

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**Aug 04 2020**

**SC Court of Appeals**

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No.: 2019-001506

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

In Re:

Terence Graham, ..... Plaintiff,

-v-

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

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

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**RESPONDENT-APPELLANT'S FINAL BRIEF**

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William F. Barnes, III  
PETERS, MURDAUGH, PARKER,  
ELTZROTH, & DETRICK, P.A.  
Post Office Box 457  
Hampton, SC 29924  
Phone: (803) 943-2111  
Email: [wbarnes@pmped.com](mailto:wbarnes@pmped.com)

-And-

Brian T. Smith  
714 Pettigru Street  
Greenville, SC 29601  
Phone: (864) 239-2007  
Email: [bsmith@btsmithlaw.com](mailto:bsmith@btsmithlaw.com)  
ATTORNEYS FOR RESPONDENT-APPELLANT

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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE LOWER COURT ABUSE ITS DISCRETION IN GRANTING TRUSTGARD'S MOTION FOR PERMISSIVE INTERVENTION WHEN ITS ARGUMENTS ARE IDENTICAL TO OTHER PARTIES?**

## STATEMENT OF THE CASE

This appeal arises from a judgment in favor of Respondent-Appellant, Terence Graham (“Graham”), for damages resulting from events that occurred on January 29, 2014, in which Graham was a passenger in a Full Logistics’ tractor-trailer operated by Johnnie Foster that struck a guardrail and wrecked.

Graham filed a Complaint against Full Logistics in the Greenville County Court of Common Pleas on January 23, 2017. (R. pp. 34-46). Full Logistics failed to file an Answer or otherwise appear as required by Rule 12, SCRCF, within the required time, and the Honorable Perry H. Gravely entered default against Full Logistics pursuant to Rule 55, SCRCF, on May 15, 2018. (R. pp. 6-7). The circuit court held a damages hearing on June 26, 2018. (R. pp. 8-17). Full Logistics received notice of the damages hearing but did not appear. (R. pp. 8-17; pp. 62-65). On July 24, 2018, the Honorable Letitia H. Verdin entered an Order of Damages and awarded Graham \$1,843,349.73 in actual damages and \$1,000,000.00 in punitive damages against Full Logistics. (R. pp. 8-17).

On November 29, 2018, Full Logistics filed a 60(b), SCRCF, motion alleging that it was “never properly served under Rule 4”, SCRCF. (R. pp. 66-67). The circuit court scheduled Full Logistics’ 60(b) Motion for January 8, 2019. At the hearing, Drico Fuller (“Fuller”), the owner of Full Logistics, appeared and, after being placed under oath, testified he received personal service of the lawsuit and turned the documents over to his insurance company. (R. p. 341, line 7 – p. 342, line 2). Following Fuller’s testimony, the court continued the hearing to a later date.

On February 22, 2019, Trustgard Insurance Company (“Trustgard”), Full Logistics’ insurer filed a Motion to Intervene and to Set Aside the Default Judgment against Full Logistics. (R. pp. 108-109). On April 24, 2019, The circuit court heard Trustgard’s Motion to Intervene

and to Set Aside the Default Judgment, at the same time it reconvened a hearing on Full Logistics' Rule 60(b) Motion. (R. pp. 23-33). On August 9, 2019, the Honorable Robin B. Stilwell issued an order granting Trustgard's Motion for Permissive Intervention for the sole purpose of posing its Motion to Set Aside Default Judgment but denied Trustgard's Motion to Set Aside Default Judgment. (R. pp. 23-33). Judge Stilwell also denied Full Logistics' Rule 60(b) Motion. (R. pp. 23-33).

On September 6, 2019, Trustgard filed its Notice of Appeal. (R. pp. 310-312). Graham served his cross-appeal on September 10, 2019. (R. pp. 314-317). Full Logistics does not appeal the circuit court's denial of its Rule 60(b) Motion.

### **FACTS**

On January 29, 2014, Graham was a passenger in a Full Logistics' tractor-trailer operated by Johnnie Foster. (R. p. 36, ¶¶ 13-14). Wintery weather conditions persisted throughout that day, and Mr. Foster drove too fast for the road conditions<sup>1</sup>, causing him to lose control of the vehicle and collide with a guard rail. (R. p. 37, ¶¶ 18-19). The accident caused serious physical injuries to Graham. (R. p. 37, ¶ 20). Trustgard insured Full Logistics through a policy in effect at the time of the accident. (R. p. 116). Trustgard was informed of the accident and began its investigation two days later, on January 31, 2014. (R. p. 117).

Graham filed the Summons and Complaint in this action on January 23, 2017. (R. pp. 35-46). Following the June 26, 2018 hearing, Judge Verdin entered judgment against Full Logistics on Graham's claims. (R. pp. 8-17). The Order finds that Full Logistics "was served the Summons and Complaint by way of process server on April 28, 2017" and that it "was served with notice of th[e] hearing on June 21, 2018 by way of regular U.S. mail." (R. p. 8). The circuit

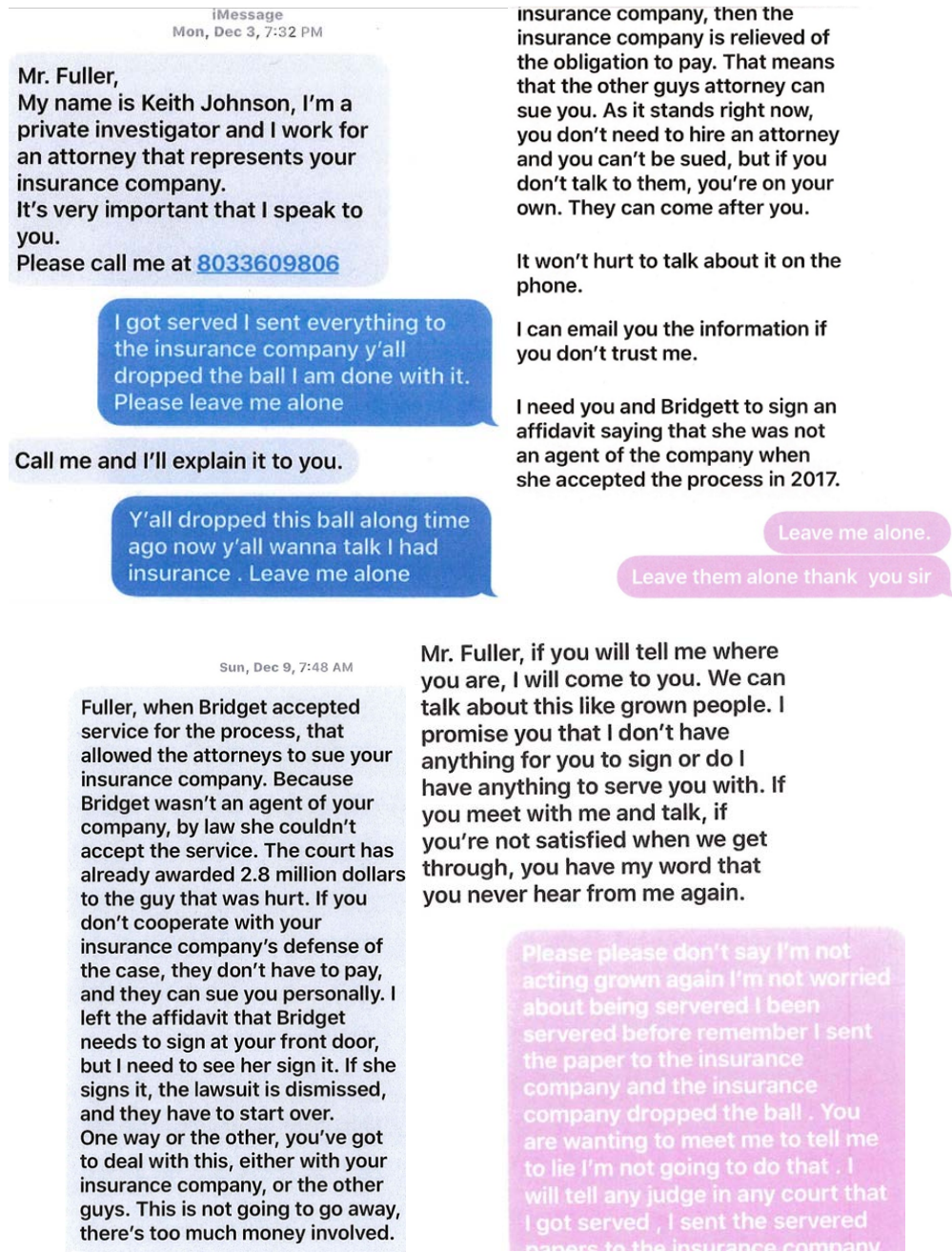
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<sup>1</sup> Mr. Foster was ticketed for traveling too fast for conditions during the wreck in violation of S.C. Code Ann. § 56-5-1520. (R. p. 213).

court noted that Foster “was traveling too fast for condition(s), lost control of the truck, struck a guardrail and jack-knifed.” (R. p. 8). Graham “experienced serious injury to his head, right arm, face, right elbow, right leg, and right ankle, as well as physical pain and mental suffering as a result of the motor vehicle collision of January 29, 2014.” (R. p. 9). He “was diagnosed with a traumatic brain injury” and incurred \$57,536.85 in medical expenses “with a projection of future medical expenses in the amount of \$456,912.88.” (R. pp. 8-9). After hearing the evidence, Judge Verdin found Graham has a “permanent injury and deficit and ongoing physical pain, mental suffering and loss of enjoyment of life.” (R. p. 9). Based on the testimony, Judge Verdin awarded \$1,843,349.73 in compensatory damages and \$1,000,000.00 in punitive damages. (R. pp. 10-11). The circuit court held that “[t]his amount is fair and reasonable based on all of the evidence and award[ed] damages in th[at] amount.” (R. p. 11).

After entry of the judgment against Full Logistics, Trustgard retained independent counsel in October 2018. (R. p. 113, ¶ 5). As early as November 8, 2018, Trustgard’s counsel communicated with counsel for Graham. (R. pp. 221-222). On November 28, 2018, Trustgard’s counsel spoke with Fuller – Trustgard’s insured – and learned that Fuller was personally served with process. (R. pp. 114-115, ¶ 9). Importantly, Trustgard’s counsel also learned that Fuller disputed that Trustgard did not have notice of the lawsuit. (R. pp. 114-115, ¶ 9). The next day, on November 29, 2018, counsel retained by Trustgard to defend Full Logistics filed a Rule 60(b) Motion arguing that Full Logistics was “never properly served under Rule 4”, SCRCF. (R. p. 66). While alleging that Full Logistics was never properly served in spite of Fuller’s representations to the contrary, counsel retained by Trustgard for the 60(b) Motion retained a private investigator, Keith Johnson (R. p. 223), to locate Fuller. Between December 3rd and 5th,

Johnson also became aware through a series of text messages that Fuller was personally served and turned the lawsuit over to Trustgard.<sup>2</sup> ((R. pp. 228-235).



Trustgard did not write Full Logistics until December 10, 2018, to inform it that counsel had been retained to defend Full Logistics with regard to the judgment. (R. pp. 236-237). On

<sup>2</sup> At the January 8, 2019 hearing Fuller provided counsel and the court copies of the his messages with Johnson.

December 13, Fuller again communicated to Johnson via text message that he received service and the insurance company “dropped the ball”. (R. pp. 228-235).

On January 4, 2019, Full Logistics filed a memorandum in support of its 60(b) Motion asserting four arguments: (1) “[t]he judgment is void under Rule 60(b)(4) because Full Logistics was never properly served with the Summons and Complaint”; (2) “[t]he judgment should be set aside under Rule 60(b)(1) because of surprise and Rule 60(b)(3) due to Plaintiff’s misrepresentations”; (3) “Full Logistics has a meritorious defense as required by Rule 60(b)(1) and Rule 60(b)(3)”; and (4) “[t]he Plaintiff will not suffer any prejudice if relief is granted.” (R. pp. 70-74).

At the January 8, 2019 hearing, Fuller appeared and after being placed under oath testified that he received personal service and turned everything over to the insurance company, confirming what Trustgard’s counsel and Keith Johnson already knew. (R. pp. 243-260). Following Fuller’s testimony, the circuit court continued Full Logistics’ 60(b) Motion.

Trustgard moved to intervene in this action on February 22, 2019 even though it had retained counsel over four months prior in October 2018 and knew as early as November 28, 2018, that Fuller received personal service and disputed Trustgard’s alleged lack of notice. (R. pp. 108-109).

On April 15, 2019, Trustgard filed its memorandum in support of the motion to intervene and motion to vacate that set forth arguments identical to those that Full Logistics set forth in its January 4, 2019 memorandum: (1) “[t]he judgment is void for improper service”; (2) “[t]he judgment should be set aside for mistake, inadvertence, surprise, or excusable neglect, or fraud”; (3) “Trustgard has several meritorious defenses to this complaint”; and (4) “Plaintiff will suffer no prejudice if relief is granted”. (R. pp. 130-133).

The circuit court heard Full Logistics' 60(b) Motion and Trustgard's Motion to Intervene and Motion to Set Aside Default Judgment on April 24, 2019. (R. pp. 23-33). The court denied Trustgard's Motion to Intervene as a matter of right but granted Trustgard's motion to intervene based on permissive intervention under Rule 24(b), SCRCF. (R. pp. 23-33). Judge Stilwell denied Full Logistics' 60(b) Motion, which it did not appeal and is the law of the case.

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

### **STANDARD OF REVIEW**

Under Rule 24(b)(2), SCRCF, permissive intervention is appropriate where (1) “an applicant's claim or defense and the main action have a question of law or fact in common” and (2) intervention does not “unduly delay or prejudice” the rights of the original parties. Rule 24(b), SCRCF. “[P]ermissive intervention should be allowed only where the prospective intervenor has a cause of action or defense it could bring or assert.” South Carolina Tax Com'n

v. Union County Treasurer, 295 S.C. 257, 263, 368 S.E.2d 72, 76 (Ct. App. 1988). The court has broad discretion in granting or declining to grant permissive intervention, and reversal of a denial of permissive intervention is subject to an abuse of discretion standard. Id. at 262, 368 S.E.2d at 75.

### **ARGUMENT**

The Court should dismiss the appeal because it cannot affect the legal status of the parties or the case. Regardless of what the Court does in this appeal the judgment still exists against Full Logistics because it did not appeal the denial of its 60(b) motion. Trustgard cannot seek to vacate the judgment on Full Logistics behalf when Full Logistics chose not to appeal. The real argument made by Trustgard is the one it is making in federal court regarding coverage for the judgment against Full Logistics. Trustgard is attempting to get multiple bites at the apple through multiple actions in multiple courts. In state court Trustgard is attempting to vacate the judgment when its insured does not appeal the denial of its 60(b) motion and says Trustgard “dropped the ball”. Trustgard simultaneously seeks a declaration in federal court that it does not have a duty to defend or indemnify Full Logistics but is facing a counterclaim for negligence and bad faith for the handling of this action. These separate but related actions necessarily impact each other.

This case presents the question of whether an insurer asserting identical arguments made and lost by its insured and without no independent cause of action asserted by or pending against it satisfies the commonality requirement for permissive intervention under Rule 24(b). The identical arguments put forth by Trustgard go to the requirement this Court held in S.C. Tax Comm’n v. Union County Treasurer, 295 S.C. 257, 368 S.E.2d 72, 75 (Ct. App. 1988), that it is not sufficient for a potential intevenor under Rule 24(b) to have identical arguments but must

instead have its own cause of action or defenses. In this case, Trustgard expressly chose not to assert a cause of action in state court and chose federal court instead. The lower court abused its discretion and committed reversible error in granting Trustgard's motion for permissive intervention.

#### **I. THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING TRUSTGARD'S MOTION FOR PERMISSIVE INTERVENTION**

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. Ex Parte Horry County State Bank, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004) (citing Black's Law Dictionary 826 (7th ed. 1999)). Intervention may be as a matter of right or permissive and is governed respectively by Rules 24(a) and (b), SCRCF, both of which are modeled after Rule 24 of the Federal Rules of Civil Procedure. Id. A majority of jurisdictions refuse to allow insurers to intervene in the underlying tort suit against their insureds because other mechanisms, like declaratory judgment actions, exist to protect the insurers' rights regarding coverage issues. See Allstate Ins. Co. v. Atwood, 319 Md. 247, 258, 572 A.2d 154, 159 (1990) ("the overwhelming majority of cases have held, in the conflict of interest situation presented by this case, that it is inappropriate for the insurer to intervene in the trial of the tort suit against its insured"); 1 Law and Prac. Of Ins. Coverage Litig. § 12:17.

The circuit court correctly denied Trustgard's motion to intervene on the basis of intervention as a matter of right under Rule 24(a), SCRCF. It held that Trustgard cannot satisfy any of the required four factors. Berkeley Electric v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990) ((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.); see also Ex parte Government Employees Ins. Co., 373 S.C. 132, 644 S.E.2d 699 (2007). Importantly, as to the third factor regarding the ability to protect its interest, the circuit court held that “Trustgard has other means to protect its interests with respect to coverage, such as through a declaratory judgment action.” (R. p. 26). Four days after the circuit court’s order Trustgard sought to protect its interests when it filed the declaratory judgment action in federal court and alleged it had no duty to defend or indemnify Full Logistics in this action.

The lower court incorrectly held that Trustgard was entitled to permissive intervention for the purpose of posing its Motion to Set Aside Default Judgment. 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), SCRCP.

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, 295 S.C. 257, 368 S.E.2d 72, 75.

S.C. Tax Comm’n requires reversal of the lower court’s decision to allow permissive joinder. In that case, Milliken & Company sued the Union County Treasurer and Auditor to collect \$87,554.40 in taxes paid under protest to Union County. Id. at 258, 368 S.E.2d at 73. The South Carolina Tax Commission (“Commission”) petitioned to intervene in the suit pursuant to Rules 24(a) – (b), SCRCP. Id. at 258-59, 368 S.E.2d at 73. The Commission argued that

although the taxes related to “county taxes” it should be allowed to intervene pursuant to Rule 24. Id. at 259, 368 S.E.2d at 73.

This Court analyzed the Commission’s motion under both Rule 24(a) (intervention as a matter of right) and 24(b) (permissive intervention). Id. In affirming the lower court’s denial of the intervention as a matter of right under 24(a), the Court noted that “[w]e are unable to discern from the Commission’s argument that its ultimate objective in this case is different from that of the Auditor and Treasurer.” Id. at 260-61, 368 S.E.2d 74. In order to warrant intervention under 24(b), a “mere general interest in the subject matter of the litigation is not sufficient.” Id. at 262, 368 S.E.2d at 75. The Court agreed with Milliken and noted that the “Commission has no claim or defense of its own, but attempts only to assert the Auditor’s and Treasurer’s defenses.” Id. at 263, 368 S.E.2d at 75. This Court explained when permissive intervention is warranted under Rule 24(b):

The typical situation for which the Rule was designed is one where the prospective intervenor might institute or be called upon to defend a separate proceeding that would substantially duplicate the one in question. With this analogy to permissive joinder, it seems clear the better rule is that permissive intervention *should be allowed only where the prospective intervenor has a cause of action or defense it could bring or assert.* Viewed in this light, the Commission could not become a party to suit where its claim or defense would be identical to the County Officers in the instant action.

Id. at 263-64, 368 S.E.2d at 75-76. (emphasis added).

**A. *Trustgard’s Arguments are Identical to the Arguments Put Forth by Full Logistics***

In this case, as in S.C. Tax Comm’n, Trustgard does not have a cause of action or defense it could assert but, rather, asserts arguments identical to those of Full Logistics. In its memorandum in support of the 60(b) motion, Full Logistics put forth four main arguments: (1) “[t]he judgment is void under Rule 60(b)(4) because Full Logistics was never properly served

with the Summons and Complaint”; (2) “[t]he judgment should be set aside under Rule 60(b)(1) because of surprise and Rule 60(b)(3) due to Plaintiff’s misrepresentations”; (3) “Full Logistics has a meritorious defense as required by Rule 60(b)(1) and Rule 60(b)(3)”; and (4) “[t]he Plaintiff will not suffer any prejudice if relief is granted.” (R. pp. 70-74). Trustgard asserted the same four arguments: (1) “[t]he judgment is void for improper service”; (2) “[t]he judgment should be set aside for mistake, inadvertence, surprise, or excusable neglect, or fraud”; (3) “Trustgard has several meritorious defenses to this complaint”; and (4) “Plaintiff will suffer no prejudice if relief is granted”. (R. pp. 130-133). Following the January 2019 hearing where Fuller testified under oath that he was personally served and turned everything over to the insurance company, Full Logistics did not abandon its arguments in support of the 60(b) motion. At the hearing in April 2019, Full Logistics still argued the “default judgment should be vacated” on the grounds of conflicting service. (R. p. 376, lines 21-22). The circuit court denied Full Logistics’ 60(b) motion and that unappealed order is the law of the case.

Trustgard has only one cause of action to assert – the one related to coverage that filed in federal court. Against this backdrop, the lower court incorrectly held that Trustgard met “the commonality requirement for permissive intervention.” (R. p. 27). Here, there is no question of law or fact in this action that is common to Trustgard’s interest. Trustgard’s interest in this action is not in determining the liability or damages of Full Logistics but rather the financial implications from its Policy insuring Full Logistics. Full Logistics’ liability and damages were already determined by the circuit court resulting in a judgment against Full Logistics that it did not appeal. Trustgard then filed a declaratory judgment action in federal court seeking a declaration that it has no duty to defend or indemnify Full Logistics, thereby eliminating any commonality to the underlying action.

A holding affirming the permissive intervention would necessarily make an insurer a party in an underlying tort action. However, the claim against the insurer would be either related to coverage or a potential bad faith/negligence action. In this case, those claims are asserted in the federal court declaratory judgment action and are not common to the issues here.

***B. Trustgard's Intervention Delays This Action and Prejudices Graham***

Trustgard's attempt to vacate the judgment delays this action when Full Logistics did not appeal the denial of its 60(b) motion, and prejudices Graham by forcing the briefing and potential argument of an appeal rather than simply addressing the declaratory judgment action in federal court related to coverage. As Trustgard's intervention further delays this action and prejudices Graham, the lower court abused its discretion and committed reversible error in granting Trustgard's motion for permissive intervention.

**CONCLUSION**

The lower court abused its discretion in granting Trustgard's Motion for Permissive Intervention under Rule 24(b). There is no commonality as Trustgard is asserting identical arguments put forth by a party. The own cause of action it could assert is for a declaratory judgment, which Trustgard filed four days after the circuit court entered its Order. The prejudice and delay to Graham and the other parties is substantial as now Graham and the other parties are handling two cases – one in state court and another in federal. For these reasons, the lower court's order granting Trustgard's Motion for Permissive Intervention should be reversed.

**[SIGNATURE TO FOLLOW ON NEXT PAGE]**

Respectfully submitted,

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

August 4, 2020  
Hampton, South Carolina

BY: \_\_\_\_\_

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

-And-

Brian T. Smith  
714 Pettigru Street  
Greenville, SC 29601  
Phone: (864) 239-2007

ATTORNEYS FOR RESPONDENT-APPELLANT

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The Honorable Robin B. Stilwell, Circuit Court Judge

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-v-

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

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

**CERTIFICATE OF COUNSEL**

The Undersigned hereby certifies that the Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



William F. Barnes, III  
PETERS, MURDAUGH, PARKER, ELTZROTH, &  
DETRICK, P.A.  
Post Office Box 457  
Hampton, SC 29924

August 4, 2020  
Hampton, South Carolina

Brian T. Smith  
714 Pettigru Street  
Greenville, SC 29601  
*Attorneys for Respondent-Appellant Terence Graham*