

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Kristi Lea Harrington, Circuit Judge

Common Pleas Case No. 2010-CP-10-6239  
Appellate Case No. 2015-000940

**RECEIVED**

JAN 17 2017

**SC Court of Appeals**

D.A. Morgan Price,.....Respondent,

v.

Todd Chas, Jacara Chas, Marsh Winds Owners Association, Inc. a/k/a Marsh Winds  
Horizontal Property Regime, and The Marshland Communities, LLC, Defendants,

Of whom Todd Chas and Jacara Chas are the.....Appellants.

RESPONDENT'S RETURN TO APPELLANTS' MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL BRIEF

The Respondent hereby submits this return to the Appellants' motion for leave to file a supplemental brief in this appeal. There is no reason for supplemental briefing in this case, and the Appellants' motion should be denied, as the following shows:

1. Nothing has happened that warrants the submission of a supplemental brief by any party to this appeal. Appellants have now hired new counsel (and the Respondent does not oppose their motion to substitute counsel); however, that does not mean that any departure from or addition to the briefing schedule provided in Rules 208 and 211, SCACR, is called for.

2. If pertinent and significant authorities have come to the Appellants' attention after the filing of their initial briefs, they may submit a letter to the court about those authorities pursuant to Rule 208(b)(7), SCACR. The Appellate Court Rules do not provide for the submission of a supplemental brief under those circumstances.
3. The Appellate Court Rules actually make no provision at all for supplemental briefs. A look at the mention of supplemental briefs in this court's jurisprudence, though, is instructive on when supplemental briefing may be appropriate.
4. The appellate court may request the submission of supplemental briefs, as when specific questions on which the court desires briefing come up at oral argument. Prince v. Beaufort Mem. Hosp., 392 S.C. 599, 604, 708 S.E.2d 122, 125 (Ct. App. 2011). The court may also request the submission of supplemental briefs where a significant development in applicable law has occurred after the briefs in an appeal have already been filed. Richitelli v. Motiva Enterps., LLC, 389 S.C. 184, 697 S.E.2d 667, 670 (Ct. App. 2010).
5. Under ordinary circumstances, such as those presented here, an appellant's brief is to contain all of the appellant's arguments on appeal. See Hunter v. Staples, 335 S.C. 93, 103, 515 S.E.2d 261 (Ct. App. 1999); Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989). The appellant's reply brief is limited to replying

to matters raised by the respondent in its brief and cannot be used to make new arguments. Id.

6. Supplemental briefs are reserved for the truly special situations that warrant them. They are not for situations in which a party has submitted his brief but has later thought of new arguments he would like to add.
7. This situation is the latter, not the former. Appellants note language from the federal district court's opinion last summer in Hyman v. S.C. Dept. of Corr. that "[i]t would offend basic principles of due process to direct one defendant to accept service for another defendant." No. 4:13-cv-3523-MGL-TER, 2016 WL 4055672 at \*2 (D.S.C. June 15, 2016). Of course, as the Appellants acknowledge, the Hyman decision is not precedent in South Carolina state courts and has no binding effect upon this court. Blyth v. Marcus, 335 S.C. 363, 368 n. 3, 517 S.E.2d 433 (1999) (South Carolina federal district court decision "[o]f course . . . is not binding on this Court"). Moreover, though, the quoted language is just inapposite to the instant case. This appeal does not involve one defendant accepting service for another or being directed to do so. The Appellants were served by publication. (R. pp. 76-78.)
8. Further, were the court to allow the Appellants to submit a supplemental brief on "[t]he substantive issue of whether the judgment is void for lack of due process[,]" as the Appellants ask,

that would be a futile exercise. No such argument is preserved for review.

9. To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). “Constitutional arguments are no exception to the rule, and if not raised to the trial court are deemed waived on appeal.” State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000); accord State v. Powers, 331 S.C. 37, 42-43, 501 S.E.2d 116 (1998); Grant v. S.C. Coastal Council, 319 S.C. 348, 356, 461 S.E.2d 388, 392 (1995). This includes due process arguments. Grant, 319 S.C. at 356.
10. The Appellants failed to raise a due process argument to the trial court.
11. In their written motion to set aside the judgment against them, the denial of which is the subject of this appeal, the Appellants only made the barest mention of due process, stating in the introductory paragraph that “[t]he judgment is void *ab initio* for lack of service, lack of personal jurisdiction, and lack of due process.” (R. p. 61.) The body of their written motion, though, did not advance any due process arguments (R. pp. 61-68); rather, the contention of the Appellants’ written motion was that they “were never properly served with any documents relating to this case. Therefore, the court lacks

personal jurisdiction over them, and the judgment must be voided.”

(R. p. 63.)

12. At the hearing on that motion, the Appellants did not mention due process or make a due process argument. (R. pp. 32-50.) Appellants’ counsel noted their argument near the outset of the hearing, stating that “[w]hat we’re doing here today is challenging the service under Rule 60(b)(4)<sup>1</sup> as void because they were never served properly.” (R. p. 34 ln. 14-16.) If the Appellants had a due process argument, they abandoned it by failing to make it at the hearing.
13. In their motion for reconsideration, the Appellants simply stated that they “contend the judgment is void *ab initio* for lack of service, lack of personal jurisdiction, and lack of due process” (R. p. 204); however, just as in their written motion to set aside the judgment, they advanced no due process argument in the substance of their motion, which was, again, concerned with service of the summons and complaint and with service of the notice of trial. (R. pp. 204-207.)
14. Further, the Appellants’ brief does not advance a due process argument. (Final Brief of Appellants pp. 5-12.) In the Appellants’ reply brief, they then contend that “service was inadequate and violated the Chases’ due process rights” and that “what Price fails to recognize is that in order to meet due process service requirements that provide the court jurisdiction over the Chases, the Chases had to

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<sup>1</sup> Actually, the transcript reads “Rule 6(d)(d)(4)[.]” but this is plainly a mistranscription. (R. p. 34 ln. 15.)

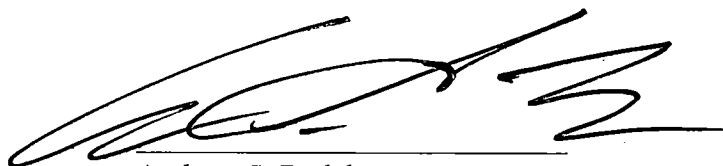
receive notice.” (Final Reply Brief of Appellants pp. 1, 5.) The first time the Appellants advanced an argument in this case that their due process rights had been violated was in their reply brief.

15. Even if this argument had been made at the trial level, which it was not, it would still be unpreserved for review, because an appellant may not use a “reply brief as a vehicle to argue issues not argued in the appellant’s brief.” Bochette, 300 S.C. at 112.
16. Appellants contend in their motion that this is an appeal from a default judgment, but it is not – it is an appeal from the denial of a motion for relief from a default judgment. Appellants contend in their recent request for oral argument that a default judgment is “an extraordinary remedy,” but it is not – it is the ordinary remedy where a party fails to plead or otherwise defend a plaintiff’s case. See Rule 55(a)&(b), SCRPC. The Respondent sees no particular need for oral argument in this appeal, which is about whether Judge Harrington abused her discretion in denying Appellant’s motion for relief from the judgment.
17. This case does not present the rare situation in which a supplemental brief is warranted. No new development in the applicable law has happened. As the Appellants’ motion basically acknowledges, they seek to file a supplemental brief not to address some new development in the law but to put argument before the court that they could have written in their appellants’ brief but did not. Further, this

court would likely conclude that, for issue preservation reasons, it could not address the arguments it seems the Appellants wish to raise in a supplemental brief. There is no reason to allow the Appellants a second bite at the briefing apple. The court should deny their motion.

WHEREFORE the Respondent asks that the court deny the Appellants' motion to file a supplemental brief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Andrew S. Radeker', written over a horizontal line.

Andrew S. Radeker  
S.C. Bar No. 73743  
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Post Office Box 50143  
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Attorney for Respondent

January 17, 2017

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM CHARLESTON COUNTY  
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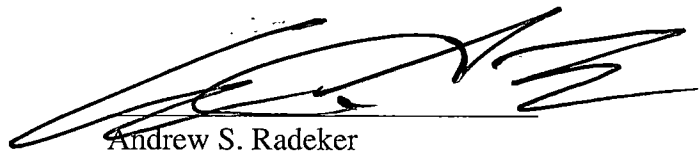
Of whom Todd Chas and Jacara Chas are the.....Appellants.

PROOF OF SERVICE

I certify that I served the foregoing return by depositing a copy of it on the date  
shown below in the United States Mail, postage prepaid, addressed as follows:

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January 17, 2017

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January 17, 2017

**VIA HAND DELIVERY**

The Hon. Jenny Abbott Kitchings  
Clerk of Court, Court of Appeals of South Carolina  
1220 Senate Street  
Columbia, South Carolina 29201

Re: **D.A. Morgan Price v. Todd Chas, et al.**  
**Appellate Case No. 2015-000940**

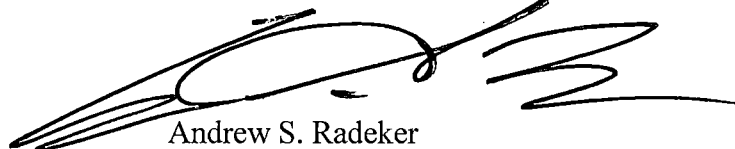
Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of a return to the appellant's motion for leave to file a supplemental brief, with attached proof of service thereof.

Kindly file these documents and return a file-stamped copy thereof to the bearer of this letter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,  
**HARRISON & RADEKER, P.A.**



Andrew S. Radeker

ASR/

Enclosures

cc: William A. Scott, Esq.  
Jeffrey S. Tibbals, Esq.  
Alexandra H. Austin, Esq.

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