

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY **MAR 18 2020**

Court Of Common Pleas **SC Court of Appeals**

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

Appellate Case No. 2019-001506

Ex Parte: Trustgard Insurance Company Appellant-Respondent,

In Re:

Terence Graham,Plaintiff,

v.

Full Logistics, Inc.,Defendant,

Of Whom Terence Graham is the Respondent-Appellant.

INITIAL REPLY BRIEF OF APPELLANT-RESPONDENT TRUSTGARD
INSURANCE COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT1

 I. The Circuit Court Erred in Denying Trustgard’s Motion to Set
 Aside the Default Judgment.....1

 A. The evidence in the record shows that Fuller was not
 served with the Summons and Complaint.1

 B. The Circuit Court erred in determining that Fuller’s
 testimony constituted a valid voluntary appearance.4

 C. The Circuit Court erred in adopting Fuller’s confused
 testimony regarding service despite the evidence of lack
 of service presented by Graham.....5

 II. Service on Hunter-Fuller Was Not Proper Service on Full
 Logistics7

 III. The Circuit Court Erred in Denying Trustgard’s Motion to Stay
 Pending Formal Discovery8

 IV. The Circuit Court Erred in Denying Trustgard’s Motion Under
 Rule 60(b)(1) and (3), SCRCP9

 V. The Circuit Court Erred in Determining Trustgard Had Not
 Presented a Meritorious Defense10

 VI. The Circuit Court Erred in Determining Graham Would Be
 Prejudiced by Setting Aside the Default Judgment12

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

<i>BB&T v. Taylor</i> , 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).....	4, 6
<i>Brown v. S.C. State Bd. of Educ.</i> , 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990)	8
<i>Collins v. Auto-Owners Ins. Co.</i> , 438 F. App'x 247, 249 (4th Cir. 2011).....	10
<i>Connell v. Connell</i> , 249 S.C. 162, 153 S.E.2d 396 (1967)	4
<i>Dyar v. Ga. Power Co.</i> , 173 S.C. 527, 176 S.E.2d 711, 714 (1934)	7-8
<i>First Sav. Bank v. McLean</i> , 314 S.C. 361, 444 S.E.2d 513 (1994)	2
<i>Graham v. Town of Loris</i> , 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978)	10
<i>Graham Law Firm, P.A. v. Makawi</i> , 396 S.C. 290, 299, 721 S.E.2d 430, 435 (2012)	8, 9
<i>Goldberg v. Kelly</i> , 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970)	8
<i>In re: Robert D.</i> , 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000).....	7
<i>Langley v. Graham</i> , 322 S.C. 428, 432, 472 S.E.2d 259, 261 (Ct. App. 1996).....	5
<i>Matheson v. McCormac</i> , 186 S.C. 93, 195 S.E.2d 122, 129 (1938).....	5-6
<i>Mulherin-Howell v. Cobb</i> , 362 S.C. 588, 600, 608 S.E.2d 587 593-594 (Ct. App. 2005)	2
<i>New Hampshire Ins. Co. v. Bey Corp.</i> , 312 S.C. 47, 50, 435 S.E.2d 377, 378 (Ct. App. 1993)	8
<i>R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.</i> , 343 S.C. 424, 540 S.E.2d 113 Ct. App. 2000)	2
<i>Roberson v. S. Fin. of S.C., Inc.</i> , 365 S.C. 6, 12, 615 S.E.2d 112, 115 (2005).....	2
<i>Roche v. Young Bros., Inc. of Florence</i> , 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995)	6
<i>Rouvet v. Rouvet</i> , 388 S.C. 301, 312, 696 S.E.2d 204, 209 (Ct. App. 2010).....	10
<i>S.C. Dep't of Soc. Servs. v. Holden</i> , 319 S.C. 72, 459 S.E.2d 846 (1995)	8

<i>State v. Cohen</i> , 13 S.C. 198, 202 (1880).....	5
<i>State v. Russell</i> , 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)	7
<i>Strickland v. Consolidated Energy Products Co.</i> , 274 S.C. 554, 556, 265 S.E.2d 682, 683 (1980)	4
<i>Thomas & Howard Co. v. T.W. Graham & Co.</i> , 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)	6

Statutes

S.C. Code Ann. § 15-9-210(c)	7
S.C. Code Ann. § 15-32-530.....	11-12

Rules

Rule 4, SCRCF.....	4, 6, 8
Rule 60, SCRCF.....	4, 9

Secondary Sources

Jean H. Toal, <i>Appellate Practice in South Carolina</i> , (2d Ed. 2002).....	7
4A Charles A. Wright & Arthur R. Miller, <i>Fed. Prac. & Proc.</i> § 1101, at 103 (1987)	8
46 Am.Jur.2d <i>Judgments</i> § 737 (1969)	10

ARGUMENT

In reply to the Response Brief of Respondent-Appellant Terence Graham (“Graham”) and in further support of the Brief of Appellant-Respondent Trustgard Insurance Company (“Trustgard”), Trustgard offers the following arguments, incorporating by reference the background facts and arguments stated in its prior Opening Brief.

I. The Circuit Court Erred in Denying Trustgard’s Motion to Set Aside the Default Judgment.

A. The evidence in the record shows that Fuller was not served with the Summons and Complaint.

In his Response Brief, Graham contends that this “appeal exists because an insurance company disagrees with and takes a position contrary to its insured.” Response Brief, p. 15. Graham’s characterization of the issue is incorrect. This appeal arises from the Circuit Court’s failure to consider the testimony provided by Drico Fuller (“Fuller”) and the fact he did not testify that he received service of the Summons and Complaint. Further, this appeal arises from Graham’s failure to demonstrate that he obtained proper service of the Summons and Complaint on Full Logistics, Inc. (“Full Logistics”).¹ Because the Circuit Court’s Order denying Trustgard’s Motion to Set Aside Default

¹ While acknowledging that Fuller, on behalf of Full Logistics, is taking a position that is contrary to Trustgard’s position (as well as contrary to logic), Graham attempts to argue that because Full Logistics did not file a Notice of Appeal to request this Court review and reverse the denial of the motion to set aside the default judgment that this denial is now the “law of the case.” *See* Response Brief, p. 15. Graham’s argument is illogical because it is Fuller’s inexplicable insistence that he was served with the Summons and Complaint (despite the evidence to the contrary) that has necessitated Trustgard’s efforts to intervene to seek to set the default judgment aside. If Fuller’s actions in preventing Trustgard from protecting its insured, Full Logistics, had not occurred, there would be no need for Trustgard to take the actions it has been forced to take in connection with the Graham Lawsuit.

Judgment (“Motion”) was based on factual conclusions that were without evidentiary support, the Circuit Court should be reversed. *See Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 12, 615 S.E.2d 112, 115 (2005) (explaining that “[t]he findings of the special referee are binding on this Court unless wholly unsupported by the evidence or controlled by an error of law” and that the “special referee’s determination that service was proper should be reversed as it is unsupported by the evidence.”). Here, the evidence in the record clearly demonstrates that the Circuit Court erred in determining that 1) Fuller was served with the Summons and Complaint and/or 2) the service on Fuller’s estranged wife, Bridget Hunter-Fuller was proper. Trustgard has met its burden and the Circuit Court’s denial of the Motion should be reversed.

Contrary to the Circuit Court’s findings that 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 the “testimony is corroborated by [Fuller’s] phone communications with Michael Burchstead ... and text messages with Keith Johnson.” (Order, pp. 6-7) Graham, without any citation to any support, simply states “[t]he Court may affirm solely for these uncontested findings.” *See* Response Brief, p. 16. Graham’s bald, unsupported statement should be disregarded by the Court. *See Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587 593-594 (Ct. App. 2005) (determining that where the “arguments made are merely conclusory statements,” the argument was deemed abandoned and did not need to be addressed by the Court) (citing *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994); *R&G Constr., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000) (declaring an issue is deemed abandoned if argument in appellate brief is only conclusory)).

And, these findings are anything but uncontested. The evidence in the record clearly demonstrates that these findings are not supported by Fuller's testimony and the other evidence in this case. During the April 2019 hearing, the Circuit Court, after hearing the argument and reviewing Fuller's testimony, stated that "none of this is clear" and that Fuller "does equivocate pretty significantly." Second Motions Hr'g Tr., p. 28. Further, the Circuit stated that "it was difficult to ascertain exactly what his assertions were." Second Motions Hr'g Tr., p. 28. It is clear from Fuller's testimony that he was confused about whether he was actually served with the Summons and Complaint. He stated he was served at his place of business by a woman and that he sent everything to the insurance company. First Motions Hr'g Tr., p. 10. However, he later testified that he sent the packet that he allegedly received to Trustgard a year before he was "served" with the suit papers. First Motions Hr'g Tr., p. 13. Fuller provided copies of the documents that were "served" on him, and the transcript of the hearing reveals:

JUDGE MILLER: Would you show it to these two lawyers and let them look at it. Oh, you got two 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.

First Motions Hr'g Tr., p. 13. Clearly, Fuller was confused about whether he had been served with the Summons and Complaint and the Circuit Court's Order is without support in the record and should be reversed.

B. The Circuit Court erred in determining that Fuller’s testimony constituted a valid voluntary appearance.

In the Order, the Circuit Court acknowledged that “[u]nder Rule 60(b)(4), a court may relieve a party from a final judgment if the judgment is void” and that “[a] judgment is void if the court acts without personal jurisdiction.” Order, p. 6 (citing *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006)). In determining that Fuller was served on behalf of Full Logistics, the Circuit Court stated that “Fuller not only acknowledged service in his testimony but also made a voluntary appearance on January 8, 2019.” Order, p. 6 (citing Rule 4(d), SCRCPP). The Circuit Court’s reliance on Fuller’s alleged voluntary appearance was improper under South Carolina law, and Graham’s arguments to the contrary are unavailing.

Graham’s reliance on the cases cited in his Response Brief is misplaced. In *Strickland v. Consolidated Energy Products Co.*, 274 S.C. 554, 556, 265 S.E.2d 682, 683 (1980), the Court explained that “a general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process” and that “if a defendant, by his appearance, ‘asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance.’” (quoting *Connell v. Connell*, 249 S.C. 162, 153 S.E.2d 396 (1967)). Fuller did not seek any relief from the Circuit Court that required the Court to have jurisdiction over Full Logistics. Therefore, Fuller did not make a general appearance on behalf of Full Logistics, and *Strickland* lends no support to Graham’s argument.

Rather, as the South Carolina Supreme Court has noted “acknowledgment 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, 202 (1880)) (explaining that “[w]hat 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.”). Graham argues that “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.” *See* Response Brief, p. 19. Graham’s argument lacks merit and is wholly unsupported under South Carolina law.

Fuller’s appearance at the hearing occurred after judgment had been rendered. South Carolina law clearly states that this is not a general appearance and the Circuit Court did not have jurisdiction over Full Logistics by way of its agent, Fuller. Therefore, the Circuit Court’s Order denying Trustgard’s Motion should be reversed.

C. The Circuit Court erred in adopting Fuller’s confused testimony regarding service despite the evidence of lack of service presented by Graham.

Graham misses the point of Trustgard’s argument regarding the fact the default judgment is void and the issues related to improper service on Full Logistics. Under South Carolina law, “[t]he proof of service must show affirmatively that the service of the process was correctly made” and “[t]his is imperatively necessary to give the court jurisdiction of the person thus sought to be brought into court.” *Matheson v. McCormac*,

186 S.C. 93, 195 S.E.2d 122, 129 (1938). Rule 4(g), SCRCP provides that “[t]he person serving the process shall make proof of service thereof promptly and deliver it to the officer or person who issued same....[i]f served by any other person, he shall make affidavit thereof.” Rule 4(g) also states that “[t]he affidavit and delivery record and any other proof shall be promptly filed by the clerk with the pleadings and become a part of the record.” Despite Graham’s apparent dismissal of the South Carolina Rules of Civil Procedure regarding service, “[a] judgment is void if a court acts without personal jurisdiction.” *BB&T*, 369 S.C. at 551, 633 S.E.2d at 503 (citing *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)). Jurisdiction is conferred by following Rule 4, and that was not done in this case. *See id.* at 552, 633 S.E.2d at 899 (quoting *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995)).

Graham’s arguments are the classic case of trying to have his cake and eat it too. If the Silvaggio Affidavit is not correct, which it cannot be if Fuller’s testimony is to be believed, then there is no valid basis to assume that service was made as outlined therein. And, if the Silvaggio Affidavit is correct, then Fuller’s testimony cannot be believed, and he did not receive actual service of the Summons and Complaint. These two scenarios are mutually exclusive and greatly impact whether the Circuit Court had jurisdiction to hear the case, issue the default judgment, and enter the damages award. Despite Graham’s assertions to the contrary, he was required to follow the South Carolina Rules

of Civil Procedure to invoke the Circuit Court’s jurisdiction over Full Logistics, and he did not, which renders the judgment void.²

II. Service on Hunter-Fuller Was Not Proper Service on Full Logistics.

Again, Graham seeks to ignore the proper mechanism for serving a defendant, which is the method that gives the Circuit Court jurisdiction over the defendant. Section 33-14-105(5) of the South Carolina Code of Laws states that dissolution of a corporation does not “prevent commencement of a proceeding by or against the corporation in its corporate name.” Section 15-9-210(a) of the South Carolina Code of Laws states that “[a] domestic business or nonprofit corporation’s registered agent is the agent of the corporation for service of any process....” And, if service cannot be made on the registered agent, the Summons and Complaint should be “addressed to the office of the secretary of the corporation at its principle office.” S.C. Code Ann. § 15-9-210(c). “Jurisdiction is absolutely essential to the maintenance of an action, and it can be obtained only by service of process in the manner prescribed by the law of the forum. There must be certainty that the person served is such an one as meets the requirements

² Graham contends that Trustgard did not preserve the issues related to judicial estoppel in connection with its Motion. Graham’s contention lacks merit. Trustgard argued that the statements made by Fuller at the hearing and by Silvaggio in the affidavit were conflicting, and Graham was bound by the statements regarding service in the Silvaggio affidavit. The Circuit Court considered this argument, and therefore, the argument was preserved. *See, e.g., State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words “corpus delicti” in his request for directed verdict); *In re: Robert D.*, 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000), *overruled on other grounds by State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation); Jean H. Toal, *Appellate Practice in South Carolina*, p. 186 (3d Ed. 2002) (noting that a party need not use the exact name of a legal doctrine in order to preserve it as long as it is clear the issue was raised).

of the statute.” *Dyar v. Ga. Power Co.*, 173 S.C. 527, 176 S.E.2d 711, 714 (1934). Under South Carolina law, the alleged service upon Hunter-Fuller was not effective service on Full Logistics. *See New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 378 (Ct. App. 1993) (determining that the plaintiff’s attempt to serve the corporation by leaving a copy of the summons and complaint with a person of discretion at the residence of the corporation’s residence was improper service and “[a]lthough such service might have been effective against [the president] as an individual, it was ineffective against” the corporation) (citing Rule 4(d)(3), SCRCF; 4A Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 1101, at 103 (1987)). Because the service was not effective, there is no basis upon which to affirm the Circuit Court’s denial of Trustgard’s Motion.

III. The Circuit Court Erred in Denying Trustgard’s Motion to Stay Pending Formal Discovery.

Graham’s attempt to distinguish *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 299, 721 S.E.2d 430, 435 (2012) fails. The *Graham Law* court explained that “[w]here important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses.” *Graham Law*, 396 S.C. at 299, 721 S.E.2d at 435 (quoting *Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970); *S.C. Dep’t of Soc. Servs. v. Holden*, 319 S.C. 72, 459 S.E.2d 846 (1995) (right to confirmation applies in civil context)). It is clear, based on the record in this case, that Trustgard has not had a full and fair opportunity to be heard on an issue that may be determinative of its legal rights with regard to protecting its insured, Full

Logistics, and the Circuit Court erred in failing to allow Trustgard the opportunity to conduct discovery regarding the alleged service on Fuller. *See Graham Law*, 396 S.C. at 302, 721 S.E.2d at 436 (explaining that the circuit court erred in denying the request for discovery because “[o]n this record, it cannot be said that Graham had a full and fair opportunity to be heard on an issue that may be determinative of its legal rights.”).

In its Motion, Trustgard fully explained to the Circuit Court its need to conduct discovery regarding the alleged service issues in the case. While the Circuit Court acknowledged the inconsistencies in Fuller’s testimony and certainly noticed the fact the Affidavits of Service that were submitted and filed by Graham did not reflect Fuller’s testimony regarding the “service,” it disregarded Trustgard’s right to due process. This decision was improper, and Graham’s arguments contending otherwise are without merit. Therefore, the Circuit Court’s denial of Trustgard’s request should be reversed.

IV. The Circuit Court Erred in Denying Trustgard’s Motion Under Rule 60(b)(1) and (3), SCRPC.

In the Order, the Circuit Court based its decision that Trustgard was not entitled to set aside the default judgment on “Fuller’s sworn testimony acknowledging service.” Order, p. 7. Based on this testimony, the Circuit Court stated that “there is no mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct that warrants setting aside the default judgment.” *Id.* As explained above, and in Trustgard’s prior Brief, the record clearly demonstrates that Fuller’s testimony about service demonstrates that he was confused about whether he was actually served and South Carolina law does not recognize the service on Hunter-Fuller as valid service on Full Logistics. Therefore, the primary basis upon which the Circuit Court rested in

denying Trustgard's Motion is faulty and the Circuit Court must be reversed.

V. The Circuit Court Erred in Determining Trustgard Had Not Presented a Meritorious Defense.

The South Carolina Supreme Court has explained that “[a] meritorious defense need not be perfect nor one which 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) (quoting *Graham v. Town of Loris*, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978) (quoting 46 Am.Jur.2d *Judgments* § 737 (1969))). Trustgard argued that a meritorious defense existed regarding the amount of damages awarded to Graham, and this is sufficient to support reversing the Circuit Court's determination. *Cf. Collins v. Auto-Owners Ins. Co.*, 438 F. App'x 247, 249 (4th Cir. 2011) (determining there was a reasonable ground for contesting the claim when the insurer had legitimate reservations about the validity of the claims and the adjusters expressed their belief that the tortfeasor had meritorious defenses to both liability and the extent of the plaintiff's damages).

Here, the evidence in the record clearly demonstrates that a meritorious defense regarding the damages awarded to Graham exists. During the hearing, Graham presented evidence that he incurred \$57,536.85 in medical expenses and sought the following additional amounts:

- Pain and suffering - \$1,028,900;
- Future medicals - \$456,912.88; and
- Loss of enjoyment - \$300,000.

And, Graham also requested **\$300,000** in punitive damages. The Circuit Court awarded all of the damages requested by Graham and increased the requested punitive damages

award by 233.33% to \$1,000,000. Damages Hr'g Tr., pp. 6-7, 9-10.

During the hearing on Trustgard's Motion, Trustgard presented evidence demonstrating that this damages award was not proper. Trustgard explained Foster denied liability in his Answer to the Complaint. Second Motions Hr'g Tr., pp. 6-7. Further, Trustgard provided evidence showing that, despite Graham's testimony that he sustained a traumatic brain injury and was unable to work following the accident, a month and a half after the accident, he had his CDL permit renewed and had it renewed again on September 2, 2014, which showed that he was still working as a truck driver. As further proof that Graham was working after the accident, Trustgard presented evidence that Graham was driving a truck owned by a "L. Logistics, Inc."³ on June 10, 2015 and received a citation for operating a commercial vehicle without periodic inspection on the trailer. And, Graham received a citation for improper speeding in Virginia on June 25, 2015. Further, Graham was driving a truck owned by "L. Logistics, Inc." on January 8, 2016, and he was issued a ticket for failure to obey a traffic light on Whitehorse Road. Second Motions Hr'g Tr., p. 7-9, 14-15.

Also, with regard to the punitive damages award, section 15-32-530 of the South Carolina Code of Laws provides that "[e]xcept as provided in subsections (B) and (C), an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars." The exceptions in subsection (B) are whether the wrongful conduct was motivated primarily by unreasonable financial gain or if the actions could

³ Trustgard also presented evidence showing that "L. Logistics Inc." was formed a month before Full Logistics was dissolved and had the same address as Full Logistics. Second Motions Hr'g Tr., p. 9.

subject the defendant to conviction of a felony. The exceptions in subsection (C) are 1) whether the defendant had an intent to harm the plaintiff; 2) whether the defendant pled guilty to or had been convicted of a felony; or 3) the defendant acted or failed to act while under the influence of alcohol, drugs, other than lawfully prescribed drugs administered in accordance with a prescription, or any intentionally consumed glue, aerosol, or other toxic vapor to the degree that the defendant's judgment is substantially impaired. There was no evidence introduced during the damages hearing that supported the Circuit Court not abiding by the statutory cap for the punitive damages award.

The information that Trustgard presented during the hearing on its Motion certainly casts sufficient doubt on Graham's damages claim such that the Circuit Court's determination that Trustgard did not present a meritorious defense should be reversed.

VI. The Circuit Court Erred in Determining Graham Would Be Prejudiced by Setting Aside the Default Judgment.

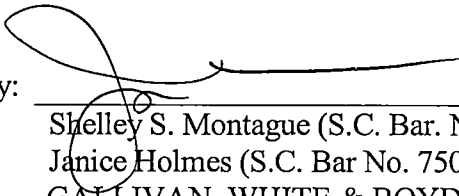
Graham's argument that he was prejudiced is the "law of the case" is incorrect. Per the Order, the Circuit Court stated that it "weighed the prejudice to Graham and will not vacate the default judgment in light of Fuller's sworn testimony regarding personal service and turning everything over to his insurance company." Order, p. 9. And, further, the Circuit Court stated that "[h]aving found Fuller made a voluntary appearance and service was waived, the Court likewise denies Full Logistics' Motion to Set Aside the Default Judgment." Order, p. 9. As previously explained, the Circuit Court's determinations upon which this finding was based are not supported by the evidence in the record. Given that Trustgard's arguments on appeal go to these very issues, there is no valid basis for Graham's argument that Trustgard did not appeal this issue.

Accordingly, this finding is not the “law of the case” to which Trustgard is bound.

CONCLUSION

For the reasons cited herein and in Trustgard’s Opening Brief, Trustgard respectfully requests this Court reverse the Circuit Court’s Order denying Trustgard’s Motion in which the Circuit Court improperly refused to set aside the entry of default judgment against Trustgard’s insured, Full Logistics.

March 18, 2020

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APPEAL FROM GREENVILLE COUNTY
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MAR 18 2020

The Honorable Robin B. Stilwell, Judicial Circuit Court Judge
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In Re:

Terence Graham,Plaintiff,

v.

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

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

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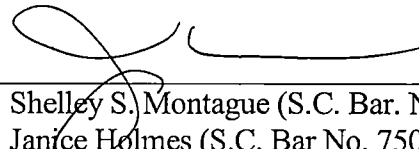
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March 18, 2020

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RE: Ex Parte Trustgard Insurance Company, Appellant-Respondent, in re: Terence
Graham v. Full Logistics, Inc., Defendant, of whom Terence Graham is
Respondent-Appellant
Appellate Case No.: 2019-001506
GWB File No.: 10006-1

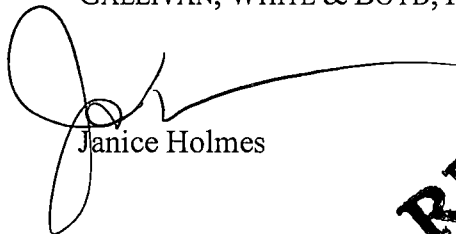
Dear Ms. Kitchings:

Enclosed for filing with your office are the original and two (2) copies of the Initial Reply
Brief of Appellant-Respondent Trustgard Insurance Company in regards to the above-referenced
matter. I would appreciate you filing the original and returning a clocked copy to me by the
awaiting individual from our office.

With kind regards, I am

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.


Janice Holmes

JH:ammo
Enclosures
Cc: All Counsel of Record

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MAR 18 2020
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