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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

Appellate Case No.: 2015-000523

Unpublished Opinion No. 2016-UP-368
Filed July 20, 2016

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.

PETITION FOR HEARING

Pursuant to Rule 221(a) and Rule 240(i), SCACR, counsel for Appellant Overland, Inc., d/b/a Land Rover Greenville ("Overland") respectfully petitions this Court for a rehearing of Unpublished Opinion No. 2016-UP-368, dated July 20, 2016. A rehearing is appropriate when a Party believes that the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Retirement System, 349 S.C. 531, 549 S.E.2d 243 (2001). In addition to the discussion herein,

Appellant relies upon and incorporates its arguments on this issue in its Final Reply Brief and its Response to Motion to Dismiss Appeal, both of which are attached to this Motion. Final Reply Brief of Appellant, pp. 15-17; R. pp. 514-518.

The Court dismissed Appellant's appeal as untimely filed; however, Appellant believes the Court misapprehended the facts and circumstances as they occurred in the trial court and the nonjurisdictional nature of Rule 59(e). Appellant's Rule 59(e) motion was timely filed with the trial court because it was filed within the time prescribed by the trial court. On December 29, 2014, Appellants requested an extension of time within which to file a Rule 59(e) motion and the trial court granted the motion *before* the ten-day period had expired.

> Judge Verdin,
>
> Good afternoon. I am writing you to request an extension of time to file a Rule 59(e) Motion in the Overland v. Nance lawsuit. I was out of the state all of last week for Christmas holidays, and I have been sick as well. If your Honor believes it cannot grant me an extension until the end of the week under these circumstances, then would your Honor please also consider allowing me to submit an Amended Motion at a later date?

(R. pp. 12-13). There is no known South Carolina precedent that precludes such an extension under Rule 59(e), nor has the South Carolina Supreme Court undercut reliance on judicial orders by holding that counsel may not rely on timely filed motions for extensions granted by trial court judges. Appellant believes the Court misapprehended the fact that the extension had been requested and granted *prior* to the deadline passing, thus leaving the grant of an extension within the sound discretion of the trial court.[1] Judge Verdin exercised her discretion to enlarge the time for filing Appellant's Rule 59 (e) motion for good cause shown – i.e., the filing deadline lay between two major holidays and counsel was ill with the flu. The Court's Opinion dismissing the appeal appears

[1] Appellant also asked the trial court for permission to amend its motion if the trial court could not grant an extension. Appellant would have filed the motion as best he could while sick and then amend as necessary if the trial court was without jurisdiction to grant the extension. Instead, the trial court granted the extension and Appellant relied upon the court's authority to issue the order granting the extension.

to overlook these facts. This is not case in which counsel simply forgot to file a motion or failed to accurately calendar a due date. This is a case in which counsel requested an order, received the order, complied with the order and relied upon that order.

A circuit judge maintains its authority to extend the filing deadlines under Rules 6 and 59, SCRCP. The Court's opinion effectively declares there are no exceptions to the 10-day filing period under Rule 59(e), and converts the rules of civil procedure for post-judgment motions into jurisdictional bars to appeals.[2] Appellant knows of no South Carolina precedent that holds that a Rule 59(e) motion filed in accordance with the facts and circumstances of this case would lead to a jurisdictional bar to an appeal in South Carolina. Conversely, the trial courts have exercised discretion to grant extensions of time for litigants to comply with procedural rules, including Rule 59. See, Camp v. Camp, 386 S.C. 571,689 S.E.2d 634 (2010).

The filing periods under South Carolina Rules 6(b), and 59(e) and (f), SCRCP, are not jurisdictional rules. They are procedural rules of limitation to be interpreted in civil cases for the "just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. The South Carolina Rules of Civil Procedure grant our circuit court judges with the discretionary authority to instruct litigants on precisely how and when they must act. Claims-processing rules are not synonymous with jurisdictional rules. See Arbaugh v. Y & H Corp., 546 U.S. 500, at 516 (2006) (holding that "time prescriptions, however emphatic, 'are not properly typed jurisdictional absent some jurisdictional designation by Congress'"); see also, Kontrick v. Ryan, 540 U.S. 443, at 455 (2004) (the jurisdictional tag applies only to rules that classify the types of cases (subject matter jurisdiction) and persons (personal jurisdiction) falling within a court's adjudicatory authority, which is not

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[2] Rule 59 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. Thus, the South Carolina and Federal rules 59 are different in substantive ways.

appropriate for claims-processing rules). In this instance, Appellant believes the Court misapprehended the distinction between the two types of rules by treating the Rule 59(e) 10-day time period as having the same absolute and inflexible filing deadline for filing a notice of appeal. When a Rule is intended to limit jurisdiction, it clearly states that limitation so that attorneys and the judiciary are all on notice of what they may and may not do regarding deadlines. Rule 6(b) limiting jurisdiction on appeals states that the "time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order." That language is absent from Rule 59(e). This Court's Opinion converts Rule 59(e) from a claims-processing rule to a jurisdictional one without prior notice or due process.

Further, because the trial judge granted Appellant's motion, this matter is distinguishable from the authorities cited by this Court in Coward Hund Constr. Co. v. Ball Corp., 336 S.C.1,3,518 S.E.2d 56, 57 (Ct. App. 1999) and Elam v. S.C. Dep't of Transp., 361 S.C.9, 14-15,602 S.E.2d 772, 775 (2004) (which dealt with successive Rule 59(e) motions by counsel alone without permission from the Court).

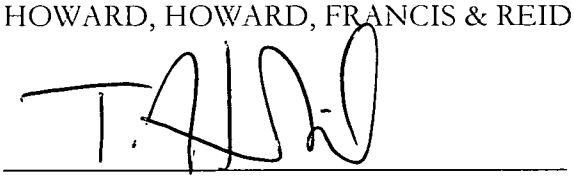
Appellant filed its Notice of Intent to Appeal on March 4, 2015, within the 30-day filing period required by Rule 203(b) after the trial court denied Appellant's Rule 59(e) motion. Appellant's Rule 59(e) motion stayed the appeal filing period under Rule 203(b).

Appellees did not object to the extension in the trial court and cannot raise the issue for the first time on appeal. Appellees are estopped because Appellant relied upon the extension.

Just as the extensions were permissible in Gallagher v. Everett, 353 S.C. 59, 577 S.E.2d 217 (Ct. App. 2002) and Camp v. Camp, 386 S.C. 571,689 S.E.2d 634 (2010), the extension in this case was also properly granted.

Respectfully submitted,

HOWARD, HOWARD, FRANCIS & REID, L.L.P.



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EXCERPT FROM FINAL REPLY BRIEF

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

R. p. 455, ¶ 42.

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

"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."

R. p. 463, ¶ 68.

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. p. 463-465. 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. p. 514-531. 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 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]

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[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 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.

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 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

[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).

EXCERPT FROM RECORD ON APPEAL VOLUME II

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Appellate Case No.: 2015-000523

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

RESPONSE TO MOTION TO DISMISS APPEAL

This case involves the embezzlement of approximately $1,400,000 and the liability of the embezzler's banks, to wit Bank of America and Sun Trust. Exhibit A – Affidavit of Michael F. O'Shea. The case was given complex case status, and assigned to the Hon. Letitia H. Verdin "to hear and handle all pre-trial motions and all other matters pertaining to this case, including trial." Exhibit B – Consent Order Designating Case Complex.

By Order dated December 15, 2014, and received by Plaintiff's counsel on December 17, 2014, Judge Verdin granted summary judgment to the banks. Within 10 days,

plus the allowable holiday and weekend grace period, Plaintiff's counsel, T. Hunt Reid, sought and received from Judge Verdin an extension of time to file a motion for reconsideration. He was out of town for the Christmas holidays, and sick. Exhibit C – E-mail chain of December 29, 2014.

Relying on Judge Verdin's extension, Plaintiff's counsel then filed his motion. On February 5, 2015, Judge Verdin denied it. Within 30 days, on March 4, 2015, Plaintiff's counsel filed a notice of appeal.

Counsel for Bank of America has moved to dismiss the appeal. He argues that the motion for reconsideration was not timely presented, but has provided no South Carolina authority for that proposition. The sole South Carolina case cited is unpublished, which means that the appellate court was unwilling to make it the law. Additionally, the cases cited in that unpublished opinion do not stand for the proposition that the trial court may not extend the time to file a Rule 59(e) Motion when the request to file such a motion is made prior to the initial deadline to file the motion.

Judge Verdin had jurisdiction not only of the motion for summary judgment, but the entire case. She had this jurisdiction by court order and consent of the parties. The argument of counsel for Bank of America misconceives the nature of the trial court's jurisdiction and the 10-day window in Rule 59(e). The 10-day window was put into the rule not as a limitation of the court's jurisdiction, but rather as an extension of it. Historically, a traveling circuit judge was deprived of jurisdiction when she or he left the circuit. The 10-day window was inserted into the rule to allow greater - not lesser - flexibility. Cox v. Fleetwood Homes of Georgia, Inc., 334 S.C. 55, 512 S.E.2d 498 (1999), decided years after the adoption of Rule 59, provided further flexibility, and shows the unwillingness of the appellate courts to be hidebound on the handling of cases at the circuit level under the prior

restrictive practice. Judge Verdin did not need the 10-day window because she had continuing jurisdiction of the case. Because she had jurisdiction, she could grant the extension.

Moreover, by accepting and then ruling on the motion for reconsideration, Judge Verdin eliminated the argument by Bank of America's counsel about the 10-day window. A similar argument was rejected in Gallagher v. Evert, 353 S.C. 59, 577 S.E.2d 217 Ct. App. 2002). That case also involved a Rule 59(e) motion.

> "Because the circuit court found it appropriate to hear the matter, we find no error in the circuit court's decision to decide the motion despite Gallagher's failure to comply with Rule 59(g), SCRCP. The notes to Rule 59, SCRCP, indicate that subsection (g) was added 'to help insure the judge is promptly notified that the motion has been filed.' There is no indication that the failure to transmit a copy of the motion to the circuit court affects the tolling provision of Rule 203(b)(1), SCACR. Therefore, the time for filing the notice of appeal did not begin to run until after the circuit court denied the motion on December 27, 2000. After the circuit court denied the motion, only twenty days passed before Gallagher filed his notice of appeal on January 16, 2001, thus Gallagher complied with Rule 203(b), SCACR." (Hearn, C. J.)

The federal cases cited by counsel for Bank of America are beside the point. The South Carolina Supreme Court has made clear that its interpretation of the South Carolina Rules of Civil Procedure is not controlled by the federal courts. In Camp v. Camp, 386 S.C. 571, 689 S.E.2d 634 (2010), it reversed a South Carolina Court of Appeals decision construing Rule 7(b)(1), SCRCP, that had relied on an identical United States Court of Appeals case. The Supreme Court reasoned that as long as "neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration", the motion is proper. Id. at 637. There is no prejudice to the Bank of America in this case, and its counsel has not argued it.

Bank of America is estopped from even bringing its motion because its counsel did not object to the enlargement of time, and in fact, expressed his willingness to be

accommodating, when the request for enlargement of time was made. Exhibit C – E-mail chain of December 29, 2014. While Mr. Sheedy raised the question whether the Judge could grant such an extension, neither he nor his client Bank of America objected to the extension. Therefore, any objection to the extension was waived on December 29, 2014 and Bank of America is estopped from bringing this motion.

Finally, and perhaps most importantly, the Due Process Clauses of the United States Constitution and the South Carolina Constitution, and simple fairness, require denial of the Bank of America's motion to dismiss. Here we have a young lawyer, sick and out-of-town during Christmas, doing what is expected of him. He contacts opposing counsel and the judge to ask for a brief extension of time. The judge grants the request and he files his motion. Of all things that one should be able to count on in the practice of law, it is the time given by the judge personally to file something with the court. In fairness, that reliance should not be undercut. Under Due Process, it cannot be. This is especially true in a case such as this one, where the South Carolina Supreme Court has not visited the issue and provided the lawyers and litigants of this State with notice whether the ten day timeframe in Rule 59(e) may or may not be enlarged upon a motion timely made before the ten day period has expired.

There is nothing remarkable about the request that the motion to dismiss be denied. This is a matter of fundamental rights. The South Carolina Supreme Court has held that in such a circumstance, "those rights take precedence over procedural rules otherwise limiting action by the court." *See* Galloway v. Galloway, 249 S.C. 157, 153 S.E.2d 326 (1967) (involving rights of minors) *cited by* Stefan v. Stefan, 320 S.C. 419, 465 S.E.2d 734 Ct.App. 1995) (involving failure to preserve issue of visitation by father). The Due Process right at

issue in this case is no less fundamental than those in Galloway and Stefan. It lies at the heart of our system of justice.

The motion to dismiss of Bank of America is misplaced. For technical reasons under Rule 59(e), estoppel, and for broader considerations of fundamental fairness and Due Process, it should be denied.

Respectfully submitted,

Date: April 8, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the Petition for Rehearing on the Respondents, Bank of America Corporation and SunTrust Banks, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on August 2, 2016, addressed to its attorneys of record at their offices and in the particular manners set forth below.

By: _____

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