

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Greenville County
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 2016-UP-368 (S.C. Ct. App. filed July 20, 2016)

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, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and SunTrust
Banks, Inc. are the Respondents.

**APPENDIX
PETITION FOR WRIT OF CERTIORARI
VOLUME III**

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TABLE OF CONTENTS

Record on Appeal	1
Final Brief of Appellants	957
Final Reply Brief of Appellants	978
Final Brief of Respondent SunTrust Banks, Inc.	1000
Final Brief of Respondent Bank of America	1017
Opinion, Court of Appeals	1055
Appellant's Petition for Rehearing	1059
Appellant's Petition for Rehearing Proof of Service	1074
Order, Court of Appeals	1076

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

Overland, Inc., d/b/a Land Rover Greenville Appellant,

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, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and
SunTrust Banks, Inc. are the Respondents.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Statement of Issues on Appeal..... 1

Statement of the Case 1

Statement of the Facts 2

Standard of Review 4

Arguments

 A. Did the Circuit Court incorrectly grant summary judgment
 against the Plaintiff over its objection that discovery was
 incomplete and in the face of the Plaintiff's motion to compel
 responses to its discovery requests?
 4

 B. Did the Circuit Court incorrectly grant summary judgment
 against the Plaintiff because it ignored the facts concerning the
 dealings between the Defendant banks and the embezzler, who
 forged checks on the Plaintiff's account and then deposited them
 with the Defendant banks?
 8

 C. Did the Circuit Court incorrectly grant summary judgment
 against the Plaintiff because it failed to understand that Sections
 3-404 and 405 of the South Carolina Uniform Commercial Code
 were amended in 2008 to provide that the Plaintiff drawer could
 recover against the Defendant depository banks under a theory of
 comparative fault?
 10

Conclusion 16

TABLE OF AUTHORITIES

CASE LAW:

Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69 (SC 1999)..... 4, 7

Bennett v. Investors Title Ins. Co., 370 S.C. 561, 569, 635 S.E.2d 660, 664 (Ct. App. 2006).... 16

BPS, Inc. v. Worthy, 362 S.C. 319, 329-330, 608 S.E.2d 155 (S.C. Ct. 2005)..... 4, 7

Burwell v. S.C. Nat'l Bank, 288 S.C. 34, 340 S.E.2d 786 (1986) 15

Eisenberg v. Wachovia Bank, N.A., 301 F.3d 220 (4th Cir. 2002) 15

Florentine Corp. v. Peda I, Inc., 287 S.C. 382, 339 S.E.2d 112 (1985) 15

Gina Chin v. First Union Bank, 256 Va. 59, 500 S.E.2d 516 (Va. 1998) 12, 13

Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 329-330, 673 S.E.2d 801 (SC 2009) 4, 9, 10

Kerr v. Branch Banking & Trust Co., 408 S.C. 328, 759 S.E.2d 724 (2014) 15

McCallum v. Rizzo, 1995 WL 114812 (Mass. Super Ct. Oct. 13, 1995) 15

Read v. First National Bank of Habersham, 286 S.C. 534, 335 S.E.2d 359 (1985) 15

Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) 15

Victory Clothing Co. v. Wachovia Bank, February Term 2004, No. 1397, 2006 Phila. Ct. Com. Pl. LEXIS 146, 59 U.C.C. Rep. Serv. 2nd (Callaghan) 376 (C.C.P. Phila. March 21, 2006 (Abramson J)). 12, 13

STATUTES:

S.C. Code Ann. § 36-3-103(a)(9) 14

S.C. Code § 36-3-404 10, 11, 12, 13, 15

S.C. Code § 36-3-405 10, 11, 12, 13, 15

S.C. Code § 36-3-406 15

Va. Code §§ 8.3A-404 12, 13

OTHER AUTHORITIES

Rule 56(c) SCRCF 4

Rule 59(e), SCRCF 7

STATEMENT OF ISSUES ON APPEAL

- A. Did the Circuit Court incorrectly grant summary judgment against the Plaintiff over its objection that discovery was incomplete and in the face of the Plaintiff's motion to compel responses to its discovery requests?
- B. Did the Circuit Court incorrectly grant summary judgment against the Plaintiff because it ignored the facts concerning the dealings between the Defendant banks and the embezzler, who forged checks on the Plaintiff's account and then deposited them with the Defendant banks?
- C. Did the Circuit Court incorrectly grant summary judgment against the Plaintiff because it failed to understand that Sections 3-404 and 405 of the South Carolina Uniform Commercial Code were amended in 2008 to provide that the Plaintiff drawer could recover against the Defendant depository banks under a theory of comparative fault?

STATEMENT OF THE CASE

This action was brought on July 21, 2010 by Overland, Inc. ("Overland") filing a Summons and Complaint with the Court of Common Pleas in Greenville County. On August 10, 2012, Overland filed a Third Amended Complaint (Jury Trial Demanded). Third Am. Compl. p. 1, R. p. 409-452. On March 5, 2014 Respondent Bank of America Corporation ("Bank of America") filed a motion to dismiss Overland's Seventeenth Cause of Action, which the Court denied, holding that "there are issues involving the seventeenth cause of action which could entitle the Plaintiff to judgment." Order, dated May 22, 2014, R. p. 24-26. The Seventeenth Cause of Action is the subject of this appeal. The Seventeenth Cause of Action alleges that Defendant banks Bank of America and SunTrust are liable to Overland because their customer opened accounts at the Defendant banks and used those accounts to deposit forged checks as part of her embezzlement scheme.

On August 22, 2014, SunTrust Bank ("SunTrust") filed a Motion for Summary Judgment. SunTrust Mot. Summ. Jdgmt., R. p. 128-130. On September 3, 2014, Bank of America filed a Motion for Summary Judgment Purely on the Basis of Law as to the 17th and

15th Causes of Action. BOA Mot. Summ. Jdgmt., R. p. 314-316. Overland filed a Motion to Compel Discovery on September 22, 2014, Overland Mot. Compel, R. p. 551-601. The Circuit Court heard argument on October 29, 2014 on both Summary Judgment Motions and the Motion to Compel Discovery and issued an Order filed December 15, 2014, R. p. 1-9, granting the Motions for Summary Judgment on December 15, 2014 and holding Overland's Motion to Compel Discovery moot. Order, Dec. 15, 2014, R. p. 9.

On December 29, 2014, Overland requested an enlargement of time to file Plaintiff's Motion to Alter/Amend or Reconsider Pursuant to Rule 59(e), SCRCF, which the Court granted. Motion for Enlargement, R. p. 114; Order, R. p. 113 and p. 12. On January 7, 2015, Overland filed Plaintiff's Motion to Alter/Amend or Reconsider Pursuant to Rule 59(e), SCRCF, R. p. 66-91, which the Court denied on February 5, 2015. Order, R. p. 10-11.

Overland filed a notice of appeal on March 4, 2015, R. p. 776-790. Overland received the transcript of the summary judgment motion hearing on May 12, 2015.

STATEMENT OF FACTS

This is a case involving many defendants. The portion of the case on appeal involves Defendants Bank of America, and SunTrust and Plaintiff Overland. Briefly, the facts pertaining to this portion of the case are as follows.¹ Overland's former employee, Lara Marie Nance, embezzled at least \$1,282,000.00 from Overland over a period of two and one-half years. Third Am. Compl. p. 9, R. p. 409. To accomplish her fraudulent scheme, Nance opened various accounts at Bank of America and SunTrust in the names of companies with which Overland did business. Third Am. Compl. p. 9-10, R. p. 419-420. For example,

¹ The full facts as to all defendants are set forth in the Third Amended Complaint, p. 1-11, R. p. 411-421.

Overland did business with and paid checks to a company called "Taylor Enterprises." Third Am. Compl. p. 9-10, R. p. 419-420. Nance set up an account "Taylor Enterprises," wrote checks to Taylor Enterprises, forged the necessary Overland signature on the checks, and then forged a Taylor Enterprises indorsement on the instrument. Third Am. Compl. p. 9-10, R. p. 419-420. She then deposited the checks into her Taylor Enterprises account. Sometimes she wrote checks to a corporate entity and then deposited the checks into her personal accounts. Transcript p. 60-61, R. p. 854, lines 9-25; p. 855, lines 1-14. Bank of America noticed some of these inappropriate deposits and rejected them, but then let her make the same deposits another day. Affidavit of Peter Seitz, R. p. 349. Nance engaged in a variety of methods of check writing and deposited the checks into several accounts at Bank of America and SunTrust. Third Am. Compl. p. 9-10, R. p. 419-420. She forged signatures on the signature cards for the accounts, provided fictitious names for corporate officers, and provided false social security numbers, all as part of her fraudulent scheme. Depo. Lara Nance, R. p. 924, lines 23-25; R. p. 929, lines 12-19; R. p. 927, line 22; R. p.928, line 4; Affidavit of Michael O'Shea, R. p. 348, Affidavit of Peter Seitz, R. p. 367-408.

Unbeknownst to Overland, Nance, hired as a payroll clerk in 2006, gained access to Overland's ADP accounting system, which allowed her to hide her activities from Overland. Third Am. Compl. p. 4-5, 8, R. pp. 414-415, 8 The checks were drawn on Overland's business accounts, which it maintained with Synovus Financial Corporation d/b/a NBSC and Branch Banking and Trust (BB&T). Third Am. Compl. p. 9-10, R. p. 419-420.

Nance pled guilty to wire fraud in the United States District Court. *United Stats v. Lara Marie Nance*, No. 6:10cr634-1 (Feb. 14, 2011), R. p. 908.

Overland also concurs with the facts set forth in the Background section of the Circuit Court's Order on appeal, pp. 1-2, R. p. 3-4. Those facts, however, are incomplete.

STANDARD OF REVIEW

The Circuit Court granted Bank of America and SunTrust's Motions for Summary Judgment and held that Overland's Motion to Compel Discovery was moot. "Summary Judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329-330, 673 S.E.2d 801 (2009). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Id.* Additionally, in South Carolina, summary judgment should not be granted until the non-moving party has had a full and fair opportunity to complete discovery. *See BPS, Inc. v. Worthy*, 362 S.C. 319, 329-330, 608 S.E.2d 155 (Ct. App. 2005) ("Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery"); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69 (1999) ("summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery").

A. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF OVER ITS OBJECTION THAT DISCOVERY WAS INCOMPLETE AND IN THE FACE OF PLAINTIFF'S MOTION TO COMPEL RESPONSES TO ITS DISCOVERY REQUESTS?

Overland objected to the Court deciding the Motions for Summary Judgment because discovery as to the issues raised in the Motions for Summary Judgment was not complete. There is no dispute that Overland had requested and was waiting for discovery,

for which the deadlines to produce had passed. Overland Discovery Request of BOA, R. p. 557-573; Overland Discovery Request of Sun Trust, R. p 532-548.; Overland Mot. Compel BOA, R. p. 551-601. The Court held, in the same Order granting the Motions for Summary Judgment, that “in light of this Court’s decision to grant Defendants Bank of America and SunTrust summary judgment as to the seventeenth cause of action, the Court finds Overland’s Motion to Compel Discovery moot.” Order, R. p. 9. Overland objected to proceeding on the Motions for Summary Judgment while discovery was outstanding and alerted the Court that Overland needed the discovery in order to defend against the Motions for Summary Judgment. Overland made this point repeatedly to the Court. In Overland’s written response to Defendants Bank of America and SunTrust’s motions for summary judgment, Overland stated:

“[Bank of America] and SunTrust must first comply with discovery dutifully before the Court entertains its summary judgment motions. . . . BOA and SunTrust have been unwilling to produce the operations and/or control manuals implemented by the bank, which would detail their procedures for opening new accounts, for depositing checks and/or item processing, and their account monitoring practices. These are not abstract features to a bank. The Bank Secrecy Act mandates that all financial institutions implement Customer Identification Programs in order to prevent fraudulent activity and terrorism. The Affidavit of Peter Seitz, dated October 21, 2014, explains in detail the importance for requiring BOA and SunTrust to produce their manuals and the relevance it would have in determining liability in this case. This Court should not allow BOA and SunTrust to continue hiding its

banking operations manuals while also claiming no genuine issues of fact are at issue.” Overland Response Mot. Summ. Jdgmt. p. 5-6, R. p. 337-338.

The affidavit of Peter Seitz alerted the Court to the need for the requested discovery materials. “In order to evaluate the defendant banks’ compliance with their procedures for negotiating checks, I would need to review the requested discovery.” Affidavit of Peter Seitz, R. p. 350.

Additionally, at the hearing, Overland brought to the Court’s attention that the summary judgment hearing was premature due to outstanding discovery:

“Just to point out the significance of why more discovery is needed and how their motion for summary judgment is not factually right for today is the fact that we have asked for their account opening procedures and their policies with respect to depositing of check items.

We need those - - we need those manuals and those policies so that we can compare whatever their internally prescribed procedures are for opening accounts and depositing checks. We need to compare them to what actually happened, what Nance did so that we can determine whether or not there’s any liability. We also need to compare them to whatever is the accepted general usage within the banking industry. . . .

So again, the motion is not right today. The law is clear on what the standard of care is. They have not complied with discovery in producing these manuals that would allow the trier of fact to make the determination.” Transcript, p. 14-15, R. p. 808, lines 11-25, R. p. 809, lines 1, 16-20.

And again later in the hearing:

“And we have not been able to schedule depositions because we don’t have a lot of the manuals and protocols that we have been requesting so that we can actually take a good factual deposition, Your Honor.” Transcript p. 63, R. p. 857, lines 16-20.

The Defendant banks had withheld needed discovery and the discovery was still outstanding as of the day the summary judgment motions were heard.² Overland still needed the remaining documents that were the subject of the motions to compel discovery and the time to take depositions once the documents were produced.³

Again, Overland advised the Court that summary judgment was premature in while the discovery remained outstanding and depositions were incomplete in Overland’s Motion to Alter/Amend or Reconsider Pursuant to Rule 59(e), SCRPC. Overland Mot. to Reconsider, pp. 5-6, R. p. 70-71. In that motion, Overland objected to the Court granting Summary Judgment because discovery was incomplete and Overland needed the discovery to defend fully against the Summary Judgment Motions. Overland Mot. to Reconsider, pp. 5-6, R. p. 70-71. Overland even supplemented its response with a letter to the Circuit Court citing two South Carolina cases that hold that summary judgment should not be granted until the non-moving party has had a full and fair opportunity to complete discovery. *See BPS, Inc. v. Worthy*, 362 S.C. 319, 329-330, 608 S.E.2d 155 (Ct. App. 2005) (“Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery”); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69 (1999)

² As a sharp litigation practice that left Overland no time to utilize the discovery, on the eve of the hearing for the motion to compel discovery and motions for summary judgment, Bank of America provided “an additional couple of hundred documents and some updated responses;” however, the manuals and protocols were still not produced. Transcript, p. 63, R. p. 857, lines 4-6.

³ Overland and the Defendant banks discussed the outstanding discovery and the banks agreed to provide the documents at the hearing; however, the discovery had not yet been provided to Overland and as of today has not been provided.

(“summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery”). Overland Letter, January 29, 2015, R. p. 92-112.

The Circuit Court’s Order itself demonstrates why the granting of Summary Judgment was premature, when the Court stated, “Overland has failed to show that Defendant banks’ procedures varied in any way from general banking usage . . . Further, Overland has not provided any evidence that Bank of America or SunTrust failed to exercise ordinary care in their maintenance of Ms. Nance’s accounts.” Order, p. 6, R. p. 8. Overland was deprived of the discovery it requested and deprived of taking factual depositions on the basis of the discovery requested, all of which was directed at the very issues on which the Court decided Overland had failed to provide evidence. Defendant banks that withheld the discovery were rewarded with an Order granting their motions for summary judgment because they withheld requested discovery.

Summary judgment was premature in this case because Bank of America and SunTrust withheld needed discovery and that was brought to the Court’s attention.

B. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF BECAUSE IT IGNORED THE FACTS CONCERNING THE DEALINGS BETWEEN THE DEFENDANT BANKS AND THE EMBEZZLER, WHO FORGED CHECKS ON THE PLAINTIFF’S ACCOUNT AND THEN DEPOSITED THEM WITH THE DEFENDANT BANKS?

Despite the Defendant banks’ withholding of crucial discoverable evidence, Overland provided the Court with sufficient evidence of the dealings between Bank of America and SunTrust and the embezzler Lara Nance to overcome the motions for summary judgment. The evidence Overland provided is far more than a mere scintilla of evidence for a trier of fact to apply to the law, which is all that is required to make summary judgment inappropriate. “In cases applying the preponderance of the evidence burden of

proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329-330, 673 S.E.2d 801 (2009). Overland provided the Court with evidence that:

- Lara Nance opened two checking accounts at Bank of America using a false Social Security Number and did not produce any documentation to Bank of America or SunTrust that she was doing business as Taylor Enterprises and Atlantic British. (Exhibit A - *Deposition of Lara Nance*, Pg. 53, lines 23-25; Pg. 111, lines 12-19). Depo. Lara Nance, Pg. 53, lines 23-25; Pg. 111, lines 12-19) R. p. 924, lines 23-25; p. 929, lines 12-19); Overland Response to Summ. Jdgmt. Mot. p. 6-7 R. p. 338-339.
- Lara Nance admitted to forging Charlie Nance’s signature on the authorization cards at SunTrust (Exhibit B – *Deposition of Lara Nance*, Pg. 101, line 22 – Pg. 102, line 4). Depo Lara Nance, p. 101, line 22 – p. 102, line 4, R. p. 927, line 22 – p. 928, line 4; Overland Response to Summ. Jdgmt. Mot. p. 6-7 R. p. 338-339.
- Bank of America and SunTrust deposited for Lara Nance third party corporate checks that were not payable to her and bearing forged endorsements (See, *Affidavit of Michael O’Shea*). Affidavit Michael O’Shea; R. p. 374-377; Overland Response to Summ. Jdgmt. Mot. p. 6-7 R. p. 338-339.
- Bank of America refused to deposit many of Nance’s stolen checks because they were not properly payable, yet it allowed Nance to re-deposit *those same checks on a later date* (See, *Exhibit A to Affidavit of Peter Seitz*). Affidavit of Peter Seitz, R. p. 349; Overland Response to Summ. Jdgmt. Mot. p. 6-7 R. p. 338-339.

The trier of fact, in this case a jury, is necessary to determine whether Bank of America and SunTrust were liable in this matter. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (requiring a mere scintilla of evidence in order for the non-moving party to survive summary judgment). The applicable statutes, discussed more fully in the next section of this brief, have implemented a comparative fault analysis with this fact pattern in mind. *See*, S.C. Code §36-3-405, *Official Comment 4*. The Overland suit is identical to the case scenarios discussed within the official commentaries, which provides for recovery from a depository bank, such as Bank of America and SunTrust, for all or part of the loss suffered by the victimized employer, such as Overland.

Accordingly, summary judgment was inappropriate in this case because Overland provided far more than a mere scintilla of evidence to support its claims. The Circuit Court's decision granting summary judgment should be reversed.

C. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF BECAUSE IT FAILED TO UNDERSTAND THAT SECTIONS 3-404 AND 405 OF THE SOUTH CAROLINA UNIFORM COMMERCIAL CODE WERE AMENDED IN 2008 TO PROVIDE THAT THE PLAINTIFF DRAWER COULD RECOVER AGAINST THE DEFENDANT DEPOSITORY BANKS UNDER A THEORY OF COMPARATIVE FAULT?

In 2008, the South Carolina Commercial Code was revised to provide that drawers may recover against depository banks pursuant to sections S.C. 36-3-404(d)⁴ and 405(b)⁵

⁴ SECTION 36-3-404. Imposters; fictitious payees.

(a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) If (i) a person whose intent determines to whom an instrument is payable (Section 36-3-110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the

under a theory of comparative fault. This revision implemented an earlier revision to the Standard Uniform Commercial Code. The commentary to 36-3-404(d) provides, “[i]n those cases . . . (referring to situations in which the bank taking the check for collection failed to exercise ordinary care in detecting the fraud) . . . the drawer has a cause of action against the offending bank to recover a portion of the loss. The amount of loss to be allocated to each party is left to the trier of fact. . . . [3-404(d) is] new and changes prior law.”

In this case, the drawer is Overland and the banks taking the checks for collection that are alleged to have failed to use ordinary care are Bank of America and SunTrust. Sections 404(d) and 405(b) provide Overland causes of action for the banks’ failures to

person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

- (1) Any person in possession of the instrument is its holder.
- (2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.
- (c) Under Subsection (a) or (b), an indorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to that of the payee.
- (d) With respect to an instrument to which Subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss. (emphasis added).**

⁵ S.C. Code Ann. §36-3-405(b), entitled “Employer’s responsibility for fraudulent indorsement by employee,” provides that, “For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. **If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.**” (emphasis added).

exercise ordinary care. There is no South Carolina case on point interpreting the revised S.C. 36-3-404(d) and 405(b). However, the Virginia Supreme Court, in *Gina Chin v. First Union Bank*, 256 Va. 59, 500 S.E.2d 516 (Va. 1998) (interpreting its state's revised S.C. 36-3-404(d) and 405(b)) applied that state's identical provisions and held that a drawer has a cause of action against a depository bank in a forgery case and in a double forgery case, which this case is. The *Gina Chin* Court held,

“While First Union is correct that the UCC provides a drawer with a cause of action against a drawee bank that charges a drawer's account based on checks constituting a forged signature of the drawer, its conclusion that §§8.3A-404 and 405 cannot be utilized by a drawer against the depository bank in a double forgery situation is *erroneous*. (emphasis added).

Virginia's UCC 8.3A-404 and 405 are the same as S.C. Code 36-3-404 and 405⁶. See also *Victory Clothing Co. v. Wachovia Bank*, February Term 2004, No. 1397, 2006 Phila. Ct. Com. Pl.

⁶ SECTION 36-3-405. Employer's responsibility for fraudulent indorsement by employee.

(a) In this section:

(1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

(2) "Fraudulent indorsement" means (i) in the case of an instrument payable to the employer, a forged indorsement purporting to be that of the employer, or (ii) in the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee.

(3) "Responsibility" with respect to instruments means authority (i) to sign or indorse instruments on behalf of the employer, (ii) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity. "Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.

LEXIS 146, 59 U.C.C. Rep. Serv. 2nd (Callaghan) 376 (C.C.P. Phila. March 21, 2006 (Abramson J.) (a negligent depository bank may be liable to drawer for a double forgery under §§3-404 and 3-405). The Circuit Court erred as a matter of law when it did not recognize that Overland is the drawer⁷ with a cause of action against Bank of America and SunTrust pursuant to S.C. Code 36-3-404 and 405.

The Circuit Court also erred when it couched Overland's Seventeenth Cause of Action as one in contract, because this case is between a bank and a non-customer. This case is governed by the Uniform Commercial Code. A drawer is entitled to bring a cause of action against a depository bank for redress of its losses. As the *Gina Chin* Court stated, "The revisions to §§ 8.3A-404 and 405 changed the previous law by allowing 'the person bearing the loss' to seek recovery for a loss caused by the negligence of any person paying the instrument or taking it for value based on comparative negligence principles." Accordingly, Overland, as the drawer and person that suffered the loss, is entitled to seek redress against the banks that participated in the loss. It is for the *trier of fact* to allocate the respective comparative fault among the parties. Additionally, as argued above, the failure of the banks

(b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(c) Under Subsection (b), an indorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name substantially similar to the name of that person or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to the name of that person.

⁷ The Circuit Court's Order, page 5, first full paragraph, seems to refer to Overland as a "drawee" rather than as the "drawer."

to provide the requested discovery deprived Overland and the Court of the necessary information regarding the Defendant banks' fault. Overland did provide the Court with more than a mere scintilla of evidence that the banks failed to exercise ordinary care resulting in loss to Overland, but was deprived of being able to show the Court the full weight of the evidence that lies within the respective bank's procedure manuals and protocols. See Arguments A and B above.

Finally, the Circuit Court opinion, page 5, suggests that Bank of America and SunTrust would not be liable to the drawer because automated teller machines (ATM's) were used for some of the transactions. However, that is not the law. While S.C. Code Ann. § 36-3-103(a)(9) *initially* lessens a bank's obligations regarding deposits at ATMs, it only lessens it for the time-period between a deposit and when the bank pursuant to its policies and procedures, all of which must be done using ordinary care, reviews it. Banks do not get a free pass simply because they have moved teller functions to automated processes; the UCC simply shifts the timeframe for completing their obligations of ordinary care. Because deposits have a hold period until the funds are cleared into and useable by the depository accounts, banks have the time to use ordinary care to review the automated transactions. As argued above, because discovery was withheld by the banks regarding their protocols and manuals, the information necessary to evaluate each bank's compliance with ordinary care was withheld from Overland and the Court.

Moreover, Bank of America did reject some deposits when Nance attempted to deposit corporate checks into her personal account, which demonstrates that Bank of America's policies and protocols do not allow such deposits; however, Bank of America later allowed the same deposits to be completed. Affidavit of Peter Seitz, R. p. 349. Additionally, Nance's banking at the Defendant banks was not only via ATM's. Subpoena Information in

United States v. Nance, No. 6:10 cr 634-1 (Feb. 14, 2011). R. p. 917. Nance was well known at Defendant Bank of America. Plaintiff's Third Am. Comp. p. 7, ¶26, R. p. 417, ¶ 26.

The Court's reliance on contract cases,⁸ UCC cases that predate the UCC revisions, and cases that do not seek redress under the 2008 revisions that resulted in the current S.C. Code 36-3-404 and 405, are factually and legally distinct from this case and not applicable. For example, *Read v. First National Bank of Habersham*, 286 S.C. 534, 335 S.E.2d 359 (1985), was decided before the UCC revision and is factually distinct because it involved an Employer v. Drawee Bank fact pattern analyzed under 3-406(a), not an Employer v. Depository Bank case to be evaluated under 3-404(d) and 3-405(b). *Read* did not prohibit a negligence cause of action under 3-404(d) or 3-405(b)⁹, but even under the precursor to the current South Carolina UCC, the *Read* Court in *dicta* stated that: "[l]iability for accepting a check for deposit into an incorrect account lies with the depository bank." *Id.* 286 S.C. at 542-43, 335 S.E.2d at 364. That is exactly what occurred here. Defendant Bank of America deposited checks made payable to "Taylor Enterprises" into Lara Nance's personal checking account (See, Affidavit of Peter Seitz), R. p. 349; Transcript p. 60-61, R. p. 854, lines 8-25; R. 855, lines 1-14.

The Circuit Court erred as matter of law and its decision should be reversed.

⁸ The Court relied upon the following cases for the proposition that a non-customer may not rely on a bank's duties to its customer as a basis for a claim: *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 759 S.E.2d 724 (2014); *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); *Florentine Corp. v. Peda I, Inc.*, 287 S.C. 382, 339 S.E.2d 112 (1985); *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220 (4th Cir. 2002); and *McCallum v. Rizzo*, 1995 WL 114812 (Mass. Super Ct. Oct. 13, 1995). None of these cases was brought pursuant to the 2008 South Carolina Statute (36-3-404 and 405) that specifically provides for the cause of action at issue here. The only case in this group that was even decided after S.C. Code 36-3-404 and 405 were enacted, is the *Kerr* case, which has nothing to do with the application of S.C. Code 36-3-404 and 405.

⁹ Instead, the *Read* Court dismissed the plaintiff's conversion cause of action. Furthermore, the *Read* case does not represent South Carolina's current double forgery law because the UCC provisions regarding double forgery cases changed in 2008.

CONCLUSION


The order of the Circuit Court should be reversed (a) because the Court heard the summary judgment motions prematurely while Overland was deprived of the discovery it needed to defend fully the motions; (b) because Overland presented sufficient evidence to overcome the motion in spite of the Defendant banks' wrongful obstruction of discovery; and (c) because the Court misunderstood the South Carolina laws on the obligation of a depository bank to a drawer. Summary judgment is not appropriate when further inquiry in the facts of the case is desirable to clarify a correct application of the law. *Bennett v. Investors Title Ins. Co.*, 370 S.C. 561, 569, 635 S.E.2d 660, 664 (Ct. App. 2006).



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September , 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

Overland, Inc., d/b/a Land Rover Greenville Appellant,

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, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and
SunTrust Banks, Inc. are the Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served copies of the Initial Reply Brief of Appellant and Amended Designation of Matter on the following by mailing a copy of the same via First Class, U.S. Mail, postage prepaid on the date set forth below to the addresses below:

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FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Standard of Review 2

Arguments:

A. Did the circuit court incorrectly grant summary judgment against the Plaintiff over its objection that discovery was incomplete and in the face of Plaintiff’s motion to compel responses to its discovery requests? 2

B. Did the circuit court incorrectly grant summary judgment against the Plaintiff because it ignored the facts concerning the dealings between the defendant banks and the embezzler, who forged checks on the Plaintiff’s account and then deposited them with the banks? 8

C. Did the circuit court incorrectly grant summary judgment against the Plaintiff because it failed to understand that Sections 3-404 and 405 of the South Carolina Uniform Commercial Code were amended in 2008 to provide that the Plaintiff account holder could recover against the Defendant depository banks under a theory of comparative fault? 11

D. Once the trial court has granted counsel an extension of time under Rule 59(e) for health reasons, and he has relied on it, can the other party object after the fact? 15

Conclusion 17

TABLE OF AUTHORITIES

CASE LAW:

<i>Brockbank v. Best Capital Corp.</i> , 341 S.C. 372, 534 S.E.2d 688 (2000).....	2
<i>Camp v. Camp</i> , 386 S.C. 571, 689 S.E.2d 634 (2010)	17
<i>Gallagher v. Everett</i> , 353 S.C. 59, 577 S.E.2d 217 (Ct. Ap. 2002)	17
<i>Gina Chin & Assoc., Inc. v. First Union Bank</i> , 256 Va. 59, 500 S.E.2d 516 (1998)	14
<i>Hancock v. Mid-South Management Co., Inc.</i> , 381 S.C. 326, 329-330, 673 S.E.2d 801 (SC 2009).....	8
<i>Jackson v. Atlantic Soft Drink Company</i> , 286 S.C. 577, 579, 336 S.E.2d 13 (1985)	3
<i>Read v. First National Bank of Habersham</i> , 286 S.C. 534, 335 S.E.2d 359 (1985)	11, 14

STATUTES:

S.C. Code § 36-3-404	11, 12
S.C. Code § 36-3-405	11, 12
Va. Code §§ 8.3A-404	14
Reporters Comments, South Carolina Uniform Commercial Code	12, 13

OTHER AUTHORITIES

Rule 59(e), SCRCF	15, 16, 17
Rule 6(b), SCRCF	17
Rule 59(e), FRCF	17

Overland files this Reply Brief in response to SunTrust and Bank of America's briefs. To the extent SunTrust or Bank of America have misstated any facts or made procedural errors, those issues are addressed within the arguments that the errors affect.

STANDARD OF REVIEW

SunTrust mistakenly asserts that the standard of review for Argument A below regarding the summary judgment motions being heard prematurely because necessary discovery was outstanding, is whether the trial court abused its discretion. That is not correct. The trial court failed to rule on the merits of the discovery question. Instead, the Court granted summary judgment on the merits and then, because of its ruling on summary judgment, ruled that Overland's Motion to Compel Discovery was moot. Order filed December 15, 2014, R. p. 9. It did not decide the discovery motion. Accordingly, the appellate court reviews the trial court's decision on the entire case *de novo*,¹ the summary judgment standard. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000).

ARGUMENT

A. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF OVER ITS OBJECTION THAT DISCOVERY WAS INCOMPLETE AND IN THE FACE OF PLAINTIFF'S MOTION TO COMPEL RESPONSES TO ITS DISCOVERY REQUESTS?

¹ Bank of America mischaracterized the Court's Order regarding Overland's Motion to Compel Discovery. Bank of America stated that the Court "found the motion was moot based on counsel's representation at the hearing that Overland had received a 'couple hundred documents and some updated responses from BANA the previous day and that counsel for the parties were 'going to work through' the remaining discovery issues.'" Bank of America Brief, p. 2. The Court's Order gives a completely different reason for finding the Motion to Compel Discovery moot. The Court found the motion moot because the Court granted the motions for summary judgment. The Court stated, "In light of this Court's decision to grant Defendants Bank of America and SunTrust summary judgment as to the seventeenth cause of action, the Court finds Overland's Motion to Compel Discovery is moot." Order, p. 7, R. p. 9.

If the Court finds that the trial court prematurely determined the summary judgment motion because needed discovery remained outstanding,² the Court need not reach the issues on the merits, as they would not yet be ripe for review.

The fact that discovery was incomplete is particularly important in this case because the case involves a 2008 statutory change in the law for which there is no South Carolina case law. The South Carolina Supreme Court has said that in such a circumstance, full and complete development of the facts is essential. *Jackson v. Atlantic Soft Drink Company*, 286 S.C. 577, 579, 336 S.E.2d 13 (1985)

In an attempt to sandbag Overland, SunTrust and Bank of America delayed, obstructed, and failed to provide requested discovery from the time the discovery was served upon them through the date of the summary judgment hearing. SunTrust and Bank of America are massive corporations with assets exceeding the gross national products of many countries. They have the resources to stall litigation and in this case, they did so with a joint defense strategy. Letter from Bank of America Counsel to Overland Counsel dated October 27, 2014, claiming as privileged anything the joint defense agreement deemed privileged, R. p. 898, Answer "8".

Moreover, both SunTrust and Bank of America acknowledged at the summary judgment hearing that discovery was not yet complete. Transcript p. 67, lines 16-20, R. p. 861, lines 16-20. It was also conceded that if it were complete, Overland may be able to show the banks were negligent. Transcript p. 5 lines 10-21, R. p. 799, lines 10-21.

² The outstanding discovery precluded Overland from taking many of the depositions it needed to take because it needed the discovery responses and documents for the depositions. Transcript, R. p. 813, lines 16-20. Additionally, Bank of America's production of hundreds of documents the night before the summary judgment hearing sandbagged Overland because Overland was not able to conduct depositions with those documents nor have its expert review the documents. Such a production also clearly shows that Bank of America had wrongly withheld hundreds of documents. This type of litigation behavior should not be tolerated or rewarded in South Carolina courts. In addition, despite Bank of America's last second production, crucial discovery remained outstanding.

SunTrust did not provide Overland the discovery requested; instead, SunTrust objected to the discovery requests right up to the morning of the summary judgment hearing. At the courthouse on the morning of the summary judgment hearing, SunTrust agreed to provide the very same discovery to which it had previously objected. Why? Because SunTrust knew it would have to explain to the Court that morning at the summary judgment hearing why SunTrust had objected to clearly discoverable materials. SunTrust stalled, delayed, and obstructed Overland's right to the discovery Overland needed to respond fully and completely to SunTrust's summary judgment motion. In its initial brief, SunTrust implied that it had provided the discovery Overland requested and that there were no outstanding discovery issues at the time the Court entered Summary Judgment. In its Statement of the Case, Statement of Facts, and Argument sections, SunTrust asserts that "SunTrust had provided and/or objected to all discovery requests . . ." SunTrust Br. P. 1. SunTrust was careful to state it had "provided and/or objected" to the discovery, because it had not provided the discovery it knew Overland was entitled to receive. Both Overland's written objection to summary judgment and oral objections during the hearing show that SunTrust *had not provided the discovery* Overland requested. See also, Transcript, p. 799, lines 10-14. Finally, at the courthouse on the morning of the summary judgment hearing, when it would be too late for Overland to make use of the discovery for that hearing, SunTrust *agreed to provide the discovery to which it had previously wrongly objected.*

The scenario with Bank of America is eerily similar to that with SunTrust with one exception. Knowing its failure to properly provide discovery would be before the Court the next morning, Bank of America provided hundreds of documents on the eve of the summary judgment hearing - in what can only be regarded as a questionable litigation practice that Bank of America likely hoped would leave Overland unable to even cursorily

review the documents before the hearing. Transcript R. p. 857, lines 4-7. Bank of America's tactic did leave Overland without an ability to obtain its experts' analysis of the documents, conduct depositions based on the newly provided information, or otherwise make use of the documents for the hearing the next morning. Despite Bank of America's last second production, Overland was able to review the documents to conclude that Bank of America *still had not provided many of the requested documents, including the policies and procedures manuals*, which Overland alerted the Court it needed for the summary hearing. Transcript R. p. 857, lines 16-20. Bank of America withheld that discovery *and only at the Courthouse immediately before the hearing did Bank of America agree to provide the discovery*. Bank of America knew it had wrongly objected to the discovery requests.

SunTrust and Bank of America both attempt to blame Overland for their having not timely provided the requested discovery. SunTrust implied that Overland had four years to seek discovery from SunTrust; however, SunTrust and Bank of America were not even parties in the case four years ago. Both SunTrust and Bank of America became parties when the Third Amended Complaint was filed.³ Third Amended Complaint, R. p. 409. Both banks filed Motions to Dismiss -- which were denied -- and stalled discovery while those motions were pending. Motions to Dismiss at R. p. 485, 488, 760, 763, 773. Overland served discovery requests in December 2013 and finally received responses to discovery in March, 2014 after weeks of being told the discovery would be forthcoming; however, very few documents or information were actually provided. Instead, form objections predominated the responses for both banks with only a few responses actually provided.

³ SunTrust filed its Answer on November 12, 2012. Bank of America filed its Answer on October 10, 2012. SunTrust Answer, R. p. 453; Bank of America Answer R. p. 469.

SunTrust Answers to Interrogatories, R. p. 602 and SunTrust Production, R. p. 621.⁴ After Overland received SunTrust's extensive objections to discovery, Overland began the process of ongoing discussions with SunTrust in an attempt to resolve the discovery issues, as courts require and encourage parties to do. SunTrust agreed to provide the requested discovery immediately before the hearing began. Had that agreement not been reached, Overland would have sought the Court's assistance in compelling SunTrust to provide the discovery that very morning.

Bank of America also attempts to obfuscate its failure to comply with discovery requests by implying that Overland did not pursue the discovery. That is false. Bank of America and SunTrust both withheld the discovery and prolonged the discovery process with back and forth discussions in Overland's attempt to secure the discovery. Overland pursued the discovery from Bank of America right up to the summary judgment hearing, including a motion to compel discovery. Motion to Compel, R. p. 551. Only when Bank of America and SunTrust would have to face the Court and subject themselves to sanctions for failure to comply with discovery did they agree to provide the discovery in the future.

Neither SunTrust nor Bank of America made any claim in the trial court that Overland had not diligently pursued discovery against the banks; accordingly, they are foreclosed from raising this argument for the first time in this appeal. Overland did pursue the discovery with repeated emails, letters and phone calls. A sample of the back and forth email and letter discovery discussions include:

1. December 16, 2014 email from Hunter Reid to Bank of America and SunTrust. R. p. 878.
2. January 23, 2014 email from Lauren Maxwell to Hunter Reid. R. p. 880.

⁴ Bank of America filed substantially similar non-responsive responses. Bank of America Answers to Interrogatories, R. p. 682 and Bank of America Production, R. p. 741.

3. January 21, 2014 email from Jim Sheedy to Hunter Reid. R. p. 879.
4. February 17, 2014 email from Hunter Reid to Jim Sheedy and Susan Driscoll. R. p. 882.
5. February 17, 2014 email from Hunter Reid to Lauren Maxwell and Jim Sheedy. R. p. 882.
6. February 19, 2014 email from Lauren Maxwell to Hunter Reid. R. p. 883.
7. March 3, 2014 email from Hunter Reid to Bank of America and SunTrust counsel. R. p. 884.
8. July 7, 2014 letter from Hunter Reid to James Sheedy and Susan Driscoll, R. p. 888.
9. October 3, 2014 email from Lauren Maxwell to Hunter Reid. R. p. 893.
10. October 27, 2014 letter from James Sheedy to Hunter Reid. R. p. 894.

Bank of America fumed when Overland finally filed a Motion to Compel. Now it takes the position that Overland did not diligently pursue the discovery in this appeal. Bank of America letter to Overland dated October 27, 2014, R. p. 894. Bank of America cannot have it both ways.

During the six-week period from the summary judgment hearing until the Court issued its Order, neither Bank of America nor SunTrust provided the agreed upon discovery. Their agreements to provide the discovery were illusory and not honored. Bank of America and SunTrust are mammoth corporations with unlimited resources. They withheld discovery in order to frustrate the litigation process and defeat a litigant at the summary judgment phase by bullying. That should not be rewarded.

Summary judgment was premature in this case because Overland needed the discovery withheld by Bank of America and SunTrust to fully defend against their Summary Judgment motions, and they know it.

B. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF BECAUSE IT IGNORED THE FACTS CONCERNING THE DEALINGS BETWEEN THE DEFENDANT BANKS AND THE EMBEZZLER, WHO FORGED CHECKS ON THE PLAINTIFF'S ACCOUNT AND THEN DEPOSITED THEM WITH THE BANKS?

Despite both banks having withheld crucial discoverable evidence, Overland provided the Court with evidence of the dealings between Bank of America and SunTrust and the embezzler Lara Nance. The evidence Overland provided is far more than a mere scintilla of evidence for a trier of fact to apply to the law, which makes summary judgment inappropriate. "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329-330, 673 S.E.2d 801 (SC 2009).

Moreover, both SunTrust and Bank of America acknowledged at the summary judgment hearing that discovery was not yet complete. As SunTrust stated, "[a]nd while discovery is not complete, uh, we concede for purposes of our motion here today that through the remaining discovery, the plaintiff may be able to prove negligence on the part of SunTrust." Transcript, p. 5, lines 10-14, R. p. 799, lines 10-14. *See also* SunTrust's statement that "I had to concede, for purposes of our motions – of the motion today, negligence on the part of the bank. Transcript p. 20 lines 10-12, R., p. 814, lines 10-12. The banks are foreclosed from arguing that Overland did not produce sufficient evidence to survive a summary judgment motion because they conceded that discovery was not complete and that if it were complete, Overland "may be able to go forward and establish negligence on the part of the bank." Transcript, p. 5, lines 19-21, R. p. 799, lines 19-21. Moreover, neither of the banks even raised this issue in their motions for summary judgment nor did either Bank argue that Overland failed to provide such evidence. Bank of America's summary judgment

motion entitled "Bank of America's Notice of and Motion for Summary Judgment Purely on the Basis of Law as to the 17th and 20th Causes of Action Against It" itself precludes any argument regarding evidentiary sufficiency. R. p. 314. Therefore, summary judgment should not have been granted on evidentiary sufficiency grounds.

Overland did provide more than the mere scintilla of evidence as to each bank's fault as set forth in Overland's earlier brief in addition to the Bank's conceding what the discovery could show once it was complete. Bank of America admitted that it accepted over \$1.2 million in checks with forged signatures and admitted that "Nance wrote checks on Plaintiff's accounts that were unauthorized by Plaintiff. . . . Nance deposited the funds into her two accounts at B of A (as well as at SunTrust) endorsing the payee names of legitimate companies which she was not authorized to do." Bank of America Brief in Support of Summary Judgment Motion, R. p. 319. Based on Bank of America's admission that it accepted for deposit approximately \$1.2 million in checks and that most were for less than \$3,000, Bank of America would have accepted approximately 400 checks that it admitted "lacked legible indorsements in the name of the payee." Bank of America Initial Brief, p. 3; *See also*, Bank of America admissions in its Answer to the Complaint, paragraphs 18, 68, 75, and 85, R. p. 455-456 ¶ 18; p. 463, ¶ 68 and 75; p. 465 ¶ 85. It is difficult to reconcile 400 forged checks with illegible indorsements being deposited into the same bank undetected if the bank complied with its policies and procedures and used ordinary care. Perhaps that is why Bank of America has been so reluctant to produce the policy and procedures manuals.⁵

⁵ SunTrust admitted to accepting almost \$55,000 of checks with forged signatures. SunTrust curiously attempts to absolve itself of liability because, it asserts, the sum of the forged checks deposited into the SunTrust accounts "was less than five percent of the amount allegedly stolen" (\$54,671.38); however, that is a substantial amount of money deposited into SunTrust. SunTrust Initial Brief R. p. 2-3. If SunTrust truly believed that \$54,671.38 was not significant, then it would have returned that sum to Overland long ago. Overland certainly does not agree that \$54,671.38 is insignificant.

Additionally, Bank of America and SunTrust knew Nance was an Overland employee, yet both allowed her to set up company accounts that she controlled in the names of Overland suppliers, allowed her to deposit Overland non-payroll checks into those accounts over 400 times. In approximately one week, Nance deposited over \$50,000 into SunTrust accounts and in December 2009 Nance deposited more than \$217,000 into Bank of America accounts. Nance was a clerk level employee at Overland and both Bank of America and SunTrust knew this – yet they allowed substantial deposits that clearly exceed Nance’s annual income in just a matter of days. Overland should be allowed the opportunity to have a trier of fact determine the extent to which Bank of America and SunTrust are liable for any of Overland’s loss, because the banks already conceded they may be at least partially at fault. Transcript, p. 5, 10-14, R. p. 799, l. 10-14.

SunTrust accepted over \$50,000 worth of checks. Many of the SunTrust transactions show the checks were accepted by a teller and not via an ATM. The back of the checks refers to tellers: 188 Tell, 424 Tell, 160 Tell, 244 Tell, for example. SunTrust Responses to First Request for Production, March 3, 2014, R. p. 638, 643, 647, 651, 655, 659, 660, 661 and 665. Additionally, SunTrust conceded that if discovery were complete, Overland may be able to show SunTrust was negligent. Transcript, p. 5, l. 10-14, R. p. 799.

Bank of America claims that Overland misstated the magnitude of the number of checks Bank of America rejected when Nance attempted to deposit them because Overland said it was “many” while Bank of America claims Overland was only referring to three.” Bank of America Initial Brief. p. 21, fn 18. Bank of America is mistaken. Bank of America rejected checks on *at least* three occasions that the discovery thus far has shown, with each occasion including multiple checks. Thus, many checks provided Bank of America many

chances to apply ordinary care as to checks it had rejected, but later accepted without any changes to the checks. Those chances are in addition to all of the banking transactions completed within the bank at the teller's counter and the almost 400 checks deposited at the tellers' counters or via ATMs. Affidavit of Michael O'Shea, R. p. 394-405.

Summary judgment was inappropriate in this case because Overland provided far more than a mere scintilla of evidence to support its claims. The Court should reverse the Circuit Court's decision granting summary judgment.

C. DID THE CIRCUIT COURT INCORRECTLY GRANT SUMMARY JUDGMENT AGAINST THE PLAINTIFF BECAUSE IT FAILED TO UNDERSTAND THAT SECTIONS 3-404 AND 405 OF THE SOUTH CAROLINA UNIFORM COMMERCIAL CODE WERE AMENDED IN 2008 TO PROVIDE THAT THE PLAINTIFF ACCOUNT HOLDER COULD RECOVER AGAINST THE DEFENDANT DEPOSITORY BANKS UNDER A THEORY OF COMPARATIVE FAULT?

In 1990, the Uniform Commercial Code was revised and the corresponding South Carolina Commercial Code was revised in 2008. Despite the 2008 revision, SunTrust and Bank of America want the Court to apply the prior law to this case, such as *Read v. First National Bank of Habersham*, 286 S.C. 534, 335 S.E.2d 359 (1985). The UCC revisions changed the law, making *Read* no longer applicable. While Bank of America attempts to steer this Court to a result inconsistent with the 2008 revised law by arguing that the comments to UCC changes (i) do not specifically say *Read is overruled* and (ii) do not give account holders a cause of action against depository banks in double forgery cases, Bank of America is simply incorrect. Rule changes and legislative changes have the result of overruling prior law without listing each and every case that the new rule or law impacts. Sometimes a case is cited for illustrative purposes, as was the case here, not as a means to restrict the new rule's applicability to only a single case. That interpretation would strain logic and turn statutory interpretation on its head. Rulemaking and legislative bodies are not charged with knowing

every legal opinion impacted by legislative changes – if that were required, legislative traction for new rules and laws would falter.

The comments explicitly confirm that account holders have a cause of action against the depository banks such as Bank of America and SunTrust. The law changed. It is that simple.

“Subsection (d) is new and changes prior law. . . . Under prior law, the drawer had no claim against a person who failed to exercise ordinary care in taking the check. See *Stone Manufacturing Co. v. NCNB of South Carolina*, 308 S.C.287, 417 S.E.2d 628 (S.C. App. 1992). Padded payroll cases decided under former 36-3-405). Subsection (d) provides that the party bearing the loss in an imposter or fictitious payee case can recover from a person who negligently paid the instrument or took the instrument for value or collection. Under subsection (d), the party bearing the loss must prove that the person paying or taking the instrument failed to exercise ordinary care and that the failure substantially contributed to the loss resulting from the payment of the instrument. If these facts are proved, the person bearing the loss can recover to the extent that the failure to exercise ordinary care contributed to the loss.”

Reporters Comment, Commercial Code, p. 165. Additionally, Reporter’s Comments to Section 36-3-405 confirms that employers have a cause of action against depository banks:

“If the employer can establish that the bank paying the fraudulently indorsed check or taking it for value or collection failed to exercise ordinary care and that failure substantially contributed to the loss resulting from the fraud, the

employer can recover from the bank failing to exercise ordinary care to the extent that the failure contributed to the loss.”

Reporters Comment, Commercial Code, p. 168. The comments clearly provide the employer a cause of action:

“The last sentence of Subsection (b) effects a *substantial change from prior law*, by affording an employer who bears the loss on a padded payroll check against a depository bank that failed to exercise ordinary care in taking the check. . . . Under Subsection (b), if the employer can establish that the depository bank failed to exercise ordinary care and that the failure substantially contributed to the loss, the employer can recover from the depository bank to the extent that the bank’s failure to exercise ordinary care contributed to the loss.” (emphasis added).

Reporters Comment, Commercial Code, p. 168. Finally, the comments describe a scenario in which an employee opens an account in the depository bank in the name of a payee corporation, but the bank fails to use ordinary care in the opening of the account. In that scenario, the employer could establish liability on the bank of the depository bank. *See Reporter’s Comments, Commercial Code, p. 168.* In this case, neither bank used ordinary care in opening the “business” accounts for Nance. Incorrect social security numbers, lack of corporate resolutions, forged signatures on account opening documents, illegible indorsements, forged signatures, as well as the banks accepting and depositing checks with a variety of companies as payees and written on Overland’s accounts while the banks *knew Nance was employed by Overland*. Hundreds of checks at Bank of America, and over \$50,000 at SunTrust in just a week.

Under the 2008 South Carolina revisions, drawers may now recover in double forgery cases against depository banks and any case law decided before 2008 holding otherwise no longer applies.⁶ See *Gina Chin & Assoc., Inc. v. First Union Bank*, 256 Va. 59, 500 S.E.2d 516 (1998) (“The revisions to §§ 8.3A-404 and 405 changed the previous law by allowing ‘the person bearing the loss’ to seek recovery for a loss caused by the negligence of any person paying the instrument or taking it for value based on comparative negligence principles.”). Accordingly, Overland, as the drawer/account holder and person who suffered the loss, is entitled to seek redress against the banks that participated in the loss. It is for the *trier of fact* to allocate the respective comparative fault among the parties.

Bank of America argues that all of the transactions were via ATMS and that such transactions would eliminate its liability. That is factually incorrect. As Overland stated in its earlier brief, some transactions were via ATMS and some were completed using a teller at the bank. See Initial Brief, pp. 14-15. See also Deposit Slip showing deposit at the teller R.p. 917. Additionally, Bank of America admitted in its Answer to the Third Amended Complaint in response to the allegations as follows:

Complaint paragraph 42:

“The unauthorized checks were drawn on Land Rover’s bank accounts at NBSC. She then deposited the funds into her bank accounts at BOA and SunTrust.”

R. p. 459, ¶ 42.

Bank of America Answer in paragraph 18:

⁶ *Read v. First National Bank of Habersham*, 286 S.C. 534, 335 S.E.2d 359 (1985), is also factually distinct because it involved an Employer v. Drawee Bank fact pattern analyzed under 3-406(a), not an Employer v. Depository Bank case to be evaluated under 3-404(d) and 3-405(b). Even if *Read* were controlling in a double forgery case in 1985, it no longer is.

“BAC admits that LMN [Nance] may have deposited checks into bank accounts at B of A.”

R. p. 455, ¶ 42.

In its Fifth Defense, Bank of America admits in Paragraph 68:

“Because the checks were deposited at a bank branch of B of A, as the depository bank, it had no ability or duty to verify the authenticity of the maker or drawee indorsements on any of the checks at issue in this action.”

R. p. 463, ¶ 68.

In its Sixth, Seventh and Eighth defenses, Bank of America asserts it did, or was entitled to, use commercially reasonable standards to process and pay the checks it accepted for deposit. Answer paragraphs 75, 81 and 85, R. p. 463-465. On summary judgment, factual disputes must be decided in favor of the nonmoving party. Additionally, the law does not support Bank of America’s argument that ATM use eliminates all bank liability. As argued above, because the banks withheld discovery regarding their protocols and manuals, the information necessary to evaluate each bank’s compliance with its policies and procedures and ordinary care as to ATM and teller assisted deposits was withheld from Overland and the Court.

The Circuit Court erred as matter of law and its decision should be reversed.

D. ONCE THE TRIAL COURT HAS GRANTED COUNSEL AN EXTENSION OF TIME UNDER RULE 59(e) FOR HEALTH REASONS, AND HE HAS RELIED ON IT, CAN THE OTHER PARTY OBJECT AFTER THE FACT?

The parties briefed this issue separately and Overland adopts and incorporates herein its Response to Motion to Dismiss Appeal filed April 10, 2015. Response to Motion to Dismiss Appeal, R. p. 514-531. In addition, Overland responds to SunTrust and Bank of America’s briefs on this issue, as follows.

After the Court granted Bank of America and SunTrust's Summary Judgment Motions and before the time to file a Rule 59(e) Motion expired, Overland requested and was granted an extension to file its Rule 59(e) Motion. Relying on the Judge's grant of the extension, Overland filed its Rule 59(e) Motion before the Court's deadline.⁷ Had the Court declined to grant the extension, Overland would have filed its Rule 59(e) Motion immediately, without an extension despite its attorney's illness. The Court graciously allowed counsel to recover from his illness and then file the Motion.⁸ This is not a case in which the time to file a Rule 59(e) motion had expired; therefore the Court retained jurisdiction to grant the extension.⁹

When Bank of America advised the Court that it did not object to Overland having an extension; it waived its right to object later. Bank of America agreed to the extension and is estopped from now raising it as a defense to Overland's appeal. While Bank of America asserts that Overland has no estoppel claim because Overland did not assert any false representation or concealment of material facts, Bank of America is mistaken. Bank of America did not object to the extension.¹⁰ That alone is conclusive.¹¹

⁷ Bank of America suggests that Overland's motion for an enlargement of time was not a real motion because it was filed as an email request designed to expedite the process due to Overland attorney's illness; however, motions are made in many forms, including oral motions during a hearing on other matters, in detailed written motions, and in emails. It is in the Court's discretion to allow an email motion, which the Court did in this case.

⁸ SunTrust's reliance on an *unpublished* opinion in which the litigant failed to request an extension until *after* the ten-day time-period expired is procedurally and factually distinct from the present case.

⁹ Rule 59(e) states a motion "shall be served not later than 10 days after receipt of written notice of the entry of the order" in contrast to the Rule 59 under the Federal Rules of Civil procedure which uses the word "*must*" rather than "shall." (emphasis added). Also, the Federal rule allows 28 days, almost three times the amount of time under the South Carolina rule.

¹⁰ SunTrust complains that it was not consulted prior to Overland having been granted an extension in the trial court; however, SunTrust's remedy was in the trial court if it objected to the extension. It did not.

¹¹ The Court considered Bank of America's argument that the Court was without authority to grant Overland an extension and rejected the agreement. Additionally, Bank of America did not object to the extension.

Contrary to SunTrust and Bank of America's assertions, Rule 59(e) is not jurisdictional.¹² When the Rules intend to limit or restrict jurisdiction, said limitation or restriction is specifically set forth in the rule. For example, Rule 6(b) states that "[t]he time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order." Rule 6(b), SCRCF. Nothing in Rule 6(b) or Rule 59(e) states that Rule 59(e) is jurisdictional. In this case, an ill attorney asked for and was granted an extension. While the federal courts may be willing to take the position that attorneys may not rely on extensions granted to them by courts, South Carolina has not been a state that sets traps for attorneys who request extensions while ill.

Rule 59(e) does not limit a court's jurisdiction. Just as the extensions were permissible in *Gallagher v. Everett*, 353 S.C. 59, 577 S.E.2d 217 (Ct. Ap. 2002) and *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634 (2010), the extension in this case was also properly granted. Overland's appeal was timely filed within thirty days after the trial court denied Overland's Motion Rule 59(e) Motion on February 5, 2015. Plaintiff's Notice of Appeal was filed March 4, 2015.

CONCLUSION

The order of the Circuit Court should be reversed (1) because the Court heard the summary judgment motions prematurely while Overland was deprived of the discovery it needed to defend fully the motions; (2) because the defendant banks admitted wrongdoing in their Answers, discovery and briefs and arguments to the trial court; and (3) because the

¹² South Carolina courts have not been inclined to penalize litigants with dismissal of appeals based on Rule 59(e). *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634 (2010).

trial court did not properly apply the law, which was changed in 2008. Any one ground is sufficient for reversal.

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September 28, 2015

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

Overland, Inc., d/b/a Land Rover Greenville Appellant,

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, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and
SunTrust Banks, Inc. are the Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served copies of the Initial Reply Brief of Appellant and Amended Designation of Matter on the following by mailing a copy of the same via First Class, U.S. Mail, postage prepaid on the date set forth below to the addresses below:

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**THE STATE OF SOUTH CAROLINA
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**APPEAL FROM GREENVILLE COUNTY
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The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
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Overland, Inc., d/b/a Land Rover Greenville.....Appellant,

v.

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.

FINAL BRIEF OF RESPONDENT SUNTRUST BANKS, INC.

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TABLE OF CONTENTS

I. STATEMENT OF ISSUES ON APPEAL 1

II. STATEMENT OF THE CASE..... 1

 A. Procedural History 1

 B. Substantive Facts 2

III. ARGUMENT..... 3

 A. The Court Lacks Appellate Jurisdiction Over Overland’s Untimely Appeal..... 3

 B. The Circuit Court Correctly Granted Summary Judgment in Favor of SunTrust..... 4

 1. Standard of Review..... 4

 2. Overland Cannot Assert a Negligence Claim Against SunTrust Under the UCC 5

 3. Overland Failed to Establish a Genuine Issue of Material Fact as to Each of the Elements of its Negligence Claim Under the UCC 6

 (a) Overland Failed to Prove That the Disputed Checks Fell Within the Scope of Sections 3-404 or 3-405..... 6

 (b) Overland Failed to Offer Proof SunTrust was Negligent in Taking the Checks For Collection 6

 (c) Overland Failed to Prove Causation 8

 C. The Circuit Court did not Abuse its Discretion in Granting Summary Judgment Despite Overland’s Objection That it had not Completed Discovery 9

 1. Standard of Review..... 9

 2. Discovery was Complete as to SunTrust 9

IV. CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).....4

Eisenberg v. Wachovia Bank, N.A., 301 F.3d 220 (4th Cir. 2002).....7

Gobbi v. People's Fed. Bank, 2006 WL 7285959, Op. No. 2006-UP-245 (S.C. Ct. App. May 16, 2006).....3

Huggins v. Citibank, N.A., 355 S.C. 329, 585 S.E.2d 275 (2003).....5

Kerr v. Branch Banking & Trust Co., 408 S.C. 328, 759 S.E.2d 724 (2014).....5

Meredith v. Stoudemayer, No. 2004-UP-012, 2004 WL 6248289 (S.C. Ct. App. Jan. 14, 2004).....4

Read v. South Carolina Nat'l Bank, 286 S.C. 534, 335 S.E.2d 359 (1985) :.....5, 6

Robertson v. First Union Nat'l Bank, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002).....9

Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998).....4

Rules

Rule 203, SCACR.....3

Rule 59, SCRCP.....3

Statutes

S.C. Code Ann. § 36-3-103.....7

S.C. Code Ann. § 36-3-404.....5, 6, 7, 8

S.C. Code Ann. § 36-3-405.....5, 6, 7, 8

I.

STATEMENT OF ISSUES ON APPEAL

1. Does this Court lack appellate jurisdiction because Appellant Overland's notice of appeal was filed more than 30 days after entry of summary judgment and the time to appeal was not tolled by Overland's untimely Rule 59(e) motion?

2. Did the Circuit Court correctly grant summary judgment in this double forgery check case because either (a) the Uniform Commercial Code does not authorize Overland's claim, or (b) Overland offered no evidence to raise a genuine issue as to each of the elements of its claim against SunTrust?

3. Did the Circuit Court abuse its discretion in deciding the summary judgment motion despite Overland's contention that it had not completed needed discovery where SunTrust Banks, Inc. ("SunTrust") had responded and/or objected to all outstanding discovery, Overland never filed a motion to compel as to SunTrust's discovery responses and objections, and the case had been pending for over four years?

II.

STATEMENT OF THE CASE

A. Procedural History

Appellant Overland and Bank of America ("BOA") provide adequate general summaries of the procedural history of this case. Missing from Overland's rendition, however, are two key facts - - (1) SunTrust had responded and/or objected to all discovery requests issued to it by Overland, and (2) Overland made no motion to compel discovery as to SunTrust's responses and objections at the time of the Court entering summary judgment.

B. Substantive Facts

SunTrust adopts the facts in the brief of BOA but adds the following concerning SunTrust's particularly limited involvement in the overall factual history of the case.

Right before discovery of Lara Nance's fraudulent double forgery scheme by Overland in late January 2010, Nance opened two business checking accounts at SunTrust. The first account, ending in -80238, was titled "Lara M. Nance d/b/a Taylor Enterprises" and opened on January 19, 2010 (the "Taylor Enterprise Account"). (R. p. 925, lines 7-10); (R. pp. 611-612). The second account, ending in -08600, was titled "Lara M. Nance d/b/a Atlantic British" and opened on January 28, 2010 (the "Atlantic British Account"). (R. pp. 611-612).

No forged checks from Overland were deposited into the Atlantic British Account. *See* (R. p. 926, lines 2-18); (R. p. 616). Only a total of 18 checks, which were made out to "Taylor Enterprises" and allegedly bore forged maker's signatures, were deposited into the Taylor Enterprise Account at SunTrust. (R. p. 937, line 22 – p. 939, line 5); (R. p. 616). The sum of these checks was \$54,671.38. (R. p. 616). These checks were all dated within a span of only one week: January 18, 2010 to January 25, 2010. (R. p. 931, lines 9-12). The deposits were in groupings of three checks - - one each from the Greenville, Asheville, and Columbia locations of Overland - - for a total of six deposits. (R. p. 930, lines 20-24); (R. p. 933, line 8 – p. 934, line 9); (R. p. 935, line 19 – p. 936, line 13); (R. p. 616).

In late January, Nance's fraudulent conduct was discovered by Overland's Allison Autrey Malone, when she found that Nance had been writing and cashing duplicate checks for the same invoices to Overland. (R. p. 941, line 15 – p. 943, line 21; p. 944, lines 14-16). Overland alleges that Nance embezzled over \$1.4 million from it for

roughly two and a half years before her fraud was uncovered. (R. p. 368); *see generally* (R. pp. 374-408). SunTrust's involvement in this two and a half year, \$1.4 million scheme was roughly one week right before Ms. Nance was caught and well less than five percent of the amount allegedly stolen.

III.

ARGUMENT

A. The Court Lacks Appellate Jurisdiction Over Overland's Untimely Appeal.

This Court previously denied SunTrust's motion to dismiss Overland's appeal but ruled that SunTrust's arguments regarding the timeliness of Overland's appeal could be raised in its initial brief. *See* (R. pp. 15-16). As discussed in its motion to dismiss, this Court cannot hear Overland's appeal for two reasons. First, Overland failed to file its notice of appeal within 30 days of the order granting summary judgment as required by Rule 203(b), SCACR. Overland received the Court's order granting summary judgment on December 17, 2014, and Overland did not file a notice of appeal until two and a half months later, on March 4, 2015. (R. p. 66); (R. pp. 776-777).

Second, Overland did not serve a motion to alter or amend under Rule 59(e), SCRCP, within the 10-day period required by the rule, which would have stayed the time for appeal. (R. pp. 66-85). Instead, it sought and obtained an extension from the trial court to file a Rule 59 motion. (R. pp. 529-531). But that extension was without legal effect, as this Court has unequivocally stated that the "ten-day time limit [under Rule 59(e)] may not be extended." *Gobbi v. People's Fed. Bank*, 2006 WL 7285959, *4, Op. No. 2006-UP-245 (S.C. Ct. App. May 16, 2006).

Additionally, it is important to note that Appellant never sought an extension from SunTrust, failing to include it on any requests for extension or asking that an extension be

granted as to the ruling for summary judgment as to SunTrust. Overland's failure to file its notice of appeal by January 16, 2015, results in its notice being tardy and therefore barred as a matter of law. For these reasons and those asserted in BOA's brief at pages 4-7, which are fully incorporated and adopted herein, SunTrust respectfully requests that Overland's appeal be dismissed.

B. The Circuit Court Correctly Granted Summary Judgment in Favor of SunTrust.

The trial court properly concluded that Overland's case for negligence against SunTrust failed on the law and facts at summary judgment. As an initial matter, the UCC does not provide for a negligence claim by a noncustomer, such as Overland, against a depository bank, such as SunTrust, in a double forgery case. Further, if such a claim is permitted at all, Overland failed to establish a genuine issue of material fact as to each of the required elements of its claim. Accordingly, the trial court's order granting summary judgment should be affirmed.

1. Standard of Review.

This Court reviews a trial court's ruling on summary judgment *de novo*. *See, e.g., Meredith v. Stoudemayer*, No. 2004-UP-012, 2004 WL 6248289, at *2 (S.C. Ct. App. Jan. 14, 2004); *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) ("An appellate court reviews the granting of summary judgment under the same standard applied by the trial court . . ."). Summary judgment is proper unless a party shows a genuine issue of material fact as to each element of its claim. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991). As discussed below, Overland has made no such showing.

2. Overland Cannot Assert a Negligence Claim Against SunTrust Under the UCC.

SunTrust is similarly situated to BOA as a depository bank and accordingly it adopts BOA's arguments in pages 9-15 of its brief. As BOA correctly argues, the UCC does not provide for a negligence claim by a noncustomer against a depository bank in double forgery cases. Case law is clear that a bank generally owes no duty of care to a noncustomer. *See, e.g., Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 727 (2014) (finding bank owed no duty of care to noncustomer); *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003) (finding credit card issuer owed no duty of care to noncustomer).

That rule equally applies under the UCC. The South Carolina Supreme Court's ruling in *Read v. South Carolina National Bank*, 286 S.C. 534, 542, 335 S.E.2d 359, 363-64 (1985), is dispositive here. In that case, the Court found that a depository bank is not liable to the drawer for taking a doubly forged check for deposit because the loss suffered by a drawer is the result of the forged drawer's signature, not an improper payee's indorsement. *Id.*, 286 S.C. at 542, 335 S.E.2d at 364. Overland's losses in this case are the result of doubly forged checks based on Overland's forged signature. Overland cannot transfer blame to SunTrust, as the losses Overland suffered are not related to improper payee indorsements.

Overland's argument that *Read* is abrogated by revisions to sections 36-3-404(d) and 36-3-405(b) of the South Carolina Code is belied by the statutory history. Indeed, the amendments do not even mention double forgery cases, and the comments to those amended sections abrogate some case law, but not *Read*. Given that the comments to the amendments specifically abrogated certain case law and not others, a proper reading of

the amendments establishes that the law not specifically abrogated remains in full effect and was not intended to be changed, including the analysis of the Supreme Court in the double forgery case of *Read*.

Based on South Carolina's UCC provisions and their interpreting case law, Overland cannot assert a negligence claim as a noncustomer against a depository bank such as SunTrust in a double forgery case. Accordingly, the trial court's granting of summary judgment should be affirmed.

3. Overland Failed to Establish a Genuine Issue of Material Fact as to Each of the Elements of its Negligence Claim Under the UCC.

If permitted at all, to establish a claim under S.C. Code sections 36-3-404(d) or 36-3-405(b), a party must show four things: (a) those sections apply to the facts of the case (b) a bank's negligence in paying or taking a check for collection, (c) causation, and (d) damages. Overland failed to establish genuine issues of fact as to the first three elements.

(a) Overland Failed to Prove That the Disputed Checks Fell Within the Scope of Sections 3-404 or 3-405.

As explained in full detail in BOA's brief at pages 15-17, which arguments are fully adopted herein, Overland has failed to show that S.C. Code sections 3-404 and 3-405 apply to this matter. Overland presents no evidence that Nance's scheme falls within the terms of these statutes, and therefore its claim for negligence against SunTrust fails.

(b) Overland Failed to Offer Proof SunTrust Was Negligent in Taking the Checks For Collection.

Overland further failed to raise a genuine issue of fact as to SunTrust's alleged failure to use ordinary care in "paying the instrument or taking it for value or for collection." See S.C. Code Ann. §§ 36-3-404(d), -405(b). There is no evidence that

SunTrust employed anything other than its automated check processing procedure for the acceptance of checks deposited into Nance's Taylor Enterprises Account. Automated check processing is explicitly allowed and included in the definition of "ordinary care" in the UCC. S.C. Code Ann. § 36-3-103(9). Overland failed to present any evidence showing an issue with SunTrust's automated check processing. Thus, there is no indication that SunTrust's paying or collecting of the alleged fraudulent checks deviated from the necessary ordinary care.

Overland contends, however, that it raises a genuine issue of fact as to its negligence claim against SunTrust because Nance did not produce any documentation to SunTrust "that she was doing business as Taylor Enterprises and Atlantic British"¹ and "Nance admitted to forging Charlie Nance's signature on the authorization cards at SunTrust." Those are not genuine issues of material fact. To start, as explained above, the bank does not owe a duty of care to noncustomers, and it surely does not owe a duty of care to a noncustomer in the opening of an account by a customer (*i.e.*, when documentation would be provided concerning a business account opened by an individual). See *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 225-26 (4th Cir. 2002) ("The mere fact that a bank account can be used in the course of perpetrating a fraud does not mean that banks have a duty to persons other than own customers. To the contrary, the duty is owed exclusively to the customer, not to the persons with whom the customer has dealings."). Further still, sections 36-3-404(d) and 36-3-405(b) provide for liability

¹ Overland seems to misunderstand the fact that doing business as an entity does not mean that SunTrust would need or be able to obtain business records relating to the business. When a person opens an account as a D/B/A, they are still operating as the individual/sole proprietorship and the only information necessary for opening an account is the individual person's identification and social security number.

only where there is lack of ordinary care “in paying or taking the instrument.” Neither of those is present by allowing Nance to open an account doing business as Taylor Enterprises and Atlantic British without obtaining documents relating to her D/B/As.

The same analysis applies equally to Nance’s forgery of a signature on authorization cards. Again, that concerns the opening of the account and has nothing to do with paying or taking the instruments at issue. Claiming this as a material fact is even more of a red herring as none of the checks at issue as to SunTrust were made out to, indorsed by, or in any way dealt with Larry Nance. In short, Appellant fails to raise any issue of fact as to its claim against SunTrust, much less a material one. For the above reasons and those cited in BOA’s brief at pages 17-22, which are fully adopted herein, summary judgment should be affirmed.

(c) Overland Failed to Prove Causation.

Both S.C. Code sections 36-3-404(d) and 36-3-405(b) require proof that the bank’s failure to exercise ordinary care “substantially contribute[d] to [the] loss.” As discussed above, there is no duty of care between noncustomers and depository banks in double forgery cases because the harm is suffered as a result of the forged drawee’s signature, not the forged indorsements of the payee. Thus, the harm suffered by Overland was the result of Nance’s conduct in forging Overland’s signature, not the acceptance of the forged indorsements by SunTrust. Accordingly, Appellant cannot show that SunTrust’s actions in anyway substantially contributed to the loss suffered.

Further still, Overland introduced no evidence to prove the causation element of its claim in the trial court. In fact, Overland ignored this requisite element in its submissions to the trial court, and it has now done so again before this Court. *See* (R. pp. 338-339); (Overland’s Final Brief, pp. 8-10, 14-15). It was the conduct of Nance left

unchecked by Overland that resulted in the losses suffered. Overland cannot hold SunTrust responsible for its own negligence. Overland has failed to raise a genuine issue of fact as to causation and therefore the trial court's grant of summary judgment should be affirmed.

C. The Circuit Court did not Abuse its Discretion in Granting Summary Judgment Despite Overland's Objection That it had not Completed Discovery.

1. Standard of Review.

This Court applies an abuse of discretion standard in determining whether the trial court properly granted summary judgment where a party claims discovery is not complete. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 347, 565 S.E.2d 309, 313 (Ct. App. 2002) (“[W]e find no abuse of discretion in the trial court's finding that discovery was complete for purposes of summary judgment.”).

2. Discovery was Complete as to SunTrust.

The trial court did not abuse its discretion in granting SunTrust's motion for summary judgment despite Overland's argument that discovery was incomplete. Most importantly, this is because discovery was complete as it relates to SunTrust (or at least Overland had failed to take the appropriate steps to seek further discovery).² This fact is conspicuously absent from Overland's argument. SunTrust had responded and/or

² On October 3, 2014, counsel for Overland sent an email to counsel for SunTrust attaching the motion to compel Overland filed against Bank of America. In that email, Overland's counsel stated that he had yet to confer with SunTrust regarding its discovery responses but had a number of issues with SunTrust's objections. He further stated that detailed correspondence regarding what Overland believed to be insufficient would be forthcoming. No such correspondence was received by SunTrust, nor was a motion to compel against SunTrust. If Overland needed further discovery and/or wanted to challenge SunTrust's responses and objections, it could have done. It chose not to. Thus, any delay in seeking or compelling discovery by the time of the summary judgment ruling cannot be laid at the feet of SunTrust.

objected to all outstanding discovery requests from Overland, and Overland did not file a motion to compel against SunTrust as to any of the objections. It cannot now come before the Court and say that discovery was incomplete to avoid summary judgment as to SunTrust.³

Further still, the lower court case had been pending for over four years by the time the summary judgment motion was filed. To say Overland had sufficient time to conduct discovery would be an understatement. Overland has not even attempted to explain its delay or why it asserts this ground for reversal against SunTrust given that it never filed any motion indicating that discovery between it and SunTrust was not complete. Finally, as explained above in the arguments on the merits, further discovery would have been futile. Accordingly, for these and the reasons asserted in BOA's brief at pages 23-27, summary judgment should be affirmed.

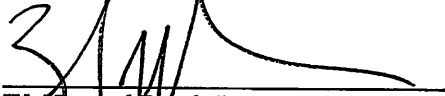
IV.

CONCLUSION

For the reasons stated above and those asserted in BOA's final brief, the contents of which are fully incorporated herein, the Court should affirm the summary judgment entered in SunTrust's favor.

³ To the extent Overland claims that summary judgment was improper because it did not have discovery from other defendants, that argument fails. Outstanding discovery from other parties, to the extent there was any, would have no bearing on SunTrust and its limited involvement in the case.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

Overland, Inc. d/b/a Land River Greenville.....Appellant,

v.

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 Bank, Inc. Defendants.

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

PROOF OF SERVICE

The undersigned hereby certifies that on the 6th day of October, 2015, he served a copy of the Final Brief of Respondent, SunTrust Banks, Inc., upon all counsel of record, by depositing a copy thereof in the United States Mail, postage prepaid, and addressed as follows:

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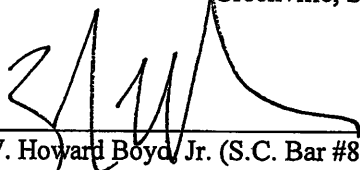
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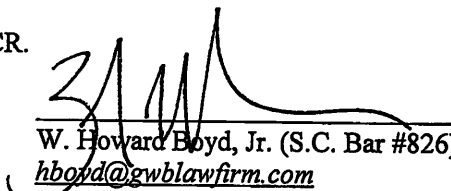
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Synovus Financial Corporation d/b/a NBSC, Branch Banking
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SunTrust Bank, Inc. Defendants.

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

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The undersigned certifies that this Final Brief of Respondent, SunTrust Banks, Inc.,
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APPEAL FROM GREENVILLE COUNTY
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The Honorable Letitia H. Verdin, Circuit Court Judge

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vs.

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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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TABLE OF CONTENTS

	<i>Page</i>
I. STATEMENT OF ISSUES ON APPEAL	1
II. STATEMENT OF THE CASE.....	1
A. Procedural History	1
B. Substantive Facts	2
III. ARGUMENT	4
A. The Court Lacks Appellate Jurisdiction Over This Untimely Appeal.....	4
B. The Trial Court Correctly Granted Summary Judgment	7
1. Standard Of Review	8
2. A Drawer Has No Negligence Claim Against A Depository Bank Especially In A Double Forgery Case	9
3. Overland Failed To Raise A Genuine Issue On Each Element Of Its Purported Negligence Claim.....	15
(a) Overland Offered No Evidence That The Disputed Checks Fell Within The Scope Of Sections 3-404 or 3-405	15
(b) Overland Did Not Offer Evidence That BANA Was Negligent In Taking The Checks For Collection.....	17
(c) Overland Did Not Raise A Genuine Issue As To Causation	22
C. The Trial Court Did Not Abuse Its Discretion In Granting Summary Judgment Despite Overland's Argument That It Had Not Completed Discovery	23
1. Standard Of Review	23
2. The Trial Court Did Not Abuse Its Discretion	24
IV. CONCLUSION.....	27

TABLE OF AUTHORITIES

Page(s)

Cases

Ahlan Wa Sahlan Hospitality Co. v. United Citizens Bank of S. Kentucky, Inc.,
No. 2011-CA-001349-MR, 2013 WL 275636 (Ky. Ct. App. Jan. 25, 2013).....9

Auto-Owners Ins. Co. v. Bank One, 879 N.E.2d 1086 (Ind. 2008)..... 18

Baird v. Charleston Cnty., 333 S.C. 519, 511 S.E.2d 69 (1999).....26

Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005).....14

Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).....9, 24

BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005).....25

Camp v. Camp, 386 S.C. 571, 689 S.E.2d 634 (2010)6

Canal Ins. Co. v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999).....4

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477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).....9

Cox v. Fleetwood Homes of Georgia, Inc.,
334 S.C. 55, 512 S.E.2d 498 (1999)6

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003).....24, 25

DBI Architects, P.C. v. Am. Express Travel-Related Servs. Co.,
388 F.3d 886 (D.C. Cir. 2004).....20

Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001).....24

Eisenberg v. Wachovia Bank, N.A., 301 F.3d 220 (4th Cir. 2002).....9, 17, 18

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004)5

Galloway v. Galloway, 249 S.C. 157, 153 S.E.2d 326 (1967)7

Gallagher v. Evert, 353 S.C. 59, 577 S.E.2d 217 (Ct. App. 2002).....6

Gina Chin & Assoc., Inc. v. First Union Bank,
256 Va. 59, 500 S.E.2d 516 (1998).....14, 15

Gobbi v. People’s Fed. Bank,
Op. No. 2006-UP-245, 2006 WL 7285959 (S.C. App. May 16, 2006).....5

Groue v. Capital One, 47 So. 3d 1038 (La. Ct. App. 2010).....19

TABLE OF AUTHORITIES

	<i>Page(s)</i>
<i>Cases</i>	
<i>Guinan v. Tenet Healthsystems of Hilton Head, Inc.</i> , 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009).....	24
<i>Halifax Corp. v. Wachovia Bank</i> , 268 Va. 641, 604 S.E.2d 403 (2004)	12
<i>Hansson v. Scalise Builders of South Carolina</i> , 374 S.C. 352, 650 S.E.2d 68 (2007)	8, 9
<i>Hoffman v. Powell</i> , 298 S.C. 338, 380 S.E.2d 821 (1989)	7
<i>Huggins v. Citibank, N.A.</i> , 355 S.C. 329, 585 S.E.2d 275 (2003)	9
<i>Kerr v. Branch Banking & Trust Co.</i> , 408 S.C. 328, 759 S.E.2d 724 (2014).....	9
<i>Lake Marion Regional Water Agency v. Goodwin</i> , Op. No. 2013-UP-088, 2013 WL 8482382 (S.C. App. Feb. 27, 2013)	5
<i>Liadov v. Mukasey</i> , 518 F.3d 1003 (8th Cir. 2008)	7
<i>Maher v. Tietex Corp.</i> , 331 S.C. 371, 500 S.E.2d 204 (Ct. App. 1998)	6
<i>McCallum v. Rizzo</i> , 1995 WL 1146812 (Mass. Super. Ct. Oct. 13, 1995).....	17
<i>Middleborough Horiz. Property Regime Council of Co-Owners v.</i> <i>Montedison S.p.A.</i> , 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995)	25
<i>Mills v. U.S. Bank</i> , 166 Cal. App. 4th 871, 83 Cal. Rptr. 3d 146 (2008).....	12, 16, 17
<i>Panhorst v. United States</i> , 241 F.3d 367 (4th Cir. 2001).....	5, 6
<i>Perini Corp. v. First Nat. Bank</i> , 553 F.2d 398 (5th Cir. 1977)	10, 11, 14
<i>Pernikoff Constr. Co. v. U.S. Bank</i> , No. 4:09CV894 JCH, 2010 WL 3258399 (E.D. Mo. Aug. 16, 2010).....	20
<i>Read v. South Carolina Nat. Bank</i> , 286 S.C. 534, 335 S.E.2d 359 (1985)	10, 11, 13, 14, 15, 22, 26
<i>Robertson v. First Union Nat. Bank</i> , 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002).....	23, 25
<i>Rodriguez v. Bank Of The W.</i> , 162 Cal. App. 4th 454, 75 Cal. Rptr. 3d 543 (2008).....	10

TABLE OF AUTHORITIES

Page(s)

Cases

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354 S.C. 397, 581 S.E.2d 161, (2003)8

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Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.,
49 Cal.App.4th 472, 56 Cal.Rptr.2d 756 (1996).....10, 18

State v. Cheeks, 400 S.C. 329, 342, 733 S.E.2d 611 (Ct. App. 2012)
aff'd as modified, 408 S.C. 198, 758 S.E.2d 715 (2014).....14

Stefan v. Stefan, 320 S.C. 419, 465 S.E.2d 734 (Ct.App. 1995).....7

Stone Mfg. Co. v. NCNB of S.C.,
308 S.C. 287, 417 S.E.2d 628 (Ct. App. 1992).....11, 12

Theisen v. Theisen, 382 S.C. 213, 676 S.E.2d 133 (2009).....7

Victory Clothing Co. v. Wachovia Bank, N.A.,
No. 1397 Feb.Term 2004, 2006 WL 773020 (Pa. Com. Pl. Mar. 21, 2006)14

Volpe v. Fleet Nat. Bank, 710 A.2d 661 (R.I. 1998).....9

Watson Coatings, Inc. v. Am. Express Travel Related Serv., Inc.,
436 F.3d 1036 (8th Cir. 2006)20

Watson v. Underwood, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014)8

Weil v. First Nat. Bank of Castle Rock, 983 P.2d 812 (Colo. App. 1999).....10

Statutes

South Carolina Constitution
Article V, section 914

South Carolina Code Annotated
Section 26-3-103 19-21
Section 36-3-404 11-13, 15-18, 22, 23
Section 36-3-405 11-13, 15-18, 22, 23
Section 36-3-406 12, 13
Section 36-3-42010, 12, 13
Section 36-4-20813
Section 36-4-40613, 14, 20, 21

TABLE OF AUTHORITIES

Page(s)

Rules

South Carolina Appellate Court Rules

Rule 2034, 5
Rule 2637

South Carolina Rules of Civil Procedure

Rule 65
Rule 76
Rule 121, 25
Rule 568, 9, 23, 24, 26, 27
Rule 594-7

I.

STATEMENT OF ISSUES ON APPEAL

1. Does the Court lack appellate jurisdiction because the notice of appeal was filed more than 30 days after receipt of notice of entry of summary judgment, and because plaintiff's untimely Rule 59(e) motion did not stay the deadline for filing the notice of appeal?

2. Did the trial court correctly grant summary judgment in this double forgery check case because either (a) the Uniform Commercial Code does not authorize plaintiff's claim, or (b) plaintiff offered no evidence to raise a genuine issue as to all elements of its claim?

3. Did the trial court correctly exercise its discretion in deciding the summary judgment motion despite plaintiff's contention, unsupported by a Rule 56(f) affidavit, that it had not completed needed discovery during the more than two years the case had been pending against Bank of America?

II.

STATEMENT OF THE CASE

A. Procedural History

Plaintiff ("Overland") provides an adequate general summary of the procedural history of this case with the following exceptions.

The motion to dismiss which Bank of America, N.A. ("BANA") filed on March 5, 2014 was brought under Rule 12(c), SCRCP. (R. p. 299).

BANA's summary judgment motion addressed Overland's 17th and 20th (misnumbered 15th) causes of action. (R. p. 125). At the hearing on the motion, Overland voluntarily withdrew its 20th cause of action. (R. pp. 589-90).

The trial court did not hear oral argument on Overland's motion to compel responses to its discovery. It found the motion was moot based on counsel's representation at the hearing that Overland had received "a couple hundred documents and some updated responses" from BANA the previous day and that counsel for the parties were "going to work through" the remaining discovery issues. (R. pp. 9, 620).

Overland did not submit a motion for enlargement of time to file a motion under Rule 59(e), SCRC. Counsel for Overland just e-mailed the trial court requesting ten more days for filing the motion. (See R. pp. 340-41).

Specific facts pertinent to Overland's argument that the summary judgment motion was premature are discussed at pages 24-27 below.

B. Substantive Facts

Overland owns car dealerships. (R. p. 222). Overland maintained its bank accounts at NBSC and BB&T. (R. p. 230, ¶ 33; Appellant's Opening Brief (AOB), p. 3).

Overland hired Lara Marie Nance ("Nance") as a payroll clerk in 2006. (AOB, p. 3). As a payroll clerk, Nance had access to Overland's check-writing program. In October 2009, Overland transferred Nance to a position on the dealership floor. (R. p. 187). In that new position, Nance no longer had any responsibility for issuing checks on Overland's accounts. (R. p. 187). However, she forged Overland's president's signature on a document that directed ADP to give her administrator privileges on Overland's check-writing program. And ADP complied. (R. p. 187).

Nance opened three accounts at BANA: a personal checking account, a personal savings account, and a d/b/a sole proprietorship account in the name of "TEBS." (See R. p. 187, 457-58). The Social Security Number listed on the signature card for Nance's personal checking account at BANA had an incorrect digit. (R. p. 159, ¶3).

Beginning at least in January 2008, Nance directed Overland's check-writing program to issue over 100 checks payable to Taylor Enterprises, Atlantic British and Invision Industries, normally for amounts like those of legitimate checks paying invoices from those parts suppliers. (R. pp. 206-216). One check was in the amount of \$6,763.31; the rest were in amounts less than \$6,000; and most were for less than \$3,000. (R. pp. 206-216).

Nance forged the maker signatures on these checks. She deposited many of the checks in her BANA accounts. The checks were signed on the back but lacked legible indorsements in the name of the payee. (R. p. 161, ¶7).

On October 1, 2009, BANA rejected one Nance deposit of three checks totaling \$9,166.75 because they were made payable to Taylor Enterprises but had been deposited into Nance's personal checking account. (R. pp. 160, ¶6; R. pp. 164-166). Undeterred, Nance successfully redeposited the same checks 28 days later. (R. pp. 160, ¶6; R. pp. 168-172).

Overland alleges that Nance embezzled over \$1.4 million before it discovered her fraud, by chance, in February 2010. (R. p. 179, ¶6).

In the parlance of UCC Articles 3 and 4, Overland is the drawer of the checks. NBSC and BB&T are the drawee banks.¹ BANA and SunTrust (where Nance also deposited some checks) are the depositary banks. Nance is a convicted embezzler, who was incarcerated during a portion of the pendency of this case.

¹ Nance, her husband, BANA and SunTrust are the only defendants against whom Overland still pursues claims. All the other defendants were voluntarily dismissed after settling with Overland.

III.

ARGUMENT

A. The Court Lacks Appellate Jurisdiction Over This Untimely Appeal

This Court lacks jurisdiction over this appeal because Overland filed its notice of appeal too late—beyond the 30-day deadline set by Rule 203(b)(1), SCACR. The appeal-filing deadline was not stayed by Overland’s Rule 59(e) motion because it, too, was untimely.²

Under Rule 203(b)(1), SCACR, the deadline for serving a notice of appeal is 30 days after receipt of written notice of entry of the appealed order. That deadline is stayed if a motion under Rule 59(e), SCRCP, is timely served. Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. To be timely, a Rule 59(e) motion must be served “not later than 10 days after receipt of written notice of the entry of the order.” Rule 59(e), SCRCP; *see also Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 6, 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.”).

Overland received notice of entry of the summary judgment order on December 17, 2014. (R. p. 41). Overland did not serve its Rule 59(e) motion until January 7, 2015, 22 days later. (R. p. 60). The motion was untimely. It did not stay the 30-day deadline for filing a notice of appeal from the summary judgment order, which expired

² This Court determines its own jurisdiction *de novo* as there is no lower court decision on the subject to review. BANA filed a motion to dismiss the appeal on the ground it was untimely filed. On June 4, 2015, this Court denied BANA’s motion to dismiss without prejudice to the parties “arguing the issue of timeliness of the appeal in their briefs.”

on January 16, 2015. Rule 203(b)(1), SCACR. Overland filed its notice of appeal on March 4, 2015—well beyond that deadline. (R. p. 539).

“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 and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004). “Accordingly, this court must dismiss an untimely appeal without considering its merits.” *Lake Marion Regional Water Agency v. Goodwin*, Op. No. 2013-UP-088, 2013 WL 8482382, at *1 (S.C. App. Feb. 27, 2013).

To escape dismissal of its appeal as untimely, Overland relies on the fact that, on December 29, 2014, the deadline for serving its Rule 59(e) motion, it sought and obtained from the trial court an e-mail purporting to extend the time for serving the Rule 59(e) motion by an additional 10 days. (R. pp. 340-41).

However, Rule 59(e) does not grant the trial court authority to extend its 10-day service deadline. Rule 6(b), SCRCF, states: “The time for taking any action under Rule[] ... 59... may not be extended except to the extent and under the conditions stated in them.” Rule 59(e) does not provide for any extension of its 10-day service deadline.

While there is no published South Carolina decision on point, this State’s Rule 59 “is substantially the Federal Rule.” Notes, Rule 59, SCRCF. Federal cases interpreting FRCP 59 hold that “[a]n untimely Rule 59 motion is never proper because the Rules expressly forbid an extension of time for such a motion.” *Panhorst v. United States*, 241 F.3d 367, 372 (4th Cir. 2001); accord *Gobbi v. People’s Fed. Bank*, Op. No. 2006-UP-245, 2006 WL 7285959, at *4 (S.C. App. May 16, 2006). Moreover, 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.

In opposition to BANA's motion to dismiss this appeal, Overland argued that Rule 59 was adopted to provide greater flexibility and to extend the court's jurisdiction, not to limit it. (R. pp. 326-27). Overland is wrong. Some flexibility is allowed with respect to other procedural requirements of a motion to alter or amend judgment, but none is allowed with respect to Rule 59(e)'s 10-day service. None of the three cases cited in Overland's opposition support its contrary contention.³

Overland also claimed that BANA was estopped from dismissing the appeal because its counsel said he was willing to be accommodating and raised no objection to the motion to enlarge time, though he stated no extension was allowed under Rule 59(e). (R. pp. 327-28, 340-41). Overland does not assert any "conduct by [BANA] which amounts to a false representation or concealment of material facts," equitable estoppel's first required element. *Maier v. Tietex Corp.*, 331 S.C. 371, 381, 500 S.E.2d 204, 209 (Ct. App. 1998). Overland cannot establish an estoppel.

Contrary to Overland's assertion, BANA did not waive any objection to the untimely Rule 59(e) motion by failing to object to the motion to enlarge time on

³ *Cox v. Fleetwood Homes of Georgia, Inc.*, 334 S.C. 55, 58, 512 S.E.2d 498, 500 (1999), held only that a circuit judge may issue an order on a Rule 59 motion while outside the circuit's territorial boundaries. *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002), held that late filing of the Rule 59(e) motion with the court past the additional 10-day period set out in Rule 59(g) did not invalidate a motion properly served within Rule 59(e)'s 10-day time limit. *Camp v. Camp*, 386 S.C. 571, 575-76, 689 S.E.2d 634, 636 (2010), held that a timely served Rule 59 motion was not invalidated by a non-prejudicial lack of particularity in stating the grounds of the motion as required by Rule 7(b)(1), SCRCF.

December 29, 2014. (See R. p. 328). BANA informed the court and counsel on December 29, before the requested enlargement was granted, that it believed the 10-day deadline could not be extended. (R. p. 340-41). No additional response was required; but even if it were, a party cannot waive a jurisdictional deadline. See Rule 263(b), SCACR (“The time prescribed by these Rules for performing any action may not be extended by agreement of the parties.”).

Finally, there is no merit to Overland’s argument that enforcement of Rule 59(e)’s 10-day deadline violates its due process rights. (See R. p. 328). Enforcement of a statute of limitations or other time limit on seeking a remedy does not deny a party due process. See *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); see also *Liadov v. Mukasey*, 518 F.3d 1003, 1012 (8th Cir. 2008).⁴

Accordingly, the Court lacks appellate jurisdiction of this untimely appeal and should dismiss it.

B. The Trial Court Correctly Granted Summary Judgment

The trial court correctly granted BANA summary judgment. Contrary to Overland’s argument, (AOB, pp. 10-15), South Carolina law does not allow a drawer to sue a depository bank for negligence in taking the drawer’s checks for collection, particularly in “double forgery” cases like this one. Even if the claim were legally permissible, Overland did not sustain its burden on summary judgment of presenting a

⁴ Overland’s reliance on *Galloway v. Galloway*, 249 S.C. 157, 153 S.E.2d 326 (1967), and *Stefan v. Stefan*, 320 S.C. 419, 465 S.E.2d 734 (Ct. App. 1995) is unavailing as this case does not involve the special concerns of minors’ or parental rights.

genuine issue of material fact on each element of its purported negligence claim. For both reasons, this Court should affirm.

1. Standard Of Review

This Court reviews an order granting summary judgment *de novo*, applying the same standard that governs the trial court under Rule 56(c), SCRCP. *Hansson v. Scalise Builders of S. Carolina*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007); *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014).

“In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party.” *Watson*, 407 S.C. at 453, 756 S.E.2d at 161, quoting *Sauner v. Pub. Serv. Auth. of S. C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

Nevertheless, summary judgment is properly granted if a non-moving party, bearing the burden of proof, fails to present evidence sufficient to create a genuine issue of fact on each element of its claim.

“Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which that party will bear the burden of proof.” Therefore, on a defendant’s motion for summary judgment such as the one at issue here, a court cannot properly deny the motion after only finding that a genuine issue of material fact exists as to one element of the plaintiff’s claim; rather, under *Baughman*, the court must determine that a genuine issue of material fact exists for each essential element of the plaintiff’s claim.

Hansson, 374 S.C. at 357-58, 650 S.E.2d at 71 (quoting *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986))).⁵

2. A Drawer Has No Negligence Claim Against A Depository Bank Especially In A Double Forgery Case

A bank owes its customers a limited duty of care arising from the bank-customer contract. However, because it has no contract with non-customers, a bank generally owes them no duty of care, even if injury to them is a foreseeable consequence of the bank's negligence. See *Kerr v. Branch Banking & Trust Co.*, 408 S.C. 328, 333, 759 S.E.2d 724, 727 (2014); *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003).⁶ As the trial court correctly stated:

South Carolina has refused to extend banks' duties to non-customers, where the non-customers' claims are premised upon contractual obligations between a bank and its customer, and where the non-customer is not an intended third-party beneficiary to that contract. In short, absent fraud or misrepresentation a non-customer does not have the right to rely on the faithful execution of a bank's duties, particularly where the non-customer is in the best position to safeguard his interests against loss.

(R. p. 6).

⁵ Here, as in *Baughman*, 306 S.C. at 116, 410 S.E.2d at 546, Overland does not contend that BANA failed to satisfy its burden under Rule 56(c). Rather, Overland argues that it submitted evidence sufficient to create a genuine issue of fact concerning the elements of its negligence claim.

⁶ The overwhelming majority of other American jurisdictions agree. See *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 225 (4th Cir. 2002) (applying North Carolina law); *Volpe v. Fleet Nat. Bank*, 710 A.2d 661, 664 (R.I. 1998); see also *Ahlan Wa Sahlan Hospitality Co. v. United Citizens Bank of S. Kentucky, Inc.*, No. 2011-CA-001349-MR, 2013 WL 275636, at *2 (Ky. Ct. App. Jan. 25, 2013) unpublished decision citing decisions from nine states).

In accordance with this general rule, a bank owes a non-customer no duty of care in the opening of an account for a customer.⁷ Both in its original and revised forms, Uniform Commercial Code, Article 3 follows that general rule as well. Revised section 36-3-420, S.C. Code Ann., for example, precludes a drawer, generally (and in this case)⁸ a non-customer, from suing a depository bank for taking its check for collection over a forged indorsement.

Consonant with these general rules, the South Carolina Supreme Court held, in *Read v. South Carolina Nat. Bank*, 286 S.C. 534, 542, 335 S.E.2d 359, 363-64 (1985), that a depository bank is not liable to the drawer for taking a doubly forged check for deposit. *Read* cited and adopted the reasoning of the "most celebrated case" of *Perini Corp. v. First Nat. Bank*, 553 F.2d 398, 413 (5th Cir. 1977).

Losses due to double forgeries, *Perini* and *Read* hold, are properly treated as losses from forged maker signatures, not forged indorsements. As *Perini* explains, the forged indorsement puts the drawer (or drawee bank) in no worse position than he or it would be in if the indorsement were genuine. *Read*, 286 S.C. at 542, 335 S.E.2d at 363-64; *Perini*, 553 F.2d at 515. The loss on a double forgery "results not from making payment to the wrong person because of a forged indorsement, but from making any

⁷ *Weil v. First Nat. Bank of Castle Rock*, 983 P.2d 812, 814 (Colo. App. 1999) ("[W]e decline to create a new common law duty burdening banks and financial institutions with a duty to inquire into a customer's authority to use an unregistered trade name. It would be unreasonable to require banks to make an independent investigation of their customers' authority to use any particular unregistered trade name; and, a duty to inquire only of the customer would not prevent the kind of harm plaintiff suffered here."); accord *Rodriguez v. Bank Of The W.*, 162 Cal. App. 4th 454, 460, 75 Cal. Rptr. 3d 543, 546 (2008); *Software Design & Application, Ltd. v. Hoefler & Arnett, Inc.*, 49 Cal.App.4th 472, 481-83, 56 Cal.Rptr.2d 756, 762-63 (1996).

⁸ On BANA's motion, the trial court dismissed Overland's claim against BANA under section 36-3-420. Overland has not appealed that ruling.

payment at all on the basis of a forged drawer's signature.”⁹ *Perini*, 553 F.2d at 415.

“Therefore, the losses are a result of the forged drawer’s signature, not the endorsements.”¹⁰ *Read*, 286 S.C. at 542, 335 S.E.2d at 364.

Here, Overland’s losses are due to double forgery checks. Nance “forged the necessary Overland signature on the checks, and then forged a Taylor Enterprises [or other] endorsement on the instrument” before depositing the checks in her accounts at BANA. (AOB, p. 3; R. pp. 230-31, ¶¶ 37, 41; R. p. 258, ¶166). Under the rule stated in *Perini* and adopted in *Read*, Overland cannot shift its losses on those double forgery checks to BANA, a depository bank, because “the losses claimed by the drawers were not related to the improper [payee] indorsements.” *Perini*, 553 F.2d at 413.

To avoid that conclusion, Overland argues that revised Article 3, and in particular §§ 36-3-404(d) and 36-3-405(b), abrogate *Perini* and *Read*, granting drawers an affirmative right to recover from a depository bank for its comparative negligence that contributes to the loss in a double forgery case. (See AOB, pp. 10-11, 15 n. 9). Overland is wrong. Neither of the revised sections mentions a double forgery. The South Carolina comments to the two sections disclose that these provisions abrogate *Stone Mfg. Co. v. NCNB of S.C.*, 308 S.C. 287, 417 S.E.2d 628 (Ct. App. 1992), but not *Read*.

⁹ “The ostensible drawer’s loss in such a situation can generally, as here, be related to the defective indorsement in only the most speculative fashion.” *Perini*, 553 F.2d at 414.

¹⁰ Overland wrongly seeks to distinguish *Read* as involving only claims against the drawee bank, not the depository bank. (See AOB, p. 15). In fact, in *Read*, the defendant bank was both the drawee and the depository bank, and it was sued as the depository bank for conversion based on the fraudulent indorsements on certain deposited checks. See *Read*, 286 S.C. at 536-37, 542, 335 S.E.2d at 360, 363.

Even if §§ 36-3-404(d) and 36-3-405(b) grant the drawer a direct cause of action against the depository bank—a dubious proposition for reasons stated in the footnote¹¹—both sections require proof not only of the depository bank’s negligence, but also proof

¹¹ Sections 36-3-404(d) and 36-3-405(b) do not expressly grant a drawer a direct claim against a depository bank. Instead, they limit a bank’s imposter and padded payroll defenses based on its comparative fault. The comments to these sections cannot and do not create a cause of action that the statutory text does not confer. The official comment to § 36-3-405 does not plainly say that subsection (b) creates a direct cause of action rather than a loss allocation limitation on the padded payroll defense. The South Carolina Comment refers to a “claim against the depository bank,” but in the context of stating that the former absolute padded payroll defense applied in *Stone* has been ameliorated by § 36-3-405(b)’s comparative fault limitation. The comments to §36-3-404(d) say nothing about a direct claim by a drawer against a depository bank.

Moreover, interpreting §§36-3-404(d) and 36-3-405(b) to permit a direct claim by the drawer against a depository bank renders Article 3 a bizarre fun-house of loss allocation without any consistent rule or supporting policy. A drawer cannot recover any forged indorsement loss from a depository bank under § 36-3-420 even if the drawer is not negligent, and the bank is both negligent and 100% at fault. Likewise, under § 36-3-406, a negligent drawer cannot recover from a negligent depository bank, no matter what the allocation of fault between the two. See *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 650-55, 604 S.E.2d 403, 406-09 (2004).

Under Overland’s interpretation, the drawer may recover from the depository bank based on its negligence only when the fraudster happens to be an imposter, or an employee with responsibility for the drawer’s checks, or writes the check to a fictitious payee. And even then, only when the fraudster forges an indorsement; the depository bank escapes liability if the checks lack indorsements and are not deposited to an account of the named payee. See *Mills v. U.S. Bank*, 166 Cal. App. 4th 871, 888-91, 83 Cal. Rptr. 3d 146, 160-63 (2008). Overland offers no public policy rationale justifying this special treatment for checks bearing forged indorsements by imposters, dishonest bookkeepers, or fictitious payees. Nor does the Uniform Commercial Code, its comments or any of its many commentators.

On the other hand, Articles 3 and 4 give rise to a coherent, sensible scheme of loss allocation if §§ 36-3-404(d) and 36-3-405(b) are treated as limitations on the defenses which those two sections otherwise allow, just as § 36-3-406 also does. Then a depository bank bears no direct liability to the drawer, but may raise defenses to a drawee bank’s breach of warranty claims based on the defenses provided in the just-cited sections, subject to loss allocation based on its comparative fault. Interpreting the UCC in this way not only harmonizes the otherwise discordant outcomes as between drawer and depository bank, but also avoids depriving the depository bank of the drawee bank’s defenses to the drawer’s claims. See p. 14 below.

that the depository bank's negligence "substantially contribute[d] to [the] loss."¹² Both *Perini* and *Read* hold that in a double forgery situation, the depository bank's taking the check for collection does not "substantially contribute to the loss." "[T]he losses are a result of the forged drawer's signature, not the endorsements." *Read*, 286 S.C. at 542, 335 S.E.2d at 364. Nothing in revised Article 3 abrogates that holding. So *Read* remains good law in the double forgery situation, even if §§ 36-3-404(d) and 36-3-405(b) otherwise permit affirmative claims by a drawer against a depository bank. Overland asks this Court to overrule *Read*. It is an invitation the Court must decline.

Continuing to follow *Read* in double forgery cases also furthers the UCC's loss allocation scheme. Drawers will not be left with all losses from double forgeries. They can recover against their drawee banks, subject to any defenses raised under their account agreements or §§ 36-3-404, 36-3-405, 36-3-406 or 36-4-406. The drawee banks, in turn, may shift some double forgery losses to depository banks by suing for breach of presentment warranties under § 36-4-208(a).

Denying drawers a direct action against depository banks in double forgery cases is consistent with the policy adopted in § 36-3-420(a). Denying a direct action also prevents drawers from circumventing drawee bank defenses under their account agreements

¹² See S.C. Code Ann. § 36-3-404, S.C. cmt. ("Under Subsection (d), the party bearing the loss must prove that the person paying or taking the instrument failed to exercise ordinary care and that the failure substantially contributed to the loss resulting from payment of the instrument." (emphasis added)); § 36-3-405, S.C. cmt. ("*If the employer can establish that the bank paying the fraudulently indorsed check or taking it for value or collection failed to exercise ordinary care and that failure substantially contributed to the loss resulting from the fraud, the employer can recover from the bank failing to exercise ordinary care to the extent that the failure contributed to the loss.*" (emphasis added)).

or § 36-4-406, and from thereby imposing greater liability on depository banks than drawee banks would bear for the same double forged checks.

In this case, for example, Nance forged Overland checks for at least two years—from January 2008 through January 2010—before Overland detected and reported her fraud in February 2010. (See R. pp. 185, 206-216). Section 36-4-406(f) precludes Overland from recovering from its drawee banks any losses on checks Nance forged during 2008, “[w]ithout regard to care or lack of care of either the customer or the bank.” There is no reason why Overland should be allowed to escape that preclusion by suing the depository banks, BANA or SunTrust, directly. See also *Perini*, 553 F.2d at 400 (account agreement defense to checks forged by misuse of facsimile signature stamp).

Arguing for a contrary result, Overland relies heavily on *Gina Chin & Assoc., Inc. v. First Union Bank*, 256 Va. 59, 61-63, 500 S.E.2d 516, 517-18 (1998). (See AOB, p. 12). *Gina Chin* is not binding on this Court; *Read* is. S.C. Const. art. V, § 9; *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) *aff’d as modified*, 408 S.C. 198, 758 S.E.2d 715 (2014); *Bass v. Isochem*, 365 S.C. 454, 478, 617 S.E.2d 369, 381 (Ct. App. 2005). Moreover, *Gina Chin* is not persuasive because it fails to note that revised Article 3 does not alter the “loss causation principle” which independently supports the holdings in *Read* and *Perini*.¹³ Also, Overland focuses on a motion to dismiss ruling, ignoring the fact that on remand, *Gina Chinn* prevailed only by showing

¹³ *Victory Clothing Co. v. Wachovia Bank, N.A.*, No. 1397 Feb.Term 2004, 2006 WL 773020, at *3, 5-6 (Pa. Com. Pl. Mar. 21, 2006), an out-of-state, unreported, trial court decision, which Overland also cites, (AOB, p. 12), notes the separate “loss causation principle,” on which *Perini* was based, but inexplicably ignores that basis of the decision in adopting *Gina Chin*’s holding that revised Article 3 upsets settled law in double forgery cases.

that the bank bore *respondet superior* liability for its teller's knowingly aiding the embezzler.

In short, this Court remains bound by *Read's* holding that, in double forgery cases, "the losses are a result of the forged drawer's signature, not the endorsements." *Read*, 286 S.C. at 542, 335 S.E.2d at 364. Therefore, the drawer, Overland in this case, cannot show that any negligence of the depository bank in taking the double forged check for collection "substantially contribute[d] to the loss" and so cannot recover under §§ 36-3-404(d) or 36-3-405(b) even if they permit a drawer to sue a depository bank directly. For that reason, summary judgment was properly entered against Overland on its 17th cause of action. This Court should affirm.

**3. Overland Failed To Raise A Genuine Issue
On Each Element Of Its Purported Negligence Claim**

Summary judgment was also properly entered and should be affirmed for the added and independent reason that Overland failed to submit evidence raising a genuine issue of material fact as to each essential element of its purported negligence claim.

If permitted at all, a claim under §§ 36-3-404(d) or 36-3-405(b) has four essential elements: (a) applicability of those sections, (b) a bank's negligence in paying or taking a check for collection, (c) causation, and (d) damages. Overland's evidence did not raise genuine issues of material fact as to the first three of these elements.

**(a) Overland Offered No Evidence That The Disputed Checks
Fell Within The Scope Of Sections 3-404 or 3-405**

To establish any claim under §§ 36-3-404(d) or 36-3-405(b), Overland first had to prove that the checks that caused its losses fell within the scope of those statutes.

The statutes apply only to checks that (i) an imposter induces the drawer to issue (§ 36-3-404(a)), (ii) are made payable to a fictitious person or one not intended to have an

interest in the instrument (§ 36-3-404(b)), or (iii) are fraudulently indorsed in the name of the payee by an employee entrusted with responsibility for the checks (§ 36-3-405(b)).

Sections 36-3-404 and 36-3-405 do not apply at all, and no claim is possible under their comparative negligence provisions if the fraud is accomplished by a means other than an imposter, fictitious payee, or padded payroll check, or the check bears no indorsement (and is not deposited in the payee's account), or indorsed in a name other than the payee's name. *See, e.g., Mills*, 166 Cal. App. 4th at 888-91, 83 Cal. Rptr. 3d at 160-63.

Overland submitted no evidence to show that the checks on which it bases its claims were fraudulently indorsed and fell within the scope of §§ 36-3-404(a), (b) or 36-3-405(b).¹⁴ (*See R. pp. 148-50; AOB, pp. 8-10*). Instead, in the trial court, it argued that "Overland is not required, nor does it accept BOA's invitation, to admit liability under this fact pattern." (*R. p. 148*).

Admission of liability is not the issue. (*See R. pp. 136-37*). A drawer need not admit liability, but it must show that the checks on which it bases its claim are ones to which §§ 36-3-404 or 36-3-405 apply. Otherwise, it cannot show that it has a claim

¹⁴ The evidence that Overland did submit shows that §§ 36-3-404 and 36-3-405 do not apply to most, if not all, of the checks on which Overland's claims are based. According to O'Shea at least after October 2009, Nance had no responsibility for Overland's checks, but she wormed her way into the company's check writing program by fraudulent means—so § 36-3-405 no longer applied, if it ever did. (*See R. p. 187*). Also, Overland produced only three checks that Nance had deposited in her BANA accounts. None of those checks was indorsed in the name of the payee as required to fall within the scope of §§ 36-3-404 or 36-3-405. (*See R. p. 168-72*). Indeed, Seitz testified that all the checks BANA accepted for deposit "were negotiated without the endorsement of the payee." (*R. p. 161, ¶ 7*). And Overland told the trial court that most of these checks were deposited in Nance's personal account, not any account held in the name of the payee. (*R. pp. 617-18, 621*.)

under §§ 36-3-404(d) or 36-3-405(b), no matter how negligent it says the depository bank was. *See Mills*, 166 Cal. App. 4th at 888-91, 83 Cal. Rptr. 3d at 160-63.

Because Overland did not submit evidence sufficient to raise a genuine issue of material fact as to this first essential element of its claim, summary judgment was properly entered against it.

(b) Overland Did Not Offer Evidence That BANA Was Negligent In Taking The Checks For Collection

Overland also failed to raise a genuine issue as to negligence.

Overland's only evidence on lack of due care was (i) Nance's testimony that she opened accounts at BANA by using an incorrect Social Security Number and without producing any documents showing she was doing business as Taylor Enterprises or Atlantic British, (ii) O'Shea's testimony that BANA deposited checks bearing forged indorsements, and (iii) Seitz's testimony that BANA redeposited three checks in her account after having returned them once as improperly deposited. (*See AOB*, p. 9; R. pp. 206-216; R. p. 160, ¶ 6; R. p. 164-172).

Because BANA owed Overland, a non-customer, no duty of care in opening accounts for Nance, evidence of lapses in account-opening procedures or "Know Your Customer" rules cannot meet Overland's burden of raising a genuine issue as to negligence. For example, affirming dismissal of a non-customer's claim that a depository bank had negligently allowed its customer to establish and operate a fraudulent bank account, the Fourth Circuit reiterated that "[t]he mere fact that a bank account can be used in the course of perpetrating a fraud does not mean that banks have a duty to persons other than their own customers." *Eisenberg*, 301 F.2d at 222, 225 (*quoting McCallum v. Rizzo*, 1995 WL 1146812, at *2 (Mass. Super. Ct. Oct. 13, 1995)).

The rule is no different under §§ 36-3-404(d) or 36-3-405(b) even if those sections conferred a direct negligence claim on Overland as it asserts. Assuming such a direct claim was possible under § 3-405(b),¹⁵ the Indiana Supreme Court explained that lack of care in opening an account does not suffice, on its own, to establish liability. *Auto-Owners Ins. Co. v. Bank One*, 879 N.E.2d 1086, 1090 (Ind. 2008). Section 3-405(b) permits recovery only for a bank's lack of ordinary care "in paying or taking the instrument." Opening an account is not paying a check or taking it for collection. "The language of the statute does not contemplate a general requirement that banks use ordinary care when opening accounts" *Auto-Owners Ins. Co.*, 879 N.E.2d at 1090.

Similarly, the "Know Your Customer" rules that banks are supposed to follow in opening accounts are promulgated to prevent money laundering and to protect banks, not their customers or check drawers. *Auto-Owners Ins. Co.*, 879 N.E.2d at 1090 & n. 2; *Software Design & Application, Ltd.*, 49 Cal. App. 4th at 482, 56 Cal. Rptr. 2d at 762. So Seitz's statements about BANA's compliance with Know Your Customer rules in opening or changing names on Nance's accounts falls far short of raising a genuine issue of fact as to whether BANA was negligent in taking her forged checks for collection. (See R. pp. 159-60, ¶¶ 3-5).

As the trial court correctly ruled, citing *Eisenberg*:

¹⁵ The Indiana Supreme Court had granted transfer on only two questions: "whether Bank One was subject to an ordinary care requirement for its actions in opening an account for Wulf, and if so, whether Bank One's failure to exercise ordinary care substantially contributed to Auto-Owners' losses." *Auto-Owners Ins. Co.*, 879 N.E.2d at 1088. Whether UCC §§ 3-404(d) or 3-405(b) granted the drawee a direct negligence claim against the depository bank was not an issue raised for the Supreme Court's consideration and so the court simply assumed that such a claim could be stated.

In the present matter, Overland only maintained accounts with NBSC and BB&T. Ms. Nance opened each account at Bank of America and SunTrust. Additionally, Overland has not alleged that either Bank of America or SunTrust committed fraud or made a misrepresentation to it regarding these accounts. Therefore, Overland is unable to demonstrate that Bank of America or SunTrust owed it any duty regarding these matters.

(R. p. 8).

Overland also fails to raise a genuine issue as to negligence in BANA's taking Nance's checks for collection. Overland conceded that the checks were deposited through ATM transactions. (R. p. 4, ¶ 7; R. p. 8; R. p. 13). When checks are processed for collection by such automated means, ordinary care and the observance of reasonable commercial standards "do not require the bank to examine the instrument." S.C. Code Ann. § 36-3-103(a)(9).¹⁶

The statute does not impose a duty upon a paying bank to inspect every check to verify signatures appearing thereon prior to processing the check for payment [or collection]. The mere fact that a bank may have paid [or taken] an item over a forged signature does not establish that a bank failed to exercise "ordinary care."

Groue v. Capital One, 47 So. 3d 1038, 1044 (La. Ct. App. 2010).

Overland produced no evidence to show that any defect in the deposited checks could have been discovered without inspecting every check. Nor did it present evidence showing that BANA departed from general banking usage in its automatic processing of Nance's checks. Hence, Overland failed to raise a genuine issue of fact about whether

¹⁶ The cited statute states in part: "In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this chapter or Chapter 4."

BANA failed to exercise ordinary care in taking Nance's checks for collection.¹⁷ See *Watson Coatings, Inc. v. Am. Express Travel Related Serv., Inc.*, 436 F.3d 1036, 1041-42 (8th Cir. 2006); *DBI Architects, P.C. v. Am. Express Travel-Related Servs. Co.*, 388 F.3d 886, 895 (D.C. Cir. 2004); *Pernikoff Constr. Co. v. U.S. Bank*, No. 4:09CV894 JCH, 2010 WL 3258399, at *5 (E.D. Mo. Aug. 16, 2010).

Overland argues that § 36-3-103(a)(9)'s definition of ordinary care only lessens the bank's obligations "for the time-period between a deposit and when the bank ... reviews it." (AOB, p. 14). Overland cites no authority for this proposition. There is none. As the UCC's comments confirm, revised Article 3's definition of ordinary care was adopted specifically to avoid any requirement that the bank "review" items it automatically processes.

The term "ordinary care" used in subsection (e) is defined in Section 3-103(a)(7), made applicable to Article 4 by Section 4-104(c), to provide that sight examination by a payor bank is not required if its procedure is reasonable and is commonly followed by other comparable banks in the area. ... The definition of "ordinary care" in Section 3-103 rejects those authorities that hold, in effect, that failure to use sight examination is negligence as a matter of law.

S.C. Code Ann. § 36-4-406, Official Cmt. 4, referenced in § 36-3-103, Official Cmt. 5.

¹⁷ Overland's expert Seitz states that BANA accepted checks for deposit without the payee's indorsement, and that doing so "is not consistent with industry practice or the requirements of the Uniform Commercial Code." (R. p. 161, ¶7). Seitz carefully omits the fact that BANA could not have known indorsements were missing unless it sight-reviewed the automatically processed checks. So his opinion shows no lack of ordinary care as defined in § 36-3-103(a)(9). For the same reason, O'Shea's statement that Nance deposited checks not payable to her shows no negligence on BANA's part. (See R. pp. 206-216). Only sight-examination would reveal the payee's name.

As the comment goes on to state, “a bank should not have to share [a forged check] loss solely because it has adopted an automated collection or payment procedure in order to deal with the great volume of items at a lower cost to all customers.” S.C. Code Ann. § 36-4-406, Official Cmt. 4. Overland’s proposal would revive the authorities that the revised Article 3 expressly rejected and require banks to engage in laborious, expensive and time-consuming sight examination of checks, a task they cannot perform given the millions of checks they process every day.

As the trial court correctly stated:

[Section 36-3-103(a)(9) provides] that where a bank processes checks by automated means, “reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank’s prescribed procedures and the bank’s procedures do not vary unreasonably from general banking usage.” This effectively creates a presumption of reasonable care in automated check processing systems.

(R. p. 7).

Overland’s last shred of evidence regarding negligence concerns three checks which BANA originally rejected for deposit on October 1, 2009 and then accepted when they were redeposited four weeks later. (*See* R. pp. 160, 164-72).¹⁸ This single deposit, rejection and redeposit of three checks does not show any negligence. Indeed, it illustrates just the contrary. It shows BANA had procedures in place to sight-review some automatically deposited checks and, when it caught improperly deposited checks in that review, it rejected them. As Overland has not shown the criteria for sight-review

¹⁸ Overland’s opening brief misstates Seitz’s evidence, claiming it shows that BANA “refused to deposit *many* of Nance’s stolen checks” yet allowed her to re-deposit the same checks at a later date. (AOB, p. 9 (emphasis added)). Seitz’s affidavit identifies only three checks in a single deposit which were rejected and redeposited. Three is not many.

were triggered by the redeposit, it cannot show—and Seitz does not opine—that the failure to detect the redeposit shows any lack of ordinary care.

In short, Overland's lack evidence fails to raise a genuine issue of material fact as to lack of ordinary care, as the trial court correctly found:

Overland has not demonstrated that Bank of America or SunTrust failed to exercise ordinary care in their check-processing procedures. At the hearing on the summary judgment motions, the parties agreed that these two banks utilize automated check processing. Overland has failed to show that Defendant banks' procedures varied in any way from general banking usage.

(R. p. 8).

(c) Overland Did Not Raise A Genuine Issue As To Causation

Both §§ 36-3-404(d) and 36-3-405(b) require proof that the bank's failure to exercise ordinary care "substantially contribute[d] to [the] loss." See p. 13 & n. 12 above.

Overland introduced no evidence to prove the causation element of its claim. In both its response to the summary judgment motion in the trial court and its opening brief in this Court, Overland simply ignored this element of its cause of action. (See R. pp. 149-50; AOB, pp. 8-10, 14-15).

As *Read* holds, lack of causation is the fatal flaw in a drawer's attempt to hold a depository bank liable for forged indorsements in a double forgery case. *Read*, 286 S.C. at 542, 335 S.E.2d at 364. Overland produced no evidence to show this case is unusual or to establish the causation that *Read* held missing.

To the contrary, the flaws that Overland tries to establish in BANA's opening or renaming of Nance's accounts and its rejection, then acceptance for redeposit of three (out of more than a hundred) checks are not the cause of Overland's loss. The loss was

caused by Nance's insinuating herself into Overland's check-writing program and forging Overland's drawer's signature on checks without Overland's knowledge or consent. Nance was not deterred by one rejection of her three-check deposit. There is nothing to show that rejecting a redeposit would have had any different result.

Overland did not raise a genuine issue of material fact with respect to causation, just as it failed to raise such issues as to the applicability of §§ 36-3-404 or 36-3-405, and as to lack of ordinary care. Thus, the trial court correctly granted BANA summary judgment. This Court should affirm.

C. The Trial Court Did Not Abuse Its Discretion In Granting Summary Judgment Despite Overland's Argument That It Had Not Completed Discovery

Contrary to Overland's argument, (*see* AOB, pp. 4-8), the trial court did not abuse its discretion in granting BANA's motion for summary judgment despite Overland's argument that its discovery was incomplete. Overland offered no excuse for its failure to complete discovery in the 2½ years BANA had been a party. It submitted no affidavit under Rule 56(f), SCRCP. At the summary judgment hearing, Overland conceded that its motion to compel discovery had been resolved. Overland did not show any discovery it sought would have raised a genuine issue that BANA had acted negligently in taking Nance's checks for collection through automated procedures.

1. Standard Of Review

This Court applies the abuse of discretion standard to review the trial court's finding that Overland's motion to compel was moot and its implicit finding that BANA's summary judgment motion was not premature since Overland had been given a full and fair opportunity to complete its discovery. *See Robertson v. First Union Nat. Bank*, 350 S.C. 339, 347, 565 S.E.2d 309, 313 (Ct. App. 2002).

2. The Trial Court Did Not Abuse Its Discretion

While a summary judgment motion is premature if brought before “the opposing party has had a full and fair opportunity to complete discovery,” *Baughman*, 306 S.C. at 112-14, 410 S.E.2d at 543-45, “[a] party claiming summary judgment is premature ... must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.” *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009) (citing *Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003)); accord *Baughman*, 306 S.C. at 112-13, 410 S.E.2d at 544.

Moreover, the proper way to make that required showing is by moving for a continuance supported by affidavit(s) of counsel or other knowledgeable witnesses stating why the party “cannot for reasons stated present by affidavit facts essential to justify [its] opposition.” Rule 56(f), SCRCP; *Schmidt v. Courtney*, 357 S.C. 310, 320-22, 592 S.E.2d 326, 332-33 (Ct. App. 2003); *Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001).¹⁹

The trial court did not abuse its discretion in finding that Overland had not shown BANA’s summary judgment motion was premature in accordance with these rules.

Overland advanced no reason why the time allowed for discovery in this case was insufficient. Approximately 2½ years transpired between Overland’s adding BANA as a defendant and Overland’s response to BANA’s summary judgment motion. (R. pp. 144, 222). Two scheduling orders were entered during that period. A third was filed while the

¹⁹ A party may excuse its failure to comply with Rule 56(f)’s affidavit requirement only by establishing the pertinent facts are brought before the trial court by other appropriate means. *Baughman*, 306 S.C. at 112 n. 4, 410 S.E.2d at 544 n. 4.

summary judgment motion was pending. The initial order set a July 31, 2014 discovery cut-off date and an August 8, 2014 motion cut-off date. (R. p. ____). Overland offered no explanation why it could not complete its discovery by the July 31 cut-off date, let alone by October 27, 2014 when it filed its response to the summary judgment motions. (R. p. 151).

Overland cannot blame its tardiness on BANA. Overland waited over 18 months before serving written discovery on BANA and another 9 months (and a month after the summary judgment motion was filed) before moving to compel additional responses from BANA. (R. pp. 363, 365-384). Moreover, at the summary judgment hearing, Overland conceded it had recently received “an additional couple hundred documents and some updated responses” and that counsel for the parties were “going to work through” the two remaining issues. (R. pp. 620, 624). Overland did not suggest that any of the recently received documents were relevant to its summary judgment response.

Much shorter discovery periods have been held sufficient to allow a party a full and fair opportunity for discovery. *See, e.g., Dawkins*, 354 S.C. at 63, 71, 580 S.E.2d at 435, 439-40 (2003) (4 months); *Middleborough Horiz. Property Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479-80, 465 S.E.2d 765, 771 (Ct. App. 1995) (4 months); *Robertson*, 350 S.C. at 346-47, 565 S.E.2d at 313 (3 months after moving defendant added as party, though 1 year after complaint filed and 8 months after moving defendant’s owner was deposed).²⁰

²⁰ Tellingly, the only cases Overland cites on this point are ones in which the trial court converted a Rule 12(b)(6) motion into a Rule 56 summary judgment motion, thus depriving the plaintiff of any chance to take discovery. (*See* AOB, p. 7 (citing *BPS, Inc. v. Worthy*, 362 S.C. 319, 330, 608 S.E.2d 155, 161 (Ct. App. 2005) and *Baird v.*

(Fn. cont'd)

Overland also failed to show that any missing discovery would uncover additional relevant evidence and create a genuine issue of material fact—as opposed to being a mere “fishing expedition.” Of course, no discovery could confer on Overland the direct cause of action against a depository bank in a double forgery case which *Read* denies. Earlier production of BANA’s policies and procedures on account opening would not have aided Overland. BANA did produce those policies and procedures. Overland did not raise any of them at the summary judgment hearing or in its later-filed Rule 59(e) motion.

(Rule 59(e) Motion).

Overland never requested production of BANA’s policies and procedures regarding processing of ATM deposits. (*See R. pp. 368-384*). Even without those documents, Overland could have tried to show BANA’s automated processing varied unreasonably from general banking usage. It made no attempt to do so. Overland did not identify any particular procedure it thought BANA failed to comply with in automatically processing Nance’s ATM deposits—despite the fact that its expert, Seitz, professed familiarity with his own bank’s check processing procedures. (*See R. p. 158, ¶ 2*). Overland just proposed a fishing expedition in the hope of finding some improbable and unsuspected flaw in BANA’s automated processing of Nance’s deposits.²¹

(Fn. cont’d)

Charleston Cnty., 333 S.C. 519, 529, 511 S.E.2d 69, 74-75 (1999). As the text shows, this case involves very different facts.

²¹ Only sight review would have caught the defective indorsements or wrong payee names. As Overland conceded that Nance’s ATM deposits were automatically processed, the problems with Nance’s deposits could not have been detected by normal procedures. Overland suggests no reason why or means by which BANA could have treated Nance’s deposits differently from other ATM deposits, subjecting hers but no others to sight review.

Finally, Overland made no motion for a continuance. It submitted no Rule 56(f) affidavits. Only four brief sentences in Seitz's affidavit addressed the supposed relevance of the supposedly needed discovery. (*See* R. p. 159-160, ¶5; R. p. 161, ¶8). Overland submitted no affidavit or other factual material to show it had not been dilatory and ignored that issue in its response to the summary judgment motions and in its Rule 59(e) motion papers. (R. pp. 41- 64, 144-219).

The trial court did not abuse its discretion in finding that Overland had been given a full and fair opportunity to complete its discovery before BANA filed its summary judgment motion.

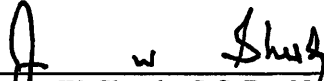
IV.

CONCLUSION

For the reasons stated above, the Court should affirm the summary judgment entered in BANA's favor.

Respectfully submitted,

Date: September 25, 2015.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

RECEIVED
SEP 28 2015
SC Court of Appeals

Overland, Inc., d/b/a Land Rover Greenville, Appellant,

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,

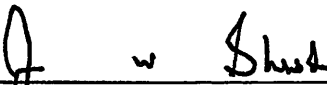
Of whom Lara Marie Nance, Charlie Andrew Nance, Roger Fields, Bank of America
Corporation, and SunTrust Banks, Inc. are the Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the *Final Brief of Respondent Bank of America, N.A.* complies with Rule 211(b), SCACR.

Respectfully submitted,

Date: September 25, 2015.



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

Overland, Inc., d/b/a Land Rover Greenville, Appellant,

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 Lara Marie Nance, Charlie Andrew Nance, Roger Fields, 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 *Final Brief of Respondent Bank of America, N.A.* and the *Certificate of Compliance* on the following by sending copies of the same via first class U.S. mail on the date set forth below.

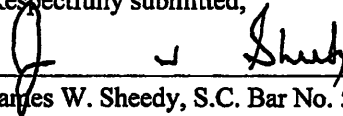
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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Overland, Inc., d/b/a Land Rover Greenville, Appellant,

v.

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.

Appellate Case No. 2015-000523

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Unpublished Opinion No. 2016-UP-368
Submitted May 1, 2016 – Filed July 20, 2016

APPEAL DISMISSED

Carl F. Muller, of Carl F. Muller, Attorney at Law, P.A.,
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both of Greenville, for Appellant.

James W. Sheedy and Susan Elizabeth Driscoll, both of
Driscoll Sheedy, P.A., of Charlotte, North Carolina; and

Jan T. Chilton, of Severson & Werson, of San Francisco,
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Corporation.

W. Howard Boyd, Jr. and Zachary Lee Weaver, both of
Gallivan, White & Boyd, PA, of Greenville, for
Respondent SunTrust Banks, Inc.

PER CURIAM: Appeal dismissed pursuant to Rule 220(b), SCACR, and the following authorities: Rule 6(b), SCRCP ("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."); Rule 59(e), SCRCP ("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."); Rule 59(f), SCRCP ("The time for appeal for all parties shall be stayed by a *timely* motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions." (emphasis added)); *Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1, 3, 518 S.E.2d 56, 57 (Ct. App. 1999) ("A motion under Rule 59(e) is timely if it is 'served not later than 10 days after receipt of written notice of the entry of the order.'" (quoting Rule 59(e), SCRCP)); Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion . . . to alter or amend the judgment . . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("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 and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.").

APPEAL DISMISSED.¹

LOCKEMY, C.J., and WILLIAMS and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

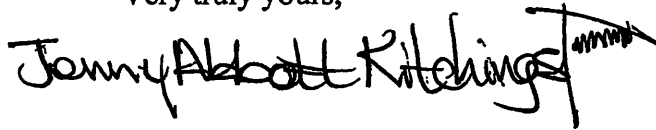
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Re: Overland v. Lara Nance
Appellate Case No. 2015-000523

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in black ink that reads "Jonny Abbott Kitchings". The signature is written in a cursive, somewhat stylized font. There is a small mark at the end of the signature that looks like a checkmark or a flourish.

CLERK

cc: The Honorable Letitia H. Verdin



The South Carolina Court of Appeals

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July 20, 2016

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2015-000523

Unpublished Opinion No. 2016-UP-368
Filed July 20, 2016

Overland, Inc., d/b/a Land Rover Greenville..... Appellant,

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, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and SunTrust
Banks, Inc. are the Respondents.

PETITION FOR HEARING

Pursuant to Rule 221(a) and Rule 240(i), SCACR, counsel for Appellant Overland, Inc.,
d/b/a Land Rover Greenville (“Overland”) respectfully petitions this Court for a rehearing of
Unpublished Opinion No. 2016-UP-368, dated July 20, 2016. A rehearing is appropriate when a
Party believes that the Court has overlooked or misapprehended an argument. Kennedy v. S.C.
Retirement System, 349 S.C. 531, 549 S.E.2d 243 (2001). In addition to the discussion herein,

Appellant relies upon and incorporates its arguments on this issue in its Final Reply Brief and its Response to Motion to Dismiss Appeal, both of which are attached to this Motion. Final Reply Brief of Appellant, pp. 15-17; R. pp. 514-518.

The Court dismissed Appellant's appeal as untimely filed; however, Appellant believes the Court misapprehended the facts and circumstances as they occurred in the trial court and the nonjurisdictional nature of Rule 59(e). Appellant'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, Appellants requested an extension of time within which to file a Rule 59(e) motion and the trial court granted the motion *before* the ten-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?

(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 filed motions for extensions granted by trial court judges. Appellant believes the Court misapprehended the fact that the extension had been requested and granted *prior* to the deadline passing, thus leaving the grant of an extension within the sound discretion of the trial court.¹ Judge Verdin exercised her discretion to enlarge the time for filing Appellant's Rule 59 (e) motion for good cause shown – i.e., the filing deadline lay between two major holidays and counsel was ill with the flu. The Court's Opinion dismissing the appeal appears

¹ Appellant also asked the trial court for permission to amend its motion if the trial court could not grant an extension. Appellant would have filed the motion as best he could while sick and then amend as necessary if the trial court was without jurisdiction to grant the extension. Instead, the trial court granted the extension and Appellant relied upon the court's authority to issue the order granting the extension.

to overlook these facts. This is not case in which counsel simply forgot to file a motion or failed to accurately calendar a due date. This is a case in which counsel requested an order, received the order, complied with the order and relied upon that order.

A circuit judge maintains its authority to extend the filing deadlines under Rules 6 and 59, SCRCF. The Court's opinion effectively declares there are no exceptions to the 10-day filing period under Rule 59(e), and converts the rules of civil procedure for post-judgment motions into jurisdictional bars to appeals.² Appellant knows of no South Carolina precedent that holds that a Rule 59(e) motion filed in accordance with the facts and circumstances of this case would lead to a jurisdictional bar to an appeal in South Carolina. Conversely, the trial courts have exercised discretion to grant extensions of time for litigants to comply with procedural rules, including Rule 59. See, Camp v. Camp, 386 S.C. 571,689 S.E.2d 634 (2010).

The filing periods under South Carolina Rules 6(b), and 59(e) and (f), SCRCF, are not jurisdictional rules. They are procedural rules of limitation to be interpreted in civil cases for the "just, speedy, and inexpensive determination of every action." Rule 1, SCRCF. The South Carolina Rules of Civil Procedure grant our circuit court judges with the discretionary 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'"); see also, Kontrick v. Ryan, 540 U.S. 443, at 455 (2004) (the jurisdictional tag applies only to rules that classify the types of cases (subject matter jurisdiction) and persons (personal jurisdiction) falling within a court's adjudicatory authority, which is not

² Rule 59 states a motion "*shall* be served not later than 10 days after receipt of written notice of the entry of the order" in contrast to the Rule 59 under the Federal Rules of Civil Procedure which uses the word "*must*" rather than "*shall*" (emphasis added). Also, the Federal Rule allows 28 days, almost three times the amount of time under the South Carolina Rule. Thus, the South Carolina and Federal rules 59 are different in substantive ways.

appropriate for claims-processing rules). In this instance, Appellant believes the Court misapprehended the distinction between the two types of rules by treating the Rule 59(e) 10-day time period as having the same absolute and inflexible filing deadline 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 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). This Court’s Opinion converts Rule 59(e) from a claims-processing rule to a jurisdictional one without prior notice or due process.

Further, because the trial judge granted Appellant’s motion, this matter is distinguishable from the authorities cited by this Court in Coward Hund Constr. Co. v. Ball Corp., 336 S.C.1,3,518 S.E.2d 56, 57 (Ct. App. 1999) and Elam v. S.C. Dep’t of Transp., 361 S.C.9, 14-15,602 S.E.2d 772, 775 (2004) (which dealt with successive Rule 59(e) motions by counsel alone without permission from the Court).

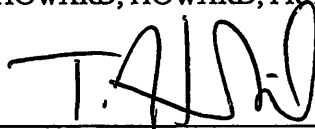
Appellant filed its Notice of Intent to Appeal on March 4, 2015, within the 30-day filing period required by Rule 203(b) after the trial court denied Appellant’s Rule 59(e) motion. Appellant’s Rule 59(e) motion stayed the appeal filing period under Rule 203(b).

Appellees did not object to the extension in the trial court and cannot raise the issue for the first time on appeal. Appellees are estopped because Appellant relied upon the extension.

Just as the extensions were permissible in Gallagher v. Everett, 353 S.C. 59, 577 S.E.2d 217 (Ct. App. 2002) and Camp v. Camp, 386 S.C. 571,689 S.E.2d 634 (2010), the extension in this case was also properly granted.

Respectfully submitted,

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**EXCERPT FROM
FINAL REPLY BRIEF**

“BAC admits that LMN [Nance] may have deposited checks into bank accounts at B of A.”

R. p. 455, ¶ 42.

In its Fifth Defense, Bank of America admits in Paragraph 68:

“Because the checks were deposited at a bank branch of B of A, as the depository bank, it had no ability or duty to verify the authenticity of the maker or drawee indorsements on any of the checks at issue in this action.”

R. p. 463, ¶ 68.

In its Sixth, Seventh and Eighth defenses, Bank of America asserts it did, or was entitled to, use commercially reasonable standards to process and pay the checks it accepted for deposit. Answer paragraphs 75, 81 and 85, R. p. 463-465. On summary judgment, factual disputes must be decided in favor of the nonmoving party. Additionally, the law does not support Bank of America’s argument that ATM use eliminates all bank liability. As argued above, because the banks withheld discovery regarding their protocols and manuals, the information necessary to evaluate each bank’s compliance with its policies and procedures and ordinary care as to ATM and teller assisted deposits was withheld from Overland and the Court.

The Circuit Court erred as matter of law and its decision should be reversed.

D. ONCE THE TRIAL COURT HAS GRANTED COUNSEL AN EXTENSION OF TIME UNDER RULE 59(e) FOR HEALTH REASONS, AND HE HAS RELIED ON IT, CAN THE OTHER PARTY OBJECT AFTER THE FACT?

The parties briefed this issue separately and Overland adopts and incorporates herein its Response to Motion to Dismiss Appeal filed April 10, 2015. Response to Motion to Dismiss Appeal, R. p. 514-531. In addition, Overland responds to SunTrust and Bank of America’s briefs on this issue, as follows.

After the Court granted Bank of America and SunTrust's Summary Judgment Motions and before the time to file a Rule 59(e) Motion expired, Overland requested and was granted an extension to file its Rule 59(e) Motion. Relying on the Judge's grant of the extension, Overland filed its Rule 59(e) Motion before the Court's deadline.⁷ Had the Court declined to grant the extension, Overland would have filed its Rule 59(e) Motion immediately, without an extension despite its attorney's illness. The Court graciously allowed counsel to recover from his illness and then file the Motion.⁸ This is not a case in which the time to file a Rule 59(e) motion had expired; therefore the Court retained jurisdiction to grant the extension.⁹

When Bank of America advised the Court that it did not object to Overland having an extension; it waived its right to object later. Bank of America agreed to the extension and is estopped from now raising it as a defense to Overland's appeal. While Bank of America asserts that Overland has no estoppel claim because Overland did not assert any false representation or concealment of material facts, Bank of America is mistaken. Bank of America did not object to the extension.¹⁰ That alone is conclusive.¹¹

⁷ Bank of America suggests that Overland's motion for an enlargement of time was not a real motion because it was filed as an email request designed to expedite the process due to Overland attorney's illness; however, motions are made in many forms, including oral motions during a hearing on other matters, in detailed written motions, and in emails. It is in the Court's discretion to allow an email motion, which the Court did in this case.

⁸ SunTrust's reliance on an *unpublished* opinion in which the litigant failed to request an extension until *after* the ten-day time-period expired is procedurally and factually distinct from the present case.

⁹ Rule 59(e) states a motion "shall be served not later than 10 days after receipt of written notice of the entry of the order" in contrast to the Rule 59 under the Federal Rules of Civil procedure which uses the word "*must*" rather than "shall." (emphasis added). Also, the Federal rule allows 28 days, almost three times the amount of time under the South Carolina rule.

¹⁰ SunTrust complains that it was not consulted prior to Overland having been granted an extension in the trial court; however, SunTrust's remedy was in the trial court if it objected to the extension. It did not.

¹¹ The Court considered Bank of America's argument that the Court was without authority to grant Overland an extension and rejected the agreement. Additionally, Bank of America did not object to the extension.

Contrary to SunTrust and Bank of America's assertions, Rule 59(e) is not jurisdictional.¹² When the Rules intend to limit or restrict jurisdiction, said limitation or restriction is specifically set forth in the rule. For example, Rule 6(b) states that "[t]he time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order." Rule 6(b), SCRPC. Nothing in Rule 6(b) or Rule 59(e) states that Rule 59(e) is jurisdictional. In this case, an ill attorney asked for and was granted an extension. While the federal courts may be willing to take the position that attorneys may not rely on extensions granted to them by courts, South Carolina has not been a state that sets traps for attorneys who request extensions while ill.

Rule 59(e) does not limit a court's jurisdiction. Just as the extensions were permissible in *Gallagher v. Everett*, 353 S.C. 59, 577 S.E.2d 217 (Ct. Ap. 2002) and *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634 (2010), the extension in this case was also properly granted. Overland's appeal was timely filed within thirty days after the trial court denied Overland's Motion Rule 59(e) Motion on February 5, 2015. Plaintiff's Notice of Appeal was filed March 4, 2015.

CONCLUSION

The order of the Circuit Court should be reversed (1) because the Court heard the summary judgment motions prematurely while Overland was deprived of the discovery it needed to defend fully the motions; (2) because the defendant banks admitted wrongdoing in their Answers, discovery and briefs and arguments to the trial court; and (3) because the

¹² South Carolina courts have not been inclined to penalize litigants with dismissal of appeals based on Rule 59(e). *Camp v. Camp*, 386 S.C. 571, 689 S.E.2d 634 (2010).

**EXCERPT FROM
RECORD ON APPEAL
VOLUME II**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED
APR 10 2015
SC Court of Appeals

The Honorable Letitia H. Verdin, Circuit Court Judge

Case No. 2010-CP-23-5880
Appellate Case No.: 2015-000523

Overland, Inc., d/b/a Land Rover Greenville Appellant,

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, Lara Marie Nance, Charlie Andrew Nance, Roger Fields, Bank of America
Corporation, and SunTrust Banks, Inc. are the Respondents.

RESPONSE TO MOTION TO DISMISS APPEAL

This case involves the embezzlement of approximately \$1,400,000 and the liability of
the embezzler's banks, to wit Bank of America and Sun Trust. Exhibit A – Affidavit of
Michael F. O’Shea. 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.

By Order dated December 15, 2014, and received by Plaintiff's counsel on
December 17, 2014, Judge Verdin granted summary judgment to the banks. Within 10 days,

plus the allowable holiday and weekend grace period, Plaintiff's counsel, T. Hunt 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.

Relying on Judge Verdin's extension, Plaintiff's counsel then filed his motion. On February 5, 2015, Judge Verdin denied it. Within 30 days, on March 4, 2015, Plaintiff's counsel filed a notice of appeal.

Counsel for Bank of America has moved to dismiss the appeal. He argues that the motion for reconsideration was not timely presented, but has provided no South Carolina authority for that proposition. The sole South Carolina case cited is unpublished, which means that the appellate court was unwilling to make it the law. Additionally, the cases cited in that unpublished opinion do not 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 a motion is made prior to the initial deadline to file the motion.

Judge Verdin had jurisdiction not only of the motion for summary judgment, but the entire case. She had this jurisdiction by court order and consent of the parties. The argument of counsel for Bank of America misconceives the nature of the trial court's jurisdiction and the 10-day window in Rule 59(e). The 10-day window 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. The 10-day window was inserted into the rule to allow greater - not lesser - 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. Judge Verdin did not need the 10-day window because she had continuing jurisdiction of the case. Because she had jurisdiction, she could grant the extension.

Moreover, 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.)

The federal cases cited by counsel for Bank of America are beside the point. The South Carolina Supreme Court has made clear that its interpretation of the South Carolina Rules of Civil Procedure is not controlled by the federal courts. In Camp v. Camp, 386 S.C. 571, 689 S.E.2d 634 (2010), it reversed a South Carolina Court of Appeals decision construing Rule 7(b)(1), SCRCP, that had relied on an identical United States Court of Appeals case. The Supreme Court 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. *Id.* at 637. There is no prejudice to the Bank of America in this case, and its counsel has not argued it.

Bank of America is estopped from even bringing its motion because its 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. Exhibit C – E-mail chain of December 29, 2014. While Mr. Sheedy raised the question whether the Judge could grant such an extension, neither he nor his client Bank of America objected to the extension. Therefore, any objection to the extension was waived on December 29, 2014 and Bank of America is estopped from bringing this motion.

Finally, and perhaps most importantly, the Due Process Clauses of the United States Constitution and the South Carolina Constitution, and simple fairness, require denial of the Bank of America's motion to dismiss. Here we have a young lawyer, sick and out-of-town during Christmas, doing what is expected of him. He 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 the court. 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 ten day timeframe in Rule 59(e) may or may not be enlarged upon a motion timely made before the ten day period has expired.

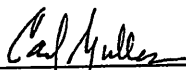
There is nothing remarkable about the request that the motion to dismiss be denied. This is a matter of fundamental rights. The South Carolina Supreme Court has held that in such a circumstance, "those rights take precedence over procedural rules otherwise limiting action by the court." See Galloway 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 motion to dismiss of Bank of America is misplaced. For technical reasons under Rule 59(e), estoppel, and for broader considerations of fundamental fairness and Due Process, it should be denied.

Respectfully submitted,

Date: April 8, 2015



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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2015-000523

Unpublished Opinion No. 2016-UP-368
Filed July 20, 2016

Overland, Inc., d/b/a Land Rover Greenville..... Appellant,

vs.

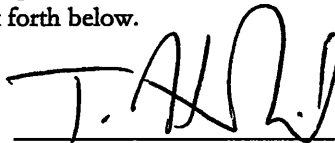
Lara Marie Nance, Charlie Andrew Nance, Roger Fields,
Synovus Financial Corporation, d/b/a NBSC, Branch Banking
and Trust Company, Bank of America Corporation, and
SunTrust Banks, Inc. Defendants,

Of whom, Lara Marie Nance, Charlie Andrew Nance, Bank of America Corporation, and SunTrust
Banks, Inc. are the Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the Petition for Rehearing on the Respondents, Bank of America Corporation and SunTrust Banks, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on August 2, 2016, addressed to its attorneys of record at their offices and in the particular manners set forth below.

By:



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The South Carolina Court of Appeals

Overland, Inc., d/b/a Land Rover Greenville, Appellant,

v.

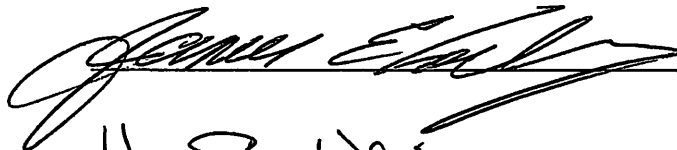
Lara Marie Nance, Charlie Andrew Nance, Roger Fields,
Synovus Financial Corporation d/b/a NBSC, Branch
Banking and Trust Company, Bank of America
Corporation, and SunTrust Banks, Inc., Defendants,

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


Appellate Case No. 2015-000523

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

FILED

September 23, 2016

cc:

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James W. Sheedy, Esquire

Susan Elizabeth Driscoll, Esquire

W. Howard Boyd, Jr., Esquire

Carl F. Muller, Esquire

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The Honorable Letitia H. Verdin