THE STATE OF SOUTH CAROLINA
In The Court of Appeals

75260

APPEAL FROM CHARLESTON COUNTY
CASE No. 2011- CP-10-1084
Circuit Court Judge R. Markley Dennis, Jr.

ROOSEVELT SIMMONS..... Appellant

Vs.

MASE and COMPANY, LLC,
J. AL CANNON, JR.,
CHARLESTON COUNTY SHERIFF'S DEPARTMENT,
CHARLESTON COUNTY REVENUE COLLECTIONS DEPARTMENT
and
HARRY LONG..... Respondents

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In February 2011, Appellant Roosevelt Simmons filed a Lis Pendens and Three Count Complaint for declaratory relief that several Magistrate's Court judgments entered against him for unpaid solid waste collection fees were invalid. The Complaint alleged that the Magistrate's Court had no jurisdiction to collect these fees because the enabling legislation , SC Code Section 44-55-1210 which permitted counties to regulate solid waste required that collection of the fees occur in the same manner as real estate taxes. Complaint at 1. Simmons asserted that each year from the time the fee was first imposed he requested that the County Auditor remove the fee from his tax bill and that the County Auditor agreed to waive the fee. Complaint at 2-3 .The Complaint further alleged that Simmons derived no benefit from the imposition of such fees as required by SC Code Section 44-55-1210 because the County did not receive or collect any solid waste from him. Complaint at 1-3.Some of the judgments against Simmons were for collection fees imposed against vacant land which was not subject to any fee and others were for property that Simmons did not own but only paid the taxes on behalf of relatives. Complaint at 4.The Complaint also sought to set aside the Sheriff's execution and sale of real property owned by Simmons known as TMS 498 because it was based upon an invalid judgment and TMS 498 was vacant land on which no collection fee could be imposed according to the enabling legislation. Complaint at 1-3. The Complaint also sought unspecified damages for violation of Simmons' right to equal protection under 42

USC Section 1983 due to the manner in which the fees were collected . Complaint at 4-5. The named Defendants were Respondent Mase and Company, LLC, the current owner of the TMS 498 and Respondents Charleston County and the Charleston County Sheriff who executed on the judgment.

Respondent Mase and Company, LLC filed a Pro Se Answer. Mase Answer at 1-2. Prior to service of an Answer by any Defendant, on March 23, 2011, Appellant filed an Amended Complaint which asserted that there were equitable grounds on which invalidate the user fee judgments and sale of his property. Amended Complaint at 6. The Amended Complaint further asserted that Appellant's right to equal protection under 42 USC Section 1983 was also violated due to the manner in which the County enforced its storm water fees. Amended Complaint at 6-7. The Amended Complaint added a claim for civil conspiracy against defendant Mase and Company, LLC alleging that it conspired to interfere with Appellant's damage claims in a pending civil action, Simmons v. Berkeley Electric Cooperative, Inc. et al, 2008-CP-10-1983 by acquiring TMS 498 during the pendency of the action. Amended Complaint at 8.

On March 25, 2011, Respondents Charleston County and Charleston County Sheriff filed a Notice of Removal in the United States District Court for South Carolina alleging that the District Court had jurisdiction over the civil rights violations alleged. County Notice of removal at 1-2. On March 31, 2011, Respondents Charleston County and Charleston County Sheriff filed an Answer to the Amended Complaint with various defenses including Sovereign Immunity. County Answer at 5. On April 28, 2011, Respondent Mase and Company, LLC filed an Answer to the Amended Complaint and a Counterclaim against Appellant for a Frivolous Claim and a Crossclaim against the Respondents Charleston County and

Charleston County Sheriff for negligence in conducting the execution and sale of TMS 498 and for indemnification. Mase Answer at 9-10. All Respondents demanded a jury trial. Appellant filed an Answer to the Counterclaim and the County Respondents filed an Answer to the Crossclaims. County Answer to Mase at 1-3; Simmons Answer to Mase at 1.

The parties then conducted discovery pursuant to a Scheduling Order entered in the District Court. The parties exchanged interrogatories and document requests and conducted depositions including the depositions of Appellant, Charles Masencup, principal of Respondent, Mase and Company, LLC and employees of respondent Charleston County Sheriff's Department including Respondent Harry Long who conducted the levy, execution and sale and George Boniface , an employee of Respondent Revenue Collections Department who was responsible for collection of the solid waste fees and filed the Magistrate Court complaints against Appellant.

The District Court Scheduling Order allowed Appellant to further amend his pleadings. In October 2011, pursuant to this Order, Appellant filed a Second Amended Complaint to incorporate further allegations that resulted from discovery. See Second Amended Complaint. Respondent Charleston County Revenue Collections Department was added as a party Defendant as the entity responsible for collection of the fees. Respondent Harry Long was named as a Defendant under the Fourth Count (civil rights violations) on the basis that he had arbitrarily and discriminatorily conducted the levy and execution that resulted in the sale of TMS 498.Second Amended Complaint at 4. The Fifth Count was amended to assert a Tort Claim against Respondent Harry Long on the basis that he had exhibited malice and an intent to injure Appellant in conducting the levy and execution and against the Sheriff's Department on the basis that it had been negligent in retaining

Respondent Harry Long as an employee. Id. at 5. All respondents filed Answers and Respondent Mase and Company, LLC realleged the same Counterclaim against Appellant and Crossclaims against the County Respondents.[1]

Thereafter in November 2011, Appellant filed a motion to dismiss the Second Amended Complaint on the basis that the District Court did not have subject matter jurisdiction to consider the validity of a state court judgment and that the civil rights claims were " inextricably intertwined" with them. Plaintiff's motion to dismiss at 4-5.County Respondents opposed the motion on the basis that the District Court could determine the alleged constitutional violations without regard to the validity of the state court judgments. County response at 1-2. The District Court agreed with Appellant that the federal court did not have jurisdiction over the validity of the Magistrate Court judgments and that they were e " inextricably intertwined" with the constitutional violations. February 7, 2012 order at 2-3. The District Court remanded the case sua sponte to the Circuit Court for further proceedings.

In February 2012, the County Respondents then filed a motion for summary judgment without supporting memorandum. County Motion at 1. The County Respondents also filed a Motion to dismiss the Second Amended Complaint as to Respondent Long on the basis that he was immune as a governmental employee. County Motion to dismiss at 1.

While this motion was pending, in April 2012, Appellant filed a motion for leave to amend the Second Amended Complaint to add a Sixth Count to vacate the Sheriff sale because the amount of the sale was grossly inadequate in relation to the fair market value of the property. See Amendment to Second Amended Complaint at Para. 41-44. Respondent Mase and Company, LLC consented to the amendment, Plaintiff's Motion to Amend at 2, but

[1] For ease of reference, J. Al Cannon, Jr., Charleston County Sheriff's Department, Charleston County Revenue Collections Department and Harry Long will be referred to as the County Respondents unless otherwise indicated.

the County Respondents opposed the amendment on the basis that plaintiff did not have standing to assert the inadequacy. County Response at 2-4. In June 2012, County Respondents filed a Motion for Summary Judgment as to Respondent Mase's Crossclaims for negligence and indemnity on the basis that they were entitled to Tort Claim Act immunity for all of its claims. County Motion at 2-3.

In July 2012, Appellant filed a Motion for Partial Summary Judgment as to the First, Second and Third Counts on the basis that he was entitled to a declaration that the Magistrate Court had no jurisdiction as a matter of law. Appellant contended that Ordinance required the collection of user fees like " ad valorem taxes" in accordance with the enabling legislation, S.C. Code Ann. Section 44-55-1210; and the Magistrate Court had no jurisdiction under the enabling legislation or the Magistrate Court Act, S.C. Ann. Section 22-3-10(1) to process a claim to collect a fee. Plaintiff's Motion for Partial Summary Judgment at 7-9

In July 2012, the County Respondents filed a Memorandum in support of their Motion for Summary Judgment asserting that the user fee was validly applied to Appellant, that the General Welfare Law SC Code Section 4-49-30 authorized the enforcement of solid waste collection fees in Magistrate's Court, that Respondent County Revenue Collections Department was immune from suit under the Tort Claims Act immunity for enforcement of laws. County memo at 4-10. County Respondents also asserted that the Respondent Sheriff's Department was immune from suit under the Tort Claim Act immunity for judicial and law enforcement activities and in the exercise of discretion, Id at 11-13; and that respondent Long was immune under the Tort Claim Act exemption for government employees. Id at 13. County respondents also asserted that there was no violation of equal protection of the solid waste collection fee ordinance because the fee was properly applied to Appellant. Id at 13-14.

With respect to the claim of negligent retention, County Respondents asserted that there was no evidence of negligence, County Memo at pages 14, and that County respondents also contended that Respondent Long had no acted with malice. Id at 14-15.

Appellant opposed this motion on the basis that the plain language of the Magistrate's Court Act, SC Code Section 23-3-10 does not authorize jurisdiction over a suit to collect a fee; that the County Ordinance to impose and collect the fee did not authorize jurisdiction in the Magistrate's Court and that the specific provision of the Magistrate's Court Act take priority over the general provision of the general Welfare Law as a matter of statutory construction. Appellant further alleged that there were disputed issues of fact and that discovery was incomplete. Plaintiff's Opposition to Summary Judgment at 35-38. Appellant also filed motion to compel discovery relating to the reasons for Respondent Long's prior suspension and for the Respondent County Sheriff's Department policy and Procedure Manual. Plaintiff's Motion to Compel Discovery at 2-4.

The County Respondents filed a Supplemental Memorandum in support of summary judgment followed by an Amended Supplemental memorandum in which they asserted that the Circuit Court did not have jurisdiction to hear the challenge to the validity of the Magistrate Court judgment since Appellant's only remedy was to file a motion in the Magistrate's Court or an appeal. County Amended Supplemental Memo at 1-4. County Respondents also asserted that the Magistrate's Court had jurisdiction under the injury to person provision of the Magistrate Court Act, S.C. Code Ann. Section 22-3-10(2). Id at 7. County Respondents also asserted that there was no nexus between the alleged negligent retention and the injury sustained. Id. at 9-11.

While the motion was pending, Appellant received additional discovery material and filed Further and Supplemental Opposition to the County Respondents Summary Judgment Motion and Opposition to the Amended Supplemental Memorandum which the County respondents filed. Plaintiff's Further Opposition, Plaintiff's Supplemental Opposition and Plaintiff's Opposition to County Defendants' Amended Supplemental Memorandum.

Appellant alleged that the Circuit Court had general jurisdiction over all of the claims and that R 60(b), SCRCP, permitted independent actions to vacate a judgment for equitable reasons including that the judgment is void. Appellant further asserted that the claims for civil rights and negligence were supported by facts and that the County Respondents were not subject to immunity. Plaintiff's Opposition to Memorandum at 20-26.

On November 7, 2012, the Court heard oral argument on all of the pending motions including the County Respondents Motions for summary judgment as to the Second Amended Complaint and the Crossclaims, Appellant's Motion for Partial Summary Judgment as to the Counts One, Two and Three and Appellant's Motion for Leave to Amend the Second Amended Complaint and a discovery motion. Following oral argument by both Counsel, the Motion Judge stated: This isn't going to be decided on summary judgment. . . There are too many issues here to—there's more than a scintilla of evidence of an issue here. So I'm denying the [summary judgment]Motion—both. " Id page 26, line 5-11. With respect to the County Respondents' argument as to the tort claim liability for arbitrary enforcement of the judgment, the Motion Judge stated:

> "I am not going to rule on the Tort Claims Act itself on the action he's brought . . . you can't just be arbitrary in selecting the property. You've got to select-- I understand the law when I was practicing , and I had this issue. You had to pick a property that didn't –that would really accommodate and satisfy what the judgment was."

Id. page 32, line 25 to page 33 line 11.Following oral argument, the Court entered a Form 4 order denying both summary judgment motions, dismissed the Complaint as to Respondent Long and granted Appellant's motion to amend the Second Amended Complaint. The County Respondents filed a motion for reconsideration of the denial of summary judgment and Appellant filed a motion to alter or amend the Order dismissing the Complaint as to Respondent Harry Long. The Court heard oral argument on both motions on March 13, 2013.

The Court later entered an Order dated June 17, 2013 granting reconsideration of its Decision and dismissing all of Appellant's claims. The Court found that Plaintiff had not appealed the Magistrates Court judgments and was barred from collaterally attacking them in Circuit Court. Order at page 2. Further the Court held that all of the causes of action necessarily flowed from the judgments and the Court had no jurisdiction over them. Id. Notwithstanding its decision that it had no jurisdiction to determine the merits of Appellant's claims, the Circuit Court ruled that the County Respondents were immune under certain provisions of the South Carolina Tort Claims Act, specifically, S.C. Code Sections 15-78-60(4) (enforcement of any law); 60(5)(exercise of discretion) , 60(11) (collection of taxes) and 60(23) (institution of judicial proceedings). The Court also ruled that the Respondent Sheriff's Office was similarly immune. With respect to the Appellant's claims of a violation of equal protection, the Court ruled that Appellant was not entitled to relief as matter of law and that Appellant had not presented a genuine issue of fact. Id at page 5.

Appellant subsequently filed a motion to alter /amend that Order, See Plaintiff's Motion to alter /amend, which was denied by Order dated October 6, 2014. The Order contains no findings or reasons. Id. Plaintiff served a Notice of Appeal on November 17, 2014.

FACTS RELATING TO THE ISSUES ON APPEAL

At all relevant times Appellant was the owner of real property known as TMS 282-00-00-138 (TMS 138) located on Johns Island. TMS 138 contains a residential dwelling and is accessible only by private road off Kitford Road. Simmons Affidavit, Para 3; See Second Amended Complaint at Para. 1. S.C. Code Ann. Section 44-55-1210 authorizes a county to provide and regulate solid waste collection and disposal and to levy user fees only against persons for whom services are provided. On or about 1987, Charleston County adopted Ordinance Section 10-51 et seq. to impose user fees upon the owners of real property located in the county for the express purpose of paying the costs of garbage and trash disposal at the county's facilities. Section 10-51 et seq. was intended to conform to S.C. Code Section 44-55-1210. See Ordinance Section 10-51(8). Ordinance Section 10-56 states: " [t]he annual disposal user fee shall be due and payable within the time and in the manner prescribed by law for county ad valorem taxes pursuant to section 12-45-70 of the code . . . or other law of similar import. The treasurer shall bill and collect the annual disposal user fee established by the county council in the same manner as taxes are collected . . . . " Ordinance 10-51 does not contain any provision for the county to collect a user fee in the Magistrate's Court.

Thereafter, pursuant to Ordinance Section 10-56, Charleston County imposed an "annual disposal user fee" on property owners in Charleston County including real property owned by Simmons. The user fee was included in the annual tax bill sent out by the

Charleston County Auditor. Plaintiff's Motion for Summary Judgment Exhibit A; Simmons Affidavit, para.4. Appellant did receive tax bills from the County for TMS 138 which included a user fee as part of the taxes owed. Id. Each time he received the tax bill, Appellant went to the Auditor's Office and objected and the Auditor's Office had him fill out a form entitled " Solid Waste Annual Disposal User Fee Application for Review " and he signed it. The employee of the Auditor's office usually Ms. Peggy Ellington would then note on it that the "user fee had been removed". Simmons affidavit, Para, 4; Plaintiff's Motion for Summary Judgment, Exhibit B 1, 2. Whereupon Appellant paid the real estate taxes and believed that he was no longer responsible for the user fee since no one at the Auditor's Office told him he was. Simmons Affidavit, Para. 4.

In response to a R. 30(b)(6) deposition notice concerning the collection of user fees the Respondent County Revenue Collections Department designated George Boniface as its representative. Boniface testified that he was the manager of the Legal Division within the Business License Fee/User Fee Department (later changed to the Revenue Collections Department). Plaintiff's Opposition to Summary Judgment, Exhibit C, Boniface Deposition page 16 line 9 to 18 .The Legal Division was responsible to prepare summons and complaints, appear in court and record judgments because there were no attorneys in the Legal Division. Id. page 19 line 3 to page 20 line 13. Boniface was familiar with the user fee ordinance and agreed that the purpose of the user fee was to collect money from people owning property in the county for whom services were provided. Id page 25, line 12 to 17. The Business License/User Fee Department was consolidated with the Delinquent Tax Department in 2008 but the collection of user fees is separate and distinct from the collection of delinquent taxes. Id page 31, line 10 to page 33, line 9.

In May 2000, Boniface filed a complaint in the Magistrate's Court against Appellant as the owner of TMS 138 for failing to pay the user fee in the amount of $89.00 for the year 2000.Plainitff's Motion for Partial Summary Judgment, Exhibit C-2. The complaint recited the provisions of the Ordinance Section 10-56 and sought judgment in the amount of the unpaid user fees. Id. Appellant asserts that he was never served with the summons and complaint. Simmons Affidavit, Para. 2.Appellant did not appear at the hearing on the complaint. Id. Para. 4. A default judgment , 2000-JG-10-1817 was entered in the amount of the user fee plus costs totaling the sum of $144.00. Id. Exhibit D . Appellant never received notice of entry of the judgment. See Simmons Affidavit, Para. 5.

Appellant contends that Charleston County does not provide any trash removal services to TMS 138 and that he should not be required to pay a user fee. Simmons Affidavit, Para. 5. If he had known of the user fee suit in magistrate's Court he would have appeared and contested it.

Subsequently Respondent County Revenue Collections Department commenced additional actions against Appellant for nonpayment of user fees imposed against TMS 138 relying upon the same language in the original 2000 Complaint. Plaintiff's Opposition to Summary Judgment, Exhibit A. Respondent Revenue Collection Department obtained six default judgments identified as follows: 2002-JG-10-0021; 2002-JG-10-923; 2003-JG10-170; 2004-JG -10-444; 2006-JG-10-931; 2010- JG -10-3099. Plaintiff's Motion for Partial Summary Judgment, Exhibit E 1-5. As to these, Appellant also contends he received no notice and had had a valid defense thereto, including waiver of the fee and the lack of any services or benefit as required by the statute. Simmons Affidavit, Para. 9.

Respondent County Revenue Collections Department also obtained a default judgment identified as JG 2009-10-391 against Appellant for nonpayment of user fees on real property designated as TMS 311-00-00-024 (TMS 024). Plaintiff's Motion for Partial Summary Judgment, Exhibit F. In prior years, Appellant paid the taxes on TMS 024 which was then held in the name of "the estate of Sam Balaam" who was married to Appellant's grandmother Hester Singleton Balaam. Simmons Affidavit, Para. 10. Because the taxes were not being paid regularly by family members and Appellant had to pay them to avoid a tax sale, he had the Tax Assessor send him the bill even though he was not the legal owner. Id. The county mistakenly listed him as the owner. See County Respondents Motion for Summary Judgment, Exhibit H. He did this in order to protect his family heirs' interest in this property. Simmons Affidavit, Para 10. Just as he had done for his own tax bill on TMS 138, Appellant asked the Auditor to remove the user fee for TMS 024 since he knew this property did not receive any trash removal or use the county disposal facilities. Id. In 2006, other persons claiming to be heirs of Sam Balaam (whom they identified as Sam Bailum) obtained a judgment in which TMS 024 was divided between third parties , Franklin Smith and LMC, LLC. As a result Appellant never acquired title to TMS 024. Simmons affidavit Para. 10.

Since 2007, Respondent Harry Long was assigned to the Judgment Section of the Sheriff's Department . His primary role was to collect user fee judgments and to assist another deputy in collecting on other civil judgments. Plaintiff's Opposition to County Motion for Summary Judgment, Exhibit D, Long Deposition page 147, line 6 to13. In February 2009, Respondent Long received six (6) user fee judgments from the Business License/user fee Department against Appellant, all involving user fees due on TMS 138. See Plaintiff's Motion

for Partial Summary Judgment, Exhibits E & F . Respondent Long testified that the 2000 judgment was originally received by the Sheriff's office in 2005 but was returned by the Sheriff at the county's request. Id. page 28, line 23 to page 29, line 8. In March 2009, Respondent Long did a record search and found several motor vehicles titled in Appellant's name but disregarded them and did not go to Appellant's house to determine what personal property was there. Id. at page 34, page 22 to 35 line 7. He thought that one of the vehicles was too old but did not investigate the others although he admitted they might be worth looking into. Id., page128, line 2 to 16. Deposition Exhibits 21-2 & 3. Respondent Long admitted that it was no more work to levy and sell personal property than to do this for real estate. Id. page135, line 19-21. He based his decision on " life experience"- not any training he received. Id. page 135, line 25 to page 136 line 3. None of the other Sheriff's Department personnel had anything to do with this case. Id. page 137, line 1 to 24.

Respondent Long also reviewed the Assessors Records and found real property in Appellant's name including property designated as TMS 138, 135, 498 and 499. Id. page 68, line 10 to page 70, line 9. TMS 138 was the property on which the user fee was delinquent resulting in the judgment he was enforcing. TMS 138 was in the joint names of Roosevelt Simmons and Gary Simmons. Id. page 70, line 23 to page 71, line 14.

Respondent Long testified that he received a phone call in early April from someone representing himself as Appellant. Respondent Long stated that this person made threats against him. Id. at page 39, line 5 to 8. He believed what this person said that he was going to take down the whole Sheriff's department. Id. at page 45 line 17 to 25. Long filed an incident report which became a permanent record against Appellant. Id. at page 41, line 15 to page 44, line 8. County Document Bates No 203. He also "blue flagged" Appellant's property with

the Communications Dept so that any other Sheriff's Department employee calling in to that location would be warned of a potential threat. Id. at page 44 line 9 to 22. County Document Bates No 40.

On July 23 Respondent Long decided to proceed against real property designated as TMS 498 owned by Appellant, not the property where Simmons lived (TMS 138). Plaintiff's opposition, Exhibit D, Long Deposition page 53, line 18 to page 58, line 11; page 60 lines 2 to 8. Respondent Long claimed that he made the decision to levy on TMS 498 based upon the appraised value in the county tax system of $23,900. Id. at page 80, line 25 to page 81 line 19. To insure that this sale could go forward, respondent Long even went to the office of the Master in Equity in August 2009 to confirm that pending suit involving TMS 498 had been dismissed. Id. at page 63, line 7 to 20. Respondent Long never discussed his decision to proceed against TMS 498 instead of personal property with his superior. Id. at page 66, line 4 to 16.

On August 26th, Respondent Long went to Appellant's home to serve the writ of execution. Id. at page 74, line 9-10, page 75, line 23-25. Long didn't remember seeing any personal property during his visit. Id. at page 76, line 11 to 20. Appellant did not behave belligerently or aggressively toward him and nothing out of the ordinary happened. Id. at page 76, line 23 to page 77 line 8.

Respondent Long conducted the sale of TMS 498 on October 5, but there were no bids. Id. at page 94, line 4 to 13. He held the second sale on November 4th and the property was sold for $600, being the highest bid. Id. at page 94, line 18 to page 95, line 7. The minimum bid was $490.62 representing the cost of advertising but that sale price was not sufficient to satisfy the judgment. Id. at page 96, line 4 to 22. Respondent Long claimed that

state law required him to set the minimum bid at the cost to advertise and that it doesn't include the amount off the judgment. Id. at page 96, line 4 to 16. The Sheriff's Department Policy and Procedure Manual, Procedure 5-04 for Civil Process does not contain any requirement that the minimum bid shall be the cost of sale. County Document Bates No. 206-229. Respondent Long acknowledged that he had a copy of the Policy and Procedure Manual. Long Deposition page 107, line 24 to page 108, line 19. He never received any formal training in the procedures pertaining to civil process. Id. at page 110, line 5 to 10. He stated that he "probably breezed through it" in connection with the sergeant's exam. Id. at page 109, line 19 to 23. After deducting the costs of sale, this amount was not sufficient to satisfy the $144.00 judgment. Id. at page 96, line 24 to page 97, line 1. Respondent Long testified that in the hundreds of executions of user fee judgments in which he was involved over 4 ½ years, in only two other cases did he have to sell real property. Plaintiff's Opposition to Summary Judgment, Exhibit G, Sheriff's Department Answers to Interrogatories at No. 17.

Appellant testified that stated he has had problems with not receiving mail for many years and did not receive any written notice of a complaint filed against him by the Business License/User Fee Department in 2000 for nonpayment of the user fees in the amount of $89.00. Simmons Affidavit, para,5. Since he never received notice of the complaint in 2000, he never went to the Magistrate's Court to object to the user fee. Id. Also he did not receive written notice that a judgment had been entered against him on that complaint. Id.

Appellant denies speaking to Respondent Long in April 2009 or making any threats against him or the Department. Simmons Affidavit, Para. 6. He never spoke to or heard from him before Respondent Long arrived at Appellant's house in August 2009. Id. Appellant denies receiving any letters which Respondent Long claims to have sent about the 2000

judgment. Appellant owns several motor vehicles including a Ford truck, a Toyota sedan and a "classic" 1955 Desoto sedan which are all owned free and clear and are registered to him. Appellant also owns a boat and trailer, a Kubota tractor and attachments for which he had paid over $8000. and an Allis Chalmers tractor for which he paid $9000. and a backhoe and dump truck. Id. Para. 7. The motor vehicles, the boat and trailer and all the heavy equipment were parked in plain sight when Respondent Long arrived at Appellant's house in August 2009 but he didn't seem to have any interest in them. Id.

Appellant contends that when Respondent Long told him at his house that he had to pay the judgment, Appellant told him the user fee had been removed. Id. Appellant further contends that because the user fee had been removed by the Auditor's Office from his tax bill earlier, Appellant did not believe that any sale of his property would occur. When Respondent Long gave him a notice of sale for TMS 282-00-00-498, another parcel he owns, Appellant did not understand why the County would try sell property on which the taxes were paid and that was not subject to the user fee. Id. Appellant had TMS 498 appraised in 2006 because of a dispute involving Berkeley Electric and the fair market was determined to be $70,000.Id. Para. 8.

According to Sheriff's Department records, Respondent Long was subject to several disciplinary actions since joining the department including two (2) Letters of Suspension and three (3) Written Reprimands. Plaintiff's Opposition to Summary judgment , Exhibit F, Bates No. 512-513,551-552. These included the following: 1998 letter of reprimand for failure to transport suspect he arrested to court hearing causing a suspect to be issued 3 contempt citations; 1999 letter of Suspension for unauthorized absence from duty (to walk his dog); 1999 Letter of Reprimand for unsafe operation of motor vehicle causing accident for which he

was found to be responsible; 2003 Letter of Reprimand for conducting warrantless search without probable cause which also references five (5) separate instances of violations of Department policy or decorum for which no disciplinary action was taken; 2004 Letter of Instruction for failure to timely serve an arrest warrant allowing suspect to escape; 2004 Letter of suspension for violating standing policy in obtaining search warrant resulting in loss of money and evidence.; 2004 Letter of Probationary Status due to failure to meet Professional Responsibility Standards . Id.

The reasons for Long's most recent suspension were redacted from his personnel file. See Id. County Document Bates No. 551-552. This redaction contrary to the Sheriff's Department own policy which states: "Suspensions will be permanently documented in the employee's personnel file." Plaintiff's Opposition to Summary Judgment, Exhibit H, Policy and Procedures Manual Section 3-08 at page 5. Appellant moved to compel production of the redacted portion of the letter of Suspension and the Respondent County Sheriff's Department in response produced the unredacted portion. Plaintiff's Supplemental Opposition to Summary Judgment, Exhibit A.

The unredacted portion indicates the reasons for Respondent Long's suspension in 2004. At that time he was a senior detective in the Criminal Investigative Division. When he was asked for advice by his partner with respect to the search of a drug house that was the site of a shooting, he ignored a "well known standing practice " to secure a search warrant and advised his partner to conduct a consent search. As a result, thousands of dollars and other items were not seized and lost as evidence in the related shooting. When asked about this by his partner the next day, he denied giving her this advice. His partner filed a complaint as to his lack of truthfulness and asked for a new partner. Plaintiff's Supplemental Opposition at 2;

Exhibit A, Bates No. 2034-2035. This Letter of Suspension also refers to an earlier incident in which Respondent Long's failure to serve an arrest warrant on time (he was 25 minutes late) led to the getaway of a "highly sought after suspect' wanted for multiple burglaries. Id. According to the Letter of Suspension, Respondent Long was issued a Written Reprimand for this incident, which was not found in his Personnel File as required by the Department's own Policy and Procedure Manual. Plaintiff's Opposition to Summary Judgment, Exhibit H, Policy and Procedures Manual Section 3-08, Disciplinary procedures, Section III, Bates No. 1300. at page 5. This Written Reprimand was never produced in discovery. Plaintiff's Opposition to Summary Judgment at 3. No reason for the redaction of the Letter of Suspension was ever given by Respondent County Sheriff's Department. Plaintiff's Supplemental Opposition to Summary Judgment at 3.

One of Respondent Long's Written Reprimands was due to his failure to transport Karlton Hillyard whom Long had arrested to a trial on a traffic summons that Long has issued. When Appellant requested a copy of the arrest report, Respondent County Sheriff's Department supplied a booking report instead which indicated that Karlton Hillyard was an 18 year old black male that Respondent Long had arrested because of his failure to provide a driver's license and proof of insurance. The reasons for the arrest were not apparent on the booking report. Id. In the Letter of Reprimand, Respondent Long's conduct was described "irresponsible" and "unprofessional". Plaintiff's Motion to Compel Discovery at 3.

The Respondent County Sheriff's Department Policy and Procedure Manual states: "[T]his agency will follow the concept of progressive discipline . . . by administering gradually increasing actions for each successive instance of employee misconduct. . . [T]he

employee may be subject to termination for the accumulation of violations. . . " Plaintiff's Opposition to Summary Judgment, Exhibit H, 3-08, Section III, B(3).

One of Respondent's Long's superiors Sergeant John Wilson testified about the process of evaluating Respondent. See Plaintiff's Opposition to Summary Judgment, Exhibit J. Wilson said he that evaluated Respondent Long during the period following his latest suspension. Id. page 20, line 10-15. Wilson did not confer with his prior superior even though he had not been Long's superior for the entire evaluation period. Id. page 23, line 5 to 18. Long's prior supervisor had made a report of unprofessional conduct by Long but Long did not know the circumstances of the infraction or talk to the other officer about it. Id. page 43, line 13 to 25. Wilson believed that what happened in the past had no bearing on his evaluation of Long. Id. page 35, line 15 to page 36, line 2. Even though Wilson had access to Long's personnel file, he never consulted it as to past misconduct. Id. page 27, line 19 to page 28, line 8.Wilson was not aware that Long was on probation during the period he evaluated him. Id. page 47, line 16 to 20. The existence of the suspension would not necessarily affected Wilson's evaluation of Long's behavior. Id. page 48, line 10-15.

Respondent County Sheriff's Department never produced any documents relating to its retention of Respondent Long other than its annual employee appraisal. Plaintiff's Opposition to Summary Judgment, Exhibit I, Notice to Produce No. 5 & County Response.

ARGUMENT

I. THE TRIAL COURT ERRED BY DISMISSING ALL OF THE CLAIMS FOR LACK OF JURISDICTION

Appellant contends that the Circuit Court erred by granting summary judgment dismissing all of his claims based upon a lack of jurisdiction. Appellant contends that 1) under

the circumstances here, the Circuit Court did have jurisdiction to hear a collateral attack upon the validity of a Magistrate Court judgment; and 2) the Circuit Court did have jurisdiction to hear the Appellant's other claims based upon its general jurisdiction even if it could not determine the validity of the user fee judgments. These two arguments are discussed below.

A. The Circuit Court has jurisdiction to hear a collateral attack on a judgment

The Circuit Court's Order granting summary judgment based upon a lack of subject matter jurisdiction is based upon an unnecessarily narrow view of its own jurisdiction. "We start with the premise that our state court's jurisdiction is general, derived exclusively from article V, section 11 of the South Carolina Constitution. . . " Limehouse v Hulsey, 397 S.C.49,62, 723 S.E.2d 211, 218 (Ct App. 2011). " [I]t is clear that anyone who asks to have such jurisdiction limited in any way must be able to point out some constitutional or statutory provision establishing such limitation." Ex parte Ware Furniture Co., 49 S.C. 20(1897) (MacIver, C.J., dissenting). The County Respondents have not pointed to any limitation of the jurisdiction of the Circuit Court to hear an action under SCRCP 60(b) to vacate a lower court judgment.

Appellant filed this action under R 60(b), SCRCP to vacate an earlier judgment by default which was entered against him based upon a lack of subject matter jurisdiction and also for damages relating to the conduct of the County Respondent . Rule 60(b), SCRCP states that the court may "entertain an independent action to relieve a party from a judgment". In T v T, 378 S.C.127, 662 S.E.2d 413 (Ct. App. 2008), the Court of Appeals upheld the use of an independent action to set aside a prior paternity judgment even though paternity was not contested in the Family Court. In discussing the circumstances where R 60(b) is applicable, the Court of Appeals said: "In essence, the rule merely reflects many of the

considerations attendant to an equitable analysis." 378 S.C. at 136, 662 S.E.2d at 417. See National Surety Co. of N.Y. v. State Bank of Humboldt, 120 Fed. 593 (8th Cir. 1903). Therefore, Rule 60 (b) provides that relief from an earlier judgment may be granted in a subsequent action based upon an equitable analysis.

In addition to the authority granted to the Circuit Court to consider a collateral attack upon an earlier judgment based upon equitable considerations, there is the fundamental principle that a court's subject matter jurisdiction is always subject to collateral attack . The law is clear that a judgment of a court without subject matter jurisdiction is void and constitutes grounds for the court to vacate the judgment under Rule 60(b). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect. . . ." Thomas & Howard Co., Inc. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). The South Carolina Supreme Court has consistently adhered to the rule that the acts of a court without jurisdiction are without effect. Toomer v. Toomer, 244 S.C. 399, 137 S.E.2d 406 (1964) As stated in Ex parte Hart, 186 S.C. 125, 133, 195 S.E. 253, 256 (1938): "It is a universal principle as old as the law, that the proceedings of a Court without jurisdiction are a nullity, and its judgment without effect, either on the person or property." Ross v. Richland County, 270 S.C. 100, 240 S.E.2d 649, 651 (S.C. 1978).

In Bunkum v. Manor Properties, 321 S.C. 95,100, 467 S.E.2d 758 (Ct. App. 1996), plaintiff commenced an action pursuant to Rule 60(b), SCRCP, seeking to have a " supplemental Order of Judgment of [sic] Costs" entered by the Charleston County Master In Equity declared void because the Master exceeded the scope of his authority. The Court of Appeals noted that the plaintiff failed to appear before the Master at the hearing on the motion, and failed to directly appeal the master's order. However, the court held that "issues

relating to subject matter jurisdiction may be raised at any time, cannot be waived even by consent, and should be taken notice of by this court on our own motion." The Court of Appeals concluded that the Master lacked jurisdiction to issue the Order and reversed. See Johnson v. State, 319 S.C. 62, 459 S.E.2d 840 (1995); State v. Richburg, 304 S.C. 162, 403 S.E.2d 315 (1991); State v. Gorie, 256 S.C. 539, 183 S.E.2d 334 (1971); Eichor v. Eichor, 290 S.C. 484, 351 S.E.2d 353 (Ct.App.1986). Bunkum has been relied upon subsequently in Ness v. Eckerd Corp., 350 S.C. 399, 566 S.E.2d 193, 195 (Ct. App. 2002); Brown v. Greenwood School Dist. 50 Bd. of Trustees, 344 S.C. 522, 544 S.E.2d 642, 643 (Ct. App. 2001) and Eldridge v. City of Greenwood, 331 S.C. 398, 408 503 S.E.2d 191, 196 (Ct. App. 1998). Therefore Bunkum and cases relying upon it establish that subject matter jurisdiction can be attacked collaterally by a R 60(b) independent action without being barred by the failure to appeal or file a post trial motion.

The Circuit Court ruled that because Appellant had not appealed or filed any motions in the Magistrates Court, the Circuit Court had no jurisdiction. County Defendants cited several cases for this proposition including Town of Hilton Head Island v. Godwin, 370 S.C. 221, 634 S.E.2d 59 (Ct. App. 2006); Brewer v South Carolina Highway Dept., 261 S.C. 52, 198 S.E. 2d 256 (1973) and O'Rourke v Atlantic Paint Co., 74 S.E.930 (1912). Appellant contends that these are not controlling because they only dealt only with direct appeals from lower court decisions involving defaults not a collateral attack on its subject matter jurisdiction. These decisions all concern compliance with the Magistrate Court Rules for motions or appeals from judgments which are subject to a time limitation of one year, based upon the policy of encouraging diligent action. See R. 12, SCRMC. Similarly appeals from Magistrate Court judgments must be filed within 30 days of written notice. See R 18,

SCRMC. These time limitations do not apply to challenges to subject matter jurisdiction. Other statutory provisions and Magistrate's Court Rules which the County Respondents have cited, e.g. S.C Code Ann. Section 22-3-1000 and R 19, SCRMC deal with post trial motions or appeals. They also do not address collateral attacks upon the lower court's jurisdiction.

R 60(b), SCRCP does not specifically prevent the Circuit Court from vacating a judgment of a lower court. Since the Rule does not contain such a restriction, the Circuit Court should not have imposed such a limitation on itself because to do so would unduly restrict its authority as a court of general jurisdiction. Appellant is seeking relief which is entirely within the power of this Court to grant: a declaratory judgment that a Sheriff's sale and deed are invalid based upon equitable reasons. Appellant contends that he had no notice of the judgment and only realized that county was trying to collect the user fee after the Sheriff's sale occurred. He did not have notice that a user fee judgment was entered in July 2000 on the basis of a default. When a deputy Sheriff came to his home to execute on that judgment in August 2009, he believed that this was an error since the Auditor's Office previously removed the user fee from the tax bill. Appellant filed this action after he discovered that TMS 498 had been sold in 2010 for the user fee on TMS 138. Since R 60(b), SCRCP permits a collateral attack upon a judgment under appropriate circumstances and jurisdictional issues can be raised at any time, the Circuit Court erred by holding that it had no jurisdiction to decide the matter.

B. The Circuit Court had subject matter jurisdiction over all other claims

In their Motion to Reconsider the County Respondents asserted for the first time that the Circuit Court had no jurisdiction to hear plaintiff's other claims since they all arose from the Magistrate Court judgments. Motion to Reconsider at page 1, 2.The County Respondents

did not cite any legal precedent, Court Rule or other authority for this argument. The Circuit Court held that it did not have jurisdiction over the claims because they " necessarily flow from the Magistrate's Court judgments. " The Circuit Court's Order does not contain any legal precedent, Court Rule or legal authority for its holding.

Appellant contends that the Circuit Court erred for several reasons. The Circuit Court is a court of general jurisdiction. S.C. Const. art. V, § 11 provides that " The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases. . . " The Fourth Count alleges a violation of equal protection by the Respondent County Revenue Collections Department by enforcement of the user fee against Appellant; and by Respondent Long by arbitrarily and discriminatorily ignoring personal property available for levy in order to execute on real property for an improper motive. See Point II. The Fifth Count alleges that County Sheriff's Department negligently retained Respondent Long; and that Respondent Long violated the procedure for enforcing judgments under the South Carolina Code due to malice. See Point III. The Sixth Count alleges that the Sheriff sale should be set aside for equitable reasons, that the price was so grossly inadequate as to shock the conscience. See Point IV.

Even if this Court were to decide that the Circuit Court had no jurisdiction over the validity of the use fee judgments, it should reverse the Circuit Court Order to allow it to hear the other claims. The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case, but it does not affect the court's subject matter jurisdiction . " Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 83 n. 5, 529 S.E.2d 6, 8 n. 5 (2000).

Finally none of these claims are within the jurisdiction of the Magistrate Court. The Circuit Court's decision that it lacks jurisdiction leaves Appellant without any remedy.

In summary, there is no statute or Court Rule which prevents the Circuit Court from hearing the claims asserted in the pleadings and arising from the user fee judgments. The Magistrate Court has no jurisdiction to hear them and dismissal of these claims leaves the Appellant without any remedy .

Although it held it had no jurisdiction, the Circuit Court dismissed the civil rights and negligence claims on the merits. Accordingly, Appellant next addresses the reasons why the Circuit Court erred in dismissing them.

II. THE CIRCUIT COURT ERRED BY DISMISSING THE FOURTH COUNT

Appellant asserts that the Circuit Court erred in separately dismissing the Fourth Count alleging a denial of equal protection of law by Respondents County Revenue Collections Department and Harry Long. Appellant made out prima facie case of a violation of 42 USC Section 1983. He has shown that the County Respondents (1) acted under the color of state law, and (2) deprived him of a constitutional right – to equal protection of the law. See e.g. Ewing v. City of Stockton , 588 F.3d 1218, 1223 (9th Cir. 2009) " A person acts under color of state law, if he exercise[s] power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Dang Vang v. Vang Xiong X. Toyed, 944 F.2d 476, 479 (9th Cir. 1991). Respondent County Revenue Collections Department was authorized to collect the user fee and Respondent Harry Long was authorized to conduct the levy and sale of property to satisfy judgments. Appellant

contends that the manner in which each Respondent performed these duties deprived him of equal protection of law.

A. County did not establish any rational basis for application of the user fee to Appellant

Appellant contends that he was denied equal protection by the Revenue Collections Department under the Charleston County Ordinance Section 10-51 which created the user fee relied upon by it to collect the user fee. The source of authority for that Ordinance is S. C. Code Ann. Section 44-55-1210 which "grants the county council the power to provide and regulate solid waste . . . and to levy fees against **persons for whom services are provided.**" (emphasis added). Respondent County Revenue Collections Department is governed by that standard: that the fee is based upon the receipt of a benefit to the owner.

Respondent County Revenue Collections Department 's own witness, George Boniface admitted this as well. Boniface, designated as the county's designated representative regarding the collections of user fees (pursuant to R 30(b) (6)), testified that the purpose of the user fees was to collect money from the persons for whom services were provided. Respondent County Revenue Collections Department is bound by his acts since he testified that he was its authorized representative to prepare these complaints. Quail Hill LLC v. County of Richland, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008). Therefore, Respondent County Revenue Collections Department is bound by plain language of its own Ordinance and the testimony of its witness that the solid waste user fees are due only from persons for whom services are provided. Therefore, it is not entitled to summary judgment as a matter of law.

The Equal Protection Clause of the Fourteenth Amendment "requires that 'the states apply each law, within its scope, equally to persons similarly situated, and that any differences

of application must be justified by the law's purpose.'" Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009)(citation omitted). To satisfy equal protection, a municipality's classification must meet the following criteria: (1) the classification must bear a reasonable relation to the legislative purpose sought to be achieved; (2) members of the class must be treated alike under similar circumstances; and (3) the classification must rest on some rational basis. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004). Appellant does not dispute that the user fee is imposed against all owners of real property in Charleston County or that the fee is the same for all residential property. However, Appellant asserts that he was not similarly situated with other property owners against whom the Ordinance was applied because he did not receive any benefit; and thus he was subject to " disparate treatment".

Appellant established that he is not similarly situated to other residential property owners. Appellant provided an Affidavit that he does not receive any solid waste disposal services or use any county facilities for solid waste collection recycling. The County Defendants never attempted to refute this but argued that the user fee was for the general collection and disposal of solid waste and not dependent on whether Appellant derived any benefit.

In dismissing the Fourth Count, the Circuit Court relied upon the holding in Skyscraper Corp. v Newberry County, 323 SC 412, 475 S.E.2d 764 (1996). In Skyscraper Corp., the owner of a commercial property contended that it should not be liable for the portion of the solid waste generated by its tenants. The Supreme Court noted that there was a difference between a tax and a user fee. " Unlike a tax, a service charge or user fee is imposed on those members of the community who receive a special benefit from the proceeds of the

charge." 323 SC at 415-416, 475 S.E.2d at 765-766. The Supreme Court held: "The purpose of [the ordinance] is to charge those persons who **generate solid waste** for the collection and disposal of the waste. Since multi-tenant property owners benefit from the collection and disposal of waste from their property, requiring multi-tenant property owners to pay the solid waste disposal fees of their tenants is reasonably related to the purpose of the ordinance." (emphasis added). Similarly in Brown v. County of Horry, 308 S.C. 180, 417 S.E.2d 565 (1992), the Supreme Court said: "A service charge is imposed on the theory that the portion of the community which is required to pay it receives some **special benefit** as a result of the improvement made with the proceeds of the charge." (emphasis added). Therefore, both Skyscraper Corp. and Brown support Appellant's contention that the imposition of the user fee must be related to the receipt of special benefit by the person being charged.

Respondent County Revenue Collections Department argument is that persons such as Appellant who do not derive a special benefit can still be charged a fee. Respondent County Revenue Collections Department is applying the user fee as a tax, to all property owners which is contrary to their position that it is not a tax. Charleston County did not assess a uniform charge applicable to all property owners whether or not they used the service, such as a school tax. Instead it passed an Ordinance which according to the enabling legislation allowed it to levy a fee against persons for whom services are provided. The County provided for the collection of solid waste and funded a disposal plant – an incinerator. Charleston County Ordinance 10-51 et seq. does not mandate that Appellant send his trash to a county facility for disposal . He can dispose of it on his own property as long as he does not create a nuisance. See Ordinance Section 10-69 (2).

Respondent County Revenue Collections Department is bound by the terms of the enabling legislation and its own Ordinance to collect the user fee only from persons to whom services are provided. " [A]ny differences of application must be justified by the law's purpose.'" Harbit v. City of Charleston, 382 S.C. 383, 675 S.E.2d 776 (Ct. App. 2009).

In summary , Respondent County Revenue Collections Department never justified its application of the fee to Appellant under the enabling legislation or any rational basis related to its purpose. The Circuit Court erred in holding that there was no equal protection violation under Skyscraper Corp. because Appellant did not derive any benefit from the services for which he was being charged.

B. Arbitrary enforcement of user fee judgment violates equal protection

The Fourth Count also alleges an equal protection violation claim against Respondents County Sheriff's Department and Harry Long in the enforcement of the user fee judgment . In Village of WillowBrook v. Olech, 528 U.S. 562 (2000), the Supreme Court said: "'[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" Id at 564. The Supreme Court found that allegations that municipal action was "'irrational and wholly arbitrary' . . . are sufficient to state a claim for relief under traditional equal protection analysis." Id. at 565. (Citation omitted). Olech recognized that disparate treatment which violates equal protection need not be directed at a class of persons but may involve only a single individual, i.e. a class of one. Id. See Town of Iva ex rel. Zoning Administrator v. Holley, 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007) (violation of the Equal Protection Clause may be based on arbitrary and purposeful discrimination in the

administration of the law being enforced). In addition, governmental action based upon ill will or vindictiveness or other ulterior motive may violate equal protection. Engquist v. Oregon Dep't of Agriculture, 478 F.3d 985, 993 (9th Cir.2007)(In an equal protection claim based on selective enforcement of the law, a plaintiff can show that a defendant's alleged rational basis for his acts is a pretext for an impermissible motive); Forseth v. Village of Sussex, 199 F.3d 363 (7th Cir. 2000)(allegations of pecuniary advantage); Esmail v. Macrane, 53 F.3d 176 (7th Cir. 1995)(equal protection violation predicated on prosecutorial discretion exercised out of an illegitimate desire to 'get' defendant).

The Circuit Court did not address this separate equal protection violation in dismissing the Fourth Count. Appellant made out a prima facie showing of an equal protection violation under Village of Willowbrook. The Sheriff's Department is the entity authorized to collect a judgment. S.C. Code Ann. Section 15-39-80 states that any execution of a judgment "shall require the Officer. . . (1) to satisfy the judgment out of the personal property of such debtor and, if sufficient personal property cannot be found, out of the real property belonging to him." S.C. Code Ann. Section 15-39-610 states that the "sheriff or officer shall and may sell, by auction, the lands, tenements, goods and chattels so taken or so much thereof as shall be sufficient to **satisfy** the judgment for the best price that can be got for them. (emphasis added).

Appellant submitted an Affidavit in which he stated that he owned several motor vehicles that were registered with the Department of Motor Vehicles free and clear as well as a boat and several large pieces of construction and farm equipment, all in plain view around his home. Respondent Long did a DMV search but ignored the motor vehicles that he uncovered in this search as being too old even though he admitted that one or more of them

might be worth pursuing. Respondent Long knew that TMS 498 was valued at $24,000 by the Tax Assessor. He decided to levy against it instead of any personalty for that reason. Respondent Long admitted that the cost to levy on the personal property was the same as for real property. The judgment Respondent Long was enforcing was for a minimal amount. The sale proceeds were insufficient to satisfy the judgment. In over the course of 4 ½ years, Deputy long only sold two other properties for user fee judgments.

Appellant established a prima facie case of arbitrary treatment in enforcement of the statute by Respondent Long. The amount to be collected was minimal and the means used to collect it- execution on valuable real estate when personalty was available was unreasonable. Administrative costs were not a valid reason to overcome a prima facie claim of disparate treatment. Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 591 (9th Cir. 2008).Therefore, County Respondents were not entitled to summary judgment as a matter of law because Appellant established a prima facie case of arbitrary and unreasonable treatment.

C. County Respondents have not asserted immunity to the civil rights claims.

County Respondents never argued immunity from liability under 42 U.S.C. Section 1983. The Circuit Court's holding that the Respondents Revenue Collections Department, the Sheriff's Department and Harry Long were immune from all claims for the collection of the user fees and enforcement of judgments under certain provisions of South Carolina Tort Claims Act is overbroad. These provisions do not provide any defense to a civil rights claim.

In summary, the Circuit Court erred by dismissing the Fourth Count for civil rights violations in the enforcement of the user fee ordinance and in the execution on the judgment. Appellant received no benefit and the County did not provide any rational basis to justify the

disparate treatment. County respondents never asserted a defense of immunity that applied to these claims and the Circuit Court's holding of immunity cannot be applied to these claims. There were genuine issues of fact which precluded the granting of summary judgment. See Point VI.

III. THE CIRCUIT COURT ERRED BY DISMISSING THE FIFTH COUNT

Appellant asserts that the Circuit Court erred by dismissing the Fifth Count against Respondents County Sheriff's Department and Harry Long for negligence under the Tort Claims Act. The Fifth Count alleged that the Respondent Sheriff's Department was negligent in retaining Respondent Long as an employee and that Respondent Long acted out of malice in enforcing the user fee judgment against real property instead of personal property. The Circuit Court said that the Respondents actions were taken to enforce a county user fee judgment and were immune under SC Code Ann. Sect.15-78-60(3) (4), (5), (11) and (23). Order at 3-4. Order at page 3. Appellant contends that the Circuit Court erred in applying the exemptions to the facts in issue.

A. No basis established for immunity for negligent retention.

Immunity under the Tort Claim Act is an affirmative defense and the County Respondents have the burden of proof to establish that the alleged tort is subject to immunity. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). County Respondents cited various provisions of the Tort Claims Act Section 15-78-60 on which they base a claim of immunity. These include: Subsection(1) judicial action/inaction ; Subsection (2) administrative action/inaction of a judicial or quasi judicial nature; Subsection (3) execution of court orders; Subsection (4) compliance with any law; subsection (11) collection of any taxes and; subsection (23) institution of judicial proceedings. On their face none of these exemptions are

applicable to negligent retention. County Respondents never asserted that any other immunity applies to Appellant's claim for negligent retention.

Appellant contends that the only immunity potentially available to Respondent Sheriff's Department to the claim of negligent retention of Respondent Harry Long is the exercise of judgment or discretion by the government entity, S.C. Code Ann. Section 15-78-60 (5), known as the discretionary function exemption. All of the other exemptions relate to action/inaction arising out of the enforcement of judicial or legislative action.

Under the discretionary function exemption, immunity is dependent on proof that the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards. Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 511 S.E.2d 355 (1999);Clark v S.C. Dept. of Public Safety, 353 S.C.291,578S.E.2d 16 (Ct. App. 2002). The County Sheriff's Department Respondents did not even allege that it exercised discretion in retaining Respondent Long and presented no facts in support of their summary judgment motion to support a finding of immunity under that provision. Their argument consisted entirely of the allegation that there were no facts to support negligence.

Appellant submitted the following facts as evidence of negligent retention by Respondent County Sheriff's Department. According to Respondent County Sheriff's Department records, Respondent Long was subject to several disciplinary actions since joining the Department including two (2) suspensions and three (3) letters of reprimand. These included the following: 1998 letter of reprimand for failure to transport suspect he arrested to court hearing causing a suspect to be issued 3 contempt citations; 1999 letter of Suspension for unauthorized absence and neglect of duty (to walk his dog); 1999 Letter of

Reprimand for unsafe operation of motor vehicle causing accident for which he was found to be responsible; 2003 Letter of Reprimand for conducting warrantless search without probable cause which also references five (5) separate instances of violations of Department policy or decorum for which no disciplinary action was taken; 2004 Letter of Instruction for failure to timely serve an arrest warrant allowing suspect to escape; 2004 Letter of suspension for violating standing policy in obtaining search warrant resulting in loss of money and evidence; 2004 Letter of Probationary Status due to failure to meet Professional Responsibility Standards .

One of the letters of reprimand Respondent County Sheriff's Department issued was a laundry list of violations including making a warrantless search without probable cause; yelling at supervisors after being removed from an interview of a suspect; failure to respond to a call; failure to document a crime victim interview; and unauthorized appearance at a search.

Although the Respondent County Sheriff's Department claims to utilize the principle of progressive punishment, at no time did Respondent take a comprehensive look at what respondent Long had done. Each of his offenses were considered in isolation, without regard to the cumulative effect. The Policy Manual provides only that employees are subject to termination for "consistent performance failures" or lying, cheating or stealing. See Id. Exhibit F, Section 3-08 at page 7.

In response to Appellant's request for all documents pertaining to decisions to retain Respondent Long to sergeant, Respondent County Sheriff's Department responded: " none". There is no documentation about why Respondent Long was not promoted. Department did not impose its policy of discipline –progressive punishment and did not put down anything

in writing as to why respondent Long was allowed to remain an employee given his extensive of procedural violations.

Testimony by Sergeant Wilson, one of Long's superiors raises questions as to the credibility of the Department's performance evaluations given to Long by his superiors. Long's prior supervisor had made a report of unprofessional conduct by Long but Wilson did not know the circumstances of the infraction or talk to the other officer about it. Wilson believed that what happened in the past had no bearing on his evaluation of Long. Even though Wilson had access to Long's personnel file, he never consulted it as to past misconduct. Wilson was not aware that Long was on probation during the period he evaluated him. The existence of the suspension would not necessarily affected Wilson's evaluation of Long's behavior. The evaluation process as exemplified by Sergeant Wilson only considers the conduct of the officer in the most recent period and ignores what happened before.

After Appellant pointed out that Respondents had not submitted any evidence of exercising its discretion, Respondent County Sheriff's Department submitted a belated defense to the negligent retention claim, in an Amended Memorandum which asserted that there was no proximate cause. Appellant submitted further Opposition in which he established that proximate cause was a jury issue. In Doe v. ATC, Inc., 367 S.C. 199, 206, 624 S.E.2d 447 (Ct. App. 2005), the Court of Appeals found that negligent retention cases generally turn on two fundamental elements-- knowledge of the employer and foreseeability of harm to third parties. "These are analyzed in terms of the number and nature of prior acts of wrongdoing by the employee, and the nexus or similarity between the prior acts and the ultimate harm caused. Such factual considerations--especially questions related to proximate cause inherent in the concept of foreseeability--will ordinarily be determined by the fact

finder, and not as a matter of law." Id. (citations omitted). See Mellen v. Lane, 377 S.C. 261 , 659 S.E.2d 236, 245 (Ct. App. 2008) ("Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's action. Legal cause is proved by establishing foreseeability. [L]egal cause is ordinarily a question of fact for the jury."); Small v. Pioneer Mach., Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct.App.1997) ("Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence.").

In summary, Appellant contends that there is no evidence that Respondent County Sheriff's Department ever conducted a comprehensive review of his performance and made a conscious decision to retain him in spite of his numerous violations of Department procedure including loss of evidence, failure to arrest a fleeing felon, destruction of a Department vehicle. Respondent Long's disciplinary problems were well known to the Sheriff's Department. They almost entirely relate to his failure to follow procedure and his temper. Appellant asserts that this was the same pattern of behavior s that caused Long to violate procedure in the levy and sale of his property. Respondent Long became angry because he believed that Appellant threatened him and he retaliated by failing to follow procedure. According, under the approach in Doe, supra, this court should permit the fact finder to decide the issue.

The Circuit Court did not address this argument and ruled solely on the basis of the immunity issue. In their Motion for Reconsideration, Respondents did not ask the Court to reconsider their argument as to proximate cause. Therefore, Respondent County Sheriff's

Department waived any right to argue that they are entitled to immunity for negligent retention because they failed to assert it or any facts to establish an exercise of discretion. The issue of proximate cause on which it did rely is a jury question.

B. No immunity for malice

In the Fifth Count, Appellant asserted that Respondent Long "exhibited hostility toward Simmons and with malice and intent to injure Simmons, caused a levy to be placed against real property owned by Simmons which resulted in a sale and loss of Simmons interest in the property." S.C. Code Ann. Sect 15-78-70(b) states: "Nothing in this chapter may be construed to give an employee . . . immunity from suit if is proved that employee's conduct . . . constituted actual malice [or] intent to harm...." Therefore none of the immunity provisions on which Respondents County Sheriff's Department and Long rely (SC Code Ann. Sect.15-78-60(3), (4), (11) and (23)) apply to acts resulting from malice or intent to harm. See South Carolina State Budget and Control Bd. .v Prince, 304 S.C.241, 403 S.E.2d 643 (1991)(no Tort claim immunity for employee who acted with actual malice).

This rule applies even to "discretionary acts " which are subject to exemption under S.C. Code Ann. Sect.15-78-60(5). " In a tort suit against a public official whose duties are discretionary, it must be shown that in the performance or non-performance of those duties the public official was guilty of corruption, or bad faith, or influenced by malicious motives, before a recovery can be had." Jensen v. Anderson County Dept. of Social Services, 304 S.C. 195, 403 S.E.2d 615 (1991). Therefore the immunity for discretionary function does not apply to acts resulting from malice or intent to harm.

Moreover, Appellant asserts that enforcement of judgments is not a matter of discretion. As previously indicated above, Respondent Long is obligated to follow the law to levy first on

V. THE CIRCUIT COURT ERRED BY DISMISSING ALL CLAIMS AGAINST RESPONDENT LONG

Appellant asserts that the Circuit Court erred by dismissing all claims against Respondent Harry Long based upon his status as a governmental employee. The County Respondents initially moved to dismiss the Second Amended Complaint against Respondent Long based upon the Tort Claims Act immunity for governmental employees. Appellant contended that Respondent Long was not entitled to absolute immunity under the civil rights claim (Fourth Count) merely because he was a government employee; and that he was not immune under the tort claim (Fifth Count) since Appellant asserted he acted with malice and submitted evidence which created a genuine issue of fact. Both are discussed below.

A. No immunity under Fourth Count Civil Rights claim for employees

The Fourth Count asserts civil rights violations under 42 U.S.C. § 1983 which provides that " (e)very person who acts under color of state law to deprive another of a constitutional right shall be answerable to that person in a suit for damages." The County Respondents asserted that Deputy Long was entitled to immunity as an employee in support of summary judgment. Although Section 1983 creates tort liability that on its face allows no immunities, there are exceptions. See Pierson v. Ray, 386 U.S. 547, 555-557 (1967)(law enforcement had qualified immunity under § 1983 coextensive with their common law defense to false arrest); Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894,898 (S.C., 1994)("[G]overnment officials performing discretionary functions generally are shielded from liability for conduct that does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). Respondent County Sheriff's Department

and Harry Long did not asset that he had a qualified immunity under Section 1983 or present any argument that his conduct did not violate clearly established statutory standards.

Appellant contended that the facts show a prima facie case of a Section 1983 violation not subject to any immunity. Respondent Long was obligated to follow the law in enforcing the user fee judgment. S.C. Code Ann. Section 15-39-80 states that any execution of a judgment "shall require the Officer. . . (1) to satisfy the judgment out of the personal property of such debtor and, if sufficient personal property cannot be found, out of the real property belonging to him." S.C. Code Ann. Section 15-39-610 states that the "sheriff or officer shall and may sell, by auction, the lands, tenements, goods and chattels so taken or so much thereof as shall be sufficient to **satisfy** the judgment for the best price that can be got for them. By virtue of his duties as a law enforcement officer and his assignment to enforce judgment, Respondent Long is charged with knowledge of this law. Respondent Long neither levied on personal property, even though he acknowledged it was available or levied upon enough personal property that was sufficient to satisfy the judgment.

Therefore, Appellant contends that the Circuit Court erred in dismissing the Fourth Count as to Respondent Long since he was not entitled to immunity as an employee and violated clear statutory standards in carrying out his duties.

B. No tort immunity for employees committing acts of malice

The Circuit Court dismissed the Second Amended Complaint as to Respondent Long on the basis that under the Tort Claim Act the Sheriff's Department was the responsible party not the employee as alleged by the County Respondents. Appellant asserted that S.C. Code Ann. Section 15-78- 70(b) removes any governmental immunity for an employee 's "conduct . . . that constituted . . . actual malice [or] intent to harm . . .". This provision has been

broadly applied to government employees to negate all claims of immunity. South Carolina State Budget and Control Bd .v Prince, 304 S.C.241, 403 S.E.2d 643 (1991)(no Tort claim immunity for employee who acted with actual malice). The Fifth Count alleged specifically that Long "exhibited hostility toward Simmons and with malice and intent to injure Simmons, caused a levy to be placed against real property owned by Simmons which resulted in a sale and loss of Simmons interest in the property." Respondents County Sheriff's Department and Long filed a motion to dismiss based upon various immunities under the Tort Claims Act. However, the law is clear that a motion to dismiss is addressed solely to the sufficiency of the complaint and the court must accept all of the allegations to be true. Gressette v. South Carolina Elec. & Gas Co., 370 S.C 377, 378-379 (2006).

In addition, Appellant presented evidence that was sufficient to establish a prima facie case of malice against Respondent Long. See Point III. Therefore the Circuit Court erred in dismissing the Second Amended Complaint as to Respondent Long because the Appellant alleged malice and also made out a prima facie case of malice which takes the case out of the statutory exemption for employees. See Point III above.

VI. THE CIRCUIT COURT ERRED IN FINDING NO GENUINE ISSUE OF FACT

The Circuit Court held that there were no genuine issues of fact as another reason to dismiss the claims. Appellant Simmons contends that there is sufficient evidence that Respondent Long arbitrarily enforced the user fee judgment and violated Appellant's right to equal protection (Fourth Count); and that Respondent Sheriff's Department did not use reasonable care in deciding to retain Long and that Respondent Long acted with malice

(Fifth Count) such that all of the issues in the Fourth and Fifth Counts should have been submitted to a jury.

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) SCRCP. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn there from must be viewed in the light most favorable to the nonmoving party. If triable issues exist, those issues must go to the jury. Eagle Container v. County of Newberry, 366 S.C. 611, 622 S.E.2d 733, 737 (2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman v A.T.& T, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). The non moving party may overcome a generalized allegation of a lack of a dispute of fact by providing evidence of such a disputed fact. See Bravis v Dunbar, 316 S.C. 263,265, 446 S.E.2d 95 495,496 (Ct. App. 1994).

A. Genuine issues of fact as to validity of user fee judgment

Appellant asserted that each year since the user fee was added to his tax bill for his home, he went to the Auditor's Office and asked to have it removed. The employee in the

Auditor's office with whom he dealt told him that all the user fees had been removed and never told him he would still have to pay them even though they were removed from the tax bill. Appellant specifically denied receiving any benefit from the County Solid Waste facilities. Appellant asserts he never received notice of the complaint for a user fee in Magistrate's Court that was filed in 2000 or the entry of a judgment. He denies that he ever received notice of efforts to enforce the judgment from the Respondent County Sheriff's Department until Respondent Long came to his house in August 2009. Appellant also denies that he had notice of the subsequent complaints or judgments for user fees.

In addition, Appellant denied that he was the owner of TMS 024 and said that the Tax Assessor erroneously placed his name as the record owner after he requested that the tax bills be sent to him because they were not getting paid. The property was listed under the "estate of Sam Balaam" up to that time and Appellant was not the legal owner and had no liability for payment of a user fee. A judgment was entered against Appellant for unpaid user fees for TMS 024 even though Appellant lost any claim to TMS 024 in a quiet title action.

Appellant's statements in his Affidavit provided a factual basis to overcome any alleged lack of a genuine issue of material fact. These facts none of which the county has admitted are material to the issue of voiding the judgments for equitable reasons in addition to the Magistrate's Court lack of subject matter jurisdiction.

B. Genuine issues of fact regarding retention of Respondent Long

Appellant contends that he has submitted facts that made out a prima facie case that Respondent County Sheriff's Department was negligent in retaining Respondent Long. It is undisputed that Respondent Long had a lengthy history of violating Department procedures and disregarding the rule of law. He received 2 Letters of Suspension and 3 Letters of

Reprimand, some of which detailed other violations for which he was not sanctioned. None of the Letters of Suspension or Reprimand indicates that the supervisor issuing the suspension or reprimand had knowledge that Respondent Long had been punished for other infractions and that the current punishment was being applied on a "progressive punishment" basis. There is no evidence that Respondent County Sheriff's Department applied its own policy of progressive punishment. Respondent County Sheriff's Department did not product any evidence that it reviewed Respondent Long's prior performance in violating department procedure and used its discretion in retaining him as an employee.

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000).

Appellant contends that Respondent Long's employment history of disciplinary violations and the lack of any evidence of the imposition of progressive punishment create the inference that County Sheriff's Department was negligent in retaining Respondent Long. Accordingly, the Circuit Court erred in dismissing the Fifth Count due to the lack of genuine issue of fact.

C. Genuine issues of fact as to the issue of malice

Respondent Long claimed to have made several attempts to contact Simmons to resolve the judgment including sending him letter . Appellant denies receiving the letters or

speaking to Respondent Long before he came to Simmons house in August 2009 to serve the writ of execution. Respondent Long claimed that Appellant threatened him and the entire Sheriff's Department but Appellant denied this. Appellant was the record owner of various items of personal property such as several autos registered to his name, a boat, several pieces of heavy equipment, all of which were in plain view to anyone including Respondent Long when he came to Appellant's Simmons house in August 2009. Respondent Long didn't remember seeing any personal property during his visit. Deputy Long ignored personal property belonging to Simmons that may have been worthwhile to pursue real estate instead, contrary to S.C. Code. Ann Section 15-39-80. Respondent Long claimed that he was required to offer the property for the amount of the advertising but the Sheriff's Department Policy and Procedure Manual, of which he had a copy of, does not contain any such requirement.

In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn there from must be viewed in the light most favorable to the nonmoving party. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). Deputy Long admitted that he was not diligent in pursuing personal property owned by Appellant even though there was no more work involved in levying on personalty than real estate. The reasonable inference from Respondent Long's lack of diligence in his levy and execution upon TMS 498 and selling it for $600 without a minimum bid to satisfy the judgment (which is still unsatisfied) is that he had ill will toward Simmons related to the alleged threats. Under the summary judgment standard, the court gives every benefit of the doubt to the non-moving party. Watters v. Terminix Service, Inc. 376 S.C.632, 635, 658 S.E. 2d 110,111 (Ct. App. 2008).

The facts presented above provide a sufficient basis for the inference that Deputy Long was out to get Simmons and acted out of malice. The Circuit Court erred in finding no genuine issue of fact as to the issue of malice.

VII. THE CIRCUIT COURT ERRED BY DENYING PARTIAL SUMMARY JUDGEMENT THAT THE MAGISTRATE COURT HAD NO JURISDICTION OVER A SUIT TO COLLECT A USER FEE

Appellant contends that the Circuit Court erred by denying his motion for partial summary judgment on the basis that the Magistrate's Court had no jurisdiction to over a suit to collect a user fee. Subject matter jurisdiction refers to the court's "power to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) ; Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 83 n. 5, 529 S.E.2d 6, 8 n. 5 (2000). The judgments complained off were all entered by the Charleston County Magistrate's Court for unpaid user fees. The Magistrate's Court has limited jurisdiction which does not include a suit for user fees due to the county. SC Code Ann. Section 22-3-10(1) provides that the Magistrate's Court has concurrent jurisdiction (with the Circuit Court) "in actions arising on contracts"; Section 22-3-10 (3) provides for jurisdiction "in actions for a penalty, fine or forfeiture". An action to collect the amount of an unpaid user fee is neither an action on a contract or for a fine or penalty. Accordingly, the Magistrate Court had no jurisdiction to hear the complaint brought by Respondent County Revenue Collections Department or to enter a judgment thereon.

Further, the particular ordinance authorizing the payment of a user fee, Charleston County Code of Ordinances Section 10-56 states: " [t]he annual disposal user fee shall be due and payable within the time and in the manner prescribed by law for county ad valorem

taxes pursuant to section 12-45-70 of the code . . . or other law of similar import. The treasurer shall bill and collect the annual disposal user fee established by the county council in the same manner as taxes are collected . . . . " There was no authority given to collect the user fee by suit in Magistrate's Court. Since the governing ordinance requires that the user fee be collected like "ad valorem taxes" the method to enforce a user fee is governed by SC Code Section 12-49-10 and laws applicable to real property taxes and that such sale is also subject to a statutory right of redemption pursuant to South Carolina Statutes Section 12-51-90.

The user fee is a variety of a tax. As the South Carolina Supreme Court stated in Powell v. Chapman, 260 S.C. 516, 520 (1973): " The essential characteristics of a tax are that it is not a voluntary payment or donation, but an **enforced contribution**, enacted pursuant to legislative authority, in the exercise of the taxing power, the contribution being of a proportional character, payable in money, and imposed, levied, and collected for the purpose of raising revenue, to be used for public or governmental purposes." (emphasis added) See 84 C.J.S. Taxation s 1, at page 32. Therefore, according to the Ordinance under which the user fee was created as well as the enabling legislation, the user fee was to be collected like a tax not in an enforcement proceeding in the Magistrate's Court.

The County Respondents argue that the Magistrate's Court has subject matter jurisdiction over user fee suits under SC Code Ann. Section 4-9-30(14) which states: Alleged violations of such ordinances shall be heard and disposed of in courts created by the general law including the magistrates' courts of the county." This is qualified by the following provision at the end of the cited paragraph: " No ordinance including penalty provisions shall be enacted with regard to matters provided for by the general law, except as specifically authorized by such general law. . . " Appellant asserts that by this provision the Legislature

has prohibited counties which enact general health ordinances from contradicting other general laws in the enforcement of those ordinances.

S.C. Code Ann. Section 22-3-10 governs jurisdiction of the Magistrate's Court and is such a general law for purposes of interpreting SC Code Ann. Section 4-9-30(14). According to the very section upon which the County Respondents rely, the county cannot adopt any ordinance which confers jurisdiction over user fee violations which contradicts the general law. Since the Magistrate's Court only has jurisdiction over fines and penalties and the complaints were brought to collect the user fee, the Country Respondents' argument over the meaning of Section 4-9-30(14) is fatally flawed.

The enabling act upon which Charleston County relied in adopting its user fee ordinance, S. C. Code Ann. Section 44-55-1210 et seq. is also a general law for purposes of interpreting S.C. Code Ann. Section 4-9-30(14). Section 44-55-1230 deals with penalties for violation of rules and regulations adopted by counties for violation of their user fee ordinances. It provides specifically for enforcement of violations as follows: " Any person **violating** the provisions of such rules and regulations shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars or imprisoned not more than thirty days." (emphasis added) This is another general law which may not be contradicted by any ordinance adopted under S.C. Code Ann. Section 4-9-30(14). Therefore, there are two general laws which refute the county's interpretation that the enabling language of Section 4-9-30(14) creates jurisdiction over suits to collect user fees.

In Terpin v. Darlington County Council, 286 S.C. 112,114, 332 S.E.2d 771, 773 (1985) the Supreme Court found that a county ordinance regulating the sale of fireworks adopted pursuant to S.C. Code Ann. Section 4-9-30(14) was invalid under the language in

that section prohibiting ordinances contrary to general laws. In particular, S. C. Code Ann. Section 23-35-10 et seq. regulates the sale, storage and use of fireworks; and specifically, Section 23-35-150 creates penalties for violation of the Act. The Court held: "The challenged ordinance has penalty provisions and concerns a matter provided for by the general law. The ordinance is thus invalid. . . . The respondent contends that the county acted within its police power and that the ordinance is valid so long as it does not conflict with provisions of the general law. We disagree; we are bound by the express terms of § 4-9-30(14)." Therefore, under Terpin, the provisions S. C. Code Ann. Section 44-55-1210 bar any suit for collection of user

As noted previously, Charleston County Ordinance Section 10-56 provides for the **collection** of " annual disposal user fee established by the county council in the same manner as taxes are collected". Furthermore, Ordinance Section 10-60 provides that when the user fee is delinquent, the " treasurer shall collect a penalty in the amount provided for delinquent taxes". Finally, Ordinance Section 10-70 states that persons who violate the ordinance shall be guilty of a misdemeanor and fined. This provision is obviously intended to mirror the provision of the enabling statute S. C. Code Ann. Section 44-55-1210 et seq. on which it relies. Therefore, there is absolutely no basis to interpret the Ordinance on which the county relies to collect its user fees as overriding the specific provision of the ordinance actually enacted.

In summary, Section 4-9-30(14) does not allow any county to adopt an ordinance which contradicts a general law. As demonstrated above both the Magistrate's Court Law S.C. Code Ann. Section 22-3-10 and the Law governing Solid Waste Collection and Disposal by Counties S. C. Code Ann. Section 44-55-1210 et seq. specifically deal with fine and

penalties. Neither of them allows an action to collect any user fee, only to enforce a fine or penalty. The provisions of Section 4-9-30(14) deal with violations of ordinances not suits to collect fees . The obvious intention of this statute is that fines and penalties were to be enforced in Magistrate's Court. That is the intent behind the use of the word "violation". That is the language in Ordinance Section 10-70: "violation. " By interpreting Section 4-9-30(14) as pertaining to suits for fines and penalties, the Court can harmonize the provisions with these other general law.

Respondent County Revenue Collections Department is urging an interpretation which causes this provision to conflict with other laws. A suit to enforce a law is the not the same as a suit for a violation. A suit for damages due to breach of contract is not the same as a suit for specific enforcement. In one case the Magistrate's Court has jurisdiction (over contracts) up to the jurisdictional limit, but in the other it doesn't. S. C. Code Section 23-3-10 (1) limits Magistrate's Court jurisdiction in contract claims to " damages only ". Respondent County Revenue Collections Department did not sue Appellant for a penalty for violating its user fee ordinance under Ordinance Section 10-70 . It sued him to collect the amount of the unpaid fee. Charleston County did not add a charge to his tax bill in accordance with Ordinance Section 10-60. The Magistrate's Court is a court of limited jurisdiction. Enforcement of the Magistrate's Court judgment for user fees would impermissibly expand its authority beyond what the Legislature has expressly granted.

Respondent County Revenue Collections Department alleged that such a suit is to recover damages for injury to the person of Charleston County. This is a completely farfetched and unjustified interpretation of the Magistrate's Court jurisdiction under Section 22-3-10(2) which applies to personal injury or property damage claims within the

jurisdictional limits of the court. Respondent County Revenue Collections Department county did not provide a single case citation to support its bizarre theory. Failure to pay a user fee does not cause any injury to any person and Charleston County is not even a person within the commonly understood meaning of the word, it is a governmental entity. Charleston has not sustained any injury to its property. Respondent County Revenue Collections Department has not been damaged in the traditional sense by Appellant failing to pay a user fee. The claims encompassed under Section 10(2) (injury to the person or property) are claims that arise under the common law. A user fee is creation of government. The obligation to pay a user fee does not arise under any theory of common law. Therefore a user fee cannot be the subject matter of a claim for injury to the person of the county as the legislature intended that term to be understood.

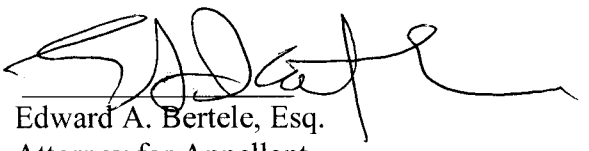
Furthermore, the user fee ordinance itself indicates the means by which it is to be enforced. Charleston County Ordinance Section 10-56 provides for the **collection** of " annual disposal user fee established by the county council in the same manner as taxes are collected". Furthermore, Ordinance Section 10-60 provides that when the user fee is delinquent, the " treasurer shall collect a penalty in the amount provided for delinquent taxes". Those are the only remedies available to the county to recover the user fees or penalties for failure to pay same.

In summary, the plain language of the Magistrate Court Act establish that the Magistrate Court had no jurisdiction to hear and enter a judgment for a user fee. The provisions of the Charleston County Ordinance and the enabling legislation establish that the user fee was to be imposed and collected like a tax. The County Ordinance provides the

means to be enforced for violations. The General Welfare statute cannot create jurisdiction in the Magistrate Court since that would violate other provisions of the general Welfare Law. None of the reasons given by the County Respondents justify the creation of jurisdiction in the Magistrate Court.

CONCLUSION

Appellant respectfully requests that this Court reverse the Circuit Court Order dismissing all claims for the reasons set forth herein and reinstate the Second Amended Complaint and Amendment to the Second Amended Complaint. Appellant also requests that the Court reverse the Order denying Appellant's Motion for Partial Summary Judgment and grant judgment thereon for the reasons set forth herein.



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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
CASE No. 2011- CP-10-1084
Circuit Court Judge R. Markley Dennis, Jr.

ROOSEVELT SIMMONS..... Appellant

Vs.

MASE and COMPANY, LLC,
J. AL CANNON, JR.,
CHARLESTON COUNTY SHERIFF'S DEPARTMENT,
CHARLESTON COUNTY REVENUE COLLECTIONS DEPARTMENT
and
HARRY LONG..... Respondents

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the Appellant's Initial brief, Designation of Matter to be included in Record on Appeal and Appellant's Motion for leave to file over length Initial Brief was served upon the Respondents attorneys, Christopher Dorsel, Esq. and Wendy Keefer, Esq. by regular mail postage prepaid at their last known mailing address.

Edward A. Bertele, Esq.

February 27, 2015