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

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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.

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# REPLY OF PETITIONER TO RESPONSE OF RESPONDENT BANK OF AMERICA

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## STATEMENT OF ISSUE ON APPEAL

CAN A LAWYER RELY ON AN EXTENSION TIMELY 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

In its brief, Bank of America ("BOA") agrees that it stated that, "I'm happy to oblige" in response to Overland's request for an extension to file its Rule 59(e) motion. (BOA Br. p. 1) Additionally, neither BOA's brief or Overland's initial brief gives any indication that BOA ever said, "I object" in response to the requested extension on the day on which (i) it was requested, (ii) the parties and court conversed about it, and (iii) it was granted (all on December 27, 2014). BOA did not object.

Overland appealed the underlying case on the merits and on the basis that it was denied critical discovery about which the circuit court was aware. The night before the summary judgment motion hearing, BOA provided an additional couple of hundred documents; however, the manuals and protocols were still not produced nor was there sufficient time to review those documents in time for the hearing the next day. (App. 966 fns 2 and 3) (See also App. 963-67) But essential discovery was still withheld the next morning when the hearing on BOA and SunTrust's motion for summary judgment and Overland's motion to compel discovery was held. Outside the courtroom doors the morning of the hearing, BOA and SunTrust's counsels told Overland's counsel, Hunter Reid, that they would provide the discovery immediately. At the summary judgment, hearing BOA and SunTrust confirmed that discovery was outstanding and represented to the circuit court that they would provide the discovery. To this day the discovery has not been provided.

Overland objected to the summary judgment motion being heard while BOA and SunTrust continued to withhold discovery. Despite those objections and BOA and SunTrust withholding discovery that was essential to the issues being decided, the circuit court held the summary judgment motion hearing and ruled on the motion.[1]

This case is important to Overland, its counsel Hunter Reid, and to the South Carolina bench and bar because it is an opportunity to clarify Rule 59(e) motions.

Overland believes oral argument would assist the Court in this case and respectfully requests oral argument.

## ARGUMENT

### Bank of America Did Not Object to Overland's Motion for an Extension of Time to File a Rule 59 Motion

On December 27, 2014, the day Overland moved for an extension to file its Rule 59 motion, BOA did not object. BOA does not state anywhere in its brief that it said to the circuit court "I object" or any phrase that included the root word "object" in response to Overland's motion. Instead, in response to Overland's attorney Hunter Reid's motion for an enlargement of time to file its motion pursuant to Rule 59(e), SCRCP, BOA admits in its brief, that its counsel said, "I'm happy to oblige." (BOA Br. p.1) At the time the motion was made, BOA did not say it objected to the circuit court granting Overland the extension and there is no factual dispute on that matter.[2] It was *only* on December 27, 2014 that such

[1] This is the type of sharp litigation tactic that causes the public to lose faith in the judicial system and distrust lawyers. It prejudiced Overland and it is one of the issues that Overland appealed.

[2] BOA also did not object to the motion being made via email or the order having been transmitted via email in the circuit court. **That issue was not preserved for appeal and BOA's attempt to raise it for the first time in this Court should fail.** *State v. Bailey*, 298 S.C. 1, 377 S.E.2d 581, 298 S.C. 1 (SC 1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal"). Even if BOA had timely raised the issue in the circuit court, an emailed motion and order are just as valid as one filed on paper. In fact, electronic methods are used in the courts regularly.

an objection would have been timely because the motion was made and granted that day after Overland and BOA's counsel had an electronic conversation with Judge Verdin regarding the motion. BOA never said, "I object."[3]

BOA did not make a contemporaneous objection with specific grounds to preserve an error for review as required by South Carolina law. *State v. Hoffman*, 312 S.C. 386, 440 S.E2d 869 (SC 1994) ("A contemporaneous objection is required to properly preserve an error for appellate review. . . .[and] the defense objection was broadly made"); *State v. Bailey*, 253 S.C. 304, 170 S. E.2d 376 (SC 1969) ("it is well settled that an objection, to be good, must point out the specific ground of the objection, and that if it does not do so, no error is committed in overruling it"); *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E2d 129, 134 (SC 1965) ("[I]t is a litigant's duty to bring to the court's attention any perceived error and the failure to do so amounts to a waiver of the alleged error"). "There are four basic requirements to preserving an issue at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002). BOA failed to meet these standards.

Only after the motion was granted, after Overland justifiably relied upon it, and after the expiration of the 30-day window to appeal Judge Verdin's order had already passed, did BOA object to the motion having been granted.[4] BOA objected for the first time on January 30, 2015 as part of its memorandum opposing Overland's Rule 59 motion

[3] BOA argues it could withhold its objection and effectively trap Overland's counsel, but no South Carolina case supports this position.

[4] Judge Verdin's December 15, 2014 Order would need to be appealed within 30 days if a Rule 59(e) motion were not filed. BOA did not object during that entire time.

on the merits when it knew that Overland's lawyer was past that window. Overland's lawyer was sandbagged in a case worth $1.4 million dollars to the client. Nonetheless, BOA's objection was too late. BOA was estopped from objecting and waived and forfeited any objection it was entitled to make. BOA's reliance on *Dill v. Gen. Am. Life Ins. Co.,* 525 F.3d 612, 619 (8th Cir. 2008), to the contrary is misplaced and that case is factually different from this case. In *Dill,* a motion to enlarge the time was not timely made before the ten-day period expired. Because Overland filed its a motion to enlarge the time before the ten days ran, BOA was required to object at the same time. It could not wait in hopes of trapping Overland's lawyer. In fact, BOA does not cite a single case in its favor in which a litigant requested and was granted an extension before the ten-day period expired. This case is a case of first impression in South Carolina.[5]

**When Overland's Motion For An Extension Was Filed With The Trial Court, The United States Supreme Court Had Already Made The Distinction Between Claims Processing And Jurisdictional Rules.**

Until its most recent brief in this Court, BOA had argued strenuously that South Carolina Rule 59 is substantially the same as the corresponding federal rule and that South Carolina Courts should follow the federal courts' interpretation of Rule 59. Now, for the first time, BOA argues that South Carolina should ignore the way the United States Supreme Court and other federal courts interpreted Rule 59 as a claims processing rule and not as a jurisdictional rule. This is a complete flip from its earlier positions. It is an entirely new argument and it was not preserved for appeal. Accordingly, BOA cannot make that argument for the first time in this Court.

[5] Overland cited in its brief in this court and its principal brief in the appellate court cases in which the South Carolina courts have not applied a rigid, inflexible standard to Rule 59 motions and adopts those cases here as well. While none of those cases dealt with this exact scenario, they do favor Overland's position.

BOA's argument fails on the merits as well. BOA attempts to convince this Court that it should ignore the United States Supreme Court. 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.[6]

BOA attempts to circumvent the United States Supreme Court's rulings by arguing that the federal courts had just engaged in an "experiment." (BOA Br. p. 8)[7] That is not the

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[6] In South Carolina, all litigants have the opportunity to file a Rule 59(e) motion, which is what Overland filed. *Elam vs. S.C. Dep't of Transp.*, 361 S.C. 9, 17, 602 S.E.2d 772, 776 (2004). Having relied upon the Court's order granting the extension, Overland could not file a notice of appeal until the circuit court ruled on the 59(e) motion because doing so would have removed jurisdiction from the trial court while the motion was still pending and eliminate Overland's right to appeal as to any issues that had not been ruled upon by the circuit court. Rule 205, SCACR. It would have eviscerated Overland's Rule 59(e) opportunity.

[7] This argument and the argument that a change to Federal Appellate Rule 4 has changed the law are new arguments made for the first time in its brief to this Court. The arguments were not preserved for appeal.

case nor has the United States Supreme Court's *Bowles, Eberhart, Kontrick* trilogy been overruled. Moreover, *at the time Overland requested its extension, it was clearly the law.*

BOA's reliance on a 2016 rule change to Federal Appellate Rule 4(a)(4) does not change the nature of South Carolina Civil Procedure Rule 59 nor could this change overrule the United States Supreme Court.[8] BOA cited to only a small portion of the commentary and that commentary does not address cases in which the motion for enlargement of time was filed before the time to file a motion had expired. In *Lizardo v. United States*, 619 F.3d 273 (3d Cir. 2010) no motion for enlargement of time was ever filed. The litigant simply filed a very late motion. That is not this case. In *Blue v. Int'l Bhd. Of Elec. Workers Local Union 159*, 676 F.3d 579 (7th Cir. 2012) the court held it had jurisdiction and ruled on the merits of the case. Moreover, *Blue* is not a Rule 59(e) case. No Rule 59(e) motion was filed. *Blue* was a Rule 59(a) and Rule 50(b) case. Still the *Blue* Court found the rules claims processing rules. Given *Lizardo, Blue,* and *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466 (6th Cir. 2007), it was reasonable for Overland and the circuit court judge to believe the court had the authority to grant Overland's requested extension. Until the United States Supreme Court decides a case differently from the its current stance in the *Bowles, Eberhart, Kontrick* trilogy that Rule 59 is claims processing and not jurisdictional, it is the law of the land for federal courts. It was reasonable for Judge Verdin to believe South Carolina's Rule 59 was also claims processing.

[8] Overland made its motion for extension before the 2016 rule change; thus, even if this change could possibly overrule *Bowles* and its progeny, retroactively applying laws violates due process, but that is what BOA advocates. Moreover, Federal Appellate Rule 4(a)(4) does not apply in this State case.

Nor have the courts ceased relying upon the *Bowles, Eberhart, Kontrick* trilogy and *Nat'l Ecological.* In a recent Supreme Court of Mississippi case, the court relied upon the claims processing line of cases. *Carter v. Carter*, 204 So.3d 747, 755 (MS 2016) ("The Sixth Circuit has held that Rules 6(b) and 59(e) are "claim-processing rules") (citing *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 475–76 (6th Cir. 2007) (relying on *Eberhart v. United States*, 546 U.S. 12, 17–18, 126 S. Ct. 403, 406–07, 163 L.Ed.2d 14 (2005); *Kontrick v. Ryan*, 540 U.S. 443, 456, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004)). Additionally, the *Carter* court stated,

> "the Seventh Circuit has held that, as in Bankruptcy Rule 4004, the time limits in Rules 50(b) and 59(b) are claim-processing rules, promulgated by the Supreme Court, and thus "do not create or withdraw federal jurisdiction." *Blue v. Int'l Bhd. of Elec. Workers Local Union 159* , 676 F.3d 579, 584–85 (7th Cir. 2012)). "To be sure, "the Seventh Circuit stated, "the district court in this case violated [Rule] 6 by extending [the movant's] time to file its post-trial motions beyond 28 days. . . ." *Id.* But the Seventh Circuit found that "this error has no jurisdictional consequences, and the district court was within its discretion to consider the motion." *Id.* at 585. Even the Third Circuit—which has adopted a strict approach to supplements to timely filed Rule 59 motions—has held the same. *See Lizardo v. United States* , 619 F.3d 273, 277–78 (3d Cir. 2010) ("Because Rule 59(e) is a claim-processing rule, an objection based on the untimeliness of a Rule 59(e) motion may be forfeited.") *Carter* at 755.

As the Mississippi Supreme Court made clear, *Blue* and *Lizardo* stand for the exact opposite of what BOA says they stand for. These cases support Overland's position that these are claims processing rules.

Like the Mississippi Supreme Court, in 2017, the United States District Court for the Northern District of New York applied *Eberhart, Kontrick* and *Nat'l Ecological* and concluded that Rule 6(b)(2) was not jurisdictional. *Legg v. Ulster* County, (1:09-CV-550

(FJS/RFT) (N.D. N.Y. August 24, 2017). BOA incorrectly asserted that the Rule 4 amendment overruled the United States Supreme Court and the Federal Court of Appeals-the courts continue to apply these cases.

Moreover, South Carolina has never been the type of state that tries to set a trap for litigants or lawyers. Hunter Reid clearly requested a timely extension and Judge Verdin clearly granted it. Clarity provides an even playing field for everyone.

**There Is No South Carolina Precedent On This Issue**

This is a case of first impression in South Carolina. In other Rule 59 cases, which Overland discussed in its opening brief, South Carolina courts have not treated Rule 59 as jurisdictional.[9] The corresponding Federal Rule of Civil Procedure, Rule 59(e) is a claims processing rule and remains such today notwithstanding BOA's attempt to confuse this Court into thinking an amendment to Federal Appellate Rule 4 could somehow turn Rule 59(e) into a jurisdictional rule. The United States Supreme Court has clearly stated otherwise.

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 him to file his motion for reconsideration within the 10-day window. Judge

[9] BOA attempts to show that these cases are irrelevant to this appeal, but that misunderstands Overland's point as to these cases. The cases are relevant because they show that Rule 59 is not jurisdictional-the courts have applied flexibility to the rule when needed. Most telling, however, is that BOA admits there is no South Carolina precedent like this case.

Verdin chose to grant the extension. Mr. Reid then relied upon the court's extension as he was entitled to do. See, *Nat'l Ecological Found. 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)

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.

**There Is A Due Process Right To A Timely Filed Appeal**

Overland filed a timely notice of appeal when it filed its notice of appeal within the thirty days after the circuit court denied its Rule 59(e) motion. BOA argues that due process is not implicated in this case; however, that position ignores volumes of appellate jurisprudence. 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.

## 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 *Nat'l Ecological,* confirm that the United States Supreme Court also finds Federal Rule 59(e) claims-processing and not jurisdictional. That was the law in 2014 in the federal courts when the motion for extension was granted and remains so today unless and until the United States Supreme Court changes it. 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.

October 20, 2017

Respectfully submitted,

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## PROOF OF SERVICE

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I certify that I have served Reply of Petitioner to Response of Respondent Bank of America on all parties to the appeal by depositing a copy to them in the U.S. Mail, postage prepaid, on October 20, 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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