

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

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**S.C. SUPREME COURT**

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.

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**PETITIONER'S REPLY TO RETURN OF RESPONDENT SUNTRUST**

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

T. HUNT REID, ESQ.  
Howard, Howard, Francis & Reid, L.L.P.  
PO Box 10383  
Greenville, SC 29603  
864-242-3522  
[hunter@hhfr.com](mailto: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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## INTRODUCTION

Petitioner Overland recently filed its Reply to Bank of America's Return to Petition for Writ of Certiorari. SunTrust Banks, Inc. ("SunTrust") is Bank of America's co-defendant. In that Reply, Petitioner addressed most of the same issues that SunTrust raises and, therefore, adopts that Reply in answer to SunTrust's Response. Like Bank of America, SunTrust mistakenly attempts to lead this Court to think that the issue Petitioner raised in its Petition is a jurisdictional issue. Also like Bank of America, SunTrust fails to mention or address the United States Supreme Court decision in *Bowles v. Russell*, 551 US. 205, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007). There the highest court in the land 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 *Bowles*, *Eberhart*, *Kontrick* cases confirmed that the time limit in Rule 59(e) is not jurisdictional. Instead, it is a "claims-processing" rule subject to extension by the Court under theories of both waiver (e.g. failure to object by the adverse party) and equity. Like Bank of America, SunTrust also wrongly asserts that Rule 59(e), SCRCP is jurisdictional. That mistake pervades all of SunTrust's arguments in its Return to Petition.

## ARGUMENT

In its Reply to Bank of America's Return, Petitioner explained that under the *Bowles*, *Eberhart* and *Kontrick* trilogy, the Sixth Circuit Court of Appeals, in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (2007), 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. Petitioner incorporates that argument into this Reply. *National Ecological* held that Rules 6 and 59(e) are not jurisdictional and that the right to object to an extension of time for a Rule 59(e) Motion can be waived by failing to object to the extension or by failing to raise the issue earlier enough.<sup>1</sup>

SunTrust waived any right it had to object to the extension when it did not raise it in the trial court. SunTrust argues that it was not asked about an extension before it was granted and therefore did not waive its right to object.<sup>2</sup> Petitioner understood that Bank of America and SunTrust had a joint defense agreement and that contacting Bank of America for an extension was sufficient. In any event, SunTrust waived its right to object to the extension when it did not raise its objection in its Response to Petitioner's Rule 59(e) Motion. *See, National Ecological*. It did not object to either the motion or the court's grant of the motion. The *Kontrick* court stated that while a "court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct' a [nonjurisdictional] claim-processing rule . . . even if unalterable on a parties' application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456. SunTrust said not a single word about the extension in its short three-page Response to the circuit court (again relying primarily on Bank of America to carry the lead in the defense). (App. pp. 100-102) SunTrust raised the timeliness issue for the first time on appeal.

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<sup>1</sup> 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)

<sup>2</sup> SunTrust also asserts that the extension of time was sought only to file a Rule 59(e) Motion as to the grant of summary judgment in favor of Bank of America. That is false. SunTrust does not cite to any record support for such a claim, nor could it because it does not exist. Moreover, SunTrust failed to make such an argument in the trial court.

SunTrust wrongly asserts that Rule 59(e), SCRCP, is jurisdictional and ignores *Eberhart, Kontrick, Bowles, and National Ecological*. Its federal cases all predate *Eberhart, Kontrick, Bowles, and National Ecological* and are not good law. The Fourth Circuit Court of Appeals followed the Supreme Court's precedent in *U.S. v. Urutyayn*, 564 F.3d 679 (4<sup>th</sup> Cir. 2009). *Urutyayn* renders *Panhorst v. United States*, 241 F.3d 367, 372 (4<sup>th</sup> Cir. 2001), the only Fourth Circuit case SunTrust cited, no longer good law. Additionally, SunTrust did not cite to any South Carolina case in which an extension of time was requested and granted *prior to* the ten days expiring. Petitioner is not aware of any such case in South Carolina, making this a unique case in need of the Supreme Court's guidance.

SunTrust concedes that Petitioner Overland requested an extension of time to file its Rule 59(e) motion *before* the ten-day period stated in the rule expired, but seems to complain, oddly, that Petitioner sought the extension just shortly before the deadline. It is sufficient to meet the deadline; filing days in advance is not required. Moreover, as Petitioner explained, counsel was ill at the time and had hoped to recover sufficiently to prepare a thorough Rule 59(e) Motion in order to seek a ruling as to each issue Petitioner desired to preserve on appeal and to attempt to persuade the Court that the summary judgment decision was in error. As Petitioner's request for the extension stated, Petitioner would have filed a Rule 59(e) Motion by the deadline if the Court had denied the request for an extension. (App. pp. 17-19) Despite SunTrust's assertion to the contrary, Petitioner placed great reliance upon the extension to enable its counsel to file a more comprehensive motion. Because Petitioner filed the Rule 59(e) motion within the time the court allotted, the motion for reconsideration was timely filed.

Further relying on a misapprehension that Rule 59(e) is jurisdictional, SunTrust 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.

SunTrust also argues that the extension to file a Rule 59(e) Motion did not pertain to SunTrust. That argument is disingenuous. Had SunTrust believed that to be the case, it surely would have raised such an objection in the trial court when it responded to Petitioner's Rule 59(e) Motion. Its three-page response to the circuit court did not mention this argument either. (App. pp. 100-102) SunTrust raised this spurious argument for the first time on appeal.

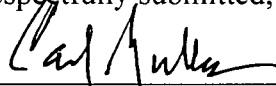
#### CONCLUSION

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, recognizing 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 to clarify the

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

November 23, 2016

Respectfully submitted,



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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 Petitioner

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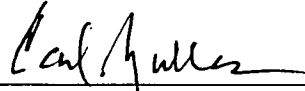
**PROOF OF SERVICE**

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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 23, 2016, addressed to:

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](mailto:carl@carlmullerlaw.com)

T. Hunt Reid, Esq.  
Howard, Howard, Francis & Reid, L.L.P.  
PO Box 10383  
Greenville, SC 29603-0383  
864-242-3522  
[hunter@hhfr.com](mailto:hunter@hhfr.com)

Attorney for Petitioners