

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Robin B. Stillwell, Circuit Court Judge

Appellate Case No.: 2019-001506  
Trial Court Case No. 2017-CP-23-00311

**RECEIVED**

**May 28 2020**

**SC Court of Appeals**

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

In Re:

Terrence Graham, ..... Plaintiff,

v.

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

Of whom, Terrence Graham is.....Respondent-Appellant.

**APPELLANT-RESPONDENT’S RETURN TO RESPONDENT-APPELLANT’S  
MOTION TO DISMISS**

Pursuant to South Carolina Appellate Court Rule 201, Appellant-Respondent Trustgard Insurance Company (“Trustgard”) files this Return to Respondent-Appellant Terrence Graham’s (“Graham”) Motion to Dismiss Appellant-Respondent’s Appeal as Unappealable (“Motion”). The Motion contends that Trustgard’s appeal should be dismissed because Trustgard should not be allowed to intervene in the *Terrence Graham v. Full Logistics, Inc.* (“the Lawsuit”) for the purpose of protecting the interests of its insured, Full Logistics, Inc. (“Full Logistics”), when, for reasons unknown, Full Logistics refused to protect its own interests and when that failure

directly affects Trustgard. As demonstrated below, Graham's Motion should be denied because South Carolina precedent permits Trustgard to intervene in the Lawsuit for the purposes allowed by the Circuit Court. Therefore, Graham's Motion lacks merit and should be dismissed.<sup>1</sup>

**A. The South Carolina Supreme Court's Decision In *Ex Parte: Builders Mutual Insurance Company* Does Not Support Dismissal of Trustgard's Appeal.**

By letter dated May 14, 2020, Graham submitted a letter to the Court stating that the South Carolina Supreme Court's decision in *Ex Parte: Builders Mutual Insurance Company*, --- S.E.2d ---, 2020 WL 2464838 (S.C. May 13, 2020) supports his Motion to Dismiss this appeal as well as his substantive arguments contained in Section I. of Respondent-Appellant's Initial Appellant's Brief and Sections I and II of Respondent-Appellant's Initial Reply Brief. Contrary to Graham's statements, a reading of the *Ex Parte: Builders Mutual* decision clearly demonstrates that the Circuit Court had the authority to consider whether the record evidence supported determining that Trustgard was entitled to permissive intervention and that decision should be affirmed.

In *Ex Parte: Builders Mutual*, after reciting the rule, the Supreme Court explained:

The record is replete with facts rationally supporting the trial court's denial of the Insurers' motions for permissive intervention. We therefore conclude the Insurers have failed to prove the trial court abused its discretion....

*Ex Parte: Builders Mut.*, 2020 WL 2464838 at \*3. It is clear that the Supreme Court considered the evidence in *that* case to determine whether the trial court abused its discretion in determining there was no basis for the insurers to be allowed to intervene in *that* case. The Supreme Court's decision certainly did not announce a wholesale rule that insurers could never be allowed

---

<sup>1</sup> Because Graham's arguments presented in the Motion are largely repetitive of the arguments he has raised in connection with the appeal of this matter, Trustgard incorporates the recitation of facts and arguments in Trustgard's Initial Brief of Appellant and Initial Response Brief of Appellant-Respondent as if fully stated here.

permissive intervention in the underlying lawsuits. Rather, the Supreme Court affirmed the rule in South Carolina that trial courts are allowed discretion to determine whether a non-party may be allowed permissive intervention and that decision will be upheld absent an abuse of discretion. *See also Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 411, 581 S.E.2d 161, 168-169 (2003) (citing *S.C. Tax Comm. v. Union City Treasurer*, 295 S.C. 257, 368 S.E.2d 72 (Ct. App. 1988)) (explaining that “[t]he granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion.”).

In addition, it goes without saying that the issue presented in *Ex Parte: Builders Mutual* is very different than the situation present in this case. The insurers were seeking to intervene for the purpose of requesting the ability to submit special interrogatories to obtain a jury verdict that allowed them to be able to separate damages that were potentially covered under the policy from those that were not covered. The Supreme Court determined that this request improperly placed the burden of demonstrating coverage on the underlying plaintiffs, which was contrary to established South Carolina law and would work prejudice to the underlying plaintiffs because of the potential of delay in the case – particularly if the insurers appealed the trial court’s decisions regarding the special interrogatories to present to the jury – and potential conflict issues with regard to counsel for the insured. Those considerations are not present here.

Trustgard sought to intervene for the purpose of protecting its insured, Full Logistics, from being subject to an excess default judgment. Trustgard sought to intervene to set that default judgment aside and to allow for the case to proceed and actually be litigated. There is certainly no prejudice to Full Logistics if the default were to be set aside, and normally, one would expect that Full Logistics would join in those efforts. However, for whatever reason, Full Logistics has shown that it has no interest at all in protecting its own interests, which has left

it to Trustgard to do what is necessary to set the default aside. Therefore, in accordance with prior South Carolina precedent, Trustgard filed the motion to intervene to do just that. *See, e.g., McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), *aff'd* 395 S.C. 85, 716 S.E.2d 887 (2011). The Supreme Court's decision in *Ex Parte: Builders Mutual* does not support a determination that the Circuit Court abused its discretion in *this* case and does not support a determination that Trustgard was not entitled to intervene as of right in *this* case given the dissimilarities between the issues presented here and in *Ex Parte: Builders Mutual*.

**B. Graham's Argument that Trustgard Is Not an Aggrieved Party Under Rule 201(B), SCACR Lacks Merit.**

Graham argues that Trustgard's interest in this case "relates solely to insurance coverage which is the issue pending in the declaratory judgment action in federal court." *See* Motion to Dismiss, p. 4. This statement makes it clear that Graham misapprehends both the basis of Trustgard's request for intervention in the Lawsuit and the basis for the declaratory judgment action pending in the United States District Court for the District of South Carolina.

This Court has explained that "[a] party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest." *Shaw v. City of Charleston*, 351 S.C. 32, 36, 567 S.E.2d 530, 532 (Ct. App. 2002) (quoting *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001)). Further, "[t]he word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." *Shaw*, 351 S.C. at 36, 567 S.E.2d at 532 (quoting *Beaufort Realty*, 346 S.C. at 301, 551 S.E.2d at 589; citing *Parker v. Brown*, 195 S.C. 35, 44-45, 10 S.E.2d 625, 629 (1940) ("An aggrieved party or person is one who is injured in a legal sense; one who has suffered an injury to person or property.")).

In *Shaw*, the Court determined that one party had the standing to challenge to another party's dismissal from the case. In determining that the party had the standing to appeal the dismissal, the Court recognized that the inclusion or exclusion of the other party "drastically affect[ed]" the other party and "b[ore] directly on its pecuniary interests." *Id.* at 37-38, 567 S.E.2d at 533.

The Court's decision in *Shaw* certainly demonstrates that there are situations where one party may have the right to challenge a ruling affecting another party, and that situation is presented here. Further, South Carolina courts have acknowledged that insurers have the opportunity to intervene for the purpose of setting aside default judgments. *See Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970) (determining the insurer stood in the shoes of the insured and could move to set aside the judgment); *McClurg*, 380 S.C. at 570, 671 S.E.2d at 91, *aff'd* 395 S.C. 85, 716 S.E.2d 887 (explaining that the trial court granted the insurer's motion to intervene "recognizing [the insurer]'s large financial interest in the action and possible responsibility for paying the judgment.").

The pending declaratory judgment action does not address the same issues as those presented in this appeal. Here, Trustgard is seeking to protect its insured from itself by seeking to set aside the default judgment when the record evidence demonstrates that Full Logistics was not properly served with the Complaint in the Lawsuit and was not given the opportunity to litigate the issues in the case. A review of the testimony provided by Full Logistics' owner, Drico Fuller ("Fuller"), clearly demonstrates that he was not served with a copy of the Summons and Complaint and that Graham never perfected service on Full Logistics such that the default judgment should have been set aside. For reasons unknown, Fuller refuses to acknowledge that Full Logistics was not properly served – which would serve its interests and comport with the

record evidence in this case – and this refusal has necessitated Trustgard’s involvement in the case to raise those arguments and arguments regarding liability and damages that should be raised by Full Logistics. The Circuit Court properly determined that Trustgard had the right to permissive intervention and is now a party to the Lawsuit for the purpose of seeking to set aside the default judgment. Further, it is clear that Trustgard is an aggrieved party able to bring an appeal of the Circuit Court’s erroneous denial of the motion to set aside the improperly entered default judgment. Graham has failed to demonstrate otherwise, and his Motion to dismiss should be denied.

**C. Graham’s Argument that Trustgard’s Appeal Is Moot Is Not Supported by South Carolina Law.**

Graham contends that “[e]ven if Trustgard is an aggrieved party the appeal should be dismissed as it is moot” because the default judgment “is the final law of the case as to Full Logistics.” *See* Motion to Dismiss, p. 7. Graham’s argument lacks merit.

South Carolina courts have explained that “[u]nder the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.” *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015) (quoting *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (5 C.J.S. *Appeal & Error* § 991 (2007))). Further, “[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case.” *Flexon*, 413 S.C. at 571, 776 S.E.2d at 403 (quoting *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 68 (1997)).

Clearly, there is no law of the case that has yet been established here. Trustgard has appealed the default judgment entered as to Full Logistics. Logically, if this Court were to reverse the Circuit Court’s denial of Trustgard’s motion, it would work to benefit Full Logistics

because Full Logistics would be able to litigate the issues of damages and liability in the Lawsuit – which logically Full Logistics would want to do to protect itself but for unknown reasons is not.

Furthermore, Graham’s argument that the issue is moot belies logic because the issue regarding the propriety of the entry of the default judgment against Full Logistics is the very issue on appeal. The South Carolina Supreme Court has explained that “[a] moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.” *Seabrook v. Knox*, 369 S.C. 191, 197-198, 631 S.E.2d 907, 910-911 (2006). *See also Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (explaining that “[a] case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy.”). The issue presented in this appeal is not an academic question. There is a live controversy at issue – whether Full Logistics was properly served with the Summons and Complaint such that the Circuit Court had jurisdiction to hear the matter and enter judgment against it in the amount of \$2,843,349.73 and whether the default judgment should be set aside. That Full Logistics has not sought to protect its interests and not file an appeal of the Circuit Court’s denial of the motion to set aside the default judgment is of no moment because Trustgard has undertaken the effort to seek reversal of the Circuit Court’s decision, and Graham has pointed to no authority demonstrating otherwise. *See Teeter v. Teeter*, 408 S.C. 485, 499-500, 759 S.E.2d 144, 152 (Ct. App. 2014) (determining the failure to cite authority to support the argument meant that the argument was abandoned) (citing *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when appellant fails

to provide arguments or supporting authority for his assertion)). Therefore, there is no basis to dismiss Trustgard's appeal, and Graham's Motion should be denied.

Further, Trustguard is a party to this case. *See McClurg*, 380 S.C. at 570, 671 S.E.2d at 91 (determining that once the motion to intervene was granted, the intervening party was a party to the suit and was entitled to relief sought). Here, it is clear that once Trustguard successfully intervened in this case, it became a party to the case, and therefore, is entitled to appeal the decision to deny the motion to set aside the default judgment. Like the *McClurg* court recognized, Trustguard's interest allows it to be a proper intervening party, and this Court's consideration of Trustgard's appeal will have a practical legal effect upon the controversy. *See, e.g., Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (explaining that "if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case."). Therefore, Graham's arguments lack merit and his Motion should be denied.

#### **D. Conclusion**

South Carolina law clearly provides this Court with an avenue to consider the appeal of the Circuit Court's Order. Therefore, for the foregoing reasons, Graham's Motion to Dismiss the Appeal must be denied.

*{Signature on next page}*

May 28, 2020



By: \_\_\_\_\_  
Shelley S. Montague (S.C. Bar. No. 68019)  
Janice Holmes (S.C. Bar No. 75038)  
GALLIVAN, WHITE & BOYD, P.A.  
Post Office Box 7368  
Columbia, South Carolina 29202  
Telephone: 803.779.1833  
Facsimile: 803.779.1767

ATTORNEYS FOR APPELLANT-  
RESPONDENT TRUSTGARD INSURANCE  
COMPANY

**RECEIVED**  
**May 28 2020**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court Of Common Pleas

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

Appellate Case No. 2019-001506

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

In Re:

Terence Graham, ..... Plaintiff,

v.

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

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

---

**PROOF OF SERVICE**

---

I certify that I served copies of the Appellant-Respondent's Return to Respondent-Appellant's Motion to Dismiss by United States mail, postage prepaid, addressed to:

William F. Barnes, III  
Peters, Murdaugh, Parker, Eltzroth & Detrick, PA  
Post Office Box 457  
Hampton, SC 29924  
wbarnes@pmped.com

and

Brian T. Smith  
714 Pettigru Street  
Greenville, SC 29601  
bsmith@btsmithlaw.com

*Attorneys for Respondent-Appellant Terence Graham*

Dorothy Holley Hogg  
Fulcher Hagler, LLP

Post Office Box 1477  
Augusta, GA 30903-1477  
dhogg@fulcherlaw.com

*Attorney for Defendant Full Logistics, Inc.*

Matthew E. Cox  
Smith, Currie & Hancock, LLP  
1325 Park Street  
Suite 200  
Columbia, SC 29201  
mecox@smithcurrie.com

*Attorney for Johnnie Williams Foster*

May 28, 2020

By:



---

Shelley S. Montague (S.C. Bar. No. 68019)  
Janice Holmes (S.C. Bar No. 75038)  
GALLIVAN, WHITE & BOYD, P.A.  
Post Office Box 7368  
Columbia, South Carolina 29202  
Telephone: 803.779.1833  
Facsimile: 803.779.1767

ATTORNEYS FOR APPELLANT-  
RESPONDENT TRUSTGARD INSURANCE  
COMPANY