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

On Writ of Certiorari to Review
Final Decision of the Court of Appeals

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.

BRIEF OF PETITIONER

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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 Respondents 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 Appellant Overland's counsel, T. Hunt Reid, 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, Mr. 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, he then filed his motion. On February 5, 2014, Judge Verdin denied it. (App. pp. 15-16) Within 30 days, on March 4, 2014, Mr. Reid filed a notice of appeal. (App. p. 786)

Bank of America moved to dismiss the appeal on March 31, 2015. (App. pp. 519-523) It asserted that the motion for reconsideration was not timely presented, but provided no South Carolina authority for that proposition.[1] The Court of Appeals denied the bank's

[1] The sole South Carolina case that the bank cited is unpublished, which means that it is not the law. Additionally, the cases cited in that unpublished opinion do not fit the facts of this case. They do not

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 on the procedural ground that the extension to file the Rule 59(e) motion should not have been granted by the circuit judge (App. pp. 1055-1058) 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) Appellant filed and served a Petition for Writ of Certiorari with accompanying Appendix on October 20, 2016, which the South Carolina Supreme Court granted on August 22, 2017.

ARGUMENT

A LAWYER CAN 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.

Summary

The Court of Appeals dismissed Overland's appeal as untimely filed because it erroneously construed Rule 59(e) as jurisdictional in the face of United States Supreme Court cases to the contrary. Also, it ignored constitutional due process, which entitles a lawyer to rely on an extension of time given to him by the court. Finally, it misapplied the two cases that it cited in its Order of Dismissal. This is especially true of *Elam v. S.C. Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), a Rule 59(e) case in which the South Carolina Supreme Court stated "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

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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 within the 10-day window. Mr. Reid made his request within the window.

between the proverbial rock and a hard place." *Id.* 361 S.C. 17, 602 S.E.2d 776 (internal citations omitted).

The bar deserves and needs the Supreme Court's 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.

Analysis of the Law and Facts

Overland's Rule 59(e) motion was timely filed with the trial court because it was filed within the time prescribed by the trial court. On December 29, 2014, Hunter Reid requested an extension of time within which to file a Rule 59(e) motion and the trial court granted the motion *before* the 10-day period had expired.

> Judge Verdin,
>
> Good afternoon. I am writing you to request an extension of time to file a Rule 59(e) Motion in the Overland v. Nance lawsuit. I was out of the state all of last week for Christmas holidays, and I have been sick as well. If your Honor believes it cannot grant me an extension until the end of the week under these circumstances, then would your Honor please also consider allowing me to submit an Amended Motion at a later date?
>
> * * *
>
> Hunter Reid

(R. pp. 12-13). There is no known South Carolina precedent that precludes such an extension under Rule 59(e). Nor has the South Carolina Supreme Court undercut reliance on judicial orders by holding that counsel may not rely on timely extensions granted by trial court judges. Appellant's extension had been requested and granted *within* the 10-day window of Rule 59(e), SCRCP. In the alternative, Mr. Reid requested permission to amend later if the court required to him file his motion for reconsideration within the 10-day window. Judge Verdin chose to grant the extension. Mr. Reid then relied upon the court's extension as he was entitled to do. See, *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007).

The 10-day window in Rule 59(e) is not both inflexible and jurisdictional and, therefore, can be enlarged by the judge hearing a motion for reconsideration. It is unlike the time for filing a 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) A motion for reconsideration is also unlike a notice of intent to appeal because the motion must be detailed and comprehensive whereas the notice is only two simple sentences. (App. C., Form 2, SCACR)

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; leaving the circuit at the end of the week ended the judge's jurisdiction. The 10-day window was inserted into the rule to allow greater - not lesser – time and 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.

Moreover, Judge Verdin had more than the 10-day window; by court order and the consent of the parties, she had continuing jurisdiction of this complex case. Because she had jurisdiction, she could grant the extension.

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.)

This case is not simply about a 10-day window. 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 in *Bowles v. Russell*, 551 U.S. 205, 127 S. Ct. 2360, 168 L.Ed. 2d 96 (2007). There it clarified the distinction between jurisdictional rules and simple time limit rules, the latter of which it characterizes "claim processing" rules. *See also, Eberhart v. United States,* 546 U.S. 12, 125 S. Ct. 403, 163 L.Ed2d 14 (2005), and *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906, 157 L.Ed2d 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.

After *Eberhart* and *Kontrick*, it is impossible to argue that Federal Rule 59(e) is jurisdictional. Likewise, it is impossible to argue that Rule 59(e) SCRCP, is jurisdictional. Moreover, jurisdictional stricture is even less defensible for the South Carolina rule, which has a filing window that is only a third as long as that for the federal rule (i.e. 10 days vs. 28 days). Also, Rule 6(b)SCRCP that allows extensions is less emphatic than the federal rule in reference to Rule 59; it does not use the word "must". Because the federal rule is not jurisdictional, surely the South Carolina rule is not jurisdictional either.

The filing period under Rule 59(e), SCRCP, is not an inflexible jurisdictional rule. It is a procedural rule for claims processing to be interpreted in civil cases for the "just, speedy, and inexpensive determination of every action." Rule 1, SCRCP. The South Carolina Rules of Civil Procedure grant our circuit court judges with the authority to instruct litigants on precisely how and when they must act. Claims-processing rules are not synonymous with jurisdictional rules. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, at 516 (2006) (holding that "time prescriptions, however emphatic, 'are not properly typed jurisdictional absent some jurisdictional designation by Congress'").

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 almost identical to the case before this Court. In *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 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 Rule 59(e) motion was untimely and, therefore, the appellate court lacked jurisdiction. That is the same argument made by the Respondents 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 Rule 59(e) 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. 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 regards 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 59(e) and 6 are not jurisdictional.

The facts underlying this appeal are like those in *National Ecological.* Appellant Overland requested an extension of time to file its Rule 59(e) motion *before* the 10-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 willingness to be accommodating, when the request for enlargement of time was made. (App. pp. 538-541) The court granted the extension within the hour. (App. pp. 538-541) The 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.[2]

Likewise, SunTrust waived its right to object to the extension when it did not raise an objection in its Response to Petitioner's Rule 59(e) Motion.[3] 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 early enough. SunTrust did not object to either the motion or the trial 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 [non-jurisdictional] 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. (App. pp. 100-102) SunTrust waived its right to object.

The Court of Appeals misapprehended the distinction between the two types of rules by treating Rule 59(e) as jurisdictional and having an absolute and inflexible filing deadline the same as that for filing a notice of appeal. When a Rule is intended to limit jurisdiction, it clearly states that limitation so that attorneys and the judiciary are all on notice

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[2] Bank of America wrongly asserted in the Court of Appeals and its Return to Petition for Writ of Certiorari that Rule 59(e), SCRCP, is jurisdictional and ignored *Eberhart, Kontrick, Bowles, and National Ecological.* Bank of America's federal cases that predate *Eberhart, Kontrick, Bowles, and National Ecological* are not good law. The only federal case Bank of America referenced that was decided after *Eberhart* and *Kontrick*, fails to mention these controlling United States Supreme Court cases and for that reason is not good law, either. *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.

[3] In its Return to Petition for Writ of Certiorari, SunTrust argued that it was not asked about an extension before it was granted and therefore did not waive its right to object. Bank of America and SunTrust had a joint defense agreement; 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. 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 not correct. SunTrust does not cite to any record support for such a claim; indeed, support for this claim does not exist. Moreover, SunTrust failed to make such an argument in the trial court.

of what they may and may not do regarding deadlines. Rule 6(b) limiting jurisdiction on appeals states that the "time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order." That language is absent from Rule 59(e). That limitation for notice of appeal, moreover, has been drummed into the bar by the South Carolina Supreme Court. No such precedent exists for the dismissal of this appeal. The Court of Appeals' dismissal converts Rule 59(e) from a claims-processing rule to a jurisdictional one without prior notice or due process.[4]

Finally, Bank of America contended in its Return to Petition for Writ of Certiorari that Overland's counsel should not have relied on Judge Verdin's order because it was transmitted by her administrative specialist via email. That argument is plainly flimsy. That the bank feels the need to make it only highlights its own doubts about the strength of its other arguments. It is ironic that an institution that handles the electronic transfer of billions of dollars every hour is reluctant to give credence to an electronic message from an officer of the court.

Perhaps most importantly, the Due Process Clauses of the United States Constitution and the South Carolina Constitution, and simple fairness, require reversal. Here we have a young lawyer, sick and out-of-town during Christmas, doing what is expected of him. He

[4] Bank of America argued in its Return to Petition for Writ of Certiorari, p. 7, that Appellant could have filed a "simple Rule 59(e) motion that day" or by serving "a notice of appeal on any of the 20 remaining days of the normal 30-day period for appeal. The short answer is that Judge Verdin's grant of the extension made those alternatives unnecessary and Hunter Reid rightly relied on what the judge had ordered. Beyond this, the Bank's argument fails for several other reasons. First, a Rule 59(e) motion in a complicated banking case involving multiple defendants is not simple. To preserve each issue for appeal, Overland was required to raise and have the trial court judge rule on each issue. Second, courts have cautioned 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, Overland's counsel did ask the Court whether it preferred a "simple" motion, with leave to amend later. The court responded by granting the extension of time. (App. p. 17)

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 10-day window in Rule 59(e) may or may not be enlarged upon a motion timely made before the 10-day period has expired.

There is nothing remarkable about the request that the Court of Appeals' decision be reversed. 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.

The South Carolina Supreme Court has 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. *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d, 634, 637 (2010). There is no prejudice to Respondents in this case, and their counsel have not argued it. Just as the extensions were permissible in *Gallagher v. Evert*, 353 S.C. 59, 577 S.E.2d 217 (Ct. App. 2002) and *Camp v. Camp*, the extension in this case was also properly granted.[5]

[5] Even if the Supreme Court rules otherwise, because this is a novel and significant procedural issue without South Carolina precedent, the appeal should not be dismissed. The underlying embezzlement case is also novel and significant substantively, and without South Carolina precedent.

CONCLUSION

The decision of the Court of Appeals to dismiss this appeal was 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, "We 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). 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 *Eberhart, Kontrick, Bowles* trilogy and their application in a remarkably similar case in *National Ecological,* confirm that the United States Supreme Court also finds Federal Rule 59(e) claims-processing and not jurisdictional. 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., Id.* The Appellant Overland 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.

September 19, 2017

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Petitioner's Brief on all parties to the appeal by depositing a copy to them in the U.S. Mail, postage prepaid, on September 19, 2017, addressed to:

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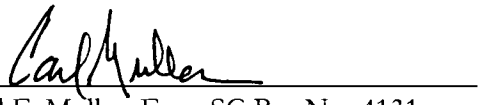
and filed fifteen (15) copies of the Brief and thirteen (13) copies of the Appendix with the Clerk of the Supreme Court.



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