

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

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S.C. SUPREME COURT

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

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

v.

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 Bank, Inc. Defendants.

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

SUNTRUST BANKS, INC.'S RETURN TO PETITION FOR WRIT OF CERTIORARI

W. Howard Boyd, Jr. (S.C. Bar #826)
hboyd@gwblawfirm.com
Zachary L. Weaver (S.C. Bar #101419)
zweaver@gwblawfirm.com
GALLIVAN, WHITE & BOYD, P.A.
55 Beattie Place, Suite 1200
P.O. Box 10589
Greenville, SC 29603
(864) 271-9580

Attorneys for Respondent SunTrust Banks, Inc.

TABLE OF CONTENTS

1. QUESTIONS PRESENTED..... 1

2. STATEMENT OF THE CASE.....2

3. ARGUMENT..... **4Error! Bookmark not defined.**

I. The Court of Appeals followed the South Carolina Rules of Civil Procedure and case law in dismissing Overland’s Appeal4

a. South Carolina’s Rules of Procedure and applicable case law do not permit an extension of time to file a Rule 59(e) motion.4

b. A party cannot rely on an extension that is forbidden by the Rules of Procedure.4

c. The Rules of Civil Procedure are clear and fair.....5

II. Even if an extension can be given, one was not given as to reconsidering the grant of summary judgment to SunTrust7

4. CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

Leviner v. Sonoco Prods. Co., 339 S.C. 492, 530 S.E.2d 127 (2000) 4

McCullough v. McCullough, 242 S.C. 108, 110, 130 S.E.2d 77, 78 (1963).....6

Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985)7

Panhorst v. United States, 241 F. 3d 367 (4th Cir. 2001).....5

Rules

Rule 203, SCACR..... 4

Rule 6, SCRCR.....4, 6

Rule 59, SCRCR..... 1, 2, 4, 5, 6, 7

Rule 59, FRCP5

QUESTIONS PRESENTED

- I. Should this Court rewrite the South Carolina Rules of Civil Procedure and extend the Circuit Court's jurisdiction to allow additional time for a party to file a motion to alter or amend a judgment under Rule 59(e) in order to accommodate the failure to timely file such a motion and a notice of appeal?
- II. If this Court determines that certiorari should be granted, should the dismissal of the appeal be sustained as to SunTrust where Petitioner never sought an extension of time to appeal the underlying summary judgment against it?

STATEMENT OF THE CASE

The key facts supporting the Court of Appeals' dismissal of Petitioner's appeal as untimely are as follows.

- **December 15, 2014** - - Circuit Court Judge Verdin grants Defendants Bank of America's and Suntrust's motions for summary judgment. (App. pp. 6-14).
- **December 17, 2014** - - Petitioner Overland receives Judge Verdin's order. *Id.*
- **December 29, 2014** - -
 - Deadline for Petitioner Overland to file a motion to alter or amend the judgment per Rule 59(e).
 - Counsel for Overland emails the Court and counsel for Bank of America requesting an extension to file a Rule 59(e). (App. pp. 538-541). Counsel for SunTrust is not contacted nor is an extension sought with respect to SunTrust. *Id.* The Court grants a 10-day extension despite Bank of America's citation to legal authorities that the time for filing a Rule 59(e) motion cannot be extended. *Id.*
- **January 7, 2015** - - Overland files its Rule 59(e) motion outside the ten-day window provided by Rule 59(e). (App. pp. 66-91).
- **February 5, 2015** - - Judge Verdin denies Overland's Rule 59(e) motion. (App. pp. 15-16).
- **March 4, 2015** - - Overland files its notice of appeal of the summary judgment order in favor of SunTrust and Bank of America. (App. p. 786).
- **March 31, 2015** - - Bank of America moves to dismiss the appeal.
- **April 9, 2015** - - SunTrust moves to dismiss the appeal.

- June 4, 2015 - - The Court of Appeals denies the motion to dismiss and requests SunTrust and Bank of America include any arguments concerning the failure to timely file an appeal in its briefs, which are subsequently filed.
- July 20, 2016 - - The Court of Appeals dismisses Petitioner's appeal as untimely. (App. pp. 1055-1056).

ARGUMENT

I. The Court of Appeals properly followed the South Carolina Rules of Civil Procedure and case law in dismissing Overland's Appeal.

a. There is no novel legal issue presented by the petition for writ of certiorari.

South Carolina Rule of Procedure 59(e) is the mechanism by which a party asks a circuit court to alter or amend a judgment previously entered. If timely served, a motion under this rule tolls the time for filing a notice of appeal. *See* SCACR 203(b)(1); Rule 59(f), SCRPC. If such a motion is not timely served, however, the time for filing a notice of appeal is not extended. In this case, a timely motion was not served under Rule 59, nor was a notice of appeal, and the Court of Appeals therefore properly dismissed Petitioner's appeal.

At issue in this case is whether the time for serving a Rule 59(e) motion can be enlarged. The answer is that it cannot. This is not a novel issue. Indeed, it has been the law in this state for years that the ten-day window for moving to alter/amend a judgment under Rule 59(e) cannot be extended. A careful reading of the rules of civil procedure makes this clear. To start, Rule 59(e) provides that service of an appropriate motion is mandatory and does not provide for extensions to do so - - "[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." Rule 59(e), SCRPC (emphasis added). Most importantly, Rule 6, which governs enlargement of time to perform acts under the Rules of Procedure, is unequivocal about extensions for serving motions under Rule 59 - - *i.e.*, they are not allowed unless expressly stated. Specifically, Rule 6 states that "[t]he time for taking any action under rule . . . 59 . . . may not be extended except to the extent and under the conditions stated." It cannot be disputed that Rule 59(e) provides no grounds for an extension to serve a motion to alter or amend a judgment, and Rule 6 therefore forbids such an extension.

Courts have consistently interpreted the rules this way. This includes federal cases

interpreting Federal Rule of Civil Procedure 59 (on which the South Carolina rule is based). *See* Notes, Rule 59, SCRCPP (indicating that Rule 59, SCRCPP, is based on Rule 59, FRCP; *see, e.g., Panhorst v. United States*, 241 F. 3d 367, 372 (4th Cir. 2001) (“An untimely Rule 59 motion is never proper because the Rules expressly forbid an extension of time for such a motion.”). South Carolina’s Rules and applicable case law explicitly lay out that the time for serving a Rule 59(e) motion cannot be extended. There is nothing novel or unclear about the issue.

b. A party cannot rely on an extension from the circuit court that is forbidden by the rules.

Rather than tackle the actual legal issue head on, Petitioner attempts to spin this case into whether counsel should be permitted to rely on an extension granted by the circuit court. That argument fails on multiple levels. First, the circuit court cannot expand its jurisdiction or perform acts contrary to the Rules of Procedure. Here, the circuit court lacked the authority to grant an extension of time to file a Rule 59(e) motion per the explicit terms of the rules, and as it has no jurisdiction to when a Rule 59(e) motion is not timely served. *See generally Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (“Under Rule 59(e), SCRCPP, the trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative absent a ‘reservation’ of jurisdiction in the form order.”). A circuit court acting beyond its authority does not save Petitioner.

Second, the notion that great reliance was placed on an extension in this case is belied by the facts. The request for an extension was sought on the deadline for serving the Rule 59 motion, and no extension was granted until roughly two hours before close of business that day. It was not as though an extension was requested well in advance of the deadline and nothing was filed in reliance on that. Instead, this was a last minute effort to obtain additional time because an appropriate motion was not prepared as required by the time limits in the rules.

Third, the inability of the circuit court to grant an extension was raised by counsel for Bank of America. If there was doubt, as there should have been based on the rules cited by Bank of America, a motion should have been served. It nonetheless was not.

c. The Rules of Civil Procedure are clear and fair.

What Petitioner asks is for this Court to rewrite the rules of procedure and extend the jurisdiction of the Circuit Court in sake of alleged fairness and clarity to the bar and bench. Even if the Court could do that, it is not warranted here. Contrary to Petitioner's claim that the rules of procedure create a trap for the unwary, the rules expressly provide that no extensions of time are permitted under Rule 59(e). The language in Rules 6 and 59 are not ambiguous; it does not get more explicit than "[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" and "[t]he time for taking any action under rule . . . 59 . . . may not be extended" The strictures of these rules do not leave room for doubt.

Furthermore, a claim of lack of due process misses the mark. Petitioner had its due process as it was afforded the right to move to amend/alter the judgment within a timely fashion and to appeal. A failure to properly exercise those rights is not equivalent to a lack of due process. *See McCullough v. McCullough*, 242 S.C. 108, 110, 130 S.E.2d 77, 78 (1963) (dismissing appeal and stating that "[t]he right of appeal is a matter of grace and is not an inherent or vested right. The rules of court and statutes must be followed in perfecting an appeal.") (internal citations omitted). Most assuredly, failing to exercise rights provided by the Rules of Procedure are not comparable to the stripping of the rights of minors and family visitation rights cited by Petitioner.

At bottom, granting Petitioner's demands would rewrite the rules of procedure, unnecessarily increase jurisdiction, extend the periods of time for a case to go on appeal, provide

excuses for tardy litigants, and create additional work for the circuit and appellate benches. The rules are fair and clear. They have been properly enforced below, and SunTrust respectfully requests this Court do the same. Overland's Petition should therefore be dismissed.¹

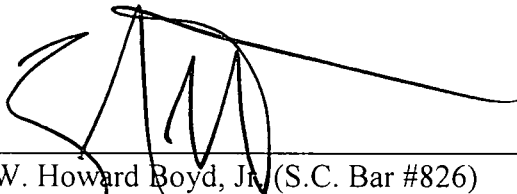
II. Even if an extension can be given, one was not given as to reconsidering the grant of summary judgment to SunTrust.

Even if this Court grants certiorari on the basis that the circuit court could properly grant an extension of time to serve a Rule 59(e) motion, Petitioner's appeal should still be barred as to SunTrust. Petitioner never sought or was granted an extension of time to appeal the summary judgment order in favor of SunTrust. In fact, SunTrust was not even copied on the emails seeking or granting the extension. As such, even if an extension of time to file a Rule 59(e) motion can be granted, such was not requested or granted as to SunTrust and therefore the notice of appeal as to SunTrust was untimely being filed over three months after entry of judgment. *See Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (dismissing appeal because “[s]ervice of the notice of intent to appeal is a jurisdictional requirement”).

¹ In addition to the arguments made herein, SunTrust adopts and incorporates Bank of America's arguments in its return to Overland's Petition for Writ of Certiorari to the extent they are not in conflict with those made in this return.

CONCLUSION

For all of the foregoing reasons, SunTrust respectfully requests that Overland's Petition be dismissed.



W. Howard Boyd, Jr. (S.C. Bar #826)

hboyd@gwblawfirm.com

Zachary L. Weaver (S.C. Bar #101419)

zweaver@gwblawfirm.com

GALLIVAN, WHITE & BOYD, P.A.

55 Beattie Place, Suite 1200

P.O. Box 10589

Greenville, SC 29603

(864) 271-9580

Attorneys for Respondent SunTrust Banks, Inc.

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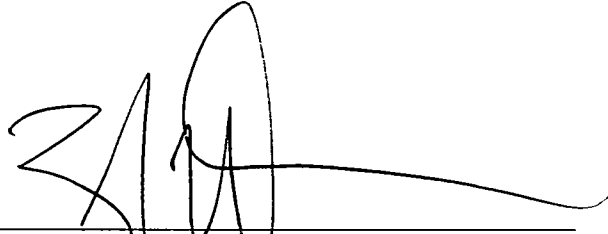
PROOF OF SERVICE

The undersigned hereby certifies that on the 17th day of November, 2016, he served a copy of the Return to Petition for Writ of Certiorari of Respondent, SunTrust Banks, Inc., upon all counsel of record, by depositing a copy thereof in the United States Mail, postage prepaid, and addressed as follows:

Mr. Carl F. Muller
Carl F. Muller, Attorney at Law, P.A.
607 Pendleton St., Suite 200
Greenville, SC 29601

Mr. T. Hunt Reid
Howard, Howard, Francis & Reid
P.O. Box 10383
Greenville, SC 29603-0383

Mr. James W. Sheedy
Driscoll Sheedy, P.A.
11520 N. Community House, Suite 200
Charlotte, NC 28927

A handwritten signature in black ink, appearing to read 'W. Howard Boyd, Jr.', with a long horizontal flourish extending to the right.

W. Howard Boyd, Jr. (S.C. Bar #826)

hboyd@gwblawfirm.com

Zachary L. Weaver (S.C. Bar #101419)

zweaver@gwblawfirm.com

GALLIVAN, WHITE & BOYD, P.A.

55 Beattie Place, Suite 1200

P.O. Box 10589

Greenville, SC 29603

(864) 271-9580

(864) 271-7502 FAX

Attorneys for Respondent SunTrust Banks, Inc.