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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Greenville County
Court of Common Pleas

S.C. SUPREME COURT

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

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STATEMENT OF ISSUE ON APPEAL

Did petitioner Overland, Inc.'s ("Overland") Rule 59(e) motion, served 21 days after receipt of notice of judgment, stay the time for appeal under Rule 203(b)(1), SCACR, simply because, in response to Overland's lawyer's email, not motion, the assigned judge sent an email, not an order, erroneously purporting to extend Overland's time to file its Rule 59(e) motion?

STATEMENT OF THE CASE

For several years before February 2010, Overland's employee Lara Marie Nance embezzled Overland's funds, causing its check-writing program to generate checks that Nance purloined and deposited in accounts she opened at Bank of America, N.A. ("BANA") and SunTrust Bank. (App. 381.) Overland sued Nance and the two banks seeking to recoup its loss. (App. 416, 445-456.)

The banks filed summary judgment motions. (App. 133, 319.) On December 15, 2014, Judge Verdin, the Circuit Court Judge assigned to this case for all purposes, entered an order granting summary judgment. (App. 6-14, 536.) Overland's counsel received notice of entry of the order on December 17, 2014. (App. 71.)

On December 29, 2014—the tenth day after December 17, excluding holidays and weekends—Overland's counsel e-mailed BANA's attorney asking if he had a problem with Overland's seeking an extension of time to file its Rule 59(e) motion. (App. 119.) BANA's counsel replied:

Hunter, look at Rule 6(b) and Rule 59(e). I don't think we can consent or that Judge Verdin has the discretion to extend, i.e. "shall be served not later than 10 days" If you have a case that says I can do this, I'm happy to oblige, but I honestly don't think there is one under Rule 59(e). Rather, the time is mandatory, I believe.

(App. 119.)

Overland's counsel then emailed Judge Verdin, requesting an extension of time to file a Rule 59(e) motion, noting that he had "conferred with opposing counsel, Jim Sheedy, and he doesn't have any objection to this request." (App. 119.)

Responding to this statement, BANA's lawyer emailed Judge Verdin:

Actually, I said to Hunter it was my belief upon review of Rules 6(b) and 59(e) that I do not have the power to extend, and the ten (10) day limit is non-discretionary, i.e., "not later than", "shall", nor am I aware of any cases allowing for extensions under Rule 59(e).

But I was also unaware of any Rule or decisional law prohibiting an amended Rule 59(e) [motion] so long as the amendment is not tantamount to a new motion (beyond the time limit).

While I am willing to be accommodating, I cannot do more than what the law allows me to do.

(App. p. 118.)

Later the same day, Judge Verdin's Administrative Specialist emailed Overland's counsel, stating that "Judge Verdin grants a ten-day extension for you to file your Motion."

(App. 118.)

Overland served its Rule 59(e) motion on January 7, 2015. (App. 71, 95.) BANA opposed the motion, arguing it was untimely as well as without merit. (App. 121-129.) On February 5, 2015, the motion was denied. (App. 15.) Overland received notice of the order denying its motion on February 6, 2015, and served its notice of appeal on March 4, 2015.

(App. 786, 788.)

ARGUMENT

A. Summary Of Argument

Overland served its Rule 59(e) motion more than 10 days after receiving notice of the summary judgment order. Under the clear language of Rule 59(e), SCRPC, the motion was untimely. As it was not “timely,” the Rule 59(e) motion did not stay the time for appeal under Rule 203(b)(1), SCACR.

The trial judge’s email purportedly extending Overland’s time to file its motion was ineffective because Rule 6(b), SCRPC, clearly denies trial judges authority to extend Rule 59(e)’s 10-day deadline.

The Court should enforce these rules according to their plain words and decline Overland’s invitation to permit equitable exceptions to the Rules’ clear, mandatory deadlines for post-trial motions that stay the time for appeal.

The federal courts’ experience cautions against allowing any exceptions to the Rules’ deadlines. Twice the federal courts allowed exceptions to the post-trial motion or appeal deadlines: once under the so-called “unique circumstances” doctrine, and a second time on the ground that the post-trial motion deadlines were mere “claims-processing” rules. Both times the exceptions proved problematic. In 2016, the United States Supreme Court amended Rule 4(a)(4)(A), Fed. R. App., to make it clear that the rules meant what they had said all along. The deadlines for filing post-trial motions are strict. They cannot be extended. There are no exceptions.

There is no reason for South Carolina to recapitulate the federal courts’ odyssey. It can avoid the entire journey by simply reaffirming that the rules mean what they say. A Rule 59(e) motion served more than 10 days after receipt of notice of order or judgment is

untimely and does not stay the time for appeal. The rules provide for no exception. There is none.

But even were the Court inclined to ignore the federal courts' unfortunate experience with exceptions to these rules, it would still affirm the dismissal of Overland's appeal because, under the facts of this case, Overland cannot satisfy the requirements of either of the two former federal exceptions that it seeks to invoke.

BANA did not waive or forfeit its objection to the untimeliness of Overland's Rule 59(e) motion, but instead timely raised that objection at the time Overland first requested an extension of time and again in BANA's opposition to the Rule 59(e) motion—in both instances, before the trial court ruled on that motion.

Overland cannot avoid Rule 59(e)'s time limit by claiming reliance on the extension that the trial court improperly emailed at Overland's request. Among other reasons, any reliance was unreasonable. Rule 6(b), SCRCP, clearly banned any extension. BANA pointed that fact out to Overland before Overland requested the extension. Overland had a duty to familiarize itself with the rules and had no right to ignore them and rely on the plainly improper extension email instead.

In short, with or without exceptions to the rules governing the time for filing post-trial motions, Overland's appeal is untimely and was properly dismissed. This Court should affirm the Court of Appeals' judgment of dismissal.

B. Under The Applicable Rules' Clear Language, Overland's Rule 59(e) Motion And Its Appeal Were Untimely

Under the clear language of South Carolina Rules of Civil Procedure and Appellate Court Rules, Overland's appeal was untimely. The Court of Appeals correctly dismissed the appeal for that reason.

Overland served its notice of appeal 78 days after it received notice of the summary judgment order. (App. 71, 786, 788.) Plainly, the appeal was untimely under the first sentence of Rule 203(b)(1), SCACR, which sets a 30-day deadline for serving a notice of appeal.

Under the second sentence of Rule 203(b)(1), SCACR, Overland's time for appeal could have been stayed if Overland had made a "timely" motion under Rule 59(e). But Overland's Rule 59(e) motion was not "timely."

"Timely" means filed within the 10-day time limit set by Rule 59(e), SCRCPP ("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."); *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999) ("To be timely, a post-trial motion to alter or amend must be served within ten days of receipt of written notice of the entry of the original order or judgment."); *see also Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 264-65, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978).

Overland did not serve its Rule 59(e) motion within that 10-day time limit. Overland received notice of entry of the summary judgment order on December 17, 2014. (App. 71.) Overland served its Rule 59(e) motion 21 days later, on January 7, 2015. (App. 71, 95.)

Overland concedes as much but argues that its Rule 59(e) motion was timely nonetheless because Judge Verdin granted Overland a 10-day extension of the Rule 59(e) deadline. Pet. Brief, 3.

Overland is wrong. Rule 6(b), SCRCPP, expressly denies trial courts the power to extend Rule 59(e)'s 10-day time limit. The rule's second sentence provides: "The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the

extent and under the conditions stated in them.” Since Rule 59 does not allow any means of extending the 10-day time limit on Rule 59(e) motions,¹ trial courts lack the power to extend that deadline. *See Panhorst v. United States*, 241 F.3d 367, 370 (4th Cir. 2001) (“Thus, the Federal Rules clearly prescribe that a motion under Rule 59(e) must be filed within ten days after entry of the judgment, and the Rules just as clearly provide the district court with no authority to extend the filing period.”).

As the 1946 Advisory Committee Notes to Rule 6, Fed. R. Civ. P., explain, Rule 6(b)’s second sentence deliberately disallows extensions of post-trial motion deadlines in order to assure prompt finality of judgments.

The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final The further argument is that Rule 6(c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6(c), some other limitation must be substituted or judgments never can be said to be final.

1946 Advisory Committee Notes to Fed. R. Civ. P. 6(b), reproduced in 12A Wright & Miller, *Fed. Federal Practice & Procedure, Civil* (2015 ed.) App. C at p. 138.²

¹ 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.

² The same rationale applies to Rules 6 and 59, SCRCF, which are modeled on the similarly numbered rules of the Federal Rules of Civil Procedure. *See* Notes, Rule 6, SCRCF (“This Rule 6(b) is the same as the Federal Rule”); Notes, Rule 59, SCRCF (“This Rule 59 is substantially the Federal Rule.”); *Elam v. South Carolina Dept. of 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.”).

Rules 6(b) and 59(e) could not be clearer. They plainly state that Rule 59(e)'s 10-day time limit on serving a motion to alter or amend judgment may not be extended.³ For that reason, Judge Verdin lacked authority to extend Overland's time to serve its motion. Her email purporting to extend time exceeded her powers and was ineffective.

Under the clear wording of Rules 6(b) and 59(e), SCRPC, and 203(b)(1), SCACR, Overland's untimely Rule 59(e) motion did not stay the time for appeal. Hence, the appeal deadline expired long before Overland served its notice of appeal on March 4, 2015. The notice of appeal was untimely. The Court of Appeal correctly dismissed the appeal for that reason. Its judgment should be affirmed.

C. The Court Should Enforce The Rules As Written, Allowing No Unwritten Exceptions

For the reasons stated above, Overland does not and cannot contend that its Rule 59(e) motion and appeal were timely under the rules as written. Instead, Overland asks the Court to create unwritten exceptions to the rules based on BANA's supposed waiver of the time limits or on Overland's purported reliance on Judge Verdin's invalid extension email.

The Court should deny Overland's request and refuse to permit email extensions of the deadlines for filing post-trial motions and appeals or to allow equitable or other unwritten exceptions to the rules governing those deadlines. The federal courts' two unsuccessful experiments with exceptions to these rules demonstrate that it is wiser judicial policy in the long run to enforce these rules as written, without exception.

³ Overland's brief wrongly argues that Rule 59(e)'s 10-day deadline "can be enlarged by the judge hearing a motion for reconsideration." Pet. Brief, 4. Rule 6(b) expressly denies the judge that power. Rule 6(b) also belies Overland's assertion that "[t]here is no known South Carolina precedent that precludes such an extension under Rule 59(e)." Pet. Brief, 4. No "precedent" is needed when Rule 6(b) clearly and expressly precludes the extension of Rule 59(e)'s 10-day deadline.

The United States Supreme Court initiated the first of the two federal experiments in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 216-17, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962). That case adopted the so-called “unique circumstances” doctrine under which an otherwise untimely appeal was permitted in order to avoid penalizing a party for relying on a district court’s assurance that the party had additional time to file an appeal beyond the time allowed by statute or court rule. *See Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 197 (3d Cir. 2008).

The “unique circumstances” doctrine spawned a split of authority among the federal Courts of Appeals on a variety of issues, including whether a party’s reliance on an order purporting to extend time for filing a post-trial motion was a “unique circumstance” *See* 16A Charles A. Wright, et al., *Fed. Practice & Procedure*, § 3950.4, pp. 365-72 (2008).

In 2007, the United States Supreme Court largely ended the “unique circumstances” doctrine, holding that “the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the ‘unique circumstances’ doctrine is illegitimate.” *Bowles v. Russell*, 551 U.S. 205, 214, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) (citations omitted).⁴ Also, as explained below, the 2016 amendment to Rule 4(a)(4)(A), Fed. R. App., ends the “unique circumstances” doctrine as an exception to the time for appeal after an otherwise untimely post-trial motion.

The federal courts’ second experiment with unwritten exceptions to the rules setting deadlines for post-trial motions and appeals began with the United States Supreme Court

⁴ *Bowles* overruled *Harris Truck Lines* and *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964), another “unique circumstances” doctrine decision “to the extent they purport to authorize an exception to a jurisdictional rule.” *Bowles*, 551 U.S. at 214.

decision in *Kontrick v. Ryan*, 540 U.S. 443, 458-59, 124 S.Ct. 906 157 L.Ed.2d 867 (2004). Before that decision, the lower federal courts held that the rules' deadlines for filing post-trial motions were jurisdictional and not subject to exception, other than possibly under the "unique circumstances" doctrine. See, e.g., *Panhorst*, 241 F.3d at 372; *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).

Kontrick upset that reasoning. Noting that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction. U.S. Const., Art. III, § 1," *Kontrick* held a deadline set solely by court rule cannot limit a federal court's subject-matter jurisdiction. Therefore, rule-set deadlines are not truly "jurisdictional." *Kontrick*, 540 U.S. at 452-56. Instead, rule-set time limits are merely "claims-processing" deadlines which a party must timely raise to avoid waiving or forfeiting any objection to a pleading or motion's untimeliness. *Id.*, at 456-59.

Later Supreme Court cases, such as *Eberhart v. United States*, 546 U.S. 12, 19, 125 S.Ct. 403, 163 L.Ed.2d 14 (2005), applied and elaborated on this jurisdictional/claims-processing dichotomy as well as the consequences which flow from those labels. Truly jurisdictional deadlines—those set by congressional enactments that evince an intent to limit the federal courts' subject-matter jurisdiction—may not be varied by the opposing party's consent or by court-created equitable exceptions. See *Bowles*, 551 U.S. at 213-14. By contrast, mere "claims-processing" rules may be waived or forfeited if not timely invoked and are subject to equitable exceptions.

Like the “unique circumstances” doctrine, the jurisdictional/claims-processing dichotomy threw the federal courts into disarray, particularly with respect to deadlines for post-trial motions. While Rules 6 and 50-60, Fed. R. Civ. P., are clearly “claims-processing” rules under *Kontrick’s* reasoning, Rule 4, Fed. R. App., is “jurisdictional” under *Bowles*. Does the fact that Rule 4 incorporates the Civil Procedure Rules’ deadlines by reference make them jurisdictional as well? The case on which Overland’s brief principally relies, *Nat’l Ecological Found. v. Alexander*, 496 F.3d 466, 475-76 (6th Cir. 2007), held that the post-trial motion deadlines were “claims-processing” rules subject to waiver and equitable exception. Some other Courts of Appeals agreed;⁵ others held to the contrary. *See, e.g., Blue v. Int’l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278 (3d Cir. 2010).

To resolve that split, Rule 4(a)(4)(A), Fed. R. App., was amended in 2016, substituting “within the time allowed by those rules”—i.e., Rules 50, 54, 58, 59 and 60, Fed. R. Civ. P.—for “timely.” The 2016 Advisory Committee Note explains the amendment’s purpose:

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that “[i]f a party timely files in the district court” certain post-judgment motions, “the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion.” Responding to a circuit split concerning the meaning of “timely” in this provision, the amendment adopts the majority approach and rejects the approach taken in *National Ecological Foundation v. Alexander*, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time—and that fact is not altered by, for example, a court order

⁵ *See, e.g., Mobley v. C.I.A.*, 806 F.3d 568, 578 (D.C. Cir. 2015); *Weitzner v. Cynosure, Inc.*, 802 F.3d 307, 312 (2d Cir. 2015).

that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

With this 2016 amendment, the federal courts have returned to the rules they followed before *Harris Truck Lines* and its "unique circumstances" doctrine and before *Kontrick* and its jurisdictional/claims-processing dichotomy. Now, once more, the federal rules mean what they say. A post-trial motion filed after expiration of the rule-set deadline for such a motion is untimely and will not stay or re-start the time for appeal. Once again, there is no exception. The appeal time is unaffected by an untimely post-trial motion even if the district court issues an order purportedly extending the time for filing the post-trial motion (the "unique circumstances" doctrine) or the opposing party fails to object to the motion's untimeliness (*Kontrick, Eberhart, Nat'l Ecological Found.*).

There is no reason for South Carolina to retrace the federal courts' long journey back to the point from which they began. This Court never adopted the "unique circumstances" doctrine. *See Elam*, 361 S.C. at 14-15, 602 S.E.2d at 775. There is no reason for it to adopt the jurisdictional/claims-processing dichotomy. Unlike the federal courts, South Carolina's courts are courts of general jurisdiction.⁶ And unlike the United States Supreme Court, which may adopt rules of practice and procedure only as allowed by the Rules Enabling Act, 28 U.S.C. § 2702, the South Carolina Constitution directly grants this Court rule-making authority. S.C. Const. art. V, § 4. So, there is little reason under South Carolina law to draw

⁶ *See Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, ___, 802 S.E.2d 794, 799 (2017); *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 120, 678 S.E.2d 430, 433 (2009); S.C. Const. art. V, § 11.

a firm distinction between jurisdictional and claims-processing rules—or to assign all deadlines set only by court rule to the latter category.⁷

Rather than focusing on those labels, the Court should address the consequences that flow from them. Can the deadline, however set, be waived or forfeited by lack of timely objection? Can a party request or the court grant an extension of the deadline by email? Are there any other equitable exceptions to the deadline? Those are the ultimately determinative questions. Insofar as deadlines for serving post-trial motions and appeals are concerned those questions are clearly answered by South Carolina’s Rules of Civil Procedure and Appellate Court Rules, particularly Rule 6(b), SCRPC.

By simply enforcing those rules, as written without exception, this Court will arrive at the same point to which the federal courts finally returned in 2016—and all without the uncertainty, travail and expense of the federal courts’ two failed experiments with unwritten exceptions to the federal rules.

D. Under The Facts Of This Case, No Equitable Exception Applies To Save Overland’s Untimely Appeal

Even were this Court inclined to allow unwritten exceptions to the rule-set deadlines for post-trial motions and appeals, it should affirm the dismissal of Overland’s appeal because Overland cannot fit within either of the two putative exceptions it mentions in its opening brief.

⁷ For example, the time for appeal is set only by court rule, not statute, in South Carolina. Rule 203, SCACR. Under *Kontrick*’s reasoning, the rule-set deadline would be merely a “claims-processing” rule subject to forfeiture or equitable exception. Yet, this Court has repeatedly held that Rule 203’s time limits are, in fact, jurisdictional. See *Elam*, 361 S.C. at 14-15, 602 S.E.2d at 775 (“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”); *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (“Service of the notice of intent to appeal is a jurisdictional requirement.”).

1. BANA Promptly Asserted Its Objection To Overland's Rule 59(e) Motion As Untimely

Under *Kontrick's* holding, to invoke the benefit of a deadline set by a “claims-processing” rule, a party must object to the untimeliness of the opponent’s pleading or motion before it is adjudicated on the merits—otherwise, the untimeliness objection is waived or forfeited.

That principle cannot save Overland’s appeal because BANA *did* object to Overland’s Rule 59(e) motion on the ground of its untimeliness before Judge Verdin denied that motion on its merits.

When first contacted by Overland’s counsel about extending time to serve its Rule 59(e) motion, BANA’s attorney replied: “look at Rule 6(b) and Rule 59(e). I don’t think we can consent or that Judge Verdin has the discretion to extend” (App. 119.) In response to Overland’s e-mail to Judge Verdin which incorrectly stated that BANA “doesn’t have any objection to this request” for an extension of time to serve a Rule 59(e) motion, BANA’s attorney reiterated his “belief upon review of Rules 6(b) and 59(e) that I do not have the power to extend, and the ten (10) day limit is non-discretionary.”⁸ (App. 118.)

In its opposition to Overland’s Rule 59(e) motion, BANA formally objected to the motion as untimely. (App. 121-123.) The opposition cited Rules 6(b) and 59(e), asserted that “[a] court may not extend the time within which a Rule 59(e) motion can be filed,” and argued that “[t]he Motion was untimely and should be denied on that basis.” (*Id.*) The

⁸ The record, thus, disproves Overland’s assertion that BANA’s “counsel did not object to the enlargement of time ... when the request for enlargement of time was made.” Pet. Brief., 7. BANA’s counsel did say he was “willing to be accommodating” insofar as the law allowed. (App. 118.) But he did not thereby waive or forfeit BANA’s timely objection. *Kontrick* requires a timely objection, not incivility.

opposition was served and filed on January 30, 2015 (App. 129), before Judge Verdin denied the Rule 59(e) motion on the merits on February 5, 2015 (App. 15).

Thus, BANA timely raised its objection to the untimeliness of Overland's Rule 59(e) motion before Judge Verdin ruled on the merits of that motion. That is all that *Kontrick's* waiver or forfeiture rule requires.

Dill raised the timeliness issue before the district court reached the merits of the Rule 50(b) motion but too late for General American to take corrective action. Because the district court had not ruled, we hold that Dill properly and timely raised the untimeliness defense and that the district court properly dismissed General American's Rule 50(b) motion for lack of jurisdiction. As a result, General American's late-filed Rule 50(b) motion did not toll its time for filing its notice of appeal.

Dill v. Gen. Am. Life Ins. Co., 525 F.3d 612, 619 (8th Cir. 2008) (citation omitted).

So even if adopted in South Carolina, *Kontrick's* waiver or forfeiture rule would not save Overland's untimely motion and appeal.⁹

⁹ “[D]istrict courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked.” *Eberhart*, 546 U.S. at 17 “[T]he central point of [*United States v. Robinson*, 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960) was] that when the Government objected to a filing [as] untimely under Rule 37, the court’s duty to dismiss the appeal was mandatory.” *Id.*, at 18. “As the 10–day filing requirement in Rule [59(e)] and the prohibition against extending that time period in Rule 6(b) are claim-processing rules with ‘inflexible’ limits, the rules ‘assure relief to a party properly raising them.’” *Dill*, 525 F.3d at 618 (citations omitted).

Nat’l Ecological Found., 496 F.3d at 476 does not hold to the contrary. Instead, it decided that “[b]ecause the district court ruled on the State’s Rule 59(e) motion before NEF raised the issue of untimeliness, NEF has forfeited its timeliness defense.” *Id.* Here, as in *Dill*, the timeliness objection was raised before the ruling on the post-trial motion. So the objection was not forfeited.

2. Unreasonable Reliance On The Circuit Court’s Email Does Not Excuse The Untimeliness Of Overland’s Motion

Without citing any authority for its position,¹⁰ Overland also invokes another supposed unwritten exception to the rule-set deadlines for post-trial motions, arguing that it was entitled to rely on Judge Verdin’s email extending Overland’s time for filing its Rule 59(e) motion. *See* Pet. Brief, 2-5.

As already mentioned, p. 8, though South Carolina has never recognized such an exception, *see Elam*, 361 S.C. at 14-15, 602 S.E.2d at 775, the federal courts’ “unique circumstances” doctrine permitted some late-filed appeals if the appellant had relied on a district court’s assurance that the party had additional time, beyond the time in a statute or Rule, to file an appeal. *Gutierrez*, 523 F.3d at 197.

The “unique circumstances” doctrine was narrow, however, applying “only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done.” *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179, 109 S.Ct. 987, 993, 103 L.Ed.2d 146 (1989).

Overland cannot satisfy those requirements. Its act—seeking and obtaining an extension of time to file its Rule 59(e) motion—could never properly be done. “An untimely Rule 59 motion is never proper because the Rules expressly forbid an extension of time for such a motion.” *Panhorst*, 241 F.3d at 372. Also, an untimely Rule 59(e) motion would not post-

¹⁰ Overland cites no South Carolina decision supporting such an exception. The federal cases Overland cites, *Kontrick*, *Eberhart*, and *Nat’l Ecological Found.*, dealt with an opponent’s forfeiting or waiving a timeliness objection by not timely raising it. None of those three decisions addressed reliance on a court order purporting to extend time despite Rule 6(b)’s prohibition of such an order.

pone the deadline for filing an appeal, even if properly done since Rule 203(b)(1), SCACR, clearly provides that only a timely post-trial motion stays the time for appeal. *Panhorst*, 241 F.3d at 372.

Moreover, Judge Verdin “did not provide ‘specific assurance’ that ‘this act [was] properly done.’” *Id.* (citation omitted). Instead, Judge Verdin simply emailed a 10-day extension of time to file the Rule 59(e) motion, without any assurance about the timeliness of any later appeal. (App. 118.)

Most importantly, “even if [Judge Verdin’s email] could be characterized as an assurance within the meaning of *Osterneck*, [Overland] did not reasonably rely on that assurance We agree with the Second, Third, Tenth, and Eleventh Circuits that 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.” *Panhorst*, 241 F.3d at 373 (citations omitted).

Appellants’ counsel could have avoided the filing error in this case by reading Rules 59(e) and 6(b), which clearly state that a Rule 59(e) motion must be filed within ten days of the entry of judgment. Because a litigant “has a duty to familiarize himself with the [Federal] Rules,” which clearly prohibit an extension of time in which to file a Rule 59 motion, we cannot say that appellants’ reliance on the district court’s acceptance of the submitted order was reasonable.

Id. (citations omitted).¹¹

¹¹ See also *Weitz*, 214 F.3d at pp. 1179-80 (“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.”); *Hahn v. Dist. 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

(Fn. cont’d)

Here, Overland's purported reliance on Judge Verdin's email is particularly unreasonable since BANA's attorney called Overland's attention to Rules 6(b) and 59(e), specifically (and correctly) asserting that they prohibited any extension of Rule 59(e)'s 10-day deadline. (App. 118, 119.) "When a party is made aware that an order extending time was entered in excess of the court's jurisdiction, and there is still time to file a notice of appeal, it is unreasonable to continue relying on that order. Reasonable reliance being the mainstay of the 'unique circumstances' doctrine, the doctrine has no application here." *In re Home & Family, Inc.*, 85 F.3d 478, 481 (10th Cir. 1996) (citation omitted).

Had Overland's counsel bothered to read those rules, after they had been pointed out to him, he would have known Judge Verdin lacked the power to extend the 10-day deadline. Moreover, Overland's counsel acted unreasonably in not lifting a finger until the afternoon of the last day to file the Rule 59(e) motion, in refusing the suggested alternative of filing a timely, but skeletal motion to be amended later (App. 17), and in failing to file a notice of appeal within the time specified in the first sentence of Rule 203(b)(1), SCACR.

To allow Overland to escape the clear deadline set by Rules 6(b) and 59(e) based on its unreasonable reliance on Judge Verdin's emailed extension would be to render Rule 6(b)'s second sentence nugatory. Whenever, in violation of that rule, a trial court judge extended the time for serving a post-trial motion, the movant could make the same claim of reliance that Overland has made here. If that sufficed, the rule's explicit prohibition of such orders would be rendered meaningless.

(Fn. cont'd)

we can scarcely envision an action by the court that could have misled Hahn into thinking the time for appeal had been stayed.").

In short, Overland's unreasonable reliance on Judge Verdin's forbidden extension order provides no basis for treating Overland's appeal as if it were timely.

E. The Rest Of Overland's Arguments Lack Merit

1. Overland's South Carolina Decisions Are Distinguishable

None of the South Carolina decisions that Overland cites support its position.

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 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(e) motion is *untimely*, there is no stay; the normal 30-day deadline applies.

In *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), SCRPC. 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. Here, the Court of Appeals did not give Rules 6(b) and 59(e) any “overly technical” reading. Instead, it simply followed those rules’ plain language.

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). Here, the problem is a missed deadline, not content.

Finally, in *Elam*, 361 S.C. at 21, 602 S.E.2d at 778, this Court held that a first Rule 59(e) motion stayed the time for appeal even if it followed an oral or written new trial motion. The Court supported that holding by pointing out that a Rule 59(e) motion was required to preserve for appeal issues that had been raised earlier in the case but had not been ruled on by the trial court. *Id.*, 361 S.C. at 23-25, 602 S.E.2d at 779-80. The Court declined to interpret the rules governing post-trial motions and appeals in a way that would place a party in the unenviable situation of having to forego the required Rule 59(e) motion in order to serve a timely appeal.

Overland was not forced into any such unenviable situation here. Like any other litigant, it could have served its Rule 59(e) motion within the 10 days that rule allots. The ordinary operation of the rule's 10-day time limit creates no trap for the unwary, nor does it place counsel or parties in any "between a rock and a hard place" sort of dilemma. The short deadline merely inconvenienced Overland's attorneys who did nothing until the afternoon of the deadline's last day. *Elam* dealt with problems of an entirely different nature.

2. 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).¹²

Neither of the two cases Overland cites holds otherwise. *See* Pet. Brief, 10. 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-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).

¹² *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).


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 which pits a luxury car dealership against two national banks, all well able to look after their own rights.

CONCLUSION

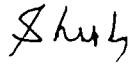
For the reasons stated above, the Court should affirm the Court of Appeals' judgment dismissing this appeal as untimely.

Respectfully submitted,

Date: October 10, 2017.



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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Appeal From Greenville County
Court of Common Pleas

OCT 11 2017

The Honorable Letitia H. Verdin, Circuit Court Judge **S.C. SUPREME COURT**

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served the *Brief of Respondent Bank of America, N.A.* on the following by sending copies of the same via first class U.S. mail to the addresses set forth below.

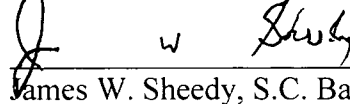
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