

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

Appellate Case No.: 2019-001506  
Trial Court Case No.: 2017CP2300311

**RECEIVED**  
JUN 11 2020  
SC Court of Appeals

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

In Re:

Terence Graham, ..... Plaintiff,

-v-

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

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

**RESPONDENT-APPELLANT'S REPLY TO APPELLANT-RESPONDENT'S  
RETURN TO THE MOTION TO DISMISS**

Pursuant to Rule 240(f), SCACR<sup>1</sup>, Respondent-Appellant, Terence Graham ("Graham"), submits this reply to Appellant-Respondent, Trustgard Insurance Company's ("Trustgard") Return to Graham's Motion to Dismiss this appeal. Graham responds to several arguments presented by Trustgard.

<sup>1</sup> Rule 240(f), SCACR, states that replies are due within five (5) days from the May 28, 2020 Return filed by Trustgard. Since the five (5) day deadline was prior to June 8, 2020, an additional twenty (20) days is added. See Order Re: Operation of the Appellate Courts During the Coronavirus Emergency (1)(2) (As Amended May 29, 2020).

The Supreme Court's recent decision in *Ex parte Builders Mutual Insurance Company*, Opinion No. 27970 (May 13, 2020) mandates dismissal of Trustgard's appeal. In *Ex parte Builders Mutual*, the Supreme Court noted the potential for unnecessary delay and a conflict of interest when the insurer tries to intervene in the action: "We conclude there are facts in the record that support the trial court's decision that permissive intervention here would **present conflict of interest concerns and likely cause undue delay and prejudice** to the Association and the Insureds." (emphasis added). While stating that *Ex parte Builders Mutual* is "very different", Trustgard incorrectly argues that "[t]hose considerations are not present here." (Return p. 3) (emphasis added). To the contrary, this case has both conflict of interest concerns and Trustgard's pursuit of its appeal has caused unnecessary delay and prejudice to Graham. Following the January 8, 2019 hearing in which Drico Fuller testified that he was personally served and turned everything over to Trustgard, then-counsel for Full Logistics filed a motion to be relieved as counsel citing Rule 1.7 – Conflict of Interest; Current Clients – Rule 407, SCACR. (Ex. 1 – Mot. to be Relieved). Following relief of counsel, Trustgard retained new counsel to defend Full Logistics. (Ex. 2 – Order Relieving Counsel). Trustgard argues throughout its Return that Full Logistics is not protecting itself because it did not file an appeal. *See* Return p. 7 ("which logically Full Logistics would want to do to protect itself but for unknown reasons is not"). This is further conflict between Trustgard and counsel it retained to defend Full Logistics as Trustgard is copying counsel it retained – Dorothy H. Hogg – on filings with this Court even though Full Logistics is not a party to the appeal. *See* Ret. Proof of Service p. 10. The same concerns the Supreme Court noted in *Ex parte Builders Mutual* regarding potential conflicts exist here.

The Supreme Court's concerns regarding undue delay and prejudice to the underlying Plaintiff and insured also exists here. In this case, Full Logistics' 60(b) motion was denied and it did not file an appeal, so the judgment against it is final. While the matters regarding coverage will be decided in the federal court declaratory judgment action where Trustgard and Full Logistics are suing each

other, Trustgard recently filed a Motion to Stay while this appeal is pending. Trustgard's appeal before this Court results in Graham having to go through the appellate process all while the party against whom the judgment was entered did not appeal. Additionally, in the federal court action, Full Logistics may be forced to wait for a decision by this Court if Trustgard's Motion to Stay in federal court is granted thereby creating additional undue delay. *Ex parte Builders Mutual* mandates dismissal of Trustgard's appeal in addition to the supporting authority cited by Graham in his Motion.

Importantly, at no point in time did Trustgard's retained counsel that defended Full Logistics withdraw its 60(b) motion in its entirety or withdraw arguments it made even though Fuller testified to the Court and informed counsel for Trustgard that he was personally served and turned everything over to Trustgard. In its Return, Trustgard attempts to argue it is an aggrieved party because it and Full Logistics are one-in-the-same such that it can appeal the judgment against Full Logistics when Full Logistics itself chose not to appeal. When it sought permissive intervention under Rule 24, SCRPC, Trustgard was a party separate and distinct from Full Logistics. *In re Horry Cty. State Bank*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004) ("Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action.").

Trustgard cannot have it both ways. It cannot claim to be separate and distinct such that it sought intervention to become a separate party while at the same time claiming it and Full Logistics are one-in-the-same such that it can appeal the judgment entered against Full Logistics. Trustgard is a separate and distinct party from Full Logistics and its interests relate solely to coverage for the judgment (which is being litigated in federal court).<sup>2</sup> As it and Full Logistics are two separate, distinct

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<sup>2</sup> Trustgard argues that Graham "misapprehends" Trustgard's interest in this case as relating "solely to insurance coverage which is the issue pending in the declaratory judgment action in federal court." (Return p. 4). It is correct that Trustgard's sole interest relates to coverage and Trustgard acknowledges as much in its Return: "Full Logistics refused to protect its own interests and *when that failure directly affects Trustgard.*" (Return pp. 1-2). Additionally, Judge Stilwell's Order, on

parties, the judgment against Full Logistics is final because it did not appeal the denial of its 60(b) motion. In its Return, Trustgard fails to address this Court's statements in *Beaufort Realty Co., Inc. v. Beaufort Cnty.*, 346 S.C 298, 301, 551 S.E.2d 588, 589-90 (Ct. App. 2001), that "[a] party cannot appeal from a decision which does not affect his or her interest, *however erroneous and prejudicial it may be to some other person's rights and interests.*" (emphasis added). Trustgard is not an aggrieved party as required by Rule 201(b), SCACR, to maintain an appeal.

Despite these potential conflict issues with counsel Trustgard retained to defend Full Logistics that are set forth above, Trustgard nonetheless argues it is attempting to "protect its insured" who has "shown that it has no interest at all in protecting its own interests . . . ." (Return p. 3). Trustgard's counsel learned on November 28, 2018, directly from Drico Fuller, that he was personally served and disputed lack of notice to Trustgard. (Ex. 3 - Burchstead Aff. ¶ 9). Fuller also communicated with the private investigator hired by counsel Trustgard retained to defend Full Logistics and learned that Fuller was served and turned everything over to Trustgard. (Ex. 4 - Jackson Texts). Trustgard did not take issue with Full Logistics "protecting itself" for over a month seeking to vacate the judgment based on improper service, even with direct knowledge from Fuller. It was only after the Court and Graham's counsel learned Fuller's testimony that Trustgard sought to intervene. At no point in time did Full Logistics withdraw its 60(b) motion or any of the arguments made in the motion and memorandum regarding lack of service. Full Logistics protected itself by filing a 60(b) motion that was denied. Trustgard's arguments that it is protecting its insured assumes Full Logistics did not receive service. In essence, Trustgard argues that Fuller, its insured, lied under oath on January 8, 2019, and that even when he testified to the contrary, Fuller should commit perjury and go along with

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which Trustgard attempts to base its appeal, holds that "Trustgard's *only interest is in the coverage it will be required to provide* in satisfaction of the judgment against its insured, Full Logistics." (Ex. 5 – p. 4) (emphasis added). Trustgard did not file a Rule 59(e), SCRCR, following the entry of this Order.

Trustgard and deny service because it is in Full Logistics' and Trustgard's best interests. If Fuller is correct that Trustgard had knowledge of the lawsuit, then Trustgard is not protecting its insured but itself. Trustgard and Full Logistics are currently suing each other in the federal court action over this conflict.

In its Return, Trustgard argues that its appeal is not moot as Graham has not pointed to any authority demonstrating it is moot. *See* Return p. 7. In the Motion, Graham sets forth the authority that there is no controversy here as the judgment is against Full Logistics. *See* Mot. pp. 7-8. Full Logistics did not appeal the denial of its 60(b) motion so the judgment against it is final and is the basis of the lawsuit and counterclaim in federal court.

### CONCLUSION

For the reasons set forth above and the arguments in his motion, Trustgard's appeal should be dismissed.

Respectfully submitted,

PETERS, MURDAUGH, PARKER, ELTZROTH  
& DETRICK, P.A.

June 9, 2020  
Hampton, South Carolina.

BY: Wil. Barnes  
William F. Barnes, III  
101 Mulberry Street, East  
P.O. Box 457  
Hampton, SC 29924  
Phone: (803) 943-2111  
Email: [wbarnes@pmped.com](mailto:wbarnes@pmped.com)

-And-

Brian T. Smith, Esquire  
714 Pettigru Street  
Greenville, SC 29601  
Phone: (864) 239-2007  
Email: [bsmith@btsmithlaw.com](mailto:bsmith@btsmithlaw.com)  
*Attorneys for Respondent-Appellant*

Other Counsel of Record:

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

Michael R. Burchstead, Esquire  
Collins & Lacy, PC  
Post Office Box 12487  
Columbia, SC 29211

Shelley S. Montague, Esquire  
Janice Holmes, Esquire  
Gallivan, White & Boyd, P.A.  
1201 Main Street, Suite 1200  
Columbia, SC 29201  
***Attorneys for Appellant-Respondent***

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO: 2017-CP-23-00311

Terence Graham,

Plaintiff,

**EXHIBIT**  
**1**

v.

**MOTION TO BE RELIEVED AS COUNSEL**

Johnnie William Foster and Full Logistics,  
Inc.,

Defendants.

**TO: BRIAN T. SMITH, ESQUIRE, ATTORNEY FOR PLAINTIFF, AND TO THE PLAINTIFF ABOVE NAMED:**

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorney for the Defendant Full Logistics, Inc., will ten (10) days after service hereof or as soon thereafter as counsel may be heard, move to be relieved as counsel for Full Logistics, Inc. Full Logistics, Inc. was insured by policy from Grange Insurance Company at the time of this alleged incident. The undersigned was retained by Grange Insurance Company to represent Full Logistics, Inc. A conflict of interest under Rule 1.7 has arisen that requires the undersigned to withdraw as counsel for Full Logistics, Inc. Therefore, the undersigned, Ronald B. Diegel and Kerri A. Rupert, hereby moves this Court to be relieved as counsel for Defendant Full Logistics, Inc.

*[Signature Page to Follow]*

MURPHY & GRANTLAND, P.A.

*s/ Kerri A. Rupert*

Ronald B. Diegel, Esq. (Bar No. 65076)

Kerri A. Rupert, Esq. (Bar No. 100557)

4406-B Forest Drive (29206)

P.O. Box 6648

Columbia, South Carolina 29260

(803) 782-4100

*Attorneys for the Defendants*

Columbia, South Carolina  
January 30, 2019

STATE OF SOUTH CAROLINA  
COUNTY OF Greenville  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2300311

Terence Graham  
PLAINTIFF(S)

Full Logistics Inc  
DEFENDANT(S)

**EXHIBIT**  
**2**

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

Kerri Rupert and Ronald Diegel's Motion to be Relieved as Counsel for Full Logistics is granted. Ms. Dorothy H. Hogg of Fulcher Hagler, LLP. is now the new Counsel of record for the Defendant Full Logistics.

**ORDER INFORMATION**

This order  ends  does not end the case.  See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/05/2019 .

Kerri Rupert for Full Logistics Inc  
William Layton Duncan  
Kristine Jaye Braswell-Amin  
Peter H. Dworjanyn for Trustgard Insurance Company  
Brian T. Smith for Terence Graham  
William Franklin Barnes, III for Terence Graham

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**

**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Greenville Common Pleas

**Case Caption:** Terence Graham vs. Johnnie William Foster , defendant, et al  
**Case Number:** 2017CP2300311  
**Type:** Order/Electronic Form 4

So Ordered

s/Alex Kinlaw, Jr., #2763



6. I made numerous attempts to communicate with Drico Fuller to determine his knowledge of the lawsuit and service of process. I called various telephone numbers found in the claims file and online as possibly being associated with Fuller or his businesses. However, I was unsuccessful in reaching him. On Monday, October 29, 2018, I sent an email to an address found in the claims file for Drico Fuller, [fulllogistics@hotmail.com](mailto:fulllogistics@hotmail.com), which stated the following:

I am an attorney in Columbia, SC and my firm has been retained by Grange Insurance in connection with an accident that took place in January 2014 involving one of your trucks and a lawsuit arising out of that accident. I have been trying to reach you to discuss certain matters regarding this accident and lawsuit, but I am unsure if my contact information is correct. Can you please give me a call at (803) 807-7891 as soon as you are able?

7. After these initial efforts to reach Fuller were unsuccessful, Larry Nelson, an investigator at Collins & Lacy, was asked to attempt to locate and contact Mr. Fuller. On October 30, 2018, Nelson had two separate telephone conversations with Mr. Fuller. Nelson came into my office in the midst of one of these telephone conversations in an attempt to get him to speak with me, but Fuller hung up the telephone on Nelson mid-conversation.

8. Immediately following this call which ended in my office, Mr. Nelson informed me that Fuller represented that he had an attorney named Michael Johnson of North Carolina. Based on this statement, I searched the online bar directories for licensed attorneys in North Carolina and South Carolina with the name of Michael Johnson. I contacted or attempted to contact several of these attorneys, but I was unable to make contact with anyone familiar with Mr. Fuller and never was able to verify that there was an actual attorney by the name of Michael Johnson representing Mr. Fuller.

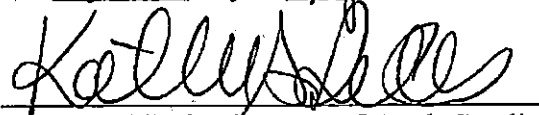
9. On November 28, 2018, at 11:27 AM, I received a telephone call from Mr. Fuller and I would describe his tone as agitated. At several instances in the conversation, he interrupted my attempts to ask him questions or otherwise engage in the conversation. Mr. Fuller stated to me

he was receiving a lot of letters from attorneys regarding this lawsuit and he did not know why because he was personally served process and not his wife. Mr. Fuller refused to answer any questions about the timing and circumstances of the alleged service of process. At one point, Mr. Fuller made a vague comment about being served on or in his truck, but he refused to provide me any further detail on the meaning of this statement. The large default judgment was noted and Mr. Fuller was asked to cooperate with the defense attorneys assigned to him by Trustgard. In response, Mr. Fuller stated he had insurance and the lawsuit was the insurance company's problem, not his, and he wanted to be done with it. The issue of Trustgard's lack of notice of the lawsuit was brought up, but Fuller disputed that Trustgard did not have notice. When pressed on what he meant by that statement, Mr. Fuller would not provide further details and was evasive. After Mr. Fuller was asked additional questions, his tone grew more agitated and he abruptly hung up the telephone.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.

  
Michael R. Burchstead

Sworn to and subscribed before me  
this 12<sup>th</sup>, day of April, 2019.

  
Notary Public for the State of South Carolina

My Commission Expires: 7/10/2028



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EXHIBIT

4

iMessage

Mon, Dec 3, 7:32 PM

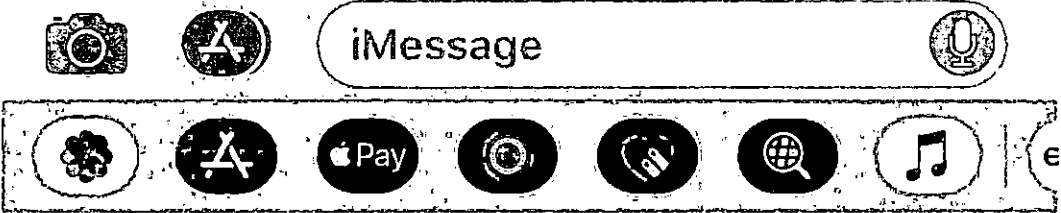
Mr. Fuller,  
 My name is Keith Johnson, I'm a private investigator and I work for an attorney that represents your insurance company.  
 It's very important that I speak to you.  
 Please call me at [redacted] 9806

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





+1 [redacted]-9806 >

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.

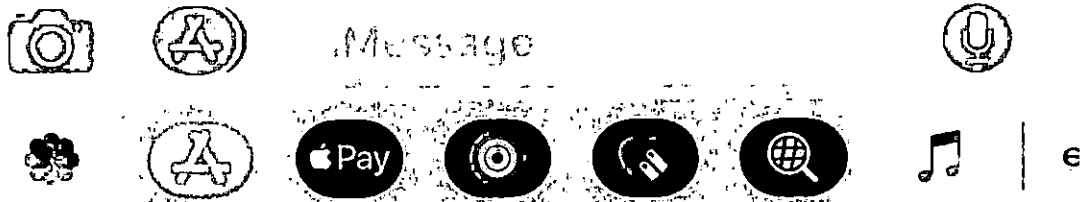
I can email you the information if you don't trust me.

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





+1 [redacted] -9806-

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



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

Sun, Dec 9, 7:48 AM

Fuller, when Bridget accepted service for the process that



iMessage



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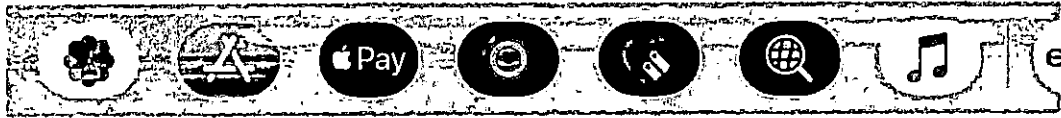
+1 [REDACTED] -9806 >

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.



iMessage

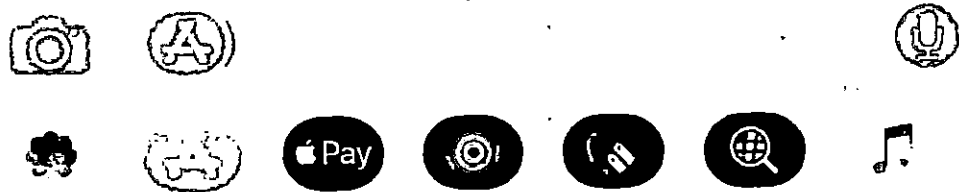




+1 [redacted]-9806

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.

Please please don't say I'm not asking grown again I'm not worried about being servered I been servered 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 lie I'm not going to do that. I will tell any judge in any court that I got served, I sent the servered papers to the insurance company.





+1 [REDACTED] -9806 >

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 servered 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 servered . 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



iMessage



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RECEIVED HONGKING

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.



iMessage



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+1 [redacted]-9806 >

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.

Thu, Dec 13, 11:04 AM

Hey, call me back

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

Mr. Fuller, if you will tell me where you are, I will come to you. We can



iMessage



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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
 )  
TERENCE GRAHAM, )  
 )  
Plaintiff, )  
 )  
 )  
v. )  
 )  
FULL LOGISTICS, INC., )  
 )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO.: 2017-CP-23-00311

**ORDER**

**EXHIBIT**  
**5**

This matter came before the Court on April 24, 2019, for hearing on Trustgard Insurance Company’s (“Trustgard”) Motion to Intervene and Motion to Set Aside Default Judgment and Defendant Full Logistics, Inc.’s (“Full Logistics”) Motion to Set Aside Default Judgment. All parties were represented by their respective counsel. After careful consideration, a review of the arguments presented by counsel at the hearing, and review of the materials submitted, the Court grants Trustgard’s Motion to Intervene for the sole purpose of posing its Motion to Set Aside Default but denies Trustgard’s Motion to Set Aside Default Judgment and denies Full Logistics’ Motion to Set Aside Default Judgment.

**FACTS**

This case arises from an accident that occurred on January 29, 2014, in which the Plaintiff, Terence Graham (“Graham”), was a passenger in a Full Logistics’ tractor trailer operated by Johnnie Foster. (Compl. ¶¶ 13-14). Wintery weather conditions persisted throughout the day, and Mr. Foster drove too fast for the road conditions, causing him to lose control of the vehicle and collide with a guard rail. (*Id.* at ¶¶ 18-19). The accident led to serious physical injuries for Graham. (*Id.* at ¶ 20). Trustgard issued a Policy of Insurance to Full Logistics, which was in effect at the time of the accident. (Trustgard’s Mem. in Supp. Mot. to Int. at 1). Trustgard was notified of the accident and began its investigation on January 31, 2014. (*Id.* at 2).

Graham filed the Summons and Complaint in this action on January 23, 2017. (Compl.). At a hearing on January 8, 2019, Full Logistics’ owner, Drico Fuller (“Fuller”), testified under oath that he

was served with process. (Graham Ex. 12). After Full Logistics failed to timely appear, default was entered and Judge Verdin held a damages hearing on June 26, 2018. (Damages Ord.). Full Logistics received notice of the damages hearing and did not appear. (Damages Ord.). On July 24, 2018, Judge Verdin entered an Order of Damages by Way of Default and awarded Graham \$1,843,349.73 in actual damages and \$1,000,000.00 in punitive damages. (Damages Ord.).

In October 2018 Trustgard retained counsel in this action. (Burchstead Aff. ¶ 5). As early as November 8, 2018, Trustgard's counsel communicated with counsel for Graham. (Graham Ex. 7). On November 28, 2018, Trustgard's counsel, Michael Burchstead, spoke with Fuller and learned that Fuller was personally served with process. (Burchstead Aff. ¶ 9). The next day, on November 29, 2018, counsel retained by Trustgard to defend Full Logistics filed a 60(b) Motion arguing that Full Logistics was "never properly served under Rule 4", SCRCP. (Full Logistics' Mot. to Vacate at 1). Full Logistics' counsel retained a private investigator, Keith Johnson, to locate Fuller. (Graham Ex. 8). Between December 3rd and 5th 2018, Johnson also became aware through a series of text messages that Fuller was personally served and turned everything over to Trustgard. (Graham Ex. 9). On December 13, Fuller again communicated with Johnson in a text message that he was served and the insurance company "dropped the ball". (Graham Ex. 9). At a January 8, 2019 hearing before the Court, Drico Fuller appeared and testified under oath that he was served and turned everything over to the insurance company: "I got served"; "They dropped the ball"; "When they served me, I sent it to them"; "I got served at my place of business". (Graham Ex. 12 – Tr. p. 10, ll. 11-22). Following continuation of the January 8, 2019 hearing, Trustgard moved on February 22, 2019, to intervene in this action to seek to set aside the default judgment.

### FINDINGS

#### **I. TRUSTGARD IS ENTITLED TO PERMISSIVE INTERVENTION FOR THE PURPOSE OF POSING ITS MOTION TO SET ASIDE DEFAULT JUDGMENT**

Trustgard argues that it is entitled to intervention as a matter of right and permissive intervention. (Trustgard Memo. in Support pp. 9-14). The Court finds that Trustgard cannot satisfy the requirements for intervention as a matter of right but grants the Motion to Intervene to pose the Motion to Set Aside the Default Judgment on permissive intervention.

Rule 24(a), SCRPC, governs intervention as a matter of right and provides in part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties.

Rule 24(a), SCRPC.

An applicant seeking to intervene as a matter of right must satisfy the following factors: (1) establish timely application; (2) assert an interest relating to the property or transaction; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. Berkeley Electric v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). While needing to satisfy all four factors for intervention as a matter of right, the Court finds Trustgard cannot satisfy any of the four factors. Although retaining counsel in October 2018 (Burchstead Aff. ¶ 5), Trustgard did not file its Motion to Intervene until February 22, 2019. The passage of over four months since retaining counsel does not establish a timely application in light of Trustgard moving after the January 8, 2019 hearing that was continued before deciding to intervene. Trustgard does not satisfy the first factor for intervention as a matter of right.

Even if it could satisfy a timely application, the Court also finds Trustgard cannot establish an interest relating to the property or transaction based on the South Carolina Supreme Court's holding in

Ex Parte Gov't Employee's Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007). Ex Parte GEICO involved a family court action where GEICO sought to intervene as a finding of common law marriage may allow stacking multiple vehicles for underinsured coverage. Id. at 134, 644 S.E.2d at 700. The Supreme Court denied GEICO's motion to intervene, holding that GEICO "has no real interest in whether Cooper and Goethe have a valid common law marriage." Id. at 138, 644 S.E.2d at 702. The Supreme Court explained that "GEICO's interest is in the financial implications of the family court's decision, which is peripheral to the subject matter before the court." Id. at 138-39, 644 S.E.2d at 702. Thus, even though GEICO argued that the decision of the family court "would impact GEICO's ability to protect its interests under the insurance policy issued to Goethe," the Supreme Court found any such interest was not "sufficiently related to the subject matter of the action" to warrant intervention. Id. at 134-35, 139, 644 S.E.2d at 703. Trustgard does not satisfy the second factor for intervention as a matter of right.

Even if Trustgard could satisfy the first two factors, it cannot demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest. Trustgard's only interest is in the coverage it will be required to provide in satisfaction of the judgment against its insured, Full Logistics. However, Trustgard has other means to protect its interests with respect to coverage, such as through a declaratory judgment action. Trustgard does not satisfy the third factor for intervention as a matter of right.

Even if Trustgard could satisfy the first three factors, it still cannot satisfy that its interest is inadequately represented by other parties. Trustgard chose, retained, and is paying for counsel to defend Full Logistics, and Full Logistics has filed its own Motion to Set Aside Default Judgment that is before the Court. Trustgard does not satisfy the fourth factor for intervention as a matter of right.

Although ruling Trustgard cannot intervene as a matter of right, the Court grants Trustgard's Motion to Intervene on the basis of permissive intervention. Permissive intervention is governed by Rule 24(b) and provides in part:

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . When exercising its discretion the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 24(b), SCRC.P.

Permissive intervention is appropriate where (1) the applicant shows a claim or defense "involving a question of law or fact in common with the main action," and (2) the intervention does not "unduly delay or prejudice" the rights of the original parties. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 368 S.E.2d 72, 75 (Ct. App. 1988). The Court finds Trustgard meets the commonality requirement for permissive intervention. Additionally, the original parties – Graham and Full Logistics – will not be unduly prejudiced by allowing Trustgard to intervene for the sole purpose of posing its Motion to Set Aside Default Judgment. For these reasons, the Court grants Trustgard's Motion for Permissive Intervention for the limited purpose of posing its Motion to Set Aside Default Judgment.

## **II. THE COURT DENIES TRUSTGARD AND FULL LOGISTICS' MOTIONS TO SET ASIDE DEFAULT JUDGMENT**

Trustgard argues that the default judgment should be set aside under Rule 60(b) because the judgment is void due to insufficient service of process, or due to mistake, inadvertence, surprise, excusable neglect, or fraud. As will be set forth below, the Court finds Fuller testified under oath in Court that he was personally served and made a voluntary appearance, thus warranting the denial of Trustgard's 60(b) Motion.

### **A. Trustgard Does Not Satisfy The Standard For Relief Under Rule 60(b)**

Rule 60(b) states that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void . . . .” Rule 60(b), SCRPC. It is well established that the standard for relief under Rule 60(b) is more rigorous than the standard to set aside default under Rule 55(c). Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Rule 60(b) *requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise*, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. Id. at 608 (emphasis added). The intent of the rules is to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality. Id. “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) (emphasis added).

**1. The default judgment is not void under Rule 60(b)(4) because Full Logistics was properly served with the summons and complaint.**

Under Rule 60(b)(4), a court may relieve a party from a final judgment if the judgment is void. Rule 60(b)(4), SCRPC. A judgment is void if the court acts without personal jurisdiction. BB&T, 369 S.C. at 551, 633 S.E.2d at 503. Trustgard argues that the court did not have personal jurisdiction over Full Logistics because it was never properly served. Fuller testified under oath to the Court on January 8, 2019 that he was personally served: “I got served”; “When they served me . . . .”; “I got served at my place of business”. (Graham Ex. 12 – Tr. p. 10, ll. 11-22). Fuller not only acknowledged service in his testimony but also made a voluntary appearance on January 8, 2019. Rule 4(d), SCRPC (“Voluntary appearance by defendant is equivalent to personal service”). In his testimony on January 8, 2019, Fuller never wavered from his position that he received notice of the lawsuit and did not contest proper service. His testimony is corroborated by his phone communications with Michael

Burchstead on November 28, 2018 and text messages with Keith Johnson in December 2018. Based on Fuller's testimony regarding personal service, the Court has personal jurisdiction. The judgment is not void for lack of process, and the Court denies Trustgard's Motion to Set Aside Default Judgement.

**2. There is No Mistake, Inadvertence, Surprise, Excusable Neglect, Fraud, Misrepresentation, or Misconduct under Rule 60(b)(1) and Rule 60(b)(3)**

Under Rule 60, a judgment may also be set aside due to mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or misconduct. Rule 60(b), SCRPC. In determining whether a default judgment should be set aside for these reasons, courts should consider the promptness with which relief is sought, the reasons for failure to act promptly, the existence of a meritorious defense, and the degree of prejudice to the plaintiff if relief is granted. Rouvet v. Rouvet, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010). 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. The mistake, inadvertence, or excusable neglect must be passed on Fuller, not on Trustgard as Full Logistics' insurer. The Court denies Trustgard's Motion to Set Aside Default Judgment.

**3. There is No Prima Facie Evidence of a Meritorious Defense**

Even if the Court finds that Full Logistics had a valid reason that it failed to act promptly, its motion should be denied because there is no evidence of a meritorious defense. Full Logistics argues that it has a meritorious defense as required by Rule 60(b)(1) and Rule 60(b)(3). "To justify relief under this rule, *a party must establish that he has a meritorious defense . . .*" Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989) (emphasis added). "A meritorious defense is more than merely a factor to consider under certain 60(b) grounds for setting aside default judgments . . . not only must the movant make a proper showing he is entitled to relief based upon one of the

specified grounds, he must also make *a prima facie showing of a meritorious defense.*” McClurg v. Deaton, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008) (citing Stearns Bank Nat’l Ass’n v. Glenwood Falls, LP, 373 S.C. 331, 341, 644 S.E.2d 793, 798 (Ct. App. 2007) (emphasis added). “A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief.” Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). In Bowers, the Court of Appeals noted that Mr. Bowers, in moving under Rule 60(b), did not offer proof of a meritorious defense through affidavit. Id. at 68, 403 S.E.2d at 129. In holding Bowers did not present a meritorious defense the Court confirmed the established legal tenet that “[a]rguments of counsel are also not evidence.” Id. (citing McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (“This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.”)).

In this case, the burden was not satisfied with evidence by way of affidavit to show a meritorious defense. Unsupported argument from counsel cannot satisfy this burden. Full Logistics claims that it has the affirmative defense of an act of God. When a defendant pleads an act of God defense, “he must prove that the act of God is the sole proximate cause of the injury, and to do so, such defendant must of necessity prove that he is without negligence which contributed as a proximate cause.” Montgomery v. National Convoy & Trucking Co., 186 S.C. 167, 195 S.E. 247, 252 (1938). Here, Full Logistics has offered no evidence that an act of God was the sole proximate cause of the accident giving rise to this action. Full Logistics merely cites the complaint to show that it was snowing on the day of the accident and that equates to an act of God defense. Since neither Full Logistics nor Trustgard have offered evidence, by affidavit or otherwise, to show that the accident was the result of anything other than its negligence, it has not met its burden of proof to merit relief under Rule 60(b). The Motion to Set Aside Default Judgment is denied on this basis.

**4. Setting Aside the Default Judgment Would be prejudicial to Graham in light of Fuller's Testimony of Personal Service**

Even if there was a valid basis to vacate the default judgment under Rule 60(b), the prejudice to Graham also outweighs vacating the judgment. The events giving rise to this collision occurred on January 29, 2014. The Court entered judgment against Full Logistics on July 24, 2018. Vacating the judgment will start these proceedings anew, which will likely add several years before this matter is brought to a close. The Court has 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.

Having found Fuller made a voluntary appearance and service was waived, the Court likewise denies Full Logistics' Motion to Set Aside the Default Judgment.

**CONCLUSION**

For the reasons set forth above, the Court denies Trustgard's Motion to Intervene as a Matter of Right but grants the Motion for Permissive Intervention for the limited purpose to move to set aside the default judgment. The Court denies Trustgard's and Full Logistics' Motions to Set Aside Default Judgment.

Further, Defendant has moved that the ruling in this matter be stayed so that additional discovery can be conducted. 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. As discussed herein, the Court has conducted a deliberate inspection of the circumstances of default. Any inconsistencies in the affidavit of service are overcome by Fuller's acknowledgement and acceptance of service. The request for additional time and discovery suggests that Defendant realizes that it does not have sufficient evidence or information to meet its burden of providing that "particularized showing" required under

the law. The Court specifically finds that the Defendant has raised a suspicion of impropriety, but has failed to meet its burden of presenting a particularized showing that it is entitled to the requested relief.

IT IS SO ORDERED.

\_\_\_\_\_  
Robin B. Stilwell  
Judge, Thirteenth Judicial Circuit

August \_\_\_\_\_, 2019  
Greenville, South Carolina



Greenville Common Pleas

**Case Caption:** Terence Graham vs. Full Logistics Inc

**Case Number:** 2017CP2300311

**Type:** Order/Other

So Ordered

s/ Robin B. Stilwell 2158

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

Appellate Case No.: 2019-001506  
Trial Court Case No.: 2017CP2300311

**RECEIVED**  
JUN 11 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.

PROOF OF SERVICE

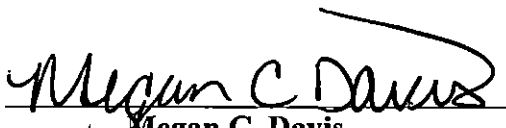
This is to certify that I, Megan C. Davis, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Respondent-Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within *Respondent-Appellant's Reply to Appellant-Respondent's Return to the Motion to Dismiss* to:

Michael R. Burchstead, Esquire  
Collins & Lacy, PC  
Post Office Box 12487  
Columbia, SC 29211

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

Shelley S. Montague, Esquire  
Janice Holmes, Esquire  
Gallivan, White & Boyd, P.A.  
1201 Main Street, Suite 1200  
Columbia, SC 29201

June 9, 2020  
Hampton, South Carolina

  
Megan C. Davis

# PMPED

PETERS | MURDAUGH | PARKER | ELTZROTH | DETRICK

ATTORNEYS AT LAW

June 9, 2020

William F. Barnes, III  
Direct Dial: (803) 914-6702  
Email: [wbarnes@pmped.com](mailto:wbarnes@pmped.com)  
Paralegal: [mdavis@pmped.com](mailto:mdavis@pmped.com)

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*

Dear Ms. Kitchings:

Please find enclosed a copy of Respondent-Appellant's Reply to Appellant-Respondent's Return to the Motion to Dismiss in the above-referenced case. The reply is being uploaded for filing to prevent any delay during the COVID-19 pandemic.

If you have any questions, please let us know.

With kind regards, I am

Sincerely,  


William F. Barnes, III

**RECEIVED**  
JUN 11 2020  
SC Court of Appeals

WFB/mcd  
Enclosures as stated

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



**First Class Mail**

**PMPED**

PETERS | MURDAUGH | PARKER | ELTZROTH | DETRICK  
101 Mulberry Street East  
Post Office Box 457  
Hampton, South Carolina 29924

TO:

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

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