ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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SC Court of Appeals

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 which Bank of America Corporation, and SunTrust Banks, Inc. are the Respondents.

FINAL BRIEF OF RESPONDENT BANK OF AMERICA, N.A.

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I.

STATEMENT OF ISSUES ON APPEAL

1. Does the Court lack appellate jurisdiction because the notice of appeal was filed more than 30 days after receipt of notice of entry of summary judgment, and because plaintiff's untimely Rule 59(e) motion did not stay the deadline for filing the notice of appeal?

2. Did the trial court correctly grant summary judgment in this double forgery check case because either (a) the Uniform Commercial Code does not authorize plaintiff's claim, or (b) plaintiff offered no evidence to raise a genuine issue as to all elements of its claim?

3. Did the trial court correctly exercise its discretion in deciding the summary judgment motion despite plaintiff's contention, unsupported by a Rule 56(f) affidavit, that it had not completed needed discovery during the more than two years the case had been pending against Bank of America?

II.

STATEMENT OF THE CASE

A. Procedural History

Plaintiff ("Overland") provides an adequate general summary of the procedural history of this case with the following exceptions.

The motion to dismiss which Bank of America, N.A. ("BANA") filed on March 5, 2014 was brought under Rule 12(c), SCRCP. (R. p. 299).

BANA's summary judgment motion addressed Overland's 17th and 20th (misnumbered 15th) causes of action. (R. p. 125). At the hearing on the motion, Overland voluntarily withdrew its 20th cause of action. (R. pp. 589-90).

The trial court did not hear oral argument on Overland's motion to compel responses to its discovery. It 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. (R. pp. 9, 620).

Overland did not submit a motion for enlargement of time to file a motion under Rule 59(e), SCRCP. Counsel for Overland just e-mailed the trial court requesting ten more days for filing the motion. (*See* R. pp. 340-41).

Specific facts pertinent to Overland's argument that the summary judgment motion was premature are discussed at pages 24-27 below.

B. Substantive Facts

Overland owns car dealerships. (R. p. 222). Overland maintained its bank accounts at NBSC and BB&T. (R. p. 230, ¶ 33; Appellant's Opening Brief (AOB), p. 3).

Overland hired Lara Marie Nance ("Nance") as a payroll clerk in 2006. (AOB, p. 3). As a payroll clerk, Nance had access to Overland's check-writing program. In October 2009, Overland transferred Nance to a position on the dealership floor. (R. p. 187). In that new position, Nance no longer had any responsibility for issuing checks on Overland's accounts. (R. p. 187). However, she forged Overland's president's signature on a document that directed ADP to give her administrator privileges on Overland's check-writing program. And ADP complied. (R. p. 187).

Nance opened three accounts at BANA: a personal checking account, a personal savings account, and a d/b/a sole proprietorship account in the name of "TEBS." (*See* R. p. 187, 457-58). The Social Security Number listed on the signature card for Nance's personal checking account at BANA had an incorrect digit. (R. p. 159, ¶3).

Beginning at least in January 2008, Nance directed Overland's check-writing program to issue over 100 checks payable to Taylor Enterprises, Atlantic British and Invision Industries, normally for amounts like those of legitimate checks paying invoices from those parts suppliers. (R. pp. 206-216). One check was in the amount of $6,763.31; the rest were in amounts less than $6,000; and most were for less than $3,000. (R. pp. 206-216).

Nance forged the maker signatures on these checks. She deposited many of the checks in her BANA accounts. The checks were signed on the back but lacked legible indorsements in the name of the payee. (R. p. 161, ¶7).

On October 1, 2009, BANA rejected one Nance deposit of three checks totaling $9,166.75 because they were made payable to Taylor Enterprises but had been deposited into Nance's personal checking account. (R. pp. 160, ¶6; R. pp. 164-166). Undeterred, Nance successfully redeposited the same checks 28 days later. (R. pp. 160, ¶6; R. pp. 168-172).

Overland alleges that Nance embezzled over $1.4 million before it discovered her fraud, by chance, in February 2010. (R. p. 179, ¶6).

In the parlance of UCC Articles 3 and 4, Overland is the drawer of the checks. NBSC and BB&T are the drawee banks.[1] BANA and SunTrust (where Nance also deposited some checks) are the depositary banks. Nance is a convicted embezzler, who was incarcerated during a portion of the pendency of this case.

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[1] Nance, her husband, BANA and SunTrust are the only defendants against whom Overland still pursues claims. All the other defendants were voluntarily dismissed after settling with Overland.

III.

ARGUMENT

A. The Court Lacks Appellate Jurisdiction Over This Untimely Appeal

This Court lacks jurisdiction over this appeal because Overland filed its notice of appeal too late—beyond the 30-day deadline set by Rule 203(b)(1), SCACR. The appeal-filing deadline was not stayed by Overland's Rule 59(e) motion because it, too, was untimely.[2]

Under Rule 203(b)(1), SCACR, the deadline for serving a notice of appeal is 30 days after receipt of written notice of entry of the appealed order. That deadline is stayed if a motion under Rule 59(e), SCRCP, is timely served. Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. To be timely, a Rule 59(e) motion must be served "not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e), SCRCP; *see also Canal Ins. Co. v. Caldwell,* 338 S.C. 1, 6, 524 S.E.2d 416, 418 (Ct. App. 1999) ("To be timely, a post-trial motion to alter or amend must be served within ten days of receipt of written notice of the entry of the original order or judgment.").

Overland received notice of entry of the summary judgment order on December 17, 2014. (R. p. 41). Overland did not serve its Rule 59(e) motion until January 7, 2015, 22 days later. (R. p. 60). The motion was untimely. It did not stay the 30-day deadline for filing a notice of appeal from the summary judgment order, which expired

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[2] This Court determines its own jurisdiction *de novo* as there is no lower court decision on the subject to review. BANA filed a motion to dismiss the appeal on the ground it was untimely filed. On June 4, 2015, this Court denied BANA's motion to dismiss without prejudice to the parties "arguing the issue of timeliness of the appeal in their briefs."

on January 16, 2015. Rule 203(b)(1), SCACR. Overland filed its notice of appeal on March 4, 2015—well beyond that deadline. (R. p. 539).

"The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). "Accordingly, this court must dismiss an untimely appeal without considering its merits." *Lake Marion Regional Water Agency v. Goodwin*, Op. No. 2013-UP-088, 2013 WL 8482382, at *1 (S.C. App. Feb. 27, 2013).

To escape dismissal of its appeal as untimely, Overland relies on the fact that, on December 29, 2014, the deadline for serving its Rule 59(e) motion, it sought and obtained from the trial court an e-mail purporting to extend the time for serving the Rule 59(e) motion by an additional 10 days. (R. pp. 340-41).

However, Rule 59(e) does not grant the trial court authority to extend its 10-day service deadline. Rule 6(b), SCRCP, states: "The time for taking any action under Rule[] ... 59... may not be extended except to the extent and under the conditions stated in them." Rule 59(e) does not provide for any extension of its 10-day service deadline.

While there is no published South Carolina decision on point, this State's Rule 59 "is substantially the Federal Rule." Notes, Rule 59, SCRCP. Federal cases interpreting FRCP 59 hold that "[a]n untimely Rule 59 motion is never proper because the Rules expressly forbid an extension of time for such a motion." *Panhorst v. United States*, 241 F.3d 367, 372 (4th Cir. 2001); *accord Gobbi v. People's Fed. Bank*, Op. No. 2006-UP-245, 2006 WL 7285959, at *4 (S.C. App. May 16, 2006). Moreover, a "party cannot

reasonably rely on a district court's improper extension of time where the party requests relief that, as a plain reading of the Rules would show, is beyond the court's authority." *Panhorst*, 241 F.3d at 373.

In opposition to BANA's motion to dismiss this appeal, Overland argued that Rule 59 was adopted to provide greater flexibility and to extend the court's jurisdiction, not to limit it. (R. pp. 326-27). Overland is wrong. Some flexibility is allowed with respect to other procedural requirements of a motion to alter or amend judgment, but none is allowed with respect to Rule 59(e)'s 10-day service. None of the three cases cited in Overland's opposition support its contrary contention.[3]

Overland also claimed that BANA was estopped from dismissing the appeal because its counsel said he was willing to be accommodating and raised no objection to the motion to enlarge time, though he stated no extension was allowed under Rule 59(e). (R. pp. 327-28, 340-41). Overland does not assert any "conduct by [BANA] which amounts to a false representation or concealment of material facts," equitable estoppel's first required element. *Maher v. Tietex Corp.*, 331 S.C. 371, 381, 500 S.E.2d 204, 209 (Ct. App. 1998). Overland cannot establish an estoppel.

Contrary to Overland's assertion, BANA did not waive any objection to the untimely Rule 59(e) motion by failing to object to the motion to enlarge time on

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[3] *Cox v. Fleetwood Homes of Georgia, Inc.*, 334 S.C. 55, 58, 512 S.E.2d 498, 500 (1999), held only that a circuit judge may issue an order on a Rule 59 motion while outside the circuit's territorial boundaries. *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002), held that late *filing* of the Rule 59(e) motion with the court past the additional 10-day period set out in Rule 59(g) did not invalidate a motion properly *served* within Rule 59(e)'s 10-day time limit. *Camp v. Camp*, 386 S.C. 571, 575-76, 689 S.E.2d 634, 636 (2010), held that a timely served Rule 59 motion was not invalidated by a non-prejudicial lack of particularity in stating the grounds of the motion as required by Rule 7(b)(1), SCRCP.

December 29, 2014. (*See* R. p. 328). BANA informed the court and counsel on December 29, before the requested enlargement was granted, that it believed the 10-day deadline could not be extended. (R. p. 340-41). No additional response was required; but even if it were, a party cannot waive a jurisdictional deadline. *See* Rule 263(b), SCACR ("The time prescribed by these Rules for performing any action may not be extended by agreement of the parties.").

Finally, there is no merit to Overland's argument that enforcement of Rule 59(e)'s 10-day deadline violates its due process rights. (*See* R. p. 328). Enforcement of a statute of limitations or other time limit on seeking a remedy does not deny a party due process. *See Theisen v. Theisen,* 382 S.C. 213, 223-24, 676 S.E.2d 133, 139 (2009); *Hoffman v. Powell*, 298 S.C. 338, 341, 380 S.E.2d 821, 822 (1989); *see also Liadov v. Mukasey,* 518 F.3d 1003, 1012 (8th Cir. 2008).[4]

Accordingly, the Court lacks appellate jurisdiction of this untimely appeal and should dismiss it.

B. The Trial Court Correctly Granted Summary Judgment

The trial court correctly granted BANA summary judgment. Contrary to Overland's argument, (AOB, pp. 10-15), South Carolina law does not allow a drawer to sue a depository bank for negligence in taking the drawer's checks for collection, particularly in "double forgery" cases like this one. Even if the claim were legally permissible, Overland did not sustain its burden on summary judgment of presenting a

[4] Overland's reliance on *Galloway v. Galloway*, 249 S.C. 157, 153 S.E.2d 326 (1967), and *Stefan v. Stefan*, 320 S.C. 419, 465 S.E.2d 734 (Ct. App. 1995) is unavailing as this case does not involve the special concerns of minors' or parental rights.

genuine issue of material fact on each element of its purported negligence claim. For both reasons, this Court should affirm.

1. Standard Of Review

This Court reviews an order granting summary judgment *de novo*, applying the same standard that governs the trial court under Rule 56(c), SCRCP. *Hansson v. Scalise Builders of S. Carolina*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007); *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014).

"'In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party.'" *Watson*, 407 S.C. at 453, 756 S.E.2d at 161, *quoting Sauner v. Pub. Serv. Auth. of S. C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

Nevertheless, summary judgment is properly granted if a non-moving party, bearing the burden of proof, fails to present evidence sufficient to create a genuine issue of fact on each element of its claim.

> "Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." Therefore, on a defendant's motion for summary judgment such as the one at issue here, a court cannot properly deny the motion after only finding that a genuine issue of material fact exists as to one element of the plaintiff's claim; rather, under *Baughman*, the court must determine that a genuine issue of material fact exists for each essential element of the plaintiff's claim.

Hansson, 374 S.C. at 357-58, 650 S.E.2d at 71 (*quoting Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986))).[5]

2. A Drawer Has No Negligence Claim Against A Depositary Bank Especially In A Double Forgery Case

A bank owes its customers a limited duty of care arising from the bank-customer contract. However, because it has no contract with non-customers, a bank generally owes them no duty of care, even if injury to them is a foreseeable consequence of the bank's negligence. *See Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 727 (2014); *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003).[6] As the trial court correctly stated:

> South Carolina has refused to extend banks' duties to non-customers, where the non-customers' claims are premised upon contractual obligations between a bank and its customer, and where the non-customer is not an intended third-party beneficiary to that contract. In short, absent fraud or misrepresentation a non-customer does not have the right to rely on the faithful execution of a bank's duties, particularly where the non-customer is in the best position to safeguard his interests against loss.

(R. p. 6).

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[5] Here, as in *Baughman*, 306 S.C. at 116, 410 S.E.2d at 546, Overland does not contend that BANA failed to satisfy its burden under Rule 56(c). Rather, Overland argues that it submitted evidence sufficient to create a genuine issue of fact concerning the elements of its negligence claim.

[6] The overwhelming majority of other American jurisdictions agree. *See Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 225 (4th Cir. 2002) (applying North Carolina law); *Volpe v. Fleet Nat. Bank*, 710 A.2d 661, 664 (R.I. 1998); *see also Ahlan Wa Sahlan Hospitality Co. v. United Citizens Bank of S. Kentucky, Inc.*, No. 2011-CA-001349-MR, 2013 WL 275636, at *2 (Ky. Ct. App. Jan. 25, 2013) unpublished decision citing decisions from nine states).

In accordance with this general rule, a bank owes a non-customer no duty of care in the opening of an account for a customer.[7] Both in its original and revised forms, Uniform Commercial Code, Article 3 follows that general rule as well. Revised section 36-3-420, S.C. Code Ann., for example, precludes a drawer, generally (and in this case)[8] a non-customer, from suing a depositary bank for taking its check for collection over a forged indorsement.

Consonant with these general rules, the South Carolina Supreme Court held, in *Read v. South Carolina Nat. Bank*, 286 S.C. 534, 542, 335 S.E.2d 359, 363-64 (1985), that a depositary bank is not liable to the drawer for taking a doubly forged check for deposit. *Read* cited and adopted the reasoning of the "most celebrated case" of *Perini Corp. v. First Nat. Bank*, 553 F.2d 398, 413 (5th Cir. 1977).

Losses due to double forgeries, *Perini* and *Read* hold, are properly treated as losses from forged maker signatures, not forged indorsements. As *Perini* explains, the forged indorsement puts the drawer (or drawee bank) in no worse position than he or it would be in if the indorsement were genuine. *Read*, 286 S.C. at 542, 335 S.E.2d at 363-64; *Perini*, 553 F.2d at 515. The loss on a double forgery "results not from making payment to the wrong person because of a forged indorsement, but from making any

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[7] *Weil v. First Nat. Bank of Castle Rock*, 983 P.2d 812, 814 (Colo. App. 1999) ("[W]e decline to create a new common law duty burdening banks and financial institutions with a duty to inquire into a customer's authority to use an unregistered trade name. It would be unreasonable to require banks to make an independent investigation of their customers' authority to use any particular unregistered trade name; and, a duty to inquire only of the customer would not prevent the kind of harm plaintiff suffered here."); *accord Rodriguez v. Bank Of The W.*, 162 Cal. App. 4th 454, 460, 75 Cal. Rptr. 3d 543, 546 (2008); *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal.App.4th 472, 481-83, 56 Cal.Rptr.2d 756, 762-63 (1996).

[8] On BANA's motion, the trial court dismissed Overland's claim against BANA under section 36-3-420. Overland has not appealed that ruling.

payment at all on the basis of a forged drawer's signature."[9] *Perini*, 553 F.2d at 415. "Therefore, the losses are a result of the forged drawer's signature, not the endorsements."[10] *Read*, 286 S.C. at 542, 335 S.E.2d at 364.

Here, Overland's losses are due to double forgery checks. Nance "forged the necessary Overland signature on the checks, and then forged a Taylor Enterprises [or other] endorsement on the instrument" before depositing the checks in her accounts at BANA. (AOB, p. 3; R. pp. 230-31, ¶¶ 37, 41; R. p. 258, ¶166). Under the rule stated in *Perini* and adopted in *Read*, Overland cannot shift its losses on those double forgery checks to BANA, a depositary bank, because "the losses claimed by the drawers were not related to the improper [payee] indorsements." *Perini*, 553 F.2d at 413.

To avoid that conclusion, Overland argues that revised Article 3, and in particular §§ 36-3-404(d) and 36-3-405(b), abrogate *Perini* and *Read*, granting drawers an affirmative right to recover from a depositary bank for its comparative negligence that contributes to the loss in a double forgery case. (*See* AOB, pp. 10-11, 15 n. 9). Overland is wrong. Neither of the revised sections mentions a double forgery. The South Carolina comments to the two sections disclose that these provisions abrogate *Stone Mfg. Co. v. NCNB of S.C.*, 308 S.C. 287, 417 S.E.2d 628 (Ct. App. 1992), but not *Read*.

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[9] "The ostensible drawer's loss in such a situation can generally, as here, be related to the defective indorsement in only the most speculative fashion." *Perini*, 553 F.2d at 414.

[10] Overland wrongly seeks to distinguish *Read* as involving only claims against the drawee bank, not the depositary bank. (*See* AOB, p. 15). In fact, in *Read*, the defendant bank was both the drawee and the depositary bank, and it was sued as the depositary bank for conversion based on the fraudulent indorsements on certain deposited checks. *See Read*, 286 S.C. at 536-37, 542, 335 S.E.2d at 360, 363.

Even if §§ 36-3-404(d) and 36-3-405(b) grant the drawer a direct cause of action against the depositary bank—a dubious proposition for reasons stated in the footnote[11]—both sections require proof not only of the depositary bank's negligence, but also proof

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[11] Sections 36-3-404(d) and 36-3-405(b) do not expressly grant a drawer a direct claim against a depositary bank. Instead, they limit a bank's imposter and padded payroll defenses based on its comparative fault. The comments to these sections cannot and do not create a cause of action that the statutory text does not confer. The official comment to § 36-3-405 does not plainly say that subsection (b) creates a direct cause of action rather than a loss allocation limitation on the padded payroll defense. The South Carolina Comment refers to a "claim against the depository bank," but in the context of stating that the former absolute padded payroll defense applied in *Stone* has been ameliorated by § 36-3-405(b)'s comparative fault limitation. The comments to §36-3-404(d) say nothing about a direct claim by a drawer against a depositary bank.

Moreover, interpreting §§36-3-404(d) and 36-3-405(b) to permit a direct claim by the drawer against a depositary bank renders Article 3 a bizarre fun-house of loss allocation without any consistent rule or supporting policy. A drawer cannot recover any forged indorsement loss from a depositary bank under § 36-3-420 even if the drawer is not negligent, and the bank is both negligent and 100% at fault. Likewise, under § 36-3-406, a negligent drawer cannot recover from a negligent depositary bank, no matter what the allocation of fault between the two. *See Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 650-55, 604 S.E.2d 403, 406-09 (2004).

Under Overland's interpretation, the drawer may recover from the depositary bank based on its negligence only when the fraudster happens to be an imposter, or an employee with responsibility for the drawer's checks, or writes the check to a fictitious payee. And even then, only when the fraudster forges an indorsement; the depositary bank escapes liability if the checks lack indorsements and are not deposited to an account of the named payee. *See Mills v. U.S. Bank,* 166 Cal. App. 4th 871, 888-91, 83 Cal. Rptr. 3d 146, 160-63 (2008). Overland offers no public policy rationale justifying this special treatment for checks bearing forged indorsements by imposters, dishonest bookkeepers, or fictitious payees. Nor does the Uniform Commercial Code, its comments or any of its many commentators.

On the other hand, Articles 3 and 4 give rise to a coherent, sensible scheme of loss allocation if §§ 36-3-404(d) and 36-3-405(b) are treated as limitations on the defenses which those two sections otherwise allow, just as § 36-3-406 also does. Then a depositary bank bears no direct liability to the drawer, but may raise defenses to a drawee bank's breach of warranty claims based on the defenses provided in the just-cited sections, subject to loss allocation based on its comparative fault. Interpreting the UCC in this way not only harmonizes the otherwise discordant outcomes as between drawer and depositary bank, but also avoids depriving the depositary bank of the drawee bank's defenses to the drawer's claims. *See* p. 14 below.

that the depositary bank's negligence "substantially contribute[d] to [the] loss."[12] Both *Perini* and *Read* hold that in a double forgery situation, the depositary bank's taking the check for collection does not "substantially contribute to the loss." "[T]he losses are a result of the forged drawer's signature, not the endorsements." *Read*, 286 S.C. at 542, 335 S.E.2d at 364. Nothing in revised Article 3 abrogates that holding. So *Read* remains good law in the double forgery situation, even if §§ 36-3-404(d) and 36-3-405(b) otherwise permit affirmative claims by a drawer against a depositary bank. Overland asks this Court to overrule *Read*. It is an invitation the Court must decline.

Continuing to follow *Read* in double forgery cases also furthers the UCC's loss allocation scheme. Drawers will not be left with all losses from double forgeries. They can recover against their drawee banks, subject to any defenses raised under their account agreements or §§ 36-3-404, 36-3-405, 36-3-406 or 36-4-406. The drawee banks, in turn, may shift some double forgery losses to depositary banks by suing for breach of presentment warranties under § 36-4-208(a).

Denying drawers a direct action against depositary banks in double forgery cases is consistent with the policy adopted in § 36-3-420(a). Denying a direct action also prevents drawers from circumventing drawee bank defenses under their account agreements

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[12] *See* S.C. Code Ann. § 36-3-404, S.C. cmt. ("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 payment of the instrument." (emphasis added)); § 36-3-405, S.C. cmt. ("*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." (emphasis added)).

or § 36-4-406, and from thereby imposing greater liability on depositary banks than drawee banks would bear for the same double forged checks.

In this case, for example, Nance forged Overland checks for at least two years—from January 2008 through January 2010—before Overland detected and reported her fraud in February 2010. (*See* R. pp. 185, 206-216). Section 36-4-406(f) precludes Overland from recovering from its drawee banks any losses on checks Nance forged during 2008, "[w]ithout regard to care or lack of care of either the customer or the bank." There is no reason why Overland should be allowed to escape that preclusion by suing the depositary banks, BANA or SunTrust, directly. *See also Perini*, 553 F.2d at 400 (account agreement defense to checks forged by misuse of facsimile signature stamp).

Arguing for a contrary result, Overland relies heavily on *Gina Chin & Assoc., Inc. v. First Union Bank*, 256 Va. 59, 61-63, 500 S.E.2d 516, 517-18 (1998). (*See* AOB, p. 12). *Gina Chin* is not binding on this Court; *Read* is. S.C. Const. art. V, § 9; *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) *aff'd as modified*, 408 S.C. 198, 758 S.E.2d 715 (2014); *Bass v. Isochem*, 365 S.C. 454, 478, 617 S.E.2d 369, 381 (Ct. App. 2005). Moreover, *Gina Chin* is not persuasive because it fails to note that revised Article 3 does not alter the "loss causation principle" which independently supports the holdings in *Read* and *Perini*.[13] Also, Overland focuses on a motion to dismiss ruling, ignoring the fact that on remand, *Gina Chinn* prevailed only by showing

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[13] *Victory Clothing Co. v. Wachovia Bank, N.A.*, No. 1397 Feb.Term 2004, 2006 WL 773020, at *3, 5-6 (Pa. Com. Pl. Mar. 21, 2006), an out-of-state, unreported, trial court decision, which Overland also cites, (AOB, p. 12), notes the separate "loss causation principle," on which *Perini* was based, but inexplicably ignores that basis of the decision in adopting *Gina Chin's* holding that revised Article 3 upsets settled law in double forgery cases.

that the bank bore *respondeat superior* liability for its teller's knowingly aiding the embezzler.

In short, this Court remains bound by *Read's* holding that, in double forgery cases, "the losses are a result of the forged drawer's signature, not the endorsements." *Read*, 286 S.C. at 542, 335 S.E.2d at 364. Therefore, the drawer, Overland in this case, cannot show that any negligence of the depositary bank in taking the double forged check for collection "substantially contribute[d] to the loss" and so cannot recover under §§ 36-3-404(d) or 36-3-405(b) even if they permit a drawer to sue a depositary bank directly. For that reason, summary judgment was properly entered against Overland on its 17th cause of action. This Court should affirm.

3. Overland Failed To Raise A Genuine Issue On Each Element Of Its Purported Negligence Claim

Summary judgment was also properly entered and should be affirmed for the added and independent reason that Overland failed to submit evidence raising a genuine issue of material fact as to each essential element of its purported negligence claim.

If permitted at all, a claim under §§ 36-3-404(d) or 36-3-405(b) has four essential elements: (a) applicability of those sections, (b) a bank's negligence in paying or taking a check for collection, (c) causation, and (d) damages. Overland's evidence did not raise genuine issues of material fact as to the first three of these elements.

(a) Overland Offered No Evidence That The Disputed Checks Fell Within The Scope Of Sections 3-404 or 3-405

To establish any claim under §§ 36-3-404(d) or 36-3-405(b), Overland first had to prove that the checks that caused its losses fell within the scope of those statutes.

The statutes apply only to checks that (i) an imposter induces the drawer to issue (§ 36-3-404(a)), (ii) are made payable to a fictitious person or one not intended to have an

interest in the instrument (§ 36-3-404(b)), or (iii) are fraudulently indorsed in the name of the payee by an employee entrusted with responsibility for the checks (§ 36-3-405(b)).

Sections 36-3-404 and 36-3-405 do not apply at all, and no claim is possible under their comparative negligence provisions if the fraud is accomplished by a means other than an imposter, fictitious payee, or padded payroll check, or the check bears no indorsement (and is not deposited in the payee's account), or indorsed in a name other than the payee's name. *See, e.g., Mills*, 166 Cal. App. 4th at 888-91, 83 Cal. Rptr. 3d at 160-63.

Overland submitted no evidence to show that the checks on which it bases its claims were fraudulently indorsed and fell within the scope of §§ 36-3-404(a), (b) or 36-3-405(b).[14] (*See* R. pp. 148-50; AOB, pp. 8-10). Instead, in the trial court, it argued that "Overland is not required, nor does it accept BOA's invitation, to admit liability under this fact pattern." (R. p. 148).

Admission of liability is not the issue. (*See* R pp. 136-37). A drawer need not admit liability, but it must show that the checks on which it bases its claim are ones to which §§ 36-3-404 or 36-3-405 apply. Otherwise, it cannot show that it has a claim

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[14] The evidence that Overland did submit shows that §§ 36-3-404 and 36-3-405 do not apply to most, if not all, of the checks on which Overland's claims are based. According to O'Shea at least after October 2009, Nance had no responsibility for Overland's checks, but she wormed her way into the company's check writing program by fraudulent means—so § 36-3-405 no longer applied, if it ever did. (*See* R. p. 187). Also, Overland produced only three checks that Nance had deposited in her BANA accounts. None of those checks was indorsed in the name of the payee as required to fall within the scope of §§ 36-3-404 or 36-3-405. (*See* R. p. 168-72). Indeed, Seitz testified that all the checks BANA accepted for deposit "were negotiated without the endorsement of the payee." (R. p. 161, ¶ 7). And Overland told the trial court that most of these checks were deposited in Nance's personal account, not any account held in the name of the payee. (R. pp. 617-18, 621.)

under §§ 36-3-404(d) or 36-3-405(b), no matter how negligent it says the depositary bank was. *See Mills*, 166 Cal. App. 4th at 888-91, 83 Cal. Rptr. 3d at 160-63.

Because Overland did not submit evidence sufficient to raise a genuine issue of material fact as to this first essential element of its claim, summary judgment was properly entered against it.

(b) Overland Did Not Offer Evidence That BANA Was Negligent In Taking The Checks For Collection

Overland also failed to raise a genuine issue as to negligence.

Overland's only evidence on lack of due care was (i) Nance's testimony that she opened accounts at BANA by using an incorrect Social Security Number and without producing any documents showing she was doing business as Taylor Enterprises or Atlantic British, (ii) O'Shea's testimony that BANA deposited checks bearing forged indorsements, and (iii) Seitz's testimony that BANA redeposited three checks in her account after having returned them once as improperly deposited. (*See* AOB, p. 9; R. pp. 206-216; R. p. 160, ¶ 6; R. p. 164-172).

Because BANA owed Overland, a non-customer, no duty of care in opening accounts for Nance, evidence of lapses in account-opening procedures or "Know Your Customer" rules cannot meet Overland's burden of raising a genuine issue as to negligence. For example, affirming dismissal of a non-customer's claim that a depositary bank had negligently allowed its customer to establish and operate a fraudulent bank account, the Fourth Circuit reiterated that "[t]he mere fact that a bank account can be used in the course of perpetrating a fraud does not mean that banks have a duty to persons other than their own customers." *Eisenberg*, 301 F.2d at 222, 225 (*quoting McCallum v. Rizzo,* 1995 WL 1146812, at *2 (Mass. Super. Ct. Oct. 13, 1995)).

The rule is no different under §§ 36-3-404(d) or 36-3-405(b) even if those sections conferred a direct negligence claim on Overland as it asserts. Assuming such a direct claim was possible under § 3-405(b),[15] the Indiana Supreme Court explained that lack of care in opening an account does not suffice, on its own, to establish liability. *Auto-Owners Ins. Co. v. Bank One*, 879 N.E.2d 1086, 1090 (Ind. 2008). Section 3-405(b) permits recovery only for a bank's lack of ordinary care "in paying or taking the instrument." Opening an account is not paying a check or taking it for collection. "The language of the statute does not contemplate a general requirement that banks use ordinary care when opening accounts ...." *Auto-Owners Ins. Co.*, 879 N.E.2d at 1090.

Similarly, the "Know Your Customer" rules that banks are supposed to follow in opening accounts are promulgated to prevent money laundering and to protect banks, not their customers or check drawers. *Auto-Owners Ins. Co.*, 879 N.E.2d at 1090 & n. 2; *Software Design & Application, Ltd.*, 49 Cal. App. 4th at 482, 56 Cal. Rptr. 2d at 762. So Seitz's statements about BANA's compliance with Know Your Customer rules in opening or changing names on Nance's accounts falls far short of raising a genuine issue of fact as to whether BANA was negligent in taking her forged checks for collection. (*See* R. pp. 159-60, ¶¶ 3-5).

As the trial court correctly ruled, citing *Eisenberg*:

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[15] The Indiana Supreme Court had granted transfer on only two questions: "whether Bank One was subject to an ordinary care requirement for its actions in opening an account for Wulf, and if so, whether Bank One's failure to exercise ordinary care substantially contributed to Auto–Owners' losses." *Auto-Owners Ins. Co.*, 879 N.E.2d at 1088. Whether UCC §§ 3-404(d) or 3-405(b) granted the drawee a direct negligence claim against the depositary bank was not an issue raised for the Supreme Court's consideration and so the court simply assumed that such a claim could be stated.

> In the present matter, Overland only maintained accounts with NBSC and BB&T. Ms. Nance opened each account at Bank of America and SunTrust. Additionally, Overland has not alleged that either Bank of America or SunTrust committed fraud or made a misrepresentation to it regarding these accounts. Therefore, Overland is unable to demonstrate that Bank of America or SunTrust owed it any duty regarding these matters.

(R. p. 8).

Overland also fails to raise a genuine issue as to negligence in BANA's taking Nance's checks for collection. Overland conceded that the checks were deposited through ATM transactions. (R. p. 4, ¶ 7; R. p. 8; R. p. 13). When checks are processed for collection by such automated means, ordinary care and the observance of reasonable commercial standards "do not require the bank to examine the instrument." S.C. Code Ann. § 36-3-103(a)(9).[16]

> The statute does not impose a duty upon a paying bank to inspect every check to verify signatures appearing thereon prior to processing the check for payment [or collection]. The mere fact that a bank may have paid [or taken] an item over a forged signature does not establish that a bank failed to exercise "ordinary care."

Groue v. Capital One, 47 So. 3d 1038, 1044 (La. Ct. App. 2010).

Overland produced no evidence to show that any defect in the deposited checks could have been discovered without inspecting every check. Nor did it present evidence showing that BANA departed from general banking usage in its automatic processing of Nance's checks. Hence, Overland failed to raise a genuine issue of fact about whether

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[16] The cited statute states in part: "In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or Chapter 4."

BANA failed to exercise ordinary care in taking Nance's checks for collection.[17] *See Watson Coatings, Inc. v. Am. Express Travel Related Serv., Inc.*, 436 F.3d 1036, 1041-42 (8th Cir. 2006); *DBI Architects, P.C. v. Am. Express Travel-Related Servs. Co.*, 388 F.3d 886, 895 (D.C. Cir. 2004); *Pernikoff Constr. Co. v. U.S. Bank*, No. 4:09CV894 JCH, 2010 WL 3258399, at *5 (E.D. Mo. Aug. 16, 2010).

Overland argues that § 36-3-103(a)(9)'s definition of ordinary care only lessens the bank's obligations "for the time-period between a deposit and when the bank ... reviews it." (AOB, p. 14). Overland cites no authority for this proposition. There is none. As the UCC's comments confirm, revised Article 3's definition of ordinary care was adopted specifically to avoid any requirement that the bank "review" items it automatically processes.

> The term "ordinary care" used in subsection (e) is defined in Section 3-103(a)(7), made applicable to Article 4 by Section 4-104(c), to provide that sight examination by a payor bank is not required if its procedure is reasonable and is commonly followed by other comparable banks in the area. ... The definition of "ordinary care" in Section 3-103 rejects those authorities that hold, in effect, that failure to use sight examination is negligence as a matter of law.

S.C. Code Ann. § 36-4-406, Official Cmt. 4, referenced in § 36-3-103, Official Cmt. 5.

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[17] Overland's expert Seitz states that BANA accepted checks for deposit without the payee's indorsement, and that doing so "is not consistent with industry practice or the requirements of the Uniform Commercial Code." (R. p. 161, ¶7). Seitz carefully omits the fact that BANA could not have known indorsements were missing unless it sight-reviewed the automatically processed checks. So his opinion shows no lack of ordinary care as defined in § 36-3-103(a)(9). For the same reason, O'Shea's statement that Nance deposited checks not payable to her shows no negligence on BANA's part. (*See* R. pp. 206-216). Only sight-examination would reveal the payee's name.

As the comment goes on to state, "a bank should not have to share [a forged check] loss solely because it has adopted an automated collection or payment procedure in order to deal with the great volume of items at a lower cost to all customers." S.C. Code Ann. § 36-4-406, Official Cmt. 4. Overland's proposal would revive the authorities that the revised Article 3 expressly rejected and require banks to engage in laborious, expensive and time-consuming sight examination of checks, a task they cannot perform given the millions of checks they process every day.

As the trial court correctly stated:

> [Section 36-3-103(a)(9) provides] that where a bank processes checks by automated means, "reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage." This effectively creates a presumption of reasonable care in automated check processing systems.

(R. p. 7).

Overland's last shred of evidence regarding negligence concerns three checks which BANA originally rejected for deposit on October 1, 2009 and then accepted when they were redeposited four weeks later. (*See* R. pp. 160, 164-72).[18] This single deposit, rejection and redeposit of three checks does not show any negligence. Indeed, it illustrates just the contrary. It shows BANA had procedures in place to sight-review some automatically deposited checks and, when it caught improperly deposited checks in that review, it rejected them. As Overland has not shown the criteria for sight-review

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[18] Overland's opening brief misstates Seitz's evidence, claiming it shows that BANA "refused to deposit *many* of Nance's stolen checks" yet allowed her to re-deposit the same checks at a later date. (AOB, p. 9 (emphasis added)). Seitz's affidavit identifies only three checks in a single deposit which were rejected and redeposited. Three is not many.

were triggered by the redeposit, it cannot show—and Seitz does not opine—that the failure to detect the redeposit shows any lack of ordinary care.

In short, Overland's lack evidence fails to raise a genuine issue of material fact as to lack of ordinary care, as the trial court correctly found:

> Overland has not demonstrated that Bank of America or SunTrust failed to exercise ordinary care in their check-processing procedures. At the hearing on the summary judgment motions, the parties agreed that these two banks utilize automated check processing. Overland has failed to show that Defendant banks' procedures varied in any way from general banking usage.

(R. p. 8).

(c) Overland Did Not Raise A Genuine Issue As To Causation

Both §§ 36-3-404(d) and 36-3-405(b) require proof that the bank's failure to exercise ordinary care "substantially contribute[d] to [the] loss." *See* p. 13 & n. 12 above.

Overland introduced no evidence to prove the causation element of its claim. In both its response to the summary judgment motion in the trial court and its opening brief in this Court, Overland simply ignored this element of its cause of action. (*See* R. pp. 149-50; AOB, pp. 8-10, 14-15).

As *Read* holds, lack of causation is the fatal flaw in a drawer's attempt to hold a depositary bank liable for forged indorsements in a double forgery case. *Read*, 286 S.C. at 542, 335 S.E.2d at 364. Overland produced no evidence to show this case is unusual or to establish the causation that *Read* held missing.

To the contrary, the flaws that Overland tries to establish in BANA's opening or renaming of Nance's accounts and its rejection, then acceptance for redeposit of three (out of more than a hundred) checks are not the cause of Overland's loss. The loss was

caused by Nance's insinuating herself into Overland's check-writing program and forging Overland's drawer's signature on checks without Overland's knowledge or consent. Nance was not deterred by one rejection of her three-check deposit. There is nothing to show that rejecting a redeposit would have had any different result.

Overland did not raise a genuine issue of material fact with respect to causation, just as it failed to raise such issues as to the applicability of §§ 36-3-404 or 36-3-405, and as to lack of ordinary care. Thus, the trial court correctly granted BANA summary judgment. This Court should affirm.

C. The Trial Court Did Not Abuse Its Discretion In Granting Summary Judgment Despite Overland's Argument That It Had Not Completed Discovery

Contrary to Overland's argument, (*see* AOB, pp. 4-8), the trial court did not abuse its discretion in granting BANA's motion for summary judgment despite Overland's argument that its discovery was incomplete. Overland offered no excuse for its failure to complete discovery in the 2½ years BANA had been a party. It submitted no affidavit under Rule 56(f), SCRCP. At the summary judgment hearing, Overland conceded that its motion to compel discovery had been resolved. Overland did not show any discovery it sought would have raised a genuine issue that BANA had acted negligently in taking Nance's checks for collection through automated procedures.

1. Standard Of Review

This Court applies the abuse of discretion standard to review the trial court's finding that Overland's motion to compel was moot and its implicit finding that BANA's summary judgment motion was not premature since Overland had been given a full and fair opportunity to complete its discovery. *See Robertson v. First Union Nat. Bank,* 350 S.C. 339, 347, 565 S.E.2d 309, 313 (Ct. App. 2002).

2. The Trial Court Did Not Abuse Its Discretion

While a summary judgment motion is premature if brought before "the opposing party has had a full and fair opportunity to complete discovery," *Baughman*, 306 S.C. at 112-14, 410 S.E.2d at 543-45, "[a] party claiming summary judgment is premature ... must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009) (*citing Dawkins v. Fields,* 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003)); *accord Baughman,* 306 S.C. at 112-13, 410 S.E.2d at 544.

Moreover, the proper way to make that required showing is by moving for a continuance supported by affidavit(s) of counsel or other knowledgeable witnesses stating why the party "cannot for reasons stated present by affidavit facts essential to justify [its] opposition." Rule 56(f), SCRCP; *Schmidt v. Courtney*, 357 S.C. 310, 320-22, 592 S.E.2d 326, 332-33 (Ct. App. 2003); *Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001).[19]

The trial court did not abuse its discretion in finding that Overland had not shown BANA's summary judgment motion was premature in accordance with these rules.

Overland advanced no reason why the time allowed for discovery in this case was insufficient. Approximately 2½ years transpired between Overland's adding BANA as a defendant and Overland's response to BANA's summary judgment motion. (R. pp. 144, 222). Two scheduling orders were entered during that period. A third was filed while the

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[19] A party may excuse its failure to comply with Rule 56(f)'s affidavit requirement only by establishing the pertinent facts are brought before the trial court by other appropriate means. *Baughman*, 306 S.C. at 112 n. 4, 410 S.E.2d at 544 n. 4.

summary judgment motion was pending. The initial order set a July 31, 2014 discovery cut-off date and an August 8, 2014 motion cut-off date. (R. p. ___). Overland offered no explanation why it could not complete its discovery by the July 31 cut-off date, let alone by October 27, 2014 when it filed its response to the summary judgment motions. (R. p. 151).

Overland cannot blame its tardiness on BANA. Overland waited over 18 months before serving written discovery on BANA and another 9 months (and a month after the summary judgment motion was filed) before moving to compel additional responses from BANA. (R. pp. 363, 365-384). Moreover, at the summary judgment hearing, Overland conceded it had recently received "an additional couple hundred documents and some updated responses" and that counsel for the parties were "going to work through" the two remaining issues. (R. pp. 620, 624). Overland did not suggest that any of the recently received documents were relevant to its summary judgment response.

Much shorter discovery periods have been held sufficient to allow a party a full and fair opportunity for discovery. *See, e.g., Dawkins*, 354 S.C. at 63, 71, 580 S.E.2d at 435, 439-40 (2003) (4 months); *Middleborough Horiz. Property Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App. 1995) (4 months); *Robertson*, 350 S.C. at 346-47, 565 S.E.2d at 313 (3 months after moving defendant added as party, though 1 year after complaint filed and 8 months after moving defendant's owner was deposed).[20]

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[20] Tellingly, the only cases Overland cites on this point are ones in which the trial court converted a Rule 12(b)(6) motion into a Rule 56 summary judgment motion, thus depriving the plaintiff of any chance to take discovery. (*See* AOB, p. 7 (citing *BPS, Inc. v. Worthy*, 362 S.C. 319, 330, 608 S.E.2d 155, 161 (Ct. App. 2005) and *Baird v.*

(Fn. cont'd)

Overland also failed to show that any missing discovery would uncover additional relevant evidence and create a genuine issue of material fact—as opposed to being a mere "fishing expedition." Of course, no discovery could confer on Overland the direct cause of action against a depositary bank in a double forgery case which *Read* denies. Earlier production of BANA's policies and procedures on account opening would not have aided Overland. BANA did produce those policies and procedures. Overland did not raise any of them at the summary judgment hearing or in its later-filed Rule 59(e) motion. (Rule 59(e) Motion).

Overland never requested production of BANA's policies and procedures regarding processing of ATM deposits. (*See* R. pp. 368-384). Even without those documents, Overland could have tried to show BANA's automated processing varied unreasonably from general banking usage. It made no attempt to do so. Overland did not identify any particular procedure it thought BANA failed to comply with in automatically processing Nance's ATM deposits—despite the fact that its expert, Seitz, professed familiarity with his own bank's check processing procedures. (*See* R. p. 158, ¶ 2). Overland just proposed a fishing expedition in the hope of finding some improbable and unsuspected flaw in BANA's automated processing of Nance's deposits.[21]

(Fn. cont'd)
Charleston Cnty., 333 S.C. 519, 529, 511 S.E.2d 69, 74-75 (1999). As the text shows, this case involves very different facts.

[21] Only sight review would have caught the defective indorsements or wrong payee names. As Overland conceded that Nance's ATM deposits were automatically processed, the problems with Nance's deposits could not have been detected by normal procedures. Overland suggests no reason why or means by which BANA could have treated Nance's deposits differently from other ATM deposits, subjecting hers but no others to sight review.

Finally, Overland made no motion for a continuance. It submitted no Rule 56(f) affidavits. Only four brief sentences in Seitz's affidavit addressed the supposed relevance of the supposedly needed discovery. (*See* R. p. 159-160, ¶5; R. p. 161, ¶8). Overland submitted no affidavit or other factual material to show it had not been dilatory and ignored that issue in its response to the summary judgment motions and in its Rule 59(e) motion papers. (R. pp. 41- 64, 144-219).

The trial court did not abuse its discretion in finding that Overland had been given a full and fair opportunity to complete its discovery before BANA filed its summary judgment motion.

IV.

CONCLUSION

For the reasons stated above, the Court should affirm the summary judgment entered in BANA's favor.

Respectfully submitted,

Date: September 25, 2015.

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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, Roger Fields, Bank of America Corporation, and SunTrust Banks, Inc. are the Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the *Final Brief of Respondent Bank of America, N.A.* complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served the *Final Brief of Respondent Bank of America, N.A.* and the *Certificate of Compliance* on the following by sending copies of the same via first class U.S. mail on the date set forth below.

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