logistic's Memo, Jan. 4, 2019). For more than two years, representatives of Trustgard had communications with attorney Smith or his office attempting to obtain information about this claim. (R.*, Trustgard's Memo, Apr. 15, 2019). Subsequently, on January 2017, Smith filed the complaint without notifying Trustgard. (Id.). The truck's driver and co-employee Foster made an appearance in the case through counsel who also failed to tender the driver's defense to Trustgard.

(Aff. of Bryant, filed Apr. 30, 2018 & Answer, Mar. 15, 2017). Attorney Smith clearly wanted an undefended default judgment with which to leverage the insurance company.

In Edwards v. Ferguson, 254 S.C. 278, 175 S.E.2d 224 (1970), Plaintiff's counsel was engaging in settlement negotiations with the insurer, then failing to notify the insurer when suit was filed. Ruling in favor of the insurer on setting aside the default judgment, the court held that State Farm "stands in the shoes" of the defendant, also holding that the default judgment rules "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits." Id. at 283; see also Lowe's of Georgia, Inc. v. Costantino, 288 S.C. 106, 110, 341 S.E.2d 382, 384 (Ct. App. 1986)(no abuse of discretion in setting aside a default judgement and finding excusable negligence where the defendants believed they were in settlement negotiations and received no notice of the complaint).

This case is in accord. If Graham's attorney wanted to notice the lawsuit rather than secure an uncontested default judgment, then all he had to do was to send the lawsuit to Trustgard, with whom he had previously communicated. Instead, Smith proceeded to obtain a $2.8 million default judgment after an uncontested damages hearing and only after this default judgment was secure did Smith tender the claim to Trustgard. In the case *sub judice*, justice requires that the judgment be set aside.

V. The circuit court erred in failing to find that Trustgard had presented a meritorious defense.

In order to be entitled to relief from a judgment under SCRCP 60(b)(1), Trustgard was required to establish a meritorious defense. Thompson v. Hammond, 299 S.C. 116, 119–20, 382 S.E.2d 900, 903 (1989). "[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real

controversy as to real facts arising from conflicting or doubtful evidence." Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978)).

The circuit court erred in denying that Trustgard did not present a meritorious defense. One such defense was on the issue of damages. Graham presented $57,536.85 worth of medical bills and received a judgment of $2,843,349.73. (R.*, Order, entered July 24, 2018). Trustgard also submits that the issues it has raised regarding service of process constitute a meritorious defense, notwithstanding that to prevail on the service of process issues themselves, a meritorious defense is not required.

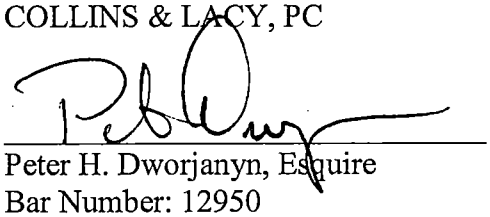
CONCLUSION

For the reasons stated herein, the circuit court order should be reversed, and this court should enter an order dismissing the action against Full Logistics with prejudice for one or more of the reasons stated herein.

[Signature on next page]

Respectfully submitted,

COLLINS & LACY, PC



Peter H. Dworjanyn, Esquire
Bar Number: 12950
pdworjanyn@collinsandlacy.com
Michael R. Burchstead, Esquire
Bar Number: 73770
mburchstead@collinsandlacy.com
1330 Lady Street, 6th Floor (29201)
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (voice)
803.771.4484 (fax)

ATTORNEYS FOR
APPELLANT/RESPONDENT
TRUSTGARD INSURANCE COMPANY

December 9, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge
Case No: 2017-CP-23-00311

Appellate Case No. 2019-001506

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

In Re:

Terrence Graham,.....Plaintiff

v.

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

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

PROOF OF SERVICE

I certify that I have served Appellant-Respondent Trustgard Insurance Compan's ***Initial Brief and Designation of Matter*** on the following counsel for Respondent-Appellants Terrance Grahan and Defendant Full Logistics, Inc. by mailing via USPS first class mail, a copy of same, on December 9, 2019:

Willian F. Barnes, III, Esquire
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.,
P.O. Box 457
Hampton, SC 29924
-and-
Brian T. Smith, Esquire,
714 Pettigru Street
Greenville, SC 2960
Attorneys for Respondent-Appellant

Dorothy Holley Hogg, Esquire
Fulcher Hagler, LLP
Post Office Box 1477
Augusta, GA 30903-147
Attorney for Defendant

PETER H. DWORYANYN
pdworyanyn@collinsandlacy.com
MICHAEL R. BURCHSTEAD
mburchstead@collinsandlacy.com
COLLINS & LACY, PC
Post Office Box 12487
Columbia, South Carolina 29211
(803) 256-2660
Attorneys for Appellant