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.

REPLY OF PETITIONER TO RESPONSE OF RESPONDENT SUNTRUST BANKS, INC.

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STATEMENT OF ISSUE ON APPEAL

CAN A LAWYER RELY ON A TIMELY 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

Overland adopts and relies upon the Statement of the Case and argument submitted in its opening brief and in its Reply to Bank of America.

ARGUMENT

Attorneys And Litigants Rely On Court Orders And The Integrity Of The Judicial Process

This case is not just about the parties before the Court. It strikes at the core of whether litigants and attorneys can rely upon a court's orders and the integrity of the judicial process. Attorneys should and must be able to rely on a court's order. If there is anything aspiring lawyers are taught, it is obedience to the court's orders. In this case, Overland's counsel asked the court for an order *either* allowing a timely extension to file a full Rule 59(e) motion or permission to amend the motion later if Overland filed a skeleton motion that day. When the court granted the extension, it impliedly denied the alternative request to later amend. Accordingly, Overland obeyed. It took the time allowed and filed a fully prepared Rule 59(e) motion.

When the circuit court granted Overland an extension to file a Rule 59(e) motion, it did not trample any other parties' rights. SunTrust and BOA ("collectively "the Banks") have not argued that they suffered any prejudice or harm. Indeed, they cannot. Instead, the Banks argue that Overland was not reasonable in relying upon the court's order.

Reasonableness is not the issue when a court speaks.[1] The issue is prompt obedience. In addition, if there is anything in a court case upon which the parties and attorneys should be able to rely, it is the court's orders. This is especially true, when, as here, the court grants the motion due to extenuating circumstances including illness, Overland's counsel being out of the state, and the time falling during the Christmas holidays.

Rule 59(D) SCRCP And Rule 59(E)SCRCP Are Distinguishable

SunTrust's cases regarding a court's ability to order a new trial on its own initiative pursuant to Rule 59(d) SCRCP are not applicable to this Rule 59(e) SCRCP case.[2] Rule 59(d) provides a court ten days to order a new trial on its own initiative. That time-frame makes sense for Rule 59(d). A trial is a witness and exhibit intensive endeavor – it takes considerable planning and coordination to bring a trial together. Afterwards, if a judge on his or her own initiative plans to order a new trial, it is essential to the integrity of the process that a new trial be ordered before the case becomes stale, the witnesses disperse, and exhibits become misplaced. It is also imperative that the decision to order such new trial be considered while the facts and circumstances of the trial remain fresh in the judge's mind. When deciding whether to order a new trial on his or her own initiative, the judge need not wait for briefing, or rely on litigants' arguments and counter-arguments. The judge need not wait for the trial transcript. The judge does not need much time to reach a decision, in fact, making the decision while the judge's memory is freshest is important to

[1] Reasonable reliance is a factor in Overland's claim that the banks are estopped from claiming that Overland's extension was not appropriate. Overland reasonably relied on BOA's statements that it was happy to oblige and wanted to be accommodating. Once the court ruled, that ruling controlled and Overland's right to rely upon it was absolute.

[2] *Citizens & S. National Bank of S.C. v. Easton*, 310 S.C. 458, 427 S.E.2d 640 (1993), is a Rule 59(d) case in which the court ordered a new trial many months after judgment had been entered. *Citizens* is not applicable to this case.

the court's decision. Additionally, if a party plans to appeal, directly from the judgment or verdict, it has only 30 days from the trial's conclusion. For that reason, the ten-day limitation in Rule 59(d) makes sense because it leaves litigants an additional 20 days within which to file an appeal. Thus, a firm ten-day limit makes sense for Rule 59(d). But that is not this case.

In a Rule 59(e) motion, everything about the case needs to be reviewed to make sure every appealable issue has been ruled upon. Sometimes, that is an extensive review necessitating transcripts.[3] An extension to file a thorough Rule 59(e) motion imparts no prejudice to any party if the extension is requested and granted before the ten-day period has expired. All that happens is that the motion is filed a brief time later – but the parties know that the motion is coming. There is no harm. Neither SunTrust nor BOA have alleged any prejudice or harm that resulted from the extension.

There has been considerable confusion about Rule 59(e) that this Court has addressed in prior cases to give the bench and bar guidance. For example, in *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634 (2010), this Court clarified that a Rule 59(e) motion that lacked detail would toll the time to file an appeal as long as "neither party is prejudiced and the court is able to fairly deal with [the] motion for reconsideration." In *Gallagher v. Evert*, 353 S.C. 59, 577 S.E.2d 217 (Ct. App. 2002), the court clarified that the Rule 59(e) motion in the case did toll the time for filing an appeal pursuant to Rule 203(b)(1), SCACR, despite movant failing to properly serve the motion on the circuit court. In *Russell v. Wachovia Bank, N.A.*, 633 S.E.2d 722, 730 & fn10, 370 S.C. 5 (2006) the Court clarified

[3] When that review must be done during the winter holidays when many businesses have only skeleton crews available it is more difficult. When counsel is also out of the state and ill, it becomes extremely difficult. The corresponding federal rule allows 28 days, which is more manageable when extenuating circumstances arise.

that the "jurisdiction" it referenced in prior cases discussing post-trial motions, such as *Pitman v. Republic Leasing Co.,* 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002), was not subject matter jurisdiction, but retention of the case. In 2006, in the *Russell* case, there was confusion as to when the ten-day period commenced. In *Pitman,* a motion for sanctions was filed two months after summary judgment had been granted.

The movants in *Russell* and *Pitman* did not move for an extension of time before the ten-day period expired. In fact, in no case cited by the banks did any litigant move for an enlargement of time before the ten-day period expired. That fact is important. In this case, Overland did move for an enlargement of time before the ten-day period expired and in doing so effectively asked the court to retain the case to receive and hear the Rule 59(e) motion.

What is clear from other cases in which the Court has clarified Rule 59(e) is that every litigant is entitled to file one such motion and the "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.,* 61 S.C. 9, 17, 602 S.E.2d 772, 776 (2004). Overland knows of no other South Carolina case with these same facts applied to a Rule 59(e) motion.[4]

SunTrust 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, neither Bank of America ("BOA") nor SunTrust objected. SunTrust does not

[4] The banks were estopped from complaining about the extension because BOA did not object at the time it was requested and SunTrust likewise did not object. Overland reasonably relied on BOA's emails in which counsel expressed willingness to be obliging and accommodating. Moreover, BOA said it was willing to be accommodating to the extent the law allowed- under the *Bowles* claims processing line of cases, BOA could consent.

allege that it said to the circuit court "I object" or any phrase that included the root word "object" in response to Overland's motion. SunTrust did not object to the extension.

SunTrust argues that it was sufficient for it to have stated: "Finally, SunTrust adopts the arguments made by Bank of America in its response to Plaintiff's motion to alter, amend, or reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure." (App. p. 126). Adoption of part of a memorandum is not an objection. First, that adoption is only as to Overland's motion to alter, amend, or reconsider, which dealt with the substantive issues (the arguments in sections II, III, and IV)– not as to the extension of time to file the motion discussed in section I. (App. pp. 118-129) Had SunTrust intended to adopt BOA's entire response, it could easily and clearly said so. It did not. Second, BOA wrote the section I argument solely as to BOA. It did not protect SunTrust. Third, there is not a *single* word in SunTrust's responsive memorandum to the trial court regarding timeliness of Overland's Rule 59(e) motion. (App. pp. 125-127) Not a single word. To object, a party must state it objects and state with specificity the reasons for the objection. *Parks v. Morris Homes Corp.,* 245 S.C. 461, 471, 141 S.e2d 129, 134 (SC 1965).[5] SunTrust did not do so and may not do so via a proxy.[6]

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[5] SunTrust is pointedly and strangely silent about when it became aware of the requested extension. BOA and SunTrust had a joint defense agreement, shared information, and strategy. Given both BOA and SunTrust's silence, it is likely SunTrust and BOA conferred the very day the extension was requested.

[6] SunTrust 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."

Even had SunTrust objected, (which it did not) it did not do so timely. SunTrust never stated that it was unaware that Overland requested the extension, nor has BOA ever stated that it did not discuss it with SunTrust that December 27th. Candor to the Court requires such disclosure. If SunTrust had an objection, it should have raised it that day – instead, it relied on BOA to engage in the email exchange with Overland in which no objection was made. SunTrust did not object promptly thereafter, either. SunTrust sat on its rights hoping to prejudice Overland's right to appeal. It appears that there was an intention to trap a young lawyer who relied on BOA's assurance (for both banks as BOA had routinely taken the lead) that it wanted to be obliging and accommodating.[7]

SunTrust also turns to *Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 619 (8th Cir. 2008), to support its position; however, that reliance is misplaced. *Dill* concerned a Rule 50(b), FRCP motion. *Dill* is not a Rule 59(e) case. In *Dill,* a motion to enlarge the time was not timely made before the ten-day period expired. Had a motion to enlarge the time been timely filed in *Dill*, the time to object would have been at that time and not much later. SunTrust does not cite a solitary 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.

Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002). SunTrust failed to meet these standards.

[7] SunTrust had a pattern of deferring to BOA. Even at the summary judgment hearing, SunTrust had another appointment and told the court, "And if it pleases the Court, by agreement of counsel, since I have a scheduling conflict, all of the other attorneys have graciously agreed that I could go first." (App. p. 798, l. 13-17) SunTrust went on to advise the court that "SunTrust is identically situated with Bank of America. We join Bank of America's motion that there is no negligence claim here. I won't take up the court's time this morning. Mr. Sheedy, I'm sure, will do a great job of arguing that." (App. p. 804, l. 1-5) And before the hearing was over, SunTrust's counsel left the hearing, "Thank you, You Honor. I appreciate the indulgence. I'm going to have to slip out." (App. p. 819, l. 18-20)

Conclusion

One of the things that has made practicing law in South Carolina not only meaningful but enjoyable is the South Carolina Supreme Court's perspective that "We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place." *Elam*, 361 S.C. at 17, 602 S.E.2d at 776. Perhaps in some jurisdictions the "I Gotcha" refrain predominates. But in South Carolina, the rules are designed to serve justice rather than to thwart it by gamesmanship. Surely if SunTrust or BOA were in Overland's position, they too would want to be able to rely on the circuit court's order.

October 26, 2017

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Reply of Petitioner to Response of Respondent SunTrust Banks, Inc. on all parties to the appeal by depositing a copy to them in the U.S. Mail, postage prepaid, on October 26, 2017, addressed to:

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

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