

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell

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.

INITIAL RESPONDENT'S BRIEF
OF RESPONDENT-APPELLANT TERENCE GRAHAM

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SC Court of Appeals

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COUNTER STATEMENT OF ISSUES ON APPEAL

- I. Whether the lower court correctly held the default judgment is not void because it had personal jurisdiction over Full Logistics?
- II. Whether the lower court correctly accepted Drico Fuller's testimony that he received service of process?
- III. Alternatively, and as an additional sustaining ground, whether Terence Graham properly served Full Logistics through Bridget Fuller?
- IV. Whether the lower court correctly denied Trustgard's motion to stay a formal ruling to conduct discovery?
- V. Whether the lower court correctly denied Trustgard's motion to set aside the default judgment under Rules 60(b)(1) and (3), SCRCP?
- VI. Whether the lower court correctly held Trustgard failed to present evidence of a meritorious defense?
- VII. Whether the Court may affirm because Trustgard did not appeal the lower court's finding that setting aside the default judgment will prejudice Graham and the prejudice outweighs vacating the judgment?

STATEMENT OF THE CASE

This is an appeal from an order denying a motion to set aside a default judgment. The insured-defendant testified under oath to receiving service of process and the insurance company takes a contrary position by contesting service.

On January 23, 2017, Respondent-Appellant Terence Graham (“Graham”) filed a Summons and Complaint in the Greenville County Court of Common Pleas against Johnnie William Foster (“Foster”) and Full Logistics, Inc. (“Full Logistics”). (Cmplt.). On March 15, 2017, Foster filed an Answer. (Ans.). On April 28, 2017, Graham served Drico Fuller, the owner of Full Logistics, by leaving a copy of the summons and complaint with his wife, Bridget Fuller. (Aff. of Silvaggio, filed April 30, 2018). On April 30, 2018, Graham filed an affidavit of default as to Full Logistics. (Aff. of Default). On May 15, 2018, the court entered an Order of Default as to Full Logistics. (Order of Default).

The Honorable Letitia H. Verdin held a damages hearing on June 26, 2018, and, on July 24, 2018, entered a default judgment against Full Logistics for \$2,843,349.73. (Order of Damages by way of Default). On November 29, 2018, Full Logistics appeared through counsel and filed a Motion to Vacate and/or Set Aside Judgment for Default Damages. (Mot. to Vacate). On January 4, 2019, Full Logistics filed a memorandum in support of the motion to vacate. (Memo. in Supp.). On January 8, 2019, the Honorable Edward W. Miller held a hearing on Full Logistics’ motion but continued it after Drico Fuller, the owner of Full Logistics, appeared and testified under oath that he received service of process. (Tr. of hearing p. 16).

On February 22, 2019, Appellant-Respondent Trustgard Insurance Company (“Trustgard”) filed a motion to intervene and to set aside default judgment. (Mot. to Intervene). On April 15, 2019, Trustgard filed a memorandum in support of the motion to intervene and to set aside default judgment. On April 23, 2019, Graham filed a memorandum in opposition to Full Logistics’ motion

to vacate and/or set aside the default judgment and a memorandum in opposition to Trustgard's motion to intervene and to set aside the default judgment. On April 24, 2019, the Honorable Robin B. Stilwell held a hearing on Full Logistics and Trustgard's motions. (Tr.). On August 9, 2019, Judge Stilwell filed an order granting Trustgard's motion to intervene solely to assert its motion to set aside default and denying Full Logistics and Trustgard's motions to set aside the default judgment. (Order). On September 6, 2019, Trustgard filed a notice of appeal. (Not.). On September 12, 2019, Graham filed a notice of cross-appeal. (Not.).

FACTS

During a wintry storm on January 29, 2014, Graham rode as a passenger in a truck owned by Full Logistics and driven by Foster. (Cmplt. ¶¶ 7, 14-15). Foster was a Full Logistics' employee. *Id.* at ¶ 17. Foster drove too fast for the winter storm conditions. *Id.* at ¶ 19. He lost control of the truck, and it jackknifed and hit a guard rail, throwing Graham around the truck cab. *Id.* The accident report states Foster was "traveling too fast for conditions." (Exh. 1 to Memo. in Opp. to Mot. to Vacate). Graham suffered severe, permanent injuries including traumatic brain injury and injuries to his head, arm, elbow and leg. *Id.* at ¶¶ 20-22; Order of Damages. He incurred substantial medical expenses, and is unable to work. *Id.* at ¶¶ 20-22.

Trustgard learned of the accident on January 31, 2014, and began its investigation. (Memo. in Supp. Mot. to Intervene p. 2). On March 3, 2014, Graham's counsel, Brian Smith, sent a letter to Full Logistics' insurer, Trustgard Insurance Company.¹ (Exh. 1 to Aff. of Jon Barrett). Mr. Smith provided notice that he represented Mr. Graham in relation to the January 29, 2014 accident, asked Trustgard to preserve all evidence, and asked to examine the truck. *Id.* In an April 14, 2014 letter to Mr. Smith, a Trustgard claims representative stated she tried to reach him by phone and

¹ Trustgard Insurance Company is also referred to in the record as Grange Insurance Company. For purposes of this appeal, they are the same.

asked him to call her. (Exh. 2 to Aff. of Jon Barrett). Over a year later, on June 30, 2015, Jon Barrett, a claims representative, sent Mr. Smith a letter stating he spoke to Mr. Smith's office that day to verify Mr. Graham was in the course and scope of his employment with Full Logistics and that Mr. Barrett would follow up with Mr. Smith after completing a review of the file. (Exh. 2 to Aff. of Jon Barrett). Over two months later, on September 11, 2015, Mr. Barrett sent a letter to Mr. Smith stating that there may be no coverage for Graham's injuries. (Exh. 2 to Aff. of Jon Barrett). On November 2, 2015, and December 1, 2015, Mr. Barrett sent letters to Mr. Smith asking if Graham was still receiving medical treatment and to confirm Graham's employer at the time of the accident. *Id.*

On December 30, 2015, the Workers' Compensation Commission notified Graham's counsel that Full Logistics is not subject to the Workers' Compensation Act because it does not regularly employ four or more people in South Carolina. (Exh. 5 to Memo. in Opp. to Mot. to Vacate). On June 15, 2016, Mr. Barrett, on behalf of Trustgard, sent a letter to Mr. Smith stating Trustgard reviewed the insurance policy and "informs you that this *claim is denied*" and "there is *no liability coverage* under the Trustgard Insurance Company policy for this claim" because Mr. Graham was an employee of Full Logistics at the time of the accident and workers' compensation "would be his only recourse for recovery." (Exh. 3 to Memo. in Opp. to Mot. to Vacate) (emphasis added). The letter does not request a copy of a lawsuit if one is filed. *Id.*

On January 23, 2017, Graham filed a Complaint against Foster and Full Logistics. (Cmplt.). Graham alleged negligence and negligence *per se* against Foster and negligent hiring, supervision, training, and entrustment against Full Logistics. (Cmplt. pp. 3-11). He sought actual and punitive damages. (Cmplt. p. 11). Graham served Foster with the Summons and Complaint on January 30, 2017. (Aff. of Svc. filed April 30, 2018). Foster filed an Answer on March 15, 2017. (Ans.).

On June 22, 2015, Full Logistics administratively dissolved. (Exh. A to Trustgard Memo. in Supp.). Graham made multiple attempts to serve Drico Fuller, the owner of and registered agent for Full Logistics. On January 28, 2017, Graham attempted service at the last known address for Full Logistics but the location was under construction. (Aff. of Non-Svc. Filed April 27, 2017; Aff. of Garrett). On March 23, 2017, Graham attempted service at another Greenville address but the person who answered the door did not know Mr. Fuller. (Aff. of Non-Svc. filed April 27, 2017; Aff. of Garrett). The process server then ran a “skip trace” on Mr. Fuller and found a third address, 11 Cog Hill Drive in Simpsonville. (Aff. of Garrett). Graham attempted service at that address on March 24, 2017, but no one answered the door and the process server left her card. *Id.*

On April 27, 2017, Graham filed an Affidavit Seeking Order to Allow Service by Publication because he could not yet physically locate Mr. Fuller. (Aff.). The 120-day deadline in Rule 3(a)(2), SCRCF, to serve Full Logistics expired on May 23, 2017, and Graham continued to try to serve Full Logistics. On April 28, 2017, another process server, Paul Silvaggio, personally served Mr. Fuller’s wife, Bridget Fuller, at the 11 Cog Hill Drive address by leaving a copy of the summons and complaint with her. (Aff. of Silvaggio, filed April 30, 2018). Mr. Silvaggio verified their marriage in numerous ways including her verbal assurance of her identity, their marriage, and that Mr. Fuller lived there, and a package on the front porch addressed to Drico Fuller. *Id.*; Aff. of Silvaggio of Jan. 7, 2019. Mrs. Fuller told the process server she was an authorized agent of Full Logistics while the company operated. (Aff. of Silvaggio, Jan. 7, 2019). On May 1, 2017, the Honorable Perry H. Gravelly signed an Order for Service by Publication. (Order p. 1). Graham did not use this method given the service to Mrs. Fuller.

On April 30, 2018, Graham filed an affidavit of default. (Aff. of Default).² On May 15, 2018, the Honorable Perry H. Gravely signed an Order of Default as to Full Logistics. (Order of Default). On June 21, 2018, Graham mailed to Mr. Fuller at the 11 Cog Hill Dr. address a notice of damages hearing set for June 26, 2018. (Smith Ltr. filed June 26, 2018).

The Honorable Letitia H. Verdin presided over the damages hearing. (Order of Damages by Way of Default). Full Logistics did not appear at the hearing. *Id.* at p. 1. Judge Verdin found Mr. Graham “provided credible testimony” of his injuries which included serious injury to his head, right arm, face, right elbow, right leg, and right ankle. *Id.* at p. 2. He received medical treatment for these injuries and a diagnosis of a traumatic brain injury. *Id.* at pp. 1-2. Graham’s actual medical expenses totaled \$57,536.85 and a doctor provided a cost projection for future medical expenses of \$456,912.88. *Id.* at pp. 1-2. Judge Verdin awarded actual, compensatory damages of \$1,843,349.73 and punitive damages of \$1,000,000.00. *Id.* at pp. 3-4. On July 24, 2018, she entered judgment against Full Logistics for \$2,843,349.73. (Form 4 Order).

On October 11, 2018, Graham wrote to Trustgard demanding the \$1,000,000.00 insurance policy limits to settle the case. (Exh. 7 to Memo. in Opp. to Mot. to Vacate). That same month, coverage counsel for Trustgard asked its private investigator, Larry Nelson, to look into service of the summons and complaint on Mr. Fuller. (Aff. of Nelson pp. 1-2; Aff. of Burchstead p: 2). On November 8, 2018, Trustgard’s coverage counsel, Michael Burchstead, rejected Graham’s demand, stating Trustgard did not get notice of the lawsuit and there is no coverage because Graham was a Full Logistics’ employee. (Exh. 7 to Memo. in Opp. to Mot. to Vacate).

² The affidavit of default mistakenly included Foster, who filed an answer. *Id.* An order of default for both parties was denied e-filing. (Order of Default dated May 1, 2018).

On November 28, 2018, Mr. Fuller called Michael Burchstead and said he received a lot of letters about the lawsuit but did not know why “because he was personally served process and not his wife” and disagreed when Mr. Burchstead said Trustgard did not have notice of the lawsuit. (Aff. of Burchstead). The following day, on November 29, 2018, Full Logistics appeared through counsel and filed a Motion to Vacate and/or Set Aside Judgment for Default Damages under Rule 60(b), SCRCP, asserting Full Logistics was not properly served, despite the fact that Mr. Fuller told Trustgard’s counsel the day before that he received service of process. (Mot. to Vacate; Aff. of Burchstead).

Between December 3 – 8, 2018, Mr. Fuller exchanged text messages with Keith Johnson, a private investigator hired by Kerri Rupert, the attorney Trustgard hired to represent Full Logistics. (Exh. 9 to Memo. in Opp. to Mot. to Vacate). The text messages are as follows:

iMessage
Mon, Dec 3, 7:32 PM

Mr. Fuller,
My name is Keith Johnson, I'm a private investigator and I work for an attorney that represents your insurance company. It's very important that I speak to you.
Please call me at 8033609806

I got served I sent everything to the insurance company y'all dropped the ball I am done with it. Please leave me alone

Call me and I'll explain it to you.

Y'all dropped this ball along time ago now y'all wanna talk I had insurance . Leave me alone

If you don't cooperate with the attorney who is defending the insurance company, then the insurance company is relieved of

insurance company, then the insurance company is relieved of the obligation to pay. That means that the other guys attorney can sue you. As it stands right now, you don't need to hire an attorney and you can't be sued, but if you don't talk to them, you're on your own. They can come after you.

It won't hurt to talk about it on the phone.

I can email you the information if you don't trust me.

I need you and Bridgett to sign an affidavit saying that she was not an agent of the company when she accepted the process in 2017.

Leave me alone.

Leave them alone thank you sir

It's not going away brother, at some point you're gonna have to deal with it.

Sun, Dec 9, 7:48 AM

Fuller, when Bridget accepted service for the process, that allowed the attorneys to sue your insurance company. Because Bridget wasn't an agent of your company, by law she couldn't accept the service. The court has already awarded 2.8 million dollars to the guy that was hurt. If you don't cooperate with your insurance company's defense of the case, they don't have to pay, and they can sue you personally. I left the affidavit that Bridget needs to sign at your front door, but I need to see her sign it. If she signs it, the lawsuit is dismissed, and they have to start over. One way or the other, you've got to deal with this, either with your insurance company, or the other guys. This is not going to go away, there's too much money involved.



Wed, Dec 5, 10:00 AM

This is from the attorney that is working for your insurance company:

I'm working on the affidavit. Did Drico say whether Johnnie Foster was his employee? Would you mind texting and asking him?

Sat, Dec 8, 8:02 PM

I got an affidavit for Bridget to sign, and this law suit stops

Thu, Dec 13, 11:04 AM

Hey, call me back

Mr. Fuller, if you will tell me where you are, I will come to you. We can talk about this like grown people. I promise you that I don't have anything for you to sign or do I have anything to serve you with. If you meet with me and talk, if you're not satisfied when we get through, you have my word that you never hear from me again.

I told y'all I got severed not my ex stranded wife she has nothing to do with this. Y'all lying say I said she got severed. I will tell the judge I got severed, I sent the paper worked to y'all. Y'all dropped the ball I had insurance.

Stop going to 11 Cog Hill Dr are she will call the cops. I lost everything cause y'all mess up

The insurance company that is let's be clear here

Please please don't say I'm not acting grown again I'm not worried about being severed I been severed before remember I sent the paper to the insurance company and the insurance company dropped the ball. You are wanting to meet me to tell me to lit I'm not going to do that. I will tell any judge in any court that I got severed, I sent the severed papers to the insurance company.

are wanting to meet me to tell me
to lie I'm not going to do that. I
will tell any judge in any court that
I got served, I sent the served
papers to the insurance company.
Now I have someone from the
insurance an the attorney trying to
get me to tell a lie. That my
exstranged wife got served. I'm
not got to lie for ANYONE this out
because I'm going

To tell the judge what I just told
you

Delivered

I'm sorry if I offended you, I sure
didn't mean to. I'm 62 years old
Mr, Fuller, I do better talking to
people in person is all. I
completely understand why you
are frustrated, anybody would be.
If you let me, I think that I can
explain what the insurance
company's lawyer wants. Frankly
they may not have their
information straight. I'll be glad to
do whatever will make you
comfortable, but I promise you,
this won't go away. If you give me
10 minutes, you have my word
that I won't bother you again.

How'bout it Mr Fuller, give me a
chance to talk to you, you've got
nothing to lose.

(Exh. 9 to Graham Memo. in Opp.). The affidavit Mr. Johnson referenced in the texts that Full Logistics' counsel (hired by Trustgard) wanted Bridget Fuller to sign includes nine paragraphs and was drafted without counsel speaking to or communicating with Mr. Fuller or his wife. The affidavit statements are not limited to the issue of service of process but plainly relate to the possible issues between Trustgard and Full Logistics. For example, it states "I recently discovered a \$2.8 million judgment was entered against Full Logistics, Inc. because Full Logistics, Inc. did not answer a lawsuit filed against them" and "*I did not provide these papers to the insurance company.*" (Exh. 8 to Graham Memo. in Opp.) (emphasis added).

During the time period that the above text messages were exchanged, Trustgard sent Full Logistics a letter stating it received notice of the lawsuit and hired a law firm to represent Full Logistics' interest. (Exh. 10 to Graham Memo. in Opp.). Contrary to the statements made by counsel's private investigator in the texts to Mr. Fuller that he did not need to hire counsel, Trustgard's letter states that, because the damages may exceed the policy limits and the plaintiff seeks punitive damages, Full Logistics may want to hire personal counsel. *Id.*

With direct knowledge from its private investigator that Full Logistics received service and turned the lawsuit over to Trustgard, on January 4, 2019, Full Logistics' counsel still filed a memorandum in support of the motion to vacate based on insufficient service, arguing service on Mr. Fuller's wife was not proper. (Memo. in Supp. pp. 3-5). Full Logistics filed an affidavit of Keith Johnson, the private investigator. (Exh. D to Memo.). Mr. Johnson states that he spoke with the Fullers, Mrs. Fuller never worked for Full Logistics and "she did not understand why a copy of a lawsuit was left on her front porch." *Id.* The affidavit says nothing about Mr. Fuller telling Mr. Johnson that he received service and handed it over to Trustgard. *Id.*

The memorandum also argues the court should set aside the judgment because of surprise and alleged misrepresentations of Graham's counsel based on counsel's communications with the insurance company prior to filing the lawsuit. *Id.* at pp. 5-7. The memorandum included an affidavit of Jon Barrett, the Trustgard claims representative for Graham's claim against Full Logistics. (Exh. A to Memo.). Mr. Barrett stated Mr. Smith communicated with Trustgard in 2015 and 2016, did not inform it when he filed the complaint, and sent a *Tyger River* demand letter for the default judgment. *Id.*

On January 7, 2019, William F. Barnes, III, made a notice of appearance as co-counsel for Graham, and filed a motion to continue the hearing scheduled for the following day. (Not. of App. & Mot. for Cont.). Graham also filed a motion to strike the affidavits of Jon Barrett and Keith Johnson as untimely filed and containing inadmissible hearsay. (Mot. to Strike). Mrs. Rupert refused to agree to a continuance, explaining "My client won't let me, especially given the facts of this case", although she was referring to Trustgard rather than Full Logistics as "my client." (Exh. 11 to Graham Memo. in Opp.).

On January 8, 2019, the Honorable Edward W. Miller held a hearing on Full Logistics' motion to vacate. (Tr. of Hearing). Mrs. Rupert argued service on Mrs. Fuller was improper and never mentioned that Mr. Fuller said he received service. (Tr. pp. 5-7). Mr. Fuller then identified himself in court and asked to be sworn in to testify. (Tr. p. 7). Mr. Fuller testified he received personal service of the lawsuit and turned it over to Trustgard. (Tr. pp. 10-15). "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." (Tr. p. 10). Counsel for Full Logistics did not object to Mr. Fuller testifying, ask to speak with him first, or request to ask questions while he was under oath. After Mr. Fuller's testimony, Judge Miller continued the hearing. (Tr. p. 16).

On January 30, 2019, Kerri Rupert and Ronald Diegel filed a motion to be relieved as counsel for Full Logistics based on a "conflict of interest under Rule 1.7", the rule addressing conflicts of interest between current clients. (Mot. to be Relieved). On February 4, 2019, Graham's counsel sent a letter to Mrs. Rupert and Mr. Diegel offering to settle for the \$1 million policy limits as a full satisfaction of the almost \$3 million judgment against Full Logistics. (Exh. 13 to Graham Memo. in Opp.). On February 15, 2019, Trustgard rejected the demand. (Exh. 14 to Graham Memo. in Opp.).

On February 22, 2019, Trustgard filed a Motion to Intervene and Motion to Set Aside Default Judgment.³ (Mot. to Intervene). It included an affidavit of Larry Nelson, a private investigator for Trustgard's counsel, about his October 2018 investigation of the service of the summons and complaint on Mr. Fuller. (Aff. of Nelson pp. 1-2).

³ This brief focuses on the motion to set aside the default judgment. The intervention issue is addressed in Graham's appeal.

On March 5, 2019, the court granted Kerri Rupert and Ronald Diegel's motion to be relieved as counsel and stated Dorothy H. Hogg is counsel for Full Logistics. (Form 4 Order). On April 3, 2019, Graham's counsel sent Mrs. Hogg a letter requesting that Full Logistics withdraw its Rule 60(b), SCRCF, motion because Mr. Fuller appeared and testified to receiving service and turning it over to Trustgard. (Exh. 18 to Graham Memo. in Opp.).

On April 15, 2019, Trustgard filed a memorandum in support of its motion to intervene and to set aside default judgment. Trustgard asked for intervention as of right and permissive intervention under Rules 24(a)-(b), SCRCF, arguing that, without intervention, "it will have *difficulty protecting its financial interest in this case.*" (Memo. pp. 9-14) (emphasis added). If it obtained intervention, Trustgard moved to set aside the default judgment under Rule 60(b), SCRCF, arguing improper service and surprise because Graham's counsel did not notify Trustgard when he filed the lawsuit. (Memo. pp. 14-18).

On April 23, 2019, Graham filed a memorandum in opposition to Trustgard's motion. As to the default judgment, Graham argued Mr. Fuller's appearance in court and testimony constituted a voluntary appearance and waived any argument as to defective service. Graham also argued service on Bridget Fuller was proper. (Memo. pp. 16-17). Graham argued counsel's conduct was proper and not a basis for Rule 60(b) relief, and Trustgard cannot show a meritorious defense. *Id.* at pp. 18-20.

On April 24, 2019, the Honorable Robin B. Stilwell held a hearing on Full Logistics' motion to set aside default and Trustgard's motion to intervene and to set aside default. (Tr. of Hearing). Full Logistics argued only that the evidence regarding service is conflicting but stated Mr. Fuller "wishes to stand on that testimony" from January 2019 that he received service. (Tr. pp. 27-28). Judge Stilwell took the motions under advisement for 30 days for the parties to attempt

settlement. (Tr. pp. 30-31). On July 18, 2019, after receiving a letter from Judge Stilwell stating his decision to deny Trustgard's motion to set aside the default judgment, Trustgard filed a motion to stay a formal ruling pending discovery it requested to conduct about service. (Mot. to Stay).

On August 9, 2019, Judge Stilwell filed an order granting Trustgard's motion as to permissive intervention "for the sole purpose of posing its Motion to Set Aside Default Judgment." (Order p. 5). Judge Stilwell then denied Trustgard and Full Logistics' motions to set aside the default judgment. (Order pp. 5-9). The lower court found Trustgard and Full Logistics failed to show a basis for relief under Rule 60(b), SCRCF, and did not satisfy the considerations for relief under the rule. *Id.* The court found personal jurisdiction for two reasons—(1) Mr. Fuller testified he received personal service and that testimony is corroborated by his communications with Michael Burchstead and Keith Johnson and (2) Full Logistics voluntarily appeared through Mr. Fuller at the January 8, 2019 hearing. (Order pp. 6-7). Trustgard failed to prove any mistake, inadvertence, surprise, or excusable neglect because Mr. Fuller testified he received service and the surprise about the lawsuit must be Full Logistics' surprise and not that of Trustgard. (Order p. 7). Trustgard failed to present evidence of a meritorious defense. (Order pp. 7-8). It argued an act of God as a defense but pointed only to the complaint and did not present evidence by way of affidavit. *Id.* at p. 8. The lower court found setting aside the default judgment would prejudice Graham by reopening the proceedings and delaying the close of the case by several years. *Id.* at p. 9. Finally, the lower court denied Trustgard's request for discovery because it saw "little profit in conducting additional discovery based on a party's hope that the testimony of witnesses or the evidence will change." (Order p. 9).

Four days after Judge Stilwell's order and prior to filing its Notice of Appeal, Trustgard sought to protect its "financial interest in this case" by filing a declaratory judgment action in

federal court against Graham, Foster, and Full Logistics seeking to void coverage under its Policy insuring Full Logistics. *Trustgard Insurance Company v. Terence Graham, Johnnie William Foster, and Full Logistics, Inc.*, 6:19-cv-02269-TMC (ECF # 1 – Aug. 13, 2019). Trustgard alleges that it “has no duty to defend or indemnify Full Logistics . . . in the Underlying Lawsuit or to pay any judgment resulting from the Underlying Lawsuit.” *Id.* at p. 5, ¶ 28. On November 8, 2019, Full Logistics filed an Answer and Counterclaim. *Id.* (Entry # 11 – Nov. 8, 2019). The Answer and Counterclaim allege that “Trustgard attempted to have its insured commit perjury and falsely state it was not served.” *Id.* at p. 6, ¶ 47. Full Logistics asserts counterclaims for insurance bad faith, negligence, and attorneys’ fees under S.C. Code Ann. § 38-59-10. *Id.*

On September 6, 2019, Trustgard filed a notice of appeal. Graham filed a notice of cross-appeal. Full Logistics did not file an appeal and is not a party to this appeal.

STANDARD

“Whether to grant or deny a motion under SCRCP 60(b) is within the sound discretion of the judge.” *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). “The trial court’s decision will not be disturbed on appeal absent a *clear* showing of an abuse of that discretion.” *Richardson v. P.V., Inc.*, 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009) (emphasis added). “An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support.” *Stearns Bank N.A. v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007) (internal quotation marks omitted). “The burden rests on the appellant to show that an order based on factual conclusions is without evidentiary support, or that the judge was controlled by an error of law.” *Berry v. Ianuario*, 286 S.C. 522, 526, 335 S.E.2d 250, 252 (Ct. App. 1985).

ARGUMENT

This is not a typical service of process case. The reason for this appeal is Trustgard's dispute that Full Logistics received service. Stated simply, this appeal exists because an insurance company disagrees with and takes a position contrary to its insured. This is wholly separate from the actual, underlying case between Graham and Full Logistics. Full Logistics—the party defendant—does not dispute service but rather maintains under oath and in the face of opposition from its insurer that it received service. The lower court correctly accepted Full Logistics' position on service, and this Court should do the same.

As an initial matter, the appeal is moot as to any relief on a motion to set aside a default judgment because Full Logistics did not file a notice of appeal and is not a party to this appeal. The default judgment is the law of the case as to Full Logistics. *See Bone v. United States Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) (“The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so.”). To pursue a defense, Full Logistics was required to file a notice of appeal to protect its interests. By way of illustration, if Trustgard is successful in this appeal, it will present its own defense because Rule 24(c), SCRPC, requires an intervening party to set “forth the claim or defense for which intervention is sought.” The fallacy of Trustgard having its own claim or defense in this action goes to the intervention issue but shows in this procedural situation that Trustgard alone cannot appeal an issue for the purpose of later asserting defenses on behalf of another party that did not appeal. The Court may dismiss Trustgard's appeal on this basis alone but Graham proceeds to address Trustgard's arguments.

I. THE LOWER COURT CORRECTLY HELD THE JUDGMENT IS NOT VOID BECAUSE IT HAD PERSONAL JURISDICTION OVER FULL LOGISTICS

The lower court held “Fuller testified under oath in Court that he was personally served and made a voluntary appearance, thus warranting the denial of” the Rule 60(b), SCRPC, motion. (Order p. 5). The Court should affirm this ruling.

Trustgard seeks relief under Rule 60(b)(4), SCRPC, arguing “the judgment is void” because “Full Logistics was not properly served” and the court lacked personal jurisdiction. (Br. of App. pp. 20-21). This is incorrect. Full Logistics was properly served.

Full Logistics appeared through Mr. Fuller at a hearing and testified under oath that it received service. “The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief.” *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). The lower court properly held Trustgard presented no evidence to contradict Mr. Fuller’s testimony. It found Mr. Fuller “acknowledged service in his testimony”, “never wavered from his position that he received notice of the lawsuit and did not contest proper service”, and that “testimony is corroborated by his phone communications with Michael Burchstead . . . and text messages with Keith Johnson.” (Order pp. 6-7). At the hearing before Judge Stilwell, counsel for Full Logistics acknowledged that Full Logistics “wishes to stand on that testimony” that it received service. (Tr. pp. 27-28). The Court may affirm solely for these uncontested findings.

Given that Trustgard put itself in the position of taking an inconsistent position with its insured in this action, it tries to avoid Mr. Fuller’s testimony by arguing other alleged issues with service. If the Court reaches these issues, they are without merit.

In addition to finding Mr. Fuller’s corroborated testimony established proper service, the lower court found he “also made a voluntary appearance on January 8, 2019” and cited Rule 4(d), SCRPC, which states that “[v]oluntary appearance by defendant is equivalent to personal service.” (Order p. 6). Trustgard argues the lower court erred in finding a voluntary appearance. (Br. of

App. pp. 21-22). Trustgard ignores that the voluntary appearance finding was an alternative and additional ruling to the finding that the uncontested testimony is Full Logistics received service. Regardless, the lower court correctly found a voluntary appearance.

Trustgard's argument is that the January 8, 2019 hearing occurred after entry of the default judgment and cannot confer jurisdiction retroactively. (Br. of App. pp. 21-22). The timing of the appearance is not relevant in this case because the purpose of the appearance was to acknowledge and admit proper service. In this case, unlike any other counsel could locate, the Defendant—Full Logistics—made an appearance at the hearing to admit and testify to receiving proper service. This “general appearance waives any defect in the jurisdiction arising either from the want of service on the defendant or from a defect therein.” *Connell v. Connell*, 249 S.C. 162, 167, 153 S.E.2d 396, 399 (1967) (finding a defendant made a general and not a special appearance when he filed an answer that contested service of process and also alleged an affirmative defense). When Mr. Fuller appeared at the January 8, 2019 hearing, he asked twice to “be sworn in” and then, when Judge Miller asked “What do you want to tell me?”, he answered “I got served.” (Exh. 12 to Graham memo pp.7, 9-10). Full Logistics appeared for the purpose of telling the Court it received service. “Any defect in the service of process is waived by the defendant’s general appearance or an appearance without objecting to the insufficiency in or the lack of proper service. The defendant is precluded from thereafter taking advantage of the defect.” 6 C.J.S. *Appearances* § 48. It cannot go without notice that Trustgard and Full Logistics’ counsel knew prior to Mr. Fuller’s testimony that Full Logistics received service. (Aff. of Burchstead; Exh. 9 to Graham Memo. in Opp.). Before anyone filed a motion to set aside the default judgment, Mr. Fuller told counsel for Trustgard that he was served and disputed lack of notice to Trustgard. (Aff. of Burchstead). The critical fact that the purpose of the appearance was to acknowledge proper service makes this case

distinguishable from those cited by Trustgard. (Br. of App. pp. 21-22). *Langley v. Graham*, 322 S.C. 428, 472 S.E.2d 259 (Ct. App. 1996), and *State v. Cohen*, 13 S.C. 198 (1880), both involved a defendant who contested proper service. *Langley*, 322 S.C. at 429, 472 S.E.2d at 260 (“Graham contends the default judgment should be set aside because” the plaintiff did not comply with Rule 4(d)(8), SCRCF, in serving him); *Cohen*, 13 S.C. at 200 (stating the issue is that the lower court entered “judgment against parties who had not been served with process”). These opinions are not applicable to the facts of this case.

Trustgard next argues that, even accepting Mr. Fuller’s testimony as true, Graham must prove the particulars of the personal service on Full Logistics testified to by Mr. Fuller. (Br. of App. pp. 22-25). This is incorrect. Mr. Fuller’s testimony alone is sufficient. By way of analogy, once a defendant answers a lawsuit without contesting service of process, there is no additional requirement for the plaintiff to affirmatively prove service of process. A general appearance is “a waiver of any claimed defects in the service of the summons and complaint.” *Strickland v. Consolidated Energy Prods. Co.*, 274 S.C. 554, 556, 265 S.E.2d 682, 683 (1980); *see also* 6 C.J.S. *Appearances* § 47 (“The general appearance of a defendant operates to waive, or dispense with, the issuance or service of process or any notices otherwise prerequisite to the jurisdiction of the court. Thus, a party never served with process may, by voluntary appearance, submit itself to the court’s jurisdiction.”). No case cited by Trustgard states that additional proof of service is required after the defendant testifies to it under oath and refuses to contest service of process. (Br. of App. pp. 23-25) (citing *Matheson v. McCormac*, 186 S.C. 93 (1938) (addressing service on the employee of a defendant who disappeared); *Singleton v. Mullins Lumber Co.*, 234 S.C. 330, 108 S.E.2d 414 (1959) (affirming foreclosure judgment where defendants challenged service of process decades after the judgment)).

Put simply, the appearance of Full Logistics for the purpose of testifying to service of process establishes personal jurisdiction and waives any further argument on an alleged defect. Trustgard does not cite to any case to refute that law or its application to the facts of this case. The lower court correctly found it had personal jurisdiction over Full Logistics based on Mr. Fuller's corroborated testimony. (Order pp. 6-7).

II. THE LOWER COURT CORRECTLY ACCEPTED MR. FULLER'S TESTIMONY

If the Court affirms the lower court's holding that Full Logistics appeared and admitted service, then there is no need for the Court to reach any of Trustgard's remaining arguments. Trustgard repeatedly misses the point that Mr. Fuller's appearance on behalf of Full Logistics and testimony of service of process waive any alleged defect in service and prevent any further argument on the issue. While Graham believes Trustgard's remaining arguments are unnecessary and misunderstand the legal consequences of Mr. Fuller's testimony, he still addresses the merits.

The essence of Trustgard's argument in its Argument section II is that service on Bridget Fuller and service testified to by Mr. Fuller are inconsistent and Graham must choose one of them in defense of the default judgment. (Br. of App. pp. 25-29). This is incorrect. While the two are not factually inconsistent, they are not legally required to be consistent. Further, all three of Trustgard's arguments on this issue are without merit.

As to Trustgard's first argument, giving credence to Mr. Fuller's position does not necessitate a conclusion that the default judgment is void. (Br. of App. pp. 26-27). Trustgard cites to no authority for this argument. *Id.* Giving credence to his testimony demands the legal conclusion that Full Logistics waived the defense of any defect in service of process and, therefore, neither it nor Trustgard can use that argument to try to set aside the default judgment. "A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Waiver requires

a party to have known of a right and known that right was being abandoned.” *Sanford v. S.C. State Ethics Comm’n*, 385 S.C. 483, 496-97, 685 S.E.2d 600, 607 (2009) (internal citation omitted). Full Logistics’ counsel’s private investigator told Mr. Fuller that service on Bridget “allowed the attorneys to sue” but “by law she couldn’t accept the service” and if he denied service “the lawsuit is dismissed, and they have to start over.” (Exh. 9 to Graham Memo. in Opp.). With this knowledge, Mr. Fuller appeared in court, listened to his counsel hired by Trustgard argue for Full Logistics to be let out of default for failure to properly serve it, asked to be sworn in, and testified to service. (Tr. of Jan. 8, 2019 hearing pp. 5-7, 10). The lower court properly accepted his testimony as evidence of service and waiver, and that is supported by the law and the evidence. This Court should affirm.

Trustgard’s second argument on judicial estoppel argument is unpreserved. “In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court.” *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). Trustgard did not mention judicial estoppel in either its memorandum in support of its motion or at the hearing on the motion. (Trustgard Memo; Hearing Tr.). There is no ruling on a judicial estoppel argument, and Trustgard did not file a Rule 59(e), SCRPC, motion to reconsider. The issue is unpreserved. Regardless, the issue is also legally and factually incorrect.

Trustgard fails to argue or show that the circumstances it alleges satisfy the elements of judicial estoppel. “[T]he following elements [are] necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional

effort to mislead the court; and (5) the two positions must be totally inconsistent.” *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). Service of process on Bridget Fuller and Mr. Fuller’s testimony are not totally inconsistent, failing to satisfy the first and fifth elements. Mr. Silvaggio’s April 28, 2017 service of process affidavit states he served the summons and complaint on Full Logistics “via Drico Montes Fuller’s wife Bridget Lovone Hunter-Fuller” and he verified she was married to Mr. Fuller by her own statement, a package on the front porch for Mr. Fuller, and driver records. (Aff. of Silvaggio, April 28, 2017). At the January 8, 2019 hearing, Mr. Fuller testified as to service on his wife: (1) “I got served, not my wife” and “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.” (Jan. 8, 2019 Hearing Tr. pp. 10, 14). This is not totally inconsistent with the affidavit. Mr. Fuller may mean that the service was addressed to him and not his wife. To satisfy the totally inconsistent requirement, “the truth of one position must necessarily preclude the veracity of the other position.” *Wright v. Craft*, 372 S.C. 1, 38, 640 S.E.2d 486, 506 (Ct. App. 2006). Trustgard’s arguments fails on this requirement. There is also no evidence or argument of the fourth element of an intentional effort to mislead the court. To the contrary, the only persons who knew prior to the January 8, 2019 hearing that Mr. Fuller would testify to and waive service of process were Trustgard and the counsel and private investigators it hired and paid. The counsel Trustgard hired chose to submit a pleading and argue to the court that service on Bridget Fuller was improper while omitting that Mr. Fuller, on behalf of Full Logistics, did not contest service and would testify to service. (Exh. 9 to Graham Memo. in Opp). Graham did not change positions but merely used additional evidence and a legal waiver as part of his argument. The Court should reject the judicial estoppel argument.

As to Trustgard's third argument, there is no basis for the lower court to "ignore" Mr. Fuller's testimony and Trustgard does not cite any law to support this argument. (Br. of App. pp. 28-29). The argument is based on an incorrect assertion that Mr. Fuller's testimony is "patently unreliable" and Mr. Silvaggio's affidavit is "reliable evidence." (Br. of App. p. 28). As explained above, his testimony is not contrary to other evidence. The lower court specifically noted evidentiary support for the testimony. "His testimony is corroborated by his phone communications with Michael Burchstead on November 28, 2018 and text messages with Keith Johnson in December 2018." (Order pp. 6-7). The lower court properly exercised its discretion to consider the evidence presented and accept Mr. Fuller's testimony. *See Stearns Bank N.A. v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793 (Ct. App. 2007) (stating an abuse of discretion arises as to a factual conclusion where it is "without evidentiary support"); *Richardson v. P.V., Inc.*, 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009) (noting an appellant must make a "clear showing of an abuse" of discretion).

III. ALTERNATIVELY, AND AS AN ADDITIONAL SUSTAINING GROUND, GRAHAM PROPERLY SERVED FULL LOGISTICS THROUGH BRIDGET FULLER

Service on Bridget is an additional sustaining ground for the lower court's denial of the motion to set aside the default judgment. Rule 220(c), SCACR. Service on a corporation is made "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." Rule 4(d)(3), SCRCR. Trustgard makes three arguments that service on Bridget is not proper, each of which are incorrect.

Trustgard first argues there is no evidence of Bridget's authority to accept service for Full Logistics. (Br. of App. p. 29). This is incorrect. Rule 4(d)(3) expressly permits service to a "managing or general agent" of a corporate defendant. Mr. Silvaggio's supplemental affidavit of

January 7, 2019, states Bridget told him she was “an authorized agent of Full Logistics, Inc. . . . when the company was operating, although the company was dissolved and no longer in business. (Exh. 20 to Graham Memo. in Opp.). There is evidence that Mr. Fuller intended to confer authority on Bridget to receive his business mail. This is not a case in which there is a place of business for the corporate defendant but the plaintiff served the corporation at someone’s home. In this case, the evidence shows there is no physical location of the corporate defendant and its owner and registered agent receives mail at his home with Bridget. (Aff. of Garrett; Affs. of Silvaggio). See Rule 4(d)(3), SCRCF (stating service is effected by “delivering” the complaint to “an officer, a managing or general agent” or to an agent “authorized by appointment or by law *to receive service of process*” (emphasis added)); accord *Hunter v. CSX Transp., Inc.*, 2006 U.S. Dist. LEXIS 48670 (D.S.C. July 12, 2006) (affirming propriety of chief mail room clerk signing return receipt for service of process on defendant’s CEO where the evidence showed he was authorized to sign the receipt because there is no requirement under Rule 4(d)(8) “that the person who signs for the mail must be authorized to *receive service*”). Mr. Silvaggio’s 2017 affidavit states he verified Mr. Fuller lived at the home with Mrs. Fuller by a package on the front porch with his name on it and by Mr. Fuller’s driving record listing that as his address. (Exh. 19 to Graham Memo. in Opp.). The private investigator hired by prior counsel for Full Logistics tried to get Bridget Fuller to sign an affidavit stating she was not employed by, an agent of, or authorized to receive service for Full Logistics. (Exhs. 8-9 to Graham Memo. in Opp.). She never signed it. The investigator even told Mr. Fuller “I got an affidavit for Bridget to sign, and this law suit stops” and she did not sign it. (Exh. 9 to Graham Memo. in Opp.).

Trustgard’s second argument is that Graham could not serve Mr. Fuller at his place of residence by leaving the complaint with a person of suitable age and discretion. (Br. of App. p.

29). Trustgard relies on *N.H. Ins. Co. v. Bey Corp.*, 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993), in which the Court of Appeals found that service on a corporate defendant's president and sole shareholder at his personal residence by leaving a copy with a person of discretion was not effective against the corporation. *Id.* at 50, 435 S.E.2d at 378. The facts of this case are distinguishable from *Bey Corp.* because there is no place of business at which to serve Mr. Fuller. Full Logistics chose to no longer use a physical place of business and go into administrative dissolution. Graham's service of Full Logistics on an agent of the company at the only location where its registered agent could be located satisfies "[t]he principal object of service of process [] to give notice to the defendant corporation of the proceedings against it." *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010) (internal quotation marks omitted). "Exacting compliance with the rules is not required to effect service of process." *Id.* at 485, 693 S.E.2d at 30. In this case, Graham's service on Bridget "sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings" when Mr. Fuller's corroborated testimony shows Full Logistics had actual notice of the lawsuit. *Id.* (internal quotation marks omitted).

Trustgard's third argument is that a plaintiff may serve a dissolved corporation only through its registered agent or the secretary of state, citing to S.C. Code Ann. § 33-14-105. That statute provides that the dissolution of a corporation does not "terminate the authority of the registered agent of the corporation." § 33-14-105(c)(7). Graham properly served Mr. Fuller by leaving a copy of the summons and complaint with Bridget. Further, Mr. Fuller's "authority" as registered agent did not terminate, allowing him to give authority to Bridget to accept the lawsuit at the physical location where he receives mail.

Graham's service on Bridget fully complies with all applicable rules, statutes, and case law, and the Court may affirm the order denying Trustgard's motion to set aside the default judgment on this additional sustaining ground.

IV. THE LOWER COURT CORRECTLY DENIED TRUSTGARD'S MOTION TO STAY PENDING FORMAL DISCOVERY

On November 28, 2018, Mr. Fuller called Trustgard's coverage counsel and told counsel he received service of process. (Aff. of Burchstead). From that time forward, Mr. Fuller maintained this position to private investigators and the court. On July 18, 2019, eight months after Trustgard first learned of Full Logistics' position on service and after the lower court notified Trustgard of its decision to deny the motion to set aside the default judgment, Trustgard filed a motion to stay the case to depose Mr. and Mrs. Fuller and Paul Silvaggio about the circumstances of service of process. (Mot. pp. 1-2). The lower court denied the motion. (Order p. 9). "The Court sees little profit in conducting additional discovery based on a party's hope that the testimony of witnesses or the evidence will change." *Id.* The lower court explained it "conducted a deliberate inspection of the circumstances of default" and the inconsistencies Trustgard complains about "are overcome by Fuller's acknowledgment and acceptance of service." *Id.* The court found Trustgard's request shows it "realizes that it does not have sufficient evidence or information to meet its burden" to set aside default. *Id.* at pp. 9-10. Full Logistics did not move for or join in Trustgard's motion for additional discovery.

The trial court's decision of whether to grant additional discovery is a matter of discretion. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 152, 723 S.E.2d 835, 840 (Ct. App. 2012). Trustgard fails to show the lower court abused its discretion in denying additional discovery. Trustgard incorrectly states it does not have "**any information** into the circumstances of service." (Br. of App. p. 30) (emphasis in original). There are affidavits from Karen Garrett, Paul Silvaggio,

Keith Johnson, Larry Nelson, and Michael Burchstead, and testimony from Mr. Fuller about the circumstances of service. Trustgard already investigated service. In October 2018, Trustgard's coverage counsel requested its private investigator "locate and contact Drico Fuller to investigate the April 28, 2018, service of the Terance Graham Summons & Complaint." (Aff. of Nelson ¶ 5). The investigator and coverage counsel spoke to Mr. Fuller. (Aff. of Nelson; Aff. of Burchstead). Counsel for Full Logistics also hired a private investigator who spoke to Mr. and Mrs. Fuller. (Aff. of Johnson; Exh. 9 to Graham Memo. in Opp.). No further discovery is necessary.

Trustgard mistakenly relies on *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 721 S.E.2d 430 (2012), as "dispositive" of this issue. (Br. of App. p. 30). In *Makawi*, the plaintiff served two defendants—a corporation and its president—by certified mail, return receipt requested at a business location. 396 S.C. at 293, 721 S.E.2d at 431-32. Two women signed the return receipts. *Id.* at 293, 721 S.E.2d at 432. The defendants went into default and, after the plaintiff obtained a judgment, filed a motion under Rule 60(b), SCRCF, to set aside the judgment based on insufficient service. *Id.* In support of the motion, the defendants filed an affidavit of the corporation's president stating the woman who signed for him individually was only a bookkeeper with no administrative duties and he had never heard of the woman who signed for him as the corporation's registered agent. *Id.* The court denied the motion. *Id.* at 294, 721 S.E.2d at 432. The defendants filed a Rule 59(e), SCRCF, motion with a second affidavit from the president stating neither woman was authorized to accept service. *Id.* The plaintiff responded in opposition and asked for discovery and cross-examination. *Id.* The trial court granted the motion to reconsider, set aside the judgment, and then denied the plaintiff's subsequent Rule 59(e), SCRCF, motion asking for a ruling on the discovery request. *Id.* On appeal, the Supreme Court held the trial court should have let the plaintiff conduct discovery because the women may have had authority to

accept service. *Id.* at 300, 721 S.E.2d at 435. It relied on the fact that the plaintiff did not previously “bear the burden of production on this issue.” *Id.* at 301-02, 721 S.E.2d at 436.

This case is readily distinguishable from *Makawi*. Trustgard bore the burden of production from the beginning when it moved to set aside the default judgment. It moved to intervene and set aside the judgment only after Mr. Fuller testified under oath to receiving service and turning it over to Trustgard. Rather than seeking discovery at that point, Trustgard asked for discovery after it learned the lower court planned to issue a ruling against it. “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 plaintiff’s claim appears to be clearly frivolous.” *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 151, 723 S.E.2d 835, 839 (Ct. App. 2012). Trustgard cannot argue to the lower court that its evidence is sufficient to win a motion and then, after losing, ask to get more evidence. That fails to show “discovery is necessary”. Further, Mr. Fuller’s testimony specifically denies and waives what Trustgard seeks to disprove through discovery—service on Full Logistics. Under these circumstances, the lower court properly exercised its discretion to deny the motion for discovery. *See Sullivan*, 397 S.C. at 152, 723 S.E.2d at 840 (affirming the denial of discovery where “[t]he affidavits introduced by Respondents specifically deny jurisdictional acts or contacts”). This Court should affirm.

V. THERE IS NO LEGAL OR FACTUAL BASIS FOR SETTING ASIDE THE DEFAULT JUDGMENT UNDER RULES 60(b)(1) AND (3), SCRPC

The lower court correctly held Trustgard failed to prove “mistake, inadvertence, surprise, or excusable neglect” or “fraud, misrepresentation, or other misconduct of an adverse party” under Rules 60(b)(1) and (3), SCRPC. (Order p. 7). Trustgard argued that it—the non-party insurance company—was surprised by the judgment. (Tr. of April 24, 2019 hearing p. 14). The court found that, the “mistake, inadvertence, or excusable neglect” argued must be that of Full Logistics and

“not on Trustgard as Full Logistics’ insurer.” (Order p. 7). “Based on Fuller’s sworn testimony acknowledging service, there is no mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct that warrants setting aside the default judgment.” *Id.* This Court should affirm.

Trustgard’s argument is that Graham’s counsel engaged “*in settlement negotiations with*” it prior to filing suit and “then failed to notify Trustgard when suit was filed.” (Br. of App. p. 31) (emphasis added). This is not an accurate description of the facts. Graham’s counsel, Mr. Smith, first communicated with Trustgard on March 3, 2014, to notify it that he represented Graham and to ask for evidence preservation and to examine the truck. (Exh. 1 to Aff. of Jon Barrett). In April 2014, a Trustgard claims representative wrote Mr. Smith a letter stating she tried to reach him by phone and asking for a return call. (Exh. 2 to Aff. of Jon Barrett). For over a year Trustgard and Mr. Smith did not communicate. On June 30, 2015, Jon Barrett, a claims representative sent Mr. Smith a letter stating he spoke to Mr. Smith’s office to verify Graham’s employment with Full Logistics and would follow-up after reviewing the file. *Id.* Over two months later, on September 11, 2015, Mr. Barrett sent another letter stating there may be no coverage. *Id.* In November and December 2015, Mr. Barrett sent letters asking if Graham was still receiving medical treatment. *Id.* Six months later, on June 15, 2016, Trustgard sent a letter denying the claim and stating there is no coverage. (Exh. 3 to Graham Memo. in Opp.). The letter does not request a copy of a lawsuit if one is filed. *Id.*

These undisputed facts show that Mr. Smith communicated with Trustgard one time prior to filing suit. Over the next two years, Trustgard sent Mr. Smith six letters, including one denying coverage. Mr. Smith never made a settlement demand, sent a demand package, engaged in settlement negotiations, or offered or promised to send a courtesy copy of the complaint. Most

importantly, Trustgard did not ask Mr. Smith to notify it if he filed a lawsuit. The assertion that “Mr. Smith clearly wanted an undefended default judgment with which to leverage the insurance company” is professionally insulting and factually baseless. (Br. of App. p. 32). Counsel properly followed the rules of civil procedure.

Further, nothing in the South Carolina Rules of Civil Procedure requires a plaintiff to provide a copy of the pleadings to an insurance carrier. Rule 4, SCRCP; *see also White Oak Manor, Inc. v. Lexington, Inc.*, 407 S.C. 1, 12, 753 S.E.2d 537, 543 (2014) (“[N]othing in the South Carolina Rules of Civil Procedure requires the service of a courtesy copy of the summons and complaint on opposing counsel.”). Trustgard cites to no such authority. (Br. of App. pp. 31-32). Notice to the insurer is a matter between the insured and the insurer, and Mr. Fuller testified Full Logistics provided that notice.

Trustgard’s citation to *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970), is misplaced because it is factually distinguishable and does not contain a ruling regarding notice to the insurance company. Ferguson owned a vehicle insured by State Farm in which he and Edwards were in a one-car accident. 254 S.C. at 280, 175 S.E.2d 224. Edwards’ attorney contacted State Farm to notify it of her claim and asked to “make contact regarding a possible settlement.” *Id.* at 280, 175 S.E.2d at 225. Two months later, after “[a] settlement of the case did not develop”, Edwards filed suit and served a copy of the summons and complaint on Ferguson’s illiterate father with whom he lived. *Id.* at 281, 175 S.E.2d at 225. Edwards’ counsel maintained he told State Farm about service the day after it occurred but State Farm denied this conversation. *Id.* Edwards did not file the lawsuit until almost three weeks after service. *Id.* Ferguson and his father denied receiving service. *Id.* Ferguson and State Farm filed a motion to set aside the default judgment

under the mistake, inadvertence, surprise, or excusable neglect grounds found in Rule 60(b)(1). *Id.* at 282, 175 S.E.2d at 225. The trial court denied the motion.

On appeal, the Supreme Court noted the unique facts of the case because the insurance policy was “an assigned risk and a certified policy” that, under the former Motor Vehicle Safety Responsibility Act, is a policy as to which “no statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy.” *Id.* at 282, 175 S.E.2d at 225-26 (quoting prior Section 46-702(7)(b)(3) (1963)). As a result of this statutory policy provision, “State Farm stands in the shoes of the defendant so far as liability is concerned⁴ in spite of the fact that the company for fourteen months was completely unaware of the collision had occurred, and in spite of the fact that the defendant has obviously failed to cooperate, to the prejudice of the company.” *Id.* Because of this special circumstance in which the insurer had no defenses to coverage based on the insured’s conduct and the insured’s insistence he did not receive service, the Court granted the motion to set aside the default judgment.

This case is distinguishable from *Edwards* for numerous reasons. In this case, Trustgard denied coverage to Graham’s counsel and filed a declaratory judgment action seeking to void the policy, contrary to State Farm’s position in *Edwards* in which it could not assert coverage defenses. This case does not involve a defendant who denies service. To the contrary, Full Logistics admitted and waived service. This case does not involve a complaint served on the defendant before it was filed at the courthouse. This case does not involve plaintiff’s counsel that asked the

⁴ Trustgard represents to the Court that *Edwards* “held that State Farm ‘stands in the shoes’ of the defendant” when “[r]uling in favor of the insurer on setting aside the default judgment.” (Br. of App. p. 32). It incorrectly insinuates that the *Edwards* court held an insurer always stands in the shoes of the defendant as to a default judgment but omits the words after “stands in the shoes of the defendant” and ignores the context of the statement.

insurer to contact him about a possible settlement. Mr. Smith and Trustgard did not engage in any settlement negotiations. *Edwards* is not applicable to this case and does not support Trustgard's request for relief.⁵

Counsel acted in compliance with the law, and the Court should affirm the lower court's holding that Trustgard failed to show entitlement to relief under Rules 60(b)(1) and (3), SCRPC.

VI. THE LOWER COURT CORRECTLY HELD TRUSTGARD FAILED TO PRESENT EVIDENCE OF A MERITORIOUS DEFENSE

The lower court correctly held Trustgard failed to satisfy its burden to present evidence of a meritorious defense. (Order p. 8). Trustgard argued to the lower court the defense of an act of God due to the wintry conditions on the night of the accident. *Id.* The court found it failed to show evidence of this defense by affidavit or otherwise and argument from counsel is insufficient. *Id.*

On appeal, Trustgard does not argue the defense of an act of God but argues only that the amount of damages is a defense because the judgment amount exceeds the amount of the medical bills. (Br. of App. p. 33). The Court should affirm the lower court's ruling that an act of God is not a meritorious defense as the unappealed law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

"[T]he existence of a meritorious defense" is one of the factors a court considers "[i]n determining whether to grant a motion under Rule 60(b)." *Rodriguez v. Gutierrez*, 391 S.C. 323, 331, 705 S.E.2d 94, 99 (Ct. App. 2011). "A meritorious defense need not be perfect nor one which

⁵ *Lowes of Ga., Inc. v. Costantino*, 288 S.C. 106, 341 S.E.2d 382 (Ct. App. 1986), cited by Trustgard (Br. of App. p. 32) is also distinguishable and inapplicable. In *Lowes* the lower court made factual findings that the plaintiffs received service and then promptly wrote a letter to Lowe's attorney that they wished to settle and, before the time to answer expired, discussed the lawsuit with a Lowe's agent and believed they were not required to do anything further. The lower court found the letter to Lowe's attorney was an answer. Lowe's did not dispute any of these factual findings on appeal.

can be guaranteed to prevail at a trial.” *Rouvet v. Rouvet*, 388 S.C. 301, 312, 696 S.E.2d 204, 209 (Ct. App. 2010) (internal quotation marks omitted). “Rather, a meritorious defense 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.” *Williams v. Watkins*, 384 S.C. 319, 326, 681 S.E.2d 914, 918 (Ct. App. 2009) (internal quotation marks omitted).

As to the amount of damages, Trustgard does not cite to any law that a dispute as to the amount of damages is a meritorious defense. This defense does not go to whether a party may prevail at trial but, rather, to the amount of damages awarded. The argument does not present “a real controversy as to real facts arising from conflicting or doubtful evidence” that would affect a determination of liability. *Williams*, 384 S.C. at 326, 681 S.E.2d at 918.

Trustgard also presents no evidence that the damages amount is incorrect. Judge Verdin found current medical bills of \$57,536.85 and future medical expenses of \$456,912.88, along with evidence of punitive conduct, and awarded \$2,843,349.73. (Order of Damages pp. 1-4). The only opposition to the amount is the bare assertion of counsel that the medical expenses are less than the judgment amount. “Arguments of counsel are also not evidence.” *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (finding party failed to present evidence to entitle him to relief under Rule 60(b)). The Court should affirm the lower court’s finding that Trustgard failed to prove a meritorious defense.

VII. THE LOWER COURT’S FINDING THAT SETTING ASIDE THE DEFAULT JUDGMENT WILL PREJUDICE GRAHAM IS THE LAW OF THE CASE

“[T]he prejudice to the other party” is a factor the court considers “[i]n determining whether to grant relief” under Rule 60(b), SCRPC. *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010). The lower court found that, “[e]ven if there was a valid basis to vacate the

default judgment under Rule 60(b), the prejudice to Graham [] outweighs vacating the judgment.” (Order p. 9). Trustgard did not appeal this finding, and it is the law of the case. *See Shirley’s Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (“An unappealed ruling is the law of the case and requires affirmance.”). The Court may affirm on this basis alone.

CONCLUSION

For any of the independent reasons discussed above, the Court should affirm the lower court’s decision to deny Trustgard’s motion to set aside the default judgment.

March 3, 2020
Hampton, South Carolina

Respectfully submitted,



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IN 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

RECEIVED

MAR 05 2020

SC Court of Appeals

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 Respondent-Appellant.

CERTIFICATE OF SERVICE

This is to certify that I, *Megan C. Davis*, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Counsel for the Respondent-Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of *Respondent's Initial Brief of Respondent-Appellant Terence Graham and Designation of Matter for the Record on Appeal* to:

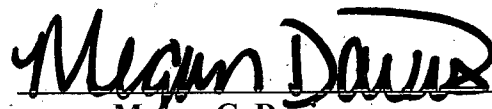
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March 3, 2020
Hampton, South Carolina


Megan C. Davis

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March 3, 2020

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The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
Post Office Box 11629
Columbia, SC 29211-1629

*Re: Ex. Parte: Trustgard Insurance Company
Appellate Case No.: 2019-001506*

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MAR 05 2020
SC Court of Appeals


Dear Ms. Kitchings:

Please find enclosed the original and one copy of the Initial Respondent's Brief of Respondent-Appellant Terence Graham and Designation of Matter to be included in the Record on Appeal in the above-referenced matter. Please file the original and return a clocked copy of each in the envelope provided.

By copy of this letter, the Initial Respondent's Brief of Respondent-Appellant Terence Graham and Designation of Matter are being served on all counsel of record.

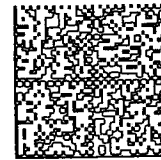
Also, Mr. Graham's name is spelled Terence with only one R instead of two. The notices from the Court regarding the case caption have two Rs. We wanted to make the Court aware and will use one R going forward. If this is an issue please let us know.

With kind regards, I am

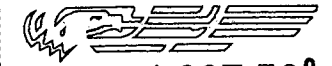
Sincerely,

William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: Michael Reid Burchstead, Esquire
Brian T. Smith, Esquire
Dorothy H. Hogg, Esquire
Shelley S. Montague, Esquire
Janice Holmes, Esquire



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