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**Nov 08 2023**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jean Hoefler Toal, Chief Justice (Ret.)

Case No. 2022-CP-40-06627

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Appellate Case No. 2023-001629

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Terry L. Green, Sr., as the Personal Representative of the Estate of Robert J. Green, Deceased  
and Evelyn V. Green, Individually, Plaintiffs,

v.

3M Company; Advance Stores Company Incorporated; Amentum Environment & Energy, Inc.;  
AutoZone, Inc.; Beatty Investments, Inc.; The Bonitz Company; CH2M Hill Engineers, Inc.;  
Cleaver-Brooks, Inc.; Covil Corporation; Daniel International Corporation; Davis Mechanical  
Contractors, Inc.; Eaton Corporation; Ellington Insulation Company, Inc.; Fluor Constructors  
International; Fluor Enterprises, Inc.; Ford Motor Company; General Electric Company; General  
Parts, Inc.; Genuine Parts Company; GG of Florida, Inc.; The Goodyear Tire & Rubber  
Company; Great Barrier Insulation Co.; Heat & Frost Insulation Company; ITT LLC; J. & L.  
Insulation, Inc.; K-Mac Services, Inc.; LGE (OLD Co.), Inc.; LGE&C (OLD Co.) LLC;  
Metropolitan Life Insurance Company; Michelin Corporation; Michelin North America, Inc.;  
O'Reilly Auto Enterprises, LLC; O'Reilly Automotive Stores, Inc.; Occidental Chemical  
Corporation; Paramount Global; Plastics Engineering Company; Pneumo Abex LLC; Presnell  
Insulation Co., Inc.; RedCo Corporation; Rockwell Automation, Inc.; Schneider Electric USA,  
Inc.; Southern Insulation, Inc.; Spirax Sarco, Inc.; Springs Industries, Inc.; Springs Industries,  
LLC; Standard Insulation Company of N.C., Inc.; Starr Davis Company, Inc.; Starr Davis  
Company of S.C., Inc.; Thermo-Kinetics Industries, Inc.; Union Carbide Corporation; Wind Up,  
Ltd., Defendants,

AND

Davis Mechanical Contractors, Inc., by and through its Receiver Peter D. Protopapas,  
Respondent

v.

American Home Assurance Company; Columbia Casualty Company; Continental Casualty  
Company; Continental Insurance Company; Federal Insurance Company; Fireman's Fund  
Insurance Company; Republic Insurance Company, n/k/a Starr Indemnity & Liability Company;

United States Fire Insurance Company; Brandywine Holdings Corporation; and Riverstone  
Claims Management, LLC, Third-Party Defendants,

of which Republic Insurance Company n/k/a Starr Indemnity & Liability Company is the  
Appellant.

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**MOTION TO DISMISS APPEAL**

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Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Peter D. Protopapas, in his capacity as the Receiver for Davis Mechanical Contractors, Inc. (“the Receiver”), by and through the undersigned counsel, respectfully requests this Court dismiss the notice of appeal filed by Republic Insurance Company n/k/a Starr Indemnity & Liability Company (“Republic”) on October 18, 2023.

Republic appeals the October 12, 2023 order of the circuit court granting the Receiver’s September 7, 2023 motion for partial summary judgment. In the notice of appeal, Republic states: “There is no transcript available because the Order was entered without mutual briefing and without a hearing.” However, Republic did not bring any issues or objections—whether substantive or procedural—to the circuit court’s attention prior to or after the entry of the October 12 order. Republic did not file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, choosing instead to file an immediate notice of appeal with this Court six days after the entry of the order.

Issue preservation rules are foundational to our appellate system. As explained by our Supreme Court in *I’On, L.L.C. v. Town of Mount Pleasant*:

An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the

lower court and obtain a ruling before an appellate court will review those issues and arguments.

338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000). “Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *Id.* at 422, 526 S.E.2d at 724.

The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

*Id.* “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). “Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.” *S.C. Dep’t of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 658–59, 667 S.E.2d 7, 15 (Ct. App. 2008).

Therefore, if an issue has not been ruled on by the trial court, a party must file a Rule 59(e) motion. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” (emphasis original)). A Rule 59(e) motion “is often **required** for issue preservation purposes.” *Home Med. Sys., Inc. v. S.C. Dep’t of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009) (emphasis original). “South Carolina appellate courts do not recognize the ‘plain error rule,’ under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party.” *Elam*, 361 S.C. at 24, 602 S.E.2d at 780. “An issue not properly preserved *cannot* be raised for the first time on appeal.” *Johnson v. Lloyd*, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014) (emphasis added).

Here, Republic has failed to raise any issues to the circuit court and, therefore, did not preserve any issues for appellate review. Republic did not file a memorandum in opposition to the Receiver's motion for partial summary judgment. After the circuit court issued the October 12 order, Republic did not file a Rule 59(e) motion to the circuit court. From Republic's Notice of Appeal, it appears that Republic will argue that the circuit court issued the October 12 order before Republic had a chance to submit an opposition memorandum and without giving it a chance to argue the motion at the hearing. However, this alleged failure was not raised to the circuit court. After receiving Republic's notice of appeal, the Receiver informed Republic he believed there were not any issues preserved for this Court's review and offered to jointly request with Republic that the circuit court vacate the October 12 order, issue a briefing schedule to allow Republic to submit a memorandum in opposition to the motion, and hold a hearing on the motion if the court believed it necessary. Exhibit A. Republic declined and, instead, indicated it wished to proceed in this Court. Exhibit B.

Due to its failure to file a Rule 59(e) motion, Republic has failed to preserve any procedural or substantive issues for this Court to review related to the October 12 order. Instead, Republic presumably seeks to have this Court reverse the order of the circuit court based on some version of the plain error rule, which South Carolina does not recognize.<sup>1</sup> Republic was required to raise whatever errors it perceived to the circuit court to rule on them and failed to do so. Pursuant to the preservation rules that are the touchstone to our appellate system, it cannot "sit idly by" and then later "claim advantage of error" which was "invited by acquiescence." *See Dykema v.*

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<sup>1</sup> To the extent that Republic alleges a violation of due process, this argument must have first been made to the circuit court. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 356, 461 S.E.2d 388, 392 (1995) ("This appeal is Grant's first mention of any deprivation of due process and, therefore, this issue is not preserved."); *State v. Powers*, 331 S.C. 37, 42-43, 501 S.E.2d 116, 118 (1998) (finding constitutional arguments are no exception to the error preservation rule).

*Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002). Because Republic did not object to the circuit court issuing the October 12 order without first allowing Republic to file an opposition memorandum or holding a hearing on the motion, any issues Republic raises in this appeal will be improperly raised for the first time to this Court. The Court cannot substantively review the October 12 order because the record reflects it was entered without opposition from Republic. The Court similarly cannot procedurally reverse and remand the October 12 order to allow for briefing because the record reflects Republic did not raise any error to the circuit court related to the procedure of the entry of the order. As recognized by our appellate courts, if a party fails to properly preserve an issue and obtain a ruling from the circuit court before appealing, the appellate courts “should not address” the issue, “even if only for the sole purpose of remaining for a ruling.” *Broom c. Ten State St., LLP*, No. 2015-000583, 2015 WL 5728106, at \*1 (S.C. Sept. 30, 2015).

In *Roche v. S.C. Alcoholic Beverage Control Commission*, our Supreme Court found the issues on appeal were “not properly before [it] for consideration” because “[n]either was raised in the court below.” *Roche v. S.C. Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 454–55, 211 S.E.2d 243, 244 (1975). As the Supreme Court explained, the purpose of appeal under our procedure is ‘to determine if the lower court did something that it should not have done, or omitted doing something it should have done.’” *Id* at 455, 211 S.E.2d at 244. “Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him [or her].” *Id*. As in *Roche*, the circuit court here cannot be reversed for failing to act on matters Republic did not raise to it.

Accordingly, in the interest of judicial economy, the Court should dismiss this appeal as there are no issues preserved for appellate review.

Respectfully submitted,

*s/Jonathan M. Robinson*

G. Murrell Smith, Jr. (S.C. Bar # 66263)

Jonathan M. Robinson (S.C. Bar # 68285)

Shanon N. Peake (S.C. Bar #102723)

Smith Robinson Holler DuBose and Morgan, LLC

2530 Devine Street, 3<sup>rd</sup> Floor

Columbia, South Carolina 29205

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ATTORNEYS FOR RESPONDENT

November 8, 2023.

# EXHIBIT A

# SMITH ROBINSON

Forward thinking. Results driven.

Smith Robinson Holler DuBose and Morgan, LLC

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SUMTER 126 N. Main Street, Sumter, SC 29151  
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CAMDEN 935 Broad Street, Camden, SC 29020  
P: 803.432.1992 F: 803.432.0784

October 24, 2023

**VIA Email Only**

Brandon R. Gottschall  
Sweeny Wingate & Barrow  
1515 Lady Street  
Columbia, SC 29201

**Re: Terry L. Green, Sr., etc., et al vs. Davis Mechanical Contractors, Inc., et al., vs. Allstate Insurance Company, et al.  
Civil Action No.: 2022-CP-40-06627  
Appellate Case No.: 2023-001629**

Dear Brandon:

We are in receipt of the Notice of Appeal from the circuit court's October 12, 2023 Order Granting Partial Summary Judgment filed by Republic Insurance Company n/k/a Starr Indemnity & Liability Company ("Republic") in the above-referenced case on October 18, 2023.

It is noted in your Notice of Appeal that the October 12, 2023 Order was entered in the case prior to Republic submitting a response in opposition to the motion. Inexplicably, Republic did not raise this issue to the circuit court, nor did they raise any issue to the trial court regarding the October 12, 2023 Order. Rather, after the entry of the Order, Republic filed an immediate Notice of Appeal before requesting that the circuit court reconsider the entry of the Order.

As you are aware, South Carolina law requires all issues to be raised and ruled upon by the circuit court in order to be preserved for appeal. *Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). Pursuant to *Elam v. South Carolina Department of Transportation*, a party "must file" a Rule 59(e) motion when the circuit court has not ruled on an issue. 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis original). "South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party." *Id.* The purpose of Rule 59(e) is to allow the parties to fairly raise all issues for the circuit court's consideration and to "prevent a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept

that ace card.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Accordingly, Republic was required to file a motion to reconsider the circuit court’s October 12, 2023 Order within the ten-day timeframe provided for in Rule 59(e). Because Republic did not file a timely Rule 59(e) motion and instead chose to file an immediate appeal, there are no issues preserved for the appellate court’s review related to the October 12, 2023 Order. Any arguments made here will be improperly raised by Republic for the first time on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”).

Republic has failed to raise any procedural or substantive issue to the circuit court as required by Rule 59(e). However, as this may have been an oversight, if Republic withdraws its Notice of Appeal, the Receiver will agree to jointly file a motion with Republic requesting that the circuit court vacate the October 12, 2023 Order, issue a briefing schedule for the motion, and schedule a hearing if determined necessary. If Republic continues to pursue this appeal, the Receiver intends to request a dismissal of the appeal due to Republic’s failure to raise and preserve any issues for appeal.

Please let me know by the close of business if Republic will agree to withdraw its appeal and move jointly with us for the Court to vacate the Order as set forth above. Please give me a call if you would like to discuss these issues further.

Very truly yours,



Jonathan M. Robinson

JMR/dlf

# EXHIBIT B

**From:** [Brandon R. Gottschall](#)  
**To:** [Jon Robinson](#)  
**Cc:** [Shanon Peake](#); [Brian Barnwell](#); [Nes, W. Brad](#); [Peter Protopapas](#); [Edwards, Brady](#); [Melissa H. Abbott](#); [Mark V. Gende](#); [Daniel Q. Atkinson](#); [Dot Faulkenberry](#)  
**Subject:** RE: Green vs. Davis Mechanical vs. Republic, et al (Appellate Case No. 2023-001629)  
**Date:** Thursday, October 26, 2023 5:48:43 PM

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Good afternoon, Jon,

Thank you again for your letter and email. We will be moving forward with the appeal. It is our position that matters related to the appeal are stayed, including these and other depositions and written discovery.

Please do not hesitate to reach out with any questions or concerns.

Brandon



Brandon Gottschall | Member  
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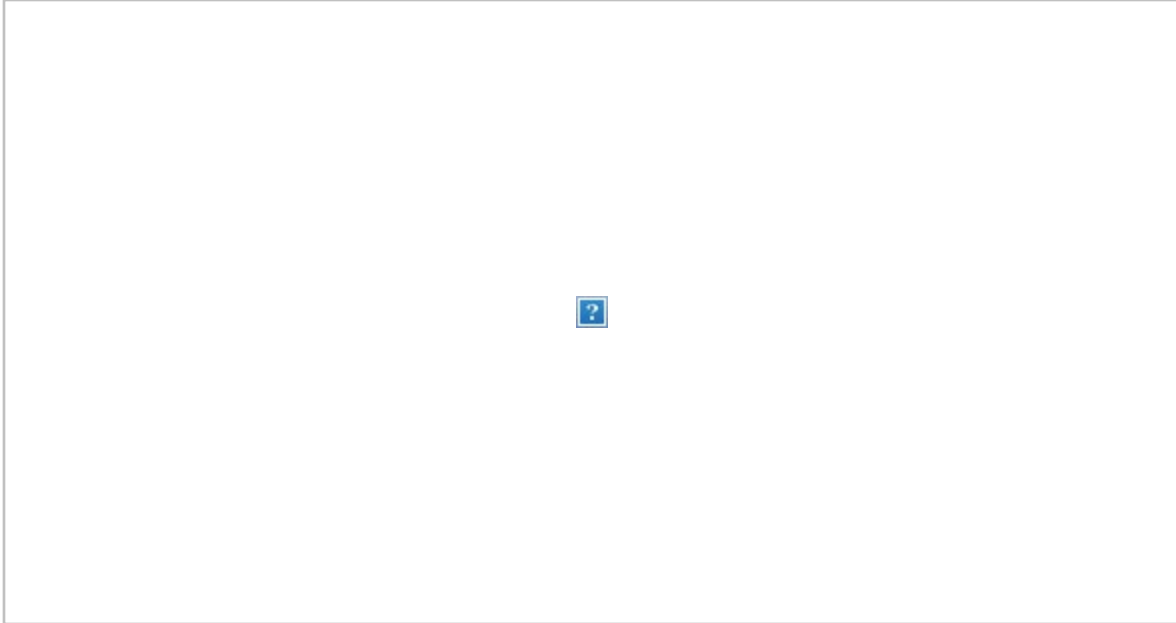
---

**From:** Jon Robinson <[jon.robinson@smithrobinsonlaw.com](mailto:jon.robinson@smithrobinsonlaw.com)>  
**Sent:** Wednesday, October 25, 2023 12:38 PM  
**To:** Brandon R. Gottschall <[BRG@swblaw.com](mailto:BRG@swblaw.com)>  
**Cc:** Shanon Peake <[shanon.peake@smithrobinsonlaw.com](mailto:shanon.peake@smithrobinsonlaw.com)>; Brian Barnwell <[BB@rplegalgroup.com](mailto:BB@rplegalgroup.com)>; Nes, W. Brad <[brad.nes@morganlewis.com](mailto:brad.nes@morganlewis.com)>; Peter Protopapas <[pdp@rplegalgroup.com](mailto:pdp@rplegalgroup.com)>; Edwards, Brady <[brady.edwards@morganlewis.com](mailto:brady.edwards@morganlewis.com)>; Melissa H. Abbott <[mha@swblaw.com](mailto:mha@swblaw.com)>; Mark V. Gende <[MVG@swblaw.com](mailto:MVG@swblaw.com)>; Daniel Q. Atkinson <[dqa@swblaw.com](mailto:dqa@swblaw.com)>; Dot Faulkenberry <[Dot.faulkenberry@smithrobinsonlaw.com](mailto:Dot.faulkenberry@smithrobinsonlaw.com)>  
**Subject:** RE: Green vs. Davis Mechanical vs. Republic, et al (Appellate Case No. 2023-001629)

Thank you for your response. Please let me know when you have a response. We intend to move forward as indicated in the absence of a response.

I understand from a call you had with Brian Barnwell, that you believe the upcoming depositions are

stayed based on the appeal of the partial summary judgment order. We disagree. As you know, depositions are taking place next week on the dates you provided to us in Boston (10/31) and Chicago (11/2). Please let us know if you do not plan to have your clients attend.



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**From:** Brandon R. Gottschall <[BRG@swblaw.com](mailto:BRG@swblaw.com)>  
**Sent:** Tuesday, October 24, 2023 6:13 PM  
**To:** Jon Robinson <[jon.robinson@smithrobinsonlaw.com](mailto:jon.robinson@smithrobinsonlaw.com)>  
**Cc:** Shanon Peake <[shanon.peake@smithrobinsonlaw.com](mailto:shanon.peake@smithrobinsonlaw.com)>; Brian Barnwell <[BB@rplegalgroup.com](mailto:BB@rplegalgroup.com)>; Nes, W. Brad <[brad.nes@morganlewis.com](mailto:brad.nes@morganlewis.com)>; Peter Protopapas <[pdp@rplegalgroup.com](mailto:pdp@rplegalgroup.com)>; Edwards, Brady <[brady.edwards@morganlewis.com](mailto:brady.edwards@morganlewis.com)>; Melissa H. Abbott <[mha@swblaw.com](mailto:mha@swblaw.com)>; Mark V. Gende <[MVG@swblaw.com](mailto:MVG@swblaw.com)>; Daniel Q. Atkinson <[dqa@swblaw.com](mailto:dqa@swblaw.com)>; Dot Faulkenberry <[Dot.faulkenberry@smithrobinsonlaw.com](mailto:Dot.faulkenberry@smithrobinsonlaw.com)>  
**Subject:** RE: Green vs. Davis Mechanical vs. Republic, et al (Appellate Case No. 2023-001629)

Jon,

I was in a deposition this afternoon but have just seen your letter. I will forward to my client so we can discuss and we will get back to you after we have an opportunity to evaluate.

Please feel free to reach out with any questions or concerns in the meantime.

Best,

Brandon

Brandon Gottschall | Member  
Sweeny, Wingate & Barrow, P.A.



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**From:** Dot Faulkenberry <[Dot.faulkenberry@smithrobinsonlaw.com](mailto:Dot.faulkenberry@smithrobinsonlaw.com)>

**Sent:** Tuesday, October 24, 2023 1:40 PM

**To:** Brandon R. Gottschall <[BRG@swblaw.com](mailto:BRG@swblaw.com)>

**Cc:** Jon Robinson <[jon.robinson@smithrobinsonlaw.com](mailto:jon.robinson@smithrobinsonlaw.com)>; Shanon Peake <[shanon.peake@smithrobinsonlaw.com](mailto:shanon.peake@smithrobinsonlaw.com)>; Brian Barnwell <[BB@rplegalgroup.com](mailto:BB@rplegalgroup.com)>; Nes, W. Brad <[brad.nes@morganlewis.com](mailto:brad.nes@morganlewis.com)>; Peter Protopapas <[pdp@rplegalgroup.com](mailto:pdp@rplegalgroup.com)>; Edwards, Brady <[brady.edwards@morganlewis.com](mailto:brady.edwards@morganlewis.com)>; Melissa H. Abbott <[mha@swblaw.com](mailto:mha@swblaw.com)>

**Subject:** Green vs. Davis Mechanical vs. Republic, et al (Appellate Case No. 2023-001629)

Mr. Gottschall,

Please find attached correspondence from Jon Robinson in the above matter.

Thank you,

