

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Case No. 2022-CP-40-06627

Appellate Case No. 2023-001629

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.; Beaty
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,

Davis Mechanical Contractors, Inc.,
by and through its Receiver Peter D. Protopapas.....Third-Party Plaintiff,

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, now known as
Starr Indemnity & Liability Company; United States
Fire Insurance Company; Brandywine Holdings Corporation;
and Riverstone Claims Management, LLC,Third-Party Defendants,

of which

Davis Mechanical Contractors, Inc.,
through its Receiver Peter D. Protopapas, is theRespondent,

and

Republic Insurance Company n/k/a
Starr Indemnity & Liability Company is theAppellant.

RETURN TO RESPONDENT’S MOTION TO DISMISS APPEAL

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Republic Insurance Company n/k/a Starr Indemnity & Liability Company (the “Appellant”) requests that this Court deny the November 8, 2023 Motion to Dismiss Appeal filed by Peter D. Protopapas in his capacity as the Receiver for Davis Mechanical Contractors, Inc. (the “Receiver”).

On October 12, 2023, without mutual briefing, a hearing, or notice of the impending order, the circuit court entered an Order (the “Order”) granting the Receiver partial summary judgment against Republic. The same Order also grants a motion to seal filed by the Receiver, also without mutual briefing, hearing, or notice of the impending Order, and further without factual findings.

As set forth below, Republic's appeal is properly preserved and Receiver's motion should be denied for several reasons:

- First, the circuit court's order, issued without briefing, hearing, or notice to Republic of the impending Order, is in the form of an *ex parte* order. South Carolina's appellate courts have considered such matters on appeal and, without any known exception, have not required post-ruling motions, including under Rule 59(e), to preserve the issues.
- Second, the issues on appeal are preserved from the face of the record and no Rule 59(e) motion was required or even proper. The issues preserved include that the circuit court entertained no briefing or argument from Republic, which is plain from the record and undisputed, and the issues actually decided in the Order.
- Third, a motion to reconsider is not necessary to preserve an issue where the motion would have been futile. The circuit court made clear in its Order that it had fully considered the Receiver's brief and exhibits and found these sufficient for the circuit court to render its decision. It then entered its Order even in the absence of mutual briefing and a hearing, demonstrating that opposing arguments were futile.
- Fourth, consideration of this appeal is justified by the exceptional circumstances presented by the circuit court's Order, entered without mutual briefing, hearing, or notice of the impending Order.

I. Republic's Claims of Violation of Its Right to Notice and to be Heard on Receiver's Motions Is Preserved.

In South Carolina, "a party interested in resisting the relief sought by a motion has a right to notice sufficient to give him an opportunity to be heard." *Brown v. Mickens*, 256 S.C. 346, 348, 182 S.E.2d 417, 417 (1971). It is well-established that an order entered without notice to a party violates the party's state and federal constitutional rights. *See, e.g., State v. Port Royal & A. Ry.*

Co., 45 S.C. 464, 23 S.E. 380, 381-82 (1895). Indeed, “a question cannot properly be considered until the parties interested have been afforded the opportunity to be heard, both by testimony and argument, if they so desire.” *Id.* These rights are so fundamental that “[a] sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.” *Id.* at 464, 23 S.E. at 381 (citing *Windsor v. McVeigh*, 93 U.S. 274, 274, 23 L. Ed. 914 (1876)).

It is long established that orders entered without notice, without the opportunity for rebuttal, and without the opportunity for a hearing, “have been considered [on appeal] without exception.” *State v. Port Royal & A. Ry. Co.*, 45 S.C. 464, 23 S.E. 380, 381-82 (1895) (further stating that the requirement of a hearing is based on the principle that a judgment against a party without the opportunity to be heard is not a “judicial determination” of a party’s rights and that such a judgment is not “entitled to respect in any other tribunal”). Indeed, Republic has found no South Carolina authority disallowing an appeal where a court entered an order without the opportunity for rebuttal or hearing. *See, e.g., Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008) (affirming reversal of trial court’s judgment, which was entered without hearing, because procedural due process requires “adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review”); *Stukes v. Hawkins*, 288 S.C. 485, 485, 343 S.E.2d 623, 623 (1986) (“It is well settled that *ex parte* orders are regarded with great disfavor in South Carolina.”); *Whittle v. Multiple Servs., Inc.*, 283 S.C. 559, 561, 324 S.E.2d 62, 63 (1984) (admonishing that “*ex parte* orders are seriously frowned upon by this Court”); *Dunnavant v. Dunnavant*, 278 S.C. 445, 446, 298 S.E.2d 442, 443 (1982) (reversing lower court, finding an order was *ex parte* where it was entered solely upon respondent’s affidavit, and stating

that “the use of an ex parte order clearly denied appellant the opportunity to be heard and deprives this Court of an adequate record on appeal”); *Herring v. Credit Bureau of Columbia*, 272 S.C. 368, 369, 252 S.E.2d 123, 123 (1979) (“We have stated repeatedly that Ex parte orders are reserved for those rare occasions where no adverse interest exists or where exigent circumstances dictate that action be taken prematurely.”).

Here, the circuit ruled against Republic without argument or hearing from Republic and without notice to Republic of the impending Order. The Order is, in form and effect, an *ex parte* order because it was entered on the application of only one party and deprived Republic of the opportunity for argument or hearing. *See, e.g., Dunnavant*, 278 S.C. 445, 298 S.E.2d 443 (finding order was *ex parte* where it was entered solely on the submission of one party). *See also* EX PARTE, Blacks Law Dictionary (11th ed. 2019) (defining *ex parte* as “[o]n or from one party only, usu[ally] without notice to or argument from the adverse party”). There is nothing more that Republic needs to have done to preserve this obvious defect for appeal. *State v. Port Royal*, 45 S.C. 464, 23 S.E. 380, 381-82 (“[T]he party who seeks to set aside, by appeal, an order granted without notice, need not first apply to the Circuit Court to set aside such order[.]”)

The Order also deprived this Court of a complete record on appeal on the substantive issues. *Dunnavant*, 278 S.C. 445, 298 S.E.2d 443. It is in precisely these circumstances—where the circuit court has deprived the appellate courts of a full record on appeal via order issued without a hearing, briefing, or notice of the impending order—that the Supreme Court has moved forward with considering appeals such as the present one. *See id.*

For these reasons, the Receiver’s Motion to Dismiss the Appeal should be denied.

II. The Record Fully Preserves Multiple Issues, Including that Republic Was Not Heard by the Circuit Court and those Issues Ruled Upon in the Order.

Further, while this Court has been deprived of a record containing those arguments that Republic would have made in opposition to Receiver's Motion below, if Republic had been given the chance, the record is replete with details sufficient for this appeal to move forward.

First, the record preserves the issue that the circuit court erroneously ruled without entertaining any brief from Republic. This is established by the public index and the circuit court's Order. *See* Copy of Public Index, attached as Exhibit A; October 12, 2023 Order, attached as Exhibit A to Republic's Notice of Appeal, at 1 (stating that the circuit court reviewed only "the Motion for Partial Summary Judgment and accompanying exhibits" and that it was entered after "full consideration" of this "brief [singular] and accompanying exhibits"). Moreover, this issue is undisputed in the Receiver's Motion to Dismiss. *See Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (noting that appellate court can take judicial notice of court records and other matters that are not disputed).

Second, the record also preserves that the circuit court ruled without any hearing. Again, this is apparent from the public index, which is devoid of any Notice of Electronic Filing related to a hearing. It is further apparent from the circuit court's Order, which references no hearing whatsoever. Further, this issue is also undisputed in the Receiver's Motion to Dismiss.

Third, the law requires a Rule 59(e) motion *only* where an issue was raised but not ruled upon. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (using the mandatory "must" in relation to issues or arguments that had already "been raised, but not ruled on", and indicating that a Rule 59(e) is optional in other circumstances). Here, the circuit court ruled on multiple issues in its Order, including the request for summary judgment and motion to

seal. Thus, no Rule 59(e) motion was required for the issues ruled upon by the circuit court, and such issues are preserved.

Fourth, a Rule 59(e) motion was not necessary, nor was it proper here, because Republic was deprived of the opportunity to raise issues prior to the court's ruling and it is black letter law that a party cannot raise an issue for the first time on a motion to reconsider. *Repko v. Cnty. of Georgetown*, 424 S.C. 494, 502, 818 S.E.2d 743, 748 (2018) ("It is settled that '[a]n issue may not be raised for the first time in a motion to reconsider.'").

Fifth, the policy arguments Receiver cites in support of its issue preservation arguments are inapplicable here. Republic has not kept "an ace card" up its sleeve and has not raised this appeal as a means to gain "another opportunity to prove [its] case." *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000). Rather, Republic was deprived of the opportunity to play any cards whatsoever. It has not yet had even the *first* opportunity to prove its case.

In summary, multiple issues are preserved for appeal, including that Republic was deprived of the opportunity for mutual briefing and of a hearing. Additional issues preserved for appeal include those ruled upon in the circuit court's Order. No Rule 59(e) motion was required, nor was one proper, in light of the circuit court's ruling without entertaining opposing argument in this case. For these reasons, the Receiver's Motion to Dismiss the appeal should be denied.

III. Rule 59(e) Would Have Been Futile.

Next, a motion to reconsider is not necessary to preserve an issue where the motion would have been futile. Here, the circuit court made clear in its Order that it had received and reviewed only the Receiver's brief and exhibits, that it had "fully considered" these items, and that the circuit court considered these materials sufficient for it to reach its decision. Having reached that decision,

the circuit court entered a seven-page order, embracing the Receiver's arguments and demonstrating that argument or hearing from Republic was not desired and would be futile.

Moreover, it was not a matter of clerical error or oversight that the circuit court's Order was issued without mutual briefing or an opportunity for Republic to be heard. As to summary judgment, the Order expressly states that its ruling is based only on one brief, that of the Receiver, which the circuit court states it "fully considered[.]" *See* October 12, 2023 Order at 1. Also, the circuit court's Order spans seven pages specifically addressing the issues raised in the Receiver's brief. It is not within this party's experience for a court to draft and then enter a specific, detailed, and multi-page Order unless the court has reached its decision. Well more than 30 days have passed since the circuit court entered its Order against Republic and there has been no suggestion from the circuit court other than that its decision has been fully rendered.

To the extent Receiver has proposed a consent motion to the circuit court regarding the summary judgment order, Receiver's proposal came after this appeal was filed. In addition, given that Republic had asked Receiver's position regarding the Order several days earlier, Receiver's decision to send its proposal the day after the 59(e) deadline expired was notable and concerning. Specifically, Receiver suggests that Republic should dismiss this appeal and trust that the circuit court would voluntarily withdraw its Order. However, if that does not occur, Receiver takes the position that the 59(e) deadline has passed and that absent a 59(e) motion, no appeal is proper. This, combined with the Receiver's efforts to dismiss this appeal, suggests that Republic is best protected by maintaining this appeal at this time. Indeed, to the extent the Receiver suggests it is not opposed to briefing and hearing of this matter, nothing prevents Receiver from consenting to such relief from this Court.

IV. The Circuit Court's Order Presents Exceptional Circumstances.

Finally, while no issue preservation matters prevent this Court from considering this appeal, even if such matters existed, this appeal merits consideration given the exceptional nature of a ruling on summary judgment and a motion to seal entered without mutual briefing, without hearing, without notice of the impending Order, and, as to the motion to seal, without factual findings. *See, e.g., State v. Bonner*, 400 S.C. 561, 566, 735 S.E.2d 525, 527 (Ct. App. 2012). The Order raises issues of fundamental constitutional rights, including the right to be heard, the right to meaningful judicial review, and the importance of maintaining open records absent a specific provision of law and findings of fact. *See, e.g., Dangerfield v. State*, 376 S.C. 176, 179, 656 S.E.2d 352, 354 (2008); *State v. Price*, 441 S.C. 70, 84, 893 S.E.2d 286, 294 (2023) (“the sealing of any part of a court record is a serious matter requiring lawful authority and specific findings of fact that justify the sealing”). The exceptional nature of these circumstances is easily demonstrated by reference to the South Carolina Appellate Court Rules, which explicitly note that an *ex parte* order is an “extraordinary circumstance” allowing for direct relief from the court of appeals without first requiring a party to seek relief from the circuit court. Rule 241(d)(1) (“The issuance of an *ex parte* order or decision ... shall constitute an extraordinary circumstance” allowing direct application with the court of appeals). Given that the Receiver’s Motion to Dismiss does not dispute the absence of mutual briefing or a hearing, the propriety of this Court’s consideration of this issue is all the more apparent.

CONCLUSION

For these reasons, Receiver’s Motion to Dismiss the Appeal should be denied.

Signature Page to Follow

s/Brandon R. Gottschall

Mark V. Gende, SC Bar No. 72835

Brandon R. Gottschall, SC Bar No. 100621

Daniel Q. Atkinson, SC Bar No. 105252

Sweeny Wingate & Barrow, P.A.

Post Office Box 12129

Columbia, South Carolina 29211

(803) 256-2233

Attorneys for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

FOR THE FIFTH JUDICIAL CIRCUIT

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

In Re: Coordinated Asbestos Docket

Civil Action No: 2022-CP-40-06627

Plaintiffs,

ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR DAVIS MECHANICAL CONTRACTORS INC.

v.

3M Company, et al.,

Defendants.

Davis Mechanical Contractors, Inc., by and through its duly-appointed Receiver Peter D. Protopapas,

Third Party Plaintiff,

v.

Allstate Insurance Company, et al.

Third Party Defendants.

Before the Court is Motion for Partial Summary Judgment, on behalf of the Receiver for Davis Mechanical Contractors, Inc. (“Receiver” or “Davis Mechanical”), against Third-Party Defendant Republic Insurance Company n/k/a Starr Indemnity & Liability Company (“Republic”). The Receiver asserts there is an actual and justiciable controversy regarding Republic’s obligations to Davis Mechanical, and therefore certain judicial declarations are warranted at this stage of this matter. The Court has reviewed the Motion for Partial Summary Judgment and accompanying exhibits.

After full consideration of the brief and accompanying exhibits, the Court finds that there is no triable issue of material fact with regard to Davis Mechanical’s declaratory judgment claims against Republic regarding Republic’s obligation under Policy No. CDU 10447. Therefore, the Court GRANTS Davis Mechanical’s Motion for Partial Summary Judgment. Further the Court

also grants the Receiver's Motion to Seal regarding Exhibit 5 and Exhibit 10.¹ The Court finds the sealing of the exhibits meets the requirements of Rule 41.1, SCRCP, and orders the exhibits provided to the Court be placed under seal as set forth in the Receiver's Motion to Seal.

FACTUAL BACKGROUND

Davis Mechanical was organized in 1965 and engaged in the business of electrical contracting, custom metal fabrication, and air conditioning duct fabrication and installation, and other activities.² In 2011, David Mechanical was administratively dissolved.³

On December 7, 2021, this Court entered an order appointing Peter D. Protopapas as Receiver for Davis Mechanical pursuant to South Carolina Code § 15-65-10.⁴ The Order provided the Receiver "with the power and authority [to] fully administer all assets of Davis Mechanical" including "the right and obligation to administer any insurance assets of Davis Mechanical as well any claims related to the actions or failure to act of Davis Mechanical's insurance carriers."⁵

Davis Mechanical has been sued in more than twenty bodily injury asbestos lawsuits ("Davis Mechanical Asbestos Suits").⁶ The plaintiffs in these lawsuits alleged causes of action for, among other things, negligence, strict liability, and product liability arising from the alleged exposure to materials or products sold, distributed, used, disturbed, or installed by Davis Mechanical or otherwise arising from the conduct of its business operations. The asbestos bodily injuries are alleged to have taken place at various times, including during the policy period covered by the insurance policies issued to David Mechanical by Employers Insurance Company

¹ The Court has reviewed *in camera* the exhibits which are confidential settlement agreements and terms that have previously been approved by this Court.

² Davis Mechanical's Mot. for Partial Summ. J., Ex. 2.

³ Davis Mechanical's Mot. for Partial Summ. J., Ex. 3.

⁴ Davis Mechanical's Mot. for Partial Summ. J., Ex. 1.

⁵ *Id.*

⁶ Including, without limitation and before this Court, *Lamm v. 4520 Corp., Inc.*, C/A No. 2022-CP-40-01241, *Davis v. 3M Co.*, C/A No. 2022-CP-40-02381, *Love v. 3M Co.*, C/A No. 2021-CP-40-06190, and *Welch v. 3M Co.*, C/A No. 2022-CP-40-03834.

of Wausau (“Wausau”) and Republic.

Wausau issued Combination Casualty Policy No. 1423-00-080954 to Davis Mechanical for the October 1, 1982 to October 1, 1983 policy period (the “Wausau 82/83 Policy”).⁷ As is pertinent here, the Wausau 82/83 Policy covers Davis Mechanical’s liability to pay damages for bodily injury during the policy period. It provides \$500,000 in coverage to Davis Mechanical “per occurrence” and in the aggregate.⁸

Republic issued umbrella liability insurance coverage to Davis Mechanical with Policy No. CDU 10447 for the October 1, 1982 to October 1, 1983 policy period (the “Republic 82/83 Umbrella Policy”).⁹ The Republic 82/83 Umbrella Policy sits directly above the Wausau primary policy.¹⁰ It covers Davis Mechanical’s liability to pay damages for bodily injury during the policy period.¹¹ It provides \$30,000,000 in coverage to Davis Mechanical for “each occurrence” and in the aggregate.¹²

Importantly, the Republic 82/83 Umbrella Policy includes a “Loss Payable” paragraph, which states in relevant part:

Liability under this policy with respect to any occurrence shall not attach unless and until the Insured or the Insured’s underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence.¹³

Following his appointment and in furtherance of his duties, the Receiver negotiated a settlement with Wausau related to the Wausau 82/83 Policy (and other policies) issued to Davis Mechanical (the “Wausau Settlement”).¹⁴ That settlement was approved by this Court and

⁷ Davis Mechanical’s Mot. for Partial Summ. J., Ex. 5.

⁸ Davis Mechanical’s Mot. for Partial Summ. J., Ex. 6.

⁹ Davis Mechanical’s Mot. for Partial Summ. J., Ex. 7.

¹⁰ *Id.*, Endorsement 2.

¹¹ *Id.*

¹² *Id.*

¹³ Davis Mechanical’s Mot. for Partial Summ. J., Ex. 8.

¹⁴ Davis Mechanical’s Mot. for Partial Summ. J., Ex. 5.

resulted in the establishment of a Qualified Settlement Fund known as the Greenville QSF, LLC Asbestos Bodily Injury Qualified Settlement Fund (“Greenville QSF” or “QSF”) for the defense and payment of Davis Mechanical Asbestos Suits.¹⁵ This Court further ordered that “upon completion and funding of the settlement to Greenville QSF, Wausau’s policies to Davis [Mechanical] or under which David [Mechanical] is entitled to benefits from Wausau . . . are fully exhausted such that no further insurance coverage will be available under the policies[.]”¹⁶ The settlement agreement also provided that funds paid by Wausau as part of the settlement agreement would be deposited into the Greenville QSF.¹⁷ Thereafter, Wausau completed the transfer of settlement funding and the Receiver settled claims asserted by several plaintiffs in the Davis Mechanical Asbestos Suits for their claims of asbestos-related bodily injuries.

SUMMARY JUDGMENT STANDARD

“Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citing Rule 56(c), SCRCP); see also *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). “When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860 (citing *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997)).

The moving party “has the initial responsibility of demonstrating the absence of a genuine issue of material fact,” at which point “the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial.” *Sides v. Greenville Hosp. Sys.*, 362

¹⁵ Davis Mechanical’s Mot. for Partial Summ. J., Ex. 9.

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 3.

S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). The nonmoving party “must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial. If [it] does not so respond, summary judgment should be entered against [it].” *Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (Ct. App. 1988).

ANALYSIS

In South Carolina, “[i]nsurance policies are subject to the general rules of contract construction.” *Whitlock v. Stewart Title Guar. Co.*, 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012) (quoting *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)); see also *Williams v. Government Employees Ins. Co.*, 409 S.C. 586, 594 (2014) (An insurance “policy’s terms are to be construed according to the law of contracts.”). “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Whitlock*, 399 S.C. at 614, 732 S.E.2d at 628 (citation omitted).

Further, our case law favors construing insurance coverage clauses broadly in favor of the insured and in favor of coverage: “rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed. This rule of construction inures to the benefit of the insured.” *McPherson By and Through McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993). In other words, “if doubt exists as to the extent or fact of coverage, the language used in most policies will be understood in its most inclusive sense.” *Id.* See also *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995) (stating that insurance policies are “construed liberally in favor of the insured and strictly against the insurer.”).

When there is ambiguity in the insurance context,¹⁸ “an insurance policy is to be liberally construed in favor of the insured, and, where reasonably susceptible of a construction which will permit recovery, that construction will be adopted.” *Linder v. Firemen’s Ins. Co. of Newark, N.J.*, 240 S.C. 331, 334, 125 S.E.2d 645, 647 (1962).

Here, the issue before the Court on summary judgment is whether Davis Mechanical’s underlying insurer, Wausau, “paid the amount of the underlying limits limits”—i.e., \$500,000—“on account of such occurrence.”¹⁹ If so, then the underlying insurance has been fully exhausted²⁰ and Republic must begin paying up to its per occurrence limit.

The Court is persuaded by Davis Mechanical that Wausau has paid the amount of the underlying limits because it disposed of or transferred money to the Greenville QSF, which in turn was used to pay asbestos plaintiff’s claims. The Receiver negotiated a settlement with Wausau related to the Wausau Policies issued to Davis Mechanical, including full payment of the limit of liability of the 82/83 Wausau Policy.²¹ Further, this Court stated that “upon completion and funding of the settlement to Greenville QSF, Wausau’s policies issued to David under which David is entitled to benefits from Wausau. . . are fully exhausted such that no further insurance coverage will be available under the policies.”²²

Following the funding of the Greenville QSF, the Receiver settled claims asserted by several plaintiffs that sued Davis Mechanical for their asbestos bodily injuries.

This Court finds because of the Receiver’s settlement with Wausau, Wausau’s policies

¹⁸ In general, a contract or contractual provision is ambiguous “when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation.” *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (1997).

¹⁹ Davis Mechanical’s Mot. for Partial Summ. J., Ex. 8.

²⁰ The Court adopts the short-hand reference of the term “exhaustion” as used in Davis Mechanical’s Motion and as used throughout this litigation.

²¹ Davis Mechanical’s Mot. for Partial Summ. J., Ex. 5.

²² Davis Mechanical’s Mot. for Partial Summ. J., Ex. 9.

“are fully exhausted such that no further insurance coverage will be available under the policies.”²³ Further, the Wausau’s policies are exhausted as Wausau had paid funds in excess of the aggregate and “per occurrence” limits in the policy. The Court agrees the policy language does not require Wausau to pay directly to asbestos plaintiffs—it simply requires that Wausau “shall have paid the amount of the underlying limits on account of such occurrence,”²⁴ and the payments here were made and they were made on account of asbestos injury occurrences. Moreover, even if payment to the Greenville QSF was not sufficient to exhaust Wausau’s policy—despite this Court already holding that it did—those funds being distributed to the asbestos claimants themselves plainly suffice. Therefore, Republic is now required to pay David Mechanical settlements, verdicts, and judgments up to its “per occurrence” and “aggregate” limits of liability in the Republic 82/83 Umbrella Policy, along with the appropriate defense costs, court costs, and interest “in addition to limits.”

CONCLUSION

For the reasons set forth above, the Court grants Davis Mechanical’s Motion for Partial Summary Judgment, and also grants Davis Mechanical’s Motion to Seal in reference to Exhibit 5 and Exhibit 10.

IT IS SO ORDERED.

[JUDGE’S SIGNATURE PAGE FOLLOWS]

²³ *Id.*

²⁴ Davis Mechanical’s Mot. for Partial Summ. J., Ex. 8.



Richland Common Pleas

Case Caption: Terry L Green Sr , plaintiff, et al vs Advance Auto Parts Incorporated
, defendant, et al
Case Number: 2022CP4006627
Type: Order/Summary Judgment

So Ordered

Jean H. Toal

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

Case No. 2022-CP-40-06627

Appellate Case No. 2023-001629

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.; Beaty
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,

Davis Mechanical Contractors, Inc.,
by and through its Receiver Peter D. Protopapas.....Third-Party Plaintiff,

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, now known as
Starr Indemnity & Liability Company; United States
Fire Insurance Company; Brandywine Holdings Corporation;
and Riverstone Claims Management, LLC,Third-Party Defendants,

of which

Davis Mechanical Contractors, Inc.,
through its Receiver Peter D. Protopapas, is theRespondent,

and

Republic Insurance Company n/k/a
Starr Indemnity & Liability Company is theAppellant.

PROOF OF SERVICE

I, the undersigned of the law offices of Sweeny, Wingate & Barrow, PA, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of Republic’s Return to Receiver’s Motion to Dismiss Appeal by emailing a copy to them to the addresses below:

Parties Served:

- Peter D. Protopapas (pdp@rplegalgroup.com)
- John B. White, Jr. (jwhite@johnbwhitelaw.com)
- G. Murrell Smith, Jr. (murrell@smithrobinsonlaw.com)
- Jonathan M. Robinson (jon@smithrobinsonlaw.com)
- Shanon N. Peake (shanonp@smithrobinsonlaw.com)

Attorneys for Respondent, Third-Party Plaintiff Davis Mechanical Contractors, Inc., through its Receiver Peter D. Protopapas

Morgan Y. Drapeau (morgan.drapeau@bowmanandbrooke.com)
Angela G. Strickland (angela.strickland@bowmanandbrooke.com)

Attorneys for Defendant 3M Company

Gregory W. Rouse, II (grouse@maronmarvel.com)

Attorney for Defendant Abex Corporation

W. David Conner (dconner@hsblawfirm.com)
Scott Edward Frick (sfrick@hsblawfirm.com)
Moffatt G. McDonald (mmcDonald@hsblawfirm.com)
Carson S. Phillips (cphillips@hsblawfirm.com)

Attorneys for Defendant Advance Auto Parts Incorporated, Defendant Daniel International Corporation, Defendant Fluor Constructors International Inc., Defendant Fluor Contractors International, Defendant Flour Corporation, Defendant Fluor Daniel Services Corporation, Defendant Fluor Enterprises Inc., Defendant General Parts Inc., and Defendant Union Carbide Corporation

Robert Wilder Harte (wharte@richardsonplowden.com)
Steven James Pugh (spugh@richardsonplowden.com)

Attorneys For Yeargin Construction Company Inc and Aecom Construction Company, Inc.

Carmela E. Mastrianni (cmastrianni@lawhssm.com)

Attorney for Third-Party Defendant Allstate Insurance Company

Tara C. Sullivan (tara.sullivan@klgates.com)

Attorney for Defendant Autozone, Inc.

Derrick Colby Foard (derrick.foard@elliswinters.com)

Attorney for Defendant Beaty Investments Inc.

Kevin Kendrick Bell (kbell@robinsongray.com)

Attorney for Third-Party Defendants Brandywine Holdings Corporation and Federal Insurance Company

James B. Glenn (jase.glenn@nelsonmullins.com)
Robert O. Meriwether (robert.meriwether@nelsonmullins.com)

Attorneys for Defendant CH2M Hill E&C, Inc., Defendant Itt LLC, and Defendant Cleaver Brooks, Inc.

Deirdre S. McCool (deirdre.mccool@nelsonmullins.com)
G. Mark Phillips (mark.phillips@nelsonmullins.com)
David G. Traylor, Jr. (david.traylor@nelsonmullins.com)

Attorneys for Defendant Cleaver Brooks, Inc., Defendant Itt LLC, GG of Florida, Inc., Michelin Corporation and Michelin North America Inc.

A. Victor Rawl, Jr. (vrawl@grsm.com)

Attorney for Columbia Casualty Company, Continental Insurance Company and Liberty Mutual Insurance Company

Ashley K. Brathwaite (ashley.brathwaite@elliswinters.com)

Attorney for Defendant Covil Corporation and Standard Insulation Company of NC, Inc.

John K. Chandler (jchandler@rplegalgroup.com)

Attorney for Covil Corporation, Davis Mechanical Contractors Inc., and Heat & Frost Insulation Company

Christopher Rutledge Jones (crjlegal@gmail.com)

Attorney for Defendant Covil Corporation

Michael J. Anzelmo (manzelmo@mcguirewoods.com)
Sarah Beth Nielsen, Esquire (snielsen@mcguirewoods.com)
Jason A. Richardson, Esquire (jrichardson@mcguirewoods.com)

and

Courtney C. Shytle (cshytle@mcguirewoods.com)

Attorney for Defendant and Third-Party Plaintiff Davis Mechanical Contractors, Inc.

Brian M. Barnwell (BB@rplegalgroup.com)

Attorney for Defendant and Third-Party Plaintiff Davis Mechanical Contractors, Inc. and Heat and Frost Insulation Company, Inc.

Erin Elaine Shofner (eshofner@hpylaw.com)

Attorney for Eaton Corporation

Addie Katherine Silver Ries (aries@smithlaw.com)

Attorney for Ford Motor Company

Sheneka S. Lodenquai (shenekalodenquai@parkerpoe.com)

and

Taylor Joy Stewart (taylor.stewart@lewisbrisbois.com)

and

Jasmine Imani Whatley (Jasmine.Whatley@lewisbrisbois.com)

Attorneys for Genuine Parts Company

Matthew Douglas Patterson (matt.patterson@nelsonmullins.com)

James H. Burns (james.burns@nelsonmullins.com)

Attorneys for GG of Florida, Inc., Michelin Corporation, Michelin North America Inc. J & L Insulation, Pipe & Boiler Insulation Inc, Presnell Insulation Co Inc., and Wind Up Ltd

Michael Paul Stover (michael.stover@nelsonmullins.com)

Attorney Michelin Corporation and Michelin North America Inc.

Michael James Bogle (michael.bogle@wbd-us.com)

Attorney for Goodyear Tire & Rubber Company

Charles William Branham, III (tbranham@dobslegal.com)

Jonathan Marshall Holder (jholder@dobslegal.com)

and

John D. Kassel (jkassel@kassellaw.com)

Theile McVey (tmcvey@kassellaw.com)

Jamie Rae Rutkoski (jrutkoski@kassellaw.com)

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

Connor Jeffrey Hoy (connorhoy@parkerpoe.com)

Jenna Brook Kiziah McGee (jennamcgee@parkerpoe.com)

Paul Nicholas Nybo (nicknybo@parkerpoe.com)

and

Joseph Yechiel Shenkar (joe@shenkar-law.com)

Attorneys for Heat and Frost Insulation Company

Mark H. Wall (mark.wall@walltempleton.com)

Attorney for Metropolitan Life Insurance Company

Brandy Gillette Price (bprice@dmclaw.com)

Attorney for O'Reilly Automotive Stores Inc, Oreilly Auto Enterprises LLC

Jennifer Ann Jordan (jenny.jordan@nelsonmullins.com)

Erika Jensene Karnaszewski Fedelini (erika.fedelini@nelsonmullins.com)

Attorneys for Occidental Chemical Corporation

Luke M. Allen (luke.allen@arlaw.com)
Kirby Darr Shealy, III (Kirby.shealy@arlaw.com)

and

David Grant Harris II (dharris@goldbergsegalla.com)

Attorneys for Pennsylvania National Mutual Casualty Insurance

Abigail Caroline Bray (abray@turnerpadget.com)
Carmelo Barone Sammataro (ssammataro@turnerpadget.com)

Attorneys for Plenco and Plastics Engineering Company

Nicolas John Cherry (ncherry@foxrothschild.com)
Stephanie G. Flynn (sgflynn@foxrothschild.com)

Attorneys for Rockwell Automation Inc

Jessica Waller Laffitte (jlaffitte@gwblawfirm.com)

Attorney for Schneider Electric Usa Inc

James Guy Kennedy (jameskennedy@piercesloan.com)

Attorney for Southern Insulation Inc. and Defendant and Third-Party Plaintiff Davis Mechanical Contractors, Inc.

Andrew Shelby Rogers (asrogers@ewhlaw.com)
Jennifer M. Techman (jmttechman@ewhlaw.com)

Attorneys for Paramount Global. General Electric Company, and Spirax Sacrho Inc.

Ashley Prickett Cuttino (Ashley.cuttino@odnss.com)
Steven Michael Nail (michael.nail@ogletreedeakins.com)

Attorneys for Springs Industries Inc and Springs Industries LLC

Carl Everette Pierce, II (carlpierce@piercesloan.com)
Benjamin Catlett Smoot, II (bensmoot@piercesloan.com)

Attorneys for Starr Davis Company Inc. and Starr Davis Company of SC Inc.

Allen Mattison Bogan (matt.bogan@nelsonmullins.com)
C. Mitchell Brown (mitch.brown@nelsonmullins.com)

Attorneys for J & L Insulation, Pipe & Boiler Insulation Inc, Presnell Insulation Co Inc., and Wind Up Ltd

Marghretta Hagood Shisko (mshisko@johnbwhitelaw.com)

and

Joel Anderson Berly, IV (jay.berly@butlersnow.com)
Robert Ernest Sumner, IV (robert.sumner@butlersnow.com)

Attorneys for Peter Protopapas, Receiver

s/Brandon R. Gottschall
Mark V. Gende, SC Bar No. 72835
Brandon R. Gottschall, SC Bar No. 100621
Daniel Q. Atkinson, SC Bar No. 105252
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

Attorneys for the Appellant, Third-Party Defendant Republic Insurance Company, now known as Starr Indemnity and Liability Company, and for Third-Party Defendant American Home Assurance Company

November 20, 2023