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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

Overland, Inc., d/b/a Land Rover Greenville ..... Appellant,

vs.

Lara Marie Nance, Charlie Andrew Nance, Roger Fields, Synovus Financial Corporation, d/b/a NBSC, Branch Banking and Trust Company, Bank of America Corporation, and SunTrust Banks, Inc. ..... Defendants,

Of whom, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and SunTrust Banks, Inc. are the Respondents.

REPLY BRIEF OF APPELLANT

CARL F. MULLER,
ATTORNEY AT LAW, P.A.

Carl F. Muller, Esq., SC Bar No. 4131
Carl F. Muller, Attorney at Law, P.A.
607 Pendleton Street, Suite 201
Greenville, SC 29601
864-991-8905
carl@carlmullerlaw.com

FAYSSOUX LAW FIRM, P.A.

T. Hunt Reid, Esq., SC Bar No. 77538
PO Box 10207
Greenville, SC 29603
864-233-0445

hunter@fayssouxlaw.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW:

STATUTES:

OTHER AUTHORITIES

Overland files this Reply Brief in response to SunTrust and Bank of America's briefs. To the extent SunTrust or Bank of America have misstated any facts or made procedural errors, those issues are addressed within the arguments that the errors affect.

STANDARD OF REVIEW

SunTrust mistakenly asserts that the standard of review for Argument A below regarding the summary judgment motions being heard prematurely because necessary discovery was outstanding, is whether the trial court abused its discretion. That is not correct. The trial court failed to rule on the merits of the discovery question. Instead, the Court granted summary judgment on the merits and then, because of its ruling on summary judgment, ruled that Overland's Motion to Compel Discovery was moot. It did not decide the discovery motion. Accordingly, the appellate court reviews the trial court's decision on the entire case *de novo*,[1] the summary judgment standard. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000).

ARGUMENT

A. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF OVER ITS OBJECTION THAT DISCOVERY WAS INCOMPLETE AND IN THE FACE OF PLAINTIFF'S MOTION TO COMPEL RESPONSES TO ITS DISCOVERY REQUESTS?

[1] Bank of America mischaracterized the Court's Order regarding Overland's Motion to Compel Discovery. Bank of America stated that the Court "found the motion was moot based on counsel's representation at the hearing that Overland had received a 'couple hundred documents and some updated responses from BANA the previous day and that counsel for the parties were 'going to work through' the remaining discovery issues." Bank of America Brief, p. 2, R. p. __. The Court's Order gives a completely different reason for finding the Motion to Compel Discovery moot. The Court found the motion moot because the Court granted the motions for summary judgment. The Court stated, "In light of this Court's decision to grant Defendants Bank of America and SunTrust summary judgment as to the seventeenth cause of action, the Court finds Overland's Motion to Compel Discovery is moot." Order, p. 7, R. p. __.

If the Court finds that the trial court prematurely determined the summary judgment motion because needed discovery remained outstanding,[2] the Court need not reach the issues on the merits, as they would not yet be ripe for review.

The fact that discovery was incomplete is particularly important in this case because the case involves a 2008 statutory change in the law for which there is no South Carolina case law. The South Carolina Supreme Court has said that in such a circumstance, full and complete development of the facts is essential. *Jackson v. Atlantic Soft Drink Company,* 286 S.C. 577, 579, 336 S.E.2d 13 (1985)

In an attempt to sandbag Overland, SunTrust and Bank of America delayed, obstructed, and failed to provide requested discovery from the time the discovery was served upon them through the date of the summary judgment hearing. SunTrust and Bank of America are massive corporations with assets exceeding the gross national products of many countries. They have the resources to stall litigation and in this case, they did so with a joint defense strategy. Letter from Bank of America Counsel to Overland Counsel dated October 27, 2014, claiming as privileged anything the joint defense agreement deemed privileged, R. p. __.

Moreover, both SunTrust and Bank of America acknowledged at the summary judgment hearing **that discovery was not yet complete.** Transcript p. 67, lines 16-20, R.p.___ **It was also conceded that if it were complete, Overland may be able to show the banks were negligent.** Transcript p. ___ lines __, R. p. __.

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[2] The outstanding discovery precluded Overland from taking many of the depositions it needed to take because it needed the discovery responses and documents for the depositions. Additionally, Bank of America's production of hundreds of documents the night before the summary judgment hearing sandbagged Overland because Overland was not able to conduct depositions with those documents nor have its expert review the documents. Such a production also clearly shows that Bank of America had wrongly withheld hundreds of documents. This type of litigation behavior should not be tolerated or rewarded in South Carolina courts. In addition, despite Bank of America's last second production, crucial discovery remained outstanding.

SunTrust did not provide Overland the discovery requested; instead, SunTrust objected to the discovery requests right up to the morning of the summary judgment hearing. At the courthouse on the morning of the summary judgment hearing, SunTrust agreed to provide the very same discovery to which it had previously objected. Why? Because SunTrust knew it would have to explain to the Court that morning at the summary judgment hearing why SunTrust had objected to clearly discoverable materials. SunTrust stalled, delayed, and obstructed Overland's right to the discovery Overland needed to respond fully and completely to SunTrust's summary judgment motion. In its initial brief, SunTrust implied that it had provided the discovery Overland requested and that there were no outstanding discovery issues at the time the Court entered Summary Judgment. In its Statement of the Case, Statement of Facts, and Argument sections, SunTrust asserts that "SunTrust had provided and/or objected to all discovery requests . . ." SunTrust Br. P. 1. SunTrust was careful to state it had "provided and/or objected" to the discovery, because it had not provided the discovery it knew Overland was entitled to receive. Both Overland's written objection to summary judgment and oral objections during the hearing show that SunTrust *had not provided the discovery* Overland requested. Finally, at the courthouse on the morning of the summary judgment hearing, when it would be too late for Overland to make use of the discovery for that hearing, SunTrust *agreed to provide the discovery to which it had previously wrongly objected.*

The scenario with Bank of America is eerily similar to that with SunTrust with one exception. Knowing its failure to properly provide discovery would be before the Court the next morning, Bank of America provided hundreds of documents on the eve of the summary judgment hearing - in what can only be regarded as a questionable litigation practice that Bank of America likely hoped would leave Overland unable to even cursorily

review the documents before the hearing. Bank of America's tactic did leave Overland without an ability to obtain its experts' analysis of the documents, conduct depositions based on the newly provided information, or otherwise make use of the documents for the hearing the next morning. Despite Bank of America's last second production, Overland was able to review the documents to conclude that Bank of America *still had not provided many of the requested documents, including the policies and procedures manuals,* which Overland alerted the Court it needed for the summary hearing. Bank of America withheld that discovery *and only at the Courthouse immediately before the hearing did Bank of America agree to provide the discovery.* Bank of America knew it had wrongly objected to the discovery requests.

SunTrust and Bank of America both attempt to blame Overland for their having not timely provided the requested discovery. SunTrust implied that Overland had four years to seek discovery from SunTrust; however, SunTrust and Bank of America were not even parties in the case four years ago. Both SunTrust and Bank of America became parties when the Third Amended Complaint was filed.[3] Both banks filed Motions to Dismiss -- which were denied -- and stalled discovery while those motions were pending. Overland served discovery requests in December 2013 and finally received responses to discovery in March, 2014 after weeks of being told the discovery would be forthcoming; however, very few documents or information were actually provided. Instead, form objections predominated the responses for both banks with only a few responses actually provided. SunTrust Answers to Interrogatories, R. p. __ and SunTrust Production, R. p.__.[4]After Overland received SunTrust's extensive objections to discovery, Overland began the process of ongoing discussions with SunTrust in an attempt to resolve the discovery issues, as courts require and

[3] SunTrust filed its Answer on November 12, 2012. Bank of America filed its Answer on October 10, 2012.

[4] Bank of America filed substantially similar non-responsive responses. Bank of America Answers to Interrogatories, R. p. and Bank of America Production, R. p.__.

encourage parties to do. SunTrust agreed to provide the requested discovery immediately before the hearing began. Had that agreement not been reached, Overland would have sought the Court's assistance in compelling SunTrust to provide the discovery that very morning.

Bank of America also attempts to obfuscate its failure to comply with discovery requests by implying that Overland did not pursue the discovery. That is false. Bank of America and SunTrust both withheld the discovery and prolonged the discovery process with back and forth discussions in Overland's attempt to secure the discovery. Overland pursued the discovery from Bank of America right up to the summary judgment hearing, including a motion to compel discovery. Motion to Compel, R. p. __. Only when Bank of America and SunTrust would have to face the Court and subject themselves to sanctions for failure to comply with discovery did they agree to provide the discovery in the future.

Neither SunTrust nor Bank of America made any claim in the trial court that Overland had not diligently pursued discovery against the banks; accordingly, they are foreclosed from raising this argument for the first time in this appeal. Overland did pursue the discovery with repeated emails, letters and phone calls. A sample of the back and forth email and letter discovery discussions include:

1. December 16, 2014 email from Hunter Reid to Bank of America and SunTrust. R. p. __.
2. January 23, 2014 email from Lauren Maxwell to Hunter Reid. R. p.__.
3. January 21, 2014 email from Jim Sheedy to Hunter Reid. R. p.__.
4. February 17, 2014 email from Hunter Reid to Jim Sheedy and Susan Driscoll. R. p.__.
5. February 17, 2014 email from Hunter Reid to Lauren Maxwell and Jim Sheedy. R. p.__.

6. February 19, 2014 email from Lauren Maxwell to Hunter Reid. R. p.__.
7. March 3, 2014 email from Hunter Reid to Bank of America and SunTrust counsel. R. p. __.
8. July 7, 2014 letter from Hunter Reid to James Sheedy and Susan Driscoll, R. p.__.
9. October 3, 2014 email from Lauren Maxwell to Hunter Reid. R. p.__.
10. October 27, 2014 letter from James Sheedy to Hunter Reid. R. p. __.

Bank of America fumed when Overland finally filed a Motion to Compel. Now it takes the position that Overland did not diligently pursue the discovery in this appeal. Bank of America letter to Overland dated October 27, 2014, R. p. __. Bank of America cannot have it both ways.

During the six-week period from the summary judgment hearing until the Court issued its Order, neither Bank of America nor SunTrust provided the agreed upon discovery. Their agreements to provide the discovery were illusory and not honored. Bank of America and SunTrust are mammoth corporations with unlimited resources. They withheld discovery in order to frustrate the litigation process and defeat a litigant at the summary judgment phase by bullying. That should not be rewarded.

Summary judgment was premature in this case because Overland needed the discovery withheld by Bank of America and SunTrust to fully defend against their Summary Judgment motions, and they know it.

B. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF BECAUSE IT IGNORED THE FACTS CONCERNING THE DEALINGS BETWEEN THE DEFENDANT BANKS AND THE EMBEZZLER, WHO FORGED CHECKS ON THE PLAINTIFF'S ACCOUNT AND THEN DEPOSITED THEM WITH THE BANKS?

Despite both banks having withheld crucial discoverable evidence, Overland provided the Court with evidence of the dealings between Bank of America and SunTrust

and the embezzler Lara Nance. The evidence Overland provided is far more than a mere scintilla of evidence for a trier of fact to apply to the law, which makes summary judgment inappropriate. "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329-330, 673 S.E.2d 801 (SC 2009).

Moreover, both SunTrust and Bank of America acknowledged at the summary judgment hearing **that discovery was not yet complete.** As SunTrust stated, "[a]nd while discovery is not complete, uh, we concede for purposes of our motion here today that through the remaining discovery, the plaintiff may be able to prove negligence on the part of SunTrust." Transcript, p. 5, lines 10-14, R. p. __. *See also* SunTrust's statement that "I had to concede, for purposes of our motions – of the motion today, negligence on the part of the bank. Transcript p. 20 lines 10-12, R., p. __. The banks are foreclosed from arguing that Overland did not produce sufficient evidence to survive a summary judgment motion because they conceded that discovery was not complete and that if it were complete, Overland "may be able to go forward and establish negligence on the part of the bank." Transcript, p. 5, lines 19-21. Moreover, neither of the banks even raised this issue in their motions for summary judgment nor did either Bank argue that Overland failed to provide such evidence. Bank of America's summary judgment motion entitled "Bank of America's Notice of and Motion for Summary Judgment Purely on the Basis of Law as to the 17th and 20th Causes of Action Against It" itself precludes any argument regarding evidentiary sufficiency. R. p.__. Therefore, summary judgment should not have been granted on evidentiary sufficiency grounds.

Overland did provide more than the mere scintilla of evidence as to each bank's fault as set forth in Overland's earlier brief in addition to the Bank's conceding what the discovery could show once it was complete. Bank of America admitted that it accepted over $1.2 million in checks with forged signatures and admitted that "Nance wrote checks on Plaintiif's accounts that were unauthorized by Plaintiff. . . . Nance deposited the funds into her two accounts at B of A (as well as at SunTrust) endorsing the payee names of legitimate companies which she was not authorized to do." Bank of America Brief in Support of Summary Judgment Motion, R. p. __. Based on Bank of America's admission that it accepted for deposit approximately $1.2 million in checks and that most were for less than $3,000, Bank of America would have accepted approximately 400 checks that it admitted "lacked legible indorsements in the name of the payee." Bank of America Initial Brief, p. __; R. p. __. *See also*, Bank of America admissions in its Answer to the Complaint, paragraphs 18, 68, 75, and 85, R. pp.__ It is difficult to reconcile 400 forged checks with illegible indorsements being deposited into the same bank undetected if the bank complied with its policies and procedures and used ordinary care. Perhaps that is why Bank of America has been so reluctant to produce the policy and procedures manuals.[5] Additionally, Bank of America and SunTrust knew Nance was an Overland employee, yet both allowed her to set up company accounts that she controlled in the names of Overland suppliers, allowed her to deposit Overland non-payroll checks into those accounts over 400 times. In approximately one week, Nance deposited over $50,000 into SunTrust accounts and in December 2009

[5] SunTrust admitted to accepting almost $55,000 of checks with forged signatures. SunTrust curiously attempts to absolve itself of liability because, it asserts, the sum of the forged checks deposited into the SunTrust accounts "was less than five percent of the amount allegedly stolen" ($54,671.38); however, that is a substantial amount of money deposited into SunTrust. If SunTrust truly believed that $54,671.38 was not significant, then it would have returned that sum to Overland long ago. Overland certainly does not agree that $54,671.38 is insignificant.

Nance deposited more than $217,000 into Bank of America accounts. Nance was a clerk level employee at Overland and both Bank of America and SunTrust knew this – yet they allowed substantial deposits that clearly exceed Nance's annual income in just a matter of days. Overland should be allowed the opportunity to have a trier of fact determine the extent to which Bank of America and SunTrust are liable for any of Overland's loss, because the banks already conceded they may be at least partially at fault. Transcript, p. __, l __, R. p.__.

SunTrust accepted over $50,000 worth of checks. Many of the SunTrust transactions show the checks were accepted by a teller and not via an ATM. The back of the checks refers to tellers: 188 Tell, 424 Tell, 160 Tell, 244 Tell, for example. SunTrust Responses to First Request for Production, March 3, 2014, R. p. __. Additionally, SunTrust conceded that if discovery were complete, Overland may be able to show SunTrust was negligent. Transcript, p. __, l __, R. p.__.

Bank of America claims that Overland misstated the magnitude of the number of checks Bank of America rejected when Nance attempted to deposit them because Overland said it was "many" while Bank of America claims Overland was only referring to three." Bank of America Initial Brief, R. p. __. Bank of America is mistaken. Bank of America rejected checks on *at least* three occasions that the discovery thus far has shown, with each occasion including multiple checks. Thus, many checks provided Bank of America many chances to apply ordinary care as to checks it had rejected, but later accepted without any changes to the checks. Those chances are in addition to all of the banking transactions completed within the bank at the teller's counter and the almost 400 checks deposited at the tellers' counters or via ATMs. Affidavit of Michael O'Shea, R.p.___.

Summary judgment was inappropriate in this case because Overland provided far more than a mere scintilla of evidence to support its claims. The Court should reverse the Circuit Court's decision granting summary judgment.

C. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF BECAUSE IT FAILED TO UNDERSTAND THAT SECTIONS 3-404 AND 405 OF THE SOUTH CAROLINA UNIFORM COMMERCIAL CODE WERE AMENDED IN 2008 TO PROVIDE THAT THE PLAINTIFF ACCOUNT HOLDER COULD RECOVER AGAINST THE DEFENDANT DEPOSITORY BANKS UNDER A THEORY OF COMPARATIVE FAULT?

In 1990, the Uniform Commercial Code was revised and the corresponding South Carolina Commercial Code was revised in 2008. Despite the 2008 revision, SunTrust and Bank of America want the Court to apply the prior law to this case, such as *Read v. First National Bank of Habersham,* 286 S.C. 534, 335 S.E.2d 359 (1985). The UCC revisions changed the law, making *Read* no longer applicable. While Bank of America attempts to steer this Court to a result inconsistent with the 2008 revised law by arguing that the comments to UCC changes (i) do not specifically say *Read is overruled* and (ii) do not give account holders a cause of action against depository banks in double forgery cases, Bank of America is simply incorrect. Rule changes and legislative changes have the result of overruling prior law without listing each and every case that the new rule or law impacts. Sometimes a case is cited for illustrative purposes, as was the case here, not as a means to restrict the new rule's applicability to only a single case. That interpretation would strain logic and turn statutory interpretation on its head. Rulemaking and legislative bodies are not charged with knowing every legal opinion impacted by legislative changes – if that were required, legislative traction for new rules and laws would falter.

The comments explicitly confirm that account holders have a cause of action against the depository banks such as Bank of America and SunTrust. The law changed. It is that simple.

> "Subsection (d) is new and changes prior law. . . . Under prior law, the drawer had no claim against a person who failed to exercise ordinary care in taking the check. See Stone Manufacturing Co. v. NCNB of South Carolina, 308 S.C.287, 417 S.E.2d 628 (S.C. App. 1992). Padded payroll cases decided under former 36-3-405). Subsection (d) provides that the party bearing the loss in an imposter or fictitious payee case can recover from a person who negligently paid the instrument or took the instrument for value or collection. Under subsection (d), the party bearing the loss must prove that the person paying or taking the instrument failed to exercise ordinary care and that the failure substantially contributed to the loss resulting from the payment of the instrument. If these facts are proved, the person bearing the loss can recover to the extent that the failure to exercise ordinary care contributed to the loss."

Reporters Comment, Commercial Code, p. 165, R. p. __. Additionally, Reporter's Comments to Section 36-3-405 confirms that employers have a cause of action against depository banks:

> "If the employer can establish that the bank paying the fraudulently indorsed check or taking it for value or collection failed to exercise ordinary care and that failure substantially contributed to the loss resulting from the fraud, the employer can recover from the bank failing to exercise ordinary care to the extent that the failure contributed to the loss."

Reporters Comment, Commercial Code, p. 168, R. p. __. The comments clearly provide the employer a cause of action:

> "The last sentence of Subsection (b) effects a *substantial change from prior law*, by affording an employer who bears the loss on a padded payroll check against a depository bank that failed to exercise ordinary care in taking the check. . . . Under Subsection (b), if the employer can establish that the depository bank failed to exercise ordinary care and that the failure substantially contributed to the loss, the employer can recover from the depository bank to the extent that the bank's failure to exercise ordinary care contributed to the loss." (emphasis added).

Reporters Comment, Commercial Code, p. 168, R. p. __. Finally, the comments describe a scenario in which an employee opens an account in the depository bank in the name of a payee corporation, but the bank fails to use ordinary care in the opening of the account. In that scenario, the employer could establish liability on the bank of the depository bank. *See* Reporter's Comments, Commercial Code, p. 168, R. p. __. In this case, neither bank used ordinary care in opening the "business" accounts for Nance. Incorrect social security numbers, lack of corporate resolutions, forged signatures on account opening documents, illegible indorsements, forged signatures, as well as the banks accepting and depositing checks with a variety of companies as payees and written on Overland's accounts while the banks *knew Nance was employed by Overland.* Hundreds of checks at Bank of America, and over $50,000 at SunTrust in just a week.

Under the 2008 South Carolina revisions, drawers may now recover in double forgery cases against depository banks and any case law decided before 2008 holding

otherwise no longer applies.[6] *See Gina Chin & Assoc., Inc. v. First Union Bank,* 256 Va. 59, 500 S.E.2d 516 (1998) ("The revisions to §§ 8.3A-404 and 405 changed the previous law by allowing 'the person bearing the loss' to seek recovery for a loss caused by the negligence of any person paying the instrument or taking it for value based on comparative negligence principles."). Accordingly, Overland, as the drawer/account holder and person who suffered the loss, is entitled to seek redress against the banks that participated in the loss. It is for the *trier of fact* to allocate the respective comparative fault among the parties.

Bank of America argues that all of the transactions were via ATMS and that such transactions would eliminate its liability. That is factually incorrect. As Overland stated in its earlier brief, some transactions were via ATMS and some were completed using a teller at the bank. See Initial Brief, p. __; R. p. __. See also Deposit Slip showing deposit at the teller R.p.__. Additionally, Bank of America admitted in its Answer to the Third Amended Complaint in response to the allegations as follows:

Complaint paragraph 42:

> "The unauthorized checks were drawn on Land Rover's bank accounts at NBSC. She then deposited the funds into her bank accounts at BOA and SunTrust."

Bank of America Answer in paragraph 18:

> "BAC admits that LMN [Nance] may have deposited checks into bank accounts at B of A."

In its Fifth Defense, Bank of America admits in Paragraph 68:

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[6] *Read v. First National Bank of Habersham,* 286 S.C. 534, 335 S.E.2d 359 (1985), is also factually distinct because it involved an Employer v. Drawee Bank fact pattern analyzed under 3-406(a), not an Employer v. Depository Bank case to be evaluated under 3-404(d) and 3-405(b). Even if *Read* were controlling in a double forgery case in 1985, it no longer is.

"Because the checks were deposited at a bank branch of B of A, as the depository bank, it had no ability or duty to verify the authenticity of the maker or drawee indorsements on any of the checks at issue in this action."

In its Sixth, Seventh and Eighth defenses, Bank of America asserts it did, or was entitled to, use commercially reasonable standards to process and pay the checks it accepted for deposit. Answer paragraphs 75, 81 and 85, R. pp.___. On summary judgment, factual disputes must be decided in favor of the nonmoving party. Additionally, the law does not support Bank of America's argument that ATM use eliminates all bank liability. As argued above, because the banks withheld discovery regarding their protocols and manuals, the information necessary to evaluate each bank's compliance with its policies and procedures and ordinary care as to ATM and teller assisted deposits was withheld from Overland and the Court.

The Circuit Court erred as matter of law and its decision should be reversed.

D. ONCE THE TRIAL COURT HAS GRANTED COUNSEL AN EXTENSION OF TIME UNDER RULE 59(e) FOR HEALTH REASONS, AND HE HAS RELIED ON IT, CAN THE OTHER PARTY OBJECT AFTER THE FACT?

The parties briefed this issue separately and Overland adopts and incorporates herein its Response to Motion to Dismiss Appeal filed April 10, 2015. Response to Motion to Dismiss Appeal, R. pp. __. In addition, Overland responds to SunTrust and Bank of America's briefs on this issue, as follows.

After the Court granted Bank of America and SunTrust's Summary Judgment Motions and before the time to file a Rule 59(e) Motion expired, Overland requested and was granted an extension to file its Rule 59(e) Motion. Relying on the Judge's grant of the extension, Overland filed its Rule 59(e) Motion before the Court's deadline.[7] Had the Court

[7] Bank of America suggests that Overland's motion for an enlargement of time was not a real motion because it was filed as an email request designed to expedite the process due to Overland attorney's

declined to grant the extension, Overland would have filed its Rule 59(e) Motion immediately, without an extension despite its attorney's illness. The Court graciously allowed counsel to recover from his illness and then file the Motion.[8] This is not a case in which the time to file a Rule 59(e) motion had expired; therefore the Court retained jurisdiction to grant the extension.[9]

When Bank of America advised the Court that it did not object to Overland having an extension; it waived its right to object later. Bank of America agreed to the extension and is estopped from now raising it as a defense to Overland's appeal. While Bank of America asserts that Overland has no estoppel claim because Overland did not assert any false representation or concealment of material facts, Bank of America is mistaken. Bank of America did not object to the extension.[10] That alone is conclusive. [11]

Contrary to SunTrust and Bank of America's assertions, Rule 59(e) is not jurisdictional.[12] When the Rules intend to limit or restrict jurisdiction, said limitation or restriction is specifically set forth in the rule. For example, Rule 6(b) states that "[t]he time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order." Rule 6(b), SCRCP. Nothing in Rule 6(b) or Rule 59(e) states that Rule 59(e) is

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illness; however, motions are made in many forms, including oral motions during a hearing on other matters, in detailed written motions, and in emails. It is in the Court's discretion to allow an email motion, which the Court did in this case.

[8] SunTrust's reliance on an *unpublished* opinion in which the litigant failed to request an extension until *after* the ten-day time-period expired is procedurally and factually distinct from the present case.

[9] Rule 59(e) states a motion "shall be served not later than 10 days after receipt of written notice of the entry of the order" in contrast to the Rule 59 under the Federal Rules of Civil procedure which uses the word "*must*" rather than "shall." (emphasis added). Also, the Federal rule allows 28 days, almost three times the amount of time under the South Carolina rule.

[10] SunTrust complains that it was not consulted prior to Overland having been granted an extension in the trial court; however, SunTrust's remedy was in the trial court if it objected to the extension. It did not.

[11] The Court considered Bank of America's argument that the Court was without authority to grant Overland an extension and rejected the agreement. Additionally, Bank of America did not object to the extension.

[12] South Carolina courts have not been inclined to penalize litigants with dismissal of appeals based on Rule 59(e). *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634 (2010).

jurisdictional. In this case, an ill attorney asked for and was granted an extension. While the federal courts may be willing to take the position that attorneys may not rely on extensions granted to them by courts, South Carolina has not been a state that sets traps for attorneys who request extensions while ill.

Rule 59(e) does not limit a court's jurisdiction. Just as the extensions were permissible in *Gallagher v. Everett*, 353 S.C. 59, 577 S.E.2d 217 (Ct. Ap. 2002) and *Camp v. Camp,* 386 S.C. 571, 689 S.E.2d 634 (2010), the extension in this case was also properly granted. Overland's appeal was timely filed within thirty days after the trial court denied Overland's Motion Rule 59(e) Motion on February 5, 2015. Plaintiff's Notice of Appeal was filed March 4, 2015.

CONCLUSION

The order of the Circuit Court should be reversed (1) because the Court heard the summary judgment motions prematurely while Overland was deprived of the discovery it needed to defend fully the motions; (2) because the defendant banks admitted wrongdoing in their Answers, discovery and briefs and arguments to the trial court; and (3) because the

trial court did not properly apply the law, which was changed in 2008. Any one ground is sufficient for reversal.

Carl F. Muller, Esq., SC Bar No. 4131
Carl F. Muller, Attorney at Law, P.A.
607 Pendleton Street, Suite 201
Greenville, SC 29601
864-991-8905
carl@carlmullerlaw.com

T. Hunt Reid, Esq. SC Bar No.: 77538
Fayssoux Law Firm, P.A.
PO Box 10207
Greenville, SC 29603
864-233-0445
hunter@fayssouxlaw.com

Attorneys for Appellant

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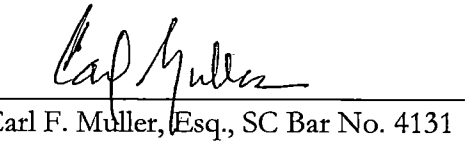
CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Reply Brief complies with Rule 211(b), SCACR.



Carl F. Muller, Esq., SC Bar No. 4131
Carl F. Muller, Attorney at Law, P.A.
607 Pendleton Street, Suite 201
Greenville, SC 29601
864-991-8905
carl@carlmullerlaw.com

T. Hunt Reid, Esq. SC Bar No.: 77538
Fayssoux Law Firm, P.A.
PO Box 10207
Greenville, SC 29603
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Overland, Inc., d/b/a Land Rover Greenville ..... Appellant,

vs.

Lara Marie Nance, Charlie Andrew Nance, Roger Fields, Synovus Financial Corporation, d/b/a NBSC, Branch Banking and Trust Company, Bank of America Corporation, and SunTrust Banks, Inc. ..... Defendants,

Of whom, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and SunTrust Banks, Inc. are the Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served copies of the Initial Reply Brief of Appellant and Amended Designation of Matter on the following by mailing a copy of the same via First Class, U.S. Mail, postage prepaid on the date set forth below to the addresses below:

W. Howard Boyd, Jr., Esq.
Gallivan White & Boyd, P.A.
55 Beattie Place, Suite 1200
Greenville, SC 29601

Counsel for Respondent,
Suntrust Banks, Inc.

James W. Sheedy, Esq.
Driscoll Sheedy, P.A.
11520 N. Community House Rd.
Suite 200
Charlotte, NC 28277
Counsel for Movant/Respondent
Bank of America

Susan Elizabeth Driscoll, Esq.
Driscoll Sheedy, P.A.
11520 N. Community House Rd., Suite 200
Charlotte, NC 28277

Lauren Thorne Maxwell, Esq.
55 Beattie Place, Suite 1200
Greenville, SC 29601

James H. Price, III, Esq.
644 E. Washington Street
Greenville, SC 29601

Bruce A. Byrholdt, Esq.
Byrholdt Drawdy, LLC
2315 N. Main Street, Suite 117
Anderson, SC 29622

David L. Moore, Jr., Esq.
Nexsen Pruet, LLC
PO Box 10648
Greenville, SC 29603

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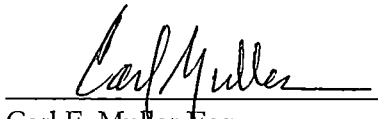

Carl F. Muller Esq. SC Bar No.: 4131
Carl F. Muller, Attorney at Law, P.A.
607 Pendleton Street, Suite 200
Greenville, SC 29601
864-991-8904
carl@carlmullerlaw.com

T. Hunt Reid, Esq. SC Bar No.: 77538
Fayssoux Law Firm, P.A.
PO Box 10207
Greenville, SC 29603
864-233-0445
hunter@fayssouxlaw.com

Attorneys for Appellant