THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell

Appellate Case No. 2019-001506

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

In Re:

Terence Graham,……...Plaintiff,

v.

Full Logistics, Inc.,……..Defendant,

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

FINAL REPLY BRIEF
OF RESPONDENT-APPELLANT TERENCE GRAHAM

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FACTS

Respondent-Appellant Terence Graham relies on and incorporates the statement of facts in his prior briefs. It is undisputed that Trustgard knew by November 28, 2018, that Mr. Fuller took the position that he received service of process for Full Logistics and handed it over to Trustgard for defense. (R. pp. 113-115). With this knowledge, the counsel hired by Trustgard for Full Logistics filed a motion ***the following day*** to set aside default based on improper service. (R. pp. 66-67). Trustgard knew the counsel it hired to defend Full Logistics continued to take the position that Full Logistic was not served for over a month until Mr. Fuller appeared in court on January 8, 2019. (R. pp. 68-102; pp. 332-349). Only after the court and Graham learned of Mr. Fuller's position did Trustgard deem it necessary to attempt to intervene.

ARGUMENT

Graham incorporates the arguments made in his initial Brief and responds here to only specific arguments made by Trustgard.

Trustgard's intervention arguments must be analyzed based on its stated purpose for intervention. Trustgard represents that it seeks intervention "for the purpose of moving to set aside a default judgment" because Mr. Fuller "continue[d] to assert that he had been served with the Summons and Complaint as Full Logistics registered agent, despite his confusion regarding when he received certain documents" and thus "he has made it impossible for counsel for Full Logistics to seek to set aside the default judgment that was entered against Full Logistics." (Br. of App.-Resp't pp. 2, 16, 18). In other words, Trustgard wants to argue that service did not occur and Mr. Fuller admitted service. Because Mr. Fuller maintained what he believes to be true—receipt of service of process—Trustgard wants to intervene to take a contrary position. Notably, Full Logistics did not appeal and the law of the case as to it is that service was proper and the default

judgment is valid. An insurer should not be permitted to intervene in an action to take a position that its insured abandoned. This is an improper use of intervention. The dispute between Trustgard and Full Logistics should be decided in the pending declaratory judgment action rather than this tort action.

I. THE LOWER COURT ERRED IN GRANTING PERMISSIVE INTERVENTION

The lower court erred in granting permissive intervention because Trustgard does not have a claim or defense that it, as a party, can bring or assert. In other words, Trustgard cannot "institute or be called upon to defend a separate proceeding that would substantially duplicate the one in question" and, therefore, permissive intervention is unnecessary. *S.C. Tax Comm'n v. Union Cnty. Treasurer*, 295 S.C. 257, 263, 368 S.E.2d 72, 75-76 (Ct. App. 1988).

Trustgard falsely states that it "and Full Logistics are not aligned regarding whether the default judgment should be set aside." (Br. pp. 19-20). It is undisputed that, after Mr. Fuller testified to service of process, Graham requested Full Logistics to withdraw its 60(b) motion to set aside the default judgment, which Full Logistics refused. (R. pp. 274-275). At no time did Full Logistics withdraw its 60(b) motion. Instead, Full Logistics pursued its 60(b) motion in spite of Mr. Fuller's testimony to the contrary. (R. pp. 376-377). Full Logistics fully pursued the exact arguments Trustgard wants to make—despite Mr. Fuller's testimony of service, service was still improper and the default judgment should be set aside. This shows that Trustgard "has no claim or defense of its own, but attempts only to assert [Full Logistics'] defenses", and the lower court abused its discretion in granting the motion for permissive intervention. *S.C. Tax Comm'n*, 295 S.C. at 263, 368 S.E.2d at 75.

Trustgard's assertions that Graham's reliance on *S.C. Tax Comm'n* is "misplaced" and he "misapprehends" the analysis are incorrect. Trustgard misstates the analysis. It argues *S.C. Tax*

Comm'n held that, if the intervenor "had an identical claim or defense, it would have been allowed to intervene." (Br. of App. p. 20). The opinion says no such thing.

Trustgard misses the distinction between having a claim "common to the main action" that an intervenor could assert or defend "on its own" versus having "no claim or defense of its own but attempt[ing] only to assert [a party's] defenses" or claim. *S.C. Tax Comm'n*, 295 S.C. at 263, 368 S.E.2d at 75. This Court distinguished between an intervenor who has an independent claim or defense of its own with questions of law or fact that are common to the main action and a claim or defense that is identical to one already asserted by a party. This distinction is made plain by the Court's statement that its "view is strengthened by the interpretation of the requirements of Rule 24(b) by the federal courts" that the party seeking permissive intervention "must establish a basis for federal subject matter jurisdiction ***independent of*** the court's jurisdiction over the underlying action." *Id.* at 264, 368 S.E.2d at 76 (emphasis added).

Trustgard "moved to intervene to assert those defenses that Full Logistics should be asserting on its own behalf and for some unknown reason its agent is not." (Br. of App-Resp't pp. 21-22). This is factually incorrect because Full Logistics fully pursued its 60(b) motion. The reason for intervention is for Trustgard to usurp the defense in conflict with its insured whom it is simultaneously suing in Federal Court. The lower court abused its discretion in finding Trustgard met the commonality requirement, and this Court should reverse.

The lower court also erred in finding intervention will not unduly delay or prejudice the adjudication of the original parties' rights. (R. p. 27). Trustgard's argument that intervention is not prejudicial to Full Logistics is simply that it is protecting Full Logistics from itself. (Br. of App-Resp't p. 22). This overlooks the fact that Full Logistics may simply be telling the truth about service and, therefore, is not a basis for finding an absence of prejudice.

Trustgard incorrectly argues that Graham failed to preserve an argument about prejudice or abandoned the issue. (Br. of App.-Resp't pp. 22-23). "In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000). Graham raised the issue in his memorandum in opposition to Trustgard's motion to intervene. He argued intervention is prejudicial because it will inject a conflict of interest between Trustgard and Full Logistics into the action and that "[a]llowing Trustgard to intervene would cause undue delay in the resolution of the action, as it has already been almost nine months since Judge Verdin issued a judgment against Graham." (R. p. 209). The lower court ruled that Full Logistics and Graham "will not be unduly prejudiced" by Trustgard's intervention. (R. p. 27). The issue is preserved.

Graham's reference to the federal court action in its argument to this Court does not affect issue preservation. Trustgard chose to file a federal court action against Full Logistics four days after the lower court issued its order and to simultaneously pursue this appeal. That something happens after the filing of the order on appeal does not make it irrelevant to the appeal. Appellate Courts may consider intervening events and their impact on the issues before them. *See, e.g.*, *Wachesaw Plantation E. Cmty. Servs. Ass'n v. Alexander*, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) ("Moot appeals result when intervening events prevent a decision on appeal from having an immediate impact on the parties. Appellate courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." (internal quotation and alteration marks omitted)).

Graham's initial Brief plainly raises this argument on appeal. It is placed under a separate heading and articulates a basis for finding undue delay and prejudice. (Br. of Resp't-App p. 13). Intervention "delays this action when Full Logistics [the tortfeasor] did not appeal the denial of its

60(b) motion." (Br. of Resp't-App p. 13). Graham is prejudiced by the continuation of this action necessitating briefing and possibly oral argument, and delaying the final judgment.

The lower court abused its discretion by granting permissive intervention in this case, and the Court should reverse.

II. THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION TO DENY TRUSTGARD'S MOTION FOR INTERVENTION OF RIGHT

Trustgard raises as an "additional sustaining ground" that it is entitled to intervention of right. (Br. p. 24). This situation is different from the usual sustaining ground because the lower court actually ruled on the issue by denying Trustgard's motion for intervention of right. The lower court found Trustgard failed to prove each of the four elements of intervention of right. Therefore, Trustgard must show the lower court abused its discretion in denying the motion for intervention of right as to each of the elements. *Berkeley Elec. Coop., Inc. v. Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990) ("In reviewing the granting or denial of a Rule 24(a)(2) motion, we must determine whether the trial judge abused his discretion."). Trustgard fails to meet this burden, and the Court should decline to grant intervention of right.

Rule 24(a)(2), SCRCP, provides for intervention as a matter of right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"Intervention of right requires a direct, substantial, legally protectable interest in the proceedings." *Ex Parte Reichlyn*, 310 S.C. 495, 499, 427 S.E.2d 661, 664 (1993). A party moving for intervention of right under Rule 24(a)(2), SCRCP, must: 1) establish timely application; 2) assert an interest relating to the property or transaction which is the subject of the action; 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. *Id.* at 498, 427 S.E.2d at 663. "[F]ailure to satisfy any one of the four requirements precludes intervention." *Id.* at 500, 427 S.E.2d at 664. The lower court held "Trustgard cannot satisfy ***any*** of the four factors." (R. p. 25) (emphasis added).

As to timeliness, the lower court held Trustgard waited four months after it hired counsel in this matter to file for intervention. (R. p. 25). Trustgard also notably waited until ***after*** the hearing at which Mr. Fuller testified to service of process before filing for intervention. *Id.* These delays do "not establish a timely application." *Id.*

As to an interest relating to the property or transaction, the lower court cited to *Ex Parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007). It held that an interest in the financial implications of a case that is peripheral to the subject matter of the case is not a sufficient interest for intervention of right, and Trustgard does not satisfy this factor. (R. p. 26).

As to showing that without intervention, disposition of the action may impair or impede Trustgard's ability to protect that interest, the lower court found Trustgard's only interest is in the insurance "coverage it will be required to provide in satisfaction of the judgment against" Full Logistics. (R. p. 26). Trustgard "has other means to protect its interests with respect to coverage, such as through a declaratory judgment action." *Id.*

Finally, as to whether Trustgard's interest is inadequately represented by other parties, the lower court found Trustgard "chose, retained, and is paying for counsel to defend Full Logistics" which filed a motion to set aside the default judgment. (R. p. 26).

A. The lower court did not abuse its discretion in finding Trustgard's Motion to Intervene was Untimely

The lower court correctly held that Trustgard's filing of its motion to intervene was untimely. (R. p. 25).

> [A] court must consider the following factors in determining whether a motion to intervene is timely:

> 1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; 2) the reason for the delay; 3) the stage to which the litigation has progressed; and 4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denying intervention.

Ex Parte Reichlyn, 310 S.C. 495, 500, 427 S.E.2d 661, 664 (1993). Trustgard cites to these elements but fails to address them in its argument.

As to the first element, three months passed from when Trustgard knew of its alleged interest in the action and when it filed for intervention. Trustgard states that the impetus for moving to intervene was Mr. Fuller's testimony at the January 8, 2019 hearing that he received service of process. (Br. of App-Resp't p. 26). However, Trustgard knew that on November 28, 2018, when Mr. Fuller told Trustgard's counsel that he received personal service and disagreed with Trustgard's position that it did not receive notice of the lawsuit. (R. pp. 113-115). Under Federal Rule of Civil Procedure 24(a), which is identical to Rule 24, SCRCP, in all relevant respects, "[a] motion to intervene is timely if it is filed promptly after a person obtains actual or constructive notice that a pending case threatens to jeopardize his rights." *R & G Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 584 F.3d 1, 8 (1st Cir. 2009). Trustgard waited until February 22, 2019, three months after it had actual notice of Mr. Fuller's position on service and notice, to move to intervene. So long as only it and counsel for Full Logistics knew that Mr. Fuller said he received service and turned it over to Trustgard, Trustgard felt protected. When that fact came out in open court, Trustgard decided to move for intervention. The lower court correctly found this untimely.

As to the second element, Trustgard argues no reason for its delay. However, it is apparent from the factual chronology and the representations in its Brief that it delayed moving to intervene with the hope that Mr. Fuller would change his position. This is not a valid reason.

As to the third element, when Trustgard moved to intervene, Full Logistics already had a pending motion to set aside default and Trustgard wanted to insert itself only to take a position

contrary to its insured. The litigation already progressed to fully presenting the motion to set aside the default judgment before Trustgard attempted to intervene.

As to the fourth element, the prejudices to the parties from granting intervention are apparent—time and expense briefing an issue another party already raised, delay in finality of the case, and the insertion of an unnecessary confusing procedural aspect to the case, to name a few. On the other hand, there is no prejudice to Trustgard from the denial of intervention because Full Logistics already made the same arguments Trustgard argued in its 60(b) motion.

The lower court did not abuse its discretion in finding Trustgard's motion was untimely. The Court should affirm the lower court on this element and, for this reason alone, decline to find intervention of right as an additional sustaining ground.

B. The lower court did not abuse its discretion in finding Trustgard does not assert an interest relating to the property or transaction

Trustgard's interest is that it may have to pay the judgment on behalf of Full Logistics. Trustgard is actively fighting its obligation to pay in Federal Court—the proper forum for determining insurance benefits. The lower court correctly relied on *Ex Parte Gov't Employee's Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007), to hold Trustgard does not assert an interest relating to the property or transaction. (R. p. 26).

In *Ex Parte GEICO*, GEICO denied Mr. Cooper's claim to stack underinsured motorist coverage because it found he was neither the spouse nor the resident relative of the insured. 373 S.C. at 134, 644 S.E.2d at 700. Mr. Cooper then filed an action in family court to validate his common law marriage to the insured, and GEICO moved to intervene in the action arguing the family court's decision "would impact GEICO's ability to protect its interests under the insurance policy." *Id.* at 134-35, 644 S.E.2d at 700. The Supreme Court affirmed the family court's denial of GEICO's motion to intervene of right. It found GEICO does not have an interest relating to the

property or transaction that is the subject of the action because "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. Stated differently, "[t]he subject matter of the family court action in the instant case is the validity of a common law marriage, which does not involve a determination of insurance benefits." *Id.* at 139, 644 S.E.2d at 703.

The same reasoning and result apply to this appeal. The subject matter of the action in this case is the tort liability of Full Logistics to Mr. Graham and whether to set aside the default judgment. The case does not involve a determination of insurance benefits, which is the true interest of Trustgard. That determination is addressed in the pending Federal Court action. Trustgard attempts to distinguish *Ex Parte GEICO* by arguing its interest in setting aside the default judgment is "not peripheral to the subject matter" but is the issue in the case. (Br. of App-Resp't pp. 28-29). This is incorrect because Trustgard's interest is whether it is required to pay insurance benefits and not the underlying tort action. To hold otherwise would allow an insurer to intervene any time it disagrees with its insured and its insured's counsel in the defense of the tort action. Another error in this argument is that Trustgard states it wants "to give its insured an opportunity to defend the allegations in Graham's complaint" but Full Logistics can no longer do that because it did not appeal the denial of its motion to set aside the default, which is now the law of the case as to Full Logistics.

Trustgard's citations to *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), and *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013), are misplaced and irrelevant. Most notably, neither case involved a party's insurer seeking to intervene to set aside a default judgment when the insured was already a party and already moving to set aside the default

judgment. Neither case involved an appellate issue about intervention of right under Rule 24(a)(2), SCRCP. They are simply not applicable to the analysis before the Court.

In *McClurg*, a plaintiff injured in a car accident sued only the driver of the other vehicle and not the driver's employer. 380 S.C. at 567-68, 671 S.E.2d at 89-90. After the plaintiff obtained a default judgment against the driver, the employer moved to intervene to file a motion to set aside the default judgment. *Id.* at 569, 671 S.E.2d at 90. The lower court granted the motion to intervene but denied the motion to set aside the default judgment. *Id.* The decision to grant intervention *was not at issue on appeal*. *Id.* at 569, 671 S.E.2d at 90-91. The Court referenced the employer's financial interest in the action and responsibility for paying the judgment in explaining that the lower court granted the motion to intervene. *Id.* at 570, 671 S.E.2d at 91. The issues in *McClurg* are not relevant to the intervention of right issue in this case. That a defendant's employer was allowed to intervene after entry of a default judgment to make a motion to set aside a default judgment does not support an argument that Trustgard has in interest relating to the property or transaction that is the subject matter of this action.

In *Narruhn*, an injured plaintiff sued a nightclub and fellow patron who shot her at the nightclub. 404 S.C. at 339, 745 S.E.2d at 91. An order of reference directed a special referee to hold supplemental proceedings to locate any assets available to satisfy the judgment. *Id.* The special referee granted the plaintiff an assignment of any rights of the nightclub against the insurer under its liability insurance policy. *Id.* When the plaintiff filed suit against the insurer, it filed a Rule 60(b), SCRCP, motion to set aside the special referee's order granting the assignment of rights. *Id.* The lower court denied the motion in part because it found the insurer did not have standing to challenge the order since it was not a party to the order. *Id.* The Supreme Court affirmed, finding that because the insurer "has not established that it was a party or the legal

representative of a party, it was not entitled to seek relief under the provisions of Rule 60(b)." *Id.* at 342, 745 S.E.2d at 92. Trustgard cites to the case and argues "Notably, the Court did not determine that the insurer would be barred from intervening in the action if it had sought to do so." (Br. of App-Resp't p. 27). It is not notable that the court did not decide an issue not presented in a case. There is no guidance or precedent from an opinion not ruling on an issue that no party raised or discussed. *Narruhn* does not support Trustgard's argument on this element.

The Court should affirm the lower court on this element and, for this reason alone, decline to find intervention of right as an additional sustaining ground.

C. The lower court did not abuse its discretion in finding Trustgard cannot establish that without intervention, disposition of the action may impair or impede its ability to protect its interest

The lower court correctly held Trustgard may protect its interest—the insurance coverage it may be required to pay—by way of a declaratory judgment action. (R. p. 26). Four days after the lower court filed its order, Trustgard did just that by filing a declaratory judgment action against Full Logistics in Federal Court. This negates any argument that "it would have difficulty adequately protecting its interests if not allowed to intervene." *Berkeley Elec. Coop., Inc.*, 302 S.C. 186, 190, 394 S.E.2d 712, 715 (1990).

Trustgard's argument on this point is that it needs to intervene to protect Full Logistics from itself. It asserts that Mr. Fuller's position that he received service of process shows "he is not interested in cooperating to work towards having the default judgment set aside", *i.e.*, that he is not interested in saying what Trustgard wants him to say regardless of the truth or falsity of it. (Br. of App-Resp't p. 29). That does not demonstrate that Trustgard will have difficulty protecting its interest to decline coverage of the judgment.

The Court should affirm the lower court on this element and, for this reason alone, decline to find intervention of right as an additional sustaining ground.

D. The lower court did not abuse its discretion in finding Trustgard's Interest is Adequately Represented by Full Logistics

The burden of demonstrating inadequacy of representation is on the entity or person moving for intervention. *Ex Parte Horry Cnty. State Bank*, 361 S.C. 503, 508, 604 S.E.2d 723, 725 (Ct. App. 2004). The Supreme Court adopted three factors for determining the adequacy of representation: "(1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent." *Id.* at 508-09, 604 S.E.2d at 726. Trustgard cites to the factors for analyzing adequate representation, but fails to address them in its argument. (Br. of App-Resp't pp. 30-31).

Trustgard makes a three-sentence argument as to why Full Logistics, Graham, and Mr. Foster do not represent its interests. *Id.* at p. 31. Mr. Foster is no longer a party to this action and is irrelevant to this analysis. The gist of Trustgard's argument is that Mr. Fuller's "conduct", *i.e.* testifying to service of process, "necessitated" it filing the motion to intervene and, therefore, he cannot represent its interests because he continues to say he received service when it wants him to say he did not. *Id.* Trustgard's argument on this point fails to show either an abuse of discretion or that it satisfies the three factors cited above.

The lower court correctly held Full Logistics adequately represents Trustgard's interests because Full Logistics did what Trustgard wants to do—filed, argued, and got a ruling on a motion to set aside default arguing in spite of Mr. Fuller's testimony about service. (R. p. 26). First, Full Logistics made all of Trustgard's arguments. Their arguments for setting aside the default judgment are identical. (R. pp. 70-74; pp. 130-133). Second, Full Logistics is capable of and did make Trustgard's arguments, including that the court should set aside the motion despite Mr.

Fuller's testimony about service of process. (R. pp. 376-377). Full Logistics never withdrew its 60(b) motion but was instead argued and denied by the lower court. Third, Trustgard does not have different knowledge, experience, or perspective on the proceedings that would otherwise be absent and it makes no such argument.

The Court should affirm the lower court on this element and, for this reason alone, decline to find intervention of right as an additional sustaining ground.

CONCLUSION

For any of the independent reasons discussed above, the Court should reverse the lower court's decision to grant Trustgard permissive intervention and affirm the lower court's decision to deny Trustgard intervention of right.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

Respectfully submitted,

August 4, 2020
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