THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2022-CP-40-06627

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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,

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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REPLY TO RETURN TO MOTION TO DISMISS APPEAL

_____

Respondent Peter D. Protopapas, in his capacity as the Receiver for Davis Mechanical Contractors, Inc. ("the Receiver"), by and through the undersigned counsel, respectfully submits this Reply to Appellant Republic Insurance Company n/k/a Starr Indemnity & Liability Company's ("Republic") Return to the Motion to Dismiss the appeal.

In its Return, Republic argues it is entitled to ignore settled issue preservation law because it classifies the October 12, 2023 order an *ex parte* order. This order was not an *ex parte* order because Republic was given notice of the Receiver's motion and his intent to seek an order from the circuit court.[1] *See, e.g.*, *Stewart v. Floyd*, 274 S.C. 437, 443, 265 S.E.2d 254, 257 (1980) (Littlejohn, J., dissenting) (describing an *ex parte* order as one that is "sought without notice"); *Halsema v. Earley*, No. 2022-000047, 2023 WL 3563106, at *1 (S.C. Ct. App. May 18, 2023) (noting family court issued an *ex parte* order granting emergency custody of a child to the mother after the mother filed a motion for emergency relief *ex parte*). However, even if Republic believed the order was an *ex parte* order, it was required to request that the circuit court vacate the order before appealing to this Court. "If one conceives himself to be aggrieved by the issuance of an *ex parte* order, **the proper procedure is to apply promptly to the issuing authority to vacate**."

[1] In fact, Republic wrote to the Receiver after filing its appeal requesting any *ex parte* communications between the Receiver and the circuit court for the record on appeal, and the Receiver responded that there were no *ex parte* communications.

First Carolina Nat. Bank v. A & S Enters, Inc., 277 S.C. 591, 594, 291 S.E.2d 380, 382 (1982) (emphasis added). If a party "elect[s] to appeal in lieu of" seeking to first vacate the order, the party "has relinquished its right to move to vacate the [o]rder and the law of waiver applies." *Id.*

Although the Receiver disagrees with Republic's characterization that a motion to reconsider under Rule 59(e) of the South Carolina Rules of Civil Procedure would have been improper in this case, Republic was still required by our rules to preserve this issue for an appeal and seek a ruling from the circuit court first.[2] "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). If Republic did not believe a Rule 59(e) Motion was appropriate, it should have moved to vacate the order pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

[2] Republic argues in its Return that "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.'"). However, Republic asserts it should be able to do the very thing at the Court of Appeals that it claims it was not required to do at the trial court on a Motion to Reconsider—raise an issue for the first time. *But see Johnson v. Lloyd*, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014) ("An issue not properly preserved *cannot* be raised for the first time on appeal." (emphasis added)).

Republic should have immediately requested that the circuit court vacate under its order pursuant to Rule 60(b)(1) if Republic believed there was a "mistake, inadvertence, surprise, or excusable neglect" or Rule 60(b)(4) if Republic believed that the order was void due to being an *ex parte* order. Contrary to Republic's contention that its only avenue was to appeal, South Carolina provides numerous procedural mechanisms for Republic to raise its arguments to the circuit court, which is the appropriate court to raise an argument for the first time.

Republic was not prevented from raising issues to the circuit court. It refused to do so. It could have sought to vacate the order in the circuit court. In fact, prior to filing the Motion to Dismiss, the Receiver requested that the parties jointly request that the circuit court vacate the order. Republic refused. Even after the Receiver filed the Motion to Dismiss, Republic has not sought to vacate the order. Republic argues that it could not agree with the Receiver to jointly request that the circuit court vacate the order because it could not "dismiss the appeal and trust that the circuit court would voluntarily withdraw its Order." (Ret. p. 8.) However, Republic could have proposed a different solution to the Receiver—that the parties request a stay of the appeal and permission from this Court to jointly request that the circuit court vacate the order. It did not do so. It adamantly chose to proceed with the appeal despite the glaring issue preservation defects. Republic could have also itself sought leave in this Court to file a motion pursuant to Rule 60(b) in the circuit court to vacate the order. *See* Rule 60(b) ("During the pendency of an appeal, leave to make the motion must be obtained from the appellate court."). It has not done so.

Republic has wholly failed to preserve any issues for this Court to review. In its Return, Republic states: "[T]he issues on appeal are preserved from the face of the record and no Rule 59(e) motion was required or even proper." This is exactly the type of plain error that this Court and our Supreme Court have rejected. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602

S.E.2d 772, 780 (2004) ("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."). Our appellate courts have refused to consider issues on appeal absent proper preservation in the circuit court.

As discussed in the Receiver's Motion to Dismiss, Republic's arguments that the order violated its due process rights is an issue that must have been first raised 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."); *Mack v. Est. of Washington, No. 2017-001077*, 2021 WL 486841, at *2 (S.C. Ct. App. Feb. 10, 2021) (finding issues related to whether a party was entitled to relief under Rule 60(b) not preserved because the party did not file a motion pursuant to Rule 60); *Bakala v. Bakala*, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003) ("A due process claim raised for the first time on appeal is not preserved."); *Durlach v. Durlack*, 359 S.C. 64, 76, 596 S.E.2d 908, 915 (2004) (finding due process claim that a party was not given notice of the claims and an opportunity to object not preserved for review because it was raised for the first time on appeal). In the Return, Republic argues 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." (Ret. p. 9.) However, constitutional issues may not be raised for the first time on appeal. *See 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).

Republic's arguments which rely on Rule 241(d) of the South Carolina Rules of Appellate Procedure also fail. Republic mischaracterizes Rule 241(d). In the Return, Republic states:

> 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).

(Ret. P. 9.) Rule 241(d) does not support Republic's faulty appeal. Rule 241(d) concerns the procedure to obtain a lift of the automatic stay or a supersedeas, not whether issues are preserved for an appeal when a party fails to raise any arguments to the circuit court. Republic takes the sentence it cites completely out of context. Rule 241(d)(1), in full, states:

> Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

The "extraordinary circumstance" that Rule 241(d) refers to an extraordinary circumstance that allows a party to file a petition with the appellate court *for an order lifting the automatic stay or for supersedeas* without first making the request from the lower court that issued the order. It is not an extraordinary circumstance that allows a party to raise arguments on appeal for the first time without first raising them to the circuit court. Rule 241(d) does not support Republic's appeal, and Republic's arguments that Rule 241(d) allows an appeal of unpreserved issues is disingenuous.

Finally, Republic's argument that the fact that the circuit court has not *sua sponte* vacated its order since Republic's appeal is absurd. In the Return, Republic states: "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." (Ret. p. 8.) In a feat of mental gymnastics, Republic attempts to improperly twist the circuit court's failure to rule on arguments never raised to it to support its untenable position that Republic's failure to move to vacate the order before appealing should be ignored by this Court because the circuit

court's subsequent inaction and lack of "suggestion" to take further action tacitly shows it would deny Republic's motion. The circuit court has not had any opportunity to "suggest" anything related to the order because Republic never raised these issues to the circuit court. The circuit court is unaware of the arguments Republic raises in its Return and that Republic contends it erred in issuing the order.

Republic is asking this Court to do exactly what our appellate preservation rules prohibit—to predict what the circuit court would have ruled if Republic would have asked for such relief and overturn the circuit court with nothing in the record. Republic was required to move for relief in the circuit court before appealing to this Court. It cannot raise these issues for the first time on appeal and has pointed to no applicable extraordinary circumstance for this Court to ignore well-settled preservation rules. If this Court were to review this appeal despite no issues being preserved for review, it would effectively adopt the plain error rule. Republic had the opportunity to properly raise these issues before it appealed or to avoid this appeal altogether and protect the scarce resources of the appellate courts—by filing a Rule 59(e) or Rule 60(b) motion to obtain a ruling from the circuit court or by joining in a consent proposal to allow further briefing on the issues addressed in the order—but it refused to do so. Instead, Republic obstinately demands the appeal be decided on procedural and substantive grounds. Accordingly, the Receiver requests the Court dismiss the appeal as no issues have been preserved for appellate review.

(Signature page follows)

Respectfully submitted,

*s/Jonathan M. Robinson*_____

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ATTORNEYS FOR RESPONDENT

November 29, 2023.

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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.

PROOF OF SERVICE

I certify that a true copy of the Reply to Return to Motion to Dismiss Appeal of Receiver Peter D. Protopapas in this case has been served on the following, this 29th day of November, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to subsection (g)(3) of the South Carolina Supreme Court's March 20, 2020 Order, as amended May 29, 2020. Pursuant to subsection (g)(3) of the South Carolina Supreme Court's Order, service on the attorneys admitted pro hac vice is accomplished by service on the associated South Carolina lawyer.

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November 29, 2023.

From:	Dot Faulkenberry
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Cc:	Shanon Peake; Jon Robinson; Murrell Smith; Peter Protopapas; Brian Barnwell; Melissa H. Abbott
Subject:	Davis Mechanical Contractors v. Republic Ins. (2023-001629)
Date:	Wednesday, November 29, 2023 2:42:00 PM
Attachments:	Reply to Return Mtn Dismiss, 3.pdf

On behalf of Jonathan Robinson, please find attached copy of the Reply to Return to Motion to Dismiss Appeal, we are filing with the Court today.

Thank you,

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