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)

Appellate Case No.: 2016-002151

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

PETITIONER'S REPLY TO RETURN OF RESPONDENT

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INTRODUCTION

This case is not simply about a 10-day time limit. It is about subject matter jurisdiction, which goes to the heart of judicial power. The United States Supreme Court addressed this issue under the Federal Rules of Civil Procedure most recently in 2007 in *Bowles v. Russell*, 551 US. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007). There it clarified the distinction between simple time limit rules and jurisdictional rules. *See also, Eberhart v. United States*, 546 U.S. 12, 125 S.Ct. 403, 163 L.Ed.2d 14 (2005), and *Kontrick v. Ryan,* 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). The time limit in Rule 59(e) is not jurisdictional. Instead, it is "claims-processing". As such, it is subject to extension by the Court under theories of both waiver (e.g. failure to object by the adverse party) and equity. Both principles apply in the present case.[1]

ARGUMENT

Under the *Bowles*, *Eberhart* and *Kontrick* trilogy, the Sixth Circuit Court of Appeals has supplied the roadmap for analyzing the claim-processing nature of Rule 59(e), SCRCP, in a case substantially identical to the case before this Court. In *National Ecological Foundation v. Alexander*, 496 F.3d 466 (2007), the State (Alexander) sought an extension of time to file a Rule 59(e) motion. NEF agreed to the extension. When the State later appealed the trial court's order, NEF argued that the Rule 59(e) motion was untimely and, therefore, the appellate court lacked jurisdiction. That is the same argument made by the Respondent in the present case. The *National Ecological* court rejected "this argument because two recent Supreme Court cases require us to conclude that the time limits set by Rules 6 and 59(e) constitute an affirmative defense to an untimely Rules 59(e)

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[1] Bank of America wrongly asserts that Rule 59(e), SCRCP is jurisdictional. That mistake pervades all of Bank of America's arguments in its Return to Petition.

motion, which the party opposing the motion is capable of forfeiting." *Id.* at 474 (citing *Eberhart* and *Kontrick). National Ecological* held that "no principled distinction exists between the rules at issue in *Kontrick* and *Eberhart* and the structure created by Federal Rules of Civil Procedure 6(b) and 59(e). Since these rules are indistinguishable from those in *Kontrick* and *Eberhart*, we conclude that they are claim-processing rules that provided NEF with a forfeitable affirmative defense." *Id* at 475.[2] NEF forfeited its affirmative defense when it "agreed not to contest the State's motion for an extension of time to file its Rule 59(e) motion." *Id.*

NEF then argued that even if the Rule 59(e) motion was allowed, the State's Rule 59(e) motion was nonetheless untimely with regard to the State's ability to file an appeal under Rule of Appellate Procedure 4(a)(4)(A)(iv). The Court disagreed, stating:

> As an initial point, we note that this argument would not prevent the review of the State's Rule 59(e) motion, which constitutes a "judgment or order" under Rule of Appellate Procedure 4(a)(1). More fundamentally, however, we conclude that, where a party forfeits an objection to the untimeliness of a Rule 59(e) motion, that forfeiture makes the motion "timely" for the purposes of Rule 4(a)(4)(A)(iv). The Rules themselves do not define "timely," but we can discern no reason for holding that an otherwise properly filed motion that was considered by the district court would fail to toll the time for filing a notice of appeal.

Id. at 476. Thus, National Ecological held that Rules 6 and 59(e) are not jurisdictional.[3]

The facts underlying this Petition for Writ of Certiorari are substantially like those in *National Ecological*. Petitioner Overland requested an extension of time to file its Rule 59(e) motion *before* the ten-day period stated in the rule expired. (App. pp. 538-541) Bank of America's counsel *did not object* to the enlargement of time, and in fact, expressed his

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[2] After *Eberhart* and *Kontrick*, is impossible to argue any longer that Federal Rule 59(e) is jurisdictional.

[3] The last sentence in Rule 6, SCRCP, is jurisdictional and precludes an extension by consent or order to file a notice of intent to appeal. That sentence is not relevant in this case, however, because the notice of appeal was filed within the 30-day window required by that rule. (App. p. 786)

willingness to be accommodating, when the request for enlargement of time was made. (App. pp. 538-541) The Court granted the extension. (App. pp. 538-541) Petitioner's Rule 59(e) motion was filed within the time allowed for the extension and the court ruled on the motion. (App. pp. 15-16) Like NEF in *National Ecological,* Bank of America forfeited its right to object to the timeliness of the motion. Additionally, Bank of America is estopped from arguing that the motion was filed untimely because a litigant cannot both consent to an extension of time and later object to it. Because Petitioner filed the Rule 59(e) motion within the time the court allotted, the motion for reconsideration was timely filed.

The facts of this case also support extension by the court on grounds of equity. Counsel for Petitioner was ill and out of town over the Christmas holiday.

Bank of America wrongly asserts that Rule 59(e), SCRCP, is jurisdictional and ignores *Eberhart, Kontrick, Bowles, and National Ecological.* Its federal cases that predate *Eberhart, Kontrick, Bowles, and National Ecological* are not good law.[4]

Further relying on a misapprehension that Rule 59(e) is jurisdictional, Bank of America asserts that Petitioner had no due process right to pursue its appeal. That argument stems from the incorrect conclusion that the appeal was untimely. It was not. A timely appeal is entitled to due process.

Bank of America argues that Petitioner could have filed a "simple Rule 59(e) motion that day" or served "a notice of appeal on any of the 20 remaining days of the normal 30-day period for appeal." This argument fails for several reasons. First, a Rule 59(e) motion in a complicated banking case involving multiple defendants is not "simple."

[4] The only federal case Bank of America references that was decided after *Eberhart* and *Kontrick*, does not even mention these controlling United States Supreme Court cases. *Robinson v. Sweeny*, 794 F.3d 782, 783 (7th Cir. 2015). That case is also distinguishable because Robinson did not file a proper Rule 59(e) motion.

To preserve each issue for appeal, Petitioner was required to raise each issue and have the trial court judge rule on each issue. Second, courts have cautioned counsel that they do not want counsel filing both a Rule 59(e) motion and a notice of appeal before the court has first decided the Rule 59(e) motion. Third, Petitioner's counsel did ask the Court whether it preferred a "simple" motion, with leave to amend later. He asked for that as well as the extension of time. (App. pp. 17-19) The court responded by granting the extension of time. (App. p. 17)

Finally, Bank of America contends that Petitioner's counsel should not have relied on the trial judge's administrative assistant's written extension via email. That is absurd and disrespectful of the work judicial assistants perform for our State's judges. Lawyers and judges rely upon judicial staff to relay judges' decisions in scheduling issues as a matter of course. An email is a writing and Bank of America did not object to it being in email form at the time the extension was granted.[5]

CONCLUSION

The South Carolina Supreme Court has taken a fair and practical approach to claims-processing rules even before the United States Supreme Court clarified the distinction, recognzing that, "civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party." *Elam v. S.C. Dep't. of Transp.*, 361 S.C. 9, 17, 602 S.E.2d 772, 776 (2004). The Petitioner implores the South Carolina Supreme Court to correct the error of the Court of Appeals, and in so doing

[5] Bank of America asserts that Petitioner did not include in the Record on Appeal the exhibits to Appellant's Response to Motion to Dismiss Appeal. That is not correct. See App. pp. 524-528, Appellant's Response to Motion to Dismiss Appeal and Exhibits A-C at App. pp. 29-41.

to clarify the court's power and provide needed guidance to the bar and bench on this very important issue.

November 9, 2016

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Petitioner's Reply to Return of Respondent to the **South Carolina Court of Appeals, Jenny Abbott Kitchings, Clerk, P.O. Box 11629, Columbia, S.C. 29211** and by depositing a copy of the same in the U.S. Mail, postage prepaid, on November 9, 2016, addressed to:

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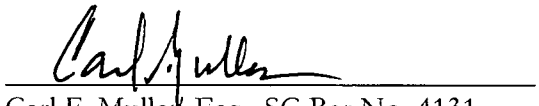

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