THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Greenville County
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 2016-UP-368 (S.C. Ct. App. filed July 20, 2016)

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

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 WRIT OF CERTIORARI

CARL F. MULLER
Carl F. Muller, Attorney at Law, P.A.
607 Pendleton Street, Suite 201
Greenville, SC 29601
864-991-8904
carl@carlmullerlaw.com

T. HUNT REID
Howard Howard Francis & Reid
PO Box 10383
Greenville, SC 29603-0383
864-242-3522
hunter@hhfr.com

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T. HUNT REID
Howard Howard Francis & Reid
PO Box 10383
Greenville, SC 29603-0383
864-242-3522
hunter@hhfr.com

Other Counsel of Record:

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

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

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QUESTION PRESENTED

Can a lawyer rely on an extension granted to him or her by a circuit judge for a circuit court matter in a circuit court case before that same judge?

STATEMENT OF THE CASE

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 (App. pp. 529-532) 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 (App. pp. 533-537)

By Order dated December 15, 2014, and received by Plaintiff's counsel on December 17, 2014, Judge Verdin granted summary judgment to the banks. (App. pp. 6-14) 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 (App. pp. 538-541) Relying on Judge Verdin's extension, Plaintiff's counsel then filed his motion. On February 5, 2014, Judge Verdin denied it. (App. pp. 15-16) Within 30 days, on March 4, 2014, Plaintiff's counsel filed a notice of appeal. (App. p. 786)

Counsel for Bank of America moved to dismiss the appeal on March 31, 2015. (App. pp. 519-523) He asserted that the motion for reconsideration was not timely presented, but presented no South Carolina authority for that proposition.[1] The Court of Appeals denied the Motion on June 4, 2015. (App. pp. 20-21) After the submission of Final Briefs and the Record on Appeal, the Court of Appeals dismissed the appeal on July 20, 2016. (App. pp. 1055-1058) The Appellant petitioned for rehearing on August 2, 2016 (App. pp. 1059-1073) The Court of Appeals denied the petition on September 23, 2016. (App. pp. 1076-1077)

ARGUMENT

The reason that the Supreme Court should grant certiorari is that the bar deserves and needs guidance on whether it can rely on an extension granted to a lawyer by a circuit judge for a circuit court matter in a circuit court case before that same judge. Similarly, the bench would benefit from such guidance. The case at hand involves this issue, which is both novel and important to the practice of law in South Carolina generally. The circumstances of the case are especially compelling because the extension was requested and granted over the Christmas and New Year holiday to a young lawyer who was ill at the time. The trial judge and parties then proceeded with the extension in place. When the Court of Appeals dismissed the case, without precedent from the Supreme Court, on the narrow procedural ground that the extension should have not been granted by the circuit judge, the consequences were disastrous not only for the client but also for the lawyer. At a minimum, the Court of Appeals decision, because it relates to a novel issue and is without precedent, should be applied only prospectively, and not in this case. Equally significant, this case gives

[1] 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 motion is made prior to the initial deadline to file the motion.

the Supreme Court the opportunity to provide clarity on a legal issue that is of overriding importance far beyond the parties now before it.

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 misconceived the nature of the trial court's jurisdiction and the 10-day window in Rule 59(e). It is unlike the time for filing notice of intent to appeal, which both the South Carolina Rules of Civil Procedure and the South Carolina Supreme Court have explicitly stated to be jurisdictional and not allowed to be extended by consent or order. (Rule 6(b), SCRCP) The 10-day window for reconsideration 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 to the Court of Appeals 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.

Perhaps most importantly, the Due Process Clauses of the United States Constitution and the South Carolina Constitution, and simple fairness, require denial of 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 that very judge. 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.

Finally, 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. (App. pp. 538-541) While Mr. Sheedy raised the question of 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 its motion.

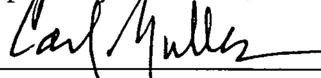
CONCLUSION

The motion to dismiss of Bank of America is misplaced and the decision of the Court of Appeals to grant it is wrong. The Supreme Court has previously reversed the Court of Appeals for misinterpreting Rule 59(e) SCRCP and thereby wrongly dismissing an appeal. The Supreme Court did so because, in its words, "civil procedure and appellate rules should

not be written or interpreted to create a trap for the unwary lawyer or party . . . Rule 1 SCRCP civil procedure rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action. . . .' and [w]e strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place." Elam vs. S.C. Dep't of Transp., 361 S.C. 9, 17, 602 S.E.2d 772, 776 (2004) (internal citations omitted). To remove all doubt about the right of a party to appeal following a motion for reconsideration at the trial level, the Supreme Court also stated, "Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written, 59(e) motion without concern a later appeal will be deemed untimely." Id. The Appellant implores the South Carolina Supreme Court to correct the error of the Court of Appeals, and in so doing to provide needed guidance to the bar and bench on this very important issue.

October 20, 2016

Respectfully submitted,



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.
Howard Howard Francis & Reid
PO Box 10383
Greenville, SC 29603-0383
864-242-3522
hunter@hhfr.com

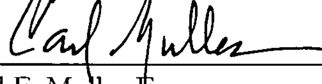
Attorneys for Appellant

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals.

October 20, 2016

Respectfully submitted,



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

T. Hunt Reid, Esq.
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Attorneys for Appellant

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PROOF OF SERVICE

I certify that I have served Petitioner's Petition for a Writ of Certiorari and accompanying Appendix to the **South Carolina Court of Appeals, Jenny Abbott Kitchings, Clerk, P.O. Box 11629, Columbia, S.C. 29211** and I have served Petitioner's

Petition for a Writ of Certiorari and accompanying Appendix by depositing a copy of them in the U.S. Mail, postage prepaid, on October 20, 2016, addressed to:

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

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

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.
Howard Howard Francis & Reid
PO Box 10383
Greenville, SC 29603-0383
864-242-3522
hunter@hhfr.com

Attorney for Petitioners