

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Brian M. Gibbons, Circuit Court Judge

Appellate Case Number: 2020-000982

Broad River Campground, LLC Appellant,

v.

Jenkinsville Water Company, Inc. Respondent.

**RESPONDENT JENKINSVILLE WATER COMPANY'S
MOTION TO DISMISS THE APPEAL**

Pursuant to Rule 240 of the South Carolina Appellate Court Rules (“SCACR”), Respondent Jenkinsville Water Company (“JWC” or “Company”) moves to dismiss this Appeal. For the reasons stated in greater detail below, the Notice of Appeal filed by Appellant Broad River Campground (“Broad River” or “BRC”) on July 10, 2020, is untimely by 40 days, thereby depriving this Court of appellate jurisdiction to consider the merits of BRC’s claims. Accordingly, the Court should dismiss this Appeal, in its entirety, and with prejudice.

FACTUAL AND PROCEDURAL BACKGROUND

Through a complaint and amended complaints, Broad River asserted multiple causes of action against JWC in the Circuit Court. On February 27, 2019, the Circuit Court entered an Order Granting in Part and Denying in Part JWC’s Motion for Summary Judgment (“First Summary Judgment Order”) on BRC’s claim alleging violation of the South Carolina Unfair

Trade Practices Act (“SCUTPA”).¹ BRC did not appeal the First Summary Judgment Order and did not include it in Broad River’s untimely Notice of Appeal herein.

At a pre-trial hearing that the Circuit Court held on January 29, 2020, JWC renewed its previous Motion for Summary Judgment on the remaining claims for breach of contract and breach of contract accompanied by a fraudulent act.

On April 30, 2020, the Circuit Court issued an Order Granting JWC’s Renewed Motion for Summary Judgment and dismissed the case in its entirety with prejudice (“Final Summary Judgment Order”). A copy of this Order is attached hereto as **Exhibit 1**.

The Circuit Court electronically entered the Final Summary Judgment Order with the Fairfield County Clerk of Court’s Office, and notice of the entry of the Order was simultaneously served electronically on counsel for all parties. A copy of the notice of entry of that Order is attached hereto as **Exhibit 2**. The Circuit Court and the parties regularly, if not exclusively, served and filed pleadings electronically throughout the case, without any problems or controversy regarding service or service dates.

On May 27, 2020, Broad River filed a Motion to Alter or Amend the Final Summary Judgment Order (“Motion to Alter or Amend”)—27 days after BRC received notice of the Final Summary Judgment Order. A copy of this motion is attached hereto as **Exhibit 3**.

JWC filed a Response to the Motion to Alter or Amend on the limited ground that the Motion was untimely under Rule 59(e) of the South Carolina Rules of Civil Procedure

¹ Broad River also filed a complaint and subsequently an amended complaint alleging SCUTPA violations against individual Defendants Gregory Ginyard and Joseph McBride, both of whom served on JWC’s Board of Trustees. The Circuit Court eventually consolidated that case with the instant case. The First Summary Judgment Order granted Ginyard and McBride’s Motion for Summary Judgment and dismissed BRC’s claims against them with prejudice. Broad River did not appeal the First Summary Judgment Order, and Ginyard and McBride are not parties in this Appeal.

("SCRCP"). A copy of the Response is attached here to as **Exhibit 4**. Broad River did not reply to JWC's Response.

On June 11, 2020, the Circuit Court entered an Order Denying Broad River's Motion to Alter or Amend ("June 11, 2020, Order"), ruling that the Motion was untimely filed, and therefore, the Circuit Court lacked jurisdiction to consider the Motion. A copy of this Order is attached hereto as **Exhibit 5**.

On July 10, 2020, Broad River filed its Notice of Appeal in this Court challenging the Final Summary Judgment Order and the June 11, 2020, Order. BRC filed the Notice of Appeal 40 days late and 70 days receiving notice of the Final Summary Judgment Order. A copy of the Notice of Appeal is attached hereto as **Exhibit 6**.

ARGUMENT

Broad River did not timely file the Notice of Appeal, and this Court lacks jurisdiction to consider this Appeal

The Court should dismiss this Appeal because Broad River untimely filed it 40 days late. Rule 203(b)(1), SCACR, states that "[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."

The timeliness of the filing and service of a notice of appeal is a mandatory jurisdictional requirement that cannot be waived or extended and that an appellant must satisfy before the Court may adjudicate the merits of any appeal. *See Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) ("service of the notice of intent to appeal is a jurisdictional requirement.").²

² This 30 day deadline for filing a timely notice of appeal remained absolute even during the uncertain times related to the COVID-19 virus. Pursuant to the South Carolina Supreme Court's Order dated March 20, 2020, regarding the "Operation of the Appellate Courts during the Coronavirus Emergency," any extensions of deadlines or forgiveness of procedural defaults allowed during the pandemic specifically did not apply to the time deadlines to serve the notice of appeal. *See Appellate Order*, at 1(1)&(2) ("**Lawyers and litigants are warned that this**

The South Carolina Supreme Court has addressed the prerequisite of timely filing a notice of appeal, ruling that:

The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. Rule 203(b)(1), SCACR. **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. S.C. Dep’t of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (emphasis added); see also Rule 205, SCACR (“Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal.”); Rule 263(b), SCACR (“The time prescribed by the [South Carolina Appellate Court] Rules for performing any act **except** the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof.”) (emphasis added); *Hill v. S.C. Dep’t of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) (“The service of a notice of appeal is a jurisdictional requirement, and **the time for service may not be extended by this Court.**”) (emphasis added); *Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000) (“This Court has consistently stated that service of the Notice of Appeal is a jurisdictional requirement, and this Court has **no authority** to extend or expand the time in which the Notice of Appeal must be served.”) (emphasis added).

Stated differently, Rule 203, SCACR, “requires a party to serve his notice of appeal within 30 days after receiving written notice of the entry of a final order or judgment, and failure to do so divests [an appellant court] of subject matter jurisdiction and results in dismissal

extension does not extend the time to serve a notice of appeal under Rules 203, 243, and 247, SCACR.”) (emphasis added).

of the appeal.” *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791, 795 (2008).³

Broad River’s Notice of Appeal expressly stated that it received written notice of the Final Summary Judgment Order on April 30, 2020. Therefore, to timely comply with Rule 203, Broad River had to file its Notice of Appeal on or before June 1, 2020.⁴ However, Broad River did not file its Notice of Appeal until July 10, 2020, which was 40 days too late. Therefore, Broad River’s Notice of Appeal was untimely, and this Court lacks jurisdiction to consider this Appeal.

³ This Court’s recent opinion of *Lemmons v. Macedonia Water Works, Incorporated* does not affect the untimeliness of BRC’s Appeal for several reasons. *See Lemmons*, 2020 S.C. App. LEXIS 67 (Ct. App, July 22, 2020) (finding that the trial court’s entry of judgment, via electronic filing, may not always constitute “receipt” of the notice of judgment as required by Rule 203(b)(1), SCACR).

First, the South Carolina Supreme Court has ruled that “an email providing written notice of entry of an order or judgment for purposes of Rule 203(b)(1), SCACR, triggers the time to appeal as long as the email is received from the court, an attorney of record, or a party.” *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 422 S.C. 211, 810 S.E.2d 856, 859 (2018). The Circuit’s electronic transmission to Appellant’s attorneys of the Final Summary Judgment Order on April 30, 2020, was sufficient notice triggering the time to appeal, under Rule 203 and *Wells Fargo*.

Second, Broad River admitted in its Notice of Appeal that it received notice of the entry of the Final Summary Judgment Order on April 30, 2020, thereby precluding BRC from now contending otherwise. *See Johnson v. Alexander*, 413 S.C. 196, 775 S.E.2d 697, 700 (2015) (“Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.”) (citation omitted).

Third, unlike in *Lemmons*, Appellee JWC specifically challenged the timeliness of Broad River’s Motion to Alter or Amend in the Response that JWC filed with the Circuit Court on June 5, 2020.

Finally, Appellee JWC and the Circuit Court created a written record notifying Broad River that the Motion to Alter or Amend was untimely, thus further differentiating BRC’s untimely Appeal from *Lemmons* and precluding Broad River from now contending that it did not receive notice of the entry of the Final Summary Judgment Order on April 30, 2020.

⁴ The 30th day after April 30, 2020, was Saturday, May 30, 2020. Pursuant to Rule 6(a), SCRCF, Broad River’s deadline was thereby extended until the next business day on Monday, June 1, 2020.

Broad River’s untimely Motion to Alter or Amend did not toll the 30 day deadline imposed by Rule 203(b)(1), SCACR

Broad River’s untimely Motion to Alter or Amend did not toll and cannot save its untimely Notice of Appeal. Rule 203(b)(1), SCARC, provides a limited exception, which is not applicable in this Appeal, for the tolling of the mandatory 30 day deadline for filing the notice of appeal. Rule 203(b)(1) states:

[Only] [w]hen a **timely** motion for judgment n.o.v. (Rule 50, SCRCPP), motion to alter or amend the judgment (Rules 52 and 59, SCRCPP), or a motion for a new trial (Rule 59, SCRCPP) has been made, the time for appeal for all parties shall be stayed and shall run from the receipt of the written notice of entry of the order granting or denying such motion.

(emphasis added). The only requirement for this tolling provision to apply, and thus stay the 30 day requirement to file the notice of appeal under Rule 203(b)(1), SCACR, is that any applicable motion must be **timely** filed.

As Broad River admitted in its Notice of Appeal, its counsel received “written notice of the entry of [Final Summary Judgment Order] on April 30, 2020.” *See Notice of Appeal*. Further, Broad River indisputably filed its untimely Motion to Alter or Amend on May 27, 2020—which was 27 days after receiving notice of the Final Summary Judgment Order.

A movant must file a Rule 59 motion no later than 10 days after receiving notice of the judgment. *See* Rule 59, SCRCPP (“A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.”); *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018) (“The ten-day limit for serving a Rule 59(e) motion is an absolute deadline.”).

Because the Rule 59(e) deadline is absolute and Broad River did not move to alter or amend within 10 days after receiving written notice of the entry of the Final Summary Judgment Order, BRC's Motion to Alter or Amend was 16 days too late and thus untimely.⁵

Accordingly, the Circuit Court lacked jurisdiction to extend the deadline or to consider the merits of BRC's Motion to Alter or Amend. *See Overland*, 423 S.C. at 256, 815 S.E.2d at 432 (“A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served, nor does a trial court have any power to grant the moving party an extension of time in which to file a Rule 59(e) motion.”).

To be timely, Broad River had to file its Motion to Alter or Amend on or before May 11, 2020.⁶ After that deadline expired, the Circuit Court no longer had jurisdiction to consider the merits of Broad River's Motion. *See Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (“When no timely Rule 59 motion was made nor timely *sua sponte* order filed under Rule 59(e), the [Order] ‘matured’ into a final judgment...because the trial judge no longer had jurisdiction over the matter.”); *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) (“Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.”).

⁵ This 10 day deadline for filing a timely Motion to Alter or Amend remained absolute even during the uncertain times related to the COVID-19 virus. Pursuant to the South Carolina Supreme Court's Order dated April 3, 2020, regarding the “Operation of the Trial Courts during the Coronavirus Emergency,” any extensions of deadlines or forgiveness of procedural defaults allowed during the pandemic specifically did not apply to the time deadlines of Rule 59. *See Trial Court Order*, at (c)(9)(D) (“The provisions of (A) through (C) above **shall not extend or otherwise affect the time for taking action under Rules 50(b), 52(b), 59, and 60(b), SCRC**...” (emphasis added).

⁶ The 10th day after April 30, 2020, was Sunday, May 10, 2020. Pursuant to Rule 6(a) of the South Carolina Rules of Civil Procedure, Broad River's deadline thereby extended to the next business day on Monday, May 11, 2020.

Broad River untimely filed its Motion to Alter or Amend 16 days late, and the April 30, 2020, Order already had become the final judgment. *See Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018) (“The failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment, **and the aggrieved party's only recourse is to file a notice of intent to appeal.**”) (emphasis added).

Accordingly, on June 11, 2020, the Circuit Court dismissed Broad River’s Motion to Alter or Amend, correctly ruling that the trial court lacked jurisdiction over the Motion because it was untimely filed.

Broad River erroneously contended, in its Notice of Appeal, that its “Motion to Alter or Amend the April 30, 2020, order was timely filed on May 27, 2020.” To the contrary, the undisputed timeline of events, long standing South Carolina precedent, and the findings from the Circuit Court conclusively show that Broad River filed its Motion to Alter or Amend 16 days too late.

Because BRC did not timely file the Motion to Alter or Amend, the 30 day deadline for Broad River to file its Notice of Appeal, pursuant to Rule 203(b)(1), SCACR, remained absolute and was not tolled by the filing of the untimely Motion to Alter or Amend. Therefore, Broad River had to file its Notice of Appeal no later than June 1, 2020, and instead filed it 40 days too late on July 10, 2020.

Accordingly, this Court lacks subject matter jurisdiction to consider this Appeal, and the Court must dismiss it. *See USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791, 795 (2008) (Appellate Rule 203 “requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so

divests [an appellant court] of subject matter jurisdiction and results in dismissal of the appeal.”).

CONCLUSION

Broad River filed its Notice of Appeal on July 10, 2020, which was 70 days after receiving written notice of the Final Summary Judgment Order. Although Broad River filed a Motion to Alter or Amend the Final Summary Judgment Order on May 27, 2020, that filing was 16 days too late and thus untimely, and the Circuit Court correctly ruled that it lacked jurisdiction to consider that Motion.

Thus, the 30 day deadline for filing the notice of appeal remained absolute and was never tolled, and it expired on June 1, 2020. Thus, Broad River filed its Notice of Appeal 40 days late on July 10, 2020.

Broad River’s Notice of Appeal is untimely, and this Court lacks subject matter jurisdiction and thus should dismiss this Appeal, per Rule 203 of the SCACR.

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EXHIBIT 1

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FAIRFIELD)
)
 Broad River Campground, LLC,)
)
 Plaintiff,)
)
 v.)
)
 Jenkinsville Water Company, Inc.,)
)
 Defendant.)
)

IN THE COURT OF COMMON PLEAS
 SIXTH JUDICIAL CIRCUIT

C/A No. 2014-CP-20-00349

**ORDER GRANTING DEFENDANT’S
 RENEWED MOTION FOR SUMMARY
 JUDGMENT**

This matter comes before the Court on Defendant Jenkinsville Water Company’s (“JWC” or “Company”) Renewed Motion for Summary Judgment (“Motion”).

On January 29, 2020, the Court heard oral arguments regarding JWC’s Renewed Motion for Summary Judgment. At the hearing, Glenn E. Bowens of the Bowens Law Firm, P.C., and Jonathan Goode of the Law Office of Jonathan Goode, LLC, represented Plaintiff Broad River Campground, LLC (“Plaintiff” or “BRC”), and Reginald W. Belcher and Mark B. Goddard of Turner, Padget, Graham & Laney, P.A. represented Defendant JWC. After hearing oral arguments, the Court asked for further briefing on the issues raised in the Motion. The attorneys filed several memoranda, including exhibits, in support of their clients’ respective positions.

After carefully considering the memoranda submitted by the parties, the evidence presented, the arguments of counsel, and the applicable law, the Court hereby **GRANTS** Defendant JWC’s Renewed Motion, and dismisses this case **with prejudice**.

PROCEDURAL HISTORY¹

The procedural history of this case since February 2019 is as follows:

1) On February 27, 2019, the Court issued the Summary Judgment Order, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, granting Summary Judgment and dismissing with prejudice Plaintiff's cause of action for alleged violation of the South Carolina Unfair Trade Practices Act, South Carolina Code § 39-5-10, *et seq.*, in the above-captioned lawsuit and further dismissed with prejudice Defendants Gregory Ginyard and Defendant Joseph McBride in Civil Action Number 2016-CP-20-256.

2) The Court held a pretrial hearing on January 29, 2020, to consider all pretrial issues before the commencement of a jury trial that was scheduled to begin on February 3, 2020, for Plaintiff's remaining causes of action for breach of contract, breach of contract accompanied by a fraudulent act, and declaratory judgment. Both Parties timely submitted pretrial briefs and motions prior to the pretrial hearing.

3) At the pretrial hearing held on January 29, 2020, Plaintiff withdrew its demand for a jury trial with the consent of Defendant.

4) Among its pretrial motions, Defendant renewed its previous Motion for Summary Judgment, contending that the Parties never entered a valid and/or legally binding contract based, in part, on new evidence that emerged since the Court issued its Summary Judgment Order in February 2019.

¹ This case has a long and complex procedural history. The Court's previous Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment dated February 27, 2019 (the "Summary Judgment Order") fully outlined the case's procedural history through February 2019. In the interest of brevity, the Court fully incorporates the Procedural History from the Summary Judgment Order herein.

5) The Parties have thoroughly briefed and argued, and the Court has considered every issue through numerous hearings, briefs, and exhibits over the past years.

FINDINGS OF FACT²

1) Broad River Campground was constructed in phases over several years with the first phase constructed in 2009 containing 46 campsites.

2) On October 28, 2009, Defendant JWC wrote a letter to Plaintiff BRC's engineer outlining JWC's commitment to serve phase 1 or 46 campsites at 175 gallons per day ("gpd") for a total of 8,050 gpd, and outlining JWC's willingness to consider increasing its commitment to serve future phases ("October 2009 Letter").

3) Plaintiff BRC did not agree to the restrictions on future expansion outlined in the October 2009 Letter.

4) In 2014, Plaintiff BRC demanded that JWC approve another expansion of BRC's campground, which would have added approximately 50 additional campsites. This expansion request did not seek increase in the commitment of water from JWC, and instead, Plaintiff BRC requested JWC change the water usage rate from 175 gpd to 53 gpd per campsite.

5) Plaintiff filed its original Complaint on September 26, 2014, alleging that the October 2009 Letter was the only contract between the Parties.

6) Plaintiff filed its Second Amended Complaint on June 29, 2018, alleging for the first time that JWC's By-Laws, Water Usage Agreement, and/or an alleged oral agreement (that

² The Court fully incorporates herein by reference the Findings of Fact from the Summary Judgment Order that are now the law of the case. *See Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 754 S.E.2d 486 (2014); *see also In re Morrison*, 321 S.C. 370, 372, 468 S.E.2d 651, 652 (1996) (an unappealed ruling becomes the law of the case and precludes further consideration of the issue).

was purportedly formed in 2009) also constituted contracts between the Parties, in addition to the October 2009 Letter.

7) The Second Amended Complaint alleged that Plaintiff intended to expand its campground via a five-year project, beginning in 2009, and that Plaintiff's alleged contracts with JWC were part of that five-year expansion plan.

8) Dee Melton, co-owner of Plaintiff BRC, testified in a deposition in December 2015, that the October 2009 Letter was the only alleged contract between Plaintiff BRC and JWC, and he was not aware of any other contracts between Plaintiff BRC and JWC.

9) When Melton testified in December 2015 that the October 2009 Letter was the only alleged contract between the Parties, he knew of the existence of the By-Laws and the Water Usage Agreement because BRC produced those documents to JWC, in pre-trial discovery, months before Melton testified.

10) Similarly, when Melton testified in December 2015 that the October 2009 Letter was the only alleged contract between the Parties, he was fully aware of the discussions that supposedly formed the alleged 2009 oral contract, as he directly was involved in those discussions in 2009.

11) Plaintiff BRC's expert witness, Larry Umberger, also testified, during his deposition in December 2019, that he was unaware of any contracts between the parties.

During pre-trial discovery, the Parties produced only a generic, unsigned copy of a Water Usage Agreement. The Parties never produced an executed copy of any Water Usage Agreement during pre-trial discovery and likewise never produced a signed copy to the Court. Plaintiff never produced any evidence proving that JWC agreed to the terms and conditions of and/or intended to be bound by the generic, unsigned Water Usage Agreement. Likewise,

Plaintiff produced no evidence establishing the material terms and conditions of any legally binding verbal agreement between the Parties regarding water usage. Accordingly, the Court finds that the Parties never entered into a valid, legally binding contract regarding water usage.

SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *See George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

“[I]n cases applying the preponderance of 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 Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

“Summary judgment should be granted when plain, palpable and undisputable facts exist on which reasonable minds cannot differ.” *NationsBank v. Scott Farm*, 320 S.C. 299, 302-03, 465 S.E.2d 98, 100 (Ct. App. 1995). “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.” *Id.* at 303, 465 S.E.2d at 100. “In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial.” *Id.* “Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party’s case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.” *Id.*

The nonmoving party’s “evidence must amount to more than speculation and conjecture” to survive summary judgment. *McKnight v. South Carolina Dept. of Corrections*, 385 S.C. 380,

684 S.E.2d 566, 570 (Ct. App. 2009); *see also Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) (addressing summary judgment and ruling that a “jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. . . . ‘However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation.’”) (citation omitted).

LEGAL CONCLUSIONS

October 2009 Letter Was Not a Valid and Enforceable Contract.

Defendant JWC is entitled to summary judgment and a dismissal with prejudice as to the breach of contract claim because there was no meeting of the minds as to the essential terms of the October 2009 Letter.

To prove the existence of a valid and enforceable contract, “there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1969).

The right to expand Plaintiff’s campground, which could not occur if JWC continued to estimate Plaintiff’s water usage at 175 gallons per day per campsite, is the primary subject at issue in this litigation.

The October 2009 Letter stated that:

At this time all [JWC] can commit to serve is...46 campsites. Average daily demand for each of the travel trailer sites is estimated to be 175 gallons per day (‘gpd’) per site for a total of 8,050 gallons per day. Water consumption is not to exceed this amount on an average day, nor are the number of campsites connected to the water system to exceed 46 without prior written

approval of the Jenkinsville Water Company. Should you wish to expand the campground, the Water Company will consider increasing our commitment, but only if that can be done without negatively impacting other customers on the water system.

Plaintiff asserted, through its admissions in its Pre-Trial Brief and through the deposition testimony of its expert witness, Larry Umberger, that it never agreed to any restrictions being placed on Plaintiff BRC's right to expand the campground. Therefore, since the Parties never agreed to all of the material terms of the October 2009 Letter, there was no meeting of the minds, and the October 2009 Letter is not a valid and enforceable contract. *See Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978).

Judicial Estoppel

Defendant also is entitled to summary judgment and a dismissal with prejudice as to the breach of contract claim because the October 2009 Letter was not a valid and enforceable contract and Plaintiff is judicially estopped from asserting that any other alleged agreements serve as the basis for its breach of contract claim.

The October 2009 Letter was not a valid and enforceable contract because there was not a meeting of the minds as to all material terms of the contract. Plaintiff's Second Amended Complaint alleged that the parties entered into three other contracts: (1) JWC By-Laws; (2) a Water User agreement; and (3) a 2009 oral promise by JWC to provide 35,000 - 40,000 gallons of water per day for up to 200 campsites, in phases to occur in 2009, 2012, and 2014.

In December 2015, Plaintiff's co-owner, Dee Melton, testified as follows:

Q. [Referencing the October 2009 Letter] Is this document the basis for the campground's claim that the campground and water company had a contract?

A. I see this document as our contract.

....

Q. Is there any other document that the campground believes constitutes a contract between the water company and the campground?

A. I would have to check with my attorney on that.

Q. Well, based on your knowledge, do you think there is? Is this, in other words, is this the only written contract you're aware of?

A. I'm not sure. A lot of things can be implied as contracts. I would refer that to my attorney. I do recognize this as our contract, for sure.

...

Q. Are there any verbal or oral promises that the campground believes constitutes a contract between the water company and the campground?

A. I'm not sure about that. No.

Q. If so, would you have alleged that in the Complaint?

A. I think I would have.

Q. If there were any other written contracts besides [the October 2009 Letter] would you have referenced that in the complaint?

A. I think we would have.

(Melton Tr. pp. 34-35).

In April 2015, in response to Defendant JWC's discovery requests, Plaintiff produced a copy of JWC's By-laws, which expressly and repeatedly referenced a "water user agreement." Further, Plaintiff alleges it engaged in oral negotiations in July 2009 for JWC to serve all phases on the campground. At the time of his deposition, Plaintiff's co-owner, Dee Melton, should have been aware of the alleged existence of these three purported contracts, yet he did not identify any of them in response to direct questions from Defendant's counsel.

Judicial estoppel “precludes a party from adopting a position in conflict with one earlier taken in the same litigation.” *Commerce Ctr. Of Greenville, Inc. v. W. Powers McElveen & Assocs.*, 347 S.C. 545, 554 n. 6, 556 S.E.2d 718, 723, n.6 (Ct. App. 2001). “Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements or contentions made under oath, is prohibited from adopting an inconsistent posture.” *Quinn v. The Sharon Corp.*, 343 S.C. 411, 416, 540 S.E.2d 474, 476 (Ct. App. 2000) (Anderson, J., concurring).

“When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him....The truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly discovered evidence.” *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997).

Plaintiff’s change in its position as to the underlying contract between the parties was not the result of newly-discovered evidence, as this information was readily available and known to Plaintiff prior to the December 2015 deposition. Therefore, Plaintiff is judicially estopped from asserting any other contracts as the basis of its breach of contract claim.

Statute of Limitations

Defendant also is entitled to summary judgment and a dismissal with prejudice as to the breach of contract claims because the applicable statute of limitations barred Plaintiff’s claims for breach of contract and breach of contract accompanied by a fraudulent act based on the By-Laws, Water-User Agreement, and/or the alleged 2009 oral contract.

Breach of contract claims are governed by a three year statute of limitations. *See* S.C. Code § 15-3-530(1). The three -year statute of limitations applicable to a breach of contract

claim also governs a claim for breach of contract accompanied by a fraudulent act. *Wilson Group v. Quorum Health Resources*, 880 F. Supp. 416, 424, n.6 (D.S.C. 1995).

Plaintiff filed its original Complaint on September 26, 2014. Plaintiff filed its Second Amended Complaint on June 29, 2018, alleging the By-Laws, Water User Agreement, and/or an oral agreement constitute the operative contract for its breach of contract and breach of contract accompanied by fraud claims.

An amendment to a pleading relates back to the original pleading only if “the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings.” *Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 SC. 207, 222, 525 S.E.2d 888, 897 (Ct. App. 1999). To properly relate back to the date of the original filing, the new claim must be “logically related to the matters originally pleaded so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired.” *Id.*

The By-Laws, Water User Agreement, and the alleged oral contract were separate and distinct allegations with completely different terms and conditions from the October 2009 Letter. By originally only pleading the October 2009 Letter as the operative contract, Plaintiff did not place Defendant on notice that these three additional alleged agreements could serve as the operative contracts for the Plaintiff’s contractual claims. Therefore, these three additional alleged contracts did not relate back to the initial Company that Plaintiff filed on September 26, 2014.

Plaintiff alleged the breach of any alleged contract occurred in the Summer of 2014 when Defendant JWC denied Plaintiff BRC’s request to expand its campground. Plaintiff BRC was required to file its claims for breach of contract and breach of contract accompanied by

fraudulent act based on the By-Laws, Water User Agreement, or the alleged oral contract within three years of the alleged breach. Plaintiff did not file the Second Amended Complaint alleging these new contracts within three years of the alleged breach, and therefore, the applicable statute of limitations barred those claims.

No Valid Contracts or Breaches

Defendant is also entitled to summary judgment and a dismissal with prejudice as to the breach of contract claims since there were no valid and enforceable contracts between the parties and/or no breaches of any alleged contract.

“The elements for a breach of contract are the existence of the contract, its breach, and damages caused by such a breach.” *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015). Plaintiff has not presented evidence to support each of these required elements for its breach of contract claim.

Oral Contract – Defendant is entitled to summary judgment on Plaintiff BRC’s allegation that the Parties entered into an oral contract in July 2009 because the Statute of Frauds prohibits any such contract.

The Statute of Frauds prohibits lawsuits based on a contract “not to be performed within the space of one year” unless the contract is “signed by the party to be charged.” S.C. Code Ann. § 32-3-10(5). Parties may not orally modify a contract required to be in writing by the South Carolina Statute of Frauds. *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989).

There is no evidence of a writing signed by JWC wherein it agreed to provide the 35,000 – 40,000 gpd to all phases of the campground through five plus years of construction. Therefore,

this alleged oral contract, which purportedly was to be performed throughout Plaintiff's five-year expansion project, failed to satisfy the Statute of Frauds and is void and unenforceable.

By-Laws - Defendant is entitled to summary judgment on and dismissal with prejudice of Plaintiff BRC's breach of contract claim based on Defendant JWC's By-laws because, as a matter of law, the By-Laws did not constitute a valid, binding contract between the Parties.

Moreover, Defendant JWC followed and did not breach its By-laws. The relevant portion of JWC's By-Laws states:

Each member shall be entitled to purchase from the corporation pursuant to such agreements as may time to time be provided and required, such service as he may desire, subject to the provisions of these bylaws and to such rules and regulations as may be prescribed by the Board of Directors.

Plaintiff BRC alleged that this provision provides it the right to unlimited water usage, and Defendant JWC's denial of its expansion request breached this provision.

Plaintiff BRC's erroneous interpretation of the By-Laws disregarded the By-Laws' plain, unambiguous language indicating that member's water usage was subject to the limitations imposed by JWC. The October 2009 Letter, though not a legally binding contract, imposed strict daily water usage limitations on Plaintiff, which fully complied with the By-Laws and JWC's legal rights, per the statutory and common law application of the business judgment rule.

Likewise, the Summary Judgment Order, the Court previously ruled that: (1) Defendant JWC's actions in considering and denying Plaintiff's requested expansion in 2014 were consistent with its By-laws; and (2) JWC's Board's determination to continue to use the 175 gpd usage calculation for Plaintiff's 2014 expansion request followed JWC's third party engineers' advice and was a reasonable and appropriate approach. These factual findings are the law of the case and the Court must apply these findings of fact when considering this Motion. *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015).

“The doctrine of the law of the case prohibits issues that have been decided....from being relitigated in the trial court in the same case.” *Ross v. Medical Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997).

Defendant’s actions were consistent with its By-Laws, which did not constitute a legally binding contract, thereby entitling JWC to summary judgment and a dismissal with prejudice as to the breach of contract claim.

Water User Agreement – Defendant is entitled to summary judgment and a dismissal with prejudice as to Plaintiff’s allegation that Defendant JWC breached its Water Usage Agreement based on the Statute of Frauds and based on Plaintiff BRC’s failure to allege a specific breach.

Since there is no tangible evidence of an executed Water Usage Agreement or any allegation of a verbal water usage agreement, this alleged contract does not satisfy the requirements for South Carolina’s Statute of Frauds. S.C. Code Ann. § 32-3-10(5). Therefore, the alleged Water Usage Agreement is non-existent, void and not enforceable.

Even if a signed copy of the Water Usage Agreement was found in order to satisfy the Statute of Frauds, this Agreement cannot serve as the basis for Plaintiff’s contractual claims.

To survive a motion for summary judgment, Plaintiff must provide evidence to support each element of its cause of action. Plaintiff cannot rely merely on its allegations from the Complaint. *See Eadie v. Krause*, 381 S.C. 55, 64, n.5, 671 S.E.2d 389, 393, n. 5 (Ct. App. 2008). Plaintiff BRC has provided no specific evidence of the alleged breach beyond the vague allegations that the Agreement was breached. Plaintiff’s vague allegations of a breach do not create the necessary question of fact to survive Defendant BRC’s Motion.

Breach of Contract Accompanied by Fraud

Defendant is entitled to summary judgment and a dismissal with prejudice as to Plaintiff's claim for breach of contract accompanied by fraudulent act.

The elements for a breach of contract accompanied by a fraudulent act are: (1) breach of contract; (2) fraudulent intent relating to the breach of the contract and not merely its makings; and (3) fraudulent act accompanying the breach. *Conner v. City of Forest Acres*, 348 S.C. 454, 465-466, 560 S.E.2d 606, 612 (2002). Plaintiff has failed to show the existence of a valid and enforceable contract and/or its breach for the reasons outlined above. Without a valid and enforceable contract and its subsequent breach, Plaintiff's claim for breach of contract accompanied by a fraudulent act fails as a matter of law.

Declaratory Judgment Action

Defendant is also entitled to summary judgment and a dismissal with prejudice as to Plaintiff's request for a declaratory judgment because the declarations have either already been addressed by the Summary Judgment Order or are simply impermissible requests for advisory opinions from the Court.

Plaintiff's Second Amended Complaint requests declarations that: (1) JWC may refuse to issue the requested willing and able letter to DHEC; (2) JWC may refuse to approve the 49 campsites if there is no negative impact on existing customers, and (3) JWC can limit the amount of water a customer can purchase. Each of these declaration requests were addressed in the Factual Findings from the Summary Judgment Order. These Factual Findings are the law of the case and the issues cannot be relitigated at this time. *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015); *see also Ross v. Medical Univ. of S.C.*, 328 S.C. 51, 492 S.E.2d 62, 68 (1997).

Plaintiff BRC's Second Amended Complaint also seeks additional declarations that: (1) JWC may provide preferential treatment to residential customers over commercial customers in the provision of water service; (2) JWC is a residential water company; (3) if JWC is determined to be a residential water company, then the rights of its business customers to water service; and (4) JWC can cut back on the volume of water or turn off the water to a commercial customer.

The relief a party seeks is beyond the scope of a declaratory judgment when the issue is abstract rather than ripe for adjudication, and presents a court with nothing more than a vehicle rendering an advisory opinion. *Hitter v. McLeod*, 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980). Because Plaintiff's claims for breach of contract and breach of contract accompanied by a fraudulent act fail as a matter of law and are dismissed with prejudice for the reasons outlined above, there are no remaining issues between the parties that make these requested declarations ripe for adjudication. The requested declarations would settle no legal rights of the parties. As a matter of law, this Court declines to extend the declaratory judgment statute beyond its intended purpose to give the parties advisory opinions on these declarations.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED
as follows:

Defendant JWC is entitled to summary judgment and/or judgment as a matter of law. Accordingly, the Court **GRANTS** Defendant JWC's Renewed Motion for Summary Judgment on Plaintiff BRC's remaining claims for Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, and Declaratory Judgment, and dismisses this case **with prejudice**.

AND IT IS SO ORDERED.

Winnsboro, South Carolina

Dated: _____

Brian M. Gibbons, Chief Administrative Judge
Sixth Judicial Circuit



Fairfield Common Pleas

Case Caption: Broad River Campground Llc VS Jenkinsville Water Co Inc

Case Number: 2014CP2000349

Type: Order/Summary Judgment

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

EXHIBIT 2

Smith, Margaret

From: efiledonotreply@sccourts.org
Sent: Thursday, April 30, 2020 11:15 AM
To: Belcher, Reginald W.
Cc: Smith, Margaret
Subject: Courtesy NEF RE: 2014CP2000349

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2014CP2000349

Official File Stamp: 04-30-2020 11:15:11 AM
Court: CIRCUIT COURT
Common Pleas
Fairfield
Case Caption: Broad River Campground Llc VS Jenkinsville Water Co Inc
Document(s) Submitted: Order/Summary Judgment Order/Summary Judgment
Filed by or on behalf of: Brian M. Gibbons

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Jonathan McCoy Goode for Broad River Campground Llc
Mark Brandon Goddard for Jenkinsville Water Co Inc
Hannah Davis Stetson for Jenkinsville Water Co Inc
John J. Fantry, Jr.
Reginald Wayne Belcher for Jenkinsville Water Co Inc
Glenn E. Bowens for Broad River Campground Llc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Town of Winnsboro

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

# **EXHIBIT 3**



# **EXHIBIT 4**

|                                   |   |                                       |
|-----------------------------------|---|---------------------------------------|
| STATE OF SOUTH CAROLINA           | ) | IN THE COURT OF COMMON PLEAS          |
|                                   | ) |                                       |
| COUNTY OF FAIRFIELD               | ) | CIVIL ACTION # 2014-CP-20-349         |
|                                   |   |                                       |
| Broad River Campground, LLC,      | ) |                                       |
|                                   | ) |                                       |
| Plaintiff,                        | ) |                                       |
|                                   | ) | <b>DEFENDANT JENKINSVILLE WATER</b>   |
| vs.                               | ) | <b>COMPANY’S RESPONSE TO</b>          |
|                                   | ) | <b>PLAINTIFF’S MOTION TO ALTER OR</b> |
| Jenkinsville Water Company, Inc., | ) | <b>AMEND<sup>1</sup></b>              |
|                                   | ) |                                       |
| Defendant.                        | ) |                                       |
|                                   | ) |                                       |

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Defendant Jenkinsville Water Company, Inc. (“JWC” or “the Company”), by and through its undersigned counsel, respectfully submits the following Response to Plaintiff’s Motion to Alter of Amend filed on May 27, 2020 (“Plaintiff’s Motion”).<sup>2</sup>

On April 30, 2020, the Court issued an Order Granting Defendant JWC’s Renewed Motion for Summary Judgment (“Summary Judgment Order”). The Summary Judgment Order dismissed this case in its entirety with prejudice. The Summary Judgment Order was signed by the Honorable Brian M. Gibbons and e-filed by the Court on April 30, 2020. Counsel of record for all parties received notice of the filing on the same day. Plaintiff filed its Motion to Alter or Amend on May 27, 2020, or twenty-seven (27) days after receipt of the Summary Judgment Order.

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<sup>1</sup> This case has a long detailed history spanning over the last six years which has involved extensive briefing by the parties. In the interest of brevity, JWC incorporates by reference its outlining of the facts of this case and the case’s procedural history from its previous filings.

<sup>2</sup> Plaintiff’s Motion makes no reference to any specific factual or legal findings it seeks the Court to reconsider, nor does it cite any statutory or case law to support its filing. This Response focuses solely on the issue of the timeliness of Plaintiff’s Motion. Should the Court decide Plaintiff’s Motion is timely, which JWC expressly denies, then JWC reserves the right to supplement this Response to address any specific findings or rulings challenged by Plaintiff.

South Carolina law regarding the time allowed to file a Rule 59 motion is well-established. *See* SCRCP 59 (“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.”); *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018 ) (“The ten-day limit for serving a Rule 59(e) motion is an absolute deadline.”). Plaintiff’s Motion was filed well outside of the ten (10) day deadline.

Because the Rule 59(e) deadline is absolute and Plaintiff did not file its Motion within ten (10) days after receipt of written notice of the entry of the order, Plaintiff’s Motion is untimely. Even if asked by Plaintiff, the Court cannot extend this deadline to consider the merits of this Motion. *See Overland*, 423 S.C. at 256, 815 S.E.2d at 432 (“A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served, nor does a trial court have any power to grant the moving party an extension of time in which to file a Rule 59(e) motion.”).<sup>3</sup>

To be timely, Plaintiff’s Motion must have been filed with the Court on or before May 11, 2020.<sup>4</sup> After this May 11, 2020, deadline passed, this Court no longer has jurisdiction to consider the merits of Plaintiff’s Motion. *See Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (“When no timely Rule 59 motion was made nor timely *sua sponte*

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<sup>3</sup> The (10) day deadline for filing a timely Motion to Alter or Amend remains absolute even during the uncertain times related to the COVID-19 virus. Pursuant to of the South Carolina Supreme Court’s Order dated April 3, 2020, regarding the Operation of the Trial Courts during the Coronavirus Emergency any extensions of deadlines or forgiveness of procedural defaults allowed during the pandemic specifically do not apply to the deadlines of Rule 59. *See* Order re: Operation of the Trial Courts During the Coronavirus Emergency at (c)(9)(D) (“The provisions of (A) through (C) above **shall not extend or otherwise affect the time for taking action under Rules 50(b), 52(b), 59, and 60(b), SCRCP ...**”) (emphasis added).

<sup>4</sup> The tenth day after April 30, 2020, was Sunday, May 10, 2020. Pursuant to Rule 6(a), SCRCP, Plaintiff’s deadline was thereby extended until the next business day, or Monday, May 11, 2020.

order filed under Rule 59(e), the [Order] ‘matured’ into a final judgment...because the trial judge no longer had jurisdiction over the matter.”); *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) (“Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.”); *Doran v. Doran*, 288 S.C. 477, 343 S.E.2d 618 (1986) (on appeal from an order entered just before the effective date of the Rules of Civil Procedure, holding the trial court lost the power to modify the final order after end of the term of court, and noted that under Rule 59(e) the trial court would have the power to alter or amend such an order for a ten-day period after entry of judgment).

Plaintiff filed its Motion sixteen (16) days after the ten (10) day deadline expired, and therefore, the Summary Judgment Order became a final order. *See Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018 ) (“The failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment, and the aggrieved party’s only recourse is to file a notice of intent to appeal.”).

### CONCLUSION

Based on the foregoing, JWC respectfully requests the Court DENY Plaintiff’s Motion to Alter or Amend the Summary Judgment Order on the specific grounds that the Motion was not timely filed and the Court has no jurisdiction to entertain its merits.

TURNER PADGET GRAHAM & LANEY P.A.

BY: s/Mark B. Goddard  
 Mark B. Goddard (SC Bar #73965)  
 Reginald W. Belcher (SC Bar #11710)  
 Hannah D. Stetson (SC Bar #101507)  
 Post Office Box 1473  
 Columbia, South Carolina 29202  
 Telephone: (803) 254-2200  
 Fax: (803) 400-1515  
 ATTORNEYS FOR DEFENDANT

June 5, 2020

# **EXHIBIT 5**



4) Plaintiff's Motion to Alter or Amend the Summary Judgment Order was filed on May 27, 2020.<sup>2</sup> Plaintiff's Motion made no reference to any specific factual or legal finding that it is seeking the Court to reconsider, nor did it cite any statutory or case law to support its filing.

5) On June 5, 2020, Defendant JWC filed a Response to Plaintiff's Motion on the limited ground that Plaintiff's Motion was not timely filed. Defendant JWC's Response did not address the substantive merits of Plaintiff's Motion.

### **LEGAL CONCLUSIONS**

#### **Plaintiff's Motion to Alter or Amend was not timely filed.**

This Court finds that it does not have jurisdiction to consider Plaintiff's Motion as the motion was not timely filed.

Under Rule 59(e), SCRCPP, "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the order."

This ten-day deadline is an **absolute** deadline that cannot be extended by the Court.<sup>3</sup> *See Overland v. Nance*, 423 S.C. 253, 815 S.E.2d 431 (2018). To be timely, Plaintiff was required to file its motion within ten days from its counsel's receipt of notice of the entry of the Summary Judgment Order. Since Plaintiff's counsel received notice of the entry of the Summary Judgment Order on April 30, 2020, any Motion to Alter or Amend under Rule 59, SCRCPP must

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<sup>2</sup> Plaintiff's Motion has never been properly served on my office as required under Rule 59(g), SCRCPP.

<sup>3</sup> Pursuant to the South Carolina Supreme Court's Order dated April 3, 2020, regarding the Operation of the Trial Courts during the Coronavirus Emergency any extensions of deadlines or forgiveness of procedural defaults allowed during the pandemic specifically did not apply to the deadlines of Rule 59.

have been filed on or before May 11, 2020.<sup>4</sup>

After this May 11, 2020, deadline passed, this Court no longer had jurisdiction to consider Plaintiff's Motion. *See Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) ("When no timely Rule 59 motion was made nor timely *sua sponte* order filed under Rule 59(e), the [Order] 'matured' into a final judgment...because the trial judge no longer had jurisdiction over the matter."); *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) ("Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.").

Since Plaintiff filed this Motion sixteen (16) days after the ten (10) day deadline expired, Plaintiff's Motion was untimely, and the Summary Judgment Order became a final order. *See Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018) ("The failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal.").

---

<sup>4</sup> The tenth day after April 30, 2020, was Sunday, May 10, 2020. Pursuant to Rule 6(a), SCRCPP, Plaintiff's deadline was thereby extended until the next business day, or Monday, May 11, 2020.

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED**  
Plaintiff's Motion to Alter or Amend the Court's April 30, 2020, Order was not timely filed as required under Rule 59(e), SCRPC. Accordingly, the Court does not have jurisdiction to consider the Plaintiff's Motion and thus denies it for lack of jurisdiction.

**AND IT IS SO ORDERED.**

Winnsboro, South Carolina

Dated: \_\_\_\_\_

\_\_\_\_\_  
Brian M. Gibbons, Chief Administrative Judge  
Sixth Judicial Circuit



Fairfield Common Pleas

**Case Caption:** Broad River Campground Llc VS Jenkinsville Water Co Inc

**Case Number:** 2014CP2000349

**Type:** Order/Other

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

# **EXHIBIT 6**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY  
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2014-CP-20-349

RECEIVED

Jul 10 2020

SC Court of Appeals

ELECTRONICALLY FILED - 2020 Jul 10 5:12 PM - FAIRFIELD - COMMON PLEAS - CASE#2014CP2000349

Broadriver Campground, LLC.....Appellant,

v.

Jenkinsville Water Company, Inc.....Respondent.

**NOTICE OF APPEAL**

Broadriver Campground, LLC appeals the orders of the Honorable Brian M. Gibbons dated April 30, 2020 and June 11, 2020. Appellant received written notice of entry of this order on April 30, 2020 and June 11, 2020. A Motion to Alter or Amend the April 30, 2020 order was timely filed on May 27, 2020.

Respectfully submitted,

July 10, 2020

By:



Glenn E. Bowens, Esq.  
Jonathan Goode, Esq.  
P.O. Box 424  
Winnsboro, South Carolina 29180  
Phone: (803) 714-7766  
Fax: (803) 714-0775  
Attorneys for Appellant

Other Counsel of Record:  
Reginald Belcher, Esq.  
Hannah Stetson, Esq.  
Mark B. Goddard, Esq.  
PO Box 1473  
Columbia, SC 29202

**RECEIVED**  
**Jul 10 2020**  
**SC Court of Appeals**

ELECTRONICALLY FILED - 2020 Jul 10 5:12 PM - FAIRFIELD - COMMON PLEAS - CASE#2014CP2000349

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY  
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2014-CP-20-349

Broadriver Campground, LLC.....Appellant,

v.

Jenkinsville Water Company, Inc.....Respondent.


**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that I served a copy of the Notice of Appeal upon the following:

Reginald Belcher, Esq.  
Hannah Stetson, Esq.  
Mark B. Goddard, Esq.  
PO Box 1473  
Columbia, SC 29202

By depositing the same in the United States Mail, postage prepaid, this the 10<sup>th</sup> Day of July 2020.

July 10, 2020

  
\_\_\_\_\_  
Glenn E. Bowens, Esq.  
Jonathan Goode, Esq.  
P.O. Box 424  
Winnsboro, South Carolina 29180  
Phone: (803) 714-7766  
Fax: (803) 714-0775  
Attorneys for Appellant

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF FAIRFIELD )  
 )  
Broad River Campground, LLC, )  
 )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Jenkinsville Water Company, Inc., )  
 )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

C/A No. 2014-CP-20-00349

**ORDER GRANTING DEFENDANT'S  
RENEWED MOTION FOR SUMMARY  
JUDGMENT**

**RECEIVED**

**Jul 10 2020**

**SC Court of Appeals**

This matter comes before the Court on Defendant Jenkinsville Water Company's ("JWC" or "Company") Renewed Motion for Summary Judgment ("Motion").

On January 29, 2020, the Court heard oral arguments regarding JWC's Renewed Motion for Summary Judgment. At the hearing, Glenn E. Bowens of the Bowens Law Firm, P.C., and Jonathan Goode of the Law Office of Jonathan Goode, LLC, represented Plaintiff Broad River Campground, LLC ("Plaintiff" or "BRC"), and Reginald W. Belcher and Mark B. Goddard of Turner, Padget, Graham & Laney, P.A. represented Defendant JWC. After hearing oral arguments, the Court asked for further briefing on the issues raised in the Motion. The attorneys filed several memoranda, including exhibits, in support of their clients' respective positions.

After carefully considering the memoranda submitted by the parties, the evidence presented, the arguments of counsel, and the applicable law, the Court hereby **GRANTS** Defendant JWC's Renewed Motion, and dismisses this case **with prejudice**.

## PROCEDURAL HISTORY<sup>1</sup>

The procedural history of this case since February 2019 is as follows:

1) On February 27, 2019, the Court issued the Summary Judgment Order, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, granting Summary Judgment and dismissing with prejudice Plaintiff's cause of action for alleged violation of the South Carolina Unfair Trade Practices Act, South Carolina Code § 39-5-10, *et seq.*, in the above-captioned lawsuit and further dismissed with prejudice Defendants Gregory Ginyard and Defendant Joseph McBride in Civil Action Number 2016-CP-20-256.

2) The Court held a pretrial hearing on January 29, 2020, to consider all pretrial issues before the commencement of a jury trial that was scheduled to begin on February 3, 2020, for Plaintiff's remaining causes of action for breach of contract, breach of contract accompanied by a fraudulent act, and declaratory judgment. Both Parties timely submitted pretrial briefs and motions prior to the pretrial hearing.

3) At the pretrial hearing held on January 29, 2020, Plaintiff withdrew its demand for a jury trial with the consent of Defendant.

4) Among its pretrial motions, Defendant renewed its previous Motion for Summary Judgment, contending that the Parties never entered a valid and/or legally binding contract based, in part, on new evidence that emerged since the Court issued its Summary Judgment Order in February 2019.

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<sup>1</sup> This case has a long and complex procedural history. The Court's previous Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment dated February 27, 2019 (the "Summary Judgment Order") fully outlined the case's procedural history through February 2019. In the interest of brevity, the Court fully incorporates the Procedural History from the Summary Judgment Order herein.

5) The Parties have thoroughly briefed and argued, and the Court has considered every issue through numerous hearings, briefs, and exhibits over the past years.

**FINDINGS OF FACT<sup>2</sup>**

1) Broad River Campground was constructed in phases over several years with the first phase constructed in 2009 containing 46 campsites.

2) On October 28, 2009, Defendant JWC wrote a letter to Plaintiff BRC’s engineer outlining JWC’s commitment to serve phase 1 or 46 campsites at 175 gallons per day (“gpd”) for a total of 8,050 gpd, and outlining JWC’s willingness to consider increasing its commitment to serve future phases (“October 2009 Letter”).

3) Plaintiff BRC did not agree to the restrictions on future expansion outlined in the October 2009 Letter.

4) In 2014, Plaintiff BRC demanded that JWC approve another expansion of BRC’s campground, which would have added approximately 50 additional campsites. This expansion request did not seek increase in the commitment of water from JWC, and instead, Plaintiff BRC requested JWC change the water usage rate from 175 gpd to 53 gpd per campsite.

5) Plaintiff filed its original Complaint on September 26, 2014, alleging that the October 2009 Letter was the only contract between the Parties.

6) Plaintiff filed its Second Amended Complaint on June 29, 2018, alleging for the first time that JWC’s By-Laws, Water Usage Agreement, and/or an alleged oral agreement (that

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<sup>2</sup> The Court fully incorporates herein by reference the Findings of Fact from the Summary Judgment Order that are now the law of the case. *See Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 754 S.E.2d 486 (2014); *see also In re Morrison*, 321 S.C. 370, 372, 468 S.E.2d 651, 652 (1996) (an unappealed ruling becomes the law of the case and precludes further consideration of the issue).

was purportedly formed in 2009) also constituted contracts between the Parties, in addition to the October 2009 Letter.

7) The Second Amended Complaint alleged that Plaintiff intended to expand its campground via a five-year project, beginning in 2009, and that Plaintiff's alleged contracts with JWC were part of that five-year expansion plan.

8) Dee Melton, co-owner of Plaintiff BRC, testified in a deposition in December 2015, that the October 2009 Letter was the only alleged contract between Plaintiff BRC and JWC, and he was not aware of any other contracts between Plaintiff BRC and JWC.

9) When Melton testified in December 2015 that the October 2009 Letter was the only alleged contract between the Parties, he knew of the existence of the By-Laws and the Water Usage Agreement because BRC produced those documents to JWC, in pre-trial discovery, months before Melton testified.

10) Similarly, when Melton testified in December 2015 that the October 2009 Letter was the only alleged contract between the Parties, he was fully aware of the discussions that supposedly formed the alleged 2009 oral contract, as he directly was involved in those discussions in 2009.

11) Plaintiff BRC's expert witness, Larry Umberger, also testified, during his deposition in December 2019, that he was unaware of any contracts between the parties.

During pre-trial discovery, the Parties produced only a generic, unsigned copy of a Water Usage Agreement. The Parties never produced an executed copy of any Water Usage Agreement during pre-trial discovery and likewise never produced a signed copy to the Court. Plaintiff never produced any evidence proving that JWC agreed to the terms and conditions of and/or intended to be bound by the generic, unsigned Water Usage Agreement. Likewise,

Plaintiff produced no evidence establishing the material terms and conditions of any legally binding verbal agreement between the Parties regarding water usage. Accordingly, the Court finds that the Parties never entered into a valid, legally binding contract regarding water usage.

### **SUMMARY JUDGMENT STANDARD**

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *See George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

“[I]n cases applying the preponderance of 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 Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

“Summary judgment should be granted when plain, palpable and undisputable facts exist on which reasonable minds cannot differ.” *NationsBank v. Scott Farm*, 320 S.C. 299, 302-03, 465 S.E.2d 98, 100 (Ct. App. 1995). “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.” *Id.* at 303, 465 S.E.2d at 100. “In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial.” *Id.* “Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party’s case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.” *Id.*

The nonmoving party’s “evidence must amount to more than speculation and conjecture” to survive summary judgment. *McKnight v. South Carolina Dept. of Corrections*, 385 S.C. 380,

684 S.E.2d 566, 570 (Ct. App. 2009); *see also Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) (addressing summary judgment and ruling that a “jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. . . . ‘However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture, or speculation.’”) (citation omitted).

**LEGAL CONCLUSIONS**

**October 2009 Letter Was Not a Valid and Enforceable Contract.**

Defendant JWC is entitled to summary judgment and a dismissal with prejudice as to the breach of contract claim because there was no meeting of the minds as to the essential terms of the October 2009 Letter.

To prove the existence of a valid and enforceable contract, “there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.” *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1969).

The right to expand Plaintiff’s campground, which could not occur if JWC continued to estimate Plaintiff’s water usage at 175 gallons per day per campsite, is the primary subject at issue in this litigation.

The October 2009 Letter stated that:

At this time all [JWC] can commit to serve is...46 campsites. Average daily demand for each of the travel trailer sites is estimated to be 175 gallons per day (‘gpd’) per site for a total of 8,050 gallons per day. Water consumption is not to exceed this amount on an average day, nor are the number of campsites connected to the water system to exceed 46 without prior written

approval of the Jenkinsville Water Company. Should you wish to expand the campground, the Water Company will consider increasing our commitment, but only if that can be done without negatively impacting other customers on the water system.

Plaintiff asserted, through its admissions in its Pre-Trial Brief and through the deposition testimony of its expert witness, Larry Umberger, that it never agreed to any restrictions being placed on Plaintiff BRC's right to expand the campground. Therefore, since the Parties never agreed to all of the material terms of the October 2009 Letter, there was no meeting of the minds, and the October 2009 Letter is not a valid and enforceable contract. *See Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978).

### **Judicial Estoppel**

Defendant also is entitled to summary judgment and a dismissal with prejudice as to the breach of contract claim because the October 2009 Letter was not a valid and enforceable contract and Plaintiff is judicially estopped from asserting that any other alleged agreements serve as the basis for its breach of contract claim.

The October 2009 Letter was not a valid and enforceable contract because there was not a meeting of the minds as to all material terms of the contract. Plaintiff's Second Amended Complaint alleged that the parties entered into three other contracts: (1) JWC By-Laws; (2) a Water User agreement; and (3) a 2009 oral promise by JWC to provide 35,000 - 40,000 gallons of water per day for up to 200 campsites, in phases to occur in 2009, 2012, and 2014.

In December 2015, Plaintiff's co-owner, Dee Melton, testified as follows:

Q. [Referencing the October 2009 Letter] Is this document the basis for the campground's claim that the campground and water company had a contract?

A. I see this document as our contract.

....

Q. Is there any other document that the campground believes constitutes a contract between the water company and the campground?

A. I would have to check with my attorney on that.

Q. Well, based on your knowledge, do you think there is? Is this, in other words, is this the only written contract you're aware of?

A. I'm not sure. A lot of things can be implied as contracts. I would refer that to my attorney. I do recognize this as our contract, for sure.

...

Q. Are there any verbal or oral promises that the campground believes constitutes a contract between the water company and the campground?

A. I'm not sure about that. No.

Q. If so, would you have alleged that in the Complaint?

A. I think I would have.

Q. If there were any other written contracts besides [the October 2009 Letter] would you have referenced that in the complaint?

A. I think we would have.

(Melton Tr. pp. 34-35).

In April 2015, in response to Defendant JWC's discovery requests, Plaintiff produced a copy of JWC's By-laws, which expressly and repeatedly referenced a "water user agreement." Further, Plaintiff alleges it engaged in oral negotiations in July 2009 for JWC to serve all phases on the campground. At the time of his deposition, Plaintiff's co-owner, Dee Melton, should have been aware of the alleged existence of these three purported contracts, yet he did not identify any of them in response to direct questions from Defendant's counsel.

Judicial estoppel “precludes a party from adopting a position in conflict with one earlier taken in the same litigation.” *Commerce Ctr. Of Greenville, Inc. v. W. Powers McElveen & Assocs.*, 347 S.C. 545, 554 n. 6, 556 S.E.2d 718, 723, n.6 (Ct. App. 2001). “Under the doctrine of judicial estoppel, a party that has assumed a particular position in a judicial proceeding, via its pleadings, statements or contentions made under oath, is prohibited from adopting an inconsistent posture.” *Quinn v. The Sharon Corp.*, 343 S.C. 411, 416, 540 S.E.2d 474, 476 (Ct. App. 2000) (Anderson, J., concurring).

“When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him....The truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly discovered evidence.” *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997).

Plaintiff’s change in its position as to the underlying contract between the parties was not the result of newly-discovered evidence, as this information was readily available and known to Plaintiff prior to the December 2015 deposition. Therefore, Plaintiff is judicially estopped from asserting any other contracts as the basis of its breach of contract claim.

### **Statute of Limitations**

Defendant also is entitled to summary judgment and a dismissal with prejudice as to the breach of contract claims because the applicable statute of limitations barred Plaintiff’s claims for breach of contract and breach of contract accompanied by a fraudulent act based on the By-Laws, Water-User Agreement, and/or the alleged 2009 oral contract.

Breach of contract claims are governed by a three year statute of limitations. *See* S.C. Code § 15-3-530(1). The three -year statute of limitations applicable to a breach of contract

claim also governs a claim for breach of contract accompanied by a fraudulent act. *Wilson Group v. Quorum Health Resources*, 880 F. Supp. 416, 424, n.6 (D.S.C. 1995).

Plaintiff filed its original Complaint on September 26, 2014. Plaintiff filed its Second Amended Complaint on June 29, 2018, alleging the By-Laws, Water User Agreement, and/or an oral agreement constitute the operative contract for its breach of contract and breach of contract accompanied by fraud claims.

An amendment to a pleading relates back to the original pleading only if “the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings.” *Whitfield Constr. Co. v. Bank of Tokyo Trust Co.*, 338 SC. 207, 222, 525 S.E.2d 888, 897 (Ct. App. 1999). To properly relate back to the date of the original filing, the new claim must be “logically related to the matters originally pleaded so that the defendant is not prejudiced by the new claim asserted after the statute of limitations has expired.” *Id.*

The By-Laws, Water User Agreement, and the alleged oral contract were separate and distinct allegations with completely different terms and conditions from the October 2009 Letter. By originally only pleading the October 2009 Letter as the operative contract, Plaintiff did not place Defendant on notice that these three additional alleged agreements could serve as the operative contracts for the Plaintiff’s contractual claims. Therefore, these three additional alleged contracts did not relate back to the initial Company that Plaintiff filed on September 26, 2014.

Plaintiff alleged the breach of any alleged contract occurred in the Summer of 2014 when Defendant JWC denied Plaintiff BRC’s request to expand its campground. Plaintiff BRC was required to file its claims for breach of contract and breach of contract accompanied by

fraudulent act based on the By-Laws, Water User Agreement, or the alleged oral contract within three years of the alleged breach. Plaintiff did not file the Second Amended Complaint alleging these new contracts within three years of the alleged breach, and therefore, the applicable statute of limitations barred those claims.

**No Valid Contracts or Breaches**

Defendant is also entitled to summary judgment and a dismissal with prejudice as to the breach of contract claims since there were no valid and enforceable contracts between the parties and/or no breaches of any alleged contract.

“The elements for a breach of contract are the existence of the contract, its breach, and damages caused by such a breach.” *Hotel & Motel Holdings, LLC v. BJC Enters., LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015). Plaintiff has not presented evidence to support each of these required elements for its breach of contract claim.

**Oral Contract** – Defendant is entitled to summary judgment on Plaintiff BRC’s allegation that the Parties entered into an oral contract in July 2009 because the Statute of Frauds prohibits any such contract.

The Statute of Frauds prohibits lawsuits based on a contract “not to be performed within the space of one year” unless the contract is “signed by the party to be charged.” S.C. Code Ann. § 32-3-10(5). Parties may not orally modify a contract required to be in writing by the South Carolina Statute of Frauds. *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989).

There is no evidence of a writing signed by JWC wherein it agreed to provide the 35,000 – 40,000 gpd to all phases of the campground through five plus years of construction. Therefore,

this alleged oral contract, which purportedly was to be performed throughout Plaintiff's five-year expansion project, failed to satisfy the Statute of Frauds and is void and unenforceable.

**By-Laws** - Defendant is entitled to summary judgment on and dismissal with prejudice of Plaintiff BRC's breach of contract claim based on Defendant JWC's By-laws because, as a matter of law, the By-Laws did not constitute a valid, binding contract between the Parties.

Moreover, Defendant JWC followed and did not breach its By-laws. The relevant portion of JWC's By-Laws states:

Each member shall be entitled to purchase from the corporation pursuant to such agreements as may time to time be provided and required, such service as he may desire, subject to the provisions of these bylaws and to such rules and regulations as may be prescribed by the Board of Directors.

Plaintiff BRC alleged that this provision provides it the right to unlimited water usage, and Defendant JWC's denial of its expansion request breached this provision.

Plaintiff BRC's erroneous interpretation of the By-Laws disregarded the By-Laws' plain, unambiguous language indicating that member's water usage was subject to the limitations imposed by JWC. The October 2009 Letter, though not a legally binding contract, imposed strict daily water usage limitations on Plaintiff, which fully complied with the By-Laws and JWC's legal rights, per the statutory and common law application of the business judgment rule.

Likewise, the Summary Judgment Order, the Court previously ruled that: (1) Defendant JWC's actions in considering and denying Plaintiff's requested expansion in 2014 were consistent with its By-laws; and (2) JWC's Board's determination to continue to use the 175 gpd usage calculation for Plaintiff's 2014 expansion request followed JWC's third party engineers' advice and was a reasonable and appropriate approach. These factual findings are the law of the case and the Court must apply these findings of fact when considering this Motion. *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015).

“The doctrine of the law of the case prohibits issues that have been decided....from being relitigated in the trial court in the same case.” *Ross v. Medical Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997).

Defendant’s actions were consistent with its By-Laws, which did not constitute a legally binding contract, thereby entitling JWC to summary judgment and a dismissal with prejudice as to the breach of contract claim.

**Water User Agreement** – Defendant is entitled to summary judgment and a dismissal with prejudice as to Plaintiff’s allegation that Defendant JWC breached its Water Usage Agreement based on the Statute of Frauds and based on Plaintiff BRC’s failure to allege a specific breach.

Since there is no tangible evidence of an executed Water Usage Agreement or any allegation of a verbal water usage agreement, this alleged contract does not satisfy the requirements for South Carolina’s Statute of Frauds. S.C. Code Ann. § 32-3-10(5). Therefore, the alleged Water Usage Agreement is non-existent, void and not enforceable.

Even if a signed copy of the Water Usage Agreement was found in order to satisfy the Statute of Frauds, this Agreement cannot serve as the basis for Plaintiff’s contractual claims.

To survive a motion for summary judgment, Plaintiff must provide evidence to support each element of its cause of action. Plaintiff cannot rely merely on its allegations from the Complaint. *See Eadie v. Krause*, 381 S.C. 55, 64, n.5, 671 S.E.2d 389, 393, n. 5 (Ct. App. 2008). Plaintiff BRC has provided no specific evidence of the alleged breach beyond the vague allegations that the Agreement was breached. Plaintiff’s vague allegations of a breach do not create the necessary question of fact to survive Defendant BRC’s Motion.

**Breach of Contract Accompanied by Fraud**

Defendant is entitled to summary judgment and a dismissal with prejudice as to Plaintiff’s claim for breach of contract accompanied by fraudulent act.

The elements for a breach of contract accompanied by a fraudulent act are: (1) breach of contract; (2) fraudulent intent relating to the breach of the contract and not merely its makings; and (3) fraudulent act accompanying the breach. *Conner v. City of Forest Acres*, 348 S.C. 454, 465-466, 560 S.E.2d 606, 612 (2002). Plaintiff has failed to show the existence of a valid and enforceable contract and/or its breach for the reasons outlined above. Without a valid and enforceable contract and its subsequent breach, Plaintiff’s claim for breach of contract accompanied by a fraudulent act fails as a matter of law.

**Declaratory Judgment Action**

Defendant is also entitled to summary judgment and a dismissal with prejudice as to Plaintiff’s request for a declaratory judgment because the declarations have either already been addressed by the Summary Judgment Order or are simply impermissible requests for advisory opinions from the Court.

Plaintiff’s Second Amended Complaint requests declarations that: (1) JWC may refuse to issue the requested willing and able letter to DHEC; (2) JWC may refuse to approve the 49 campsites if there is no negative impact on existing customers, and (3) JWC can limit the amount of water a customer can purchase. Each of these declaration requests were addressed in the Factual Findings from the Summary Judgment Order. These Factual Findings are the law of the case and the issues cannot be relitigated at this time. *See Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015); *see also Ross v. Medical Univ. of S.C.*, 328 S.C. 51, 492 S.E.2d 62, 68 (1997).

Plaintiff BRC’s Second Amended Complaint also seeks additional declarations that: (1) JWC may provide preferential treatment to residential customers over commercial customers in the provision of water service; (2) JWC is a residential water company; (3) if JWC is determined to be a residential water company, then the rights of its business customers to water service; and (4) JWC can cut back on the volume of water or turn off the water to a commercial customer.

The relief a party seeks is beyond the scope of a declaratory judgment when the issue is abstract rather than ripe for adjudication, and presents a court with nothing more than a vehicle rendering an advisory opinion. *Hitter v. McLeod*, 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980). Because Plaintiff’s claims for breach of contract and breach of contract accompanied by a fraudulent act fail as a matter of law and are dismissed with prejudice for the reasons outlined above, there are no remaining issues between the parties that make these requested declarations ripe for adjudication. The requested declarations would settle no legal rights of the parties. As a matter of law, this Court declines to extend the declaratory judgment statute beyond its intended purpose to give the parties advisory opinions on these declarations.

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED**  
as follows:

Defendant JWC is entitled to summary judgment and/or judgment as a matter of law. Accordingly, the Court **GRANTS** Defendant JWC’s Renewed Motion for Summary Judgment on Plaintiff BRC’s remaining claims for Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, and Declaratory Judgment, and dismisses this case **with prejudice**.

**AND IT IS SO ORDERED.**

Winnsboro, South Carolina

\_\_\_\_\_  
Brian M. Gibbons, Chief Administrative Judge  
Sixth Judicial Circuit

Dated: \_\_\_\_\_

RECEIVED

Jul 10 2020

SC Court of Appeals



Fairfield Common Pleas

**Case Caption:** Broad River Campground Llc VS Jenkinsville Water Co Inc

**Case Number:** 2014CP2000349

**Type:** Order/Summary Judgment

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF FAIRFIELD )  
  
Broad River Campground, LLC, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Jenkinsville Water Company, Inc., )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

C/A No. 2014-CP-20-00349

RECEIVED

Jul 10 2020

SC Court of Appeals

Plaintiff's Motion to Alter or Amend  
(Rule 59, SCRPC)

**TO: REGINALD BELCHER, ATTORNEY FOR THE DEFENDANT AND TO THE DEFENDANT ABOVE NAMED:**

**YOU WILL PLEASE TAKE NOTICE** that the undersigned, as attorney for the Plaintiff, will move before the presiding judge of the Fairfield County Court of Common Pleas at the Fairfield County Courthouse at 10:00 o'clock a.m. on the tenth (10<sup>th</sup>) day after service hereof, or as soon thereafter as counsel may conveniently be heard, for an Order Altering or Amending the Order Granting Defendant's Motion for Summary Judgment issued April 30, 2020.

This motion is made pursuant to Rule 59 of the South Carolina Rules of Civil Procedure and applicable case law. This Motion will be supplemented and supported by such affidavits, depositions, discovery responses, memoranda of law, and such other documents as appropriate.

Respectfully submitted,

By: /s/ Glenn Bowens  
Glenn E. Bowens, Esq.  
P.O. Box 424  
Winnsboro, SC 29180  
(803) 714-7766  
(803) 714-0775  
Attorney for Plaintiff

Winnsboro, SC  
May 27, 2020.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF FAIRFIELD )  
 )  
Broad River Campground, LLC, )  
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 )  
Plaintiff, )  
 )  
v. )  
 )  
Jenkinsville Water Company, Inc., )  
 )  
 )  
Defendant. )  
 )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

C/A No. 2014-CP-20-00349

**ORDER DENYING PLAINTIFF’S MOTION  
TO ALTER OR AMEND**

**RECEIVED**

**Jul 10 2020**

**SC Court of Appeals**

This matter came before the Court by way of Plaintiff Broad River Campground, LLC’s (“BRC”) Motion to Alter or Amend the Court’s April 30, 2020, Order granting Defendant Jenkinsville Water Company’s (“JWC”) Renewed Motion for Summary Judgment. (“Plaintiff’s Motion”). The Court finds that for the reasons stated below that Plaintiff’s Motion was untimely filed, and therefore, the Court lacks jurisdiction to consider Plaintiff’s Motion.

**PROCEDURAL HISTORY**<sup>1</sup>

1) On April 30, 2020, the Honorable Judge Brian M. Gibbons issued an Order Granting Defendant JWC’s Renewed Motion for Summary Judgment. (“Summary Judgment Order”). The Summary Judgment Order dismissed this case in its entirety with prejudice.

2) The Summary Judgment Order was executed and e-filed with the Fairfield County Clerk of Court’s Office on April 30, 2020.

3) All counsel of record received written electronic notice of the entry of the Summary Judgment Order on April 30, 2020.

<sup>1</sup> This case has a long and complex procedural history. The Summary Judgment Order outlined the case’s relevant procedural history prior to the Court issuing the Summary Judgment Order. In the interest of brevity, the Court fully incorporates the Procedural History from the Summary Judgment Order herein.

4) Plaintiff's Motion to Alter or Amend the Summary Judgment Order was filed on May 27, 2020.<sup>2</sup> Plaintiff's Motion made no reference to any specific factual or legal finding that it is seeking the Court to reconsider, nor did it cite any statutory or case law to support its filing.

5) On June 5, 2020, Defendant JWC filed a Response to Plaintiff's Motion on the limited ground that Plaintiff's Motion was not timely filed. Defendant JWC's Response did not address the substantive merits of Plaintiff's Motion.

### **LEGAL CONCLUSIONS**

#### **Plaintiff's Motion to Alter or Amend was not timely filed.**

This Court finds that it does not have jurisdiction to consider Plaintiff's Motion as the motion was not timely filed.

Under Rule 59(e), SCRCF, "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the order."

This ten-day deadline is an **absolute** deadline that cannot be extended by the Court.<sup>3</sup> See *Overland v. Nance*, 423 S.C. 253, 815 S.E.2d 431 (2018). To be timely, Plaintiff was required to file its motion within ten days from its counsel's receipt of notice of the entry of the Summary Judgment Order. Since Plaintiff's counsel received notice of the entry of the Summary Judgment Order on April 30, 2020, any Motion to Alter or Amend under Rule 59, SCRCF must

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<sup>2</sup> Plaintiff's Motion has never been properly served on my office as required under Rule 59(g), SCRCF.

<sup>3</sup> Pursuant to the South Carolina Supreme Court's Order dated April 3, 2020, regarding the Operation of the Trial Courts during the Coronavirus Emergency any extensions of deadlines or forgiveness of procedural defaults allowed during the pandemic specifically did not apply to the deadlines of Rule 59.

have been filed on or before May 11, 2020.<sup>4</sup>

After this May 11, 2020, deadline passed, this Court no longer had jurisdiction to consider Plaintiff's Motion. *See Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) ("When no timely Rule 59 motion was made nor timely *sua sponte* order filed under Rule 59(e), the [Order] 'matured' into a final judgment...because the trial judge no longer had jurisdiction over the matter."); *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) ("Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.").

Since Plaintiff filed this Motion sixteen (16) days after the ten (10) day deadline expired, Plaintiff's Motion was untimely, and the Summary Judgment Order became a final order. *See Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 432 (2018) ("The failure to serve a Rule 59(e) motion within ten days of receipt of notice of entry of the order converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal.").

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<sup>4</sup> The tenth day after April 30, 2020, was Sunday, May 10, 2020. Pursuant to Rule 6(a), SCRCPP, Plaintiff's deadline was thereby extended until the next business day, or Monday, May 11, 2020.

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED**  
Plaintiff's Motion to Alter or Amend the Court's April 30, 2020, Order was not timely filed as required under Rule 59(e), SCRPC. Accordingly, the Court does not have jurisdiction to consider the Plaintiff's Motion and thus denies it for lack of jurisdiction.

**AND IT IS SO ORDERED.**

Winnsboro, South Carolina

Dated: \_\_\_\_\_

\_\_\_\_\_  
Brian M. Gibbons, Chief Administrative Judge  
Sixth Judicial Circuit



Fairfield Common Pleas

**RECEIVED**

**Jul 10 2020**

**SC Court of Appeals**

**Case Caption:** Broad River Campground Llc VS Jenkinsville Water Co Inc

**Case Number:** 2014CP2000349

**Type:** Order/Other

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

APPEAL FROM FAIRFIELD COUNTY  
Brian M. Gibbons, Circuit Court Judge

**Aug 12 2020**  
**SC Court of Appeals**

Appellate Case Number: 2020-000982

Broad River Campground, LLC ..... Appellant,

v.

Jenkinsville Water Company, Inc. .... Respondent.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 11th day of August, 2020, she served a copy of the foregoing Respondent Jenkinsville Water Company, Inc.’s Motion to Dismiss the Appeal in the above-captioned matter to all counsel of record, by electronic mail and by placing a copy in the United States Mail, with due and proper postage affixed thereto as addressed below:

|                                                                                                                                                          |                                                                                                                                                         |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p><b>Glenn E. Bowens, Esquire</b><br/>P.O. Box 424<br/>Winnsboro, SC 29180<br/>Email: gbowens@bowenslawsc.com</p> <p><i>Attorneys for Appellant</i></p> | <p>Jonathan M. Goode, Esquire<br/>P.O. Box 120<br/>Winnsboro, SC 29180<br/>Email: jonathan@thegoodelawyer.com</p> <p><i>Attorneys for Appellant</i></p> |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------|

*Margaret H. Smith*  
\_\_\_\_\_  
Margaret H. Smith  
Legal Assistant

# Turner | Padget

REPLY TO:

**Mark B. Goddard**

E-Mail: [mgoddard@turnerpadget.com](mailto:mgoddard@turnerpadget.com)  
Writer's Direct Dial: 803-227-4334  
Writer's Direct Fax: 803-400-1542

August 11, 2020

**RECEIVED**

**Aug 12 2020**

**SC Court of Appeals**

**VIA EMAIL TO [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)**

The Honorable Jenny Abbott Kitchings  
Clerk  
The South Carolina Court of Appeals  
P.O. Box 11628  
Columbia, SC 29211

**Re: Broad River Campground, LLC v. Jenkinsville Water Company, Inc.  
Appellate Case No. 2020-000982  
Our File No. 10728.151**

Dear Ms. Kitchings:

Pursuant Section (c)(6) of the Amended Order Regarding the Operation of the Appellate Courts During the Coronavirus Emergency, as amended on May 29, 2020, attached for filing is Respondent Jenkinsville Water Company's Motion to Dismiss the Appeal in the above-referenced matter. Please file this motion and return a clocked copy to me at [mgoddard@turnerpadget.com](mailto:mgoddard@turnerpadget.com). I am sending a check for the \$50.00 filing fee under separate cover. By copy of this letter, I have copied all counsel of record.

Should you have any questions or concerns, please do not hesitate to contact me.

Yours very truly,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Mark B. Goddard

MBG:mhs  
Enclosure

cc: Glenn E. Bowens, Esquire  
Jonathan Goode, Esquire