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Oct 24 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Darlington County
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge
Civil Action No. 2024-CP-16-00922

Appellate Case No. 2025-001729

Adams Outdoor Advertising Limited Partnership.....Appellant,

v.

West & Joyce, LLC, successor in interest to West Oil Company.....Respondent.

CORRECTED MOTION TO DISMISS APPEAL
(only adding Exhibit Numbers)

I) No Issue Preservation: Post-Trial Motion Cannot Be Used To Raise Issue for First Time

This action was initiated by the Appellant, as a commercial billboard tenant, *seeking damages* against the Respondent landlord *solely* for an alleged breach of the lease contract with regard to an alleged right of first refusal to purchase the leased real property. The Complaint did not seek any injunctive relief to protect any alleged remaining property interest in the leased property or its structures. **Exhibit 4** (Complaint filed 9/19/2024).

The Respondent answered and asserted various counterclaims including a claim to a declaratory judgment “finding that [Respondent] has a right to remove and destroy any structures, including the Billboard.....” **Exhibit 5** (Answer and Counterclaim filed October

25, 2024).

Thereafter, the Respondent moved for summary judgment (**Exhibit 13**, Motion filed 1/13/2025) on the Plaintiff's claim of breach and further asserting that the lease had terminated and that Appellant had no further right to use the billboard structure. In support of its motion, the Respondent submitted the affidavit of member Alexander West (**Exhibit 12**, originally filed January 13, 2025) which stated in part (¶9): "The Lease expired on October 1, 2024 and West & Joyce decided not to extend the Lease. [Appellant] was reminded of the termination date of the Lease and it requested that the [Appellant] remove the Billboard from the Billboard Property. The [Appellant] failed to remove the Billboard as requested." West Affidavit also resubmitted as Exhibit B to Memorandum filed February 10, 2025. **Exhibit 8.**

The Appellant cross-moved for summary judgment (**Exhibit 14**, filed 2/4/25) only on its sole claim of breach -- related to the alleged sale and right of first refusal to purchase for the billboard real property. The January West affidavit had also confirmed that the billboard property (TMS 058-00-01-167) had not been sold at all, but only the adjacent convenience store property (TMS 058-00-01-101) had been sold. **Exhibit 12**, Affidavit ¶¶ 2-10.

The Appellant failed to address the lease termination raised by Respondent's motion and Respondent's affidavit -- either in its motion filings or in its argument on February 10, 2025. Appellant chose to focus its entire argument on its sole claim that it had a right of first refusal to purchase the combined billboard and convenience store property and the damages claim that this right of first refusal had been breached by a sale of the convenience store property -- Appellant placed all its eggs in the theoretical basket that the properties were somehow combined and *did not offer any response to the affidavit* stating that the lease was terminated and that a billboard removal opportunity had been provided.

The trial court's order of summary judgment was entered on April 9, 2025. **Exhibit 9.** Appellant's Rule 59(e) Motion to Alter or Amend the Judgment was filed on April 21, 2025 (the first non-weekend day after the 10th day). **Exhibit 15.** Appellant's Rule 59(e) Motion raised, *for the first time*, the Appellant's claim to ownership of the billboard structure located on the Respondent's real property. Indeed, this is the only issue raised in Appellant's post-judgment motion.

In its supporting memorandum (**Exhibit 7**, filed May 12, 2025), the Appellant argued that there was "no legal basis" for ruling that the Respondent owned the billboard. But there was the West affidavit supporting that the lease had terminated and that affidavit went unaddressed by the Appellant, until after the trial Court's ruling; the Appellant choosing to rely solely on its argument that a right of first refusal to purchase, the combined properties, had been breached.

It is well settled that a party may not rest in the face of affidavit support for a Motion for Summary Judgment. *Kitchen Planners, LLC v. Friedman*, 440 S.C. at 463, 892 S.E.2d 297, 301 (2023) (in response to a motion for summary judgment, opposing party is obliged to come forward with contrary evidence of the existence of a genuine issue of material fact.). "[It] is not sufficient for a party to create an inference that it is not reasonable or an issue of fact that is not genuine." *Id.*, 440 S.C. at 463, 892 S.E.2d at 301 (*quoting Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). As Rule 56(c) mandates, *the party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts"* but "must come forward with specific facts showing that there is a genuine issue of fact for trial." *Id.*, 440 S.C. at 461, 892 S.E.2d at 300 (internal quotations omitted) (emphasis added).

It is also well settled that a party may not, for the first time, raise an issue for the first

time in post-trial motions; such an issue is not preserved. *Kiawah Property V. Public Service*, 359 S.C. 105, 597 S.E.2d 145 (S.C. 2004); *Peterson v. Porter*, 389 S.C. 148, 152, 697 S.E.2d 656, 658 (Ct. App. 2010) (holding appellant failed to preserve issue for review where appellants raised the employer-employee argument in his motion to reconsider but failed to raise it during the summary judgment proceedings); *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App. 1999); *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct.App.1995) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment); see also *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 468 S.E.2d 633 (1996) (a party may not raise an issue for the first time in a motion for a new trial).¹

Appellant did, in support of its Rule 59(e) Motion to Alter or Amend, submit a Memorandum (**Exhibit 7**) which included an October 14, 2024 Notice of Default letter and a November 1, 2024 Notice of Trespass letter – but these documents had not been offered previously and the issue of lease termination, raised by Respondent’s affidavit had also not been addressed by Appellant.

II) Lack of Appellate Jurisdiction: Because the Post-Trial Motion Was Improper, It Failed To Toll Time for Appeal

The trial court’s order of summary judgment was entered on April 9, 2025. **Exhibit 9**. Appellant’s Rule 59(e) Motion to Alter or Amend the Judgment was filed on April 21, 2025 (the first non-weekend day after the 10th day). **Exhibit 15**. While the filing of a proper Rule 59(e) Motion normally stays the time for appeal, SCRCP 59(f), it is also well settled that an improper

¹ Respondent also raises the preservation issue now to avoid any presumption of preservation – or waiver. *McCormick v. England*, 328 S.C.627, 494 S.E.2d 431 (Ct. App. 1997). Trial counsel for Respondent did note at the Rule 59(e) Motion hearing that the Appellant’s “took a chance ... to leave [the Billboard] up and go with the argument that they had a right to buy this land.”

or unneeded Rule 59(e) Motion does not stay the time for appeal. *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004); *Collins Music Co. v. IGT*, 353 S.C. 559, 579 S.E.2d 524 (Ct.App.2002). While the *Elam* and *Collins Music Co.* line of cases dealt with successive or unneeded Rule 59(e) Motions instead of “new issues”, the raising of new issues post-trial is equally improper as noted above. The preserved issues were already ripe for appeal and raising new issues by Rule 59(e) only thwarts judicial economy.

The time for appeal from the April 9, 2025 Summary Judgment Order was 30 days under SCACR 203(b)(1) which would have run on Friday, May 9, 2025. This appeal was filed with the appellate court on August 28, 2025. Accordingly, because Appellant chose to only address the theory of breach of lease in its argument and presentation to the trial court on the cross-motions for summary judgment; it needed to appeal that ruled-upon theory by May 9, 2025 – and raising an unpreserved issue for the first time by Rule 59(e) Motion did not toll the time for appeal.

Accordingly, no preserved issued has been timely appealed and this appeal should be dismissed.²

October 24, 2025

Florence, South Carolina

By: /s/ J. Rene Josey

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² *In the alternative*, the Respondent suggests that tolling only be allowed for those issues raised by Appellant prior to its Rule 59(e) motion – mainly, its theory seeking damages for an alleged breach of the right of first refusal to purchase the combined billboard and convenience store properties.