

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

**RECEIVED**

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

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

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**I.**

**QUESTION PRESENTED**

Expressed in the terms and circumstances of this case, *see* Rule 242(d)(1), SCACR, the question raised by the petition is *not* whether a party may, in general, rely on an extension of time granted by a circuit judge.

Instead, the question is whether a circuit judge has the authority to extend the time for serving a motion to alter or amend judgment under Rule 59(e), SCRCR, thus staying the jurisdictional deadline for serving a notice of appeal.

**II.**

**CERTIORARI SHOULD BE DENIED**

**A. This Court's Review Is Not Required As The Rules Provide A Clear Answer**

Contrary to Overland's claim, this Court's review is not required on the question that the petition presents. The Rules of Civil Procedure clearly answer the question. Were it needed, further guidance is given by federal authority under the identically-worded federal rules.

Under Rule 203(b)(1), SCACR, the normal deadline for serving a notice of appeal is 30 days after receipt of written notice of entry of the order. Overland missed that deadline. Overland received notice of entry of judgment on December 17, 2014 but served its notice of appeal on March 4, 2015. (App. 41, 786.)

Rule 203(b)(1) stays the normal appeal deadline when a "timely" motion to alter or amend judgment has been made. Overland relies on that provision to rescue its otherwise untimely appeal. But, as the Court of Appeals correctly held, Overland's motion to alter or amend judgment was *not* "timely" made, so it did not stay the appeal deadline. (App. 1055-1058.)

Rule 59(e), SCRCPP, unambiguously states the deadline for filing a motion to alter or amend judgment: “A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.”<sup>1</sup>

Overland missed that deadline as well. It received written notice of entry of judgment on December 17, 2014 but served its motion to alter or amend judgment 22 days later, on January 7, 2015. (App. 41.) So its only hope lies in claiming the trial court could extend the 10-day deadline for serving the Rule 59(e) motion.

Rule 6(b), SCRCPP, dashes that hope. It states: “The time for taking any action under rule[] ... 59 ... may not be extended except to the extent and under the conditions stated in [it].” Rule 59(e) does not expressly provide for any extension of its 10-day deadline under any condition.<sup>2</sup> So none may be had.

These rules could not be clearer. Rule 6(b) plainly provides that Rule 59(e)’s 10-day time limit on serving a motion to alter or amend judgment may not be extended.

Were any further guidance needed, federal authorities provide it.<sup>3</sup> They hold: “The court is not permitted to extend the time in which to make the motion [to alter or

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<sup>1</sup> By this means, Rule 59(e) sets an easily determined, objective standard for finality of the order or judgment. There is no need to search the record—or, in this case, non-record e-mails—to see if an extension of time to file a Rule 59(e) motion has been granted. Rule 6(b) prohibits any extension of Rule 59(e)’s 10-day deadline for this very reason. *See* 1946 Advisory Committee Notes to Fed. R. Civ. P. 6(b) in 12A Wright & Miller, *Fed. Practice & Procedure Civ. App. C* (3d ed.).

<sup>2</sup> By contrast, Rule 59(b) expressly allows the court discretion to permit a new trial motion to be served up to 10 days after a jury is discharged.

<sup>3</sup> “In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules.” *Maybank v. BB&T Corp.*, 416 S.C. 541, \_\_\_, 787 S.E.2d 498, 510 (2016). Both Rules 6(b) and 59(e), SCRCPP, duplicate prior versions of the similarly numbered federal rules. *See* Notes, Rule 6, SCRCPP (“This Rule 6(b) is the same as the Federal Rule ...”); Notes, Rule 59, SCRCPP (“This Rule 59 is substantially the Federal Rule.”); *Elam v. South Carolina Dept. of*  
(Fn. cont’d)

amend judgment].” 11 Wright & Miller, Federal Practice & Procedure, § 2817 Amendment or Alteration of Judgment (3d ed.) (fn. omitted).<sup>4</sup>

The question Overland’s petition raises does not warrant this Court’s review since the Rules of Civil Procedure provide the answer and federal authorities confirm the Rules’ plain meaning.

**B. None Of Overland’s Cases Cast Any Doubt On The Answer Stated In The Rules**

Trying to create uncertainty or permit “flexibility” where none exists under Rule 6(b)’s and Rule 59(e)’s clear wording, the petition cites three South Carolina decisions. (Pet., 3-4.) None of the three come close to casting a shadow of doubt or allowing any flexibility in the Rules’ explicit ban on extensions of the time for serving a motion to alter or amend judgment.

In *Cox v. Fleetwood Homes of Georgia, Inc.*, 334 S.C. 55, 512 S.E.2d 498 (1999), the only issue was whether a judge who had heard the trial of a case while on assignment outside his circuit of residence retained jurisdiction to rule on matters resubmitted for decision on remand from the Court of Appeals. The decision did not address any issue

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(Fn. cont’d)

*Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (“Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.”).

<sup>4</sup> Cases so holding include *Robinson v. Sweeny*, 794 F.3d 782, 783 (7th Cir. 2015); *Panhorst v. United States*, 241 F.3d 367, 372 (4th Cir. 2001); *Weitz v. Lovelace Health Sys., Inc.*, 214 F.3d 1175, 1178-81 (10th Cir. 2000); *Alston v. MCI Commc’ns Corp.*, 84 F.3d 705, 706-07 (4th Cir. 1996); *Kraus v. Consolidated Rail Corp.*, 899 F.2d 1360, 1362-68 (3d Cir. 1990). The federal courts have had no difficulty construing the clear language of Rules 6(b) and 59(e), but have struggled with the federal “unique circumstances” exception to the requirement of a timely notice of appeal. See *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178-79, 109 S. Ct. 987, 993, 103 L. Ed. 2d 146 (1989). This state has never recognized such an exception. See *Elam*, 361 S.C. at 14-15, 602 S.E.2d at 775.

regarding a motion to alter or amend judgment, mentioning Rule 59 only in passing as one express exception to the normal rule that “a judge assigned to hold court in a circuit in which he is not a resident must generally exercise judicial duties relating to the circuit during the period of the assignment.” *Id.*, 334 S.C. at 58, 512 S.E.2d at 500.

In *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002), the appellant timely served his motion to alter or amend judgment but failed to provide the judge a copy of the motion within 10 days of filing as required by Rule 59(g), SCRCF. The Court of Appeals held that the timely served motion, nevertheless, extended the time for appeal, observing:

The notes to Rule 59, SCRCF, 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.

*Id.*, 353 S.C. at 63, 577 S.E.2d at 219.

*Gallagher* does not assist Overland. Rule 203(b)(1), SCACR, may not mention transmittal of a copy to the trial court. But the Rule *does* expressly require timely service of the Rule 59(e) motion. Rule 203(b)(1) stays the normal 30-day deadline for serving a notice of appeal *only* when a *timely* Rule 59(e) motion has been made. When, as in this case, the Rule 59 is *untimely*, there is no stay; the normal 30-day deadline applies.

Finally, *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634 (2010), the appellant again served its motion to alter or amend judgment within the 10-day time limit. However, the motion allegedly failed to state the grounds of the motion with particularity as required by Rule 7(b)(1), SCRCF. This Court held that since neither party was prejudiced by that failure and since the court was able to deal fairly with the motion, “applying an overly

technical reading of the rules does not serve the purpose of Rule 7(b)(1), SCRPC.” *Id.*, 386 S.C. at 576, 689 S.E.2d at 637. *Camp* did not address timeliness, but only the contents, of a motion to alter or amend judgment.

Time deadlines for an appeal are jurisdictional. Requirements for the contents of a notice of appeal or post-trial motion are not. *See, e.g., Mason v. Mason*, 412 S.C. 28, 59, 770 S.E.2d 405, 421 (Ct. App. 2015), cert. dismissed (July 31, 2015). Here, the problem is timeliness, not content. The time deadline is strict and jurisdictional. “[T]he [c]ourt has no authority to extend or expand the time in which the notice of intent to appeal must be served.” *Conner v. City of Forest Acres*, 348 S.C. 454, 461, 560 S.E.2d 606, 609 (2002).

### **C. There Is No Due Process Right To An Untimely Appeal**

More than 50 years ago, this Court answered Overland’s assertion that it somehow has been deprived of due process by the dismissal of its untimely appeal. “The right of appeal is a matter of grace and is not an inherent or vested right, and the rules of court and statutes must be followed in perfecting an appeal.” *Toomer v. Toomer*, 244 S.C. 399, 403, 137 S.E.2d 406, 408 (1964); *see also Cobb v. South Carolina Nat’l Bank*, 210 S.C. 533, 535, 43 S.E.2d 465, 466 (1947).<sup>5</sup>

The two cases cited by Overland do not hold otherwise. *See* Pet., 5. Neither involves any issue of constitutional right to an appeal or of the timeliness of an appeal. Rather, both deal with the non-jurisdictional, discretionary matter of proper preservation of issues on timely appeals through proper briefing. Both allow review of otherwise non-

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<sup>5</sup> *See also 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) (due process not violated by enforcement of statutes of limitation or repose).

preserved issues when necessary to protect the rights of minors in custody disputes. *See Stefan v. Stefan*, 320 S.C. 419, 422, 465 S.E.2d 734, 736 n. 2 (Ct. App. 1995); *Galloway v. Galloway*, 249 S.C. 157, 160, 153 S.E.2d 326, 327 (1967).

These cases plainly do not support Overland's argument. This matter turns on the jurisdictional time deadlines for appeals, not matters of discretion, like preservation of arguments by adequate briefing. No minors are involved in this commercial case between three corporations well able to look after their own rights.

**D. Overland Could Have Easily Avoided Dismissal Of Its Appeal**

Lacking a cogent legal argument, Overland tries to evoke the Court's sympathy. *See Pet.*, 1, 2, 4. Sympathy, even if merited, would not suffice. "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*, 361 S.C. at 14-15, 602 S.E.2d at 775.

Moreover, sympathy is not merited. Overland had the same 10 days to serve a Rule 59(e) motion as any other litigant. Rule 59(e) grants no additional time to young lawyers or to those who are ill. Under Rule 6(b), there can be no Holiday extension of Rule 59(e)'s 10-day deadline.

Even if Overland's counsel did not read those Rules, he was warned of their contents in plenty of time to protect Overland's right to appeal. In response to his request for consent to an extension of time, Bank of America's attorney replied that "the time is mandatory"; hence, Bank of America lacked the ability to consent to an extension. (App.

1070<sup>6</sup>, Exhibit C to Response to Motion to Dismiss Appeal). The same day, Bank of America's counsel reiterated this position, telling the trial court and Overland's counsel that the "ten (10) day time limit is non-discretionary, i.e., 'not later than', 'shall', nor am I aware of any cases allowing for extensions under Rule 59(e)." (*Id.*)

When these e-mails were exchanged between 2:00 p.m. and 3:00 p.m., Overland still had time to serve a Rule 59(e) motion. Overland could have served a simple Rule 59(e) motion that day to avoid any question as to timeliness. It could have served a notice of appeal on any of the 20 remaining days of the normal 30-day period for appeal.

Overland did neither. It did not read the Rules or the authorities interpreting the identical federal rules. Instead, it relied exclusively on a reply e-mail from the trial judge's administrative specialist granting more time. It bet all on the hope that the trial court had authority to extend the Rule 59(e) deadline rather than taking other, safer courses of action readily available to it.

For the same reasons, Overland cannot rightly shift blame to the circuit judge or opposing counsel for its own failure to read the Rules, research the law, and take the action necessary to preserve its appellate rights. As the Tenth Circuit has explained:

Appellant's counsel could have avoided this mistake by reading Rules 59(e) and 6(b) prior to filing the motion for an extension of time. In light of the clear prohibition of the extension, we cannot say that Appellant's reliance on the court's order was reasonable.

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<sup>6</sup> Overland failed to include a full copy of the Response to Motion to Dismiss Appeal in the Appendix submitted to the Court. For the Court's convenience, a full copy, with exhibits, is submitted with this Response.

[T]he rules expressly forbid any extensions for Rule 59(e) motions, and even a passing reference to the rules will reveal this fact. Consequently, the mere fact that a court has granted such an extension does not justify reliance that is clearly at odds with the text of the rules.

*Weitz*, 214 F.3d at pp. 1179-80.<sup>7</sup>

Also, contrary to Overland's contention, Bank of America is not estopped to raise the untimeliness of Overland's motion and thus its appeal. *See* Pet., 5. As already stated, Bank of America timely warned Overland's counsel that it thought no extension of the motion-filing deadline was possible. (App. 88.) Nothing more was required of it. 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.").

### III.

#### CONCLUSION

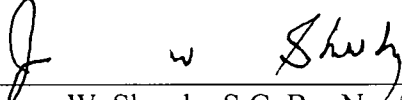
For the reasons stated above, the Court should deny the petition for certiorari.

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<sup>7</sup> *See also Panhorst*, 241 F.3d at 373 (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."); *Hahn v. District of Columbia Water & Sewer Auth.*, 727 A.2d 317, 320 (D.C. Ct. App. 1999) (Appellant is "responsible for knowing that the trial court could not extend the time to file a Rule 59(e) motion, in turn making his reliance on the extension order 'unreasonable.' Indeed, so clear is the law on this point that we can scarcely envision an action by the court that could have misled Hahn into thinking the time for appeal had been stayed.").

Respectfully submitted,

Date: November 1, 2016.

  
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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.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that on the date indicated below he served the *Return to Petition for Writ of Certiorari* on the following by sending copies of the same via first class U.S. mail on the date set forth below.

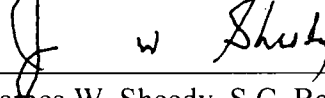
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