THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Appellate Case Number 2015-000940

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.

APPELLANTS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

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Attorneys for Appellants

January 24, 2017

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rule 240(f) of the South Carolina Rules of Appellate Procedure, Appellants, Todd Chas and Jacara Chas, hereby submit this reply to Respondent's return to Appellants' motion for leave to file a supplemental brief in the above-captioned matter. Appellants state the following in support thereof:

1. Respondent sets forth the position that the Court of Appeals may permit supplemental briefs only under a limited set of circumstances, such as when specific questions arise during oral argument, or where a significant development in applicable law has occurred after appellate briefs have been filed. Return at 4. Appellants disagree with this narrow interpretation, and assert that the Court of Appeals has broad discretionary power to allow supplemental briefing where the Court deems it appropriate or desired.
2. The Appellate Court Rules contain no prohibition upon supplemental briefs. However, Appellants acknowledge that supplemental briefs should only be filed with leave of Court, which is the purpose of the instant motion.
3. Because this case impacts their fundamental constitutional rights, Appellants suggest that this Court should take a permissive stance on supplemental briefing in order to assure that the ends of justice are met, and constitutional protections stand firm. *See Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 644, 659, 591 S.E.2d 611, 619 (2004) (explaining in the context of personal jurisdiction that "there is the fundamental interest in not allowing constitutionally infirm judgments to be enforced").

4. In accordance with principles of fairness, Appellants would not oppose but welcome a supplemental brief from Respondent, responding to arguments in Appellants' supplemental brief, if the Court permits its filing.

5. Respondent argues that the substantive issue of whether the default judgment is void for lack of due process has not been preserved for review. Return at 8-15. Appellants disagree, and would show that the failure of due process is a thread woven through the fabric of this case, from the first appearance of Appellants in the trial court, to Appellants' Final Reply Brief in this case.

6. The general rule of issue preservation states that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal. *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) (citing *State v. Dunbar,* 356 S.C. 138, 587 S.E.2d 691 (2003) and *State v. Lee*, 350 S.C. 125, 564 S.E.2d 372 (Ct.App.2002)).

7. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (citing *Pelican Bldg. Centers of Horry–Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993)); *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); Rules 52(b) and 59(e), SCRCP).

8. "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." *Pye v. Estate of Fox*, 369 S.C. 555, 565–66, 633 S.E.2d

505, 510 (2006) (quoting *James F. Flanagan South Carolina Civil Procedure* 475 (2d ed.1996)).

9. Appellants properly preserved the issue of a due process violation at the trial court level. In the very first paragraph of Appellants' Notice of Motion, Motion to Set Aside Judgment, and Supporting Memorandum of Law, Appellants contended that the "judgment is void *ab initio* for lack of service, lack of personal jurisdiction, and lack of **due process**." R. at 61 (emphasis added).

10. After the trial court issued a form 4 order denying Appellants' Rule 60 motion, R. at 1, Appellants filed a Notice of Motion and Motion for Reconsideration, stating, "The Chases contend the judgment is void *ab initio* for lack of service, lack of personal jurisdiction, and lack of **due process**." R. at 204 (emphasis added).

11. The trial court denied Appellants' Rule 59 motion, again by form 4 order, and without specific findings of fact or conclusions of law. R. at 3. Thus, in accordance with binding jurisprudence, the due process argument was preserved for appeal.

12. Another rule of issue preservation is that a legal doctrine need not be specifically named in order to preserve a legal argument for review. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue") (citing *State v. Russell,* 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001)).

13. Nor must an issue be specifically set out in a statement of issues in an appellate brief for preservation to attach. "When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments." *Herron*, 395 S.C. at 466, 719 S.E.2d at 642–43

(citing *Eubank v. Eubank,* 347 S.C. 367, 555 S.E.2d 413 (Ct.App.2001) (finding the statement of issue, when read in conjunction with the argument, sufficiently raised the issue to the court); *compare Williams v. Leventis*, 290 S.C. 386, 390, 350 S.E.2d 520, 523 (Ct. App. 1986) ("This argument is embraced in a single sentence on the last page of his brief, is not supported by any authority whatever, and is found in the formal conclusion to his brief; thus, it may be viewed as effectively abandoned.").

14. Although it is sufficient, for the purposes of issue preservation, that Appellants have raised the specific argument of deprivation of due process at each necessary juncture, a brief review of the meaning of due process in the context of this case is appropriate, to determine if the due process issue is reasonably clear from Appellants' arguments.

15. In *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002), a case cited in Appellants' Motion to Set Aside Judgment (R. at 62), Appellants' Brief (at p. 7), and Appellants' Reply Brief (at p. 1), this Court of Appeals held: "The requirements of due process not only include notice, but also include an opportunity to be heard in a meaningful way, and judicial review." (citing *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); and *S.C. Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995)).

16. Additionally, in *Caldwell v. Wiquist*, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013), cited in Respondent's Brief (at p. 18), this Court of Appeals quoted other authorities stating: "[S]ervice by publication is constitutionally insufficient where actual notice by mail is feasible." "If the name and address of an individual is reasonably ascertainable, then notice by publication is insufficient to satisfy due

process." (quoting *United States v. Borromeo,* 945 F.2d 750, 752 (4th Cir. 1991); and *Montgomery v. Scott,* 802 F.Supp. 930, 935 (W.D.N.Y.1992)).

17. The arguments and themes in this case center upon Appellants' lack of opportunity to be heard, and the failures of Respondent to properly mail notice to Appellants, and are pervasive throughout all of Appellants' filings in the trial court and in this appeal. *See, e.g., inter alia,* Motion to Set Aside Judgment, R. at 63 ("This entire action, including the trial, was conducted without the knowledge of the Chases, who only first learned about this case on July 28, 2014."); Motion to Set Aside Judgment, R. at 65 ("The Plaintiff missed, disregarded, or did not pursue numerous items that would have given Plaintiff the correct contact information for the Chases."); Motion to Set Aside Judgment, R. at 67 ("The Notice of Trial was not properly served"); Hearing Transcript on Motion to Set Aside Judgment, R. at 34 ("During the entire time, they just did not know this case was going on or had any knowledge. What we're doing here today is challenging the service under Rule 6(d)(d)(4) (sic) as void because they were never served properly."); Hearing Transcript on Motion to Set Aside Judgment, R. at 37 ("But they need an opportunity to properly defend themselves because they clearly never had notice of this complaint"); Motion for Reconsideration, R. at 204 ("The Chases never made an appearance and contend they were never served and never had notice of the trial."); Appellants' Brief at p. 2 ("The Chases were allegedly served via publication, and contend they never received notices of the complaint or the trial, which are the issue (sic) in the appeal."); Appellants' Brief at p. 11 ("The Chases never had notice of the complaint because of the Plaintiff's lack of due diligence and failure to follow the law."); Respondent's Brief at p. 13 ("This was a

proper case for service by publication, and the Chases received all the notice they were entitled to get, under the circumstances").

18. Appellants' Reply Brief, at p. 5, sums up the due process theme, stating: "**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 receive notice. *BB&T v. Taylor*, 369 S.C. at 551. In this case, numerous irregularities and failure to comply with the rules regarding service by publication resulted in the Chases never receiving notice and denied the Chases' their right to due process.**"

19. The application of the issue preservation rules to the due process argument in this case demonstrates that the issue has been unquestionably preserved for review.

20. The federal district court case cited by Appellants in the instant motion is not raised as binding precedent, but rather to illustrate a helpful point of law: each defendant deserves due process of law, and must be individually served with process. Respondent glosses over this point in Respondent's Brief, at footnote 4, appearing to take the position that Mr. Chas had no independent constitutional rights. Respondent's Brief does not dispute that the record shows no attempt to serve Mr. Chas nor to even locate him.

21. Appellants, by and through a supplemental brief, do not seek to introduce new arguments, but rather synthesize and more comprehensively present issues that have been preserved.

Respectfully Submitted,

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PROOF OF SERVICE

I, Jeffrey S. Tibbals, Esquire, hereby certify that on the 24th day of January, 2017, I served a copy of APPELLANTS' REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF, submitted by Appellants Todd Chas and Jacara Chas, upon counsel for Respondent and former counsel for Appellants by mailing copies to them via United States Mail, postage prepaid, and addressed as follows:

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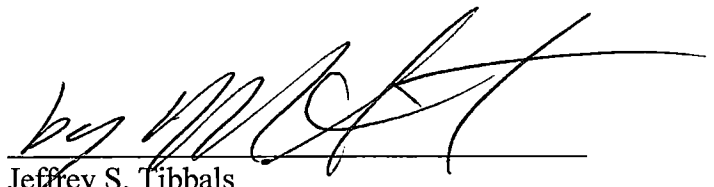

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January 24, 2017

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Jeffrey S. Tibbals
Member
Admitted in MD, VA, DC, SC

January 24, 2017

BY HAND DELIVERY

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

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

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellants' Reply in Support of Motion for Leave to File Supplemental Brief in the above-referenced matter. Please file the original and return the file-stamped copy in the enclosed, postage-paid envelope.

By copy of this letter, I have served counsel for Respondent, as indicated in the Proof of Service.

Sincerely,

Jeffrey S. Tibbals

JST/ksh
Enclosures
cc: Andrew S. Radeker

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